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

Judicial Review and the Legislative Council

At the meeting held on 22 February 2011, the Subcommittee requested the Legal Service Division (LSD) to prepare a paper on the legal principles of judicial review in relation to Legislative Council (LegCo). This paper identifies these principles and, where appropriate, sets out LSD's views for members' reference.

2. There is no statutory provision that expressly states whether and under what circumstances judicial review may be sought against LegCo. We have only decided cases as guidance. During the past few years, various applications for leave to commence judicial review proceedings have been made to the courts against LegCo[1], its President, its Clerk, its Members and those of its Members who are members of a select committee. The subject matters giving rise to such proceedings are also varied. Upon closer reading, the cases may be divided into three categories according to the subject matters in respect of which each applicant was seeking judicial review:-

(1) those relating to the internal working of LegCo;

(2) those concerning ordinances enacted by LegCo; and

(3) those concerning resolutions passed by LegCo.

The legal principles that may be deduced from these cases are discussed in the ensuing paragraphs.

[1] For example, the action commenced by the Right to Inherent Dignity Movement Association and others (HCAL 48/2008).

Internal working of LegCo

3. In *Cheng Kar Shun & Anor v. Honourable Li Fung-ying & Ors* [2009] 4 HKC 204 (the *Cheng Kar Shun* case), the witnesses summoned to attend before a select committee of LegCo (the Committee) applied to court for judicial review to challenge the power of the Committee to order them to attend before the Committee and to produce documents. One of the grounds of the challenge was based on section 9(2) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382). The section provides, among others, that the power to order attendance of witnesses may be exercised by a select committee of LegCo if it is specifically authorised by a resolution of LegCo to exercise the power *in respect of any matter or question specified in the resolution*. The applicants argued that since the subject matter of the inquiry by the Committee was set out in the resolution of LegCo, in summoning the applicants the Committee had exceeded its power granted by the resolution. In order to decide this issue, it was necessary for the Court to interpret the resolution of LegCo that set up the Committee. This went to the performance of the powers and functions of LegCo in the course of its proceedings, which Cheung J termed as "internal working of LegCo". The first question was therefore whether the courts had jurisdiction to intervene in the internal working of the legislature.

4. The learned judge referred to *Rediffusion (Hong Kong) Limited v Attorney General* [1970] HKLR 231 and the recent case of *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387. The former is a case concerning the Legislative Council as a colonial non-sovereign legislature under the British rule and the Colonial Laws Validity Act 1865[2]. The latter case concerned LegCo under the Basic Law (BL) and the question whether part of its Rules of Procedure (RoP) that prohibited members from introducing committee stage amendments which have charging effect, were *ultra vires* article 74 of BL[3]. Hartmann J (as he then was) held that BL recognised LegCo as a sovereign body under BL and provided that LegCo did not act in

[2] This case does not seem to be pertinent to LegCo as the legislature of HKSAR under BL.

[3] The applicant did not challenge the actual ruling of the President of LegCo on the proposed committee stage amendments.

contravention of BL, it was answerable to no outside authority[4].

5. The learned judge also referred to the Privy Council case of *The Bahamas Methodist Church v Symonette* [2000] 5 LRC 196 which examined the positions of the courts in common law countries with written constitutions under which the constitutions, not the parliaments, were supreme. In the judgment delivered by Lord Nicholls, it was stated that the constitutional principle prevailing in the United Kingdom that Parliament had exclusive control over the conduct of its own affairs had to be modified to the extend, but only to the extent, necessary to give effect to the supremacy of the constitution. Subject to this important modification, the rationale underlying the constitutional principle remained as applicable in a country having a supreme, written constitution as it is in the United Kingdom where the principle originated[5].

6. Cheung J then concluded that the same common law principles applied in Hong Kong. He held that the courts of Hong Kong SAR did not, as a rule, interfere with the internal working of LegCo, but they did have jurisdiction to intervene in the exceptional circumstances when questions of whether LegCo, in going about its business, had acted in contravention of the provisions of BL. He emphasized that the jurisdiction had to be exercised with great restraint, having regard to the different constitutional roles assigned under BL to different arms of the government[6].

7. The *Cheng Kar Shun* case has therefore established two principles. First, unless there is contravention of BL, LegCo has exclusive control over the conduct of its own business. Secondly, when the question of whether there is contravention of BL arises, the courts will only intervene when it is necessary to do so to uphold the supremacy of BL. It may be of interest to note that in a recent decision by Reyes J disposing of an unrepresented applicant's application for leave to judicial review of a decision of the Finance Committee of LegCo of approving funding for a High-Speed Rail Link between Hong Kong and Guangzhou, he held that the decision by the Finance Committee was a legislative act

[4] At p. 261I.
[5] At p. 262F
[6] At p. 263B.

and was not subject to judicial review[7]. His view was affirmed by the Court of Appeal[8].

Whether LegCo could be respondent

8. Judicial review (JR) proceedings are not one party affairs. There must be a respondent to JR proceedings initiated by the applicant. Very often this is a further hurdle that must be surmounted before any JR proceedings may be instituted. Since LegCo is an unincorporated body and cannot be a respondent to such proceedings[9], JR proceedings could not be commenced against LegCo as a body.

The President as the respondent?

9. The President of LegCo (the President) is a Member of LegCo. He enjoys the same privileges and immunities as other Members under the Basic Law and Cap. 382[10]. Section 23 of Cap. 382 further provides that the President is not subject to the jurisdiction of any court in respect of the lawful exercise of any power conferred on or vested in the President by or under Cap. 382 or RoP. It follows that any lawful ruling by the President in any proceedings of LegCo are beyond the jurisdiction of the courts. It should be noted, however, that once it is alleged that the President's exercise of power is unlawful, the jurisdiction of the courts could be invoked[11].

Ordinances enacted by LegCo

10. The end result of legislative acts of LegCo could be an Ordinance or a resolution with legislative effect[12]. Hence, very often when such Ordinance or resolution is being challenged in the courts, it is the act of an officer who, or a department of the Administration which, is

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[7] *Re Chan Kai Wah* HCAL40/2010 (unreported) at p. 2.

[8] *Chan Kai Wah v Hong Kong Special Administrative Region* CACV126/2010 (unreported) per Hartmann JA at para. 16. The hearing was *ex parte* without legal representation.

[9] *Glory Success Transportation Limited v Secretary for Justice* HCAL93/2006, per Chu J at para. 12.

[10] See Article 77 of the Basic Law and sections 3 and 4 of Cap. 382.

[11] The President of LegCo has been made respondent to judicial review proceedings in *Chim Pui Chung v President of Legislative Council* [1998] 4 HKC 5 and *Leung Kwok Hung v President of the Legislative Council* [2007] 1 HKLRD 387.

[12] Resolutions with legislative effect are explained in paragraph 16.

acting pursuant to an empowering provision of an Ordinance or a piece of subsidiary legislation that is called into question.

11. The leading case concerning Ordinances is *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4 (the *Ng Ka Ling* case). In *Ng Ka Ling* case, the appellants asserted their right of abode as permanent residents of Hong Kong and challenged the scheme administered by the Director of Immigration under the Immigration (Amendment) (No. 3) Ordinance 1997 (the No. 3 Ordinance) that required permanent residents residing on the Mainland to hold an one way permit before they could enter Hong Kong to enjoy the right of abode. The Court of Final Appeal (CFA) held such requirement to be contrary to BL and that the provisions of the No. 3 Ordinance imposing such requirement were invalid. CFA stated its jurisdiction in the following terms:-

> "In exercising their judicial power conferred by the Basic Law, the courts of the [Hong Kong Special Administrative] Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or an executive act is invalid at least to the extent of the inconsistency."

12. The case may have decided other issues of constitutional importance but for our present purposes, it has affirmed the principle that any Ordinance that is inconsistent with BL is invalid. This is an application of the classic doctrine of *ultra vires*, i.e. any Ordinance that is *ultra vires* of BL is invalid. The case itself is an illustration of how an Ordinance duly enacted by LegCo but contained provisions inconsistent with BL may be declared invalid to the extent of that inconsistency.

13. *Secretary of Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 is another illustration of the operation of the doctrine of *ultra vires*. The defendant was charged with buggery under section 118F(1) of the Crimes

Ordinance (Cap. 200). Since only males were chargeable of the offence under the section, the magistrate held section 118F(1) to be unconstitutional and dismissed the charge. The Secretary for Justice (SJ) ultimately appealed to CFA. CFA dismissed SJ's appeal. Li CJ said in his judgement:-

> "Discrimination on the ground of sexual orientation would plainly be unconstitutional under both article 25 of Basic Law and article 22 of the Bill of Rights in which sexual orientation is within the phase "other status". [13]"

This seems to suggest that when BL has provided for the implementation of the provisions of the International Covenant on Civil and Political Rights[14], any statutory provision inconsistent with the provisions of the Covenant would be *ultra vires* of BL.

14. *Solicitor v Law Society of Hong Kong & Secretary for Justice (Intervener)* (2003) 6 HKCFAR 570 is an interesting case that shows how provisions of an Ordinance enacted before the Reunification in 1997 may be held *ultra vires* under BL. Section 13 of the Legal Practitioners Ordinance (Cap. 159) provided that the Court of Appeal's decision on an appeal from the Solicitors Disciplinary Tribunal should be final. The appellant appealed to the Court of Appeal and after the appeal was dismissed, appealed to CFA. At issue was whether CFA had jurisdiction. CFA held that it did have jurisdiction. That was because the offending provision was not part of the law of Hong Kong prior to 1 July 1997 by virtue of the UK Colonial Laws Validity Act 1865. Since section 13 offended the Judicial Committee Acts, it was void and inoperative. It followed that it was not a law previously in force in Hong Kong within the meaning of article 8 of BL and had no application in HKSAR. Further, article 82 of BL vested the power of final adjudication in CFA. The limitation of the power of final adjudication by section 13 was not proportional to the purpose sought to be achieved. It was held inconsistent with BL and therefore invalid.

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[13] At p. 346D.

[14] Li CJ was of the view that the Hong Kong Bill of Rights Ordinance (Cap. 383) implemented in accordance with article 39 of BL the provisions of the International Covenant on Civil and Political Rights. (at p. 345J) Article 26 of the International Covenant was implemented in article 22 of the Hong Kong Bill of Rights as set out in Section 8 of Cap. 383.

15. The above cases clearly established that provisions of Ordinances that are *ultra vires* of BL are invalid. Hence, the results of the legislative acts of LegCo are subject to JR on the basis of the doctrine of *ultra vires*. In cases where JR was sought against the validity of an Ordinance, the Secretary for Justice was named as the respondent. This is consistent with the pre-1997 practice.

Resolutions with legislative effect passed by LegCo

16. Resolutions with legislative effect passed by LegCo include resolutions approving subsidiary legislation[15], amending Ordinances[16], repealing subsidiary legislation [17] and approving RoP and any amendments to RoP[18]. The doctrine of *ultra vires* applies equally to all these resolutions.

17. In this context, *ultra vires* can occur in two different senses: first, the resolution is inconsistent with BL and secondly, the resolution goes beyond the enabling or empowering statutory provision.

18. *Leung Kwok Hung v President of Legislative Council*, supra, is an instance of inconsistency with BL. The challenge was directed at rule 57(6) of RoP. RoP were approved by a resolution of LegCo pursuant to article 75 of BL. The judgement of Hartmann J (as he then was) affirmed the jurisdiction of the court over the matter albeit having regard to the sovereignty of LegCo under BL, it is a jurisdiction that should only be exercised in a restrictive manner[19].

19. The case is also the authority on the question of the appropriate remedy in respect of a statutory provision whose content contravenes BL. The learned judge cited the Privy Council case of *The Bahamas District*

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[15] For example: under section 9A of the Criminal Procedure Ordinance (Cap. 221); section 29 of the Product Eco-Responsibility Ordinance (Cap. 603); section 29 of the Pharmacy and Poisons Ordinance (Cap. 138); and section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525).

[16] For example: under section 87(2) of the Disability Discrimination Ordinance (Cap. 487); section 7 of the Legal Aid Ordinance (Cap. 91); section 48A of the Employees' Compensation Ordinance (Cap.282); and section 8 of the District Councils Ordinance (Cap. 547).

[17] For example: under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1); and section 3(3) of the Fugitive Offenders Ordinance (Cap. 503). .

[18] Under article 75 of BL.

[19] Paragraphs 28 to 31 per Hartmann J in *Leung Kwok Hung v President of Legislative Council*, supra.

of the Methodist Church in the Caribbean and the Americas v Speaker of the House of Assembly (2002-2003) 5 ITELR 311 and adopted the observation of Lord Nicholls that "[t]he primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void"[20].

20. There is as yet no decided case in which a resolution of LegCo is alleged to be *ultra vires* of the empowering provision[21]. The recent controversy over the repeal of the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (the Amendment Order) in fact arose from the dispute whether LegCo had acted *ultra vires* the empowering provision, i.e. section 34(2) of Cap. 1. The nub of the matter is the prescription by section 34(2) that a piece of subsidiary legislation may only be amended in any manner consistent with the power to make that subsidiary legislation. The Administration took the view that the statutory provision authorising the making of the Amendment Order, i.e. section 14 of the Country Parks Ordinance (Cap. 208), did not allow the Chief Executive to repeal a designation made. Hence, LegCo could not repeal the Amendment Order. The President considered that section 14 only prescribed what could be designated by CE as a country park but did not have the effect of restricting his powers in respect of the subsidiary legislation implementing the designation[22]. LegCo eventually repealed the Amendment Order by a resolution at its meeting on 13 October 2010. The repealing resolution was published in the Gazette as L.N. 135 of 2010 (the repealing resolution).

21. If any JR proceedings were to be instituted in respect of the repealing resolution, neither LegCo nor the President should be a respondent for reasons already explained in the above paragraphs. The question of who could be made the respondent would not be easy to answer if it is the Administration who seeks JR of the repealing resolution.

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[20] Paragraph 32 *ditto*.

[21] On *ultra vires* of delegated legislation made by the Administration, there are numerous cases. The leading case perhaps remains that of *Singway Co Ltd. v Attorney General* [1974] HKLR 275, in which notes inserted in an outline zoning plan were held *ultra vires* section 4(1) of the Town Planning Ordinance (Cap. 131).

[22] Details of the matter have been provided in LC Paper No. CB(2)852/10-11.

Other requirements for initiating JR proceedings

22. Procedures for JR proceedings are prescribed by Order 53 of the Rules of the High Court (Cap. 4 sub. leg. A). Any JR proceedings relating to LegCo must also comply with these requirements, which are common to all JR proceedings. Rule 3(1) stipulates that application for JR may only be made with the leave of the court. Rule 3(7) stipulates that the court must not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates. This is normally referred to as whether the applicant has the necessary standing to make the application. Rule 4(1) prescribes that an application must be made within three months of the date when the grounds for the application first arose.

23 Since *Chan Po Fun Peter v Cheung CW Winnie & Anor* [2005] 5 HKC 145, the appropriate test for granting of leave to apply for JR has been stated by CFA to be that of the arguability test[23]. Under this test, arguability means reasonable arguability. A reasonably arguable case is one which enjoys realistic prospects of success. This represents a higher threshold than the potential arguability test which has been applied until the CFA decision.

24. In the premises, an application for JR in relation to LegCo could only be commenced if the applicant has a reasonably arguable case based on the doctrine of *ultra vires* in respect of matters for which the immunities under Cap. 382 do not apply. In the absence of good reasons that a court would extend the period, an application for leave must be made within three months of the date when the grounds for JR first arose.

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[23] At p. 152 F, per Li CJ.