

# *The Rule of Law in the Shadow of the Giant: The Hong Kong Experience\**

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## *Abstract*

The *Basic Law*, constituting the Hong Kong Special Administration Region, draws a unique distinction between the power of final interpretation and the power of final adjudication. Unlike common law jurisdictions, authoritative interpretation is invested outside the national and local court systems in the Standing Committee of the National People's Congress. The approach marks a clear departure from the traditional separation of powers integral to the rule of law in a common law system. Yet it does not necessarily follow that it erodes the values that the traditional conception of the rule of law is designed to support. This article examines the scope of the interpretive power, the character of the Standing Committee and the frequency and way in which the power is exercised to determine the legal effect of Standing Committee interpretation of HKSAR Courts. It concludes that despite the potential tensions inherent in such a system, the provisions of the *Basic Law* ensure that the decisions of HKSAR Courts are respected, even if their interpretations on occasion give way.

## **The Rule of Law**

The rule of law is a concept which has defied definition. Professor Brian Tamanaha has described it as 'an exceedingly elusive notion' giving rise to a 'rampant divergence of understandings'.<sup>1</sup> Yet, as Lord Bingham of Cornhill has pointed out, the concept has been employed in judgments by eminent judges as one which has substantive and procedural content and has been referred to in the *Constitutional Reform Act 2005* (UK) and in international instruments of high

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\* This article is an adaptation of a speech made by Sir Anthony Mason as part of the Sydney Law School's 'Distinguished Speakers Program' on 30 June 2011.

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<sup>1</sup> Brian Tamanaha, *On the Rule of Law* (Cambridge University Press, 2004) 3.

standing.<sup>2</sup> In Australia, the importance of the concept was recognised by Sir Owen Dixon when he said in the *Communist Party Case*<sup>3</sup> that ‘the rule of law forms an assumption’ on which the Australian Constitution is based.

The rule of law is a combination of interrelated ideas. Its core idea, as expressed by Lord Bingham is that:

all persons and authorities within the State ... should be bound by and entitled to the benefit of laws publicly made taking effect (generally) in the future and publicly administered by the courts.<sup>4</sup>

He went on to say, ‘any departure from the rule I have stated calls for close consideration and clear justification’.<sup>5</sup>

I shall focus in this article on one aspect of this core idea, namely that the power of adjudication (including the power of final adjudication) of disputes in accordance with legal norms is exercised by independent and impartial courts.

According to the common law conception of the rule of law, the exercise of that power involves the authoritative interpretation and application of the law, be it constitutional, statutory or judge-made law.<sup>6</sup> Although Professor A V Dicey’s three meanings of the rule of law did not specifically deal with this question, because each of his three meanings was tied to the role of the courts there can be little doubt that he subscribed to the view that the rule of law mandated final and authoritative interpretation by the courts. This aspect of the rule of law is associated with the separation of powers and the independence of the judiciary.

The decision in the *Communist Party Case*<sup>7</sup> demonstrates that, in Australia, the power of final and authoritative interpretation by the courts is an element in the rule of law. In that case, the federal legislation, which sought to dissolve the Australian Communist Party, was based on the defence power.<sup>8</sup> The legislation contained a preamble reciting the reasons why Parliament considered the law was necessary for defence. The High Court of Australia held that it was for the Court, not Parliament, to decide whether the law was one with respect to

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<sup>2</sup> Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 6–7.

<sup>3</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

<sup>4</sup> Bingham, above n 2, 8.

<sup>5</sup> *Ibid.*

<sup>6</sup> See generally Cheryl Saunders and Katherine LeRoy, ‘Perspectives on the Rule of Law’ in Saunders and LeRoy (eds), *The Rule of Law* (Federation Press, 2003) 9; Keith Mason ‘The Rule of Law’ in P D Finn (ed), *Essays on Law and Government* (Law Book Co, 1995) 135.

<sup>7</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

<sup>8</sup> *Commonwealth Constitution* s 51(vi).

defence. McTiernan J said that the preamble was ‘in no way decisive of the question whether the Act is valid or invalid, for that is a judicial question which only the judicature has the power to decide finally and conclusively’<sup>9</sup>. In these words, his Honour was repeating the famous proposition stated by Marshall CJ that it is ‘the province and duty of the judicial department to say what the law is’.<sup>10</sup>

While it must be accepted that the exercise of the power of final and authoritative interpretation by the courts is a fundamental element in the rule of law in Australia, it does not inevitably follow that the vesting of the power of final interpretation in another body is destructive of the rule of law. There are many aspects to the concept and it is incapable of universal application without exception or qualification; it is not fixed for all time and varies across jurisdictions.<sup>11</sup> Where the power of final interpretation is exercised by a body other than the courts, conformity with the rule of law will depend upon the scope of the power, the character of the body and the frequency with which and the way in which it exercises the power.

### **The *Basic Law***

In light of these preliminary comments on the common law conception of the rule of law, I turn to the provisions of the *Basic Law*<sup>12</sup> (‘*BL*’), Hong Kong’s unique Constitution, which does not vest the power of final interpretation of the *BL* in the courts of Hong Kong or in the courts of the People’s Republic of China (‘PRC’). The *BL* came into operation on 1 July 1997. It is an enactment of the National People’s Congress (‘NPC’) in accordance with the basic policies and text agreed upon by the United Kingdom Government and the PRC in their Joint Declaration of 19 December 1984. By that Declaration, the parties affirmed that the PRC would resume the exercise of sovereignty over Hong Kong.

The unique character of the *BL* stems from certain aspects of its provisions, in particular art 158. The *BL* constitutes the Hong Kong Special Administrative Region (‘HKSAR’) as a local administrative region of the PRC pursuant to art 31 of the Constitution of the PRC with a ‘high degree of autonomy’<sup>13</sup> and guarantees an extensive range of fundamental rights.<sup>14</sup> It then provides that the ‘socialist system and policies shall not be practised’ in the HKSAR and ‘the previous

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<sup>9</sup> Mason above n 6, 205; see also at 262.

<sup>10</sup> *Marbury v Madison* (1803) 5 US 137; (1803) 1 Cranch 137.

<sup>11</sup> Bingham, above n 2, 8, 174.

<sup>12</sup> *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (‘*BL*’).

<sup>13</sup> *Ibid* art 2.

<sup>14</sup> *Ibid* ch III.

capitalist system and way of life shall remain unchanged for 50 years'.<sup>15</sup>

These provisions give effect to the central principle of the *BL*, namely 'one country, two systems', which is recited in the preamble; that is the continuation of the capitalist system in the Region, notwithstanding the existence of the prevailing socialist system in mainland China.

In providing for a separation of powers, the *BL* vested legislative power in the Legislative Council ('Legco'),<sup>16</sup> executive power in the Chief Executive<sup>17</sup> and judicial power in the courts of the Region.<sup>18</sup> In accordance with both colonial and communist constitutional models, the executive is strong and the legislature relatively weak, when compared with the Westminster model.

With mainland support, the capitalist economy of Hong Kong is flourishing. No less than 22.7 million mainlanders were granted tourist visas to visit Hong Kong last year (63 per cent of total arrivals). They are the highest overnight spenders among visitors to Hong Kong. The Hong Kong Stock Exchange is the international exchange on which the major mainland companies are floated and listed. Five hundred and ninety-two mainland enterprises are listed, representing 57 per cent of total market capitalisation. Mainland-related stocks last year accounted for 68 per cent of equity turnover and 55 per cent of total equity funds raised on the Hong Kong exchange.<sup>19</sup>

Thirteen Hong Kong banks, of which HSBC (one of the world's largest banks) is one, carry on business and operate over 270 branches or sub-branches in the mainland, either directly or through subsidiaries, and this branch network is expanding. Despite the difference in the 'two systems', the economy of Hong Kong is increasingly integrated with, and dependent on, that of the mainland.

Just as the *BL* preserved the existing capitalist system in Hong Kong, so also it maintained, subject to the all-important provisions of *BL* art 158, Hong Kong's existing common law legal system by maintaining 'the laws previously in force', including the common law, except for any laws that contravene the *BL* and subject to legislative amendments.<sup>20</sup> The *BL* provides for other fundamental elements of a common law legal system, such as a form of separation of powers,

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<sup>15</sup> *Ibid* art 5.

<sup>16</sup> *Ibid* arts 17, 66, 73.

<sup>17</sup> *Ibid* arts 16, 43, 59, 62.

<sup>18</sup> *Ibid* arts 19, 80, 81, 82.

<sup>19</sup> The information contained in this paragraph was provided to the author by the Hong Kong Economic and Trade Office, Sydney.

<sup>20</sup> *BL* arts 8, 18.

independent judicial power,<sup>21</sup> including the power of final adjudication which is vested in the Hong Kong Court of Final Appeal ('CFA'),<sup>22</sup> subject to art 158, and restrictions on the removal of judges, to cases of inability to discharge the duties of office and misbehaviour in accordance with prescribed procedures.<sup>23</sup>

The Hong Kong common law system is reinforced by other provisions of the *BL*. Judges from other common law jurisdictions may be appointed<sup>24</sup> and may be invited to sit on the CFA<sup>25</sup> while the Hong Kong courts may refer to precedents of other common law jurisdictions.<sup>26</sup>

### Article 158 of the *Basic Law*

The conjunction of a common law system under a national law within the larger framework of Chinese constitutional law is a fundamental aspect of the principle 'one country, two systems'. Article 158 is the link between the two systems. It draws a distinction between the power of final interpretation which is vested in the Standing Committee of the NPC ('the Standing Committee') and the power of final adjudication which is vested in the CFA.

Article 158 is critical to a discussion of the rule of law in Hong Kong. The first paragraph of the article provides:

The power of interpretation of this law shall be vested in the [Standing Committee].

The second paragraph goes on to provide that the Standing Committee:

shall authorise the courts of the [HKSAR] to interpret on their own, in adjudicating cases, the provisions of this law which are within the autonomy of the Region.

The third paragraph of art 158 enables the courts of the Region also to interpret 'other provisions' of the *BL* in adjudicating cases: that is, provisions outside the limits of the autonomy of the Region. But the paragraph then states:

[i]f the courts of the Region, in adjudicating cases, need to interpret the provisions of the [*BL*] 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 judgment

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<sup>21</sup> Ibid art 85.

<sup>22</sup> Ibid art 82.

<sup>23</sup> Ibid art 89.

<sup>24</sup> Ibid art 82.

<sup>25</sup> Ibid art 81.

<sup>26</sup> Ibid art 84.

will affect the judgment 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]...

The courts of the Region are bound to follow an interpretation once issued, though 'judgments previously rendered shall not be affected'. There is no provision expressly entitling a party to proceedings which are the subject of a reference to appear before the Standing Committee or present submissions to it on the questions of interpretation referred.

The first paragraph of art 158, by vesting a free standing power of interpretation of the *BL* in the Standing Committee, marks a departure from the separation of powers, in particular from the principle that independent and impartial courts are the institutional authority which interprets and applies the law; a court of final appeal with the power of final adjudication being the ultimate authority in that respect. The vesting of the power of binding interpretation of the *BL* in the Standing Committee enables a body external to the courts to impose its interpretation on the courts of the Region and, to that extent, limits what would otherwise be the power of final interpretation of the CFA.

The first paragraph of art 158 is a reflection of art 67(4) of the Constitution of the PRC which confers power on the Standing Committee 'to interpret laws'. This power extends to the *BL* which is a national law.<sup>27</sup> To have vested a power of final interpretation of the *BL* in the HKSAR courts would have been inconsistent with art 67(4) of the PRC Constitution and would have presented major problems for the PRC, given that the *BL* is a national law and that it not only provides for Hong Kong's autonomy as an SAR but also reserves to the Central Government responsibility for defence and foreign affairs and provides for the relationship between the Central Authorities and the Region.<sup>28</sup> The first paragraph of art 158 is therefore consistent with the principle 'one country, two systems'.

Because art 158 is the point of intersection between two systems, it is the source of tension. The tension arises not merely from the co-existence of two interpreters — the courts of the Region and the Standing Committee — and the possibility that different systems of law will yield different interpretations, but also from different concepts of what constitutes interpretation.

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<sup>27</sup> *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300; *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 222; cf Hongshi Wen, 'Interpretation of law by the Standing Committee of the National People's Congress' in J Chan, H Fu and Y Ghai (eds), *Hong Kong's Constitutional Debate* (Hong Kong University Press, 2000), 15 (where a contrary view is expressed).

<sup>28</sup> See *BL*, ch 2.

It has been suggested that the Standing Committee's power of interpretation of the *BL* is limited to the provisions of the *BL* that are outside the limits of the autonomy of the Region.<sup>29</sup> The suggestion, which is based on a consideration of the drafts that preceded the final adoption of the *BL* and the doctrine of delegation of powers in Chinese public law, is inconsistent with the decisions of the CFA<sup>30</sup> and with the provisions of art 67(4) of the PRC Constitution.

## The Standing Committee

Article 58 of the PRC Constitution provides that the NPC and its Standing Committee exercise the legislative power of the state. It is not a committee of legal experts. Its very large membership consists mainly of persons who are not lawyers. It is organised into various committees, each with its own chairman. Before giving an interpretation of the *BL*, the Standing Committee is required by the final paragraph of art 158 to consult with its Committee for the *BL* of the HKSAR.<sup>31</sup> It is a working committee under the Standing Committee, consisting of 12 members, six from the mainland and six from Hong Kong. The Hong Kong members, who include lawyers, are jointly nominated by the Chief Executive, the President of Legco and the Chief Justice of the CFA.

## Common Law and Chinese Statutory Interpretation – the Difference

Chinese jurisprudence does not make the firm distinction made by the common law between interpretation, on the one hand, and legislation or amendment on the other.<sup>32</sup> According to Chinese jurisprudence, the institution which best understands what the legislative intention was, is the institution which enacted the law. So it is the legislature (which is the supreme organ of the state) that enacted the law or an arm of the legislature that is best equipped to interpret it. Hence, the power of interpretation is supplementary to the legislative power. So it is said that: 'the interpretation of laws is an important function of the [Standing Committee] acting as the legislature.'<sup>33</sup>

<sup>29</sup> Ling Bing, 'Subject Matter Limitation on the NPCSC's Power to Interpret the Basic Law' (2007) 37 *Hong Kong Law Journal* 619.

<sup>30</sup> *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300; *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211.

<sup>31</sup> The Committee ('BLC') was established when the *BL* was to take effect by a decision of the NPC at the 3<sup>rd</sup> session of the 7<sup>th</sup> NPC on 4 April 1990.

<sup>32</sup> See generally Albert Chen, *An Introduction to the Legal System of the People's Republic of China* (LexisNexis, 3<sup>rd</sup> ed, 2004) 118–28; Albert Chen, 'The Interpretation of the Basic Law' (2000) 30 *Hong Kong Law Journal* 380.

<sup>33</sup> P Y Lo, *The Hong Kong Basic Law* (LexisNexis, 2011) 814.

Interpretation by the Standing Committee may extend beyond ascertaining the meaning of the legislative text — for example, resolving an ambiguity — to supplementing the text.<sup>34</sup> This extended form of interpretation, known in China as legislative interpretation, is more in the nature of supplementary legislation<sup>35</sup> and is said to have a socialist (or communist) heritage.<sup>36</sup> One instance of a legislative interpretation issued by the Standing Committee was its interpretation on 15 May 1996 on the implementation of the PRC Nationality Law in the HKSAR. The interpretation introduced new provisions into that law because it had not addressed the status of Hong Kong residents who had settled abroad before 1 July 1997 and decided to return afterwards. The purpose of the interpretation was to extend the Nationality Law to these former Hong Kong citizens subject to certain qualifications.

Even in relation to non-legislative interpretation — that is, interpretation designed to ascertain the meaning of a legislative text — the Chinese approach is not the same as the common law approach. No authoritative set of rules or principles for the interpretation of statutes appears to have evolved. It is said, however, that the Chinese interpretive approach is not dissimilar to that of the civil law.<sup>37</sup> On the other hand, it appears that the Chinese approach to interpretation is more policy oriented than the common law approach.<sup>38</sup>

Be this as it may, the two philosophies of legal interpretation may produce different outcomes from time to time. Thus, when Hong Kong's first Chief Executive, Tung Chee Hwa, resigned before the expiration of his term of office, the question arose whether his successor should be appointed to a new full term of five years — as a common law interpretation of art 46 of the *BL* would seem to mandate — or for the unexpired portion of the term (two years) as the Chinese interpretation required. Article 46 provides that the term of office of Chief Executive 'shall be five years'. The question was resolved by a Standing Committee interpretation on 27 April 2005 prescribing a two-year term.<sup>39</sup>

The preservation of the common law system in Hong Kong, which includes the common principles of statutory interpretation as elaborated by statutory provisions, means that the courts of the Region

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<sup>34</sup> Chen, 'The Interpretation of the Basic Law', above n 32, 412–13.

<sup>35</sup> *Ibid* 413.

<sup>36</sup> *Ibid* 408–9.

<sup>37</sup> Zhenmin Wang, 'From the Judicial Committee of the British Privy Council to the Standing Committee of the National People's Congress – an Evaluation of the Legal Interpretive System after the Handover' (2007) 37 *Hong Kong Law Journal* 605, 614.

<sup>38</sup> Lo, above n 33, 814.

<sup>39</sup> The interpretation was based on art 53(2) which is directed to a vacancy in the office of Chief Executive, but it makes no reference to the term of office of the person appointed to the vacancy.



apply the law of Hong Kong, not mainland law. As you might expect, it has not been argued that the Hong Kong courts should interpret the *BL* by reference to mainland constitutional law,<sup>40</sup> except in so far as the courts of the Region are bound to apply Standing Committee interpretations of the *BL*.

Before I turn to the four interpretations issued by the Standing Committee relating to the *BL* under art 158, it is necessary to refer to the Standing Committee's Decision on 23 February 1997 under art 160. Its purpose was to determine whether previous Hong Kong laws contravened the *BL*.<sup>41</sup> Article 160 of the *BL* provided that upon the establishment of the HKSAR,

the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee . . . declares to be in contravention of this law.

The Decision listed in Annexes I and II the legislative instruments previously in force in Hong Kong held to be in contravention of the *BL* and which were therefore not adopted as part of Hong Kong's laws on 1 July 1997.

Paragraph 4 of the Decision also provided:

Such of the laws previously in force in Hong Kong which have been adopted as the laws of the Hong Kong Special Administrative Region shall, as from 1 July 1997, be applied subject to such modifications, adaptations, limitations or exceptions as are necessary so as to bring them into conformity with the status of Hong Kong after resumption by the People's Republic of China of the exercise of sovereignty over Hong Kong as well as to be in conformity with the relevant provisions of the Basic Law.

This paragraph, which is consistent with the principle of Australian constitutional law which requires the common law to conform with the Constitution,<sup>42</sup> extends to statute law as well.

Paragraph 4 (1) also required the laws previously in force, which are adopted and relate to foreign affairs in respect of the HKSAR, to be

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<sup>40</sup> National laws other than those listed in Annex III to the *BL* shall not be applied in Hong Kong (*BL* art 18(2)), though the Standing Committee can add to or delete from that list (*BL* art 18(3)). Annex II does not list a national law dealing with constitutional interpretation.

<sup>41</sup> For a discussion and criticism of the interpretation, see Yash Ghai, 'The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?' (2007) 30 *Hong Kong Law Journal* 363, 395–6.

<sup>42</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566.

subject to national laws applied to the HKSAR and ‘consistent with the international rights and obligations of the [CPG]’.

Paragraphs 4 and 4(1) of the Decision were subsequently enacted as local law in Hong Kong by means of s 2A of the *Interpretation and General Clauses Ordinance* (Hong Kong) (*‘the Ordinance’*).

The Standing Committee’s first interpretation of the *BL*, made under the first paragraph of art 158, related to the right of abode recognised by art 24. The interpretation arose out of the decisions of the CFA in *Ng Ka Ling v Director of Immigration*<sup>43</sup> and *Chan Kam Nga v Director of Immigration*.<sup>44</sup> In the first case, a question arose concerning the relationship between arts 22(4) and 24(2)(3) of the *BL*. Article 24(2)(3) granted the right of abode to persons of Chinese nationality born outside Hong Kong to Chinese citizens born in Hong Kong or Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years. But art 22(4) of the *BL* provided:

For entry into the [HKSAR], people from other parts of China must apply for approval. Among them the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People’s Government after consulting the government of the Region.

A Hong Kong law, enacted by the Provisional Legislative Council, restricted the right of abode of a child in the mainland born to a parent who had the right of abode in Hong Kong, by making that child subject to the mainland procedures and approval for entry into Hong Kong (see art 22(4) above). That law also provided that, to be entitled to the right of abode, the child had to be born during the period when the parent had the right of abode. In *Na Ka Ling*,<sup>45</sup> the CFA held that the right of abode was not subject to mainland approval on entry into Hong Kong and struck down the offending provisions of the Hong Kong law. In *Chan Kam Nga*,<sup>46</sup> the CFA also held that a child had the right of abode even if the child was born before the parent acquired a right of abode in Hong Kong.

The Standing Committee disagreed with the CFA’s interpretations, asserting that all children in the mainland have to apply for an exit permit and that a child only had the right of abode if, at its birth, one of the parents had the right of abode. The interpretation did not, however, question the Court’s jurisdiction to strike down a local

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<sup>43</sup> (1999) 2 HKCFAR 4 (*‘Ng Ka Ling’*).

<sup>44</sup> (1999) 2 HKCFAR 82 (*‘Chan Kam Nga’*).

<sup>45</sup> (1999) 2 HKCFAR 4.

<sup>46</sup> (1999) 2 HKCFAR 82.

law which is inconsistent with the *BL*. The interpretation also stated that the CFA should have referred the questions of interpretation to the Standing Committee under the third paragraph of art 158 as they involved art 22(4) which was a provision within the responsibility of the Central Authorities and concerned the relationship between the Central Authorities and the Region. The CFA had circumvented this question by adopting the test of asking, as a matter of substance, what predominantly is the provision that is to be interpreted in the adjudication of the case. If it is an excluded provision, there is an obligation to refer. If it is not an excluded provision, there is no such obligation, even if an excluded provision is related to the construction of the non-excluded provisions. In subsequent cases the CFA have referred to the possibility of revisiting the criteria which it applied in *Ng Ka Ling* in determining whether a reference is to be made.<sup>47</sup>

An important aspect of the interpretation arising from *Ng Ka Ling* and *Chan Kam Nga* was that it was made at the request of the Chief Executive of Hong Kong, that is, in effect, by the unsuccessful litigant. The interpretation did not affect the decision in the case itself because it was a ‘judgment previously rendered’ within the meaning of the last sentence in the third paragraph of art 158. The fact that the interpretation issued at the request of the Chief Executive after the CFA had ruled against the government generated concern outside and within Hong Kong about the future of the rule of law in Hong Kong, following as it did upon the government’s request for a ‘clarification’ of the Court’s decision, a matter to which I now turn.

In the *Ng Ka Ling* judgment, the Court affirmed its power to strike down not only local laws but also national laws that are inconsistent with the *BL*, although no national law was involved in the case. This led to an application by the Secretary for Justice for clarification of this aspect of the judgment so far as it related to national laws. In response the Court delivered a unanimous judgment in which the Court acknowledged that, although its jurisdiction to interpret and enforce the *BL* was derived from the *BL*, the *BL* included art 158(1), which vested the power of interpretation in the Standing Committee and art 158(2), which vested the power of adjudication in the courts.<sup>48</sup>

At the root of this controversy was the rejection of constitutional judicial review in Mainland jurisprudence. This rejection is based on acceptance of the proposition that the NPC is the highest organ of state power in Chinese constitutional law;<sup>49</sup> the concept being comparable to

<sup>47</sup> *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 230 B–C; *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] HKCFA (8 June 2011) [403].

<sup>48</sup> *Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141; see Lo, above n 33, 791; Chen, ‘The Interpretation of the Basic Law’, above n 32, 423 et seq.

<sup>49</sup> Constitution of the People’s Republic of China, art 57.

the supremacy of the United Kingdom Parliament, with a similar consequence for constitutional judicial review.

Another related aspect of mainland constitutional law which presents a problem for a common law legal system is that the PRC does not subject itself to the jurisdiction of the courts of the HKSAR. In cases in which its interests are at stake, its interests may be represented or put forward by other parties or by the Secretary for Justice as a party or intervener, as they were in the landmark case of *Democratic Republic of the Congo v FG Hemisphere Associates LLC*<sup>50</sup> ('the Congo Case'), a case to be discussed later.

### Interpretations on Constitutional Reform

The second interpretation of the *BL*, issued under the first paragraph of art 158, related to Annexes I and II of the *BL*. Annex I sets out the method of election until 2007 of the Chief Executive and Annex II sets out the method of formation until 2007 of the Legislative Council (Legco). Article 7 of Annex I and art III of Annex II set out the procedure for reform of these methods, if 'there is a need for reform' subsequent to 2007. These procedures do not expressly provide for a role for the Standing Committee but they do provide that amendments shall require a two-thirds majority of members of Legco and the consent of the Chief Executive and shall be reported to the Standing Committee, in the case of Annex I for its approval and in the case of Annex II 'for the record'.

On 6 April 2004, in an interpretation, again issued under the first paragraph of art 158, the Standing Committee set out the procedure for the initiation of the reform process. The procedure so prescribed calls for a report from the Chief Executive on whether there is a need for amendments to the electoral processes. Based on the report, the Standing Committee is to make a determination 'in the light of the actual situation in Hong Kong and in accordance with the principle of gradual and orderly progress'.

This interpretation was initiated by the Council of the Chairmen of the Standing Committee in circumstances where there appeared to be popular support in Hong Kong for universal suffrage.

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<sup>50</sup> [2011] HKCFA (8 June 2011).

## Interpretation on the Term of Office of the Chief Executive

The third interpretation under art 158, to which I have already referred,<sup>51</sup> related to art 53(2) of the *BL*, on the term of office of a Chief Executive who takes up office before the expiration of the term of office of his predecessor, was made by the Standing Committee on a proposal from the State Council on a report from the Chief Executive and was made when legal proceedings to contest the question had been commenced or were about to be commenced in the Hong Kong courts. No doubt it was thought that if the Standing Committee was to make an interpretation, it was better to do so before or immediately after proceedings were commenced. Then there would be no risk of reversing a court interpretation of the *BL* and impact on court proceedings would be reduced as far as possible.

### The CFA's Interpretation of the Article 158 Reference Provisions

As might be expected of a court applying a common law legal system, the CFA has given a relatively strict construction to art 158 and a relatively confined field of operation to an interpretation issued by the Standing Committee. In *Ng Ka Ling*, the CFA held that it was for it to determine whether the conditions for making a reference under art 158 are satisfied. The Court considered that, as a threshold point, the question which was the subject of the proposed reference must be an 'arguable' question. If it is unarguable then there is no need to make a reference. If, however, the question is arguable then the Court is obliged to make the reference.

*Ng Ka Ling* decided that, apart from the threshold requirement, two conditions must be satisfied before an obligation to refer under art 158 arises. First, there is the 'classification condition'; that is, whether the question concerns affairs which are the responsibility of the Central People's Government or the relationship between the Central Authorities and the HKSAR under the *BL* (which are collectively referred to as 'the excluded provisions'). Second, there is the 'necessity condition'; that is, is the Court unable to resolve the dispute without deciding the question, in which event there is an obligation to refer under art 158.<sup>52</sup> The necessity condition is based on the words in art

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<sup>51</sup> See above n 39 and accompanying text.

<sup>52</sup> Professor Albert Chen considers that the necessity condition should be considered ahead of the classification condition; see Chen, 'The Court of Final Appeal's Ruling in the Illegal Migrant Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law' in J Chan, H Fu and Y Ghai (eds) *Hong Kong's Constitutional Debate* (Hong Kong University Press, 2000) 113–41; Chen, 'Ng Ka

158 ‘and if such interpretation will affect the judgments on the cases’. The reference requirement does not prevent the court from expressing its own view on the question of interpretation; it simply prevents the court from proceeding to final judgment.<sup>53</sup>

So far there has been little elucidation of which provisions constitute ‘provisions within the limits of the autonomy of the Region’ and which constitute ‘excluded provisions’ for the purpose of the reference procedure mandated by art 158. ‘Defence’ and ‘foreign affairs’ are matters which obviously constitute ‘provisions of this law concerning affairs which are the responsibility of the [CPG]’ within the meaning of art 158. Although the heading of ch II of the *BL* is ‘Relationship between the Central Authorities and the [HKSAR]’, a number of the provisions of the chapter on their face would not seem to bear on that relationship except in an indirect or remote way. If all the provisions of ch II could be classified as ‘concerning that relationship’ within the meaning of the third paragraph of art 158, then the potential scope of the mandatory reference obligation under that article could be wide. Although the question has not arisen, it is perhaps conceivable that an obligation to refer a question relating to art 158 itself could arise.

### The Congo Case

There was some suggestion in the aftermath of the CFA’s landmark provisional decision in the *Congo Case*<sup>54</sup> that an interpretation by the Standing Committee on an art 158 reference might be more acceptable than a freestanding interpretation. In that case, *FG Hemisphere* (FGH), a so-called vulture fund, acquired certain rights to payment under arbitration awards from the Democratic Republic of the Congo (‘the Congo’) arising from the construction of infrastructure projects in the Congo by companies which included the China Railway Group. FGH sought to enforce the awards against assets said to be held by the Congo in Hong Kong. The Congo raised a plea of state immunity. At first instance, Reyes J held that, on the basis of the restrictive theory of state immunity applicable in Hong Kong before 1 July 1997, the transaction did not fall within the commercial exception to state immunity recognised by the restrictive theory. He therefore upheld the plea of state immunity. The Court of Appeal (by a majority of two to one) allowed FGH’s appeal and

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Lang and Article 158(3) of the Basic Law’ (2001-02) 5 *Journal of Chinese and Comparative Law* 221, a view which the CFA said subsequently ‘merits serious consideration’: *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211.

<sup>53</sup> See *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] HKCFA (8 June 2011) [398] (where the majority delivered a provisional judgment after expressing its views on questions referred to the Standing Committee).

<sup>54</sup> *Ibid.*

directed an inquiry to ascertain the relevant amount and whether the amount payable was immune from execution. The majority held that restrictive immunity had been part of the common law of Hong Kong before it was given statutory effect by the extension to Hong Kong of the *State Immunity Act 1978* and revived upon that Act ceasing to apply to Hong Kong. Yeung J in dissent held that Hong Kong was bound to follow the mainland approach to state immunity and that therefore the Congo was entitled to absolute immunity.

The CFA (Chan and Ribeiro PJJ and Mason NPJ, with Bokhary PJ and Mortimer NPJ dissenting) allowed the Congo's appeal. Relevant to the reasoning were three letters from the Office of the Commissioner of the Ministry of Foreign Affairs of China in Hong Kong ('the OCMA') placed before the courts. The three letters stated that the consistent and principled position of China has been that a state and its property enjoy in foreign courts absolute immunity from jurisdiction and execution and that China has never applied the theory of restrictive immunity, a theory that appears to have the strongest support internationally.

The majority accepted the letters as stating facts relevant to the policy decision of the Central People's Government ('CPG') on the matter of state immunity. These facts were not in dispute. The majority found that state immunity was a matter falling within the responsibility for 'the foreign affairs of the [HKSAR]' which is allocated to the CPG by the first paragraph of art 13 of the *BL*. The argument to the contrary was based mainly on the provisions of arts 19(2) and (3) of the *BL*. The first paragraph of art 19 vests independent judicial power in the courts of the HKSAR. Articles 19(2) and (3) then provide:

The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

The majority rejected the argument that the continuation of the laws previously in force in Hong Kong<sup>55</sup> preserved the theory of restrictive immunity. The majority held that the *BL* required Hong Kong and its institutions to respect and to act in conformity with the CPG's policy determination on state immunity in the exercise of its responsibility for foreign affairs. Further, that arts 19(2) and (3) did not relevantly qualify this obligation because art 19(3) treated such a determination as an 'act of state' which was not justiciable by the Hong Kong courts. The majority also pointed out that state immunity is a privilege or characteristic associated with states and that Hong Kong is no more than a special administrative region lacking the attributes of a state. As such, Hong Kong could not establish a theory of state immunity different from that adopted by its sovereign state.

The majority went on to hold that the modification of previously existing Hong Kong laws so as to bring them into conformity with Hong Kong's status (as an SAR of the PRC), after the resumption of sovereignty by the PRC, brought about by the 1997 Decision of the Standing Committee and s 2A of *the Ordinance*, along with the allocation to the CPG of responsibility for the foreign affairs of the HKSAR, meant that the pre-existing restrictive theory of state immunity was modified in order to conform to the constitutional status of Hong Kong as an SAR and to the absolute theory. The majority also held that the Congo had not waived its claim to immunity.

Having reached a provisional conclusion and making provisional orders on the basis of this reasoning, the majority nonetheless concluded that it was required by art 158 to refer to the Standing Committee four questions relating to the interpretation of arts 13 and 19, and indicated that the Court would dispose of the case in light of the interpretation issued by the Standing Committee.

The minority (Bokhary RJ and Mortimer NPJ) took the view that, by virtue of the continuation of the pre-existing laws of Hong Kong effected by arts 8 and 160 of the *BL*, the question whether the immunity available in the courts of Hong Kong was absolute or restrictive was a question of Hong Kong common law for determination by Hong Kong's courts. They then considered that, according to the common law, the immunity is restrictive both in its application to immunity from suit and immunity from execution, including procedure for enforcement. Their Lordships considered that art 19 of the *BL* was designed to replicate the common law determination of state immunity to the courts of Hong Kong and that art 13 did not dispense with the requirement that there should be a law giving effect to any policy ruling of the CPG. On the minority's interpretation of art 13 and 19 of the *BL*, which their Lordships thought

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<sup>55</sup> *BL* arts 8, 18.



was unattended with any doubt, there was no obligation to refer any questions under art 158. The minority further concluded that the Congo had waived any claim to immunity by its submission to arbitration. The minority sought reinforcement for its approach in the rule of law and judicial independence.

The decision generated a range of reactions in Hong Kong. It was suggested that the decision to refer to the Standing Committee rather than the provisional decision itself was detrimental to judicial independence and to the rule of law in Hong Kong. With all respect to those who think otherwise, it is difficult to see that judicial independence was compromised. According to my understanding, it is not claimed that Hong Kong judges lack independence or impartiality. The decision to refer and a consequential obligation to apply a Standing Committee interpretation is something that goes to the rule of law and the separation of powers rather than to judicial independence. And, in considering this in the context of the rule of law, we need to remember that it is something mandated by the *BL* itself. No doubt the CFA's decision to refer questions to the Standing Committee for interpretation has symbolic significance because it marked the first occasion on which the CFA itself has initiated such an interpretation. The reality is, however, that it is an event for which the *BL* explicitly provided.

In response to the reference of the four questions by the CFA, on 24 August 2011, Mr Li Fei, Deputy Director of the Legal Affairs Commission of the Standing Committee, presented a Draft Interpretation accompanied by Explanations to the Standing Committee.

On 26 August 2011, upon the motion of the Council of Chairmen of the Standing Committee that the Draft be examined by the Standing Committee, pursuant to the CFA's request, the Standing Committee issued its interpretation on the four questions referred by the CFA.

The effect of the interpretation was as follows:

**As to question (1):** that on the true interpretation of art 13(1), the CPG has the power to determine the rules or policies of the PRC on state immunity to be given effect uniformly in the territory of the PRC.

**As to question (2):** that on the true interpretation of arts 13(1) and 19, the courts of the HKSAR must apply and give effect to the rules or policies on state immunity determined by the CPG and must not depart from such rules or policies nor adopt a rule that is inconsistent with the same.

**As to question (3):** that the words 'acts of state such as defence and foreign affairs' in art 19(3) of the *BL* include the determination by the CPG as to rules or policies on state immunity.

**As to question (4):** (i) that according to arts 8 and 160 of the *BL*, the laws previously in force in Hong Kong shall be maintained except for any that contravene the *BL*; (ii) that according to para 4 of the Decision of the Standing Committee dated 23 February 1997 made pursuant to art 160, laws previously in force which have been adopted as the laws of the HKSAR shall be applied as from 1 July 1997 subject to such modifications, adaptations, limitations or exceptions as are necessary to bring them into conformity with the status of Hong Kong after resumption by the PRC of the exercise of sovereignty over Hong Kong, and to bring them into conformity with the relevant provisions of the *BL*; (iii) that, accordingly, the laws previously in force in Hong Kong relating to the rules on state immunity may continue to be applied after 1 July 1997 only in accordance with the requirements already stated; (iv) that, in consequence, the laws previously in force concerning the rules on state immunity, as adopted in the HKSAR must be applied as from 1 July 1997 subject to such modifications, adaptations, limitations or exceptions as are necessary to make them consistent with the rules or policies on state immunity that the CPG has determined.

As the provisional judgment of the majority on the CFA was consistent with the Interpretation, the CFA made the judgment final and made its orders final.

The Draft Explanation which accompanied the interpretation was more comprehensive than earlier interpretations issued by the Standing Committee under art 158.

### **The Legal Effect of a Standing Committee Interpretation on the HKSAR Courts**

When the Standing Committee makes an interpretation of the *BL* under art 158, whether under the first or third paragraphs, the CFA has accepted, as it did in the *Congo Case*, that the Hong Kong courts, the CFA included, are bound to apply that interpretation.<sup>56</sup> The effect of such an interpretation, when it overrules a judicial interpretation, is similar to the overruling of a precedent in a common law system, whether by judicial decision or legislation, whatever the effect may be as a matter of Chinese law. At common law, it is the precedent decision informed by the principle on which the decision is based which has binding and authoritative force.<sup>57</sup> When the Standing Committee makes an interpretation of provisions of the *BL*, the third

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<sup>56</sup> *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300.

<sup>57</sup> Anthony Mason, 'The Role of the Common Law in Hong Kong' in J Young and R Lee (eds), *The Common Law Lecture Series 2005* (Faculty of Law, University of Hong Kong, 2006) 3, 13, 25.

paragraph requires the courts of the Region to ‘follow the interpretation’ but that is all. And, as noted earlier, ‘judgments previously rendered shall not be affected by an interpretation’.<sup>58</sup>

In *Director of Immigration v Chong Fung Yuen* (‘*Chong Fung Yuen*’), the CFA said:

. . .the binding effect of an interpretation under Article 158 centres on the specific provision to which it is directed. The expression of other views depends upon the circumstances. These views may well be persuasive but not to the point of affecting the language of a provision of the [BL] which is clear and unambiguous when read in the light of its context and purpose. This accords with the well-understood common law principle of interpretation.<sup>59</sup>

Basing itself on the common law and the separation of powers, the Court said that it could not give to the language of art 24(2)(i) of the *BL* a meaning which the language could not bear, simply on the footing of a statement that was part of the Standing Committee interpretation of the provision to which the interpretation was directed.<sup>60</sup>

In that case, the CFA considered the language of art 24(2)(1), the provision of the *BL* to be interpreted, to be so clear that the CFA did not give effect to a passage in the 1999 interpretation of arts 22(4) and 24(2)(3) of the *BL* by the Standing Committee. In its interpretation the Standing Committee had referred to opinions on the implementation of art 24(2) of the *BL* adopted by the Preparatory Committee for the HKSAR of the NPC on 10 August 1996 (before the *BL* came into operation) which were relied on to support an interpretation contrary to that upheld by the Court.<sup>61</sup>

In *Chong Fung Yuen*,<sup>62</sup> the Director of Immigration conceded that there had been no interpretation of art 24(2)(1) by the Standing Committee in its 1999 Interpretation. But in *Banao v Commissioner of Registration* (‘*the Maid’s Case*’),<sup>63</sup> Lord Pannick QC for the Commissioner reserved the right to re-open the argument on the effect of the 1999 Interpretation when the case reaches a higher level, presumably in the CFA.<sup>64</sup>

<sup>58</sup> See page 626 above.

<sup>59</sup> (2001) 4 HKCFAR 211; see also *Prem Singh v Director of Immigration* [2003] 1 HKLRD 550 575–6.

<sup>60</sup> (2001) 4 HKCFAR 211.

<sup>61</sup> Following the decision, the Standing Committee issued a statement that the Court’s decision was not consistent with ‘the legislative intent’; the Standing Committee did not issue an interpretation under the first paragraph of art 158.

<sup>62</sup> (2001) 4 HKCFAR 211.

<sup>63</sup> [2011] HCAL 124/2010 (30 September 2011)

<sup>64</sup> *Ibid* [14].

In the *Maid's Case*, the applicant, a Filipino foreign domestic helper, successfully challenged in the Court of First Instance the validity of s 2(4)(a)(vi) of the Immigration Ordinance. This sub-section provided that a person shall not be treated as ordinarily resident in Hong Kong for the purpose of the Immigration Ordinance during any period in which the person remains in Hong Kong in specified circumstances, one of them being 'while employed as a domestic helper who is from outside Hong Kong'.

Lam J held that this provision derogates from, and is inconsistent with art 24(2)(4) of the *BL* which confers a right of abode on a person who is not of Chinese nationality, entered Hong Kong with valid travel documents, ordinarily resided in Hong Kong for a continuous period of not less than seven years and has taken Hong Kong as his or her place of permanent residence. Lam J noted that as 117,000 of 285,681 foreign domestic helpers have been continuously working in Hong Kong for more than seven years, the ultimate decision in the case has great importance for Hong Kong.

There have been relatively few interpretations of national laws by the Standing Committee and only four interpretations of the *BL* under art 158. Moreover, the Standing Committee provides little in the way of reasoning for its interpretive conclusion, the *Congo Case*<sup>65</sup> interpretation being an exception. Consequently, the interpretations have not constructed a corpus of constitutional law on which the Hong Kong courts could draw, even assuming it to be legitimate to do so. If it were otherwise, the Hong Kong courts might then be confronted with the problem of whether to adjust and, if so, how to adjust, common law constitutional law concepts to conform to Chinese jurisprudence, beyond accepting the impact of the interpretation on the specific provision to be interpreted.

It might be suggested that, by framing questions referred narrowly in a reference under art 158, the CFA can limit the effect of a Standing Committee interpretation. This suggestion would need to take account of the possibility, heralded in the *Maid's Case*,<sup>66</sup> that the CFA might be asked to reconsider *Chong Fung Yuen*<sup>67</sup> and also of the Standing Committee's power to make a free-standing interpretation.

## Concluding Comments

In so far as concerns have been expressed about the rule of law in Hong Kong, these concerns, as might be expected, spring from the presence of art 158 and its vesting of the power of authoritative

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<sup>65</sup> [2011] HKCFA (8 June 2011).

<sup>66</sup> [2011] HCAL 124/2010 (30 September 2011).

<sup>67</sup> (2001) 4 HKCFAR 211.

interpretation, not in the courts, but in the Standing Committee. By so providing, art 158 departs from an important element of the common law conception of the rule of law. Because art 158 is a central element in the rule of law in Hong Kong, it follows that, to this extent at least, there is a difference between the rule of law in Hong Kong and the common law conception. This difference translates into a modification of judicial power by entrusting to another body outside the national and local court systems the power of authoritative interpretation.

This modification of judicial power excites two questions:

- (1) What are the consequences of the difference?
- (2) To what extent does the difference erode the values which the traditional conception of the rule is designed to support, for example, public confidence in the system of government and the law, including the judiciary and the legal system?

The continued existence of that confidence is associated with the certainty, predictability and consistency of government and legal decision-making.

On the basis of the Hong Kong experience so far, there is little reason to think that these values are at risk. There have been no more than four interpretations under art 158 since the *BL* came into operation and they have been absorbed by the Hong Kong system of government without difficulty. For the future much may depend upon the frequency, the subject matter and content of Standing Committee interpretations and the circumstances in which they are sought. Take for example, circumstances such as those in *Ng Ka Ling* where the Chief Executive sought an interpretation from the Standing Committee after the CFA had held that a mandatory reference under art 158 was not required.

There is, of course, an element of artificiality in asking the two questions I have posed because concern about the rule of law is associated with and subordinated to other matters which have a larger public profile, such as the future of Hong Kong's autonomy and the prospect of further progress in the direction of a fully democratic franchise. These issues attract more public and media attention than the rule of law but they are not matters on which I should or can comment.

There are, however, some comments I can make. The first is that the closer the attention I give to the provisions of the *BL*, the greater the respect I have for the people who put it together. They were confronted with the task of constructing a constitution which bridged two different systems of government, two different economic systems and two different legal systems. From a technical viewpoint, their well-crafted

constitution appears to have identified the potential difficulties and to have provided solutions to them. Only the future will determine how successful these solutions are.

Despite the tensions which it may generate from time to time, art 158 is an ingenious link between the two legal systems. Whether it is viewed from a constitutional, legal or political perspective, art 158 is central to the Hong Kong conception of the rule of law. Debate about the rule of law in Hong Kong must recognise and proceed from the centrality of art 158. In the words of Professor Vernon Bogdanor, '[f]or believers in the rule of law ... power should lie ... with the constitution'.<sup>68</sup>

Recognition of that centrality in a constitution which seeks to bridge two systems of law and jurisprudence enables us to see more clearly that the *BL*'s distinction between the power of authoritative interpretation and the power of final adjudication leaves the Hong Kong courts in a position where their *decisions* are respected and prevail, even if their interpretations of the *BL* may give way on occasions to different interpretations based on a different system of law. It must be acknowledged, however, that in other *common law* legal systems the power of final adjudication ordinarily includes the power of final interpretation. That is not so in Hong Kong. The power of final adjudication in Hong Kong does not include the power of final interpretation.

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<sup>68</sup> Vernon Bogdanor, 'The Sovereignty of Parliament on the Rule of Law'. (Speech delivered at the 2<sup>nd</sup> Magna Carta Lecture, Royal Holloway, University of London, 15 June 2006).