立法會CB(2)1377/03-04(03)號文件 (立法會秘書處譯本,只供參考用)

(香港大學法律學院用箋)

傳真文件(傳真號碼: 2509 0775)

香港中區 香港特別行政區立法會 小組委員會秘書 湯李燕屏女士

湯李燕屏女士:

《2003年聯合國制裁(利比利亞)規例》小組委員會

小組委員會現時進行的討論,提出了和《聯合國制裁條例》(第537章)(下稱"該條例")是否合憲有關的重要問題。

該條例第3條賦予行政長官強制性的立法權力,而該項權力是獨立於立法會的立法權力。訂立此項權力的目的是藉着制定附屬法例,在香港特別行政區實施聯合國安全理事會根據《聯合國憲章》第VII章訂定而具有約束力的決定及措施。有關權力屬強制性質的原因,是因為行政長官一旦接獲中華人民共和國(下稱"中國")外交部作出的有關指示,便須行使其權力以執行該等指示(該條例第3(1)條)。該項權力獨立於立法會的立法權力的原因,是因為根據該條例第3(5)條,立法會通常享有對附屬法例作出修訂、予以廢除,以及在有所規定時予以通過的權力,均已被刪除。換言之,該項權力並不受立法會的制約。

然而,此項立法權力所獨有的特點構成了根本的憲法問題,特別是該項權力表面上似乎與《基本法》所訂,有關三權分立及行政問責的原則並不一致。

香港法院已確認《基本法》保留了普通法中三權分立的原則,因此,與此項原則不一致的法例應被廢除²。此項原則不單指政府的立法、行政或司法機關不應干預另一機關的日常運作及職能,亦含有就每一機關保留不同權力及職能的意思。因此,在Yau Kwong Man v Secretary for Security 一案中,行政長官所行使的是"司法職能"(即訂定因行政酌情決定而被拘留的少年犯的最低刑期),法庭遂裁定此做法與三權分立的原則不一致³。

¹ 請注意,《逃犯條例》(第503章)第3(15)條亦訂有和該條例第3(5)條相若的豁除條文。

² 請參考 Yau Kwong Man & Another v Secretary for Security [2002]3 HKC 457 (CFI); Lau Kwok Fai & Others v Secretary for Justice [2003] HKEC 711 at ¶ 19 (CFI)。

³ 同上。

從形式及實質內容而言,根據該條例訂定的規例似乎是"法例之類"的東西。換言之,該等規例訂立各項刑事罪行、強制性的警權及其他對香港人有直接影響的規管職責。草擬及制定此等措施的工作可明確地被形容為立法職能。把此項立法職能單單賦予行政長官一人,似乎有損三權分立的原則。

第二項相關問題涉及《基本法》第六十四條所訂明的行政問責原則:

"香港特別行政區政府必須遵守法律,對香港特別行政區立法會負責:執行立法會通過並已生效的法律;定期向立法會作施政報告;答覆立法會議員的質詢;徵稅和公共開支須經立法會批准。"

本人並不相信上述職能已涵蓋《基本法》第六十四條所訂須對立法會 負責的所有事宜。容許行政長官行使某項立法職能而立法會並無合法 權限對之作出介入,實在說不上是對立法會負責的做法。鑒於有關規 例所訂的警權及刑事禁制罪行有可能會對香港市民的基本人權造成影 響,立法會有(或應有)極大必要獲當局訂立某些途徑,藉以就此等規例 問責及作出規管。

以上所述並非用以指出行政長官不能擁有此項立法職能。事實上,以 行政長官"執行中央人民政府……發出的指令"的權力及職能而言,他似 乎必須具有該項職能⁴。然而,為了與《基本法》所訂的三權分立及行政 問責原則一致,立法會必須獲准在此方面行使其立法權力。此安排所造 成的實際影響,是必須刪除該條例第3(5)條所訂的豁除條文。

小組委員會委員可參考其他國家為實施安全理事會根據第VII章訂立的決議而採取的安排。隨文附上與此有關的加拿大《聯合國法令》(United Nations Act)。請注意該法令的第4條,已明文規定根據該法令制定的規例必須提交國會省覽,而且國會有權廢止該等規例。

最後,從以上所述可以推論,任何由中國外交部發出的相關證明書或正式文件,均應提交立法會,以便立法會議員更有效執行其立法職能。假如須由政府的行政、立法及司法3個機關中的兩個機關共同負責此方面的工作,那麼,在兩個機關之間保持一定的透明度,以加強有關工作的整體效能,才是合理的做法。

謹致謝意。

楊艾文教授

連附件

副本致: 法律學院院長陳文敏教授 法律系系主任穆洛黛教授

2004年2月16日

^{4 《}基本法》第四十八(八)條。

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CURRENT TO FEBRUARY 12, 2004

United Nations Act

R.S.C. 1985, c. U-2

An Act respecting Article 41 of the Charter of the United Nations

SHORT TITLE

Short title

1. This Act may be cited as the United Nations Act.

R.S.C. 1970, c. U-3, s. 1.

ORDERS AND REGULATIONS OF THE GOVERNOR IN COUNCIL

Application of Security Council decisions

2. When, in pursuance of Article 41 of the Charter of the United Nations, set out in the schedule, the Security Council of the United Nations decides on a measure to be employed to give effect to any of its decisions and calls on Canada to apply the measure, the Governor in Council may make such orders and regulations as appear to him to be necessary or expedient for enabling the measure to be effectively applied.

R.S.C. 1970, c. U-3, s. 2.

Offence and punishment

- 3. (1) Any person who contravenes an order or regulation made under this Act is guilty of an offence and liable
 - (a) on summary conviction, to a fine of not more than \$100,000 or to imprisonment for a term of not more than one year, or to both; or
 - (b) on conviction on indictment, to imprisonment for a term of not more than 10 years.

Forfeiture

(2) Any property dealt with contrary to any order or regulation made under this Act may be seized and detained and is liable to forfeiture at the instance of the Minister of Justice, on proceedings in the Federal Court, or in any superior court, and any such court may make rules governing the procedure on any proceedings taken before the court or a judge thereof under this section.

** Ouicklaw Table **

For changes prior to Quicklaw Tables, please see other sources for in force information.

Provision	Changed by	In force	Authority
3	2001 c41 s112	2001 Dec 24	SI/2002-16

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R.S.C. 1970, c. U-3, s. 3; R.S.C. 1970, c. 10 (2nd Supp.), s. 64; S.C. 2001, c. 41, s. 112.

Tabling in Parliament

4. (1) Every order and regulation made under this Act shall be laid before Parliament forthwith after it has been made or, if Parliament is not then sitting, forthwith after the commencement of the next ensuing session.

Resolution

(2) If both the Senate and House of Commons within the period of forty days, beginning with the day on which an order or regulation is laid before Parliament pursuant to subsection (1) and excluding any time during which Parliament is dissolved or prorogued or during which both the Senate and House of Commons are adjourned for more than four days, resolve that it be annulled, it ceases to have effect, but without prejudice to its previous operation or anything duly done or suffered thereunder or any offence committed or any punishment incurred.

R.S.C. 1970, c. U-3, s. 4.

SCHEDULE

(Section 2)

ARTICLE 41-The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

R.S.C. 1970, c. U-3, Sch.

TOTAL P.05 P.05

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