

**THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE**

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**CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST**

**NO. 185 OF 2016**

**AND**

**MISCELLANEOUS PROCEEDINGS NO. 2819 OF 2016**

*This Summary is prepared by the Court's Judicial Associate and is not part  
of the Judgment*

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**PRESS SUMMARY**

**HCAL 185/2016**

<b>1<sup>st</sup> Applicant</b>	The Chief Executive of the Hong Kong Special Administrative Region
<b>2<sup>nd</sup> Applicant</b>	The Secretary for Justice
<b>Respondent</b>	The President of the Legislative Council
<b>1<sup>st</sup> Interested Party</b>	Mr. Sixtus Leung Chung Hang
<b>2<sup>nd</sup> Interested Party</b>	Ms. Yau Wai Ching
<b>Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants</b>	Mr. Benjamin Yu SC, Mr. Johnny Mok SC, Mr. Jimmy Ma and Mr. Jenkin Suen
<b>Counsel for the</b>	Mr. Jat Sew-tong SC and Mr. Anthony Chan

**Respondent**

**Counsel for the 1<sup>st</sup> Interested Party** Mr. Hectar Pun SC and Mr. Anson Wong Yu-yat

**Counsel for the 2<sup>nd</sup> Interested Party** Mr. Philip J Dykes SC and Mr. Jeffrey Tam

**HCMP 2819/2016**

**1<sup>st</sup> Plaintiff** The Chief Executive of the Hong Kong Special Administrative Region

**2<sup>nd</sup> Plaintiff** The Secretary for Justice

**1<sup>st</sup> Defendant** Ms. Yau Wai Ching

**2<sup>nd</sup> Defendant** Mr. Sixtus Leung Chung Hang

**3<sup>rd</sup> Defendant** The President of the Legislative Council

**Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs** Mr. Benjamin Yu SC, Mr. Johnny Mok SC, Mr. Jimmy Ma and Mr. Jenkin Suen

**Counsel for the 1<sup>st</sup> Defendant** Mr. Philip J Dykes SC and Mr. Jeffrey Tam

**Counsel for the 2<sup>nd</sup> Defendant** Mr. Hectar Pun SC and Mr. Anson Wong Yu-yat

**Counsel for the 3<sup>rd</sup> Defendant** Mr. Jat Sew-tong SC and Mr. Anthony Chan

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**Judge:** The Honourable Mr. Justice Au J

**Hearing Date:** 3 November 2016

**Date of Judgment:** 15 November 2016

**Decisions:** HCMP 2819/2016

- (1) A declaration that the oaths purportedly taken by Mr. Leung and Ms. Yau on 12 October 2016 contravened the Basic Law and the Oaths and Declarations Ordinance and are invalid and void and have no legal effect;
- (2) A declaration that Mr. Leung and Ms. Yau have been disqualified from assuming and have vacated the office of a member of the LegCo since 12 October 2016 and are not entitled to act as a member of the LegCo;
- (3) An injunction restraining Mr. Leung and Ms. Yau from acting as a member of the LegCo
- (4) A declaration that Mr. Leung and Ms. Yau claimed to act and/or acted as a member of the LegCo while disqualified from acting in that office; and
- (5) An injunction restraining Mr. Leung and Ms. Yau from claiming to be entitled and/or acting as a member of the LegCo.

HCAL 185/2016

- (1) A declaration that the President has no power to re-administer or allow for re-administration of any further oath(s) to be taken by Mr. Leung and Ms. Yau;
- (2) A declaration that the office of member of the LegCo previously occupied by each of Mr. Leung and Ms. Yau is now vacant;
- (3) An order of *certiorari* to quash the President's decision (namely to allow Mr. Leung and Ms. Yau to retake the LegCo

- Oath at the next LegCo meeting); and
- (4) An injunction restraining the President from administering or allowing to be administered the making of the oaths of Mr. Leung and Ms. Yau.

**SUMMARY:**

1. These proceedings concern the questions (a) whether the oaths purportedly taken by Mr. Leung and Ms. Yau at the LegCo meeting on 12 October 2016 before the Clerk to the LegCo (“the Clerk”) contravene the requirements under Art. 104 of the Basic Law (“BL104”) and/or the Oaths and Declarations Ordinance (“ODO”), and (b) if so, whether they shall be regarded as having vacated their respective office (“the Office”) of a LegCo member as a matter of law.
2. BL104 constitutionally mandates, among others, an elected LegCo member when assuming his office to take an oath in accordance with the laws under the ODO (a) to swear to uphold the Basic Law and (b) to swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.
3. Sections 16 and 19 of the ODO further require that a LegCo member elect must take the Legislative Council Oath (“the LegCo Oath”) which is in the form prescribed under the ODO. Section 21 of the ODO further relevantly provides that if a LegCo member who “declines or neglects” to take the LegCo Oath when requested to do so shall vacate the Office (if he has already entered on it); or shall be disqualified from entering on it (if he has not yet entered on it).
4. There is no dispute among the parties that, on 12 October 2016, Mr. Leung and Ms. Yau purported to take the oath in the following ways and manners:
  - (a) Each of them used the term “Hong Kong nation” at the outset of the oath-taking;

- (b) After the interjection by the Clerk, each of them *mispronounced* the word “China” as “Geen-na” or “Sheen-na” (“支那”);
  - (c) Ms. Yau *mis-pronounced* “People’s Republic of China” as “the People’s *Refucking* of Sheen-na”;
  - (d) Each of them unfolded and displayed a blue banner bearing the words “HONG KONG IS NOT CHINA”;
  - (e) Mr. Leung displayed dismissive and not-serious tone in taking the oath after the Clerk’s interjection and crossed his index and middle finger of his right hand over the Bible; and
  - (f) Ms. Yau emphasized “Hong Kong” with a distinctly loud tone of voice but adopted a lower voice and hurried manner for the rest of the oath.
5. The Court notes that Mr. Leung and Ms. Yau have not put forward any positive case by way of submissions or evidence that the oaths they purportedly took on 12 October 2016 complied with BL104 or the requirements under the ODO. Nor have they put forward any positive case by way of submissions or evidence that their above conducts did not amount to declining or neglecting to take the LegCo Oath under BL104 or the ODO.
6. Instead, Mr. Leung and Ms. Yau oppose the application on the principal grounds that the court could or should not intervene in the matters now under challenged in light of: (1) the non-intervention principle; and (2) the LegCo member’s immunity provided under Article 77 of the Basic Law (“BL77”) and sections 3 and 4 of the Legislative Council (Power and Privilege Ordinance (Cap 382) (“LCPPO”). So far as the President is concerned, his only objection is that he should not be joined as a party in these proceedings.
7. On 7 November 2016, in exercise of its power under Article 158 of the Basic Law (“BL158”) the Standing Committee of the National People’s Congress (“NPCSC”) pronounced an interpretation of the meaning of BL104 (“the Interpretation”). The Interpretation is

binding on all Hong Kong courts and the courts should give effect to it<sup>1</sup>.

8. Relevant for the present purposes, the meaning of BL104 under the Interpretation essentially provides that an elected LegCo member when assuming office must take the LegCo Oath as prescribed under the ODO (being the laws of HKSAR) solemnly and sincerely and in compliance with it both in substance and in form. If he *intentionally* declines to so take the LegCo Oath, whether in form or in substance, the oath taken is invalid and he shall be disqualified from assuming the Office.
9. On the other hand, the Court also accepts CE/SJ's submissions that the laws of Hong Kong as set out in relevant provisions of the ODO, when properly construed independent of the Interpretation, carry effectively the same meanings and legal effects as those of the above meaning of BL104.
10. Adopting a purposive construction and common law<sup>2</sup>, the Court holds that sections 16, 19 and 21 of the ODO have the following meanings and effects<sup>3</sup>:
  - (a) These relevant provisions in the ODO reflect and underline the requirements under BL104;
  - (b) A LegCo member must take the oath as soon as possible after being elected and *before* his assumption of office;
  - (c) A LegCo member must take the oath in the same form, manner and substance of the LegCo Oath as prescribed under the ODO;
  - (d) An oath *must* be taken solemnly and sincerely and is a form of attestation by which a person signifies that he is bound in conscience to perform an act *faithfully* and *truthfully*. An oath of allegiance or loyalty means that a person promises and binds

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<sup>1</sup> See: *Director of Immigration v. Chong Fung Yuen* (2001) 4 HKCFAR 211

<sup>2</sup> Having referred to authorities such as *Leung Kwok Hung v. Clerk to the Legislative Council* (HCAL 112/2005, 6 October 2004, per Hartmann J), *Haridasan Palayil v. The Speaker, Kerala Legislative Assembly* AIR 2003 Ker 328, 2003 (3) KLT 119, and *AG v. Bradlaugh* (1885) 14 QBD 667

<sup>3</sup> These are in any event *not* disputed or challenged in a material way by the President, Mr. Leung and/or Ms. Yau.

himself to bear true allegiance to a particular sovereign and government and to support its constitution. In determining the validity of the taking of an oath, the essential question to be answered is whether it can be seen objectively that the person taking the oath faithfully and truthfully commits himself or herself to uphold and abide by the obligations set out in the oath.

- (e) For the purposes of the ODO, the word “decline” means an intentional act to refuse or object to the taking of the oath as prescribed by law; and the word “neglect” means a deliberate or willful (in contrast to an inadvertent or accidental) omission to perform the duty to take the oath as prescribed.
  - (f) If a LegCo member “declines or neglects” to take the LegCo Oath whether in form or in substance, by the operation of law, he must (“shall”) be regarded as having vacated his office if he has entered upon it, or be disqualified from entering his office if he has not done so.
11. The Court agrees with the CE/SJ that the undisputed and unchallenged evidence in the present cases shows that (a) Mr. Leung and Ms. Yau had been requested to take the LegCo Oath on 12 October 2016, (b) the manner and way in which they purported to take the oaths show objectively and clearly that they did not truthfully and faithfully intend to commit themselves to uphold and abide by the two obligations under the LegCo Oath and BL104, as they objectively clearly did not recognize the principle of “one country, two systems” and the importance of “one country” under that principle, which (as well recognized by the Court of Final Appeal<sup>4</sup>) is the foundation for the establishment of the Hong Kong Special Administrative Region under the People’s Republic of China and of the Hong Kong’s constitutional model under the Basic Law.
12. In the premises, Mr. Leung and Ms. Yau therefore objectively manifested a clear conduct to refuse (thus “decline”) to take the LegCo Oath, whether in form or in substance, as required under

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<sup>4</sup> See *Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4, and *HKSAR v. Ng Kung Siu* (1999) 2 HKCFAR 442

BL104 and the ODO. It is again noted that neither Mr. Leung nor Ms. Yau has suggested otherwise by way of submissions or evidence.

13. In such circumstances, s.21 of ODO should apply and operate as a matter of law to disqualify Mr. Leung and Ms. Yau from continuing to be a LegCo member.
14. The Court rejects the opposition ground based on the non-intervention principle. The principle has its origin in common law based on the doctrine of separation of powers as practised in England, where there is the principle of Parliamentary supremacy and the absence of a written constitution. The extent and limit of this principle's application in another jurisdiction must be subject to and considered in the context of that other jurisdiction, in particular where there is a written constitution.
15. In Hong Kong, there is a written mini-constitution of the Basic Law and the Basic Law is supreme instead of the legislature (see: *Cheng Kar Shun v. Li Fung Ying*<sup>5</sup>). The scope and limit of the non-intervention principle as applied in Hong Kong has since been laid down by the CFA in *Leung Kwok Hung v. The President of the Legislative Council (No. 1)*<sup>6</sup>. Deriving from the CFA's judgment: (1) the principle of non-intervention as applied in Hong Kong is necessarily subject to the constitutional requirements of the Basic Law; (2) where the Basic Law confers law-making powers and functions on the legislature, the court has powers to determine whether the legislature has a particular power, privilege or immunity; and (3) what can be properly regarded as the "internal business" or "internal process" of the LegCo must be viewed under the above *caveat*.
16. Applying the above principles, the non-intervention principle as applied in Hong Kong therefore does not prohibit the court from determining the questions of (a) whether an oath taken by the LegCo member complies with the important constitutional requirements

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<sup>5</sup> [2011] 2 HKLRD 555

<sup>6</sup> (2014) 17 HKCFAR 689

under BL104 (and hence also the legal requirements under the ODO), and (b) whether, in failing to so comply with these constitutional and legal requirements, the LegCo member shall be disqualified from the Office under BL104 and/or section 21 of the ODO.

17. In this respect, neither sections 19 and 21 of the ODO nor paragraph (4) of the Interpretation provides expressly that the decision of those administering the oath as to whether an oath is in compliance with BL104 and the laws of Hong Kong is *final*. Accordingly, although the Clerk or the President has an incidental duty and power to determine whether the oath taken is in compliance with the law as and when circumstances practically require, the Court holds that it does have power to finally adjudicate the matters under challenged in the present cases.
18. The court also rejects the ground based on LegCo members' immunity. The Court holds that, on proper construction, the protection provided under BL77 and sections 3 and 4 of the LCPPO only covers statements and speeches made by a LegCo member in the course of official debate on the floor of the LegCo when exercising his powers and discharging his functions as a LegCo member. The words expressed by a LegCo member in taking an oath cannot be properly regarded as falling within these meanings nor could they be regarded as expressed in the course of the exercise of a LegCo member's power or carrying out his functions since he has not yet validly assumed the Office.
19. The Court also holds *alternatively* that, in any event, the court must have jurisdiction as expressly granted by section 73 of the Legislative Council Ordinance (Cap 542) ("LCO") to adjudicate the underlying question of whether a LegCo member has been disqualified when proceedings are brought under that provision against a person purporting to act as a LegCo member when disqualified. The Court rejects Mr. Leung and Ms. Yau's submissions that section 73 of the LCO does not intend to cover the circumstances where a member has been disqualified under section 21 of the ODO.

20. The Court further holds that the decision of the President to allow Mr. Leung and Ms. Yau to re-administer the oath in substance and in effect implies that Mr. Leung and Ms. Yau did not decline or neglect to take the LegCo Oath on 12 October. Hence, the decision of the President has a substantive effect and is amenable to judicial review and the President was properly joined as a party.
21. As regards the *locus* of CE, the Court holds that, since under Article 48 of the Basic Law, the CE has the constitutional responsibility for the implementation of the Basic Law and other laws in Hong Kong, the CE therefore does have *locus* to bring either the judicial review or HCMP 2819/2016. On the other hand, in so far as proceedings concerning section 73 of the LCO are concerned, the Court accepts that the CE in his capacity as the CE has no *locus* to bring such proceedings against Mr. Leung and Ms. Yau. However, this does not materially affect these proceedings, as the SJ as one of the plaintiffs is a proper party to bring the section 73 proceedings.
22. Finally, Mr. Leung and Ms. Yau contend that the Court is not bound by the Interpretation since, properly construed under common law, the Interpretation amounts to amendments of BL104 instead of an interpretation as understood under BL158. The Court does not find this submission to be relevant to the present cases as it agrees with the submissions of CE/SJ that, with or without the Interpretation, the Court would reach the same above conclusion. The Court therefore does not see the need to determine on this question.
23. Upon the President's request, the Court further clarifies that Mr. Leung and Ms. Yau have vacated their office since 12 October 2016.

HCAL 185/2016

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST  
NO 185 OF 2016**

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BETWEEN

CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION 1<sup>st</sup> Applicant

SECRETARY FOR JUSTICE 2<sup>nd</sup> Applicant

and

THE PRESIDENT OF THE LEGISLATIVE COUNCIL Respondent

and

SIXTUS LEUNG CHUNG HANG 1<sup>st</sup> Interested Party

YAU WAI CHING 2<sup>nd</sup> Interested Party

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AND

HCMP 2819/2016

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
MISCELLANEOUS PROCEEDINGS NO 2819 OF 2016**

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BETWEEN

THE CHIEF EXECUTIVE OF THE HKSAR 1<sup>st</sup> Plaintiff

SECRETARY FOR JUSTICE 2<sup>nd</sup> Plaintiff

and

YAU WAI CHING 1<sup>st</sup> Defendant

SIXTUS LEUNG CHUNG HANG 2<sup>nd</sup> Defendant

PRESIDENT OF THE LEGISLATIVE COUNCIL 3<sup>rd</sup> Defendant

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(heard together)

Before: Hon Au J in Court

Date of Hearing: 3 November 2016

Date of Judgment: 15 November 2016

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J U D G M E N T

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A. INTRODUCTION

1. A member of the Legislative Council (“LegCo”) is constitutionally mandated under Article 104 (“BL104”) of the Basic Law (“BL”), upon assuming office, to take an oath to swear to uphold the BL and to swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.

2. For the purpose of BL104, a LegCo member is required under section 19 of the Oaths and Declarations Ordinance (Cap 11) (“ODO”) to take the Legislative Council Oath (“LegCo Oath”) in the form *as prescribed* under section 16(d) and Schedule 2 thereof. Part IV of Schedule 2 prescribes the form of the LegCo Oath as follows:

“THE LEGISLATIVE COUNCIL OATH

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.

(name of person making the oath)” (*emphasis added*)

3. Section 21 of the ODO further provides that if a LegCo member “*declines or neglects*” to take the LegCo Oath “*when requested*” to do so, he “*shall*” (meaning he must) vacate the office if he has already entered on it, or he “*shall*” be disqualified from entering on the office if he has not.

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4. In the present cases, Mr Leung and Ms Yau were elected in their respective constituencies in the general election held in September this year to be a LegCo member. As mandated under BL104 and section 19 of the ODO, they were asked to take the LegCo Oath before the Clerk to the LegCo (“the Clerk”) at the first meeting of the LegCo on 12 October 2016.

5. There is no dispute that they purported to take the LegCo Oath before the Clerk on that occasion in the following way and manner:

(1) Each of them used the term “*Hong Kong nation*” right at the outset of oath-taking:

(a) Mr Leung declared in open public that he shall *keep guard over* the interest of the *Hong Kong nation*;

(b) Ms Yau declared in open public that she will be *faithful and bear true allegiance to the Hong Kong nation*.

(2) The Clerk interrupted each of them and said he could not administer their respective oath-taking as that was not taken in compliance with the LegCo Oath.

(3) Each of them then purported to take the oath again.

(4) In doing so, each of them *mis*-pronounced the word “China” consecutively for three times, as “*Geen-na*” or “*Sheen-na*” (“支那”).

(5) Further, Ms Yau *mis*-pronounced “People’s Republic of China” as “the People’s *Refucking* of Sheen-na” consecutively for three times.

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B (6) Each of them also intentionally unfolded and displayed a  
C blue banner bearing the words “HONG KONG IS NOT  
D CHINA”.

E (7) Mr Leung adopted a contrast in the tone of his voice between  
F his initial words before the interjection by the Clerk and his  
G subsequent words after such interjection (which shows a  
H dismissive and not serious attitude). He further crossed the  
I index and middle fingers of his right hand over the Bible in  
J seeking to take the oath again after the initial interjection by  
K the Clerk.

L (8) Ms Yau emphasized “Hong Kong” with a distinctly loud  
M tone of voice but adopted a lower voice and hurried manner  
N for the rest of the oath.

O 6. Moreover, Mr Leung said to the press immediately after the  
P LegCo meeting on 12 October 2016 as follows:

Q “今日我哋 [referring to himself and Ms Yau] 成個誓詞嗰個部  
R 份我哋有，我自己啦，我有 3 part 係做咗啦，呀，有個手勢  
S 啦，有一個係呀披肩咁樣嘅野啦，亦都有一個說法，咁而  
T 3樣野係一個組合嚟嘅”。

U 7. In light of the above undisputed way and manner in which  
V Mr Leung and Ms Yau purported to take the oath, on 18 October 2016,  
the President of the LegCo (“the President”) decided (on legal advice)  
that the oath purported to be taken by each of them on that day is invalid.  
However, the President then further decided (also on legal advice) to  
allow each of them to re-take the LegCo Oath at the next LegCo meeting  
if they made a written request to do so. I would call this second part of  
the decision for convenience as “the President’s Decision”.

8. Mr Leung and Ms Yau later on that day did make a written request to re-take the oath.

9. The Chief Executive of the HKSAR (“the CE”) and the Secretary for Justice (“the SJ”) (collectively, “the applicants”) however contend that Mr Leung and Ms Yau already declined or neglected to take the LegCo Oath on 12 October 2016. As a result, under section 21 of the ODO, as a matter of law, they must be regarded as having vacated their office of a LegCo member or alternatively be disqualified from entering on it. On the same basis, the CE and the SJ also say that the President misdirected himself on the law in making the President’s Decision as there is no question that Mr Leung and Ms Yau could re-take the oath again after they have so vacated the office or having been disqualified from entering on it.

10. Thus, on the same day of the President’s Decision (ie, 18 October 2016), the CE and the SJ commenced the present action under HCMP 2819/2016 against Ms Yau, Mr Leung and the President; and this judicial review against the President (joining Mr Leung and Ms Yau as interested parties).<sup>1</sup>

11. In HCMP 2819/2016, the applicants seek against Ms Yau and Mr Leung (respectively as the 1<sup>st</sup> and 2<sup>nd</sup> defendants) the principal reliefs of (a) a declaration that the oaths taken by them on 12 October

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<sup>1</sup> The applicants also sought on the evening of 18 October 2016 urgent interim injunctions to restrain the President from allowing Mr Leung and Ms Yau to proceed to re-take the oath, and to also restrain them from proceeding to do so. I refused to grant the interim injunctions after hearing the parties for the reasons now recorded in the written decision dated 18 October 2016.

2016 contravened BL104 and the relevant provisions of the ODO, and are invalid and void as the LegCo Oath as required under the law; (b) a declaration that they are disqualified from assuming or entering on the office of a LegCo member, or have vacated that office, and are not entitled to act as a LegCo member; and (c) injunctions to restrain them from acting or claiming to be entitled to act as a LegCo member.

12. In the judicial review, the applicants seek against the President the principal reliefs of (a) a declaration that the President has no power to re-administer or allow for re-administration of any oaths to be taken by Mr Leung and Ms Yau as they are disqualified from assuming or entering on the office of a LegCo member or have already vacated it; (b) a declaration that the office of member of the LegCo previously occupied by each of Mr Leung and Ms Yau is now vacant; (c) an order of *certiorari* to quash the President's Decision; and (d) an injunction to restrain the President from administering or allowing to be administered the making of oaths of Mr Leung and Ms Yau under section 19 of the ODO.

13. It is important to note that, notwithstanding the CE and the SJ's above forefront contentions made in these applications, Mr Leung and Ms Yau have *not* put forward any positive case by way of submissions (primary or alternative) or evidence that the oaths they purported to take on 12 October 2016 complied with BL104 or the requirements under the ODO. They also have *not* put forward any positive arguments by way of submissions or evidence that they did not "decline or neglect" to take the LegCo Oath when requested to do so on that day.

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14. Instead, Mr Leung and Ms Yau oppose these applications on two principal grounds. They are that (a) matters concerning the oath taking by a LegCo member and the validity thereof are “internal business” of the LegCo and, under the non-intervention principle in common law, the court should and could not intervene in these matters or any decisions made by the President or the Clerk relating to them; and (b) the words spoken in relation to the “oaths” taken by Mr Leung and Ms Yau are protected by the immunity provided under BL77 and sections 3 and 4 of the Legislative Council (Powers and Privileges) Ordinance (Cap 382) (“LCPPO”), and they are therefore immune from suit, including the present ones. Mr Leung and Ms Yau have also raised some other ancillary arguments in aid of the above principal grounds, including an objection that the CE has no *locus* to bring these proceedings. I would elaborate on all these grounds and arguments in greater detail later.

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15. Insofar as the President is concerned, his only objection to these proceedings is that he should *not* be joined as a party. It is submitted that he has not made any substantive decision as to whether Mr Leung and Ms Yau have declined or neglected to take the LegCo Oath, and the President’s Decision is only a procedural decision in nature. There are thus no extant substantive decisions that are amenable to judicial review. The judicial review should therefore not be brought against him. Further, in relation to HCMP 2819/2016, it is said that there are no suggestions that the President would *not* abide by the ruling of this court if it decides to grant the reliefs as sought against Mr Leung and Ms Yau. In that case, there is also no basis for the CE and the SJ to join the President in this action.

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16. Before I deal with all these grounds of opposition, it is important for me to first look at the relevant constitutional and statutory frameworks and their proper meanings which provide for the legal context mandating a LegCo member to take the LegCo Oath and as to when he would be disqualified in failing to do so.

*B. THE RELEVANT CONSTITUTIONAL AND STATUTORY FRAMEWORKS*

*B1. The constitutional framework*

17. The BL is the written mini-constitution for Hong Kong. BL104 provides as follows:

***“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.”*** (emphasis added)

18. It is thus a constitutional requirement under BL104 that LegCo members (as well as the CE, principal officials, Executive Council members and judges of the Hong Kong Special Administrative Region) are mandatorily required to take an oath *when assuming office*.

19. On 7 November 2016, the Standing Committee of the National People's Congress of the People's Republic of China (“NPCSC”) in the exercise of its power under BL158(1) pronounced an

interpretation (“the Interpretation”) of the meaning of BL104. The Interpretation is as follows:

- (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.*

20. Although the courts in Hong Kong are authorised by BL158(2) and (3) to interpret provisions of the BL in adjudicating cases, the NPCSC has the final power of interpretation of the BL as provided under BL158(1) and (3) and Article 67(4) of the Constitution of the People's Republic of China. An interpretation made by the NPCSC is binding on all the courts of Hong Kong, and the courts are under a duty to follow it. This has been well recognised by the Court of Final Appeal in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, where Li CJ said at pp 222G and H as follows:

“...where the [NPCSC] has made an interpretation of the [BL] pursuant to its power under art 67(4) of the Chinese Constitution and art 158 of the Basic Law, the courts in Hong Kong are under a duty to follow it.

...

That power of the [NPCSC] extends to every provision in the Basic Law and is not limited to the excluded provisions referred to in art 158(3).”

21. In the premises, the Interpretation is binding on this court. In this judgment, unless otherwise stated, whenever I refer to the meaning of BL104, it is a reference to the meaning as set out in the Interpretation.

22. Hence, essentially for the present purposes, under BL104, a LegCo member when assuming office must take the LegCo Oath as prescribed under the ODO (being the laws of the Hong Kong Special Administrative Region).<sup>2</sup> He shall take it solemnly and sincerely and in compliance with the LegCo Oath both in substance and in form. If he *intentionally* declines or fails to so take the LegCo Oath, whether in form or in substance, the oath taken is invalid and he shall be disqualified from assuming the office.

23. On the other hand, as submitted by Mr Yu SC for the CE and the SJ, *independent of the Interpretation*, the laws of Hong Kong as set out in the relevant provisions ODO, when properly construed, indeed carry effectively the same meanings and legal effects as these essential meanings of BL104. This is what I would turn to next.

*B2. The ODO*

24. Sections 16 and 19 of the ODO provide as follows:

**“Section: 16 Forms of Oaths**

The Oaths referred to in this Ordinance as-

...

(d) the Legislative Council Oath;

...

*shall* be in the respective forms set out in Schedule 2.

...

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<sup>2</sup> It has been held in *Leung Kwok Hung v Clerk to the Legislative Council* (HCAL 112/2004, 6 October 2004, Hartmann J) at paragraph 22 that the phrase “in accordance with the law” under BL104 refers to the legal requirements provided in the relevant provisions of the ODO.

Section: 19 **Oath of Legislative Councillors**

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.” (*emphasis added*)

25. Section 21 of the ODO further provides for the legal consequence of non-compliance by a person who is requested to take an oath as required under the ODO as follows:

“Section: 21 **Consequence of non-compliance**

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.” (*emphasis added*)

26. The construction of the meaning of these provisions of the ODO is for this court, and under common law the court should adopt a purposive construction, read in their proper context of the whole statute.<sup>3</sup>

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<sup>3</sup> See: *T v Commissioner of Police* (2014) 17 HKCFAR 593, at paragraphs 4 and 48; *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45 at paragraphs 75 - 77; *Town Planning Board v Society for the Protection of the Harbour Ltd* (2004) 7 HKCFAR 1 at 131-J.

27. In this respect, as rightly submitted by Mr Yu, on a proper purposive construction of sections 16, 19 and 21 of the ODO, they have the following meanings and legal effects in relation to the taking of the LegCo Oath by a LegCo member.

28. First, the relevant provisions in the ODO are to reflect and underline the constitutional requirements in BL104. If a LegCo member swears his oath in a manner or form that is inconsistent with the requirements set out in the ODO, his oath offends the constitutional requirements under BL104: *Leung Kwok Hung, supra*, at paragraph 22, *per* Hartmann J.

29. Second, a LegCo member has to take the LegCo Oath “as soon as possible” after the commencement of his term of office, and that must be done *before he assumes* his office. This is borne out by the plain and express words of BL104 and section 16 of the ODO, and supported by *Leung Kwok Hung, supra*, at paragraph 22.

30. Third, a LegCo member *must* take the oath in the same form, manner *and substance* as the LegCo Oath as expressly prescribed under section 19 and Schedule 2 of the ODO. It is not any oath that may be devised by a LegCo member provided that the “oath” meets the two obligations set out in BL104: *Leung Kwok Hung, supra*, at paragraphs 24 - 27. *A fortiori*, if the “oath” taken does not even meet any of the two obligations set out in BL104, it is not a valid oath.

31. Fourth, an oath is a solemn declaration. In its original form it was invariably a promise to one's deity. The ODO does not allow for any real difference in the form and substance of the oath itself as to how a person wishes to take it. Hence, a LegCo member who seeks to alter the form, manner or substance of the oath when taking it will offend BL104 and therefore be unlawful and of no effect: *Leung Kwok Hung, supra*, paragraphs 36 - 40.

32. An oath *must* be taken solemnly and sincerely is consistent with the trite position under common law that taking an oath is a form of attestation by which a person signifies that he is bound in conscience to perform an act *faithfully and truthfully*. Similarly an affirmation in lieu of oath binds a person to live by what he undertakes. In particular, an oath of allegiance or loyalty means that a person promises and binds himself to bear true allegiance to a particular sovereign and government and to support its constitution.<sup>4</sup> The obvious purpose is to ensure the person concerned (such as a member of legislature) makes a commitment to live by the constitutional process; he has to owe allegiance to the constitution, and he has to uphold the sovereignty and integrity for the country. It is *not* a mere formality or empty form of words. The purpose of prescribing the form is to induce a sense of subordination to the constitution in men of all faiths. It has to be followed "in letter and spirit". See: *Haridasan Palayil v The Speaker, Kerala Legislative Assembly* AIR 2003 Ker 328, 2003 (3) KLT 119 at paragraphs 21, 24, 30

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<sup>4</sup> As submitted by the CE and the SJ, similar constitutional requirement to swear an oath of allegiance to the sovereign and/or the constitution exists in other jurisdictions like the, Australia, Canada and New Zealand. In the UK, members of both Houses of Parliament are required by section 3 of the Parliamentary Oaths Act 1866 to swear an oath of allegiance to the Queen.

and 31; *AG v Bradlaugh* (1885) 14 QBD 667 at 696 - 698, *per* Brett MR, at 707 - 709, *per* Cotton LJ, and at 716 - 717, *per* Lindley LJ.

33. In the premises, the fundamental and essential question to be answered in determining the validity of the taking of an oath is whether it can be seen objectively that the person taking the oath faithfully and truthfully commits and binds himself or herself to uphold and abide by the obligations set out in the oath.

34. Fifth, read together with the above provisions and context, section 21 of the ODO when properly construed means that if a LegCo member “declines or neglects” to take the LegCo Oath *whether in form or in substance* when he is requested to do so, he “shall” (thus must) vacate his office if he has entered upon it, or *must* be disqualified from entering upon his office if he has not done so. In other words, under the clear and express words of section 21 of the ODO, once it is shown that a LegCo member declines or neglects to take the LegCo Oath when requested to do so, he can no longer continue to be qualified as a LegCo member and act as such; in which case, there is no question that he could seek to take the oath again.

35. In this respect:

- (1) The ordinary and natural meaning of the word “decline” is to refuse or object.<sup>5</sup> This is consistent with the natural meaning of its Chinese translation “拒絕”. Read in the context of section 21 of the ODO, which entails the serious

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<sup>5</sup> See: *The New Shorter Oxford Dictionary*.

consequence of disqualification, the word refers to an intentional act to refuse or object to the taking of the oath as prescribed by law. As submitted by Mr Yu, such an act would also include conduct which objectively manifests itself an intentional refusal.

(2) The word “neglect” has been defined as “an omission to perform a duty which the person owing the duty is able to perform”.<sup>6</sup> Again, when properly read in the context of section 21 of the ODO, it should mean a deliberate or wilful (in contrast to an inadvertent or accidental) omission to perform the duty to take the oath as prescribed when requested to do so.

36. The above proper meanings and effects of the relevant ODO provisions are reached by application of common law principles of construction and supported by authorities, independent of the Interpretation. They are in any event *not* disputed or challenged in any material way by counsel for the President, Mr Leung and Ms Yau whether by way of primary or any alternative submissions.

*C. WHETHER MR LEUNG AND MS YAU DECLINED TO TAKE THE LEGCO OATH WHEN REQUESTED TO DO SO OR AS REQUIRED UNDER BL104*

37. As mentioned above, Mr Leung and Ms Yau in these proceedings have not put forward any positive arguments that they did not decline or neglect to take the LegCo Oath when requested to do so on 12 October 2016.

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<sup>6</sup> See: *Jowitt's Dictionary of English Law (4<sup>th</sup> Edn)*.

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38. The applicants submit that objectively viewed at, it must be clear and beyond debate that Mr Leung and Ms Yau have declined to take the LegCo Oath when requested to do so. I agree with the applicants as that is incapable of dispute in light of the following.

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39. The objective and undisputed evidence shows that Mr Leung and Ms Yau had been duly requested to take the LegCo Oath at the first meeting of the LegCo on 12 October 2016. They had also been reminded repeatedly that they must take the oath in accordance with the form as prescribed by the ODO.<sup>7</sup>

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40. Further, objectively viewed against the undisputed acts and manner in how Mr Leung and Ms Yau purported to take the oath on 12 October 2016 as summarised in paragraphs 5 and 6 above, they must be regarded as having manifested an intentional refusal (and thus their “decline”) to take the LegCo Oath, whether in form or in substance. My reasons are these.

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41. It is plain that, in referring to “Hong Kong nation” when they first sought to take the oath, and later in mis-pronouncing the words “Republic” and “China”, they did not take the oath in the same form of

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<sup>7</sup> See: the circular paper issued by the Clerk to the LegCo on 20 September 2016; circular paper issued by the Clerk dated 7 October 2016 reminding members to take the oath in the form and manner as prescribed by ODO; circular paper dated 11 October 2016 issued by the Clerk once again reminding members to take the LegCo Oath in the form and manner prescribed by the ODO; on 12 October 2016, they were requested by the Clerk to walk up to the table at the centre of the LegCo Chamber to take the Legislative Council Oath in accordance with the pre-determined order (see Affirmation of Wong Hwa Yih filed in HCMP 2819/2016 at paragraph 7); while Mr Leung and Ms Yau were at the centre table, the Clerk orally requested and reminded them to take the Legislative Council Oath in accordance with the statutory form of words.

A the LegCo Oath as prescribed by law, and they did that intentionally.  
B Mr Leung and Ms Yau have *not* suggested otherwise.  
C

D 42. Further, as submitted by Mr Yu, they also did not objectively  
E intend to take the LegCo Oath in substance as they did not seriously,  
F faithfully and truthfully intend to abide by a declaration to pledge  
G allegiance to the Hong Kong Special Administrative Region of the  
H People’s Republic of China and to uphold the BL. It is so as in adopting  
I the way and manner they purported to take oath, they expressed the  
J position that they did not recognise the fundamental constitutional model  
K of “one country, two systems”, which underpins and underlines the BL,  
L and under which the Hong Kong Special Administrative Region was  
M established.

N 43. As recognised by the Court of Final Appeal in *Ng Ka Ling v*  
O *Director of Immigration* (1999) 2 HKCFAR 4 at 28G-H, the purpose of  
P the BL is to establish the Hong Kong Special Administrative Region  
Q being an inalienable part of the People’s Republic of China under the  
R principle of “one country, two systems” in accordance with China’s basic  
S policies regarding Hong Kong as set out and elaborated in the Joint  
T Declaration. The Court of Final Appeal also recognises the fundamental  
U importance of the “one country” in this model as observed by Li CJ in  
V *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, at 460C-E as follows:

“... In these circumstances, the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests which are within the concept of public order (*ordre public*). As I have pointed out, the national flag is the unique symbol of the one country, the People’s Republic of China, and the regional flag is the unique symbol of the Hong Kong Special

Administrative Region as an inalienable part of the People's Republic of China under the principle of 'one country, two systems'. These legitimate interests form part of the general welfare and the interests of the collectivity as a whole."

44. Indeed, as emphasized by Mr Yu, the theme and policy of "one country, two systems" runs throughout the BL, as reflected in particular in the following articles:

(1) The Preamble states that Hong Kong has been part of the territory of China since ancient times. The resumption of the exercise of sovereignty by China over Hong Kong with effect from 1 July 1997 fulfils the long cherished common aspiration of the Chinese people for the recovery of Hong Kong. Upholding national unity and territorial integrity, and maintaining the prosperity and stability of Hong Kong, the People's Republic of China has decided that upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established and that under the principle of "one country, two systems", the socialist system and policies will not be practiced in Hong Kong. The BL was enacted by the NPCSC in accordance with the Constitution of the People's Republic of China.

(2) The Preamble, BL1 and 12 all state that the Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China. It shall be a local administrative region of the People's Republic of China which shall enjoy a high degree of autonomy and come directly under the Central People's Government ("CPG").

(3) BL 16, 17 and 19 provide the constitutional foundation for Hong Kong Special Administrative Regions to enjoy executive, legislative and judicial power; and BL66 provides the constitutional foundation that the LegCo of the Hong Kong Special Administrative Region shall be the legislature of the Region.

(4) The importance of territorial integrity is also underscored by BL23, which imposes a constitutional obligation on the Hong Kong Special Administrative Region to enact laws on its own to, among others, prohibit secession, sedition, subversion against the CPG.

45. Bearing the above in mind, again as rightly submitted by Mr Yu, the manner and way in which Mr Leung and Ms Yau purported to take the LegCo Oath on 12 October 2016 demonstrate objectively and clearly their intention not to recognise this fundamental constitutional model of “one country, two systems” and the importance under this model of the “one country”:

(1) In the case of Ms Yau, she used an “*f*” word to replace the word “*Republic*”. The inevitable inference is the contempt she showed for the People’s Republic of China as the “*one country*” in the “*one country, two systems*” concept which is fundamental to the BL and her repudiation of any allegiance to the Hong Kong Special Administrative Region as an inalienable part of the People’s Republic of China. She has not sought to suggest otherwise in these proceedings.

(2) The deliberate *mis*-pronunciation of China as “Geen-na” or “Sheen-Na” (“支那”) and the use of the banner bearing

“Hong Kong is NOT China” by both Mr Leung and Ms Yau assumes particular significance:

(a) The unchallenged evidence is that the meaning of “支那” has a historical background and is widely or commonly understood to carry a derogatory, disparaging meaning and is used in mockery when referring to China and the People’s Republic of China; was used by the Japanese to refer to China during the Japanese invasion; and was used to mock China in an offensive way.<sup>8</sup>

(b) By seeking to make a mockery of China and the People’s Republic of China in a derogatory and humiliating manner, it is objectively plain that Mr Leung and Ms Yau refused to pledge allegiance to the Hong Kong Special Administrative Region as an inalienable part of the People’s Republic of China.

(c) The unchallenged evidence is also that the term “支那人” is commonly used by anti-Chinese organizations such as “台獨”, “港獨” groups to refer derogatorily or disparagingly to Chinese people.<sup>9</sup> Mr Leung and Ms Yau thus conveyed the message that they advocated independence of Hong Kong (港獨), as exemplified in their reference and pledge to the “*Hong Kong nation*”.

(d) The unchallenged evidence is further that “*Hong Kong is NOT China*” also has reference to the use of the

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<sup>8</sup> See: paragraphs 11 - 12 of the Affirmation of Wong Hwa Yih in HCMP 2819/2016, paragraphs 10 - 11 of the Affirmation of Wong Hwa Yih in HCAL 185/2016 and paragraph 20 of the 2<sup>nd</sup> Affirmation of Rosanna Law in HCMP 2819/2016.

<sup>9</sup> See: paragraph 13 of the Affirmation of Wong Hwa Yih in HCMP 2819/2016 and paragraph 12 of the Affirmation of Wong Hwa Yih in HCAL 185/2016

same banner at a local football match between Hong Kong and China held on 17 November 2015, which expresses the meaning, in context, that the Hong Kong Special Administrative Region is not part of the People's Republic of China.<sup>10</sup>

(3) The expression “支那” was uttered three times, by each of Mr Leung and Ms Yau. It cannot be the result of mere inadvertence, ignorance or mistake. Objectively looked at, and coupled with the absence of any explanations (let alone any credible explanations) by them, it was part of the wilful and deliberate attempt by both of them (sharing the same political affiliation) to insult China and the People's Republic of China, advocate the political message of “港獨” and make a mockery of the contents of the LegCo Oath, by praying in aid the derogatory meaning of the expression “支那” commonly subscribed to it by the general public and the overseas Chinese community.<sup>11</sup> Mr Leung and Ms Yau have *not* sought to suggest otherwise in these proceedings.

(4) Mr Leung in crossing his index and middle fingers with his hand placed over the Bible in purporting to take the oath must objectively be regarded as intending to send the message of not taking the oath seriously or with a clear conscience, and that he was intending to tell a lie or to signify that the oath he was making should be invalidated.<sup>12</sup> Mr Leung has not suggested otherwise.

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<sup>10</sup> See: paragraphs 14 - 19 of Affirmation of Rosanna Law.

<sup>11</sup> See: a public statement (“嚴正聲明”) jointly published by a group of scholars and workers in the field of history, culture and education in various newspapers on 18 October 2016, exhibited as “WHY-7” to the Affirmation of Wong Hwa Yih in HCMP 2819/2016.

<sup>12</sup> See: paragraphs 8 - 10 of the Affirmation of Wong Hwa Yih in HCMP 2819/2016; paragraphs 7 - 9 of the Affirmation of Wong Hwa Yih in HCAL 185/2016.

(5) It is also obvious that Mr Leung and Ms Yau acted in concert and did so *deliberately*: see paragraphs 6 and 39 above.

(6) In the midst of repeated reminders, the manner in which Mr Leung and Ms Yau took their oath demonstrates that they not only refused and deliberately failed to take the LegCo Oath as an oath, with due solemnities of the mode of taking an oath,<sup>13</sup> but also manifested a clear intention *not* to be bound in conscience to perform faithfully and truthfully the oath *as required by BL104 and the ODO*. Again, Mr Leung and Ms Yau have not sought to suggest otherwise in these proceedings.

46. In the circumstances, as submitted by the applicants, Mr Leung and Ms Yau and each of them manifestly refused (and thus declined) to solemnly, sincerely and truly bind themselves to uphold the BL or bear true allegiance to the Hong Kong Special Administrative Region of the People's Republic of China. Alternatively, at the least, they must have wilfully omitted (and hence neglected) to do so.

47. Section 21 of the ODO should therefore apply and operate to disqualify Mr Leung and Ms Yau from continuing to be a LegCo member, and the court should proceed to declare as such.

48. However, Mr Pun SC and Mr Dykes SC respectively raise a number of grounds for Mr Leung and Ms Yau to submit that the court should not and cannot intervene in these matters. I will now look at these grounds in turn.

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<sup>13</sup> See also *AG v Bradlaugh*, *supra*, at 701 - 702, 719.

D. MR LEUNG AND MS YAU'S GROUNDS OF OPPOSITION

D1. *The court should not intervene in these cases under the non-intervention principle*

49. Under this ground, Mr Pun argues that the taking of the LegCo Oath by LegCo members and the President's Decision to allow Mr Leung and Ms Yau to take the oath again belong to the "internal business" of the LegCo. In the premises, under the established non-intervention principle, the court should and could not intervene in them. In support of these submissions, Mr Pun relies heavily and principally on the authority of *Bradlaugh v Gosset* (1884) 12 QBD 271.

50. With respect, I am unable to agree with Mr Pun for the following reasons.

51. The non-intervention principle has its origin in common law and is premised on the doctrine of separation of powers in England, where there is no written constitution, and where there is supremacy of the Parliament. However, the scope of this principle as applied in a different jurisdiction must be understood in and limited to the proper context of that jurisdiction, in particular where there is a written constitution.<sup>14</sup> Thus, in present day Hong Kong, where there is the

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<sup>14</sup> See also Sir Anthony Mason's extra-judicial views in "The place of comparative law in developing the jurisprudence on the rule of law and human rights in Hong Kong" (2007) HKLJ299 at 304 - 305, where it is expressed that, given the obvious differences in the meaning and constitutional model of the doctrine of separation of powers between UK and other common law jurisdictions with a written constitution, such as Australia, Canada and the United States, "judicial decisions on the separation of powers need to be treated with great care before they can be imported from one jurisdiction to another. This proposition has significance for Hong Kong... It would not follow that the Basic Law, when construed in the light of its context and the preservation of the English common law by Article 8 of the Basic Law, necessarily mandates a separation of powers that confirms either to the United States or Australian model."

written constitution of the BL and where the BL is supreme instead of the legislature, the court does have jurisdiction under the BL to determine, by declaratory relief, questions such as whether the internal Rules of Procedure enacted by the LegCo (which would be regarded as “the internal matters” of the Parliament under the non-intervention principle in the UK) are consistent with the BL. This has been explained by A Cheung J (as the learned CJHC then was) in *Cheng Kar Shun v Li Fung Yung* [2011] 2 HKLRD 555 at paragraph 217 as follows:

“217. After 1997, in *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387, a case concerning the prohibition of members of the Legislative Council from introducing bills to the Legislative Council which have a charging effect under art.74 of the Basic Law, Hartmann J (as he then was) noted that being subordinate to the Basic Law, the Legislative Council must act in accordance with that law. His Lordship pointed out that in the United Kingdom, Parliament is supreme. The courts there 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. ***However, in Hong Kong, the Basic Law is supreme. But subject to that, the Basic Law recognises the Legislative Council to be a sovereign body under that law. In setting Rules of Procedure to govern how it goes about the process of making laws, provided those rules are not in conflict with the Basic Law, the Legislative Council is ‘answerable to no outside authority’. The learned Judge concluded that so far as jurisdiction is concerned, the courts of the Hong Kong Special Administrative Region do have jurisdiction under the Basic Law to determine, by way of declaratory relief, whether Rules of Procedure enacted by the Legislative Council are consistent with the Basic Law.*** Yet, it is a jurisdiction which, having regard to the sovereignty of the Legislative Council under the Basic Law, ‘should only be exercised in a restrictive manner’. See p.390 para.5, p.391 paras.9-10, p.393 para.24, p.394 paras.28, 31.” (*emphasis added*)

52. In this respect, the scope of the non-intervention principle as applied in *Hong Kong in the context of BL* has recently been authoritatively explained by the Court of Final Appeal in *Leung Kwok Hung v The President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689 (“*Leung Kwok Hung CFA*”), where the Court said these at paragraphs 28 - 32 and 39:

“28. In construing and applying the provisions of the BL, it is necessary not only to apply common law principles of interpretation but also principles, doctrines, concepts and understandings which are embedded in the common law. They include the doctrine of the separation of powers and, within it, the established 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, in particular its legislative processes. 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 (‘the non-intervention principle’).

29. The strength of this proposition rests not only on principle and authority but also on public policy. In Hong Kong, LegCo has as its primary responsibility its law-making function. It also has vested in it other important powers and functions under art 73, for example:

- ‘(2) To examine and approve budgets introduced by the government;
- (3) To approve taxation and public expenditure;
- (4) To receive and debate the policy addresses of the Chief Executive;
- (5) To raise questions on the work of the government;
- (6) To debate any issue concerning public interests;’

30. The important responsibilities of LegCo, notably its law-making function, require, as with other legislatures, that it should be left to manage and resolve its own 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 interests of the orderly, efficient and fair disposition of LegCo's business.

31. The adoption of the principle of non-intervention by the courts will reduce, if not eliminate, the prospect of pre-enactment challenge to proceedings in LegCo. It will also reduce, if not eliminate, post-enactment challenges to the validity of laws made by LegCo based on irregularity in its proceedings, unless such an irregularity amounts to non-compliance with a requirement on which the validity of a law depends.

32. In this respect *it is important to recognise that the principle of non-intervention is necessarily subject to constitutional requirements. The provisions of a written constitution may make the validity of a law depend upon any fact, event or circumstance they identify, and if one so identified is a proceeding in, or compliance with, a procedure in the legislature the courts must take it under its cognizance in order to determine whether the supposed law is a valid law.* In Australia, *Cormack v Cope* was such a case. There s 57 of the Australian Constitution provided a means of resolving a deadlock between the two Houses of Parliament culminating in a joint sitting of the two Houses to deliberate and vote upon a proposed law. But the section prescribed a procedure to be followed and compliance with that procedure was a condition of the validity of the proposed law when enacted.

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39. *This qualification arises from the circumstance that, in the case of a written constitution, which confers law-making powers and functions on the legislature, the courts will determine whether the legislature has a particular power, privilege or immunity.* In *R v Richards, ex p Fitzpatrick and Browne*, Dixon CJ, speaking for the High Court of Australia and with reference to the two Houses of the Australian Parliament, said:

it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise." (*emphasis added*)

53. Distilled from these principles as laid down by the Court of Final Appeal are the following ones which are particularly relevant for the present purposes:

(1) The principle of non-intervention as applied in Hong Kong is necessarily subject to the constitutional requirements of the BL. The provisions of the BL may make the validity of a law depend on any fact, event or circumstance they identify, and if one so identified is a proceeding in, or compliance with, a procedure in the legislature, the court must take it under its cognizance in order to determine whether the supposed law is a valid law. See *Leung Kwok Hung CFA*, paragraph 32.

(2) Further, in the case where the written constitution which confers (as the BL in Hong Kong does) law-making powers and functions on the legislature, the court will determine whether the legislature has a particular power, privilege or immunity. See *Leung Kwok Hung CFA*, paragraph 39.

(3) In the premises, what can be properly regarded as the “internal business” or “internal process” of the LegCo must be viewed under the above *caveat* prescribing the non-intervention principle in Hong Kong.

54. Bearing these principles in mind, it is clear to me that the non-intervention principle as applied in Hong Kong does not prohibit the court from determining the matters under challenge in these proceedings.

55. The constitutional requirement to take the oath under BL104 is of fundamental importance. All the most important public officials

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under the executive, legislative and judicial branches of the Hong Kong Special Administrative Region must take the oath as prescribed and in accordance with the laws set out in BL104 and the ODO *before* each of them can assume his or her office. As I have explained above, an intentional failure to do so would result in his or her disqualification from assuming the office. In the premises, given that BL104 (incorporating the ODO) has identified and provided for the legal parameters under which the oath-taking requirement is to be complied with, under the principle of non-intervention as explained in *Leung Kwok Hung CFA*, the court must still “*take it under its cognizance in order to determine whether*” that act of the oath-taking is valid and compliant with BL104 (together with the ODO).

56. In the same vein, the court must also have the jurisdiction to determine whether the Clerk or the President has the power under BL104 (and the ODO) to make a decision (such as the President’s Decision in the present case) to allow a LegCo member to take the LegCo Oath again if and when it is challenged that the member has already been disqualified in law from doing so under BL104 and the ODO.

57. When considered in the above context, the oath-taking by a LegCo member as mandated by BL104 and a decision made by the Clerk or the President relevant to that act also cannot be properly regarded as the “internal business” of the LegCo for the purpose of the non-intervention principle.

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58. In respect, it must also be remembered that BL104 mandates constitutionally *not* just LegCo members but also the CE, principal officials, Executive Council members and judges of the Hong Kong Special Administrative Region to take the oath before each of them can assume the office. Further, section 21 of the ODO also provides the same consequence for non-compliance of the oath-taking for all these categories of persons, and *not just* the LegCo members. As such, it does not make sense that somehow *only* LegCo members (but not all the others) would be excluded from the courts' jurisdiction to determine whether an oath is taken in compliance with the constitutional requirement implemented through the provisions of the ODO.

59. The authority of *Bradlaugh v Gossett* relied on by Mr Pun does not assist him.

60. In *Gossett*, Mr Bradlaugh was returned by election as a member of the House of Commons (ie, the Parliament). Under the Parliamentary Oaths Act 1866, he had to take a parliamentary oath in the House before the Speaker as prescribed by that Act. However, in light of the disruptive conducts he had had before in the House, the House passed a resolution "that the Serjeant-at-Arms do exclude Mr Bradlaugh from the House until he shall engage not further to disturb the proceedings of the House". In other words, under the resolution, he could not enter the House to take the oath unless he had stopped any acts disturbing the proceedings of the House. Mr Bradlaugh applied to the court for an injunction to restrain the Serjeant-at-Arms from carrying out the resolution. In support of the application, Mr Bradlaugh argued that he had a legal right conferred by the Act to take the oath before the

Speaker, and the resolution deprived him of that right. The court therefore should intervene and grant the injunction to protect his legal right provided by the Act.

61. However, the court (Coleridge CJ, Mathew J and Stephen J) refused to grant the injunction on the basis that the resolution was a matter relating to the internal management of the House, and thus the court had no power to intervene whether that resolution was valid or invalid in law.

62. Mr Pun submits that the circumstances of *Gossett* are similar to the present one. Leading counsel therefore submits that if, under the non-intervention principle, the court cannot intervene in the Parliament's decision to prevent a member from exercising his statutory right to take the oath, a decision of the President to allow a member to take the LegCo Oath (as in the present case) must similarly be regarded under that principle as a matter relating to the internal management of the LegCo. The court therefore has no power to intervene.

63. I am unable to agree. *Gossett* is clearly distinguishable and does not apply to Hong Kong directly for two reasons. First, in Hong Kong, the binding authority on the scope and applicability of the non-intervention principle is *Leung Kwok Hung CFA*. I have already explained above why under the principles laid down in *Leung Kwok Hung CFA*, the courts have jurisdiction to intervene in the present matters. Second, and in any event, *Gossett* was decided in the context of parliamentary supremacy and the absence of a written constitution in

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England. These constituted an important rationale underlying the English court’s decision in that case. As explained above, Hong Kong is very different as we have a written constitution of the BL and legislature is not supreme. These are important material differences in determining the scope and extent of the non-intervention principle. Hence, one cannot simply apply that authority to Hong Kong.

64. Mr Pun also relies on the authorities of *R v Chaytor* [2011] 1 AC 684 and *Baron Mereworth v Ministry of Justice* [2012] Ch 325 to support his submissions for the application of the non-intervention principle in the present cases. These cases are similarly concerned with the discussions and determinations of the application of that principle in the UK. For the same reasons I have explained above, they are not directly applicable to Hong Kong and must be read subject to the principles laid down in *Leung Kwok Hung CFA*. They therefore also do not take Mr Pun’s case any further.

65. Finally, as an ancillary and supporting argument, Mr Pun says, given the non-intervention principle, on a proper interpretation of BL104 and sections 19 and 21 of the ODO, the person administering the oath is the *final* arbiter of the questions of (a) whether an oath taken is in compliance with the legal requirements; and (b) whether the oath taker has declined or neglected to take the oath when requested to do so. This reinforces, says Mr Pun, the submissions that these matters and questions are related to the “internal business” of the LegCo and hence not subject to the court’s scrutiny under the non-intervention principle. After the issue of the Interpretation, Mr Pun further submits that paragraph (4) of the Interpretation supports this construction.

66. There is no substance in these submissions.

67. Mr Pun's submissions are in fact a circular one, which is premised on the correctness of his contention that the non-intervention principle applies in the present case. For the reasons I have explained above, that contention is incorrect. The submissions that the Clerk or the President is the *final* arbiter in relation to these questions therefore also fall away.

68. Further and in any event, it is plain and obvious that the courts of law in the society are regarded generally and in principle as the final arbiter in adjudicating questions of law, including important questions of constitutional compliance with the provisions of the BL and the questions of compliance with statutory provisions. This is also consistent with our constitutional model where our courts are given the powers and authority to adjudicate cases in accordance with the law: see BL81 - 85.<sup>15</sup> In the premises, a statutory provision could not be construed with the intention to oust the courts' role in being the final arbiter of questions of law, unless it is clearly and expressly provided for.

69. In this respect, BL104 and sections 19 and 21 of the ODO simply have not provided in any express and clear way that the person who administers the oath is the *final* arbiter of the questions of the validity of the oath taken and whether someone has declined or neglected to take the oath and therefore has to vacate his office or to be disqualified

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<sup>15</sup> Subject to BL158 where the power of *interpretation* of the BL is vested in the NPCSC, where the Hong Kong courts have been authorised by the NPCSC to interpret the BL when adjudicating cases.

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B from entering on it under section 21. Of course, as a matter of necessary  
C implication, that person would have the power incidental to his duty to  
D administer the oath to make a decision on those questions as and when  
E circumstances may practically require. But that is different from saying  
F that it is intended by BL104 or the provisions of the ODO that the person  
G administering the oath is the *final* decision-maker on those questions.

70. Paragraph (4) of the Interpretation does not assist Mr Pun.  
H It only provides that the person administering the oath has the power to  
I determine whether “an oath taken is in compliance” with BL104 and laws  
J of Hong Kong. It does not provide expressly or impliedly that that  
K decision is a final one. It is consistent with the court’s above  
L observation.

71. On a proper analysis and construction, the courts in Hong  
Kong must be objectively intended in BL104 and the provisions of the  
M ODO to be final arbiter of those questions.

72. For all the above reasons, I am of the clear view that the  
N non-intervention principle as applied in Hong Kong does not cover the  
O matters under the present challenges in these proceedings. The courts  
P therefore have jurisdiction to adjudicate them.

73. Alternatively, and in any event, I accept Mr Yu’s  
Q submissions that section 73 (“section 73”) of the Legislative Council  
R Ordinance (Cap 542) (“LCO”) confers an express jurisdiction to the court  
S to determine matters such as whether a LegCo member has been  
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disqualified from being a LegCo member or has ceased to be one. In the premises, the non-intervention principle in any event should give way to this express jurisdiction conferred to the court by statute in relation to these matters.

74. Section 73 provides as follows:

**“Section: 73 Proceedings against persons on grounds of disqualification**

- (1) An elector, or the Secretary for Justice, may bring proceedings in the Court against any person who is acting, claims to be entitled to act, as a Member on the ground that the person is disqualified from acting as such.
- (2) Proceedings under this section may not be brought after 6 months from the date on which the person concerned acted, or claimed to be entitled to act, as a Member.
- (3) If, in proceedings brought under this section, it is proved that the defendant acted as a Member while disqualified from acting in that office, the Court may-
  - (a) make a declaration to that effect; and
  - (b) grant an injunction restraining the defendant from so acting; and
  - (c) order the defendant to pay to the Government such sum as the Court thinks appropriate, not exceeding \$5000 for each occasion on which the person so acted while disqualified.
- (4) If, in proceedings brought under this section, it is proved that the defendant claimed to be entitled to act as a Cap 542 - Legislative Council Ordinance 47 Member while disqualified from acting in that office, the Court may-
  - (a) make a declaration to that effect; and
  - (b) grant an injunction restraining the defendant from so acting.

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- (7) Proceedings against a person on the ground that the person has, while disqualified from acting as, 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.”

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75. As submitted by Mr Yu, section 73 therefore expressly gives jurisdiction to the court to determine proceedings brought by the SJ or an elector against a LegCo member who has been disqualified or who has ceased to be one but continues to act or claims to be entitled to act as a member. In the section 73 proceedings, the court can declare that the member so acts or seeks to act while disqualified, and restrain him from doing so. In considering granting those reliefs, the court must be entitled to determine the underlying essential question as to whether the member has been so disqualified.<sup>16</sup> This includes the question of whether a member has been so disqualified under section 21 of the ODO.

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76. Thus, even if (which I disagree) the non-intervention principle were initially to cover the questions raised under the present actions, by section 73, the LegCo has expressly conferred jurisdiction to

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<sup>16</sup> Cf. *AG v Bradlaugh, supra*, is in relation to a statutory action brought under the Parliamentary Oath Act 1866 by the Attorney General against Mr Bradlaugh as a member of parliament for a statutory penalty for an offence in voting and setting in any debate of the Parliament “without having made and subscribed” to the parliamentary oath in the form as required under the Parliamentary Oath Act 1868. Although the 1866 Act only gives the AG the right to bring an action against such a member to recover the penalty, in determining whether Mr Bradlaugh was liable for the penalty, and notwithstanding the non-intervention principle as considered in the earlier related case of *Gossett*, the court had to and did determine the underlying necessary question as to whether Mr Bradlaugh as an antitheist could validly take and subscribe to the oath.

A the court to determine them in the proceedings brought thereunder. The  
B non-intervention principle must hence be subject and limited to that  
C extent, and would not prevent the court from determining such a question  
D under section 73 proceedings.

E 77. Mr Dykes and Mr Pun however argue that section 73 is  
F objectively intended to apply *only* to those circumstances of  
G disqualification as provided under section 15(1) of the LCO. To  
H supplement this submission, Mr Pun also says section 15 intends to  
I provide *exhaustively* the circumstances when a member can be  
disqualified from his office.

J 78. Section 15(1) provides as follows:

K “Section: 15 **When Member ceases to hold office**

L (1) A Member’s office becomes vacant if the Member-

- M (a) resigns in accordance with section 14 or is taken to  
N have resigned from that office in accordance with  
O section 13; or  
P (b) dies; or  
Q (c) subject to subsection (2), alters either the Member’s  
R nationality or the fact as to whether the Member has  
S a right of abode in a country other than the People’s  
T Republic of China as declared under  
U section 40(1)(b)(ii); or  
V (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.”

79. With respect, I am unable to agree with Mr Dykes and Mr Pun:

(1) Section 15 of the LCO does not provide expressly that the circumstances listed thereunder are *all* and the *only* circumstances when a member can be disqualified. There is also nothing in the submissions that can suggest why *necessarily* it should be implied that the provision intends to exhaustively provide for the circumstances of disqualification. In the premises, I cannot see how it could be construed objectively and purposively that this is intended to provide exhaustively all the circumstances of disqualification of a LegCo member.

(2) Section 73 also does not provide expressly that the circumstances of disqualification are limited to only those under section 15 of the LCO. It is not even provided that section 73 is subject to section 15. Again, nothing has been submitted to show why it is necessary to imply that section 73 is intended only to cover disqualification circumstances provided under section 15 of the LCO. I therefore also cannot see how it could be construed objectively that section 73 is intended to cover only section 15's disqualification circumstances.

80. I note that Mr Dykes and Mr Pun have also raised the point that even if section 73 proceedings can be brought against Mr Leung and Ms Yau in relation to the present challenges, the CE has no *locus* to bring a section 73 action in HCMP 2819/2016 when *suing in his capacity as the CE*. I think counsel is right in this part of the submissions. However, this cannot constitute a valid ground to oppose the section 73 action as

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B the SJ (being a party entitled to bring the action under section 73) is also  
C a plaintiff in the action.

D 81. In the premises, notwithstanding the non-intervention  
E principle, the court must alternatively in any event have jurisdiction to  
F look at and determine the underlying question of whether a LegCo  
G member has been disqualified to be a member under section 21 of the  
H ODO when section 73 proceedings are brought against him, as in the  
I present case.<sup>17</sup>

J *D2. Mr Leung and Ms Yau's oath-taking conducts are immune from suit*

K 82. Under this ground, Mr Dykes submits that what were said by  
L Mr Leung and Ms Yau in the oath-taking process are protected by the  
M immunity provided under BL77 and sections 3 and 4 of the LCPPO.  
N Hence, Mr Leung and Ms Yau cannot be sued upon in relation to these  
O matters, and the court cannot even look at them.

P 83. With respect, I do not accept these submissions.

Q 84. BL77 provides as follows:

R **“Article 77**

Members of the Legislative Council of the Hong Kong Special  
Administrative Region shall be immune from legal action in  
respect of their *statements at meetings* of the Council.”

S <sup>17</sup> There is no question that Mr Leung and Ms Yau did purport to act or claim to be entitled to  
T continue to act as a LegCo member. See: Affirmation of Law Shuk Pui Rosanna filed under  
U HCMP 2819/2016, at paragraphs 29 - 31. Further, the fact that they sought to proceed to  
V take the oath again after the President's Decision must also amount to their acting or claiming  
to be entitled to act as a LegCo member.

85. Sections 3 and 4 of the LCPPO provide as follows:

**“Section: 3 Freedom of speech and debate**

There shall be freedom of *speech and debate* in the Council or proceedings before a committee, and such freedom of *speech and debate* shall not be liable to be questioned in any court or place outside the Council.

**Section: 4 Immunity from legal proceedings**

No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Council or a committee, or *by reason of any matter brought by him therein by petition, Bill, resolution, motion or otherwise.*” (*emphasis added*)

86. In its proper context and read together with BL104, the plain and ordinary meaning of the word “statements” used in BL77 is to mean statements made by a LegCo member in the course of official debates on the floor of the LegCo when exercising his powers and discharging his functions as a LegCo member. See also: *A v The United Kingdom* (App No 35373/97, 17 March 2003), ECHR, at paragraph 84. It cannot be seriously suggested that a member can enjoy such immunity even *before* he has validly assumed the office of a LegCo member, as it is only after the assumption of office that he could validly exercise his powers and functions as a LegCo member.

87. Thus, the word expressed by a LegCo member in purporting to take an oath (when he has not yet validly assumed office) cannot be properly regarded as falling within the meaning of “statements” in BL77.

88. Once understood that way, sections 3 and 4 of the LCPPO do not add anything further, as they must be read consistently with the

constitutional provision of BL77. In fact, in my view, the plain words of sections 3 and 4 of the LCPPO<sup>18</sup> (as italicized above) make it even clearer that the immunity provided attaches only to words and speeches (spoken or written) in relation to debates in the LegCo meetings.

89. Moreover and in any event, as submitted by Mr Yu, section 73 also constitutes an alternative answer to Mr Dykes' arguments based on the immunity provided under BL77 and sections 3 and 4 of the LCPPO.

90. By granting jurisdiction to the court to adjudicate proceedings brought under section 73, LegCo members must have regarded to have consented to subject themselves to the court's jurisdiction in circumstances where someone who has been disqualified as LegCo member but continues to act as such. Thus, even if (which I disagree) the word "statements" used in BL77 and the phrases "speeches and debates" and "words" used respectively in sections 3 and 4 of the LCPPO were intended to cover the reading out of the LegCo Oath in the process of taking an oath, the court would still have jurisdiction and power to look into them in a section 73 proceedings to determine the question of whether someone has been disqualified as a member of the LegCo under section 21 of the ODO or otherwise.

91. I therefore also reject this ground of opposition.

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<sup>18</sup> The Chinese version of section 4 of LCPPO is even clearer in this meaning. It states "不得因任何議員曾在立法會或任何委員會席前發表言論，或在提交立法會或委員會的報告書中發表的言論，或因他曾以呈請書、條例草案、決議、動議或其他方式提出的事項而對他提起民事或刑事法律程序。".

D3. *Section 21 of the ODO does not operate automatically as a matter of law*

92. Finally, Mr Pun argues that on a proper construction of section 21(a) of the ODO, even if a person has declined or neglected to take the LegCo Oath as prescribed and that he “shall” vacate the office as a member of the LegCo, the vacating of the office does *not* operate automatically as a matter of law as contended for by the SJ and the CE. This is so because the provision is phrased in active voice in that the person “shall vacate” the office, instead of passive voice such as that the person “shall be vacated from his office”. Mr Pun therefore submits that although the person *must* vacate the office, it can only take effect either by the person resigning under section 14(1) of the LCO<sup>19</sup> or, if he fails to do so, by the President exercising his power under BL73(1) or (7) to declare that person to be disqualified.

93. There are no merits in this argument.

94. In light of the use of the word “shall”, Mr Pun accepts, as he must, that once the condition of “decline or neglect” under section 21 of the ODO is established, the legal effect intended in section 21 is that the person *must* vacate the office or be disqualified from entering on it, with the clear intended inevitable consequence that he cannot continue to act as a member of the LegCo. In the premises, I see no basis at all (let alone any reasonable basis) to construe section 21 to require any further intervening steps to be taken to achieve that inevitable effect and result.

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<sup>19</sup> Section 14(1) of the LCO provides “A Member may, at any time, resign from office as a Member by giving written notice of resignation to the Clerk to the Legislative Council.”

95. Further, as pointed out by Mr Yu, a LegCo member who tenders a resignation under section 14(1) of the LCO is entitled to specify in the resignation notice the date upon which he intends the resignation to take effect. See: section 14(3)(b).<sup>20</sup> In other words, if Mr Pun's above submissions are correct, it would be entirely up to the disqualified member to decide when he would effectively vacate the office by resigning. That cannot be consistent with the above objective meaning of section 21 of the ODO.

96. BL79(1) and (7) provide as follows:

**“Article 79**

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;

...

(7) When he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of the members of the Legislative Council present.”

97. It is plain that BL79(1) provides for the situation where the President shall declare a LegCo member to be disqualified when the member is either physically or mentally unable to discharge his duties as a member. This is supported by the Chinese version of BL79(1), which states: “因嚴重疾病或其他情況無力履行職務”, in particular the words “無力履行職務”. The plain and ordinary meaning of these words refers

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<sup>20</sup> Section 14(3)(b) of the LCO provides “ A notice of resignation takes effect – (a) ...; or (b) if a later date is specified in the notice, on that later date.”

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to the circumstances where, although it is open to the member concerned to carry out the duties, he is unable to do so. This does not cover the circumstances where the member is mandated to vacate his office under section 21 of the ODO, and hence it is no longer open to the member to carry out the duties as a LegCo member.

98. BL73(7) similarly does not cover a section 21 circumstance as it is again plain that the a person who declines or neglects to take the LegCo Oath cannot be regarded as to be “in breach of the oath”.

99. The word “misbehaviour” (“行為不檢”) under BL73(3) also cannot be objectively intended to cover the conduct of intentionally refusing or failing to take the LegCo Oath. It is so as, given the context that such “misbehaviour” has to be “censured” for by two-thirds of the LegCo members before the President could declare the member to be disqualified:

- (1) It objectively makes no logical or common sense to require such a procedure of censure to disqualify someone from being a LegCo member when he or she is not even capable of assuming the office given BL104.
- (2) It would be up to the other LegCo members to decide whether this would happen, which is by no means certain. This again cannot be and is clearly inconsistent with the above objective intention of section 21 of the ODO.

100. In the premises, on a proper construction of section 21 of the ODO, a LegCo member who has already entered on the office but

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B declined or neglected to take the LegCo Oath *shall*, by the operation of  
C law, be regarded as having vacated his office. Similarly, the LegCo  
D member will be as a matter of law disqualified from entering that office if  
E he has not entered on it. This does not require any further steps to be  
F taken by that person himself, the President or any other person.

G *D4. The CE's locus*

H 101. Finally, it has been raised by Mr Leung and Ms Yau that the  
I CE has no *locus* to bring either the judicial review or HCMP 2819/2016.

J 102. Mr Yu however submits that the CE clearly has a *locus* to  
K bring these proceedings given his constitutional role and duty under  
L BL48(2).

M 103. Under BL48(2) provides as follows:

N **“Article 48**

O The Chief Executive of the Hong Kong Special Administrative  
P Region shall exercise the following powers and functions:

Q (1) ...

R (2) To be responsible for the implementation of this Law and  
S other laws which, in accordance with this Law, apply in the  
T Hong Kong Special Administrative Region;

U ...”

V 104. Thus, under BL48(2), the CE has a constitutional role and  
duty to implement the BL and other laws of the Hong Kong Special  
Administrative Region.

105. Given this constitutional role, I agree with Mr Yu that the CE has a proper *locus* to bring these proceedings to implement BL104 and the relevant provisions of the ODO and to ensure that they are complied with. In this respect, it must be noted that the action brought under HCMP 2819/2016 is not premised only on a section 73 cause of action.

106. I therefore also reject Mr Leung and Ms Yau's contention on locus.

*D5. Conclusion under Mr Leung and Ms Yau's grounds of opposition*

107. For all the above reasons, I do not accept any of the grounds of opposition advanced by Mr Leung and Ms Yau.

108. Thus, as a matter of law under BL104 and section 21 of the ODO, they shall be regarded as having already vacated their office in declining to take the LegCo Oath in form and in substance on 12 October 2016.<sup>21</sup> Their respective office as a member of the LegCo has become vacant.

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<sup>21</sup> In light of sections 4 and 13(1) of the LCO, the CE and the SJ in these proceedings proceed primarily on the basis that Mr Leung and Ms Yau, for the purpose of section 21 of the ODO, had entered on their respective office of a member of the LegCo by the time when they purported to take the LegCo Oath on 12 October 2016. No one has submitted or argued otherwise in these proceedings. The court would therefore also proceed on that basis. However, to avoid any doubts, it must be noted that, to be consistent with BL104, the meaning of "entered on the office" in section 21 of the ODO, and the meaning of "having accepted office" under section 13(1) of the LCO should not be treated as the same meaning of "assuming office" under BL104.

*E. THE PRESIDENT'S ARGUMENTS*

109. As mentioned above, the President's only objection in these proceedings is that he should not be joined as the respondent in the judicial review application and as a defendant in HCMP 2819/2016.

110. The principal arguments advanced by Mr Jat SC for the President are these:

(1) The President's Decision is in nature *not* a substantive decision determining whether Mr Leung and Ms Yau declined or neglected to take the LegCo Oath on 12 October 2016 and whether therefore they had vacated their office as a LegCo member. It is also not a substantive decision to say whether the re-taking of the oath again by them, if it is to proceed, would be a valid one. The President has simply *not yet* made any decisions of substance. The President's Decision is therefore simply a procedural one, allowing Mr Leung and Ms Yau to seek to *procedurally* retake the oath, which is by itself not amenable to judicial review. There is no extant substantive decision that is amenable to judicial review. The judicial review should be dismissed.

(2) Insofar as the HCMP 2819/2016 is concerned, the substantive reliefs sought therein are only against Ms Yau and Mr Leung (as the 1<sup>st</sup> and 2<sup>nd</sup> defendants). There are no reliefs sought against the President (who has been joined as the 3<sup>rd</sup> defendant). However, there is nothing to suggest that there is a likelihood that the President would not abide by the decision of and the reliefs granted by the court under this action. In the premises, there are no reasons and basis

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B for the CE and the SJ to join the President as one of the  
C defendants in HCMP 2819/2016.

D 111. I do not accept the President's submissions.

E 112. I agree with Mr Yu that in making the President's Decision,  
F the President impliedly has decided that Mr Leung and Ms Yau did not  
G decline or neglect to take the LegCo Oath on 12 October 2016 and thus  
H shall not be regarded as having disqualified under section 21 of the ODO  
I to continue to act as a LegCo member. This is so since there would be  
J no practical and useful purpose to be served to allow them to re-take the  
K oath in another occasion if the President has not already effectively come  
L to the view under the President's Decision that they have not been so  
M disqualified. Whether or not they already declined or neglected to take  
N the LegCo Oath *on 12 October 2016* should not be dependent on how  
O they would take the oath again on a *subsequent* occasion. If they  
declined or neglected to take the LegCo Oath on 12 October 2016, as a  
matter of law, they shall be regarded as having vacated their office or  
been disqualified from that. There is no question that they can do it  
again as a member of the LegCo.

P 113. In the premises, I am satisfied that the President's Decision  
Q is amenable to judicial review, and the President has been properly joined  
R as a respondent.

S 114. Given my above conclusion that in law Mr Leung and  
T Ms Yau should be regarded as having already vacated their office as a  
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member of the LegCo on 12 October 2016 in declining or neglecting to take the LegCo Oath, I agree with Mr Yu that the President had misdirected himself on the law in making the President's Decision. On that basis, I would quash the President's Decision.

115. In relation to HCMP 2819/2016, given the President's Decision and its effect as explained above, I am similarly satisfied that it is reasonable and necessary for the CE and the SJ to join the President as the 3<sup>rd</sup> defendant to ensure that he would be bound by the ruling in that case.

*F. SUPPLEMENTAL SUBMISSIONS RELATING TO THE INTERPRETATION*

116. As the Interpretation was issued by the NPCSC on 7 November 2016 after the hearing of the present proceedings, the court subsequently directed the parties to provide supplemental written submissions, if they so wished, on the effect of the Interpretation relevant to the present cases or arguments already advanced by the parties. The parties provided their written supplemental submissions on 10 November 2016.

117. The CE and the SJ submit in their supplemental submissions that the Interpretation is binding on this court.

118. However, Mr Yu for the CE and the SJ emphasises in their supplemental written submissions that the Interpretation does not affect their original submissions made to this court on the proper purposive

A  
B construction of BL104 and sections 16, 19 and 21 of the ODO insofar as  
C the time and manner of oath-taking and the consequences of declining to  
D take the oath are concerned (which have been accepted by this court  
above in paragraphs 24 - 36 and 92 - 100 above).

E 119. In this respect, it must be noted, as this court has repeatedly  
F emphasised above, Mr Leung and Ms Yau have not advanced any  
G arguments by way of submissions or evidence seeking to rebut the  
H applicants' submissions on the proper meaning and effects of BL104 and  
I the provisions in the ODO, construed independently of the  
J Interpretation.<sup>22</sup> They have also not advanced any submissions or  
K evidence to say that they did not decline or neglect to take the LegCo  
L Oath falling within the meaning of section 21. Their principal grounds  
of opposition raised in these cases based on the non-intervention principle  
and the immunity also have nothing to do with, and thus would not be  
affected in any material way by, the Interpretation.

M 120. Thus, I agree with Mr Yu's submissions that the outcome of  
N this case as regards Mr Leung and Ms Yau is the same with or without  
O referring to the terms of the Interpretation.

P 121. Insofar as Mr Leung and Ms Yau are concerned, their  
Q supplemental submissions also say that the Interpretation does not affect  
R and has no impact on their arguments raised under the non-intervention  
and the immunity grounds. This is correct. I have for the above

S  
T <sup>22</sup> Save as to Mr Pun's contention that section 21 of the ODO does not operate automatically as a  
U matter of law to vacate a member's office after the member has declined or neglected to take  
V the LegCo Oath. A contention I have rejected at paragraphs 92 - 100 above.

reasons rejected these grounds without reference to or relying on the Interpretation.

122. Mr Leung and Ms Yau in their supplemental submissions further raise two main observations concerning the Interpretation itself.

123. First, Mr Pun for Mr Leung submits that paragraph (4) of the Interpretation supports his submissions that the person administering the oath is the final arbiter to determine the taken oath's validity and compliance with BL104 and the ODO, hence also in support of his submissions under the non-intervention principle. I have rejected this submission above in paragraph 70.

124. Second, Mr Dykes for Ms Yau submits that, construed in the eyes of common law, the Interpretation goes further than merely as an interpretation of the meaning of BL104 and thus amounts to effectively a legislative act to amend BL104. As such, it is not made in compliance with BL158 and thus not binding on this court. In any event, given that it is effectively an amendment, it also has no retrospective effect under common law.

125. Given my acceptance of the CE and the SJ's above submissions that the court would reach the same above conclusion for reasons I have explained above with or without referring to the terms of the Interpretation, this submission is irrelevant to the present proceedings and it is unnecessary for me to determine it. I however think that it may be open to arguments that whether the Interpretation falls within the

A  
B proper meaning and scope of “interpretation” as intended under BL158 is  
C a final matter for the NPCSC, given that the NPCSC has the ultimate  
D power to interpret the BL. However, since this issue has not been  
E argued substantively before me, I would refrain from saying anything  
F further.

F 126. Finally, the President accepts that the Interpretation is  
G binding on this court but also submits that it does not affect their  
H submissions that the President should not be joined in these proceedings.  
I For the reasons stated above, I have already rejected those submissions.

I 127. The President further asks this court to clarify the date from  
J which the vacation or disqualification took effect if the court shall declare  
K that Mr Leung or Ms Yau have vacated their office or disqualified from  
L taking office.

M 128. In my view, given the plain meaning of section 21 of the  
N ODO, the vacation took effect from the time when Mr Leung and Ms Yau  
O declined to take the LegCo Oath when requested to do so. That would  
P be 12 October 2016.

P 129. This is also consistent with BL104 and the Interpretation.  
Q Under BL104 and the Interpretation, a person can only “assume the  
R office” of a LegCo member after he has validly taken the LegCo Oath,  
S but would be disqualified from “assuming” the office after he has  
T intentionally declined to take the LegCo Oath. Insofar as the present  
U cases are concerned, Mr Leung and Ms Yau could only seek to “assume  
V

office” on 12 October 2016 when they purported to take the LegCo Oath. As they declined to take the LegCo Oath on that day, they have thus been disqualified from assuming the office since that day.

*G. DISPOSITIONS*

130. For all the above reasons, the CE and the SJ succeed in the judicial review and HCMP 2819/2019. I would grant the following reliefs:<sup>23</sup>

(1) Under HCMP 2819/2016:

(a) A declaration that the oaths that Mr Leung and Ms Yau purported to take on 12 October 2016 contravened BL104 and/or sections 16(d) and 19(a) and Schedule 2 of the ODO and are invalid and void and have no legal effect as an oath of a member of the LegCo required by BL104 and as a LegCo Oath required by the ODO.

(b) Further:

(i) a declaration that the Mr Leung and Ms Yau have been disqualified from assuming the office of a member of the LegCo, and have vacated the same since 12 October 2016, and are not entitled to act as a member of the LegCo;

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<sup>23</sup> For completeness, I would also grant leave to the CE and the SJ (a) to amend respectively the Form 86 and the Originating Summons in the form of the draft attached to the respective summons issued under HCMP 2819/2016 and HCAL 185/2016 both dated 24 October 2016; and (b) to file and rely on the 2<sup>nd</sup> Affirmation of Law Shuk Pui Rosanna affirmed on 27 October 2016 in both actions. All these have been considered at the hearing on an *de bene esse* basis. The proposed amendments and the further evidence are clearly relevant to the present proceedings and do not cause any real prejudice to the respondents. No real objections have been taken by the respondents. The costs of all these summonses shall be in the cause.

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- (ii) an injunction restraining Mr Leung and Ms Yau from acting as a member of the LegCo;
- (iii) a declaration under section 73 of the LCO that Mr Leung and Ms Yau claimed to be entitled to act and/or acted as a member of the LegCo while disqualified from acting in that office since 12 October 2016; and
- (iv) an injunction under section 73 of the LCO to restrain Mr Leung and Ms Yau from claiming to be entitled and/or acting as a member of the LegCo.

(2) Under the judicial review:

- (a) A declaration that the President has no power to re-administer or allow for re-administration of any further oath(s) to be taken by Mr Leung and Ms Yau under section 19 of the ODO 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.
- (b) A declaration that the office of member of the LegCo previously occupied by each of Mr Leung and Ms Yau is now vacant.
- (c) An order of *certiorari* to quash the President's Decision.
- (d) An injunction that the President be restrained from administering or allowing to be administered the making of oaths of Mr Leung and Ms Yau under section 19 of the ODO.

131. Finally, I make an order *nisi* that costs of these applications be to the CE and the SJ, to be taxed if not agreed, with certificate for three counsel. Given the limited scope of the opposition raised by the President in these proceedings, the President shall bear one-fifth of the applicants' costs, while Mr Leung and Ms Yau shall bear four-fifth of the costs.

132. Lastly, I must thank counsel for their helpful assistance in these matters.

(Thomas Au)  
Judge of the Court of First Instance  
High Court

Mr Benjamin Yu SC, Mr Johnny Mok SC, Mr Jimmy Ma and Mr Jenkin Suen, instructed by Department of Justice, for the 1<sup>st</sup> and 2<sup>nd</sup> applicants in HCAL 185/2016 and the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in HCMP 2819/2016

Mr Jat Sew-tong SC and Mr Anthony Chan, instructed by Lo and Lo, for the respondent in HCAL 185/2016 and the 3<sup>rd</sup> defendant in HCMP 2819/2016

Mr Hectar Pun SC and Mr Anson Wong Yu-yat, instructed by Ho Tse Wai and Partners, for the 1<sup>st</sup> interested party in HCAL 185/2016 and the 2<sup>nd</sup> defendant in HCMP 2819/2016

Mr Philip J Dykes SC and Mr Jeffrey Tam, instructed by Khoo & Co, for the 2<sup>nd</sup> interested party in HCAL 185/2016 and the 1<sup>st</sup> defendant in HCMP 2819/2016