

Constitutional Crisis in Hong Kong: Congressional Supremacy and Judicial Review

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The decision on January 29, 1999, of the Court of Final Appeal (CFA) of the Hong Kong Special Administrative Region (SAR) in the illegal migrant children case¹ provoked the first serious controversy concerning the relationship between the SAR and the central government in Beijing since the establishment of the SAR on July 1, 1997.² The controversy was centered around the CFA's statement in its judgment (Statement)³ that the Hong Kong courts have the jurisdiction to examine whether any legislative acts of the National Peoples Congress (NPC) or its Standing Committee (SC) are consistent with the Basic Law and to declare the acts invalid if found to be inconsistent.⁴

In a highly publicized seminar reported in Hong Kong and mainland newspapers on February 7, 1999, four leading Chinese law professors (who were former members of the Drafting Committee for the Hong Kong Basic Law and of the Preparatory Committee for the establishment of the SAR) vehemently attacked the Statement. The attack elevated to the point of saying that the judgment has the effect of placing the courts of Hong Kong above the NPC as the supreme organ of state power under the Chinese Constitution, and

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1. See *Ng Ka-Ling & Others v. Director of Immigration* [1999] 1 H.K.L.R.D. 315 (H.K.).

2. The case is known as the illegal migrant children case because it concerns the right of abode in Hong Kong of children born in mainland China to Hong Kong permanent residents, and the procedural controls on the exercise of such right. Before July 1, 1997, such children had no right of abode in Hong Kong. However, under article 24 of the Basic Law of the Hong Kong SAR, which came into effect on July 1, 1997, such children are entitled to the right of abode in Hong Kong. To avoid a sudden flood of migrants to Hong Kong, procedural restrictions on the exercise of such rights were introduced on July 9, 1997, by the Provisional Legislative Council (PLC) of the SAR. In the *Ng Ka-Ling* case, the relevant legislation enacted by the PLC was challenged as being inconsistent with article 24 of the Basic Law. It was further argued that the PLC had no legislative power at all because its establishment (purportedly in pursuance of certain decisions of the National Peoples Congress and its Standing Committee) was inconsistent with the Basic Law.

3. The Statement may or may not form part of the ratio decidendi of the Court's decision on the legality of the Provisional Legislative Council in this case, depending on how the reasoning process on this point is to be interpreted.

4. See *Ng Ka-Ling*, 1 H.K.L.R.D. at 337.

of turning Hong Kong into an independent political entity. This attack is the strongest conceivable criticism of the judgment from the political point of view, given China's consistent stance that issues relating to sovereignty are non-negotiable and no concessions can be made in this respect under any circumstances. After the Beijing visit on February 12–13 of Ms. Elsie Leung, the SAR's Secretary for Justice, to discuss the matter, it was reported that Chinese officials also criticized the Statement as unconstitutional and called for its rectification. This call for rectification is the strongest conceivable criticism of the judgment from the legal point of view.

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

The Statement was made in the section of the judgment entitled “Constitutional Jurisdiction of the Courts.” Two lines of reasoning leading to the Statement can be identified.

I. The First Line of Reasoning

The first line of reasoning⁵ runs as follows:

- a. The NPC and its SC are indeed the highest organs of state power under the Chinese Constitution and their acts are indeed acts of the Sovereign.
- b. But, when the NPC enacted the Basic Law, it implicitly empowered the courts of the SAR to review whether any of its legislative acts, or those of its SC, are inconsistent with the Basic Law, subject of course to the provisions of the Basic Law itself.⁶
- c. The proposition in (b) is true because as with other constitutions, laws that are inconsistent with the Basic Law are of no effect and are invalid.⁷
- d. Furthermore, the Basic Law has conferred on the Hong Kong courts independent judicial power within the high degree of autonomy conferred on the Region. It is for the courts of the Region to determine questions of inconsistency and invalidity when they arise.⁸ The jurisdiction to enforce and interpret the Basic Law necessarily entails

5. See *id.* at 337–38.

6. There is no further explanation in the judgment of how the alleged power on the part of Hong Kong courts to review NPC acts is constrained by provisions of the Basic Law. There are two provisions that seem to be particularly relevant in this regard, and they are articles 19 and 158. These provisions are mentioned subsequently in the judgment in the context of the discussion on limitations on the jurisdiction of the Hong Kong courts, but there is no commentary on how they would operate in practice to limit the court's power to review NPC acts.

7. See *id.* at 337.

8. See *id.* at 337–38.

the jurisdiction stated above over acts of the National Peoples Congress and its Standing Committee to ensure their consistency with the Basic Law.⁹

- e. It is pointed out, in support of the supremacy of the Basic Law and its capacity to be used in the SAR for judicial review of acts of the NPC or its SC, that the Basic Law was enacted to implement the Joint Declaration, and that article 159 of the Basic Law provides a limit on the extent to which it may be amended.

II. The Second Line of Reasoning

The second line of reasoning consists of a repudiation of the doctrine accepted by the Court of Appeal in *HKSAR v. Ma Wai Kwan David*.¹⁰ The doctrine consists of the following:

1. Since article 19(2) of the Basic Law provides that the jurisdiction of the Hong Kong courts is subject to the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong immediately before the establishment of the SAR; and
2. the Hong Kong courts previously had no power to review any legislative act of the sovereign (e.g., Acts of Parliament) and to declare it as null and void, therefore the SAR courts have no jurisdiction to review any act of the NPC or its SC, that represent the new sovereign.

The CFA rejected this doctrine on the following ground:

The analogy drawn with the old order was misconceived. Prior to July 1, 1997, Hong Kong was a British colony. According to the common law, the United Kingdom Parliament had the supreme authority to legislate for Hong Kong and the courts in Hong Kong could not have questioned that authority.

For the reasons already explained, the position in the new order is fundamentally different. Article 19(2) of the Basic Law provides for the limitation on the constitutional jurisdiction of the courts "imposed by the legal system and principles previously in force in Hong Kong." This cannot bring to the new order restrictions only relevant to legislation of the United Kingdom Parliament imposed under the old order.¹¹

III. Critique of the First Line of Reasoning

Let us now examine the correctness of the first line of reasoning. The first query relates to proposition (c) above. It is trite law that only a written constitution (as distinguished from ordinary laws, with the possible exceptions¹² of manner and form or procedural restrictions imposed by an ordinary law regarding how it may be amended, and of rules of construction against implied repeal) can restrain the exercise of legislative power by the national legislature of a sovereign state.¹³ Applying this general principle to the Peoples Republic of China (PRC), only its constitution can define the limits to which the legislative power of the NPC (and that of its SC) is subject.

9. *See id.* at 338.

10. [1997] H.K.L.R.D. 761 (H.K.).

11. Ng Ka-Ling, 1 H.K.L.R.D. at 338–39.

12. *See sources cited infra* notes 22 and 23.

13. It is somewhat arguable whether it is possible to set up an effective constitutional limitation of a substantive or procedural nature to the exercise of legislative power in a country without a written constitution.

Bearing in mind this principle of constitutional restraint on the exercise of legislative power by a sovereign legislature, and reading proposition (c) in the context of the Statement as a whole, we can see that proposition (c) may be interpreted to have assumed that the Basic Law should be regarded as having the same status, force, and effect as the PRC Constitution itself. Now, the validity of such an assumption would be highly questionable. No authority has been cited in the judgment in support of this assumption. Indeed, the assumption has not been explicitly stated in the judgment, even though its correctness is crucial if the Statement is to be logically established.

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

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

To answer this question, an understanding of the basic concepts, structure, and operation of the Chinese constitutional system is essential. As the judgment itself recognizes,¹⁴ the NPC and its Standing Committee are the highest organs of state power within the Chinese constitutional system. Although the PRC has a written constitution, it is important to note that the written constitution is not enforceable (in the context of review of the constitutionality of legislative acts) by any court in mainland China, unlike the situation in common law jurisdictions like the United States, Canada, Australia, or India. Nor is it enforceable (in the context of the review of the validity of any legislative act) by any other institution. The NPC (and the SC, which has the constitutional power to interpret the Constitution and the law under article 67 of the Constitution) is, from the legal, as distinguished from the political, point of view, the sole and exclusive guardian of the Constitution and its implementation. The Constitution establishes constitutional norms for the guidance of the NPC and its SC when they engage in legislative or other governmental work. They have a legal, moral, and political obligation of fidelity to the Constitution. However, the implementation of the Constitution and the avoidance of legislative actions contravening it depends entirely on the self-awareness and self-restraint of the NPC and its SC. Even if it is alleged that they have acted in breach of the Constitution, there is no legal remedy, and any remedy would have to lie in the political domain.

This kind of constitutional system is no stranger to Common Law lawyers in Britain, Hong Kong's former master and from whom Hong Kong has inherited the Common Law

14. See Ng Ka-Ling, 1 H.K.L.R.D. at 337 [citing articles 57 and 58 of the PRC Constitution].

15. The enactment of the European Communities Act of 1972 and the Human Rights Act of 1998 has not fundamentally altered the position. See generally A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMIN-

tradition. In the U.K., the doctrine of parliamentary supremacy has reigned for centuries and still reigns today.¹⁵ The observance of basic constitutional and human rights norms depends on Parliament's voluntary compliance, which is ultimately secured by history, politics, culture, and tradition. The courts have a constitutional duty to recognize and enforce all Acts of Parliament and they cannot strike any of the acts down as courts do in the United States, Canada, Australia, or India. In this regard, the Chinese system is closer to the British than to these other common law jurisdictions, despite the fact that China has a written constitution.

Therefore, the Statement made by the CFA may be interpreted to have the following effects:

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

It is inconceivable that this was the intention of the PRC legislature when it enacted the Basic Law. The Basic Law cannot reasonably be construed to have conferred on the SAR courts the general power claimed for them in the Statement unless such power is conferred in the clearest express terms. The proposition arises because the grant of that general power would be such a fundamental alteration of the constitutional structure and principles of the PRC (or, indeed, in the words of Sir William Wade writing about the possible restriction on parliamentary sovereignty introduced by the European Communities Act 1972, a constitutional revolution¹⁶) that a corresponding amendment to the PRC Constitution would be necessitated from any jurisprudential point of view. Nevertheless, as demonstrated below, the Basic Law may indeed be construed to have conferred on the SAR courts a limited power of judicial review vis-a-vis Type 2 acts and Type 3 acts as discussed below.

Incidentally, the above analysis demonstrates that although not every provision in the PRC Constitution is directly applicable to Hong Kong, the proper construction of the Basic Law on the issue of the constitutional jurisdiction of the SAR courts can only be arrived at by taking into account the nature, structure, and fundamental principles of the

ISTRATIVE LAW Chs. 4, 8 (12th ed. 1997); HILAIRE BARNETT, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* Ch. 7 (2d ed. 1998).

16. See H.W.R. Wade, *Sovereignty—Revolution or Evolution?*, 112 L. Q. REV. 568 (1996). See also Wades' earlier work on this subject, H.W.R. Wade, *What Has Happened to the Sovereignty of Parliament?*, 107 L. Q. REV. 1 (1991). For a critical discussion of Wade's views, see John Eekelaar, *The Death of Parliamentary Sovereignty—A Comment*, 113 L. Q. REV. 185 (1997); T.R.S. Allan, *Parliamentary Sovereignty: Law, Politics, and Revolution*, 113 L. Q. REV. 443 (1997).

Chinese constitutional system as a whole. Therefore, the development of the jurisprudence of one country with two systems depends on the study and understanding of both systems, so that problems arising at the interface of the two systems can be resolved in a manner that is fair, reasonable, and acceptable to both sides.

IV. Critique of the Second Line of Reasoning

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

The colonial situation was as follows:¹⁷

1. The written constitution for Hong Kong was the Letters Patent enacted by the Crown;
2. In British constitutional law, the doctrine of parliamentary supremacy prevails. As formulated by Professor Stanley de Smith, this means that The Queen in Parliament is competent, according to United Kingdom law, to make or unmake any law whatsoever on any matter whatsoever; and no United Kingdom court is competent to question the validity of an Act of Parliament. This principle was described by Professor de Smith as the most fundamental rule of English constitutional law;¹⁸
3. Therefore, the Hong Kong courts could not question the validity of any Act of Parliament that was made applicable to Hong Kong by Parliament itself, nor did they have the power to review whether any such act was inconsistent with the Letters Patent or the British constitution or to declare it to be invalid.

In light of the discussion of Chinese constitutional law in the preceding section of this article (of which the Hong Kong Basic Law, that the CFA itself rightly recognized is a national law and is the constitution of the Region,¹⁹ is a part), the direct parallel between the colonial situation and that of the SAR can easily be demonstrated:

1. The written constitution for the Hong Kong SAR is now the Basic Law enacted by the NPC.
2. In Chinese constitutional law, the doctrine of congressional supremacy prevails. To paraphrase de Smith's passage quoted above, this doctrine means that the NPC and

17. Strictly speaking, this situation was not due to the fact that Hong Kong was a colony, but due to the fact that Hong Kong was subject to the legal sovereignty of Parliament. Similarly, according to one widely held view of parliamentary sovereignty in British constitutional law, as far as the British courts were concerned, Canada and Australia continued to be subject to the legal sovereignty of the U.K. Parliament for decades after they became politically independent. See generally *British Coal Corporation v. The King* App. Cas. 500 (P.C. 1935) (appeal taken from Quebec); *Manuel and Others v. Attorney General* [1982] 3 All E.R. 822.

18. See STANLEY DE SMITH & RODNEY BRAZIER, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 64 (6th ed. 1989).

19. See *Ng Ka-Ling*, 1 H.K.L.R.D. at 337.

its SC are competent, according to PRC constitutional law, to make or unmake any law whatsoever on any matter whatsoever, and no court is competent to question the validity of a legislative act of the NPC or its SC. This principle is one of the most fundamental rules of Chinese constitutional law, and answers the question of where is the ultimate authority in constitutional law in the PRC, of which the Hong Kong SAR is, in the words of the very first article of the Basic Law, an inalienable part.

3. Therefore, the Hong Kong courts cannot, as a matter of general principle (but subject to the distinction between Type 1 acts, Type 2 acts, and Type 3 acts discussed below), question the validity of any act of the NPC or its SC that is lawfully made applicable to Hong Kong. Nor (again subject to the distinction between Type 1 acts, Type 2 acts, and Type 3 acts discussed below) do they have a general power to review whether any such Act is inconsistent with the Basic Law or the Chinese Constitution, and declare it invalid.

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

V. Can a Clarified Version of the Statement Be Defended?

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

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

- a. *Model 1*: The Hong Kong courts may review the acts of the NPC or its SC in court proceedings where such acts are challenged as being inconsistent with the Basic Law. However, if the NPCSC, acting under article 158, issues an interpretation of the relevant provision of the Basic Law that the act being challenged is not inconsistent with the Basic Law, the Hong Kong courts would be bound by this ruling.²⁰ Thus,

20. The NPCSC may also interpret the act being challenged for the purpose of indicating whether there is an inconsistency between the Basic Law and the act. Under article 67 of the Chinese Constitution, the NPCSC does have the power to interpret the latter act. See P.R.C. Const. art. III.

the NPCSC remains the supreme arbiter of the validity of Chinese legislative acts where it is alleged that they are inconsistent with the Basic Law.

- b. *Model 2*: The Hong Kong courts have no jurisdiction to entertain any claim that a legislative act of the NPC or its SC is invalid, or to otherwise determine the validity of an act on the basis of whether it is inconsistent with the Basic Law. This is the position argued for earlier in this essay (subject to the distinction between Type 1 acts, Type 2 acts, and Type 3 acts discussed below).

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

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

- a. will not issue on its own initiative any interpretation of the Basic Law under article 158, not even in relation to those provisions in the Basic Law concerning affairs that are the responsibility of the Central Peoples Government, or concerning the relationship between the Central Authorities and the Region (not to say Basic Law provisions that are within the limits of the autonomy of the Region); and,
- b. will only issue an interpretation when requested by the CFA to do so under article 158(3).

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

VI. Can a Weaker Version of the Statement Be Defended?

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

- a. *Type 1 acts*: These are acts done within the framework of the Basic Law, in pursuance of specific provisions in it and in accordance with the procedures laid down therein. Examples are:
 1. acts under article 18(3) to apply a national law relating to defense, foreign affairs, and other matters outside the limits of the autonomy of the SAR to the SAR. Procedurally, the NPCSC must consult the SAR Government and the Basic Law Committee before doing so;

2. acts under article 17 to invalidate a law enacted by the SAR on the ground that it is not in conformity with the provisions of this law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region. Procedurally, the NPCSC must consult the Basic Law Committee first;
 3. interpretations of the Basic Law issued under article 158. The NPCSC must consult the Basic Law Committee first; and
 4. amendment of the Basic Law under article 159, which does not contravene the established basic policies of the PRC regarding Hong Kong. The procedures regarding how amendments may be initiated and voted for at various stages and regarding the role of the Basic Law Committee are laid down in the article.
- b. *Type 2 acts*: These are acts done within the framework of the Basic Law in pursuance of specific provisions in it, but in violation of the procedures laid down therein. The examples can be derived from the four examples above by imagining that the requisite procedures in each case have not been complied with.
 - c. *Type 3 acts*: These are acts done outside the framework of the Basic Law (i.e., not in pursuance of any provision in the Basic Law). For example, the NPCSC makes a law that purports to apply to Hong Kong, but the law has not been added to Annex III of the Basic Law in accordance with article 18.

The weaker version of the Statement, which I think is sustainable, includes the following propositions. In relation to Type 1 acts, the Hong Kong courts have no jurisdiction to inquire whether, as a matter of substance or merits, the relevant acts satisfy the substantive (as distinguished from procedural) conditions or tests laid down by the Basic Law. The structural design of the constitutional framework set up by the Basic Law, and in particular the establishment of the Basic Law Committee comprising both mainland and Hong Kong members (including lawyers or jurists) to advise the NPCSC in relation to the exercise of the relevant powers, confirms the view put forward earlier in this essay and mandated by the basic tenets of Chinese constitutional jurisprudence. The NPCSC, or the NPC in the case of the amendment of the Basic Law, is the sole and exclusive arbiter of whether the relevant substantive conditions have been satisfied (e.g., whether a national law applied under article 18 relates to defense, foreign affairs, or other matters outside the limits of the autonomy of the Region, whether a law invalidated under article 17 relates to affairs within the responsibility of the Central Authorities or the relationship between the Central Authorities and the Region, or whether an amendment of the Basic Law adopted by the NPC contravenes the established basic policies of the PRC regarding Hong Kong). When a relevant act is done by the NPCSC or NPC in these situations, the SAR courts must presume conclusively that the substantive conditions laid down for the exercise of the power have been fully satisfied, and they may not substitute their own judgment for that of the NPC or NPCSC in this regard. To this extent, the act is not justiciable before the Hong Kong court.²¹

21. For the doctrine of justiciability in British constitutional law, see the landmark decision of the *House of Lords in the Council of Civil Service Unions v. Minister for the Civil Service* [1985] App. Cas. 374 (U.K.). The doctrine of justiciability is even more highly developed in American law. The U.S. Supreme Court has developed an elaborate body of principles to justify abstention in certain circumstances from the exercise of

However, the above argument that the question of compliance with the relevant substantive conditions is non-justiciable does not mean, for example, that any law that has been inserted into Annex III of the Basic Law in accordance with article 18 is necessarily valid and enforceable in its entirety. Where particular provisions in such a law are found to be in potential conflict with other provisions of the Basic Law (i.e., provisions other than article 18 itself) or other legal norms in other sources of Hong Kong law, the Hong Kong court will decide how, if possible, to reconcile the conflicting rules, and determine which rules should prevail in case of irreconcilable conflict. If, in the course of doing this, the Hong Kong court decides that a particular provision in a law that has been inserted into Annex III of the Basic Law is unenforceable, it will not be reviewing or declaring as invalid an act of the NPCSC under article 18 of the Basic Law. It is simply performing its natural duty of handling apparently conflicting provisions in the law of Hong Kong. In this respect, it would be perfectly legitimate for it, as a matter of construction, to give priority to the intention of the Chinese legislature as expressed in the Basic Law (e.g., the provisions on human rights).

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

In relation to Type 3 acts, I believe the Hong Kong courts can legitimately claim that they have no legal force in Hong Kong (even if they purport to apply to Hong Kong by their express terms or by necessary implication), on the ground that they are outside the sources of law in the SAR as stipulated in the Basic Law. The thesis can be put forward that the Basic Law contains an exhaustive statement of all the sources of law in the SAR (e.g., articles 8, 18, 17, 158, 159, 160), and the SAR courts have no constitutional or legal obligation to give effect to any legislative act of the NPC or its SC that does not come within any of these sources. Again, in such a situation, the Hong Kong courts need not use the radical language of reviewing the act to determine whether it is consistent with the Basic Law, and declare it invalid if it is determined to be so inconsistent. The courts need only hold that the act is not relevant or applicable to Hong Kong, and does not have legal

the power to review the constitutionality of the acts of other governmental organs. The doctrine of political questions is part of this body of law. This doctrine enables the court to decline jurisdiction to examine the constitutional validity of acts where the court determines that the issue is more appropriately resolved by a branch or organ of the government other than the court. Many factors can be taken into account in making this determination, such as: (1) whether the constitution has already granted the authority to decide the issue to another branch of government; (2) whether judicially manageable standards exist for deciding the issue; (3) whether the issue involves a policy determination fit for non-judicial discretion; (4) whether the assumption of jurisdiction by the court implies a lack of respect for another branch of government; (5) whether there is an unusual need to adhere to a previous policy decision by another branch of government; and (6) whether the court's pronouncement on the issue would lead to the embarrassment of multifarious pronouncements by various departments of government on one question. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 67-72, 96-107 (2d ed. 1988).

force in Hong Kong. In other words, the Hong Kong courts are simply giving effect to a rule of construction that the exhaustive statement in the Basic Law of the sources of Hong Kong law has not been impliedly repealed (partially) by this act. After all, under article 104 of the Basic Law, when the judges and other senior officials, councillors, and legislators of the SAR swear their oath of allegiance, the oath is to uphold the Basic Law.

VII. A Tentative Conclusion

The thesis of this article, up to this point, may be captured by the following thought experiment. Imagine that Hong Kong is still under British sovereignty. Parliament enacts an act (let us call it the Act of Hong Kong Autonomy) almost identical to the Basic Law, granting a high degree of autonomy to Hong Kong, limiting the application of British law to Hong Kong in terms almost identical to article 18 of the Basic Law, and limiting the possibility of amendment of the Act of Hong Kong Autonomy in terms almost identical to article 159 of the Basic Law. To what extent will such an act limit the sovereignty of Parliament or change the content of the constitutional doctrine of parliamentary supremacy? The argument in this article is that on the jurisprudential level, this presents a structurally similar problem in the case of Hong Kong under the Basic Law, because although China has a written constitution, the doctrine of congressional (NPC) supremacy reigns in Chinese law in the same way as the doctrine of parliamentary supremacy reigns in British law.

Although the matter is not beyond dispute and is still the subject of lively academic discussion, it has been suggested in Britain that the inability of Parliament to bind its successors (thus limiting the sovereignty of future Parliaments) may be subject to manner and form or procedural exceptions.²² Moreover, since the U.K.'s accession to the European Economic Community, it has been suggested that a rule of construction may be adopted by the courts giving priority to the intention of Parliament as expressed in the European Communities Act of 1972 over subsequent Acts of Parliament that are inconsistent with EC law (and hence also with the European Communities Act), in the absence of a clearly expressed intention in the subsequent act to override the European Communities Act.²³

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

VIII. The Aftermath

On February 26, 1999, in a fairly risky attempt to resolve the constitutional crisis on the basis of the SAR's own legal machinery and without the formal legal intervention of Beijing

22. See generally SIR IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 152-156 (5th ed. 1959); R.V.F. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* Ch. I (2d ed. 1964); J.D.B. MITCHELL, *CONSTITUTIONAL LAW* 78-79 (2d ed. 1968); GEOFFREY MARSHALL, *CONSTITUTIONAL THEORY* 55-57 (1971).

23. See the analysis in P.P. Craig, *Sovereignty of the United Kingdom Parliament after Factortame*, 1991 *EUR. Y.B.* 221.

(through the NPC Standing Committee issuing an interpretation of the Basic Law regarding the scope of SAR judicial power),²⁴ the SAR Government made a highly controversial move: it applied to the CFA for a clarification of that part of the judgment of the CFA dated January 29, 1999, at pages 337–39, relating to the NPC of the PRC and its Standing Committee on the ground that such matters are of great constitutional, public, and general importance.

The application was made pursuant to rule 46(1) in part X of the Rules of the Court of Final Appeal. However, this provision relates to applications for orders and directions on matters of practice and procedure generally. An application to a court requesting it to clarify its judgment is undoubtedly unprecedented in the legal history of Hong Kong, nor is it a generally acceptable practice in common law jurisdictions elsewhere.

In this case, the SAR Government argued that the CFA has an inherent jurisdiction to entertain such an application. The British House of Lords decision on December 17, 1998, in the *Pinochet* case²⁵ was relied on for this purpose. In that case, the House of Lords acting in its capacity as the court of final appeal in the United Kingdom made the unprecedented move of setting aside an order it made after disposing of a case and rendering judgment. In a judgment dated January 15, 1999, the House of Lords set out the reasons for setting aside the order (upon a petition brought by Mr. Pinochet alleging that one of the law lords who heard the case should have been disqualified by the rule against bias, the first rule of natural justice). On the point of whether the House of Lords has the jurisdiction to reopen a case that it has tried and on which it has rendered judgment, Lord Browne-Wilkinson said:

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

In principle it must be that your Lordships, *as the ultimate court of appeal*, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore *its inherent jurisdiction remains unfettered*. In *Cassell & Co Ltd v Broome (No 2)* [1972] 2 A11 ER 849, AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point. [emphasis supplied]

However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.²⁶

In the present CFA case, the government stressed that it was not seeking to reopen the case or to challenge any order or declaration that has already been made by the court in

24. Under article 158 of the Basic Law, the NPC Standing Committee has full legal power to do this, but if it does exercise the power in this case, the political cost would be substantial in terms of alleged or perceived intervention into the autonomy of Hong Kong's judicial system. It should be noted in this regard that by mid-February, the mainland reaction to the CFA Statement had already aroused international as well as local concern regarding the rule of law and judicial independence in Hong Kong. The British Consulate in Hong Kong, the U.S. Consulate in Hong Kong, and the American Chamber of Commerce in Hong Kong had all issued statements expressing concern about the matter and support for the CFA and for judicial autonomy in Hong Kong. These were implicit warnings to the Chinese government against intervention.

25. *Reg v. Bow Street Magistrate, Ex parte Pinochet (No 2)* [1999] 2 W.L.R. 272 (U.K.).

26. *Id.* at 281.

this case. Nor was the government contending that any part of the judgment was incorrect. It only sought a clarification of part of the judgment on the ground that the matter had aroused great public concern and was of great constitutional importance. The *Pinochet* case was therefore only relied upon for the purpose of demonstrating the existence of an inherent jurisdiction of a court of final appeal, and for the purpose of arguing that the CFA in this case should exercise such jurisdiction to entertain the application for clarification despite the absence of express statutory provisions conferring jurisdiction on the court to do so.

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

With respect, my own view is that the government's move was legitimate and justified under the circumstances, and I do not agree that the legal process was being subordinated to politics in this case. As explained above, at the heart of the constitutional crisis that the CFA judgment of January 29, 1999, precipitated was a Statement (as defined above) that consists of a number of legal propositions. Beijing's reaction was based on its honest and (as demonstrated above) legitimate belief that, as a matter of law, some of the propositions were wrong and unacceptable. These propositions were of great constitutional importance and related to the relationship between SAR judicial power (particularly the power of judicial review of legislative acts) and national legislative power (particularly the supremacy and sovereignty of the NPC). The Central Government thus had a legitimate interest in getting these propositions rectified.²⁷ The SAR Government's position (and that of some members of the Hong Kong legal community) was that the propositions were not incorrect, but perhaps need to be clarified if any misunderstanding resulting from the original Statement was to be removed.

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

Therefore, it can be seen that in the actual circumstances, there was indeed a strong and pressing need for the constitutional position to be settled in a manner that was acceptable to both Hong Kong and the mainland. In some other legal systems, the judicial machinery exists for constitutional questions of great import to be authoritatively determined even if no litigation concerning them has actually arisen. For example, in Canada the federal government may refer major questions of law, particularly constitutional questions, to the Su-

27. As explained in *supra* note 24, it also has the lawful power under the Basic Law to achieve such rectification, although a political cost would have to be incurred if it does exercise this power.

preme Court. When this reference procedure is invoked, it is the duty of the court to hear and consider it and to answer each question so referred.²⁸ Similarly, the Supreme Court in India has an advisory jurisdiction to give its opinion on questions of law referred to it by the president where such questions are of such public importance that it is expedient to obtain the opinion of the Supreme Court.²⁹

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

In regard to the foregoing analysis, the CFA's positive response on February 26, 1999, to the government's application is to be welcomed. In a unanimous judgment (Supplementary Judgment),³⁰ the CFA said:

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

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

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

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

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

28. See Supreme Court Act, R.S.C., Ch. S-19, § 53 (1970) (Can). PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 209-15 (4th student ed. 1996).

29. See India Const., art. 143; DURGA DAS BASU, *INTRODUCTION TO THE CONSTITUTION OF INDIA* 249-50 (6th ed. 1976).

30. Ng Ka-Ling & Others v. Director of Immigration (No. 2) [1999] 1 H.K.L.R.D. 577 (H.K.).

the provisions of the Basic Law and the procedure therein. It is also significant that the Supplementary Judgment acknowledged that the Hong Kong courts' jurisdiction to interpret the Basic Law is derived by authorization from the Standing Committee.

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

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

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

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

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

Although this question was not directly answered by the Supplementary Judgment, which, as pointed out above, is in fact susceptible to two interpretations, one consistent with the clarified version and the other with the weaker version discussed above, the better view is that the weaker version is more likely to prevail in the extremely unlikely event of

the Hong Kong court having to choose between the two in the future. Where the NPC or its SC has done an act directly and expressly in exercise of a power conferred on it by the Basic Law, and in its opinion the act is in accordance with the provisions of the Basic Law, it is difficult to imagine how a Hong Kong court can legitimately substitute its judgment on whether the act is in accordance with the provisions of the Basic Law for that of the NPC or its SC. Particularly in view of the NPCSC's overriding power of interpretation of the Basic Law, and in view of the fact that the Hong Kong courts' power of interpreting the Basic Law is itself derived from the NPCSC. Both of the latter points have actually been highlighted in the Supplementary Judgment. Thus, the Hong Kong court should conclusively presume that the relevant act has been done in accordance with the provisions of the Basic Law, or should hold that any question about this is not justiciable before a Hong Kong court.

In light of the foregoing analysis of the Supplementary Judgment, it is not surprising that the Central Government was willing to accept it and put the constitutional dispute to rest. On February 27, 1999, the day following the issue of the Supplementary Judgment, the Legislative Affairs Commission of the NPCSC issued a statement commenting that the clarification made by the Supplementary Judgment had been essential. The statement quoted at length the last two paragraphs of the Supplementary Judgment, and concluded by stating that:

The NPC is the supreme organ of state power of the PRC. The NPC and its SC will exercise their functions and powers in accordance with the principle of one country, two systems and with the Basic Law.³¹

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

31. National Peoples Congress Standing Comm., statement of Legislative Affairs Comm'n, Feb. 27, 1999 (author's translation from Chinese text).