EXPLORING THE POLITICAL QUESTION DOCTRINES IN HONG KONG

In Hong Kong, instead of a political question doctrine, the courts arguably enforce three political question doctrines. First, the Hong Kong courts do not have jurisdiction to review matters that are expressly or implicitly committed to the Central People's Government in Beijing exclusively. Second, the Hong Kong courts observe the principle of non-intervention in the internal process of the Legislature. Where this principle applies, the courts will exercise jurisdiction to determine the existence of a power, privilege or immunity of the Legislative Council, but the courts "will not exercise jurisdiction to determine the occasion or the manner of exercise of any such powers, privileges or immunities" by the Legislature. Finally, with regard to statutory restrictions on the electoral process and voting rights, the Judiciary will accord a margin of appreciation to the Legislature when assessing the constitutionality of these limitations as these issues implicate "political and policy considerations" that judges are ill-equipped to resolve. In essence, the Hong Kong judiciary have tiered the standard of review on political questions. Cases in the first category are non-justiciable. Those in the second are justiciable only to the extent that courts would only determine whether the Legislature has the requisite non-reviewable powers in the first place. And, in the third category, the disputes are non-justiciable in the "secondary" sense, that is, the Judiciary would decrease its standard of review when resolving these disputes. In itself, each strand of the three political doctrines in Hong Kong is conceptually defensible. But their applications have been fraught with inconsistencies and the purpose of this paper is to illuminate this political thicket.

YAP Po Jen
LLB (National University of Singapore), LLM (Harvard),
LLM (London), PhD (Cantab);
Associate Professor, The University of Hong Kong.

I. Introduction

1 In the first constitutional decision handed down by the Hong Kong Court of Final Appeal ("CFA"), the unanimous court in *Ng Ka*

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

Ling v Director of Immigration[1] ("*Ng Ka Ling*") – in a memorable paragraph that echoed *Marbury v Madison*[2] – emphatically asserted its power to engage in constitutional review, even after the People's Republic of China ("PRC")'s resumption of sovereignty over the city:[3]

> [The Hong Kong courts] undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency …

2 But this ambitious expression that the court's power to invalidate legislation is "a matter of obligation, not of discretion"[4] cannot be read at face value, as the Hong Kong judiciary has regularly accepted that the institutional design of the Basic Law[5] – the operative constitutional instrument governing Hong Kong post-handover – does not require the courts to be the final arbiter of every constitutional provision.

3 Instead, the non-justiciability doctrine – also labelled as the political question doctrine in the US – postulates that certain issues in constitutional law are inappropriate for judicial resolution and, in those circumstances, the judgment of the political branches should prevail over the judicial one.[6]

4 The political question doctrine is generally defended on two normative grounds. First, the Judiciary is not constitutionally authorised to resolve disputes for which the subject matter has been expressly or implicitly committed exclusively to another branch of government for "self-monitoring".[7] The underlying assumption herein is that the political branches of government possess certain institutional characteristics or have special expertise in particular areas that warrant judicial non-interference. Second, judicial abdication is justified on prudential grounds. To maintain its legitimacy, the courts must pick their fight; and the best way to accomplish this is to avoid

1 (1999) 2 HKCFAR 4.
2 5 US 1 Cranch 137 (1803).
3 *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at [25].
4 *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at [25].
5 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.
6 See Martin H Redish, "Judicial Review and the 'Political Question'" [1984] Nw U L Rev 1031.
7 Louis Henkin, "Is There a 'Political Question' Doctrine" (1976) 85 Yale LJ 597 at 599.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

political controversies that do not "lend themselves to principled judicial resolution".[8]

5 This political question doctrine has been implemented by common law courts in different forms. In the US, the modern restatement of the political question doctrine was laid out by William Brennan J in *Baker v Carr*:[9]

> [1] Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non judicial [*sic*] discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

But one should note that in the recent US Supreme Court decision of *Zivotofsky v Clinton*,[10] the US Chief Justice John Roberts (on behalf of the majority) only recognised the first two criteria and the other four factors were completely ignored.[11]

6 In contrast, in the UK, its Supreme Court in *Shergill v Khaira*[12] ("*Shergill*") has recognised two categories of non-justiciability. The first category comprises cases where the issue in question is "beyond the constitutional competence assigned to the courts under our conception of the separation of powers"[13] and they include "certain transactions of foreign states and … proceedings in Parliament".[14] The second category comprises claims or defences which are based neither on private legal rights/obligations nor reviewable matters of public law.[15] In the latter category, the cases are only presumptively non-justiciable as the cases must, nevertheless, be resolved if "their resolution is necessary in order to decide some other issue which is in itself justiciable".[16] On the facts in

---

8 Martin H Redish, "Judicial Review and the 'Political Question'" [1984] Nw U L Rev 1031 at 1032; Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962) at p 184.
9 369 US 186 at 217 (1962).
10 132 SCt 1421 (2012).
11 *Zivotofsky v Clinton* 132 SCt 1421 at 1428 (2012).
12 [2015] AC 359.
13 *Shergill v Khaira* [2015] AC 359 at [42].
14 *Shergill v Khaira* [2015] AC 359 at [42].
15 *Shergill v Khaira* [2015] AC 359 at [43].
16 *Shergill v Khaira* [2015] AC 359 at [43].

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

Shergill, there was a dispute between two factions of the Sikh community concerning the trusteeship of two Sikh temples, and the UK Supreme Court held that while matters of religious doctrine were *prima facie* non-justiciable, the Judiciary could adjudicate these issues if this was necessary to interpret a trust deed.

7 Interestingly, in Hong Kong, instead of *a* political question doctrine, we arguably have three political question doctrines. First, the Hong Kong courts do not have jurisdiction to review matters that are expressly or implicitly committed to the Central People's Government in Beijing exclusively.[17] Second, the Hong Kong courts observe the principle of non-intervention in the internal process of the Legislature. Where this principle applies, the courts will exercise jurisdiction to determine the existence of a power, privilege or immunity of the Legislative Council ("LegCo"), but the courts "will *not* exercise jurisdiction to determine the occasion or the manner of exercise of any such powers, privileges or immunities"[18] by the Legislature. Finally, with regard to statutory restrictions on the electoral process and voting rights, the Judiciary will accord a margin of appreciation to the Legislature when assessing the constitutionality of these limitations as these issues implicate "political and policy considerations"[19] that judges are ill-equipped to resolve. In essence, the Hong Kong judiciary have tiered the standard of review on political questions. Cases in the first category are non- justiciable. Those in the second are justiciable only to the extent that courts would only determine whether the Legislature has the requisite non-reviewable powers in the first place. And, in the third category, the disputes are – as Bruce Harris terms it – non-justiciable in the "secondary"[20] sense, that is, the Judiciary would decrease its standard of review when resolving these disputes.[21] In itself, each strand of the three political doctrines in Hong Kong is conceptually defensible. But their applications have been fraught with inconsistencies and the purpose of this paper is to illuminate this political thicket.

17 Article 19 of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China reads: "[t]he courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs".

18 *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689 at [43].

19 *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735 at [45].

20 Bruce Harris, "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 62(3) *The Cambridge Law Journal* 631.

21 See Paul Daly, "Justiciability and the 'Political Question' Doctrine" [2010] *Public Law* 160.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

A. *Non-justiciable matters expressly or implicitly committed to the Chinese government exclusively*

8 Hong Kong courts do not have jurisdiction to review matters that are expressly or implicitly committed exclusively to the Central People's Government in Beijing.

9 For example, the Basic Law provides that the Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region ("HKSAR").[22] It also states that the Central People's Government shall be responsible for Hong Kong's defence.[23]

(1) Acts of State and state immunity

10 Article 19(3) of the Basic Law further inserts an express ouster clause: "[t]he courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs".

11 Unfortunately, the term "acts of state" is not defined in the Basic Law and this has been the subject of a major litigation in Hong Kong. FG Hemisphere – the assignee of the benefit of debts owed by the Democratic Republic of the Congo in consequence of two International Chamber of Commerce arbitration awards made against it – had sought to enforce these arbitral awards against money said to be payable in Hong Kong to the Congo by China Railway. The Congo and China Railway had sought to resist enforcement on the basis that the Congo, as a sovereign state, enjoyed immunity in Hong Kong. The central issue before CFA in *Democratic Republic of the Congo v FG Hemisphere*[24] ("*FG Hemisphere*") was whether state immunity was an act of state such that the Hong Kong courts had no jurisdiction to resolve this dispute.

12 CFA (by a 3:2 majority), in a provisional ruling, determined that: (a) the law of state immunity in Hong Kong was an act of state enshrined under Art 19(3) of the Basic Law; (b) Hong Kong could not, as a matter of legal or constitutional principle, adhere to a doctrine of state immunity that was at variance with the PRC and therefore the doctrine of absolute immunity as practiced in the PRC should apply too in Hong Kong; and (c) CFA had a duty herein to refer the interpretation of Art 19(3) of the Basic Law to the Standing Committee of the National

22 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Art 13.
23 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Art 14.
24 (2011) 14 HKCFAR 95.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

People's Congress ("NPCSC") as CFA needed to interpret these said provisions, which were provisions concerning affairs falling within the responsibility of the Central People's Government or the relationship between the central authorities and HKSAR, when adjudicating this case in question.[25]

13 According to the majority judges, Art 19(3) is "consistent with the common law doctrine of act of state"[26] and therefore they applied the common law understanding of what constituted an act of state. In particular, they endorsed Lord Wilberforce's views in *Buttes Gas and Oil Co v Hammer*[27] that the act of state doctrine in the context of foreign affairs was part of a "more general principle that courts will not adjudicate upon the transactions of foreign sovereign states".[28]

14 Undeniably, the doctrine of state immunity is concerned with the relations between states. Therefore, the majority judges reasoned that state immunity fell within the common law understanding of an act of state as enshrined under Art 19. Unfortunately, this is where the majority judges erred at law.

15 Certainly, the majority judges were right that state immunity implicated the relations between sovereign states. But that does not mean that it automatically falls within the scope of the common law act of state doctrine. At common law, even though state immunity does concern the relationship between the state and foreign nations, it has also been accepted by judicial practice that the determination of the nature and extent of immunity accorded to a foreign state, in the absence of legislation, is for the courts to decide. In 1975, the Privy Council of Hong Kong in *Philippine Admiral v Wallem Shipping (Hong Kong) Ltd*[29] ("*Philippine Admiral*") established that a restrictive approach to immunity should be adopted in relation to immunity claimed for vessels arrested in admiralty *in rem* actions. Subsequently, in 1977, the

25 Article 158(3) of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China reads:

> [I]f the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region.

26 *Democratic Republic of the Congo v FG Hemisphere* (2011) 14 HKCFAR 95 at [345].

27 [1982] AC 888.

28 *Democratic Republic of the Congo v FG Hemisphere* (2011) 14 HKCFAR 95 at [350]; *Buttes Gas and Oil Co v Hammer* [1982] AC 888 at 931.

29 [1977] AC 373.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

English Court of Appeal in *Trendtex Trading Corp v Central Bank of Nigeria*[30] ("*Trendtex Trading Corp*") extended the restricted view of immunity to *in personam* cases. Finally, in the House of Lords decision in *Playa Larga v I Congreso del Partido*[31] ("*I Congreso del Partido*"), Lord Wilberforce also endorsed the courts' earlier assumption of the judicial role to define the doctrine of state immunity prior to any legislative enactment. In all these cases, even though the judicial policy on immunity implicated the relationship between sovereign nations, there was no suggestion that this was an act of state for which the courts were denied jurisdiction or that they had exceeded jurisdiction by making such a determination.

16 Assuming that the majority judges in *FG Hemisphere* were indeed applying the common law doctrine of act of state, then they must also accept its parameters, which had always deemed the law on state immunity as falling outside the scope of this doctrine even though it concerned foreign affairs. The issue therefore is not whether state immunity concerns foreign affairs; the issue is whether state immunity is a foreign affairs issue that falls within the common law act of state doctrine over which any jurisdiction is denied to the courts. If the majority judges were indeed endorsing Lord Wilberforce's definition of the common law act of state doctrine in *Buttes Gas and Oil Co v Hammer*, surely to be consistent, they must also accept Lord Wilberforce's endorsement in *I Congreso del Partido* that the courts had the jurisdiction to determine the policy on state immunity. Surely, a jurist as eminent as Lord Wilberforce could not have been contradicting himself or recanting his view within a space of months; his Lordship clearly must not have deemed state immunity as falling within the scope of the common law act of state doctrine. Therefore, assuming the majority judges were applying the common law act of state doctrine, *a fortiori*, they must also accept that under the common law, the law on state immunity is a subject matter that common law courts have consistently ruled on and it is not an act of state for which courts have been denied jurisdiction to decide.

17 Even though state immunity falls outside the scope of the common law act of state doctrine, this does not necessarily mean that the dissenting judges in *FG Hemisphere* were right to apply the restrictive approach to immunity, which does not confer on states immunity in domestic courts *vis-à-vis* their commercial transactions.

18 The dissenting judges in *FG Hemisphere* argued for the restrictive approach to immunity to apply in Hong Kong because this

30 [1977] 1 QB 529.
31 [1983] 1 AC 244.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

had been the state of affairs under the common law as decided by the English courts in *Trendtex Trading Corp* and *I Congreso del Partido*.

19 On the other hand, counsel for the Secretary for Justice (as intervener) had argued that the PRC government observes the doctrine of absolute immunity and therefore the Judiciary and the Executive should speak with "one voice" on foreign affairs issues.

20 In response, the dissenting judges argued that, under the common law, the English courts had never consulted the Executive on their position on state immunity. In fact, Bokhary PJ cited the Privy Council's warning in *Philippine Admiral* that "if the courts consult the Executive on such questions, what may begin by guidance as to the principles to be applied may end in cases being decided irrespective of any principle in accordance with the view of the Executive as to what is politically expedient".[32]

21 Unfortunately, this is where the minority judges erred. In *Philippine Admiral*, *Trendtex* and *I Congreso del Partido*, the courts were free not to apply an absolute approach to immunity because the Executive never took a contrary stance. The Executive never intervened in any of those proceedings; therefore, there was no need for the courts to seek guidance from the Executive and the judges were free to make their own determinations. Whichever way the courts decided, the "one voice" principle would not have been infringed as the Executive never took a stand. However, on the facts in *FG Hemisphere*, the Secretary for Justice had intervened on behalf of the Hong Kong government, and had insisted on the application of the doctrine of absolute immunity. If the Hong Kong courts had instead applied the restricted approach to immunity, the "one voice" principle on foreign affairs would clearly have been violated.[33]

22 This author must emphasise that the "one voice" principle allows judges to display comity by choosing to speak with the same voice as the Executive on foreign affairs. Courts do so out of judicial modesty, and not because they have been denied jurisdiction to decide the dispute, unlike the act of state doctrine which strips the courts of jurisdiction completely.

23 Therefore, in *FG Hemisphere*, the majority judges were right to depart from the common law position on state immunity and argue for

32 *Democratic Republic of the Congo v FG Hemisphere* (2011) 14 HKCFAR 95 at [86].
33 For a fuller discussion of this point, See Po Jen Yap, "*Democratic Republic of Congo v FG Hemisphere*: Why Absolute Immunity Should Apply But a Reference Was Unnecessary" (2011) 41 HKLJ 393.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

the absolute approach to immunity in Hong Kong. Yet, they should have done so not because state immunity is an act of state but because, as a matter of comity, the courts should speak with the same voice as the Executive on foreign affairs. If the CFA judges had resolved the matter as this author has proposed, the Hong Kong courts would have been free to adopt the doctrine of restrictive immunity on its own initiative in the future if the executive branch of the Hong Kong government did not take a stance on state immunity then. Furthermore, if the law of state immunity fell outside the scope of Art 19(3) of the Basic Law, there would have been no need for CFA to apply this constitutional provision when adjudicating this case and a judicial reference to NPCSC would not have been required.

24 Unsurprisingly, in response to CFA's judicial reference, and ten weeks after CFA's Congo ruling, NPCSC affirmed in an interpretation that state immunity was an act of state for which the Hong Kong courts had no jurisdiction and the local judiciary "must apply and give effect to the rules or policies on state immunity determined by the Central People's Government as being applicable to the Hong Kong Special Administrative Region".[34]

(2) National People's Congress ("NPC") and NPCSC legislative acts

25 Article 158 of the Basic Law provides that when NPCSC "makes an interpretation of the [Basic Law] provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee".

26 CFA in *Lau Kong Yung v Director of Immigration*[35] ("*Lau Kong Yung*") has affirmed that NPCSC's power of constitutional interpretation is "general and unqualified",[36] and its Interpretation on any Basic Law provision is "binding on the courts of the HKSAR".[37]

27 But what is unclear is the constitutional status of NPC and NPCSC legislative acts that do not take the form of interpretations and are not officially annexed to the Basic Law. Article 18(1) of the Basic Law states that the laws in force in Hong Kong shall be the Basic Law,

34 Interpretation of Paragraph 1, Article 13 and Article 19 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 (adopted at the Twenty Second Session of the Standing Committee of the Eleventh National People's Congress on 26 August 2011).

35 (1999) 2 HKCFAR 300.

36 *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 at 323.

37 *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 at 324.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

law previously in force in Hong Kong as preserved by Art 8[38] and the laws enacted by the Legislature of the HKSAR. More importantly, Art 18(2) continues by stating that National Laws shall not be applied in Hong Kong except those listed in Annex III to the Basic Law, which shall be applied locally by promulgation or legislation. Concurrent to the Annex III laws that are generally uncontroversial[39] and interpretations that NPCSC is expressly constitutionally authorised to issue, the Hong Kong government has also enforced free-standing NPC and NPCSC Decisions in the city. These Decisions generally relate to governance issues in Hong Kong and the enforcement of most of these Decisions[40] are not expressly provided for in the Basic Law.

28 As to be expected, the courts in Hong Kong have been divided on the constitutional status of these free-standing NPC and NPCSC legislative acts and whether they can be reviewed by the local judiciary.

29 The Court of Appeal in *HKSAR v Ma Wai Kwan David*[41] ("*Ma Wai Kwan*") held that the local judiciary did not have the power to question the validity of any act or resolution by the Sovereign, that is, NPC or NPCSC.[42] In that case, the Accused were charged in 1995 with conspiracy to pervert the course of public justice, a common law offence. On 3 July 1997, the tenth day of the trial, the defendants argued that the common law had not survived the change of sovereignty on 1 July 1997 and their indictments should thus be discontinued. The Court of Appeal disagreed, stating that the Basic Law provided for the

---

38 Article 8 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China reads: "[t]he laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region".

39 Examples include the Resolution on the Capital, Calendar, National Anthem and National Flag of the People's Republic of China and the Resolution on the National Day of the People's Republic of China.

40 Examples include the Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008 (adopted at the Ninth Session of the Standing Committee of the Tenth National People's Congress on 26 April 2004) and the Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage (adopted at the Thirty First Session of the Standing Committee of the Tenth National People's Congress on 29 December 2007).

41 [1997] HKLRD 761.

42 *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761 at 781.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

continuation of all laws previously in force in Hong Kong after the change of sovereignty.[43] More interestingly, the court held in the alternative that the criminal justice system had, nonetheless, been preserved by the Hong Kong Reunification Ordinance,[44] a statute passed by the Provisional Legislative Council ("PLC").

30 Unfortunately, PLC was not provided for in the Basic Law as it was enacted under the assumption that members of the last colonial legislature would automatically become members of the first HKSAR LegCo. This "through-train" plan was derailed following Governor Christopher Patten's unilateral introduction of political reforms to LegCo prior to the handover and the PRC's unequivocal rejection of the pre-existing Hong Kong legislative members after the change of sovereignty. Confronted with the prospect of a legal vacuum in Hong Kong after the handover, NPCSC issued the 1993 and 1994 Decisions,[45] which established the Preliminary Working Committee of the Preparatory Committee for the HKSAR. In turn, the Preparatory Committee issued a Decision in 1996 to create PLC, an interim legislative body tasked to review and enact laws upon the establishment of the HKSAR till the formation of the first LegCo. The Preparatory Committee's Decision to establish PLC was subsequently adopted by an NPC Resolution in March 1997.[46]

31 The accused in *Ma Wai Kwan* naturally argued that PLC did not meet the specific qualifications for the first LegCo as laid out in Art 68[47] of the Basic Law and the NPC 1990 Decision (incorporated into the Basic Law via Annex II),[48] and thus any statutes passed by this entity, which included the impugned Reunification Ordinance, would be null and void.

---

43 *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761 at 777.

44 Instrument A601.

45 Under Chinese law, decisions of the National People's Congress or Standing Committee of the National People's Congress have full legal force and may be regarded as law for all intents and purposes. See Albert HY Chen, *An Introduction to the Legal System of the People's Republic of China* (LexisNexis, 4th Ed, 2011) at pp 123–150.

46 For a fuller discussion of the events leading to the formation of PLC, see Albert HY Chen, "The Provisional Legislative Council of the SAR" (1997) 27 HKLJ 1.

47 Article 68 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China reads: "[t]he Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election".

48 Annex II of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China reads: "[t]he Legislative Council of the Hong Kong Special Administrative Region shall be composed of 60 members in each term. In the first term, the Legislative Council 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".

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

32 In disagreement, then Chief Judge Chan in *Ma Wai Kwan* replied:[49]

> [R]egional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign. There is simply no legal basis to do so. It would be difficult to imagine that the Hong Kong courts could, while under British rule, challenge the validity of an Act of Parliament passed in UK … which had an effect on Hong Kong …

Consequently, the court held that the creation of PLC by the Preparatory Committee was authorised by the NPC 1990 and the NPCSC 1994 Decisions, and in any case, its establishment was ratified by the NPC Resolution in 1997.

33 In essence, the Court of Appeal in *Ma Wai Kwan* took the position that the constitutionality of the NPC and NPCSC legislative acts was non-justiciable and the local judiciary was bound to apply NPC/NPCSC Decisions and Resolutions that apply to Hong Kong, regardless whether they had been formally incorporated into the Basic Law.

34 A diametrically opposite position was later adopted by CFA in *Ng Ka Ling*. Therein, the applicants – children born in the Mainland to Hong Kong permanent residents – argued that their constitutional right of abode in Hong Kong as provided under Art 24(3) of the Basic Law[50] had been contravened by new immigration legislation passed by PLC days after the handover. Essentially, the immigration law in Hong Kong required Chinese nationals residing in the Mainland who wished to exercise the right of abode arising by descent to satisfy Hong Kong's Director of Immigration that they had obtained the mainland authorities' permission to leave for Hong Kong.[51]

35 In *Ng Ka Ling*, CFA held that it not only had the jurisdiction to invalidate legislation enacted by the local legislature that are inconsistent

49 *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761 at 780.

50 Article 24 reads:

> 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) Person of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2) …

51 See para 2(c) of Schedule 1 of the Immigration (Amendment) (No 3) Ordinance; *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

with the Basic Law, it "had the duty to declare invalidity"[52] if any legislative acts of NPC or its Standing Committee are found inconsistent with the Basic Law. The analogy drawn by CFA in *Ma Wai Kwan* on the symmetry between the old sovereign (British Parliament) under the colonial system and the new sovereign (NPC and its Standing Committee) under HKSAR constitutional order was rejected definitively by CFA in *Ng Ka Ling*.[53] On the facts, CFA held that the Immigration Ordinance[54] was unconstitutional to the extent that it required permanent residents of the HKSAR residing in the Mainland to obtain a one-way permit before they could enjoy the constitutional right of abode.[55]

36 Naturally, the central government in Beijing was infuriated as it perceived CFA's provocative grab for power as a direct challenge to its sovereignty and interpretive mandate. The Hong Kong government then requested CFA to "clarify" its decision in *Ng Ka Ling*. The court acceded to this request, in view of the controversy this decision had engendered, and issued a clarification. In a very terse judgment, handed down on 26 June 1999, the court accepted that NPCSC had the authority to issue a constitutional interpretation under Art 158 of the Basic Law, and this Interpretation would have to be followed by the courts of the HKSAR.[56] But more interestingly, the court followed this concession with a veiled reassertion of judicial power: "the Court accepts that it cannot question … the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein".[57] This statement seemed to suggest that the court was amenable to questioning or invalidating any legislative acts of NPC or NPCSC which the judges deemed not to be in accordance with the Basic Law. Oddly, the subversive nuances in *Ng Ka Ling v Director of Immigration (No 2)*[58] were lost on the central government and Beijing was sufficiently appeased by this clarification.[59]

52 *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at [26].
53 *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at [26].
54 Cap 115.
55 Moreover, in *Chan Kam Nga v Director of Immigration* [1999] 1 HKLRD 304, a judgment issued on the same day as *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, the Court of Final Appeal also invalidated a statutory bar that excluded children, who were born before their parents acquired the right of permanent residency, from claiming their right of abode by descent in Hong Kong.
56 *Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141.
57 *Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141 at 142.
58 (1999) 2 HKCFAR 141.
59 See Albert HY Chen & Anne SY Cheung, "Debating the Rule of Law in Hong Kong" in *Asian Discourses of Rule of Law* (Randall Peerenboom gen ed) (Routledge, 2004) ch 8, at p 257.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

37 The Hong Kong government was, however, not placated. It was more concerned about the practical ramifications that would result from the massive influx of mainland Chinese immigrants into Hong Kong and the strain this would put on the city's healthcare, housing and social welfare system. Consequently, the Government waged a media war by raising the ominous spectre of 1.67 million Mainlanders trooping into Hong Kong over the next seven years if the decisions were implemented and the tide of public opinion inevitably turned against the court. The HKSAR government also returned to Beijing and sought an Interpretation from NPCSC to reverse *Ng Ka Ling/Chan Kam Nga v Director of Immigration*[60] ("*Chan Kam Nga*") definitively.

38 Soon after the request was made, NPCSC issued its first Interpretation under the Basic Law on 26 June 1999,[61] stating unequivocally that mainland children born to Hong Kong permanent residents had to first obtain the requisite one-way permits before they could acquire the right of abode in Hong Kong. Furthermore, for this right to arise under Art 24(3), either parent of the child had to be a Hong Kong permanent resident at the time of the child's birth. The original parties in the *Ng Ka Ling/Chan Kam Nga* litigations were also held not to be affected by this Interpretation, but the rights of all others would be determined by reference to the Interpretation.

39 Thereafter, in *Lau Kong Yung*, CFA enforced the Interpretation against persons who were not parties in the *Ng Ka Ling* litigation and affirmed the Director of Immigration's right to issue the removal orders against them. But while CFA has accepted the supremacy of the NPCSC Interpretations in Hong Kong, the constitutional status of other NPC and NPCSC legislative acts remains unclear. Technically, in *Lau Kong Yung*, CFA had not retracted its assertions in *Ng Ka Ling* and *Na Ka Ling (No 2)* that it could question or invalidate any legislative acts of NPC or NPCSC, which the judges deemed not to be in accordance with the Basic Law.

40 In view of this ambiguity, the lower courts in Hong Kong have erred on the side of caution and have disavowed any judicial role in invalidating these extraordinary NPCSC legislative acts. In 2014, NPCSC issued its decision on electoral reform in Hong Kong. Specifically, Beijing authorised for the election of the chief executive by the people from 2017 onwards; but there can be only two or three

60 [1999] 1 HKLRD 304.
61 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 at the Tenth Session of the Standing Committee of the Ninth National People's Congress on 26 June 1999).

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

candidates for the people to choose from, and each candidate must be first approved by more than half of all the members on a nominating committee.[62] The composition and formation method of this nominating committee would be the same as that for the current chief executive's Election Committee.[63] In essence, the current Election Committee would transition into a nominating committee, and all registered Hong Kong voters could vote on candidates who have been prescreened by the pro-Beijing delegates on this nominating committee. Consequently, the Hong Kong government published various proposals on how the HKSAR could introduce electoral reform in accordance with this NPCSC decision.[64]

41 A pro-democracy activist was dissatisfied with the democratic reforms sanctioned by the NPCSC decision and the constitutional proposals introduced, and she took the Hong Kong government to court. But unsurprisingly, the Court of First Instance ("CFI") in *Leung Lai Kwok Yvonne v Chief Secretary for Administration*[65] swiftly refused to grant her leave to seek judicial review. CFI held definitively that "a decision of the NPCSC, is not subject to review by the courts in Hong Kong";[66] and since NPCSC had the "ultimate authority to disapprove"[67] any constitutional proposals endorsed by the Hong Kong legislature, the local government was under no legal duty to consult the people on

62 Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 (adopted at the Tenth Session of the Standing Committee of the Twelfth National People's Congress on 31 August 2014).

63 The chief executive of Hong Kong is currently elected by an Election Committee composed of only 1200 members, with 300 members fielded from each of the following four sectors: (1) the industrial, commercial and financial sectors; (2) the professions; (3) labour, social services, religious and other sectors; and (4) members of the Legislative Council, representatives of district-based organisations, Hong Kong deputies to the National People's Congress and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference.

64 See The Hong Kong Special Administrative Region Government, *Method for Selecting the Chief Executive by Universal Suffrage: Consultation Report and Proposals* (April 2015) <http://www.2017.gov.hk/filemanager/template/en/doc/report_2nd/consultation_report_2nd.pdf> (accessed 25 August 2017). The HKSAR government's eventual proposal for electoral reform was rejected by the Hong Kong Legislative Council on 18 June 2015; see also Albert HY Chen, "Law and Politics of the Struggle for Universal Suffrage in Hong Kong, 2013–15" (2016) 3 *Asian Journal of Law and Society* 189 at 197.

65 [2015] HKEC 1034.

66 *Leung Lai Kwok Yvonne v Chief Secretary for Administration* [2015] HKEC 1034 at [30].

67 *Leung Lai Kwok Yvonne v Chief Secretary for Administration* [2015] HKEC 1034 at [33].

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

"non-viable options"[68] that would contradict NPCSC's stipulated framework for electoral reform.

B. Principle of non-intervention in the internal process of the Legislative Council

42 The second strand of the political doctrine in Hong Kong is the principle of non-intervention in the internal affairs of LegCo. And, as we shall see, its application in Hong Kong has also been riddled with inconsistencies.

43 The principle of non-intervention in the internal process of LegCo was affirmed by CFA in *Leung Kwok Hung v President of the Legislative Council (No 1)*[69] ("*Leung Kwok Hung*"). CFA held that in construing and applying the provisions of the Basic Law, 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".[70]

44 In *Leung Kwok Hung*, two lawmakers had attempted to filibuster a legislative bill by moving over 1300 amendments at the relevant LegCo debate. After 33 hours into the debate, the President relied on r 92 of the Rules of Procedure of LegCo[71] ("RoP"), which provides that in any matter not provided for in the RoP, the practice and procedure to be followed in LegCo shall be as decided by the President,[72] to end the debate.

68 *Leung Lai Kwok Yvonne v Chief Secretary for Administration* [2015] HKEC 1034 at [33].

69 (2014) 17 HKCFAR 689.

70 *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689 at [28].

71 Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Made by the Legislative Council of the Hong Kong Special Administrative Region on 2 July 1998 in Pursuance of Article 75 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China); Article 75(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China reads: "[t]he rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene this Law".

72 Rule 92 of the Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Made by the Legislative Council of the Hong Kong Special Administrative Region on 2 July 1998 in Pursuance of Article 75 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China) reads: "[i]n any matter not provided for in these Rules of Procedure, the practice and procedure to be followed in the Council shall be such

(*cont'd on the next page*)

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

45 The central issue before CFA in *Leung Kwok Hung* was whether Art 73(1) of the Basic Law, which empowers LegCo to "enact, amend or repeal laws in accordance with the provisions of [the Basic Law] and legal procedures",[73] requires Hong Kong courts to exercise jurisdiction to ensure compliance with the RoP in LegCo's lawmaking process. Critically, CFA noted that Art 73(1) of the Basic Law 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.[74] Since Art 73(1) of the Basic Law is *ambiguous* on this point, the court held that the constitutional provisions therein do not displace the common law principle of non- intervention.[75] Nevertheless, pursuant to a written constitution which confers lawmaking powers on the Legislature, the courts will determine whether the Legislature has a particular power or privilege,[76] but it will not exercise jurisdiction to determine "the occasion or the manner of exercise"[77] of such powers or privileges by LegCo or its President.

46 On this basis, 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 Basic Law to "preside over meetings".[78] 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.[79]

47 In sharp contrast to CFA's decision in *Leung Kwok Hung*, the Court of Appeal in *Chief Executive of the Hong Kong Special*

---

as may be decided by the President who may, if he thinks fit, be guided by the practice and procedure of other legislatures".

73 Article 73(1) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China reads: "The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions: … [t]o enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures".

74 *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689 at [36].

75 *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689 at [38].

76 *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689 at [39].

77 *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689 at [43].

78 *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689 at [46]; Article 72(1) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China reads: "[t]he President of the Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions: … [t]o preside over meetings".

79 *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689 at [46].

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

Administrative Region v President of the Legislative Council[80] refused to apply the principle of non-intervention and decided to disqualify on its own two newly elected members of LegCo for declining to take the LegCo Oath at the Council's first sitting.[81]

48 On the facts, two newly-elected lawmakers openly derided the PRC at their swearing-in ceremony on 12 October 2016 and a pair of them (Sixtus Leung and Yau Wai-ching) even referred to the PRC as "Sheen-na" – a derogatory term used by the Japanese on the Chinese during the Second World War – and pledged allegiance to the "Hong Kong nation" instead. Unsurprisingly, the President of LegCo did not accept the validity of the pair's oaths but, nevertheless, allowed them to retake their oaths at the next LegCo meeting. However, before Leung and Yau could retake their oaths, the Hong Kong government swiftly went to court and sought a declaration that the pair had been disqualified from their office on 12 October 2016 when they had declined to take the requisite legislative oath and that the LegCo President was therefore disempowered from re-administering their oaths. But on 7 November 2016, *before* CFI delivered its ruling, NPCSC issued an Interpretation of Art 104 of the Basic Law,[82] which *inter alia* provides that "[i]f the oath taken [by a public officer specified in Art 104 of the Basic Law] is determined as invalid, no arrangement shall be made for retaking the oath".[83] Agreeing with Beijing, CFI on 15 November 2016 determined that Leung and Yau had intentionally declined to take the requisite oath of office on 12 October 2016 and that they had therefore been automatically disqualified from assuming their office.[84] The CFI decision was affirmed by the Court of Appeal on 30 November 2016.

80 [2017] 1 HKLRD 460.

81 For a fuller discussion on this case, see Po Jen Yap & Eric Chan, "Legislative Oaths and Judicial Intervention in Hong Kong" (2017) 47 HKLJ 1.

82 Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 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.

83 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 (adopted by the Standing Committee of the Twelfth National People's Congress at its Twenty-fourth Session on 7 November 2016) at para 2(3).

84 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2016] 6 HKC 417.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

49 According to the Court of Appeal, the abovementioned NPCSC Interpretation has conclusively set out the penalty of disqualification as the consequence of an oath-taker's refusal to take the relevant oath,[85] and the court must therefore enforce the Interpretation and disqualify the errant lawmakers.[86]

50 With respect, there are two separate and conceptually distinct issues herein and the court has conflated both. The first concerns the consequence for legislators if they intentionally decline to take the approved 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 *silent* on whether the Judiciary is the branch of government that disqualifies a lawmaker after his oath is deemed invalid. In fact, Albert Chen, an eminent pro-Beijing constitutional law scholar and member of the HKSAR Basic Law Committee – a political body that advises NPCSC prior to the official issue of any Interpretation – has stated publicly *prior to CFI's ruling* that it was open to the Hong Kong courts to punt the issue over to the President at LegCo.[87]

51 The Court of Appeal justified its right to disqualify the lawmakers on the basis that it was its constitutional duty to "adjudicat[e] on the consequence of a failure to meet the constitutional requirement"[88] imposed under Art 104 of the Basic Law. As reasoned by the court, Art 104 of the Basic Law requires key public officials to swear allegiance to the HKSAR before they can assume office, and since it is for the courts to determine whether a constitutional requirement has been met,[89] *a fortiori*, it must be for the courts – and not the oath administrator – to determine whether a valid oath as required under Art 104 has been taken.[90] Otherwise, if a member of LegCo is "wrongly

85 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [29].

86 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [42].

87 Jeffie Lam & Joyce Ng, "Hong Kong Courts Can Decide Fate of at Least 10 Lawmakers Despite Beijing Ruling", *South China Morning Post* (11 November 2016) <http://www.scmp.com/news/hongkong/politics/article/2045224/hong-kong-courts-can-decide-fate-least-10-lawmakers-despite> (accessed 1 February 2017).

88 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [31].

89 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [32].

90 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [33].

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

ruled by the Clerk or President [of LegCo] to have failed to comply with article 104 and disqualified",[91] that member would have no relief.

52 With respect, the Court of Appeal's concerns are legitimate but misplaced. Undoubtedly, for the reasons given by the court, the Judiciary must be empowered under Art 104 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 the lawmaker must be allowed to assume office.

53 On the other hand, it is submitted that if the court decides that the oath taken is *invalid*, it should be left to the President of LegCo to determine if the lawmaker should be denied a second chance of retaking the oath and be disqualified. (Naturally, if the legislator's conduct during oath-taking falls within the ambit of the Interpretation, the President would have no discretion and would be legally bound by the Interpretation to disqualify him). Unfortunately, the Court of Appeal took the view that the disqualification of the said legislators was automatic, and its reasons are discussed immediately below.

54 First, the Court of Appeal held that para 2(3) of the Interpretation "*automatically disqualified* [the pair of lawmakers] *forthwith* from assuming their offices" [emphasis added].[92] This is an unfortunate judicial sleight of hand. The term "automatic" or "automatically" is found nowhere in the Interpretation. The Interpretation only uses the term "forthwith", which means "without delay",[93] and it would not be inconsistent with the Interpretation for the Court of Appeal to punt the issue over to the oath administrator at LegCo to proceed with the disqualification expeditiously. As discussed earlier, the Interpretation is actually *silent* on who should do the disqualifying.

55 Second, the Court of Appeal held that s 21 of the Oaths and Declarations Ordinance[94] ("ODO") provides that "any person who declines … to take an oath duly requested … shall … if he has already entered on his office, vacate it, and if he has not entered on his office, be

91 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [74], concurring opinion by Vice President Johnson Lam.

92 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [42].

93 *Concise Oxford English Dictionary* (Catherine Soanes & Angus Stevenson eds) (Oxford University Press, 11th Ed, 2006) at p 560.

94 Cap 11.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

disqualified". Therefore, the court reasoned that s 21 of the ODO not only did not allow the two lawmakers to retake their oaths,[95] their removal from office was "automatic".[96] 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 were 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 required emergency medical attention right before they were to be sworn in, those lawmakers too would be automatically disqualified from office. But this surely cannot be right.

56 More importantly, this is not even what the ODO mandates. Section 19 of the ODO merely requires a member of LegCo to take his 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". Therefore, s 21,[97] which disqualifies a lawmaker for declining 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 of the ODO – found also in the same Part IV of the ODO – is flouted. This means that a lawmaker will only be disqualified after he declines to take the oath duly requested by s 19 of the ODO, that is, a valid oath is not taken as soon as reasonably possible[98] after the commencement of his term of office. Therefore, reading s 19 together with s 21, 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"[99] on the occasion where he first

95 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [42].

96 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [42]–[43].

97 Section 21 of the Oaths and Declarations Ordinance (Cap 11) 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.

98 In construing statutes, courts would avoid a construction that leads to an absurd result – a scenario described at paras 55 above – since that is unlikely to be what the Legislature intended: *Bennion on Statutory Interpretation* (Francis Bennion & Oliver Jones eds) (Sweet & Maxwell, 6th Ed, 2013) at p 869. Moreover, common law courts have often construed the phrase "as soon as possible" to mean "within a reasonable time": see *Vines v Djordjevitch* (1955) 91 CLR 512 at 522; *R v Greenaway* (1994) 12 CRNZ 103 at 106; therefore, "as soon as possible" in s 19 of the Oaths and Declarations Ordinance (Cap 11) should mean "as soon as *reasonably* possible", and therefore within "a *reasonable* time".

99 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [42].

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

declined to take the requisite oath. It is unfortunate that the Court of Appeal did not explore the interpretive effect s 19 has on s 21 and the interplay between both statutory provisions.

57 Third, the Court of Appeal 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",[100] and therefore it was for the courts to disqualify the two lawmakers after their oaths were deemed invalid. With respect, the court's reasoning on this ground is unconvincing too.

58 In *Leung Kwok Hung*, notwithstanding that Art 73(1) of the Basic Law explicitly requires LegCo to "enact … laws in accordance with the provisions of [the Basic Law] and legal procedures", CFA argued 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.[101] 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.[102] Where this principle applies, the Judiciary will only determine whether the Legislature has a particular power[103] – 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"[104] of such powers by LegCo or its President.

59 The principles laid out in *Leung Kwok Hung* are apposite herein. Just as Art 73(1) of the Basic Law 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, this author has argued that Art 104 of the Basic Law and the relevant NPCSC Interpretation are *ambiguous* on whether Hong Kong courts are required to enforce the adverse consequences that follows 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 allow or deny a newly

100 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [31].
101 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [36].
102 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [38].
103 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [39].
104 *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2017] 1 HKLRD 460 at [43].

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

elected LegCo member's retaking of 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.

60 It is submitted that the Basic Law and the RoP confer on the President the aforesaid power to allow or deny a retaking of the legislative 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. 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 LegCo. Second, Art 72(2) of the Basic Law empowers the President to "decide on the agenda".[105] 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 a valid oath must be taken within a reasonable time – 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.[106] 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.

61 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"[107] of this power. 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.

---

105 Article 72(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China reads: "[t]he President of the Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions: … [t]o decide on the agenda, giving priority to government bills for inclusion in the agenda".

106 Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region, r 92.

107 *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689 at [43].

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

62 Admittedly, the political fates of the two juvenile lawmakers would have been sealed even if the Court of Appeal had passed the buck to the oath administrator in LegCo. 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.[108] 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.[109] 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.

C. Margin of appreciation on electoral matters

63 The third and final strand of the political question doctrine in Hong Kong pertains to the judicial approach to statutory restrictions on the electoral process. The courts have emphasised that they will accord a margin of appreciation to the Legislature when assessing the constitutionality of these limitations as these issues implicate "political and policy considerations"[110] that judges are ill-equipped to resolve.

64 In *Leung Chun Ying v Ho Chun Yan Albert*[111] ("*Leung Chun Ying*"), CFA had to decide whether the Chief Executive Election Ordinance[112] was unconstitutional as it only permits a failed candidate in the Chief Executive race to lodge an election petition within seven days after the election result is declared.[113] In the lower court, the seven-day limit was deemed unconstitutional as the Government could not discharge its burden of justifying how a short time bar as such was

108 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) <https://www.hongkongfp.com/2016/12/07/road-no-return-part-2-courts-handled-oaths-row/> (accessed 1 February 2017).

109 While these four lawmakers had intentionally slipped pro-democracy messages into their legislative oaths, their oaths were either approved by the oath administrator or were validly retaken when 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) <http://www.scmp.com/news/hong-kong/politics/article/2051266/hong-kong-lawmakers-accused-setting-aside-solemnity-taking> (accessed 1 February 2017).

110 *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735 at [45].

111 (2013) 16 HKCFAR 735 at [45].

112 Cap 569.

113 Section 34(1) of the Chief Executive Election Ordinance (Cap 569) reads: "[a]n election petition questioning an election must be lodged within 7 working days after the day on which the result of the election is declared".

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

proportionate, and the lower court applied a remedial interpretation to the electoral law so as to confer upon the court a discretion to extend time, where necessary.[114]

65 However, on appeal, CFA disagreed and overruled the lower's court decision to read-in a judicial discretion to extend time. Instead of assessing whether this statutory restriction was reasonable or necessary, CFA turned the proportionality test on its head when it decided to accord significant deference to the legislative choice, instead of requiring the Government to justify on a balance of probability the rights-derogation at issue:[115]

> Elections, however, also involve political and policy considerations and it is in these areas where the legislature is involved. The determination that seven days is the appropriate limit for the lodging of election petitions is one that does involve considerations other than legal ones. A due margin of appreciation should be accorded in the present case …

By sweeping aside the proportionality analysis, CFA was thus free to downplay the excessiveness of the seven-day time bar. Specifically, CFA suggested that persons who were *not* candidates in the Chief Executive election, and hence unaffected by the seven-day time bar that applied only to the election candidates, could still launch separate judicial review proceedings against the election result.[116] In other words, while the candidates themselves were time-barred after seven days, their surrogates were free to seek judicial review and challenge the validity of the election after that.

66 Next, in *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs*,[117] the Court of Appeal upheld a law that disqualifies a legislator from running in the by-election held to fill a vacancy in the very seat in LegCo that he recently resigned from.[118] The law was passed in October 2012 after five pro-democracy legislative councillors from

---

114 *Ho Chun Yan Albert v Leung Chun Ying* [2012] 5 HKLRD 149 at [125].
115 *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735 at [45].
116 *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735 at [49].
117 [2015] 5 HKLRD 881.
118 Section 39(2A) of the Legislative Council Ordinance (Cap 542) reads:

> A person is also disqualified from being nominated as a candidate at a by-election if—
> (a) within the 6 months ending on the date of the by-election—
> (i) the person's resignation under section 14 as a Member took effect; or
> (ii) the person was taken under section 13(3) to have resigned from office as a Member; and
> (b) no general election was held after the relevant notice of resignation or notice of non-acceptance took effect.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

different geographical constituencies ("GC") – as a collective act of political protest – resigned mid-term in 2010 to trigger city-wide by-elections for their seats. (Given that electoral seats in the GCs are awarded on a proportional basis, their re-election was virtually guaranteed; and their resignation and re-election was pure political posturing).

67 The focus of the electoral challenge centred on whether the electoral restriction was proportionate, in particular whether it served a legitimate aim. The court unanimously agreed that it should defer to the Government on their "assessment as to whether there is a need to discourage resignations with a view to trigger by-elections",[119] especially since this (somewhat unnecessary) political exercise cost HK$126m in public expenditure.[120]

68 Unfortunately, while the Government may have been pursuing a legitimate aim when crafting a law of this nature, the Court of Appeal erred in so far as it also decided that the electoral restriction was "no more than necessary to address those concerns".[121] Specifically, counsel had raised concerns that the law was overbroad in so far as, *inter alia*, it had also barred legislative councillors who resigned after being convicted of a criminal offence but had their conviction quashed on appeal after their resignations and before the resulting by-election.[122] Oddly, the Court of Appeal only had this pithy reply: "[w]ith respect, they are fanciful suggestions and we do not find those to be a concrete basis for upsetting the balance struck by the legislature in the form of a modest restriction".[123] One wonders why the suggestion was particularly "fanciful", especially since many (somewhat unruly) pro-democracy legislators are regularly convicted of minor public order offences in Hong Kong.[124]

---

119 *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2015] 5 HKLRD 881 at [62].
120 *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2015] 5 HKLRD 881 at [13].
121 *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2015] 5 HKLRD 881 at [65].
122 *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2015] 5 HKLRD 881 at [67].
123 *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2015] 5 HKLRD 881 at [68].
124 *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229; *HKSAR v Wong Yuk Man* [2015] 1 HKLRD 132.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

69 Nevertheless, the tenor of the court's judgment was summed up by the Chief Judge of the High Court, Andrew Cheung, in his concurring opinion:[125]

> Generally speaking, the court is neither constitutionally positioned nor institutionally equipped to deal with a political issue, that is, an issue essentially involving political rather than legal judgment … This is so regardless of whether the right sought to be restricted is a fundamental right, and also whether the issue is encountered at the first limb or the third limb of the proportionality test. For good reasons, the court should, generally speaking, accord the government/legislature a broad margin of appreciation regarding their discretionary judgment on such an issue.

70 Most recently, in *Wong Chi Fung v Secretary for Justice*,[126] CFI upheld the constitutionality of a statutory provision that required persons to be at least 21 years old before he could stand for LegCo elections.[127] Notwithstanding that the minimum age for voting (and the age of majority) in Hong Kong is 18, the court held that this higher age-threshold for legislators is necessary to ensure that lawmakers are sufficiently mature to carry out their public duties.[128] This stance staked out by the Hong Kong court stands in sharp contrast against the current position in the UK,[129] Australia,[130] New Zealand[131] and Canada,[132] which have all reduced their minimum age requirement for parliamentarians to 18. But CFI insisted that "[t]he choice of that age is predominantly a discretionary political judgment for the elected members of the LegCo to make"[133] and the Judiciary has to apply "common sense"[134] in lieu of "evidence",[135] and give a "broad margin of appreciation to the LegCo's discretionary judgment".[136]

71 Conceptually, it is not normatively indefensible for Hong Kong courts to adopt a posture of respect to the electoral regulation passed by the Legislature. The problem is the current stance of the Judiciary stands

125 *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2015] 5 HKLRD 881 at [6].
126 [2016] 3 HKLRD 835.
127 Section 37(1)(a) of the Legislative Council Ordinance (Cap 542) reads: "[a] person is eligible to be nominated as a candidate at an election for a geographical constituency only if the person … has reached 21 years of age".
128 *Wong Chi Fung v Secretary for Justice* [2016] 3 HKLRD 835 at [40].
129 UK Electoral Administration Act 2006 (c 22) s 17(1).
130 Australian Commonwealth Electoral Act 1918, s 163.
131 New Zealand Electoral Act 1993, ss 47 and 74.
132 Canada Elections Act (SC 2000, c 9) ss 3 and 65.
133 *Wong Chi Fung v Secretary for Justice* [2016] 3 HKLRD 835 at [30].
134 *Wong Chi Fung v Secretary for Justice* [2016] 3 HKLRD 835 at [57].
135 *Wong Chi Fung v Secretary for Justice* [2016] 3 HKLRD 835 at [56]–[57].
136 *Wong Chi Fung v Secretary for Justice* [2016] 3 HKLRD 835 at [30].

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

in sharp contrast with the prior practice of the courts, which have rigorously scrutinised statutory limitations on electoral rights when the invalidation of these restrictions does not risk eroding Beijing's political control over the city.[137] In 2000, CFA unanimously decided that the exclusion of non-indigenous inhabitants from village elections was an unreasonable violation of right to participate in public affairs.[138] In 2008, CFI invalidated a blanket legislative ban that barred all prisoners from voting, regardless of the gravity of their offenses or the length of their custodial sentences.[139] In 2012, CFI struck down a legislative provision that barred persons from standing for elections when they were on bail pending appeal against their criminal convictions.[140] In all three instances, the Hong Kong judiciary did not accept at face value the Government's position that the law was proportionate or reasonable. Instead, the courts had required the administration to prove with evidence how the law – in the form it took – was a reasonable curtailment of electoral rights and the courts would "examine the [legislative] choices, as made, closely and whether the restrictions on voting rights they represent can be justified"[141] as there is "no escape from the Court's unique constitutional task"[142] herein.

72 Previously, while the Hong Kong judiciary has accepted that major electoral systemic overhauls[143] or the overturn of the high-stakes Chief Executive election results[144] are off-limits to the courts, the judges have successfully ushered in modest changes to Hong Kong's restrictive electoral regime by extending voting rights writ small to non-indigenous villagers,[145] disenfranchised prisoners,[146] and allowing those who had been convicted of minor offences pending appeal to stand for elections.[147] But now it is noteworthy that since *Leung Chun Ying* and the articulation of this new "margin of appreciation" test on electoral issues, no electoral restriction has been invalidated by the courts again. It would appear that the courts have sounded the death knell for judicial review over electoral law.

---

137 Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press, 2017).
138 *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459 at 474G.
139 *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166 at [112] and [116].
140 *Wong Hin Wai v Secretary for Justice* [2012] 4 HKLRD 170.
141 *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166 at [156].
142 *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166 at [156].
143 *Chan Yu Nam v Secretary for Justice* [2010] HKEC 1893.
144 *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735.
145 *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459.
146 *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166.
147 *Wong Hin Wai v Secretary for Justice* [2012] 4 HKLRD 170.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

II. Conclusion

73 After the PRC's resumption of sovereignty over Hong Kong in 1997, the fundamental jurisprudential conundrum confronting CFA is how it can preserve the Judiciary as a separate and independent branch of government, whilst quelling any concerns from the Mainland that Hong Kong courts, if left unleashed, would turn the city into another "renegade province" in the south.

74 If the Hong Kong judiciary rules too aggressively against the Government, the PRC would simply circumvent its judgments by routinely using NPCSC Interpretations to censure the court and circumscribe its powers further. On the other hand, if the courts are too indulgent on the Hong Kong government, the Basic Law would be reduced to a mere hollow shell that only protects rights on paper but not in practice.

75 The political question doctrines were conceived by the Hong Kong CFA to confine the Judiciary to its constitutional mandates and preserve its institutional legitimacy. But in so far as the application of each of the three strands of the doctrine has been fraught with inconsistencies, the absence of predeterminable outcomes challenges the very rule of law ideal that the doctrines were invoked to uphold. Judicial abdication on all electoral matters – as the third strand of the political question doctrine invariably condones – poses the greatest constitutional concern as the court, in a manner reminiscent of Pontius Pilate,[148] washes its hands of all opportunities to nudge the Hong Kong government on electoral reform writ small, and this abstinence invites further political stagnation or repression.

---

148 Martin H Redish, "Judicial Review and the 'Political Question'" [1984] Nw U L Rev 1031 at 1061.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.