

A **Leung Kwok Hung**
and
President of Legislative Council

B

(Court of First Instance)
(Constitutional and Administrative Law List No 87 of 2006)

C **Hartmann J**
13–15 November 2006 and 22 January 2007

*Constitutional law — Legislative Council — separation of powers — for Executive and administration to formulate policy on public expenditure — for
D Legislature to approve such proposals — Basic Law art. 73*

*Constitutional law — Legislative Council — art. 75(2) granted LegCo power to regulate manner in which it discharged enacting process — introduction of bills, per art. 74, discrete process distinct from enacting process — art. 74 prohibited members from introducing bills which had impact on public expenditure, but silent
E on such amendments being proposed at committee stage — r.57(6) prevented members from proposing such amendments at committee stage — r.57(6) constitutional — Basic Law arts. 73, 74, 75(2) — Rules of Procedure of the Legislative Council r.57(6)*

F [Basic Law arts. 73, 74, 75(2)]

憲法—立法會—權力分立—行政會議和行政當局負責制訂公共開支政策—立法機關負責審批相關建議—《基本法》第73條

G 憲法—立法會—第75(2)條賦權立法會自行對於立法過程的進行方式作出規管—根據第74條提出法律草案乃屬獨立和有別於立法過程的程序—第74條禁止立法會議員提出對公共開支造成影響的法律草案，但未有對於在委員會審議階段所提出的造成相類影響的修訂建議作出規定—第57(6)條規則禁止議員在委員會審議階段此等修訂—第57(6)條規則合憲—《基本法》第73、74、75(2)條—《立法會議事規則》第57(6)條規則

H [《基本法》第73、74、75(2)條]

The Basic Law art. 73 states that the Legislative Council (LegCo) shall exercise the following powers and functions: “(1) To enact, amend, or repeal laws in accordance with the provisions of this Law and legal procedures; (2) To examine and approve budgets introduced by the Government; and (3) To approve taxation and public expenditure”. Article 74 prohibits members from introducing bills into LegCo which had a charging effect, that is, an impact on public expenditure, but is
I silent on whether amendments proposed at the committee stage which had a charging effect are allowed. Under art. 75(2), LegCo has the
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power to set for itself rules of procedures. Rule 57(6) of the Rules of Procedure provides that a committee stage amendment which has a charging effect may only be proposed by the Chief Executive; a designated public officer; or a member of LegCo if the Chief Executive consented to in writing. At issue was the constitutionality of r.57(6).

Held, that r.57(6) was not inconsistent with the Basic Law, that:

- (1) The Basic Law was supreme but recognised LegCo to be a sovereign body under that Law. Article 75(2) gave LegCo the power to regulate, as it deemed best, the manner in which it discharged the enacting process. In setting rules of procedure, provided those rules were not in conflict with the Basic Law, LegCo was answerable to no outside authority. (see paras.10, 56–59.)
- (2) The introduction of bills into LegCo was not part and parcel of the enacting process, but rather a preliminary and discrete process. Article 74 circumscribed the rights of members *before* anything was brought within the purview of LegCo. On the other hand, proposing amendments to bills was part of the enacting process, which took place *after* bills were brought within the purview of LegCo, and so independent of the scope of art.74. Accordingly, r.57(6) was not inconsistent with the Basic Law (*M'Culloch v State of Maryland* 17 US 316 (1819), *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 considered). (see paras.64–72.)
- (3) Insofar as r.57(6) diminished the powers and functions of legislators, it was a diminishment of long-standing and found in other common law and civil law jurisdictions. It was founded on the separation of powers, the particular constitutional principle being that no charge on public funds could be incurred except on the initiative of the Executive and the administration. It was for these two organs of state to create and propose policies related to the collection and disbursement of public funds, and it was for the Legislature to examine and, if thought fit, to approve such proposals. (see paras.79–87.)

Application for judicial review

This was the applicant's application for judicial review seeking a declaration that r.57(6) of the Legislative Council's rules of procedure was inconsistent with the Basic Law. The facts are set out in the judgment.

Mr Philip Dykes SC, Mr Hectar Pun and Ms Jocelyn Leung, instructed by Henry Wan & Yeung, for the applicant. (13 and 14 November 2006)

Mr Hectar Pun and Ms Jocelyn Leung, instructed by Henry Wan & Yeung, for the applicant. (15 November 2006)

Sir John Swaine SC, instructed by Wilkinson & Grist, for the first respondent.

- A Mr Michael Thomas SC and Mr Jin Pao, instructed by the Department of Justice, for the second respondent.

Legislation mentioned in the judgment

- B Basic Law of the Hong Kong Special Administrative Region arts.11, 48, 48(10), 56(2), 62(4), 62(5), 68(3), 72, 73, 73(1), 74, 75(2), 158, Annex 11

Cases cited in the judgment

- Ashwander v Tennessee Valley Authority 297 US 288 (1935)
- C Association of Expatriate Civil Servants of Hong Kong v Chief Executive of HKSAR [1998] 1 HKLRD 615
Bahamas District of the Methodist Church in the Caribbean and the Americas v Speaker of the House of Assembly (2002–2003) 5 ITEL 311
- D Director of Immigration v Chong Fung Yuen (2001) 4 HKCFAR 211, [2001] 2 HKLRD 533
Hong Kong Letters Patent 1917 to 1995 art.XII
Hong Kong Royal Instructions 1917 to 1993 (Nos 1 and 2) cl.XXIV
HKSAR v Ma Wai Kwan & Others [1997] HKLRD 761, [1997] 2 HKC 315
- E Leung Kwok Hung & Another v Chief Executive of HKSAR (unrep., HCAL No 107 of 2005, [2006] HKEC 239)
Locust Grove Cemetery Association of Philo v Rose 156 NE 2d 577 (1959)
- F M’Culloch v State of Maryland 17 US 316 (1819)
Ng Ka Ling & Others v Director of Immigration (1999) 2 HKCFAR 4, [1999] 1 HKLRD 315, [1999] 1 HKC 291

Other materials mentioned in the judgment

- G Bennion, Francis, *Statutory Interpretation: A Code* (4th ed., 2002) p.429 s.174
Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament (23rd ed., 2004) p.853
French Constitution art.40
- H Interception of Communications and Surveillance Bill
Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, 19 December 1984
- I Rules of Procedure of the Legislative Council r.57(6)
Standing Orders of the House of Commons O.48
Standing Orders of the Legislative Council of Hong Kong O.23

Hartmann J

J *Introduction*

1. This application for judicial review raises a constitutional issue

going to the powers of members of the Legislative Council (LegCo) to propose amendments to bills, called committee stage amendments, which, if adopted and made law, will have a charging effect; that is, an impact (by way of diminution or addition) on the public purse. A

2. The Basic Law does not permit members of LegCo to introduce bills which have a charging effect but is silent on the question of whether, once a bill is introduced, members may propose committee stage amendments which will have the same effect. However, LegCo has a rule of procedure — r.57(6) — which effectively prevents members from proposing such amendments. It is the applicant's case that this rule of procedure is inconsistent with the Basic Law. B C

3. Article 73 of the Basic Law sets out in broad and ample language the powers and functions of the Legislative Council. Of relevance to this application, the article states:

The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions: D

- (1) To enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures;
- (2) To examine and approve budgets introduced by the government; E
- (3) To approve taxation and public expenditure;

4. The powers and functions described in art.73 are not given to members of LegCo as individuals but to LegCo itself sitting as a legislative body. As to the manner in which LegCo carries out its constitutional functions defined in art.73, the Basic Law lays down two specific procedural requirements: F

- (i) Article 75(1) directs that the required quorum for a meeting of LegCo shall be "not less than one half of all its members". G
- (ii) Article 68(3), read with Annex 11, directs that, in respect of voting procedures, the passage of "motions, bills or amendments to government bills" by individual members shall require a simple majority vote of both members returned by functional constituencies and those returned by geographical constituencies. H

5. Being subordinate to the Basic Law, LegCo must, of course, act in accordance with that Law. In this regard, art.73(1) directs that LegCo, in enacting, amending or repealing laws, must exercise its powers and functions in accordance with the Basic Law. In addition, however, it directs that LegCo must do so in accordance with "legal procedures". I

6. I pause to consider the phrase: "in accordance with ... legal procedures". The phrase appears in a number of different contexts in the Basic Law. As a broad and general phrase, it is capable, depending on its context, of different meanings. As to this conclusion, see the observations of Keith J (as he then was) in *Association of Expatriate Civil* J

A *Servants of Hong Kong v Chief Executive of HKSAR* [1998] 1 HKLRD 615 at p.622, or my complementary observations in *Leung Kwok Hung & Another v The Chief Executive* (unrep., HCAL No 107 of 2005) at p.53.

B 7. In the context of art.73(1), I am satisfied that the phrase, “in accordance with ... legal procedures” means that the Legislative Council must act not only in accordance with the Basic Law itself but also in accordance with the rules of procedure which the Council has the power to set for itself in order to govern the manner in which it enacts, amends or repeals laws. The power to set its own rules of procedure is contained within the Basic Law art.75(2) reading:

The rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene this Law.

D 8. I do not exclude the possibility that constitutionally binding “legal procedures” other than the rules of procedure adopted by LegCo may apply. During the course of the hearing, however, none were identified to me.

E 9. In the United Kingdom, Parliament is supreme. The courts are confined to interpreting and applying what Parliament has enacted. Parliament has exclusive control over the conduct of its own affairs. The courts will not permit any challenge to the manner in which Parliament goes about its business. If there are irregularities that is a matter for Parliament to resolve, not the courts.

F 10. In Hong Kong, however, as I have indicated, although LegCo has inherited many of the constitutional attributes of Parliament, the Basic Law is supreme. That being said, in my judgment, the qualifying phrase “on its own” in art.75(2) underscores the fact that the Basic Law recognises LegCo to be a sovereign body under that Law. In setting rules of procedure to govern how it goes about the process of enacting, amending and repealing laws, provided those rules are not in conflict with the Basic Law, LegCo is answerable to no outside authority.

G 11. In the United Kingdom, members of Parliament may introduce H bills. Prior to the change of sovereignty, members of Hong Kong’s colonial legislature had the same power and that power remains under the Basic Law. Members of LegCo, acting individually or in a group, may introduce bills. But, as I have indicated earlier, the nature of those bills is restricted. Included in those restrictions, bills which relate to I public expenditure; that is, which have a charging effect, may not be introduced. Article 74 reads:

J Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members

of the Council. The written consent of the Chief Executive shall be required before bills relating to government polices are introduced. A

12. Article 74, while it directly prohibits members from introducing bills into LegCo which have a charging effect, is silent on the matter of later proposed committee stage amendments which have the same effect. B

13. LegCo, however, being of the view that committee stage amendments are procedural only, introduced a rule of procedure to govern them. That rule is r.57(6) of the Rules of Procedure of the Legislative Council. It directs that a committee stage amendment: C

... the object or effect of which may, in the opinion of the President ... be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by:

- (a) the Chief Executive; or
- (b) a designated public officer; or
- (c) a Member, if the Chief Executive consents in writing to the proposal. D

14. The applicant, a political activist known by the *nom de guerre* of "Long Hair", is an elected member of the Legislative Council. It is his case that r.57(6), by restricting the right of members of LegCo to participate in the enacting process — to participate, that is, by proposing amendments which have a financial impact on would-be legislation — materially diminishes the powers and functions of members. In so doing, it diminishes a substantive right and is therefore inconsistent with the Basic Law. E F

15. As to how the applicant has come to challenge the constitutional validity of r.57(6), arises out of the following history. G

16. In February 2006, on the advice of the Executive Council, the Chief Executive ordered that a bill called the Interception of Communications and Surveillance Bill be introduced into LegCo. The Bill proposed a regime (which the Executive believed would accord with the requirements of the Basic Law) regulating covert surveillance operations. H

17. In March 2006, after the second reading of the Bill had been adjourned to a date to be fixed, LegCo formed a bills committee to study it. Some four months later, in July 2006, the House Committee directed that the second reading of the Bill should take place in early August of that year. I

18. Many of the provisions of the Bill had excited controversy. In the result, a substantial number of committee stage amendments were proposed by members.

19. The proposed committee stage amendments were placed before the President of LegCo. In terms of art.72 of the Basic Law, the President presides over meetings, decides on the agenda to be followed J

A and exercises such other powers and functions as are prescribed in the Council's rules of procedure.

20. On 31 July 2006, the President ruled that certain of the proposed amendments would go forward for consideration by the Council sitting in committee. On the following day; that is, on 1 August
B 2006, the President ruled that the remaining proposed amendments had a charging effect and, in terms of r.57(6) of the Rules of Procedure, could not go forward for consideration.

21. Although the applicant was not himself the author of any of the proposed amendments which were made the subject of the
C President's 1 August ruling, he was of the view that, as a member of LegCo, he had been unlawfully hindered in the discharge of his constitutional duty by that ruling. The applicant therefore instituted the present proceedings on 5 August 2006 while the Bill was still before LegCo.

22. It is to be emphasised that the applicant's challenge does not in any way touch on the lawfulness of the President's reasons for refusing to permit certain proposed committee stage amendments to go forward for consideration. The challenge goes only to the constitutional validity of r.57(6) under which the President made her
D ruling.
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23. By way of remedy, the applicant has sought two declarations. They are:

(1) A declaration that an amendment proposed by any member of
F LegCo to a Government proposed bill which has an impact on public expenditure (or has a charging effect on the revenue) is not a bill relating to public expenditure within the meaning of art.74 of the Basic Law.

(2) A declaration that r.57(6) of the Rules of Procedure of LegCo, insofar as it seeks to preclude a member of LegCo from proposing
G an amendment that has a charging effect on the revenue, contravenes arts.73(1) and 74 of the Basic Law.

H *Jurisdiction*

24. It has not been disputed that this Court has jurisdiction to determine, by way of declaratory relief, whether rules of procedure enacted by the Legislative Council are consistent with the Basic Law. Nor has it been disputed that the issues falling for determination in
I this case are justiciable. Nevertheless, something briefly needs to be said on the subject.

25. As I have said, while in the United Kingdom the Legislature; that is, Parliament, is supreme, in Hong Kong the Legislature bows
J to the supremacy of the Basic Law. LegCo, along with all other organs of state, must act in accordance with the Basic Law. Article 11 provides that no law enacted by LegCo shall contravene the Basic Law.

26. Under the Basic Law, LegCo has no judicial power; no power, that is, to make a binding interpretation of the Basic Law. That power is delegated by the Standing Committee of the National People's Congress to the courts of Hong Kong. Article 158, in so far as relevant, reads:

The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law ...

27. The constitutional jurisdiction of the courts has been affirmed by the Court of Final Appeal in *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 at p.25, in the following terms:

In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. ... In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of *acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law.* (Emphasis added.)

28. In the present case it is asserted by the applicant that r.57(6) is inconsistent with the Basic Law. It is clearly for this Court to interpret the Basic Law to determine whether r.57(6) is or is not inconsistent. In this regard, as the Court of Final Appeal has said, it does no more than act as a constitutional check on the Legislature to ensure that it acts in accordance with the Basic Law.

29. The issues that are to be determined are justiciable. An appropriate remedy (by way of declaration) may be fashioned.

30. As for the applicant, I am satisfied that, as a member of LegCo who is concerned that substantive constitutional rights are being denied to him, he has the necessary standing.

31. It is therefore plain, in my view, that this Court has jurisdiction. Nevertheless, a general note of caution must be sounded; namely, that it is a jurisdiction which, having regard to the sovereignty of LegCo under the Basic Law, should only be exercised in a restrictive manner.

32. In the judgment of the Privy Council in *The Bahamas District of the Methodist Church in the Caribbean and the Americas v Speaker of the*

A *House of Assembly* (2002–2003) 5 ITELR 311, a judgment concerning a legislature which (like LegCo) is subject to constitutional restraints, Lord Nicholls spoke of the need for a restrictive approach to the exercise of jurisdiction. I can do no better than cite his observations:

- B ... so far as possible, the courts of The Bahamas should avoid interfering in the legislative process. The primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void. This may be coupled with any necessary, consequential relief. However, the qualifying words “so far as possible” are important. This is no place for absolute and rigid rules. Exceptionally, there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the courts unless they intervene at an earlier stage.
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- D For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If such an exceptional case should arise, the need to give full effect to the Constitution might require the courts to intervene before the Bill is enacted. In such a case parliamentary privilege must yield to the courts’ duty to give the Constitution the overriding primacy which is its due.
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- Their Lordships consider that this approach also leads ineluctably to the conclusion that the courts have jurisdiction to entertain a claim that the provisions in a Bill, if enacted, would contravene the Constitution and that the courts should grant immediate declaratory or other relief. The courts have power to enquire into such a claim and consider whether any relief is called for. In their Lordships’ understanding, that is what is meant by “jurisdiction” in this context. The exercise of this jurisdiction is an altogether different matter. The courts should exercise this jurisdiction in the restrictive manner just described.
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Have the issues been rendered academic?

- H 33. In the present case, although the judicial review proceedings were instituted when the Bill was still before LegCo, by the time the substantive hearing took place the Bill had been enacted into law. However, the issues raised by the applicant remain of considerable public importance, colouring the day-to-day work of our Legislature.
- I In my view, if the issues are not dealt with now, they will have to be determined in fresh proceedings in the near future. In short, the issues remain immediate.

J *The respondents’ different approaches to the constitutionality of r.57(6)*

34. Both respondents, that is, the President of LegCo and the

Secretary for Justice, are of the view that r.57(6) is entirely consistent with the Basic Law. They approach the matter, however, from different viewpoints. In doing so, they are at odds as to the true interpretation of art.74. A

35. I am informed that this divergence of opinion as to the true interpretation of art.74 arose in 1998 and arose in the following manner. B

36. Article 74, while it directly prohibits members from introducing bills into LegCo which have a charging effect, is silent on the matter of later proposed committee stage amendments which have the same effect.

37. The Secretary for Justice took the view that the word "bills" in art.74 must be construed to include later committee stage amendments to a bill. Any other interpretation, it was argued, would create the anomaly that members may achieve by way of committee stage amendments that which they were constitutionally prohibited from achieving by way of introducing a bill. C

38. On the basis of an opinion obtained from Mr Denis Chang SC in 1998, LegCo took the view that art.74 bore a clear meaning. There was no ambiguity in the concept of "introducing a bill", that phrase plainly referring solely to the initiation of the legislative process. Even on a purposive construction, therefore, it was not possible to contend that the phrase, or the word "bill" itself, included later committee stage amendments. D

39. LegCo, however, concluded that a proposed committee stage amendment, by its nature, is a procedural matter only and fell to be governed by art.75(2). That being the case, to avoid an impasse which may have jeopardised good governance, I am told that LegCo adopted r.57(6), directing that a committee stage amendment which has a charging effect may only be proposed by the Chief Executive, a designated public officer or by a member of LegCo who has the written consent of the Chief Executive. E

40. During the course of the hearing before me, Mr Michael Thomas SC, leading Counsel for the Secretary for Justice, acknowledged that the differences that had arisen in 1998 as to the true interpretation of art.74 — and contiguously, art.48(10) which gives the power to the Chief Executive to introduce motions regarding revenue or expenditure — had not been resolved. What was important to note, however, was that no need had arisen to resolve them. And no need now arose, as a result of these proceedings, to do so. F

41. A *modus vivendi* had been fashioned, one that had endured for some eight years, said Mr Thomas. This had seen the delivery of a flow of legislation that had not threatened the Executive's constitutional obligation to manage public finances nor that of LegCo to scrutinise and, if satisfied, approve such finances. That being the case, it was in the public interest that the *status quo* be left undisturbed until, if at all, it became necessary for a definite interpretation of art.74 to be sought. G

Such a definitive interpretation was simply not necessary in the present case. H

A 42. Mr Thomas emphasised that in the present case, the ruling
of the President — the single decision challenged by the applicant
— had been made pursuant to r.57(6) of LegCo's rules of procedure.
That being so, a discrete issue fell for determination, an issue purely
of law. That issue, he submitted, was contained in the language not
B of the first declaration sought but only of the second; namely, that
r.57(6) was inconsistent with the Basic Law. Whether r.57(6) was
inconsistent could be decided, he submitted, without first having to
determine the broader issue of the exact nature and extent of art.74.
Mr Thomas argued that accordingly, there was no reason for me to
C determine the first declaration and that I should do so only if I found
it to be an essential "stepping stone" to determining the second.

43. I acknowledge, of course, what must be an almost universal
rule of the common law that courts should not anticipate a question
of constitutional law in advance of the necessity of deciding it. By
D way of illustration, it is a principle of long-standing in United States
jurisprudence that a court will not formulate a rule of constitutional
law broader than is required by the precise facts to which it is to be
applied: see, for example, *Ashwander v Tennessee Valley Authority* 297
US 288 (1935), a decision of the Supreme Court.

E 44. In the present case, I do not see the necessity of coming to
a broad and definitive interpretation of the nature and effect, for all
purposes, of art.74. I will therefore decline to determine, one way or
the other, the first declaration. I will give a determination in respect
of the second declaration only.

F 45. That being said, in my judgment, the meaning of art.74, in
the context of other relevant provisions of the Basic Law, is integral
to a consideration of the constitutionality of r.57(6). To adopt the
phrase used by Mr Thomas, I have found it necessary therefore to
consider art.74 as a stepping-stone to determining the core issue in
G this matter; the issue which, in my view, is encapsulated in the second
declaration sought.

The applicant's case

H 46. Nowhere in the Basic Law, in direct language, are members of
LegCo given the right, be it substantive or procedural, to propose
amendments to bills.

I 47. That being said, the Basic Law of course contemplates that,
after the introduction of a bill into LegCo, there must be a legislative
process.

J 48. For the applicant, leading counsel, Mr Philip Dykes SC,
founded his submissions as to the asserted principle that when a law-
making body is established by a constitutional instrument it should
be assumed that the body has full legislative powers unless restrictions
are imposed by that constitutional instrument: see, for example, the
judgment of the Supreme Court of Illinois in *Locust Grove Cemetery
Association of Philo v Rose* 156 NE 2d 577 at p.580 (Ill. 1959):

The Illinois legislature does not look to the state constitution for power to act, but looks to it and the federal constitution only for restrictions upon its powers to act.

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49. There is nothing in the Basic Law, contended Mr Dykes, that limits LegCo from amending a bill introduced by Government under art.62(5) or by a member under art.74. LegCo, being able to exercise all legislative powers not expressly, or by necessary implication, denied to it by the Basic Law, must therefore have the power to amend bills no matter what the nature of the amendment.

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50. Supporting this submission, or alternative to it, Mr Dykes argued that, applying common law principles of interpretation, the power to propose amendments to bills is a necessary implied power under art.73(1). The power to “enact” laws, he said, must carry with it the implied power, in the enacting process, to suggest changes to those laws; that is, to propose amendments to them.

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51. As to the well-recognised common law principle, Bennion, *Statutory Interpretation: A Code* (4th ed., 2002) at p.429 s.174 reads:

The rule in *A-G v Great Eastern Rly Co* (1880) 5 App Cas 473 provides that an express statutory power carries implied ancillary powers where needed. As stated by Lord Blackburn the rule says that “those things which are incident to, and may reasonably and properly be done under the main purpose [of an enactment], though they may not be literally within it, would not be prohibited”. Or, as stated by Lord Selborne LC, the rule is that “whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*”.

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52. As to the application of the principle in a constitutional context, Mr Dykes cited an 1819 decision of the Supreme Court of the United States, that of *M’Culloch v State of Maryland* 17 US 316:

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A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.

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53. In my view, essentially the same principle has been enunciated by our own Court of Final Appeal. In this regard, in *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 at p.28, the Court of Final Appeal explained:

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- A ... because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and
- B relevant extrinsic materials.

Accordingly, said the Court:

- C ... in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.
- D 54. Mr Dykes submitted that the right given to LegCo — on the basis of the two mutually supporting, or alternative, principles he had enunciated — was, for all practical purposes, a right vested in each member of LegCo. This was because the right could only be exercised by a quorate assembly of individual members meeting and voting in
- E accordance with the prescribed voting procedures set in art.68(3), as read with Annex 11.
55. At this juncture, I pause to say that, whatever the validity of the principles enunciated by Mr Dykes, I have had difficulty seeing how they apply in the present case.
- F 56. It seems to me that, in giving full legislative powers to LegCo, the Basic Law has, in clear terms, given to it the power to regulate, as it (and it alone) deems best, the manner in which it discharges what, during the course of the hearing before me, was described as the “enacting process”. In this regard, to cite it again, art.75(2) states that:
- G The rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene this Law.
- H 57. Mr Thomas, for the Secretary for Justice, pointed to the fact that, within the structure of the Basic Law, any motion to amend a bill may only be made after that bill has been introduced into and is therefore before LegCo and subject to its enacting process. As such, it is plain, he said, that any proposal to amend, whatever its nature, is subject to
- I the rules of procedure made under art.75(2) to regulate that enacting process.
58. Sir John Swaine, for the President of LegCo, submitted that not only was a proposal to amend a bill part of the enacting process which fell to be governed by LegCo’s own rules of procedure, it
- J was in any event recognised in parliamentary practice in the United Kingdom, Australia, Canada, and Hong Kong itself before the change of sovereignty, as a purely procedural matter.

59. Whether a motion placed before the Council to amend a bill, in so far as it may constitute a right at all, is a substantive or procedural right, does not seem to me to be the most straightforward issue to resolve. I am, however, in agreement with Mr Thomas that it is not necessary to resolve the issue in this case. It is sufficient to recognise that a motion to amend is part of the enacting process that takes place only once a bill has been introduced into and is therefore before LegCo. As such, in terms of art.75(2) it is subject to LegCo's rules of procedure such as r.57(6). A B

60. Returning to the submissions of Mr Dykes, he contended, however, that the introduction of a bill into LegCo *was* part of the enacting process, indeed the first step in that process. The introduction of bill, he said, and the proposed amendment of that bill were simply different stages of the same enacting process. That being so, said Mr Dykes, art.74, which limits the power of individual members to introduce bills into LegCo, governs the enacting process. And, as such, rules of procedure made under art.75(2) may not contravene art.74. C D

61. In respect of the enacting process, art.74, said Mr Dykes, prohibits members from introducing bills into LegCo which have a charging effect. It does not, however, limit their power at a later stage of the enacting process to propose amendments to bills which have the same effect. If art.74 does not expressly, or by necessary implication, limit the power of members to propose amendments which have a charging effect then, in terms of the two constitutional principles upon which he relied, there being no restriction elsewhere in the Basic Law, Mr Dykes argued that the Basic Law must be read as permitting such proposed amendments. LegCo does not look to the Basic Law for power to act; it looks to it only for restrictions upon that power. E F

62. As I understood the summary of Mr Dykes' submissions, it was to the effect that r.57(6), in purporting, as a rule of procedure only, to prevent the exercise of a right permitted by the Basic Law was therefore inconsistent with that Law. G

63. Mr Dykes advanced the proposition that construing art.74 in such a way as to permit LegCo members to propose amendments that have a charging effect is, in context, an ordinary reading of the article and does not mean that the Executive is thereby subordinated to the Legislature. He rejected the contention that reading art.74 in the manner he proposed would enable members to achieve through the back door (by way of amending a bill) what they were prohibited from doing through the front door (by way of introducing a bill). As he put it, a public officer proposing a bill can always withdraw it before a final reading if any amendments made are unacceptable. In that way, the underlying principle that the executive asks and the Legislature grants is preserved. H I

My conclusions

 J

64. It was, of course, fundamental to Mr Dykes' argument that the

- A introduction of a bill into LegCo is integral to the enacting process. As he put it, the introduction of a bill and a later proposed amendment to that bill are simply different stages of the same process. It was on the basis of that argument that Mr Dykes was able to contend that art.74 engages the enacting process.
- B 65. In my judgment, however, within the framework of the Basic Law, art.74 is not to be read as engaging the enacting process. To put it more broadly, on my reading of the Basic Law, the introduction of bills to LegCo is not dealt with as being part and parcel of the enacting process but rather as a preliminary and discrete process.
- C 66. The Basic Law enshrines the separation of powers. A reading of the Law makes it evident that the Executive, the administration and the Legislature are each to perform their constitutionally designated roles in a co-ordinated and co-operative manner for the good governance of Hong Kong. Mr Thomas described it as the “workability principle”.
- D 67. Hong Kong has an Executive-led Government. It is the function of the Chief Executive to lead the Government, to decide on Government policies and to approve the introduction of motions regarding revenues or expenditure to the Legislative Council: art.48. It is the function of the Government; that is, the Executive authorities
- E (led by the Chief Executive) to formulate and implement policies, to conduct administrative affairs and to draw up and introduce (into LegCo) budgets and final accounts: art.62. LegCo does not exercise executive or administrative functions of the kind I have just described. To put it plainly, it does not run any “mirror” Ministry of Finance.
- F It is instead the function of LegCo to enact, amend or repeal laws, to examine and approve budgets introduced by the Executive authorities and to “approve” (not create or decide upon) taxation and public expenditure: art.73.
- G 68. Accordingly, while it is for the Executive and the administration to formulate policy, expressing it in terms of legislation and financial proposals, it is for the Legislature to enact that legislation and to approve those financial proposals. What the Basic Law defines is the method of inter-action; that is, the nexus, both introductory and consequential, which connects the Executive and administration on the one part
- H with the Legislature on the other. To put it another way, who carries responsibility for this inter-action, the manner in which it is to be executed and how the consequences are to be managed are fundamental matters defined in the Basic Law. The following provisions, to state them again, illustrate my meaning:
- I
- (i) Article 48(10) gives to the Chief Executive the function of approving the introduction of motions regarding revenue or expenditure to LegCo. Article 56(2) directs that he must consult the Executive Council before introducing bills to LegCo.
- J
- (ii) Article 62(4) gives to the administration (ie the Government) the function of drawing up and introducing budgets to LegCo.

Article 62(5) gives to it the function of drafting and introducing bills, motions and subordinate legislation to LegCo. A

- (iii) While, in terms of art.62(5), it is for the Government to introduce bills to LegCo, art.74 allows members of LegCo themselves to introduce bills provided they do not relate to “public expenditure or political structure or the operation of the Government”. B

69. In my judgment, considered in that context, art.74 is not to be read in the manner advocated on behalf of the applicant; that is, as applying to, and in some way governing, the entire enacting process, but only as defining the limit of the power given to members of LegCo (in addition to the power given to the Executive and the administration) to introduce bills. Article 74 therefore circumscribes the rights of members *before* anything has been brought within the purview of LegCo while proposing amendments to bills is part of the process that takes place *after* bills have been brought within the purview of LegCo. C D

70. As Mr Dennis Chang expressed it in his 1998 opinion, to prevent members from introducing bills is one thing, to prevent them from proposing amendments to bills already introduced — and therefore already within the purview of LegCo — is another. E

71. I am of the view that nothing is to be construed from the fact that art.74 is silent on the question of whether members do or do not have the power to propose amendments to bills which have a charging effect. Nothing is to be construed because any power to propose amendments when bills are before LegCo is a matter independent of the scope of art.74. F

72. In my judgment, therefore, subject to the considerations which follow, I am satisfied that r.57(6) of LegCo’s Rules of Procedure is not rendered inconsistent with the Basic Law by the application of art.74. G

Considering extrinsic materials

73. Mr Dykes contended that, if the Basic Law was read as denying LegCo members a substantive right to propose amendments which have a charging effect, it would materially diminish their powers. But if that is so, then, as I understand the position, the same powers are similarly diminished in the United Kingdom Parliament and, before the change of sovereignty, were diminished in equal measure in Hong Kong’s Legislative Council. H I

74. As to the long-standing position in the United Kingdom, and the position in Hong Kong prior to the change of sovereignty, I consider that they both constitute extrinsic material which throws light on the context and purpose of the provisions of the Basic Law which are the subject of this judgment. J

75. I accept, of course, that the Basic Law is a “unique document”: see *HKSAR v Ma Wai Kwan & Others* [1997] HKLRD 761 at p.773.

A But that being said it was not created in a vacuum. It is now well-established in our jurisprudence that, while of course the Basic Law created new rights and duties, one of its purposes has been to enshrine the principle of continuity.

B 76. In interpreting the Basic Law, a literal, technical or narrow approach must be avoided, a purposive approach being required. But that said, the role of our courts is to ascertain the legislative intent as expressed in the language used in the Basic Law itself. In *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 at p.223, the Court of Final Appeal directed that:

C The courts do not look at the language of the article in question in isolation. The language is considered in the light of its context and purpose. ... The exercise of interpretation requires the courts to identify the meaning borne by the language when considered in the light of its context and purpose. This is an objective exercise. Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear. As was observed in *Minister of Home Affairs v Fisher* [1980] AC 319 at p.329E, a case on constitutional interpretation: "Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language".

D 77. In addition, as the Court of Final Appeal noted, extrinsic materials may help to throw light on the context or purpose of particular provisions in the Basic Law. Extrinsic materials which may be considered include the Joint Declaration and pre-enactment materials, including domestic legislation; that is materials (generally speaking) brought into existence prior to or contemporaneous with the enactment of the Basic Law. The Court of Final Appeal did not close the door on the nature of such pre-enactment materials.

E 78. In this judgment, I have looked first to the language employed in the Basic Law, seeking to construe that language in the light of its context and purpose. In the present case, as I have made plain, I have considered context — the architecture of the Basic Law itself — to be of particular importance. But I do consider it relevant — in this case — to look to relevant extrinsic material, if only as some guide to satisfying myself that my interpretation already stated is correct.

F 79. It may be said that the Basic Law, in its fundamentals, is fashioned on the "Westminster model". Acknowledging that, as a colony of the United Kingdom, Hong Kong's system of government was, prior to the change of sovereignty, given to it by the United Kingdom, as I have said earlier, it is of some assistance, I think, to consider the manner in which, in the United Kingdom, the Crown and Parliament have discharged their designated constitutional roles in respect of matters related to public finance.

G 80. *Erskine May's on Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23rd ed., 2004) at p.853, describes this relationship

as being qualified by “the long-established and strictly observed rule of procedure, which expresses a principle of the highest constitutional importance, that no charge on public funds ... can be incurred except on the initiative of the Crown”. In broader terms, qualified by history, the relationship is described, at p.848, as follows:

It was a central factor in the historical development of parliamentary influence and power that the Sovereign was obliged to obtain the consent of Parliament (and particularly of the House of Commons as representatives of the people) to the levying of taxes to meet the expenditure of the State. But the role of Parliament in respect of State expenditure and taxation has never been one of initiation: it was for the Sovereign to request money and for the Commons to respond to the request. The development of responsible government and the assumption by the government of the day of the traditional role and powers of the Crown in relation to public finance have not altered this basic constitutional principle: the Crown requests money, the Commons grant it ...

81. Order 48 of the Standing Orders of the House of Commons gives effect to this constitutional principle, directing that:

This House will receive no petition for any sum relating to public service or proceed upon any motion [any proposition formally made] for a grant or charge upon the public revenue, whether payable out of the Consolidated Fund or the National Loans Fund or out of money to be provided by Parliament, or for releasing or compounding any sum of money owing to the Crown, unless recommended from the Crown.

82. In Parliament, therefore, it is a standing order; that is, a rule of procedure, that no proposal to amend a bill which has a charging effect may be made except on the recommendation of the Crown.

83. It is also of some limited relevance, I think, to observe that either by way of constitutional dictates or rules of procedure, a good number of both common law and civil law jurisdictions place some form of restriction on the ability of individual legislators to propose amendments to bills which have a charging effect. These jurisdictions include, among others, Australia, Canada, New Zealand, South Africa, and the United States. In France, for example, a civil law jurisdiction, there is a direct constitutional bar. Article 40 of the French Constitution translates to the following effect:

Bills and amendments introduced by Members of Parliament shall not be admissible where their adoption would have as a consequence either a diminution of public resources or the creation or increase of an item of public expenditure. [Emphasis added.]

- A 84. As for the position in Hong Kong prior to the change of sovereignty, the principle of English constitutional law that there could be no charge on public funds unless it was at the initiative of the Crown, was integral to the laws and procedures regulating our Legislative Council.
- B 85. In this regard, cl.XXIV of the Hog Kong Royal Instructions made under art.XII of the Hong Kong Letters Patent stated that:
- (1) Subject to para.(2) of this clause, it shall be competent for any Member of the Legislative Council to propose any question for debate therein; and such question shall be debated and disposed of according to the standing rules and orders.
- C (2) Every Ordinance, vote, resolution, or question, the object or effect of which may be to dispose of or charge any part of Our revenue arising within the Colony, shall be proposed only by:
- D (a) the Governor;
- (b) a public officer whom the Governor has designated to make such a proposal under cl.XXIB para.(2); or
- E (c) a member of the Legislative Council expressly authorised or permitted by the Governor to make such a proposal.
86. In accordance with the Hong Kong Royal Instructions, the Standing Orders of the Legislative Council (O.23) provided that:
- F A motion or amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by:
- G (a) the Governor;
- (b) a public officer designated by the Governor under Standing Order No 4B (Attendance of Public Officers); or
- (c) a Member of the Council expressly authorized or permitted by the Governor to make such a proposal.”
- H 87. In summary, in so far as r.57(6) diminishes the ability of Hong Kong’s legislators, it is a diminishment of long-standing, one inherited by our colonial legislature from Parliament and one, in some like manner, imposed upon legislators in other common law and civil law
- I jurisdictions. It is, I am satisfied, a diminishment founded on the separation of powers, the particular constitutional principle being that no charge on public funds can be incurred except on the initiative of the executive and the administration. It is for those two organs of state to create and propose policies related to the collection and
- J disbursement of public funds; it is for the Legislature to examine and, if thought fit, to approve such proposals.

88. As a cross-check, therefore, the extrinsic material which I have considered does not raise any doubt as to my conclusion earlier provisionally stated that r.57(6) is consistent with the Basic Law. A

My orders

89. The applicant has sought two declarations. However, for the reasons given, I am satisfied that the single issue raised; namely, whether r.57(6) of LegCo's Rules of Procedure is or is not consistent with the Basic Law, is an issue contained in the language not of the first declaration sought but only the second. I therefore decline to come to any determination in respect of the first declaration. B C

90. The second declaration sought, to cite it again, was as follows:

A declaration that r.57(6) of the Rules of Procedure of LegCo, insofar as it seeks to preclude a member of LegCo from proposing an amendment that has a charging effect on the revenue, contravenes arts.73(1) and 74 of the Basic Law. D

91. For the reasons given, I am satisfied that r.57(6), insofar as it seeks to preclude a member of LegCo from proposing an amendment that has a charging effect, is not rendered inconsistent with the Basic Law by the application of art.74 or any other article of that Law. To put it another way, I am satisfied that r.57(6), as it governs "the enacting process" before LegCo, is constitutionally valid. In the circumstances, I decline to grant the second declaration sought. E F

92. The application for judicial review is therefore dismissed.

93. In respect of costs, if it is necessary, I will hear from the parties as to an appropriate order.