立法會
Legislative Council

LC Paper No. LS2/05-06

Paper for the Subcommittee to Examine the Implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to Sanctions

Possible legal proceedings to be taken to clarify the constitutionality of section 3(5) of the United Nations Sanctions Ordinance (Cap. 537)

Background

Section 3(5) of the United Nations Sanctions Ordinance (Cap. 537) ("UNSO") provides that sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap. 1) shall not apply to regulations made under the UNSO. The effect is that any regulation made under the UNSO by the Chief Executive ("CE") to give effect to the instruction of the Ministry of Foreign Affairs of the People's Republic of China for implementing United Nations sanctions is not required to be laid before the Legislative Council ("LegCo") and is not subject to amendment by LegCo.

2. Professor Yash Ghai questioned the constitutionality of section 3(5) of the UNSO. He opined that "[A]n ordinance that takes away from the LegCo the ultimate control over the enactment of subsidiary legislation would therefore be unconstitutional. The LegCo has been given its legislative responsibilities by the National People's Congress and it cannot divest itself of that power ('delegatus non potest delegare')" (see p.5 - 6 of LC Paper No. CB (1)1665/04-05(01)).

3. The Administration, in its response (vide paragraph 4(b) and (c) of LC Paper No. CB(1)1934/04-05(01)), opined that "while LegCo is entrusted with the power and function to enact laws, the Basic Law does not prohibit the delegation of law-making power/function to other bodies or persons to make subsidiary legislation which is clearly contemplated by BL 56(2), BL 62(5), BL 8 and BL 18. In line with the theme of continuity of the Basic Law and section 2(1) of Cap. 1, LegCo may disapply section 34 (negative vetting procedure) and section 35 (positive vetting procedure) of Cap. 1 in relation to subsidiary legislation made by the CE". The Administration concludes that the disapplication of sections 34 and 35 of Cap. 1 in relation to subsidiary legislation made by the CE under section 3 of UNSO is consistent with the Basic Law and should be maintained.

4. The Subcommittee is concerned about the constitutionality of section 3(5) of UNSO. The Legal Service Division is requested to explore, if clarification is to be sought from the court, what possible legal proceedings may be taken and what the possible obstacles are.

Possible legal proceedings – judicial review

5. If the constitutionality of section 3(5) of UNSO is to be clarified, the more appropriate legal proceedings that could be taken is to seek a court declaration by way of an application for judicial review under section 21K of the High Court Ordinance (Cap. 4) and Order 53 of the Rules of the High Court (Cap. 4 sub. leg. A). An alternative could be to seek a declaratory judgment under Order 15 Rule 16 of the Rules of the High Court. However, the court has held that such action was not appropriate for cases involving public law[1].

Preliminary issues - capacity of LegCo and Subcommittee to sue and funding

6. Prior to making an application for judicial review, some preliminary issues, in particular, the capacity of LegCo or this Subcommittee to sue, and the funding of an action have to be considered.

7. At common law, the general rule is that a person with legal personality (either a natural person or corporation) may sue and be sued in his/its own name or jointly with other persons with legal personality. An unincorporated body cannot sue or be sued in its own name or jointly with others but may do so through its members in their own capacity.

---

[1] For example –

(i) In *Lee Miu Ling and others v. Attorney General* (MP 1696/1994), the plaintiffs commenced proceedings by originating summons, seeking declaratory relief that those provisions in the Legislative Council (Electoral Provisions) Ordinance (Cap. 381) which related to functional constituencies were unconstitutional. Before hearing the case, Keith J. wanted first to be satisfied that the originating summons procedure was appropriate. After hearing both parties, the judge ruled that the action could proceed by way of originating summons since the Government did not object to it. On appeal to the Court of Appeal, the application for a declaration was refused. Litton VP commented that he had "no doubt that the only proper proceeding was by judicial review". (p.135 in [1996] 1HKC).

(ii) In *Lau Wong Fat v. Attorney General* [1997] HKLRD A15, the applicant challenged the constitutionality of the New Territories Land (Exemption) Ordinance. The proceeding was commenced by writ and the court held that that was the wrong procedure. It was held that where a person seeks to establish that the decision of a person or body infringes rights which are entitled to protection under public law, he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action. However, no further action was taken by the applicant.

8. LegCo is the legislature provided for under the Basic Law as a component of the political structure of the HKSAR. It is responsible for exercising the legislative power of the HKSAR and is vested with the powers and functions provided in Article 73 of the Basic Law. These powers and functions do not expressly include the power to sue and be sued. Nor do any of the provisions in the Basic Law confer on LegCo any legal personality. However, it may be noted that section 186 of the Copyright Ordinance (Cap. 528) provides that "for the purposes of holding, dealing with and enforcing copyright and in connection with all legal proceedings relating to copyright, the Legislative Council is to be treated as having the legal capacities of a body corporate". This is the only instance where LegCo is expressly given legal personality by statute but only in respect of limited purposes.

9. There are no precedent cases in which the legislature in Hong Kong has ever instituted a legal action, though the legislature has been involved as defendant in some cases. Most plaintiffs have tactfully avoided the issue of legal capacity of LegCo[2]. However, in the recent case of *Chan Yuk Lun v. The Legislative Council of the HKSAR* (HCA No. 1189 of 2004), the plaintiff, who acted in person, sought an order of mandamus to compel LegCo to substitute the term "British Crown" and other similar terms in the legislation of Hong Kong with appropriate terms, to enact legislation to protect the security of the People's Republic of China, and to pay the plaintiff damages of not less than one million dollars. During the handling of the case, Counsel's opinion was sought on whether the legislature established under the Basic Law is capable of being sued. Counsel opined that "[T]he LegCo has its powers and functions delineated under the Basic Law. It does not have unlimited powers. The colonial legislature of Hong Kong was sued in the case of *Rediffusion*

---

[2] For example-

(i) In *Rediffusion (Hong Kong) Limited* (HCA507/1968), the plaintiff took out a writ and named "Sir David C.C.Trench, K.C.M.G., M.C., M.D.I.Gass, C.M.G., J.P., D.T.E. Roberts, O.B.E.,Q.C., J.P. for and on behalf of themselves and all other members of the Legislative Council of Hong Kong" as the 1st defendants and Geoffrey Catzow Hamilton as 2nd Defendant, seeking a declaration that it would not be lawful for the Legislative Council of Hong Kong to pass a Bill on copyright matters. At the hearing, application has been made to replace by the Attorney General the representatives originally named as 1st Defendants, as prompted by an observation coming from a member of the bench, and this was not opposed by the defendants. Hence, "the Attorney General of Hong Kong for and on behalf of himself and all other members of the Legislative Council of Hong Kong" were named as 1st Defendant.

(ii) In April 1997, in M.P. 1211 of 1997, In the matter of the inquiry by the Select Committee of the Legislative Council into the circumstances surrounding the departure of Mr. Leung Ming Yin, and in the matter of section 9(1) and 14(1) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) and in the matter of Order 24 Rules 13 and 15, Rules of Supreme Court, the Attorney General (the plaintiff) took out originating summons and the members of the Select Committee, i.e. the Hon Ip Kwok-Him, the Hon. Mrs Selina Chow, the Hon. Ronald Arculli, the Hon. Cheung Man-Kwong, the Hon. Margaret Ng, the Hon. James To Kun-sun, the Hon. Christine Loh Kung-wai, the Hon. Mrs. Elizabeth Wong, the Hon. Lawrence Yum Sin-ling, Dr. the Hon. Law Cheung-Kwok and Dr. the Hon. Philip Wong Yu-hong were named as defendants.

(iii) Also in 1997, in *Ng King Luen v. Rita Fan* (HCAL 39/1997), the President of the Provisional Legislative Council was named as a defendant.

(iv) In HCAL 71/1998, Chim Pui-chung sued The President of the Legislative Council on the decision that the motion to remove Chim from office be placed on the agenda for debate at the meeting of Legislative Council on 9 September 1998.

(Hong Kong) Limited v. AG and another [1970] HKLR 231….. The Privy Council held that the legislature could be sued, principally because it does not have unlimited power. Article 8 of the Basic Law provides for the maintenance of common law previously in force in Hong Kong. Accordingly, the principle in the *Rediffusion* case remains applicable.". Nonetheless, the issue was not argued in court. The *Chan Yuk Lun* case was struck out under Order 18 Rule 19 on the following grounds –

(a) no reasonable cause of action is disclosed;

(b) it is frivolous or vexatious; and

(c) it is an abuse of the process of the court.

10. With regard to Commonwealth experience on the issue of the legal capacity of a legislature, it is noted that in *Montana Band v. Canada* [1998] 2F.C. 3, a Canadian court has expressed the view that implied capacity to sue and be sued exists in respect of a Band Council in Canada. (According to the Indian Act of Canada, "band" means a body of Indians.) That case did not turn on whether an elected body such as the Band Council in question has the capacity to sue or be sued because apart from naming that body as plaintiff, certain members of that body were also named as acting on their own behalf and on behalf of all other members. According to the court, this manner of framing the legal action "covers any uncertainties about legal status that might exist". In another Canadian case, the Speaker of the Legislative Assembly of Ontario did initiate a legal action for and on behalf of the Legislative Assembly of Ontario[3].

11. It appears that there are no precedent cases in which legislatures in major Commonwealth jurisdictions have applied for judicial review of the constitutionality of a piece of primary legislation. This may be because of legal and constitutional reasons, such as the application of the doctrine of Parliamentary Supremacy. It may also be due to the practical reason that those legislatures are dominated by members of the ruling party who can exert influence on the government to change the law, if necessary and there is no need in practice to bring the matter to court. However, the constitutional status of the Legislative Council of the Hong Kong Special Administrative Region is quite different from those legislatures.

12. There is at present no clear judicial authority for the Legislative Council's capacity or the lack of capacity to sue and be sued. As a solution to overcome the uncertainty over LegCo's capacity to sue, one or more of the Members may act as parties acting on their own behalf and on behalf of all other members in an

---

[3] In *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (379/99), the Speaker of the Legislative Assembly of Ontario applied for judicial review of a decision by the Ontario Human Rights Commission to proceed with the complaint of a non-Christian regarding the reading of Lord's Prayer as part of the daily proceedings at the Assembly. The Speaker of the Legislative Assembly claimed that the reading of Lord's Prayer at the beginning of each session was day-to-day operation of the Legislature and fell within the scope of parliamentary privilege and they had to be protected from outside attack from a body such as the Human Rights Commission. The application was allowed.

action. However, this solution may not be easy to come about, as consent of the Members not named in such an action has to be obtained. There is no procedure available for LegCo to seek consent of these other Members. Indeed any resolution which may be passed by LegCo for this purpose would face a possible constitutional challenge on the basis that LegCo is but only the Legislature established by the Basic Law and it is not vested with the powers and functions to sue the Executive Authorities. Even if LegCo were to pass a resolution authorising certain Member(s) to sue in the name of LegCo and its other Members, there would still be the question of how the proceedings are going to be funded. Any motion which has the object or effect of creating a charge on the public revenue may not be moved under the Rules of Procedure unless the CE gives his consent. It would be unrealistic to contemplate that the CE would give his consent in that regard.

13. The Subcommittee may consider taking up the legal action instead of LegCo, in which case similar issues would arise. Apparently, even if the Subcommittee voted to take legal proceedings by its members on behalf of the Subcommittee, approval or authorization may have to be sought from the House Committee or ultimately LegCo. The terms of reference of this Subcommittee should not cover an authority to sue.

14. From a practical point of view, any agreement to authorize Members or Subcommittee members to institute legal proceedings should better be sought outside of the setting of LegCo operating formally under the Basic Law. A LegCo motion may then be moved for Council to express recognition of such an agreement. The funding issue will also involve the vires issue. But perhaps it would only be reasonable for the LegCo Commission to allow itself to consider such funding application and may approve it with condition that if held otherwise by the court that LegCo does not have the necessary capacity to sue, the cost has to be refunded.

Thresholds that need to be considered to obtain leave for judicial review

15. In general, judicial review is the means by which the court exercises its general supervisory jurisdiction over decisions of public bodies. It is concerned with reviewing not the merits of the decision of which the judicial review is made but the decision-making process itself. It is a matter of discretion for the court to grant remedies including a declaration. The court will not, however, be concerned with a hypothetical or academic issue and will not give an advisory opinion.

16. Application for judicial review is a two-stage process: a leave application followed by a substantive hearing. Prior to making an application for leave, the following thresholds have to be considered and satisfied–

(a) the applicant having sufficient interest in the application (for example, where the decision challenged deprives him of a benefit or that he is being adversely affected by that decision);

(b) a decision to be reviewed, made by a public body against which the review should lie;

(c) grounds for review**,** i.e. whether there is an arguable case on the grounds for review (for example, any illegality, procedural impropriety or unreasonableness); and

(d) promptitude, i.e. whether the application has been made promptly and in any event within 3 months from the date when the grounds for review first arose.

17. On the application of the thresholds, it is relevant to refer to the recent case of *Leung TC William Roy v. Secretary for Justice* (HCAL 160 of 2004), in which leave was granted by Hartmann J. on 28 June 2005 to challenge the constitutionality of primary legislation. In the case, a 20-year old homosexual male, applied for judicial review seeking a declaration that sections 118C, 118F(2)(a), 118H and 118J(2)(a) of the Crimes Ordinance (Cap. 200) enacted in 1991 are unconstitutional in that they are inconsistent with Articles 25 and 39 of the Basic Law and Articles 1, 14 and 22 of the Bill of Rights. The provisions relate to the prohibition of both buggery and acts of gross indecency with a man under the age of 21. The applicant has not been prosecuted under any of the relevant provisions in the Ordinance.

18. The Secretary for Justice was named as respondent. Counsel for the respondent submitted that the court had no jurisdiction to grant leave as –

(a) the applicant was not affected by any decision of a public body and he had no locus standi;

(b) the applicant's challenge did not relate to any "decision" of a public body;

(c) that the applicant's complaint was concerned with a hypothetical issue; and

(d) that the applicant's challenge was in any event out of time.

19. Hartmann J. opined that the test to be applied in granting leave was whether the material before the court disclosed matters which, on further consideration, might demonstrate an arguable case for the grant of relief sought. He opined -

> "If an applicant seeks only declaratory relief, the court has the jurisdiction to hear the matter even though the challenge is not based on the existence of some 'decision' by a public body. Absent a 'decision', declaratory relief may be granted if the court considers it 'just and convenient' to do so.

> …Having found that it is prima facie arguable that, in only seeking declaratory relief, the applicant does not require a 'decision' to be identified in order to found jurisdiction, it must follow that he does not need to demonstrate that he has been affected by any 'decision'.
>
> …When declaratory relief only is sought going directly to primary legislation, what is being considered is an on-going state of affairs. What then becomes of paramount importance is whether there is a real question to be determined and whether the applicant has a real interest in it. ...In the present case, the court having a discretion, it does not seem to me that issues of promptness are of importance, not at least to prevent the applicant from arguing his case at a substantive inter partes hearing.".

20. In brief, Hartmann J. was of the view that if only a declaratory relief was sought, the applicant did not require a "decision" that affected him in order to found jurisdiction and that the issue of promptitude was not important so long as the case is prima facie arguable. Leave for application for judicial review was granted. The case was heard before Hartmann J. on 21 and 22 July 2005. Judgment for the applicant was handed down on 24 August 2005 and declarations that the four sections are inconsistent with the Basic Law and/or the Bill of Rights were granted. As the Secretary for Justice has lodged an appeal on 30 September 2005, it remains to be seen if the view of Hartmann J. on granting the application for leave of judicial review is to be upheld.

Conclusion

21. Should clarification on the constitutionality of section 3(5) of the UNSO by way of an application for judicial review be considered necessary, the internal issues of the capacity of the LegCo or the Subcommittee to institute legal proceedings and funding of cost have first to be resolved. Whether leave will be granted to such a challenge to the constitutionality of primary legislation will be considered by the court upon certain thresholds. The outcome of the appeal, the *Leung TC William Roy v. Secretary for Justice* case could throw light on whether those thresholds will be met for such a challenge.

Prepared by

Legal Service Division
Legislative Council Secretariat
November 2005