

SJ's speech at Conference on Effective Judicial Review: A Cornerstone of Good Governance (English only)

Following is the Keynote Address by the Secretary for Justice, Mr Wong Yan Lung, SC, at the Joint Conference on "Effective Judicial Review : A Cornerstone of Good Governance" today (December 11) :

Chief Justice, Lord Woolf, Professor Forsyth, Lord Justice Laws, Professor McConville, My Lords, Distinguished Guests, Ladies and Gentlemen,

Introduction

Thank you for this opportunity to address such a distinguished audience. I have a strong sense of affiliation to this present conference. The subject matter itself is of course an integral part of my responsibility as Secretary for Justice. But on a personal level, it is my great pleasure to be associated with Sir David Williams who lectured me on constitutional and administrative law at Cambridge in the early 80's and with Professor Forsyth who is a great friend of my department. It is also most gratifying to see the Chinese University's Faculty of Law thriving so well and co-organizing such an important and successful conference - as I was a member of its Planning Committee before joining the Government.

In the past few days alone, two judicial review judgments have attracted public attention. Last week, the Hon. Justice Saunders declared the Government's policy in the administration of the screening process for claims under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to be unlawful and in breach of the Government's duty to assess such claims in accordance with high standards of fairness. On Monday, the Hon. Justice Andrew Cheung concluded the disenfranchisement provisions relating to voting and registration contravene the right to vote guaranteed under Art. 26 of the Basic Law and Art. 21 of the Hong Kong Bill of Rights so far as they affect prisoners.

The number of judicial review applications has been on the rise in Hong Kong. There are now around 150 applications each year. This compares with only 29 cases (with leave granted in 26 of them) 20 years ago in 1988.

Among all the cases where challenges were brought by way of judicial review, the number of cases attacking decisions involving the Government (but not other public bodies) has also increased markedly. For the current year 2008, up to 30 November, we have 118 judicial review applications involving the Government.

Yesterday Lord Woolf mentioned judicial review as a barometer of governance. I must therefore add that although the two recent judgments I mentioned are against the Government, we have not been doing too badly as the rate of successfully resisting a judgment obtained against the Government remains over 80% over recent years.

The Court's power to strike down unconstitutional legislation

Hong Kong is one of the jurisdictions which have a written bill of rights. Apart from the Bill of Rights Ordinance ("BOR") which was enacted back in 1991, the Basic Law provides comprehensive protection of fundamental human rights and freedoms in Chapter III and by the incorporation of the ICCPR and other major international human rights conventions.

Judicial review in respect of constitutional and human rights issues is a far more potent remedy in Hong Kong than in some other common law jurisdictions. Domestic legislation can be declared invalid by the Court. Under the UK Human Rights Act 1998, for example, although the court may declare a provision in domestic legislation incompatible with the protection of a convention right, the validity of the legislation will not be affected by the declaration of incompatibility. The minister concerned can refer the legislation back to Parliament for remedial order under a specified procedure. In Hong Kong, however, by virtue of the Basic Law, any domestic legislation contravening the Basic Law will be declared invalid and struck down by the court.

Secondly, although the Court accepts the expertise and experience of the legislature or the executive should be respected, where infringement of fundamental rights is involved, the judicial scrutiny will be more intense and the width of deference to the legislature or executive more limited.

Because of the breadth of human rights protection under the Basic Law and the BOR, quite often applicants of judicial review base their applications on the contravention of provisions of the Basic Law or BOR relating to fundamental rights, in addition to any conventional grounds.

For instance, Article 11 of BOR provides extensive guarantees for persons charged with criminal offences such as the presumption of innocence, trial without undue delay, and right against self-incrimination. It is further underpinned by Article 87 of the Basic Law. Judicial reviews mounted on these provisions engaged issues including: whether the imposition by the Insider Dealing Tribunal of penalty tripling the profit violated Articles 10 and 11 of the BOR which protect the privilege against self-incrimination, and whether the curtailment of the salary of a public officer subject to an interdiction order was incompatible with the presumption of innocence under Article 11 of the BOR.

Another fertile ground of judicial review challenges is the constitutional protection of private property. Article 6 of the Basic Law provides for the protection of the right of private ownership of property and Article 105 provides, inter alia, for the right to compensation for lawful deprivation of property. Because the amount at stake can be colossal, you should not be surprised to see teams of top silks (some of whom are taking part in this conference) arguing these points before our court rather frequently. The cases falling in this category raised arguments as to whether Article 105 required compensation for land resumed by Government to be based on the open market value of the property or just its real value without the speculative price the market was prepared to pay, and whether restriction on use imposed by the Town Planning Board gave rise to de facto deprivation of property.

Of course, the margin of appreciation accorded to the legislature or the executive varies with the subject matter. The courts appear to be more ready to give deference when it comes to socio-economic matters.

Because of this power of the court, particularly of the Court of Final Appeal, to invalidate legislation and executive acts, and because the consequences of invalidation could be very serious, the Court has to consider on more than one occasion intricate issues such as whether the court can order "temporary validity" or "temporary suspension", where the Court has declared certain legislative provisions or executive actions unconstitutional and invalid.

Effect on the Government - e.g. Proportionality Test

What is the effect of these constitutional and other challenges by way of judicial review on the Government, all coming within a relatively short span of time? Leaving aside the inevitable tension and exhaustion, the Government has to be and has become more vigilant. These challenges help develop a culture on the part of the Government and public authorities to formulate their legislative proposals and policies in compliance with the constitutional and human rights protection.

The Department of Justice has been tasked to clear the paragraphs on Human Rights and Basic Law implications which find their ways into every Executive Council paper seeking endorsement for the introduction of legislative changes before the Legislative Council. Seminars and workshops to keep the civil service up to date with the development of public and administrative law are being held regularly. And in this regard, Professor Forsyth has been a pillar of support.

By way of an example, the notion of proportionality has, through a number of landmark cases, been entrenched in the Government's thinking process. The Courts have provided the Government with important and practical guidance in areas where the relevant legislative provisions may not be free from ambiguity, or where specific local legislation does not even exist, in certain areas affecting fundamental rights.

Seven years ago, the court upheld a challenge by the Equal Opportunities Commission on the ground of sex discrimination in respect of the allocation of secondary school places. The court said that a test of proportionality must be applied to ascertain if the decision was within the range of responses open to a reasonable decision maker; and that it must be demonstrated that (a) the restriction is necessary, (b) it is rational in the sense that it is not arbitrary, unfair or based on irrational considerations, and (c) it is no more than is necessary to accomplish the legitimate objective. This formula is being memorised like the multiplier table.

Effect on the Government - e.g. Protection of Harbour

Lord Justice Laws was talking to me about the harbour yesterday. The other example I can give is indeed the judicial reviews relating to the Wan Chai reclamation plan. In dismissing the government's appeal against the successful judicial review challenge, the Court of Final Appeal considered that the intensity of the judicial scrutiny of the reasonableness of an administrative decision may vary according to the statutory context or the unique status of the subject matter. Where

interests in life, liberty or private property are liable to be directly affected or substantial public interests are involved, a more rigorous test for reasonableness stricter than the Wednesbury test but less stringent than where substantive interference with fundamental human rights will be applied.

This important clarification of the public duty imposed by the Protection of the Harbour Ordinance (Cap. 531) had also helped the Government in laying down rules, formulating policies or working out plans for the future. The Chief Executive-in-Council reviewed the Central reclamation plan in the light of that Court of Final Appeal's judgment. His decision following that review was itself challenged, but was upheld by the court. The two court decisions have clarified the presumption against reclamation and the overriding public need test.

Effect on Government - e.g. Legitimate Expectation

As the courts in Hong Kong, in particular our Court of Final Appeal, continue to develop important public law principles, taking into account overseas and international jurisprudence, the Government in turn has to shape its considerations, policies, decisions, and decision-making process accordingly, in order to maintain and meet the requisite evolving standards.

An example of such important development is legitimate expectation. The decision of the Privy Council in *Attorney General of Hong Kong v. Ng Yuen Shiu* back in 1980's is the leading authority for the principle where a public authority, charged with a duty of making a decision, promises to follow a certain procedure before reaching that decision, good administration requires that it should act by implementing that promise, provided the implementation does not conflict with the authority's statutory duty.

Where it might have been thought for some time that this protection of legitimate expectation was only procedural, the Court of Final Appeal, some twenty years later, held in one of its decisions concerning the right of abode that the protection is also afforded in a substantive sense. In so doing, it held that individuals had substantive rights to remain in Hong Kong, and not merely a procedural right to be processed in a particular way, as a result of official statements. Such substantive rights may arise when a public officer has, by way of a promise or established practice, raised a legitimate expectation.

The notion of 'legitimate expectation' is now no less than a "household name" among government officials. Because public officials realise their public statements may give rise to legitimate expectation, they have become more careful about what they say. In other words, the risk of judicial reviews has tamed the tongue of the decision makers.

Government applying for judicial review

It is not always the case when the government or a public body is on the respondent side of a judicial review application. There have been occasions where the Government, with a view to clarifying certain matters of principle affecting proper governance, may have to apply for judicial review, particularly to seek declaratory

relief.

The Secretary for Education, for example, brought an application for judicial review to challenge a finding by a Commission of Inquiry which concluded, on the Government's interpretation, that direct contacts of a senior government officer with academic members of an education institution to protest against the critical views of the latter, without any threat of sanction or reprisal, would constitute improper interference with academic freedom. The Government is concerned that an unreasonably low threshold for improper interference with academic freedom has been set and, if allowed to stand, is likely to seriously affect the dealings between government officials and academic institutions in the future. Since the judgment in this judicial review is still reserved, I must refrain from discussing the matter further. However, this is a case in point demonstrating another obvious connection between judicial review and good governance.

"Effective" judicial review

With the range of areas covered by judicial review proceedings broadening considerably in recent years, it is inevitable that, from time to time, there will be high profile challenges. It is also inevitable that some court decisions on them will have political, social and economic repercussions for society.

In his speech yesterday, the Chief Justice has reminded the public again that the Courts are concerned with legal validity and do not assume the role of the maker of the challenged decision; and that the courts could not possibly provide an answer to, let alone a panacea for, any of the various political, social and economic problems which confront society in modern times.

In recent years, the Courts have refused leave to apply for judicial review where the applicants, for example, asked the court "to manage environment" by overruling the Town Planning Board's zoning decisions, sought declarations that the Government contravenes the "right to life" and the "right to health" by failing to combat air pollution, and mounted challenges which were bound to fail.

The Court of Final Appeal in the case of *Po Fun Chan v. Winnie Cheung* recognised the important filtering process of the leave requirement in making sure cases that are not reasonably arguable or where the order sought in them would lead to no practical benefit are weeded out. The CFA said the lower threshold of "potential arguability" is not sufficient.

Furthermore, the Courts have also made it clear that not all cases having a public interest dimension will warrant a pre-emptive costs order. Cases commenced seemingly for public interest when the fundamental aim is to pursue individual purposes might defeat the public interest incidental to the application. In these circumstances, the taxpayers' money may not be properly used to support the legal action taken out for a private agenda.

Misconceived judicial reviews, apart from being costly for the community, may also cause unnecessary uncertainty, interruption or delay to essential public works. In addition, they can also have long-term effect on the mentality of some

decision-makers, who may become over cautious, reluctant to break new grounds or exercise discretion which might court controversy. Furthermore, in order to minimize uncertainty and to shield oneself from any allegation of irrationality or Wednesbury unreasonableness, he may become inclined to promulgate more rules, turning into excessive regulatory fetters, which in turn may generate more judicial reviews.

So, while judicial review is plainly of cardinal importance as a means to provide redress for the individual against any illegal or invalid government actions, and is plainly conducive to raising and maintaining standards, for it to be truly effective to improve governance, it is important that the remedy be used responsibly and appropriately.

To Conclude

Although defeats in judicial reviews can be hard to swallow immediately, I am convinced, and I know that conviction is shared by many of my colleagues in the government, that the commitment to the high standards of legality, reasonableness and fairness, and the metamorphosis brought about by judicial discipline at times, will improve public administration, and will make Hong Kong a better society and home for our next generation. Effective judicial review is and remains a corner stone for good governance in Hong Kong.

On that note I shall end, and I wish you all very fruitful exchanges today.
Thank you.

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