Creating a Constitutional Relationship

Postscript

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Since this article was written, certain further developments have occurred. The Government of the HKSAR was genuinely concerned about how to manage the potential major new immigration wave resulting from the Right of Abode decisions of the CFA. Unfortunately, the Government allowed shorter-term concerns to dominate its thinking. A number of Hong Kong's official advisers on the Basic Law (drawn from the drafters of the Basic Law) most regretably also urged the Government to seek a "quick fix".

There was widespread concern within the HKSAR that current residents of Hong Kong would suffer if the CFA decisions were to take full effect. The Government did little to reduce this community anxiety. If anything, it acted so as to increase these concerns. Government studies tended to emphasize the "worst case" possibilities of the CFA decisions. The figures provided were far from concrete.

The Government at no stage combined: (a) a moderating commentary on the consequences of the CFA decisions with; (b) an explanation of the longer-term benefits arising from any migration: and (most importantly) (c) an explanation of how the CFA, in enhancing judicial independence, had made an exceptional contribution to the HKSAR's long-term wellbeing. The Government, in other words, failed to show real leadership on this issue. Although the Government was careful not to attack the CFA directly, its lack of real support for the CFA at such a crucial turning point was manifest.

After doing little to reduce the climate of anxiety - and helping to increase it also - it was not a big surprise when the Government announced it would need to take action to deal with the consequences of the CFA Right of Abode decisions. Once this decision was made, two possibilities arose. The Government could seek to have the Basic Law amended under Article 159 - or it could seek an "interpretation" of the Basic Law under Article 158. The worst of these two unsatisfactory options was the interpretation solution. Ultimately the Basic Law can be amended by the SCNPC but, prior to any amendment, a detailed process applies where both the issues and the Government's dubious reasoning and projections would have been subject to wide debate. Under the interpretation provisions of Article 158, no such process ensues - the SCNPC simply advises what its interpretation is on a given issue under the Basic Law.

The way in which the matter was ultimately resolved bore all the hallmarks of a Government avoiding responsibility. A report was prepared by the HKSAR Government on the interpretation of Articles 22(4), 24 (2) and 24 (3) and sent to the Mainland Chinese Government (the State Council). The State Council then asked the SCNPC to interpret the relevant provisions. The SCNPC duely "interpreted" the provisions on June 26, 1999. The interpretation was not really an interpretation at all but, rather, a pronouncement that the CFA had misunderstood the legislative intent of the drafters of the Basic Law and, in effect, that the narrow view of the meaning of the relevant articles advanced by the HKSAR Government would henceforward prevail. In accordance with the Basic Law, the interpretation would not, it was said, affect the particular rights of those persons who were parties to the CFA Right of Abode decisions handed down on January 29, 1999.

The HKSAR Government subsequently contended that its actions had not undermined the Rule of Law in Hong Kong. Few, other than the blindly faithful, were convinced by their ragged arguments. Even the majority of HKSAR residents who supported the Government's actions were under no such illusions. The HKSAR Government has helped to undermine the Rule of Law in Hong Kong. This particular

instance of the Executive "trumping" the Judiciary did not affect "big money", of course, but, rather, just many "poor people". No immediate significant economic impact was felt when the SCNPC gave its interpretation. The precedent has now been set, however, and it is a bad one. The full extent of the damage will only emerge over time.

In early December 1999, the CFA had occasion to comment on the validity of the SCNPC Interpretation (on the Right of Abode matter) under Article 158. The CFA found, as was expected, that the Interpretation was given in conformity with Article 158. The CFA judgment did not articulate any clear limits on the scope of Article 158. It is unclear, at present, just how Articles 158 and 159 are meant to interact. Presumably at some point an "interpretation" can become an "alteration." Just when that point is reached we do not know. Nor do we know if, when an interpretation becomes an alteration of the Basic Law, Article 159 would have the effect of invalidating any such interpretation. That is, must all alterations of the Basic Law be effected according to Article 159 only? Much Common Law constitutional reasoning (and theory) would say as much. But such rules of law are now less certain in their impact in Hong Kong.