CACV 224/2016

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 224 OF 2016

(ON APPEAL FROM HCAL 185/2016)

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BETWEEN

CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION	1st Applicant
SECRETARY FOR JUSTICE	2nd Applicant

and

THE PRESIDENT OF THE LEGISLATIVE COUNCIL	Respondent

and

SIXTUS LEUNG CHUNG HANG	1st Interested Party
YAU WAI CHING	2nd Interested Party

———————

AND

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BETWEEN

CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION	1st Applicant
SECRETARY FOR JUSTICE	2nd Applicant

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THE PRESIDENT OF THE LEGISLATIVE COUNCIL	Respondent

and

SIXTUS LEUNG CHUNG HANG	1st Interested Party
YAU WAI CHING	2nd Interested Party

AND

CACV 226/2016

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 226 OF 2016

(ON APPEAL FROM HCMP 2819/2016)

BETWEEN

THE CHIEF EXECUTIVE OF THE HKSAR	1st Plaintiff

SECRETARY FOR JUSTICE 2nd Plaintiff

and

YAU WAI CHING 1st Defendant

SIXTUS LEUNG CHUNG HANG 2nd Defendant

PRESIDENT OF THE LEGISLATIVE COUNCIL 3rd Defendant

AND

CACV 227/2016

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO 227 OF 2016
(ON APPEAL FROM HCMP 2819/2016)

BETWEEN

THE CHIEF EXECUTIVE OF THE HKSAR 1st Plaintiff

SECRETARY FOR JUSTICE 2nd Plaintiff

and

YAU WAI CHING 1st Defendant

SIXTUS LEUNG CHUNG HANG 2nd Defendant

PRESIDENT OF THE LEGISLATIVE COUNCIL 3rd Defendant

(Heard Together)

Before: Hon Cheung CJHC, Lam VP and Poon JA in Court
Dates of Hearing: 24 & 25 November 2016
Date of Judgment: 30 November 2016

JUDGMENT

Hon Cheung CJHC:

The facts

1. These appeals are from the judgment of Au J dated 15 November 2016.

2. The controversy leading to these appeals is so great and so widely reported that it is unnecessary, particularly in view of the urgency of the matter, to give any detailed account of the facts. Suffice it to say, Sixtus Leung Chung Hang ("Leung") and Yau Wai Ching ("Yau") were elected in their respective geographical constituencies in the general election for the Legislative Council ("LegCo") held in September this year. Their terms of office as members of the LegCo started on 1 October 2016.

3. As stipulated in section 19 of the Oaths and Declarations Ordinance (Cap 11) ("the Ordinance"):

> " A member of the Legislative Council shall, as soon as possible after the commencement of his term of office, take the Legislative Council Oath which –
>
> (a) if taken at the first sitting of the session of the Legislative Council immediately after a general election of all members of the Council and before the election of the President of the Council, shall be administered by the Clerk to the Council;
>
> (b) if taken at any other sitting of the Council, shall be administered by the President of the Council or any member acting in his place."

4. Section 16(d) and Schedule 2, Part IV of the Ordinance require the LegCo Oath to be in the following terms:

> " I swear that, being a member of the Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China and serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity."

5. The first meeting of the LegCo was held on 12 October 2016. On that day, both Leung and Yau were duly requested to take the LegCo Oath before the Clerk to the LegCo, as the election of the President of the Council had yet to take place. Both Leung and Yau purported to do so, but in ways and manners, detailed in paragraph 5 of the judgment below, which departed substantially from the statutory contents of the LegCo Oath, and evinced objectively an intention on their respective parts not to be bound by it.

6. In particular, it is plain, as the learned judge below analysed in paragraphs 45 and 46 of his judgment, that neither Leung nor Yau intended to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, or bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China. Both elements are mandatory parts of the LegCo Oath. But not only that – they actually constitute the core substantive requirement of article 104 of the Basic Law:

> " When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China."

7. On 18 October 2016, the President of the LegCo (elected to his office after the oath taking incident described above) gave a written "ruling", after obtaining senior counsel's advice, that "[Leung and Yau] could not be serious about their oath and were unwilling to be bound by it" (paragraph 6), and their oaths were invalid. Nonetheless, he said he was "prepared to allow Mr LEUNG and Ms YAU to take their oath afresh at a Council meeting if they put forward their requests in writing" (paragraph 7), which requests Leung and Yau immediately made on the same day.

8. As is only too well-known, these events triggered the urgent commencement by the Chief Executive and the Secretary of Justice of two sets of proceedings below on 18 October 2016, which were described in some detail in paragraphs 9 to 12 of the judgment below, as well as an interpretation by the Standing Committee of the National People's

Congress ("NPCSC"), pursuant to article 67(4) of the Constitution of the People's Republic of China and article 158(1) of the Basic Law, of the true meaning of article 104 on 7 November 2016 ("the Interpretation")[1].

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[1] The Interpretation reads:

> "1. 'To uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China' and to bear 'allegiance to the Hong Kong Special Administrative Region of the People's Republic of China' as stipulated in Article 104 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, are not only the legal content which must be included in the oath prescribed by the Article, but also the legal requirements and preconditions for standing for election in respect of or taking up the public office specified in the Article.
>
> 2. The provisions in Article 104 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* that 'When assuming office', the relevant public officers 'must, in accordance with law, swear' bear the following meaning:
>
> (1) Oath taking is the legal prerequisite and required procedure for public officers specified in the Article to assume office. No public office shall be assumed, no corresponding powers and functions shall be exercised, and no corresponding entitlements shall be enjoyed by anyone who fails to lawfully and validly take the oath or who declines to take the oath.
>
> (2) Oath taking must comply with the legal requirements in respect of its form and content. An oath taker must take the oath sincerely and solemnly, and must accurately, completely and solemnly read out the oath prescribed by law, the content of which includes 'will uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China'.
>
> (3) An oath taker is disqualified forthwith from assuming the public office specified in the Article if he or she declines to take the oath. An oath taker who intentionally reads out words which do not accord with the wording of the oath prescribed by law, or takes the oath in a manner which is not sincere or not solemn, shall be treated as declining to take the oath. The oath so taken is invalid and the oath taker is disqualified forthwith from assuming the public office specified in the Article.
>
> (4) The oath must be taken before the person authorized by law to administer the oath. The person administering the oath has the duty to ensure that the oath is taken in a lawful manner. He or she shall determine that an oath taken in compliance with this Interpretation and the requirements under the laws of the Hong Kong Special Administrative Region is valid, and that an oath which is not taken in compliance with this Interpretation and the requirements under the laws of the Hong Kong Special Administrative Region is invalid. If the oath taken is determined as invalid, no arrangement shall be made for retaking the oath.
>
> 3. The taking of the oath stipulated by Article 104 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* is

The judgment below

9. After an expedited hearing, the judge concluded in his judgment that what Leung and Yau did amounted to their respectively declining or "wilfully" omitting to take the LegCo Oath when duly requested to do so. The consequence of what they did, the judge decided, is governed by section 21 of the Ordinance:

> " Any person who declines or neglects to take an oath duly requested which he is required to take by this Part, shall-
>
> (a) if he has already entered on his office, vacate it, and
>
> (b) if he has not entered on his office, be disqualified from entering on it."

10. Rejecting an argument to the contrary, the judge decided that once a person declines or neglects to take the relevant oath when duly requested to do so, he is automatically regarded as having vacated his office in question under section 21. In other words, what Leung and Yau did on 12 October 2016 led automatically, by operation of law under section 21, to the vacation of their respective offices as Legislative Councillor.

11. In those circumstances, the judge agreed with the Chief Executive and the Secretary for Justice that contrary to his ruling dated 18 October 2016, the President of the LegCo had no power to give Leung and Yau a second chance to take the LegCo Oath again. The judge

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> a legal pledge made by the public officers specified in the Article to the People's Republic of China and its Hong Kong Special Administrative Region, and is legally binding. The oath taker must sincerely believe in and strictly abide by the relevant oath prescribed by law. An oath taker who makes a false oath, or, who, after taking the oath, engages in conduct in breach of the oath, shall bear legal responsibility in accordance with law."

rejected various arguments raised by Leung and Yau, including their main argument based on the non-intervention principle, and decided the proceedings in favour of the Chief Executive and the Secretary for Justice by granting declaratory and other relief against the President, "on the basis that Mr Leung and Ms Yau have already vacated the office as a member of the LegCo, and are not entitled to act as a member of the LegCo" (paragraph 130(2)(a)). In other words, Leung and Yau have lost their seats in the LegCo, their offices are vacant and there will be by-elections.

The arguments on appeal

12. Aggrieved by the judge's decision, Leung and Yau appealed. Mr Hectar Pun SC (Mr Anson YY Wong with him), for Leung, essentially argued that the principle of non-intervention applied to the present case so that the judge was wrong to interfere with the internal workings or business of the LegCo, that is, the taking or the retaking of the LegCo Oath by Leung. Mr Pun accepted that the principle of non-intervention as applied in Hong Kong "is subject to the constitutional requirements of the [Basic Law]" (paragraph 12(1) of his skeleton arguments), but he emphasised that in the present case, the constitutional requirement under article 104 of the Basic Law was simply "not engaged" because the dispute here was not about whether his client had taken the LegCo Oath – he had not. Rather, the issue was about the consequence of his failure to do so, which turned on whether Leung had declined or neglected to take the LegCo Oath – in which case section 21 of the Ordinance would be triggered and his client would be obliged to vacate his seat. Mr Pun submitted that section 21 does not form part of the constitutional requirement under article 104. He argued that the present case was not distinguishable from the English case of *Bradlaugh v Gossett* (1884) 12 QBD 271, where the English court

refused to interfere with an oath taking dispute between Parliament and one of its members.

13. Mr Pun further argued neither the Clerk nor the President had determined that Leung had declined or neglected to take the LegCo Oath on 12 October 2016, whereas Leung had indicated in evidence that he had been "ready, prepared and willing" to take the Oath afresh at the next meeting on 19 October 2016 and had not "declined" or "neglected" to do so. Furthermore, the President had indicated in his capacity as the oath administrator that he was prepared to allow Leung to take the Oath afresh on 19 October 2016. All these matters were internal business of the LegCo in which the courts cannot intervene.

14. Mr Pun took the further point, relying on *Makucha v Sydney Water Corporation* [2013] NSWCA 177, that even if a LegCo member had declined or neglected to take the LegCo Oath, there was to be no automatic vacation of office. Rather, section 21 merely requires the member to vacate it. Mr Pun submitted that the member had to resign or the President could make a declaration, pursuant to article 79(1) of the Basic Law,[2] that the member was "no longer qualified for the office" as he or she had "[lost] the ability to discharge his or her duties as a result of … [section 21]".

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[2] Article 79(1) of the Basic Law reads:

> " The President of the Legislative Council of the Hong Kong Special Administrative Region shall declare that a member of the Council is no longer qualified for the office under any of the following circumstances:
>
> (1) When he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons;"

15. Mr Pun also submitted that section 73 of the Legislative Council Ordinance (Cap 542)[3], based on which one set of proceedings below was commenced, does not confer any jurisdiction on the court to determine matters such as whether a LegCo member has been disqualified from being a member or has ceased to be one, and does not therefore provide a bypass to the non-intervention principle. He argued that as Leung had not been "disqualified" under section 21 of the Ordinance, section 73(1) simply had no application. Section 73(1) is only applicable after a declaration under article 79(1) of the Basic Law has been made by the President as described above. In any event, section 73(1) does not give the Chief Executive any locus to sue.

16. Mr Pun further argued that the judge was wrong in usurping the fact-finding function of the President regarding whether Leung had declined or neglected to take the LegCo Oath.

17. Insofar as may be necessary but not otherwise, Mr Pun relied on the Interpretation, particularly paragraph 2(3) and (4) to say that whether an oath taker has fallen foul of section 21 by declining to take the

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[3] Section 73 reads:

> " (1) An elector, or the Secretary for Justice, may bring proceedings in the Court against any person who is acting, [or] claims to be entitled to act, as a Member on the ground that the person is disqualified from acting as such.
> …
> (7) Proceedings against a person on the ground that the person has, while disqualified from acting …, [acted,] or claimed to have been entitled to act, as a Member may be brought only in accordance with this section.
> (8) For the purposes of this section, a person is disqualified from acting as a Member if the person-
> (a) is not qualified to be, or is disqualified from being, a Member; or
> (b) has ceased to hold office as a Member."

LegCo Oath is a matter for the Clerk or President, but not the court to decide. However, insofar as the Chief Executive and the Secretary for Justice sought to make a case against his appeals based on the Interpretation, Mr Pun raised the issues of whether the Interpretation has retrospective effect in the sense that it covers the present case now before the court, and whether it is truly an interpretation falling within the meaning of article 158 of the Basic Law (or merely an interpretation in name but an amendment of the Basic Law in substance).

18. Finally, in written submissions, Mr Pun also prayed in aid article 77 of the Basic Law regarding members of the LegCo's immunity from suit, and argued that the immunity covered the oath taking event in the present case.

19. Mr Philip Dykes SC (Mr Jeffrey Tam with him), for Yau, also relied on the principle of non-intervention. Essentially, Mr Dykes submitted that oath taking is an internal business of the LegCo. Primarily, it is for the Clerk or the President to determine whether an oath has been validly taken, and in particular, whether the member has declined or neglected to take the oath. Mr Dykes accepted that once a decision has been made by the Clerk or the President, the court has the jurisdiction to decide whether article 104 of the Basic Law has been complied with. However, Mr Dykes submitted, neither the Clerk nor the President has made any such decision. It is simply premature for the court to intervene in the matter.

20. Likewise, counsel submitted, an application made under section 73 of the Legislative Council Ordinance is, except in the case of a member's resignation, predicated on a declaration by the President under

article 79 of the Basic Law. In the present case, the President has made no such declaration.

21. As Mr Benjamin Yu SC (Mr Johnny Mok SC, Mr Jimmy Ma and Mr Jenkin Suen with him) for the Chief Executive and the Secretary for Justice submitted, the applicants' arguments essentially raised several subject matters, that is, the non-intervention principle; the role of the oath administrator; whether vacation of the office is automatic under section 21 of the Ordinance; the scope of application of section 73 of the Legislative Council Ordinance; and the immunity from suit under article 77 of the Basic Law. Counsel submitted that the appellants' arguments were unsustainable.

The principle of non-intervention

22. The principle of non-intervention has been dealt with by the courts in recent years: *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387; *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555; *Leung Kwok Hung v President of the Legislative Council of the Hong Kong Special Administrative Region*, CACV 123/2012, 1 February 2013 (CA); affirmed on appeal: (2014) 17 HKCFAR 689 (CFA). It is an established principle of common law which is of seminal importance and high constitutional significance. Historically, it was derived from or justified by historical development, functional necessity, the constitutional doctrine of separation of powers and (in the United Kingdom) the sovereignty of Parliament. The preferred view in a jurisdiction like Hong Kong now is to justify it on the common law principle of separation of powers. The principle makes good constitutional as well as practical sense. Under it, the court respects and

recognises the exclusive authority of the legislature in managing its own internal processes in the conduct of its business. The court will not intervene to rule on the regularity or irregularity of the internal processes of the legislature but will leave it to determine exclusively for itself matters of this kind. On a practical level, this principle allows the legislature to be left freely to manage and to resolve its internal affairs, free from intervention by the courts and from the possible disruption, delays and uncertainties which could result from such intervention. Freedom from these problems is both desirable and necessary in the interest of the orderly, efficient and fair disposition of the legislature's business. *Leung Kwok Hung* (CFA), paragraphs 27 to 30.

23. In the United Kingdom where Parliament (or more precisely, the Queen in Parliament), replacing the absolute monarchy in old times, is supreme and sovereign, a further explanation for this principle of non-intervention is that it gives effect to Parliament's supremacy and sovereignty. In the context of Parliament's law making function, the court's role there is confined to interpreting and applying what Parliament has enacted. When an enactment is passed there is finality unless and until it is amended or repealed by Parliament: *The Bahamas District of the Methodist Church v Symonette* [2000] 5 LRC 196, 207h-208a.

24. However, in a jurisdiction like Hong Kong where a written constitution (that is, the Basic Law), rather than the legislature, is supreme, where the rule of law reigns and where the courts are given under the constitution the independent power of adjudication, this principle of non-intervention has its own inherent limit.

25. First and foremost, the supremacy of the Basic Law means that no one – the legislature included – is above the Basic Law. In other words, where a constitutional requirement under the Basic Law is in issue, even the legislature cannot act contrary to that requirement under the Basic Law. Secondly, given that the courts are given under the constitution the independent power of adjudication of the Special Administrative Region, the question of whether that constitutional requirement has been complied with or breached is a matter which it is both the power and responsibility of the courts to decide. As the Court of Final Appeal importantly pointed out in *Leung Kwok Hung*, paragraph 32:

> "In this respect it is important to recognise that the principle of non-intervention is necessarily subject to constitutional requirements."

Article 104 is a constitutional requirement

26. In the present case, there cannot be any doubt that article 104 of the Basic Law lays down a constitutional requirement. Article 104 is found in Chapter IV of the Basic Law setting out the political structure of the Hong Kong Special Administrative Region. It contains six sections, dealing respectively with the Chief Executive, the Executive Authorities, the Legislature, the Judiciary, District Organizations and lastly, Public Servants. In essence, it covers everyone who is empowered to and charged with the responsibility for running the Special Administrative Region. At the very end of this long chapter, one finds article 104, which expressly requires that when assuming office, the Chief Executive, principal officials, members of the Executive Council and of the LegCo, judges of the courts at all levels and other members of the judiciary to, in accordance with law, swear to uphold the Basic Law and swear allegiance to the Special Administrative Region.

27. As the judge correctly explained (paragraphs 31 to 33), the taking of an oath and pledging of allegiance are serious matters. When taking an oath, no less a promissory oath such as the LegCo Oath, both the form and the substance matter greatly. The requirement under article 104 is plainly designed to secure the genuine, solemn and sincere declaration and pledge by the holders of the important offices mentioned in that article to do their utmost, in accordance with the Basic Law, to discharge the high responsibilities entrusted to them in running the Special Administrative Region in their respective roles assigned under the Basic Law. Article 104 clearly lays down a constitutional requirement that an oath must be taken in accordance with what is required under that article. Moreover, it says "when assuming office", the oath must be taken. It must mean that taking the oath is a prerequisite and precondition to the assumption of office.

28. All this is now put beyond doubt by the Interpretation.

Consequence of non-compliance is part of the constitutional requirement

29. The Interpretation gives the true meaning of article 104. Paragraph 2(3) of the Interpretation specifically sets out the consequence of an oath taker's declining to take the relevant oath – automatic disqualification, as part of the true meaning of article 104. It conclusively defeats Mr Pun's argument that the consequence of a failure to take the relevant oath as required by article 104 does not form part of the constitutional requirement, so that the principle of non-intervention applies.

30. Furthermore, article 104 says the oath must be taken "in accordance with law". The relevant provisions in the Ordinance actually

predated the drafting of the Basic Law. When article 104 refers to law, the drafters must have in mind the provisions in the Ordinance. Section 21(a) of the Ordinance says that if an office holder declines or neglects to take the relevant oath, he shall vacate his office. That is perfectly consistent with article 104. Since article 104 specifically refers to the implementing law, it provides another reason for rejecting Mr Pun's argument that article 104 is not engaged but only section 21(a) of the Ordinance is – and therefore the principle of non-intervention still applies. It is neither right nor realistic to look at article 104 without looking at its implementing law (in the present case, the relevant provisions in the Ordinance) together, or to look at the statutory provisions without looking at article 104 at the same time, in deciding whether the constitutional requirement under article 104 has been satisfied.

31. Mr Pun argued that "law" in the phrase "in accordance with law" only includes sections 16 and 19 of the Ordinance, but not section 21. With respect, this is taking far too narrow a reading of article 104. "Law" in article 104 must be a reference to the whole of the implementing law, including in particular that part of the law which prescribes the consequence of a failure to take the oath in question (that is, section 21). As Mr Yu submitted, when article 104 lays down a requirement, the consequence of failing to meet that requirement is necessarily part and parcel of the requirement itself. The principle of non-intervention cannot prevent the court from adjudicating on the consequence of a failure to meet the constitutional requirement.

A matter for the court to decide

32. Since articles 19(1) and (2) and 80 of the Basic Law vest the independent judicial power of the Special Administrative Region in the courts, giving the courts "jurisdiction over all cases in the Region", and establishing them as the judiciary of the Region, "exercising the judicial power of the Region", it is for the courts, not anyone else, to determine whether the constitutional requirement described above has been satisfied.

33. This disposes of three arguments mounted on behalf of Leung and Yau. First, as mentioned, the courts cannot shrink from their constitutional duty to adjudicate on the question of whether the constitutional requirement under article 104 has been satisfied by not intervening in the present dispute in the name of the principle of non-intervention or separation of powers. The Basic Law, not the legislature, is supreme. Secondly, it also disposes of the further argument that it is for the oath administrator (that is, the Clerk or the President) to determine whether Leung and Yau have respectively taken a valid oath, and if not, whether they have respectively declined or neglected to take the oath. Thirdly, it also disposes of the more limited argument raised by Mr Dykes that before the oath administrator makes a decision on the issues just described, it is premature to invite the court to intervene.[4] Plainly, section 21 says none of these. Nor does the principle of non-intervention require any such interpretation be put on section 21, as the principle simply has no application given that a constitutional requirement is involved.

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[4] In any event, I take the view that the President has already in his ruling on 18 October 2016 decided, in substance (although not in so many words), that both Leung and Yau have declined or wilfully neglected to take the LegCo Oath. With respect, what he did not do (upon strong legal advice) was to follow that decision to its logical conclusion, and apply and act on section 21 accordingly.

34. All these arguments must be rejected.

Paragraph 2(4) of the Interpretation

35. Mr Pun relied on paragraph 2(4) of the Interpretation to back his argument that it is for the oath administrator, rather than the court, to decide whether the LegCo Oath has been validly taken, or whether the (purported) oath taker has declined or neglected to take the oath. I reject the argument. Paragraph 2(4) of the Interpretation reads in Chinese:

> "宣誓必須在法律規定的監誓人面前進行。監誓人負有確保宣誓合法進行的責任，對符合本解釋和香港特別行政區法律規定的宣誓，應確定為有效宣誓；對不符合本解釋和香港特別行政區法律規定的宣誓，應確定為無效宣誓，並不得重新安排宣誓。"

36. It is clear from the Chinese version, particularly the use of the words "應確定" (which is better rendered as "should confirm/affirm"), that paragraph 2(4) seeks to emphasise the important administrative duty of the oath administrator to ensure that the oath taker has taken the relevant oath properly and validly in full accordance with the Interpretation and the law, and that when the office holder declines to take the oath (paragraph 2(3)), the oath administrator must resolutely say so and refuse to make any administrative arrangement for the retaking of the oath. What it plainly does *not* say is it gives the oath administrator any judicial power of the Special Administrative Region to determine whether the oath taken is in accordance with the requirements of the Basic Law and the Ordinance. Still less does it take away the courts' judicial power of the Special Administrative Region, granted under the Basic Law, to adjudicate on a dispute.

37. Neither does the Interpretation give the oath administrator any fact-finding role in any judicial sense. In other words, it does not give the oath administrator a judicial power of the Special Administrative Region to make any finding of fact. Nor does it constitute the oath administrator as a sort of administrative tribunal of fact (subjecting him thereby to all that standard administrative law requires of such a tribunal of fact to observe by way of procedural fairness etc). Still less does it exclude the courts' judicial power, conferred under the Basic Law, to make the relevant findings of fact.

38. If anything, paragraph 4 highlights the absolute importance of full compliance with the oath taking requirements under article 104 and the implementing law. Indeed, one may ask rhetorically: if the oath administrator is required, as indeed he is under paragraph 2(4), to use his utmost to ensure compliance, how much more are the courts of the Special Administrative Region expected and required to do so?

39. In the final analysis, what is at stake is the compliance of a constitutional requirement of great significance. In any given set of facts, this can admit of one correct answer only. There is no room for a court to simply sit back without correcting an answer given by the oath administrator which the court considers to be wrong, at the expense of the constitutional requirement. What is in issue is squarely a judicial matter which the courts alone are given the judicial power of the Special Administrative Region under the Basic Law to determine. What is involved is not an ordinary judicial review type of situation where the court only conducts a *Wednesbury* unreasonableness review. Rather, there can be only one right answer when the issue of compliance with the constitutional requirement is raised and nothing short of a full merit review

will suffice. The court, according to the Basic Law, is the ordained organ to determine the question.

40. Of course, what I have said above does not prevent at all a court from, when hearing a dispute on the validity of an oath taken or one regarding whether the oath taker has declined or refused to take the oath when duly requested to do so, receiving evidence from the oath administrator on what his views are and the reasons for those views, insofar as they are relevant and admissible, and according them weight accordingly.

Both Leung and Yau have declined to take the Oath

41. On the facts, there can be no dispute that both Leung and Yau have declined respectively to take the LegCo Oath. They have put forward no argument to dispute this. Nor can they. There can be no innocent explanation for what they uttered and did on 12 October 2016. What has been done was done deliberately and intentionally. This conclusion, reached by the judge after careful consideration, is unassailable.

Disqualification forthwith and automatic vacation of office

42. As a matter of law and fact, Leung and Yau have failed the constitutional requirement. They are caught by paragraph 2(3) of the Interpretation as well as section 21 of the Ordinance which gives effect to the constitutional requirement. Under the former, they were automatically disqualified forthwith from assuming their offices. Under the latter, they "shall … vacate [their respective offices]." There is therefore no question of allowing them to retake the LegCo Oath.

43. That leaves only the question of whether vacation of office under section 21 is automatic. This is a necessary plank to Mr Pun's and Mr Dykes' procedural argument, based on section 15(1)(e) of the Legislative Council Ordinance[5], that a declaration by the President under article 79(1) of the Basic Law is a prerequisite to any proceedings under section 73 of the Legislative Council Ordinance.

44. I agree with the judge that vacation of office is automatic. It simply serves no useful purpose to require a further step to be taken by the person in question to vacate his office. By definition, this is someone who has declined or wilfully neglected to do the very first and basic thing required of him or her when assuming office, that is, to take the oath when duly requested to do so. There is simply no point in requiring him or her to take the further step of vacating the office. To do so would simply invite further dispute as well as create confusion and uncertainties. The Australian case of *Makucha* is not binding on this court. It was dealing with a totally different situation, and the court there was simply expressing

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[5] Section 15(1) of the Legislative Council Ordinance reads:

> "(1) A Member's office becomes vacant if the Member-
>
> (a) resigns in accordance with section 14 or is taken to have resigned from that office in accordance with section 13; or
>
> (b) dies; or
>
> (c) subject to subsection (2), alters either the Member's nationality or the fact as to whether the Member has a right of abode in a country other than the People's Republic of China as declared under section 40(1)(b)(ii); or
>
> (d) is the President and has been found under the Mental Health Ordinance (Cap. 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs; or
>
> (e) is declared in accordance with Article 79 of the Basic Law to be no longer qualified to hold that office."

an *obiter* view without any reasoning (paragraph 18). It is fair to say that the court there was mainly concerned with upholding the judicial acts done by the judge below the validity of whose judicial oath was called into question.

Article 79(1) of the Basic Law

45. I reject the further argument based on article 79(1) of the Basic Law. With respect, one only needs to read the Chinese text of article 79(1)[6] to see that it plainly does not apply to the present type of situation. Disqualification under section 21 is miles away from "無力履行職務" ("loses the ability to discharge his or her duties") in article 79(1).

Section 73 of the Legislative Council Ordinance

46. In any event, I reject the argument that the scope of application of section 73(1) is limited to those situations set out in section 15 of the Legislative Council Ordinance. It does not say so. The fallacy of the argument is to treat section 15 as being exhaustive. It is not.

47. Given my views above, the arguments over the scope of application of section 73 of the Legislative Council Ordinance are of little significance so far as the principle of non-intervention is concerned. It is unnecessary to resort to section 73 to get round, as it were, the principle of non-intervention. When a constitutional requirement is at stake, this

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[6] Article 79(1) reads in Chinese:

> "香港特別行政區立法會議員如有下列情況之一，由立法會主席宣告其喪失立法會議員的資格：
>
> (一) 因嚴重疾病或其他情況無力履行職務；"

court's jurisdiction is not founded on the legislature's voluntary concession of jurisdiction. This court's jurisdiction is conferred by the Basic Law, the exercise of which is a matter of constitutional duty, which is not restrained by the common law principle of non-intervention.

48. Section 73 is of significance in the arguments raised in these appeals also for a procedural reason. It is said that section 73 only gives the Secretary for Justice, but not the Chief Executive, the locus to sue. Further, it is said that section 73(7) excludes all other forms of proceedings.

49. All I wish to say is this. I accept that proceedings under section 73 may only be brought by the Secretary for Justice or an elector, but not the Chief Executive in his official capacity as such. However, I do not agree that apart from section 73, no proceedings can be brought by the Chief Executive. Given the Chief Executive's constitutional role under article 48(2) of the Basic Law (to be responsible for the implementation of the Basic Law and other laws), any attempted restriction on the Chief Executive's right to take steps, including the commencement of court proceedings, to implement the Basic Law must be incompatible with article 48(2) and therefore invalid. Plainly, section 21J of the High Court Ordinance (Cap 4)[7] entitles the Chief Executive to sue. On its proper

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[7] Section 21J reads:

> "(1) Where a person not entitled to do so acts in an office to which this section applies, the Court of First Instance may-
>
> (a) grant an injunction restraining him from so acting; and
>
> (b) if the case so requires, declare the office to be vacant.
>
> (2) This section applies to any public office or office which has been created by any enactment."

construction, section 73(7) does not prevent the Chief Executive from doing so.

50. In any dispute, one must look at the facts concerned and the relief one seeks to determine whether proceedings should be commenced under section 73 of the Legislative Council Ordinance, or under section 21J of the High Court Ordinance by means of an application for judicial review (section 21K(1)(b) of the High Court Ordinance), or both.

Immunity from suit under article 77

51. Immunity from suit enjoyed by legislators under article 77 of the Basic Law has no relevance in the present dispute. The article gives members of the LegCo immunity from legal action in respect of their statements at meetings of the Council. It is neither necessary nor desirable to define the scope of immunity conferred by that article in these appeals. One thing is clear. The Basic Law must be read as a whole. Article 77 must be read together with article 104. Given the importance of article 104 as explained above, it is simply unarguable that the drafters of the Basic Law intended to permit members of the LegCo – yet not anyone else as article 77 only applies to them – to get round the constitutional requirement on oath taking laid down in article 104 via the backdoor of article 77. It would make a mockery of article 104 and serve no discernable, meaningful purpose. Thus analysed, the old English case of *Bradlaugh v Gossett*, a case heavily relied on by Mr Pun and Mr Dykes, loses much if not all of its relevance in the present debate. First, the English court there was not faced with a constitutional requirement. Secondly, Parliament is supreme and sovereign in the United Kingdom. The English court was simply not in a position to adjudicate on the dispute

between Parliament and its member in question. In any event, the English case is not binding on this court, and insofar as may be necessary, I would, with respect, decline to follow it.

The Interpretation

52. Finally, I turn to Mr Pun's arguments on the Interpretation.

53. First, the Interpretation, by definition, sets out the true and proper meaning of article 104 from day one. The question of whether it applies "retrospectively" to any given set of facts whether pending before the court or not therefore cannot and does not arise, save for the situation specifically provided in article 158(3) of the Basic Law, which is not the case here. As the Court of Final Appeal explained in *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, 326D:

> "The Interpretation, being an interpretation of the relevant provisions, dates from 1 July 1997 when the Basic Law came into effect. It declared what the law has always been."

54. Secondly, regarding Mr Pun's argument that an interpretation only applies retrospectively if it merely clarifies the law in question but not when it supplements it, this submission has no support from the authorities. The Court of Final Appeal said in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 222J-223C:

> " The Standing Committee's power to interpret the Basic Law is derived from the Chinese Constitution and the Basic Law. In interpreting the Basic Law, the Standing Committee functions under a system which is different from the system in Hong Kong. As has been pointed out, under the Mainland system, legislative interpretation by the Standing Committee can clarify or supplement laws. Where the Standing Committee makes an interpretation of a provision of the Basic Law, whether under art. 158(1) which relates to any provision, or under art. 158(3) which relates to the excluded provisions, the courts in Hong

> Kong are bound to follow it. Thus, the authority of the Standing Committee to interpret the Basic Law is fully acknowledged and respected in the Region. This is the effect of the Basic Law implementing the 'one country, two systems' principle as was held by the Court in *Lau Kong Yung*. Both systems being within one country, the Standing Committee's interpretation made in conformity with art. 158 under a different system is binding in and part of the system in the Region."

55. No distinction is drawn between the two types of situations under discussion. The suggested distinction by Mr Pun must be rejected.

56. Thirdly, as to the submission that the Interpretation is only an interpretation in name but an amendment of the Basic Law in substance which can only be done by the National People's Congress in accordance with article 159 of the Basic Law, this argument does not even get off the evidential ground and must be rejected. Here, as explained in *Chong Fung Yuen* in the passage cited above, one is in the interface of "one country two systems", and, in particular, one is concerned with the other system – that is, the civil law system practised on the Mainland, when it comes to an interpretation by the NPCSC. When the NPCSC interprets the Basic Law, it is operating under the Mainland's civil law system.

57. In the absence of any evidence to show what, under a civil law system, particularly the civil law system practised on the Mainland, is regarded as the proper scope of an interpretation of the present type, one simply has no material to argue, let alone to conclude, that what has been done has gone outside the permissible scope of an interpretation. The view of a common law lawyer, untrained in the civil law system, particularly the civil law system practised on the Mainland, is, with respect, simply quite irrelevant.

58. But more importantly, this present argument raises an *a priori* question of whether under the Basic Law, the courts of the Hong Kong Special Administrative Region have ever been vested with the jurisdiction to determine whether an interpretation officially promulgated as such by the NPCSC in accordance with article 67(4) of the Constitution and article 158 of the Basic Law and the procedure therein is invalid on the ground under discussion. Apart from citing to the court a passage in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 26A-B which must be read together with *Ng Ka Ling (No 2)* (1999) 2 HKCFAR 141, where the Court of Final Appeal clarified in no uncertain terms that the courts in Hong Kong cannot question "the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein" (p 142E), Mr Pun has simply made no submission on this fundamental question of jurisdiction.

59. In my view, the court has no jurisdiction to deal with the issue raised.

Disposal

60. For all these reasons, I would dismiss these appeals with costs.

Hon Lam VP:

61. I respectfully agree with the judgment of the Chief Judge and for the reasons he gave the appeals must be dismissed. In view of the constitutional importance of these appeals and the apparent

misapprehension on the scope of the principle of non-intervention, I would add some observations of my own.

62. As accepted by Mr Dykes (but disputed by Mr Pun), in Hong Kong the principle of non-intervention is only a self-restraint imposed by the courts in the exercise of jurisdiction rather than a matter that goes to jurisdiction.

63. The Basic Law is the foundation of all executive, legislative and judicial authorities in Hong Kong. As my Lord the Chief Judge pointed out, the judicial power of the courts in Hong Kong and the correspondent adjudicative authority are derived from article 80 of the Basic Law. Further, under article 85, the courts shall exercise judicial power independently and free from any interference. In the exercise of judicial power, judges must adjudicate issues strictly in accordance with laws, and nothing else. The laws, as set out in article 8 are, subject to a very important rider, the common law and statutes. The rider is that these laws must not contravene the Basic Law.

64. Thus, as explained by the Chief Judge, the LegCo, whilst designated as the legislative authority under the Basic Law, must also be subject to the Basic Law. In this respect, our LegCo is different from Parliament of the United Kingdom.

65. The Basic Law does not confer any judicial authority on the LegCo. Hence, in respect of issues arising from disputes concerning compliance with the Basic Law, the LegCo does not have any judicial authority. Whilst article 79 of the Basic Law does confer authority on the President of the LegCo to declare a member no longer qualified for office

in certain specified circumstances, it is not the same as saying that the President has judicial authority to determine all questions relating to membership of the LegCo. A clear example where membership of LegCo is to be determined by courts through a judicial process is election petition concerning LegCo elections.

66. Since the source of the courts' judicial power is derived from the Basic Law, a judge has a constitutional duty to consider the constitutionality of legislation passed by the LegCo if it is an issue arising from the facts of a case before him. Likewise, where there is a complaint as to the non-compliance with a constitutional prerequisite before assumption of office, our courts are duty-bound to examine the same according to law. As explained by the Chief Judge, article 104 is an important constitutional requirement and the courts have a constitutional duty to uphold the same.

67. The exercise of such judicial power should not be perceived as the courts being embroiled in political disputes. In the judgment of the U.S. Supreme Court in *Powell v Mc Cormack* (1969) 395 US 486 cited by Mr Dykes, Warren CJ held at pp.548-9 that the determination of a Congressman's right to sit required no more than an interpretation of the Constitution which fell within the traditional role accorded to courts to interpret the law. Even if the exercise of such power conflicted with the resolution of the Congress, Warren CJ said these:

> "The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility…. For, as we noted in *Baker v Carr* … it is the responsibility of this Court to act as the ultimate interpreter of the Constitution."

68. As I have said, in adjudicating on these issues the courts only concern themselves with legal questions, and the issues before us in these appeals are whether the requirement in article 104 has been complied with and if not, what are the consequences. In our deliberations, we address legal arguments advanced before us and apply the law (including the Interpretation, which upon its pronouncement becomes part of our laws) strictly as we find them. It is for this very reason that the Chief Judge had to stop Mr Yu when counsel at one stage unwittingly treaded beyond the proper scope of legal arguments by quoting from Socrates on abuse of democracy. It is important that we keep politics out of the judicial process.

69. Nor should the exercise of judicial power in these instances be regarded as the court's intervention into the internal affairs of the LegCo. The principle of non-intervention is a principle governing the exercise of the court's jurisdiction, placing importance on the integrity and efficiency of the legislative process. Thus, in cases where the intervention of the court would disrupt the legislative process as in *Cheng Kar Shun v Li Fung Ying* [2011] 1 HKLRD 555 and *Leung Kwok Hung v President of the Legislative Council* (2014) 17 HKCFAR 689, the court would refrain from intervention. But the court would not shy away from examining the products of such process as in cases where the courts examined the constitutionality of a piece of legislation. In *Leung Kwok Hung*, the Court of Final Appeal highlighted at [39] to [43] that in cases where the legislative authority is subject to a written constitution (as in the case of our LegCo), the judicial authority will determine whether the legislature has a particular power, privilege or immunity though it would not exercise jurisdiction to determine the occasion or the manner of the exercise of the same.

70. The Court of Final Appeal expressed the principle of non-intervention in these terms at [28] by reference to the relationship between the legislature and the courts:

> "….This relationship includes the principle that the courts will recognise the exclusive authority of the legislature in managing its own internal processes in the conduct of its business …The corollary is the proposition that the courts will not intervene to rule on the regularity or irregularity of the internal processes of the legislature but will leave it to determine exclusively for itself matters of this kind…"

71. The Court of Final Appeal also stressed that the principle of non-intervention is necessarily subject to constitutional requirements, see [32]. This has been consistently regarded by our courts as the limits of that principle, see the decision at first instance in *Leung Kwok Hung v President of the Legislative Council* [2012] 3 HKLRD 483, at [36]; at the Court of Appeal, in CACV 123 of 2012, 1 Feb 2013, at [24]; *Cheng Kar Shun v Li Fung Ying*, supra at [220].

72. For the reasons given by the Chief Judge, the non-compliance with the oath-taking prerequisite in article 104 and its consequence are matters of constitutional requirement which the courts have a constitutional duty to examine when it is an issue in a case coming before us. Compliance with such constitutional requirement is not merely a matter of internal process of the LegCo. Oath taking is not simply a requirement of LegCo's internal rules. Though it took place within the walls of the LegCo Building, it is a matter of immense importance to the whole Hong Kong Special Administrative Region including the Government as well as its general public because the requirement underpins the allegiance owed to the Hong Kong Special Administrative Region of the People's Republic of China and the sincerity and integrity of the oath taker in upholding the

Basic Law. Without the oath properly taken, the member concerned could not assume office and no authority is conferred upon him or her to act as our lawmaker.

73. As illustrated by election petition cases, membership of LegCo is not an internal matter for the LegCo. The courts must intervene when non-compliance with article 104 is brought to our attention.

74. The soundness of this analysis is easily borne out by examining a hypothetical case where a member is wrongly ruled by the Clerk or President to have failed to comply with article 104 and disqualified under Section 21 accordingly. It is hard to see why in such circumstances such a member cannot come to court to seek relief notwithstanding that the oath taking took place within the walls of the LegCo Building. Mr Dykes and Mr Pun readily agreed that the court must intervene in such circumstances.

75. In the converse situation, where a member should have been disqualified but was not so disqualified, electors in the electoral constituency of that member should, as a matter of law, be entitled to have a by-election for the seat and other candidates should also be entitled to run for the same. Hence, it is impossible to characterise the oath taking as a mere internal affair or a matter in the internal process of the LegCo. There is no reason why the courts should refrain from intervening in such circumstances.

76. Properly understood, *Bradlaugh v Gossett* (1884) 12 QBD 271 on which Mr Pun placed great reliance cannot stand in the way of the above analysis. What was in issue in that case was the resolution of the

House of Commons excluding a member from the House until he shall engage not to attempt to take the oath in disregard of the resolution of the House then in force. What happened was that Mr Bradlaugh was prohibited from taking the oath because he did not believe in the existence of a Supreme Being, see *AG v Bradlaugh* (1885) 14 QBD 667, also the judgment of Stephen J in *Bradlaugh v Gossett*, supra at p.279. In that case, Mr Bradlaugh sued the Serjeant-at-Arms who excluded him from the House pursuant to the resolution of the House. It was in such context that Lord Coleridge CJ said at p.275:

> "What is said or done within the walls of Parliament cannot be inquired into in a court of law… The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive."

Coleridge CJ obviously regarded it as a matter of internal discipline as he said at pp.276-277:

> "Consistently with all the statements in the claim, it may be that the plaintiff insisted on taking the oath in a manner and under circumstances which the House had a clear right to object to or prevent."

At p.277 he also agreed with Stephen J's broader analysis as to why the court should not examine the basis on which the House passed the resolution. Stephen J proceeded on the assumption that there was inconsistency between the resolution and the Parliamentary Oaths Act and he ruled that the court should not intervene because

(a) The court could not do justice without infringing the dignity and independence of the House as it would necessitate the examination of the reasons for the House's resolution, see pp.280-281;

(b) In respect of matters of parliamentary privilege in respect of affairs within the House of Commons, even if the House decided the same not in accordance with law, it would be akin to an error by a judge whose decision was not subject to any appeal, see p.284-286.

77. It should be noted that the courts did not hold that they had no jurisdiction to examine if the affirmation adopted by a member of the House was valid. In earlier proceedings in *Clarke v Bradlaugh* (1881) 7 QBD 38, the court held that the affirmation by Mr Bradlaugh purportedly under section 4 of the Parliamentary Oaths Act 1870 was invalid as he was not a person falling within the scope of that section. Though the actual result was overturned on appeal in the House of Lords reported in (1883) 8 App Cas 354 as the court held that the person who brought the proceedings had no locus to do so, the finding on the invalidity of the affirmation was not disturbed. Stephen J accepted that the courts had the power to make such decision in *Bradlaugh v Gossett*, supra, at pp.281 to 282. Subsequently in *AG v Bradlaugh* (1885) 14 QBD 667, in proceedings brought by the Attorney General penalty was imposed by the Divisional Court on account of Mr Bradlaugh's sitting and voting in the parliament despite his invalid affirmation and it was upheld on appeal to the Court of Appeal. Thus, the reference to the court's inability to investigate into what happened within the walls of the Parliament should not be taken too literally.

78. Whatever the position may be in respect of the relationship between the courts and the House of Commons in 19th century England, for the reasons already given, the respective roles of the courts in Hong Kong and the LegCo as prescribed by the Basic Law are different. As the Chief

Judge observed, LegCo is subject to the Basic Law. By reason of article 104, there is no right on the part of any elected member to assume office in LegCo without fulfilling the constitutional requirement under that article and the refusal or neglect to take the oath when duly requested would lead to vacation from office or disqualification. Hence, it is not a matter of internal discipline. Nor is it a matter of parliamentary privilege. Instead, it is a constitutional requirement which our courts have the constitutional responsibility to adjudicate on in the same way as the U.S. Supreme Court did in *Powell v Mc Cormack*, supra.

79. The above analysis also resolves the question as to identity of the decision maker under Section 21. Though the oath administrator would have the power to administer the oath under Section 19, he is not given any judicial role in the determination if an oath taker has declined or neglected to take the oath. In this connection, Section 21 does not say that an oath taker would be disqualified if he or she had, in the opinion of the oath administrator, declined or neglected to take the oath. I agree with the Chief Judge that paragraph 2(4) of the Interpretation does not confer any judicial role upon the oath administrator and any dispute on the application of Section 21 has to be determined by the courts. It also follows that in the determination of such dispute, the courts must conduct a full merit review with full opportunity for the parties to adduce relevant and admissible evidence on the issues instead of the limited review by way of traditional approach in a judicial review.

80. My analysis also reinforces the conclusion of the Chief Judge that Section 15 of the Legislative Council Ordinance is not exhaustive as to the circumstances in which a member is disqualified. Though the scope of Section 73 is of little significance in the present appeals (as 2 sets of

proceedings have been commenced in respect of each Interested Party), it would be helpful if we can give some guidance on the interface between Section 73 and Section 21J.

81. In my view, these statutory jurisdictions have a common origin in the prerogative writ of quo warranto by which the authority of a person holding a public office could be challenged in courts. In Hong Kong, the prerogative writ has become obsolete and been largely (if not wholly) overtaken by statutory jurisdictions. Section 21J is a general provision, applicable to any public office created by any enactment whilst Section 73 specifically applies to a person acting or claiming to be entitled to act as a member of LegCo. Proceedings under Section 21J must be brought by way of judicial review, see Section 21K(1) of the High Court Ordinance and they are subject to the rules governing applications for judicial review. Leave is therefore required and it is subject to the usual time constraint in applications for judicial review. On the other hand, Section 73 is to be brought by way of some other form of civil proceedings and leave is not required. However, the time limit is 6 months: section 73(2) must be construed purposively as referring to 6 months from the date on which the person first acted or claimed to be entitled to act whilst disqualified, otherwise the time limit will be meaningless. Further, Section 73 proceedings can only be brought by an elector or the Secretary for Justice, see Section 73(1). In the case of proceedings by an elector, such proceedings would be stayed pending the payment of security for costs, a sum to be ordered by the court which shall not exceed $20,000 in respect of each member challenged, see Section 73(5) and (6).

82. Section 73(7) provides that proceedings within the scope of that section can only be brought in accordance with that section. In other

words, it would not be open to persons coming within the scope of this section to bring proceedings by other means like an application for judicial review under Section 21J.

83. However, the Court of Final Appeal in *Albert Ho v Leung Chun Ying v Ho Chun Yan, Albert* (2013) 16 HKCFAR 735 held that election petition is not the only means to challenge an election and judicial review is an available alternative for those who are not eligible to bring proceedings under section 33 of the Chief Executive Election Ordinance. By the same token, it may be arguable that Section 73(7) does not preclude someone who is not an elector to commence proceedings under Section 21J in respect of a disqualified legislator. As the Chief Judge observed, the Chief Executive is not a person who is entitled to proceed under Section 73. He has to proceed under Section 21J to seek the remedy of declaration and injunction against the Interested Parties in HCAL 185/2016.

84. In any event, given that Section 73 was enacted to protect members of the LegCo against unlimited challenges to their offices (by way of security for costs and time limit for application), I believe even in cases where an applicant is outside the scope of that section and an application is brought by way of judicial review, the court must bear such protection in mind in assessing whether leave should be granted. In particular, given that judicial review should not be permitted when an alternative remedy by way of Section 73 is available, the court should consider whether an applicant who is not an elector in the constituency of the member concerned should be allowed to make the challenge and enquire whether the Secretary for Justice or any elector is willing to bring proceedings under Section 73. The court must also examine the locus standi of such an applicant carefully if neither the Secretary for Justice nor

any elector in that constituency is willing to bring proceedings under Section 73.

Hon Poon JA:

85. I agree with the judgment of the Chief Judge and the judgment of Lam VP. I would like to add a few words of my own on the principle of non-intervention in the Hong Kong context.

86. As the Court of Final Appeal pointed out in *Leung Kwok Hung*, supra, at [32], the common law principle of non-intervention is necessarily subject to the constitutional requirements in the Basic Law. As our written constitution, the Basic law is supreme. It binds all organs and branches of the government, including LegCo. The court is the guardian of the Basic Law. The court is constitutionally tasked to protect the provisions of the Basic Law and to ensure that all governmental organs and branches, including LegCo, stay within its bounds.

87. Being subject to the Basic Law, LegCo must uphold and abide by its provisions, always acting within its framework and fulfilling its constitutional requirements. So must all LegCo Members, whether they are elected from functional constituencies or geographical constituencies through direct elections. When disputes arise as to whether LegCo has acted in breach of the constitutional requirements in the Basic Law, such as passing a law which is contrary to certain provisions of the Basic Law, or whether individual LegCo Members have breached the constitutional requirements as mandated in the Basic Law, such as the present, the court has a constitutional duty to adjudicate and rule on the matters. In so doing,

the court does not seek to undermine the authority or function of LegCo as the legislature or diminish the mandate that the electors gave to the LegCo Members concerned. Rather the court ensures that LegCo or the Members concerned exercise their powers lawfully in accordance with the constitutional requirements of the Basic Law. Only thus can the public confidence in LegCo be maintained. Only thus can the integrity of the very many important acts performed by LegCo be preserved.

Hon Cheung CJHC:

88. Accordingly, the appeals are dismissed with costs to all other parties (including the LegCo President for his costs for the hearing on 17 November 2016) together with a certificate for 3 counsel. The costs order is made on a *nisi* basis and any application to vary it shall be dealt with by written submissions only.

89. As indicated at the conclusion of the hearing, we will hear any application for leave to appeal to the Court of Final Appeal tomorrow at 9:30 am. All time requirements are abridged accordingly, and we will accept undertakings to file and serve the formal documents in lieu of actual filing or service before the hearing so long as draft documents are made available to the court and the opposite parties in advance.

(Andrew Cheung) Chief Judge of the High Court	(Johnson Lam) Vice President	(Jeremy Poon) Justice of Appeal

Mr Benjamin Yu SC, Mr Johnny Mok SC, Mr Jimmy Ma and Mr Jenkin Suen, instructed by the Department of Justice, for the 1st and 2nd applicants in CACV 224 & 225/2016 and the 1st and 2nd plaintiffs in CACV 226 & 227/2016

Mr Hectar Pun SC and Mr Anson Wong Yu Yat, instructed by Ho Tse Wai and Partners, for the 1st interested party in CACV 224 & 225/2016 and the 2nd defendant in CACV 226 & 227/2016

Mr Philip Dykes SC and Mr Jeffrey Tam, instructed by Khoo & Co, for the 2nd interested party in CACV 224 & 225/2016 and the 1st defendant in CACV 226 & 227/2016

Lo & Lo, for the respondent in CACV 224 & 225/2016 and the 3rd defendant in CACV 226 & 227/2016, did not appear