Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation

Administration's response to issues raised at the meeting of 10 June 2011

When the Subcommittee discussed the paper of the Administration entitled "Supplementary Information on the Principles and Policies for Delegating Power to make Subsidiary Legislation to an Executive Authority or Other Body" (LC Paper No. CB(2) 1974/10-11(01)) at its meeting held on 10 June 2011, the Subcommittee requested the Administration to provide examples of subsidiary legislation falling within those factors to be considered when deciding whether to make provision in primary or subsidiary legislation as listed in paragraph 6 of the paper. The Subcommittee also sought the Administration's views, with reference to No. 2 judgment of *Ng Ka Ling & Others v Director of Immigration*[1], on whether judicial clarification was applicable to resolving differences over the interpretation of legislative provisions between the Legislative Council and the Administration.

Factors listed in paragraph 6 of the Administration's paper

2. Paragraph 6 of the Administration's paper (LC Paper No. CB(2) 1974/10-11(01)) refers to some of the factors identified by the Cabinet Office of the UK Government as relevant when deciding whether to make provision in primary or secondary legislation[2]. To recap, the UK Guide suggests that it may be appropriate to make secondary legislation in the following situations -

(a) the matters in question may need adjusting more than it would be sensible for Parliament to legislate for by primary legislation;

(b) there may be rules which will be better made after some experience of administering the new Act and which it is not essential to have as soon as it begins to operate;

(c) the use of delegated powers in a particular area may be well precedented and uncontroversial; and

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[1] (1999) 2 HKCFAR 141.

[2] *Guide to Making Legislation* ("the UK Guide"), Cabinet Office of the UK Government, 23/9/2010, para. 9.36. No examples have been provided in the UK Guide.

(d) there may be transitional and technical matters which it would be appropriate to deal with by delegated powers.

3. The factors identified in the UK Cabinet Guide would be useful principles to refer to in similar situations in Hong Kong. At the same time, it is noted that, even in the UK, these factors are guidelines and not prescriptive rules. On matters requiring adjustment as stated in paragraph 2(a) above, examples can be found in regulations made under the Merchant Shipping (Safety) Ordinance (Cap. 369)[3]. That Ordinance empowers the Secretary for Transport and Housing to make regulations relating to various aspects of marine safety, e.g. radio safety and life saving appliances. Section 112A(4) provides that such regulations may provide for the adoption of standards, specifications or codes of practice issued by the International Maritime Organization. Another example is the Poisons List Regulations (Cap. 138, sub. leg. B) made under the Pharmacy and Poisons Ordinance (Cap. 138). Section 29 of that Ordinance authorizes the Pharmacy and Poisons Board to make regulations prescribing a list of poisons and to amend the regulations. Similarly, section 9 of the Prevention and Control of Disease Ordinance (Cap. 599) empowers the Director of Health to prescribe by order measures to implement temporary recommendations made by the World Health Organisation under the International Health Regulations.

4. With regard to the factor referred to in paragraph 2(c) above, the use of delegated legislation by professional bodies to regulate professional practice is well precedented and uncontroversial in Hong Kong. Examples can be found in the Professional Accountants By-laws (Cap. 50 sub. leg. A) made by the Hong Kong Institute of Certified Professional Accountants pursuant to section 8 of the Professional Accountants Ordinance (Cap. 50) and the Solicitors' Practice Rules (Cap. 159 sub leg. H) made by the Council of the Law Society pursuant to section 73 of the Legal Practitioners Ordinance (Cap. 159). Other examples can be found in licensing or permit schemes which contain detailed provisions on the operation of such schemes. For instance, the Hazardous Chemicals Control (General) Regulation (Cap. 595 sub. leg. A) contains provisions concerning the application for permits under the principal Ordinance concerned.

5. Regarding the transitional and technical matters referred to in paragraph 2(d) above, in Hong Kong, the more common practice is to include transitional matters in the primary legislation itself, mostly in a Schedule to the Ordinance, instead of setting them out in subsidiary legislation. There

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[3] See Part IX of Cap. 369.

are, however, instances of delegation of powers to make transitional provisions. Examples are section 14A of the Road Traffic Ordinance (Cap. 374), section 97 of the Trade Marks Ordinance (Cap. 559), section 283 of the Copyright Ordinance (Cap. 528) and section 158 of the Patents Ordinance (Cap. 514). As regards examples of technical matters, indeed one of the main reasons for using subsidiary legislation is to set out technical details. For example, rules relating to the conduct of court or other proceedings are highly technical or procedural in nature and it is often appropriate for such rules to be dealt with by subsidiary legislation. Rules made under the High Court Ordinance (Cap. 4), the District Court Ordinance (Cap. 336) and the Criminal Procedure Ordinance (Cap. 21); rules made under the Administrative Appeals Board Ordinance (Cap. 442); and rules made by the Equal Opportunities Commission, i.e. the Sex Discrimination (Formal Investigations) Rules (Cap. 480 sub. leg. A), pursuant to section 88 of the Sex Discrimination Ordinance (Cap. 480) would be in this category. Where the legal rules in question are highly technical or operational in nature, it would also be appropriate for them to be made by persons who have expertise in the field (see for example the regulations made by the various professional bodies to regulate professional practice discussed in paragraph 4 above).

Judicial opinion

6. In No. 2 judgment of *Ng Ka Ling & Others v Director of Immigration*, the Court of Final Appeal ("CFA"), upon the application of the Director of Immigration, invoked its inherent jurisdiction to clarify part of its judgment given on 29 January 1999[4]. The CFA considered that it was faced with an exceptional situation as various different interpretations had been put on part of the Court's original judgment and this had given rise to much controversy. However, in No. 2 judgment, the CFA clarified part of its earlier judgment in the same case. It did not provide a judicial opinion per se in the absence of a dispute. The judicial clarification in *Ng Ka Ling* is part and parcel of the original decision and is therefore distinguishable from a case where the parties seek the court's advice on the interpretation of a legislative provision in the absence of a legal action before the court.

7. Under the common law, where there is on-going litigation, the court has wide powers to grant appropriate declaratory relief on any application to safeguard the due process of law under its inherent jurisdiction. The term "inherent jurisdiction" was defined by Jacob as follows -

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[4] *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4.

> "In this light, the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." [5]

8. The scope of the court's power to grant declaratory relief under its inherent jurisdiction has been evolving. The jurisprudence in Hong Kong in this regard has understandably been much influenced by the case law in the United Kingdom all along. In particular, the Hong Kong courts have often made reference to and relied on the following passage of Lord Diplock's judgment in *Gouriet v Union of Post Office Workers* [6]-

> "…But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."[7]

9. It appears that the Hong Kong courts have been cautious about granting declaratory relief on hypothetical or academic issues which may never arise or are yet to arise for adjudication by the courts. In *Charter View Development Limited v Golden Rich Enterprises Limited & Another*[8], the Court refused to grant a declaration to the effect of "an advisory opinion based on a hypothetical course of action which may or may not eventuate" and "[t]he court declines to act as legal adviser in such cases."[9] Giving the judgment of the court, Ribeiro JA, as he then was, said:

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[5] Jacob, H, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems*, 23, 51. Jacob's article has been referred to by our court on many occasions in its discussion of the concept of "inherent jurisdiction". For example, it was referred to as containing an erudite discussion of the concept by the Court of Appeal in *So Wing Keung v Sing Tao Ltd & Another* [2005] 2 HKLRD 11, para. 31.

[6] [1978] AC 435 at 510D.

[7] In *In re S (Hospital Patient: Court's Jurisdiction)* [1996] 3 WLR 78, the Court of Appeal considered that Lord Diplock's speech in *Gouriet* can no longer be taken to be exhaustive description of the circumstances in which declaratory relief can be granted today. The court held that a dispute between rival claimants as to the care of an adult patient incapable of expressing his wishes in respect of treatment or care was a justiciable issue in respect of which the court's advisory declaratory jurisdiction could properly be invoked. See also the discussion in Zamir J & Lord Woolf, *The Declaratory Judgment*, 3rd ed., Sweet & Maxwell: London, 2002, 140-145. The learned authors commented that "[w]hile the courts remain conscious of the dangers of advisor opinions, they have also recognised that there may be special circumstances, particularly in the field of public law, where the advantages of certainty stemming from the grant of declaratory relief may outweigh the disadvantages." (At p. 142).

[8] CACV 42/2000, 13 March 2000.

[9] Ibid, para. 32. See also paras. 14 and 15.

> "15. There is no doubt that declaratory relief has for many years been embraced in common law jurisdictions as a valuable and flexible remedy appropriate for use in many different contexts. This is recognized in O 15 r 16 of the High Court Rules which provides that -
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> "No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed."
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> However, the courts have also made it clear that they will not entertain applications for declarations in relation to issues which are in a material sense merely hypothetical or academic. As pointed out in Zamir and Woolf, *The Declaratory Judgment,* Sweet & Maxwell, 2nd Ed, at p 127, it is of particular importance that the declaration sought must be based on concrete facts. If it is not, and if, for instance, there is no dispute in existence or the dispute is based on purely hypothetical facts or if the dispute has ceased to be of any practical significance, the court's established practice is to refuse declaratory relief. The court will in particular refuse to give an advisory opinion sought by a plaintiff in the guise of declaratory relief in respect of a situation that has not arisen and may never arise."

10. In *Man Ping Nam v Man Mei Kwai*[10], Le Pichon JA cited with approval the aforesaid passage of Lord Diplock's judgment in *Gouriet* (at para. 8 above)[11]. Following Lord Diplock's approach, the Court of Appeal held that it has no jurisdiction to provide an advisory opinion.

11. The Court of Appeal considered the discretion to make an advisory declaration in *Chit Fai Motors Co Ltd v Commissioner for Transport*[12]. Ma CJHC, as he then was, considered whether the court has jurisdiction to provide an advisory opinion for hypothetical or academic issues. His lordship opined that where a question is purely hypothetical or academic in the sense that there are simply no events that have occurred that form the basis for the question to be answered, the court will not have any jurisdiction to determine the question. However, if the question which originally drove the parties to the litigation has only become hypothetical or academic and is no longer in existence between the parties at the time of the hearing, the court still has jurisdiction to hear and

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[10] CACV 193/2002, 11 December 2002, para. 22.

[11] *Gouriet* was a public law case but Le Pichon JA accepted that the principles are equally applicable to a private law case.

[12] [2004] 1 HKC 465, 472-473.

determine the question in issue. In deciding whether or not to do so, the court will closely examine the relevance or utility of any decision. In the public law sphere where the duties of public bodies fall to be exercised on a continuing basis, it may be easier to demonstrate the relevance or utility of a decision[13].

12 Outside the litigation context, it appears that at the constitutional level, the Hong Kong judiciary has explored the idea of introducing a procedure for a constitutional reference to the CFA but finally decided against such a procedure. According to former Chief Justice Li[14] -

> "Constitutional references are often made in the heat of political controversy and this may put the Court in a delicate position. In my view, it suffers from two main disadvantages. First, the constitutional questions will be considered divorced from any actual factual situation. This is unsatisfactory. Having a real situation usually enables the court to focus better on the question of law raised. Secondly, on a constitutional reference, the court will be exercising an original jurisdiction. It will not have the benefit of the judgments of the lower courts. These judgments, together with the refinement of the arguments by the lawyers through the experience of the hearings in the lower courts, are of great assistance to a final appellant court."

13. It appears in the light of the above discussion that the court has jurisdiction to give advisory opinion, in the form of a declaration in case of an important point of public interest even if the issue in question has become academic between the immediate litigating parties. It is a matter of discretion which the court will only exercise in exceptional circumstances[15]. The Court of Appeal's approach discussed above (*Charter View Development Ltd* & *Man Ping Nam)* indicates that the court is disinclined to act as the parties' legal adviser and to entertain a request for an advisory opinion in respect of the correct interpretation of a legislative provision per se if there is

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[13] See also *Secretary for Security v Prabakar* (2003) 6 HKCFAR 397. In that case, the CFA held that even though the question before the court is no longer a live issue between the parties but has become academic by the time of the hearing, the court may still make a decision on the question if there is a sufficiently great public interest to be served. On academic questions, see also *Leung v Secretary for Justice* [2006] 4 HKLRD 211, paras. 24-29. On the English court's approach to academic questions, see *R v Home Secretary ex parte Salem* [1999] 1 AC 450. There the House of Lords held that it had discretion to hear the appeal even if there was no longer a *lis* to be determined directly affecting the parties' rights. But the discretion was to exercise with caution and academic appeals should not be heard unless there was a good reason in the public interest for so doing.

[14] Chief Justice Li, "Reflections on the retrospective and prospective effect of Constitutional Judgments", *The Common Law Lecture Series 2010*, edited by Jessica Young and Rebecca Lee, Faculty of Law, The University of Hong Kong, 2011, 21- 55, at 49.

[15] *Leung v Secretary for Justice* [2006] 4 HKLRD 211, para. 28(7)-(8) and footnote 13.

no legal issue or dispute before it. Outside the litigation context, it appears that the court would be wary of providing an advisory opinion even if the issue concerns matters of constitutional importance.

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