The 20th Biennial LAWASIA Conference
5-8 June 2007
Hong Kong Convention & Exhibition Centre

Session 12 : Judicial Scrutiny of Administrative Actions

Mr Benedict LAI, JP, Law Officer (Civil Law)
Department of Justice, Hong Kong

Title : Recent Trends and Developments of Judicial Review in Hong Kong

Chairman, Ladies and Gentlemen,

I. Introduction

1. I am most delighted to have this opportunity to speak on an occasion where there is a presence of such distinguished judges, jurists and practitioners of such varied backgrounds and on a topic which is of major concern to the general public.

2. For those in the audience who are other than from a common law background or who do not know much about the legal system of Hong Kong, the Hong Kong Special Administrative Region operates, under the principle of "One Country, Two Systems" enshrined in our mini constitution effective since 1 July 1997, the Basic Law, we have inherited an English common law model where there is a highly developed set of distinct public law principles (independent of private law and comparable to those in civil law countries[1]) vigorously enforced by the judges of our Court of First Instance of the High Court exercising their supervisory jurisdiction over administrative decisions in judicial review applications, even though we do not have a separate and distinct public or administrative law court as such. This is in addition to statutory avenues of appeal to the Court or to independent specialist tribunals[2] of which we have many.

3. It is well established and embedded in our legal system that in exercising their supervisory jurisdictions over administrative decisions or actions, judges adjudicate essentially on the legality (as opposed to the merits) of such decisions or actions. Judges are best placed to exercise a supervisory role to determine the legality of government actions. First, the courts have the legal expertise. Second, they are independent and impartial.

4. With judicial review being invoked in "less orthodox areas" in Hong Kong which I shall further explain, the courts appear to be reminding themselves that they should respect the "margin of appreciation", a concept developed from European jurisprudence, on the part of the legislature and the executive even for those matters which are amendable to judicial review.

5. By "less orthodox areas" in Hong Kong, I have in mind constitutional challenges which may now be taken out if an applicant is able to point to some provisions of

---

1 *Cf.* the body of *droit administratif* in civil law countries

2 such as those established under the *Buildings Ordinance* (Cap. 123), *Town Planning Ordinance* (Cap. 131) and the *Administrative Appeals Board Ordinance* (Cap. 442)

our mini-constitution, the Basic Law, in establishing a public law right. This is not restricted to fundamental human rights set out under Chapter III of the Basic Law (which sets out the "Fundamental Rights and Duties of Residents") or under the *Hong Kong Bill of Rights Ordinance* (Cap. 383) enacted in 1991 to incorporate into domestic law Hong Kong's international obligations under the *International Covenant on Civil and Political Rights* ("ICCPR") as applied here. Other constitutional rights such as the right of abode and the protection of property are included. For the constitutional protection of human rights, I understand that this is the subject of another session and it is better for me not to attempt – not that I am implying that I would succeed even if I do – to steal the thunder of those distinguished experts who will be speaking shortly later.

6. It therefore does not come as a surprise to anyone that the number of judicial review applications has been on the rise steadily since 1990, especially after 2001, hovering at 150 or so applications each year[3]. Among all the judicial review proceedings taken out, the number of cases involving the government (as opposed to other public bodies) has increased from less than 100 in 2004 to 130 in 2005 and 128 in 2006. That will be an increase of more than 25 percent compared with just two years ago. As many as 28 has already been taken out against the government before the Court of First Instance by the end of April this year.

7. With the growth, both in number and in breadth, of judicial review applications in Hong Kong, it will be legitimate for us to pause here and examine our Hong Kong experience in the development of judicial review of administrative actions in recent years.

II. <u>The Trends of Judicial Review in Hong Kong</u>

(1) The Growth in Number of Cases

8. Before I go into the niceties of the development of the legal principles in administrative law in Hong Kong, allow me to dispel any thoughts that the increase in number of judicial review applications is an indication of the quality of government decision-making in Hong Kong. There is no such indication whatsoever.

9. A number of factors both before and after the Chinese resumption of sovereignty over Hong Kong have contributed to the increase of litigation generally, the most obvious of which is the increased accessibility to justice before the courts. In anticipation of the handover, the then Attorney General's Chambers (now the Department of Justice) started since 1987 the exercise of bilingual legislation and judicial proceedings before our courts have become fully bilingual since 1995[4]. These have had significant impact over the public's awareness of their legal rights and obligations and their understanding of how the courts work in action. Thanks to better civic as well as legal education throughout the years, there has been a discernable increase in interests in the constitutional protection of basic legal rights.

---

[3] In HK, most of the judicial review applications were decided in 1950 or after. There have been more cases in the 1980s than in the period 1950 -1979. In Re Sum Tat-man [1991] 2 HKLR 601, 613 Barnett J provided the following statistics : 1988 : 29 applications for judicial review, 26 of which were granted leave. In 1990, there were 75 leave applications, of which 62 were granted leave. (See Clark & McCoy, <u>Hong Kong Administrative Law</u>, 2nd edition, p.1)

[4] By an amendment to section 5 of the *Official Languages Ordinance* (Cap. 5), the use of Chinese as the other official language has been extended beyond the magistrates' courts to the superior courts.

10. The Judiciary, for its part, has established the Resource Centre for Unrepresented Litigants which commenced operation on 22 December 2003 and receives on average 20 visitors a day, 40% of them are intended litigants who want to know the procedure to commence civil proceedings of one sort or another. The Resource Centre also publishes information pamphlets and provides access to other reference materials, including those in the form of videos.

11. At the same time, the government itself has become more open and transparent. Many government policies have been the subject of open debates and public statements have been made from time to time. Administrative actions are not just put under the close scrutiny of the watchful eyes of the members of the legislature but also interest or pressure groups or NGOs who are always ready to assist those who may feel aggrieved one way or another. A free and independent press also enhances the flow of information and ideas.

(2) The Growth in Types of Participants

12. Whilst administrative decision-makers are more transparent in their decision-making process, they are more susceptible to criticisms or attacks launched by those others whom they may have disappointed. Examples that may easily come to mind include the issue of an environmental permit[5] or a noise abatement notice (including the terms on which those documents were issued)[6], the approval of a scheme submitted by a flight operator governing the avoidance of fatigue to aircrew[7] and a consultation (against which an allegation of pre-determination was mounted) concerning changes to the existing regulatory framework for interconnection charges between fixed and mobile telecommunication networks[8].

13. In an application for judicial review taken out by a professed male homosexual on grounds of discrimination[9] to which I shall return shortly, neither the applicant nor the respondent objected to the Equal Opportunities Commission participating in the proceedings and to be heard. The court, at the appeal stage, allowed the Commission's counsel to appear as *amicus curiae* as opposed to being an intervener.

---

[5] In *Shiu Wing Steel Limited v. Director of Environmental Protection and Airport Authority of Hong Kong* [2006] 3 HKLRD 487; (2006) 9 HKCFAR 478, the Court of Final Appeal considered the scope of the Director's power in approving an environmental assessment report submitted by the Airport Authority in the light of the relevant provisions of the technical memorandum issued by the Secretary for Environment, Transport and Works and the Director's own study brief.

[6] In *Noise Control Authority and Anor v. Step In Limited* [2005] 1 HKLRD 702; (2005) 8 HKCFAR 113, the Court of Final Appeal upheld the criterion of "not audible" during night hours as adopted in a noise abatement notice as being entirely certain and reasonable in construing the meaning of the word "annoyance" as defined to mean an "annoyance that would not be tolerated by a reasonable person" under section 2 of the Noise Control Ordinance (Cap. 400).

[7] In *Cathay Pacific Airways Fight Attendants Union v. Director-General of Civil Aviation and Cathy Pacific Airways Limited (Interested Party)* (unreported) CACV No. 324 of 2005 (Judgment: 6 February 2007), the decision being impugned before the Court of Appeal is one made by the Director-General regarding the minimum in-flight rest period for cabin staff on what are known as "Ultra Long Range" flights.

[8] In *PCCW-HKT Telephone Ltd v. The Telecommunications Authority and Ors* (unreported) HKAL No. 112 of 2006 (Judgment: 13 February 2007), the act of the regulatory body, which will have an economic impact on the applicant's competitors, was challenged.

[9] *Leung T. C. William Roy v. Secretary for Justice* (unreported) CACV No. 317 of 2005 (Judgment on 17 March 2006)

14. Incidentally, the government is not the only target for judicial review. Judicial review proceedings have also been taken out against independent public bodies, statutory or otherwise which carry a public function. Those having generated media or public attention include:

(a) the Hong Kong Housing Authority[10];

(b) the Equal Opportunities Commission[11];

(c) the Securities and Futures Commission[12];

(d) various disciplinary bodies such as the Engineers Registration Board[13] and the Solicitors Disciplinary Tribunal[14], the Disciplinary Committee of the Stock Exchange of Hong Kong Limited[15] and the Insurance Claims Complaints Bureau[16]; professional bodies such as the Hong Kong Institute of Certified Public Accountants[17]; and educational institutes[18].

III. The Developments of Judicial Review in Hong Kong – Substantive Aspects

15. Hong Kong has witnessed significant developments in the substance as well as the boundary of judicial review.

(1) Legitimate Expectation

16. If the landmark decision of *The Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629 by the Judicial Committee of the Privy Council is to be regarded as the mother of the concept of "legitimate expectation" for the common law world, our Court of Final Appeal's decision in *Ng Siu Tung v. Director of Immigration* [2002] 1 HKLRD 561; (2002) 5 HKCFAR 1 fairly marks this child's adulthood.

17. What the Privy Council had held at *Ng Yuen Shiu* was this: *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*

---

[10] *Ngo Kee Construction Co Ltd v. Hong Kong Housing Authority* [2001] 1 HKC 493; *E. Bon Building Materials Co Ltd and Anor v. Hong Kong Housing Authority* (unreported) HCAL 21 of 2003 (Judgment: 15 October 2004)

[11] *Sit Ka Yin Priscilla v. Equal Opportunities Commission* [1998] 1 HKC 278

[12] In *Re Koon Wing-yee* (unreported) HCAL No. 7 of 2007 (Decision on Leave: 1 February 2007) leave has been granted to challenge the use of investigative powers by the regulatory body for breach of a person's right against silence.

[13] *Dr Nkasu Michael Mmaama v. Engineers Registration Board* (unreported) HCAL No. 67 of 2006 (Judgment: 11 September 2006)

[14] *Kwong Ka Yin Phyllis v. The Solicitors Disciplinary Tribunal* (unreported) HCAL No. 93 of 2004 (Judgment: 12 July 2006)

[15] *The Stock Exchange of Hong Kong Limited v. New World Development Co Ltd & Ors* [2006] 2 HKLRD 518; (2006) 9 HKCFAR 234

[16] *Pacific Century Insurance Co Ltd v. Insurance Claims Complaints Bureau* [1999] 3 HKLRD 720

[17] Proceedings have been taken out but yet to be heard on a decision not to circulate among professional members the newsletters published by a Legislative Councillor of the relevant functional constituency.

[18] *Leung Chak Sang v. Lingnan University* [2001] 2 HKC 435; *R v. English Schools Foundation* (unreported) HCAL No. 61 of 2004 (Judgment: 26 July 2004)

implementing the promise, provided the implementation does not conflict with the authority's statutory duty.

18. In that case, the government had announced that illegal immigrants would be interviewed in due course and that, although no guarantee could be given that they would not be subsequently removed, each case would be treated on its merits. The court held that this created a legitimate expectation that this procedure would be followed before a decision was made whether or not to remove a person. In other words, although Mr Ng could not, with the discontinuance of the "touched base" policy, claim that he was entitled to remain in Hong Kong as of right, the government could not just remove him without giving him an opportunity to be properly heard. This is the protection of legitimate expectation in the **procedural** sense.

19. Over the years, the question over whether protection of legitimate expectation goes beyond the procedural but also the **substantive** sense had been the subject of judicial examination. This included the then latest English Court of Appeal's decision in *ex parte Coughlan*[19] from which, I am sure, our Court of Final Appeal had benefited when it held that the principles of legitimate expectation does not just allow procedural, but also substantive protection to a legitimate expectation. In so doing, it held that individuals had substantive rights to remain in Hong Kong, and not just a procedural right to be processed in a certain way, as a result of official statements made publicly. Such substantive rights will arise when a public officer has by way of a promise or established practice given rise to a legitimate expectation. This is subject to the *proviso* that an order to the officer to honour the promise or practice will not require the officer to act outside his lawful authority or contrary to overriding public interests.

(2) Declaratory Relief as a Remedy

20. In criminal proceedings, many challenges to the validity of statutory provisions were taken as a form of defence. As is in the case of civil proceedings, challenges were against certain decisions (e.g. decisions to prosecute) taken by the authority, not against a hypothetical issue and not for an advisory opinion from the courts which in the absence of strong justifications are reluctant to entertain. This has been so since the enactment of the *Hong Kong Bill of Rights Ordinance* (Cap. 383) as then entrenched by an amendment to the Letters Patent and now Article 39 of the Basic Law.

21. The applicant in *Leung v. Secretary for Justice* [2006] 4 HKLRD 211, the professed male homosexual I mentioned a moment ago, took out judicial review proceedings before he was 21 years of age to challenge the constitutionality of certain provisions of the *Crimes Ordinance* (Cap. 200) which related to homosexual buggery and gross indecency as being an infringement of his rights to equality and privacy[20]. Although he had not been the

---

[19] *R. v. North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213, [2000] 2 WLR 622, [2000] 3 All ER 850 An oral assurance that a nursing home could remain for life of a severely disabled patient was held binding in the absence of any overriding public interest.

[20] Upon the Respondent's concession at the first instance, the issues on the applicant's *locus standi* and the constitutionality of section 118C of the Ordinance became the real bone of contention. Under section 118C, homosexual buggery with or by man under 21, irrespective of consensual or not, is an offence. In comparison, consensual vaginal intercourse with a girl over 16 is legal.

It was held by the Court of Appeal that :-

(a) vaginal intercourse and buggery are similar in nature;

subject of any criminal prosecutions, the Court of Appeal agreed with the European jurisprudence that, in a case of constitutional challenge to legislation of which this was one, individuals cannot be required to breach the law in order to gain access to justice. The court considered, put bluntly, if a law is unconstitutional, the sooner this is discovered, the better.

22. It is therefore not a question of jurisdiction but one of discretion as to whether or not the court should entertain an application taken out on, in one way of looking at it, an academic or hypothetical point. However, in the grant of declaratory relief, the court must be careful in exercising its jurisdiction. This means, for example, that an applicant must demonstrate to the satisfaction of the court that he or she has a "sufficient interest" for the purposes of O.53, r.3(7) of the Rules of the High Court. The court will more likely be prepared to entertain an application when the resolution of the questions before it involves pure points of law, unencumbered with the need to make findings of fact.

23. This is in line with the Court of Appeal's earlier decision in *Chit Fat Motors Company v. Commissioner for Transport*[21] where it was held that although "the court will not give an advisory opinion on hypothetical facts. … Sometimes … the question is said to be hypothetical or academic only because the real dispute that drove the parties to litigation (sometimes called the *lis*) happens no longer to be in the existence at the time of the hearing, even though the relevant facts giving rise to the dispute were real and had actually taken place. … In th[is] type of situation, … the court had a discretion whether or not to determine the question before it even though there was no longer a *lis* …".

24. It would be of interest to note that the court may exceptionally suspend the operation of a declaration. In a successful challenge over the constitutionality of an executive act, the Court of Final Appeal in *Koo Sze Yiu and Anor v. Chief Executive of the HKSAR* [2006] 3 HKLRD 455[22], recognising "that exceptional circumstances may call for exceptional judicial measures" and without precluding the possibility of according temporary validity to any impugned executive or legislative act, held that there is judicial power to suspend the operation of a declaration which is a concomitant of the power to make the declaration in the first place and within its inherent jurisdiction. To afford an opportunity for the enactment of corrective legislation, the court suspended for no longer than necessary (in that case, six

---

(b) although buggery with a girl under 21 is also illegal, for gay couples the only form of sexual intercourse is buggery, they are therefore deprived of any gratification through intercourse between 16 and 21 by reason of the age limit under section 118C;

(c) homosexuals are therefore subject to a different treatment compared with heterosexuals; accordingly, the age limit under section 118C is brought down from 21 to 16 in line with vaginal intercourse; and

(d) whilst the Court should accord margin of appreciation to the Legislature, it would scrutinize with intensity the justification to deprivation of right based on race, sex or sexual orientation.

[21] *Chit Fat Motors Co Ltd v. Commissioner for Transport* (unreported) CACV 142 of 2003 (Judgment: 9 January 2004)

[22] Article 30 of the Basic Law provides that "No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communications in accordance with **legal procedures** …". In that case, the applicant successfully attacked the constitutionality of an Executive Order made by the Chief Executive of HKSAR for the purpose of serving as a set of "legal procedures" under the Article.

Despite the declaration that the Executive Order amounted to administrative directions only and not "legal procedures", the first instance Judge made a "temporary validity order" to the effect that the Executive Order would stand valid for a period of 6 months pending corrective legislation. On appeal, the Court of Final Appeal replaced the "temporary validity order" with a "suspension of declaration of unconstitutionality" to defer the effect of the declaration.

months from the date of judgment) the declarations of unconstitutionality so as to postpone their coming into operation in respect of the infringing legislative and executive act.

(3) Amenability to Judicial Review

25. There are a few types of decisions in respect of which we anticipate that further developments will be experienced in Hong Kong as to whether or not they are amenable to judicial review. One type of which is decisions not to prosecute.

26. With the enactment of the English *Human Rights Act 1998*, there has been a long line of authorities since the House of Lords decision in *ex parte Kebeline*[23] on the reviewability of the decision whether or not to prosecute. In Hong Kong, our Director of Public Prosecutions appeared before the Court of Appeal in a case[24] where submissions were made on the developments in England where judicial review may be available if dishonesty, bad faith or some other exceptional circumstance can be shown. The court however did not find it necessary to express any definite view in that case given that the refusal of leave by the first instance judge cannot be faulted as there were no merits in the applicant's challenge.

27. There also has been a long line of English authorities since *ex parte Datafin*[25] which held that, as there is no universal test to determine whether the actions of a public body were governed by public law, if the formal source of power was not determinative, then what invariably fell for examination was the nature of the power exercised.

28. This point has taken an important twist and turn in Hong Kong. This is because the management, use and development of all the land (which was Crown land before the handover in 1997), together with other natural resources, is, pursuant to Article 7 of the Basic Law, constitutionally the responsibility of the HKSAR government.

29. Notwithstanding the constitutional responsibility, if the Director of Lands, as a public officer, in making decisions on lease matters is not performing a public function but only acting in his private capacity as landlord, such decisions will not be susceptible to judicial review. Although the Court of First Instance has already handed down its decision in the very recent case of *Rank Profit*[26], I am prevented from saying anything further since the matter will go on appeal.

---

[23] *R. v. DPP, ex p. Kebeline* [2000] 2 AC 326

[24] *Pearl Kwan Sun Chu v. DPP* [2006] 3 HKC 207

[25] *R. v. Panel on Take-overs and Mergers, ex p. Datafin plc & Anor* [1987] 1 QB 815, [1987] 1 All ER 564; [1987] 2 WLR 699

[26] *Rank Profit Industries Ltd v. Director of Lands* [2007] 2 HKC 168. In brief, it was held that :-

(a) The mere fact that a decision relates to Crown lease, which should be governed by the law of contract, is not decisive on the reviewability of this decision. The true question is whether the making of a particular decision amounts to the performance of a function within the public domain. For example, a threat of "future action" (note: the Court has not elaborated further on what this term refers to) may constitute a reviewable act.

(b) Whatever the position might be in other jurisdictions, it has been settled law in Hong Kong that, in deciding whether to grant or withhold its consent to a modification of the terms of a lease, the Government did not exercise a public law function but acted in its private capacity as landlord.

(c) The Director of Lands, in negotiating modification of the lease agreement, was not acting pursuant to specific statutory authority Hence, the basis of negotiation was contractual and the parties were at liberty to make or reject any offer of amendment.

(d) Article 7 of the Basic Law should not be read to mean all lease agreements entered into by Government were governed by public law principles.

IV. The Developments of Judicial Review in Hong Kong – Procedural Aspects

(1) Pre-emptive Costs Orders

30. When an important issue of public interest is realised by an applicant who has no private interest in the outcome, courts have increasingly come to recognise that, even if an applicant is unsuccessful, it may not be equitable to penalise that applicant in costs. In what turned out to be an unsuccessful challenge in relation to the term of office of the Chief Executive of the HKSAR[27], the court confirmed its inherent power to make orders known as "pre-emptive costs orders" directing that no order as to costs will be made against applicants no matter what the outcome of the case. Such orders will enable applicants to press home their proceedings in the comfort that, while they will have to meet their own costs, they are now protected from any risk of having to pay the costs of the opposing party. The court also gave guidance as to when such anticipatory orders should be made.

31. Having said that, the same learned judge in a very recent decision on costs, made after a failed attempt to challenge the constitutional validity of the relevant the rule and procedure of the Legislative Council which restricts the power of a private member to introduce what we call "committee stage amendments" to a government bill[28], warned that "public interest litigation … does not grant an immunity form costs or a "free kick" in litigation"[29] because, as His Lordship had observed in an earlier case brought by the same applicant, "when a public body … is made the subject of legal challenge, it may well have to

---

(e) It might, as a broad observation, be said that the Government exists for the benefit of the public, yet that fact alone does not elevate all actions by Government officials into the realm of public function.

(f) In defending a writ action founded upon contract law, the Director was acting as a private litigant and entitled to attempt to settle the matters. Hence, the Director's act of putting forward settlement offers was not subject to judicial review.

[27] *Chan Wai Yip Albert v. Secretary for Justice* (unreported) HCAL No. 36 of 2005 (Judgment on 19 May 2005). In March 2005, the former Chief Executive ("CE") of HKSAR Mr. Tung Chee Hwa resigned from his office 2 years and 3 months before the expiry of his term. Article 53 of the Basic Law provides that when such vacancy arises a new CE shall be selected within 6 months in accordance with the provisions of Article 45 of the same Law. Article 46 provides that the term of the CE of HKSAR shall be 5 years.

It was the Government's stance that the newly elected CE should only serve the residue of Mr. Tung's term. To ensure that this interpretation was secured in legislative form, the Government published a bill to amend the Chief Executive Ordinance (Cap. 569). The applicant in this case, a Legislative Councillor, commenced judicial review proceedings for a declaration that the enactment of the bill would be inconsistent with the Basic Law and therefore unconstitutional.

Before the matter was scheduled to be heard, the Standing Committee of the National People's Congress announced its interpretation of the relevant Articles in line with the Government's said stance. The applicant accepted that the interpretation was binding on the Court, and therefore there was no more issue of law to be determined save the question of costs.

[28] *Leung Kwok Hung v. President of the Legislative Council* [2007] 1 HKLRD 387. Article 74 of the Basic Law provides that members of the Legislative Council (LegCo) have to obtain the Chief Executive's ("CE") consent before introducing bills relating to government policies to the Council, but the Article is silent on whether members could propose amendments to a bill relating to government policies without CE's consent **after its having been introduced to the Council** (i.e. the "committee stage").

The LegCo's own Rules of Procedures provides that CE's consent is required for such amendments. The applicant, a Legislative Councillor, sought to review the constitutionality of those provisions, but the application was dismissed.

[29] *Leung Kwok Hung v. President of the Legislative Council* (unreported) HCAL No. 87 of 2006 (Ruling on Costs: 27 April 2007)

expend costs in defending its position and such costs … must come from public funds; put bluntly, from the pockets of Hong Kong tax payers."[30]

(2) Leave Procedures

32. It would not be complete on an examination of the procedural aspects of taking out judicial review applications for me not to mention the need for permission as in many common law jurisdictions where leave from the court is required and for good reasons. First, the court has to be satisfied that the applicant has sufficient interest (i.e. proper standing or *locus standi*) to take out the challenge and that it be brought without delay to avoid causing substantial hardship to, or substantial prejudice to the rights of others or being detrimental to good administration[31]. Second, there is every reason for hopeless cases to be weeded out.

33. To bring our system of judicial challenge in line with developments by way of the Woolf reform in England, the *Final Report of the Chief Justice's Working Party on Civil Justice Reform*[32] (available on the internet) has recommended that the procedures for application of leave be streamlined. The most significant changes include that:

(a) applications for leave be required to be served with all supporting evidence on the proposed respondent and on any other persons known by the applicant to be directly affected unless the court directs otherwise;

(b) persons served should be given the choice of either acknowledging service and putting forward written grounds of resisting the application or grounds in support additional to those relied on by the applicant; or declining to participate unless and until the application secures leave to bring judicial review; and

(c) after grant of leave, the order granting leave and any case management directions be served by the applicant on the respondent (whether or not he has acknowledged service) and on all interested parties who have acknowledged service, such persons then becoming entitled, if they so wish to file grounds and evidence to contest or support on additional grounds, the claim for judicial review.

34. The proposed draft amendments to O.53, *Rules of the High Court* may be found in the *Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform*[33] which is also available on the internet.

V. <u>Is Judicial Review a hindrance or help?</u>

35. Some people, administrators in particular, may think that the judicial review process can too easily be subject to abuse and is an obstacle to effective policy formulation or

---

30 *Leung Kwok Hung v. Clerk to the Legislative Council* (unreported) HCAL No. 112 of 2004 (Ruling on Costs: 13 October 2004)

31 *Cf.* section 21K of the *High Court Ordinance* (Cap. 4) and O.53, *Rules of the High Court*

32 section 31 on pp. 467-486: <http://www.civiljustice.gov.hk>

33 <http://www.civiljustice.gov.hk>

implementation. The legal action challenging (and hence delaying) the floatation of the Link-REIT[34], is an example they might give.

36. 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 or economic repercussions for society.

37. Admittedly, there are some applications for judicial review that should never have been brought. In respect of those cases, leave was generally not granted by the court, sometimes after the respondent has been heard. Nothing can stop those who are ready to wield the judicial review sword against the Administration whenever they cannot achieve their goals through persuasion or debates.

38. The learned Chief Justice himself considered it important for the public to understand the courts' proper role on judicial review. This is what he said at the last Opening of the Legal Year,

> *"… the courts do not assume the role of the maker of the challenged decision. The courts are concerned and only concerned with the legality of the decision in question, adjudged in accordance with common law principles and the relevant statutory and constitutional provisions. It follows that the courts' judgment can only establish the limits of legality. 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."*

39. On the other hand, policy makers must weigh and balance the conflicting interests at stake and consult widely in our community, rather than merely settling for administrative convenience or doing what looks expedient in the circumstances. Judicial scrutiny undoubtedly has raised the standards of both the decision making process in individual cases, and the formulation of government policies at the highest level. Any standards set by the courts will help the Administration to explain why it has to do what it proposes to.

40. Experience tells us that some government proposals and legislative programmes turned out to be more acceptable to the general public after attempts were made to challenge them in the courts by those who felt aggrieved than before. The implementation of the Secretary for Education and Manpower's policy to tighten the criteria for operating Primary One classes for aided schools[35], a levy of $400 per month on employers of foreign

---

[34] *Lo Siu-lan v. Housing Authority* [2005] 3 HKLRD 257; (2005) 8 HKCFAR 363. The applicant challenged by way of judicial review the Housing Authority's decision to divest the retail and carpark facilities in public housing estates to a unit trust essentially for absolving the Housing Authority from fulfilling its statutory duty to secure the provision of amenities to public housing tenants. The application was filed one day before the deadline for the subscription of the unit trust, thereby suspending the floatation of the trust for almost a year.

[35] *Lam Yuet Mei v. Permanent Secretary for Education and Manpower of the Education and Manpower Bureau* [2004] 3HKLRD 524; and *Cheng's Educational Fund Limited v. Secretary for Education and Manpower* (unreported) HCAL 61 of 2005 (Judgment: 2 September 2005).

domestic helpers[36] and the passage of the *Interception of Communications and Surveillance Ordinance* (Cap. 589)[37] are just a few examples where society has become more receptive to governmental measures, partly because arguments for both sides were fully rehearsed before the courts and widely reported.

41. Since the Basic Law has been in force, judicial review has had the effect of adding flesh to our new constitutional framework. Through the process of judicial review, our proper understanding of the unique constitutional precepts of Hong Kong as a special administrative region with a high degree of autonomy has grown significantly and will continue to grow.

42. So, upon final analysis, is judicial review a hindrance or help to good administration?

43. Professor Christopher Forsyth observed in the latest edition of his famous work for public lawyers, *Administrative Law*[38]:

> *"It is a mistake to suppose that a developed system of administrative law is necessarily antagonistic to efficient government. Intensive administration will be more tolerable to the citizen, and the government's path will be smoother, where the law can enforce high standards of legality, reasonableness and fairness. Nor should it be supposed that the continuous intervention by courts, which is now so conspicuous, means that the standard of administration is low."*

44. The protection of an individual citizen's rights, and of the public interest generally, through judicial review is achieved without undermining good administration. On the contrary, it is the very possibility of a challenge by way of judicial review which keeps administrators on their toes.

45. The ventilation of the administrators' and policy makers' side of the story does assist the courts in arriving at a decision which will be good for the effective governance of Hong Kong. Ultimately, the people of Hong Kong are the beneficiaries of a system that ensures that administrators act fairly and in strict accordance with the law.

~ End ~

---

[36] *Julita F. Raza and Ors v. Chief Executive in Council and Ors* (Judgment on Appeal unreported) CACV 218 of 2005 (Date: 19 July 2006) and (Judgment on First Instance) [2005] 3 HKLRD 561.

[37] *Koo Sze Yiu and Anor v. Chief Executive of the HKSAR* [2006] 3 HKLRD 455; (2006) 9 HKCFAR 441.

[38] Wade and Forsyth, *Administrative Law, 9th edn.*, pp. 7 to 8.