Constitutional Remedies under the Basic Law

The Basic Law came into effect on 1 July 1997, establishing a new constitutional order for Hong Kong. Since it is the first time that Hong Kong has acquired a comprehensive, written and modern constitutional instrument, it raises a number of constitutional issues, one of which is the legal consequence of an unconstitutional law.

For laws enacted by the legislature of the HKSAR, BL11(2) provides that "[n]o law enacted by the legislature of the HKSAR shall contravene the Basic Law". As regards laws previously in force and adopted as part of the laws of the HKSAR, BL160(1) stipulates that "[i]f any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by law". However, unlike the constitutions of some other jurisdictions, the Basic Law does not set out expressly the remedies which the HKSAR courts may grant in respect of unconstitutional laws.

Traditional approach – declaration of invalidity

Notwithstanding the absence of specific HKSAR laws, HKSAR courts have dealt with the question of constitutional remedies as an integral part of their power of adjudication. The legal consequence of an unconstitutional law was considered by the CFA in *Ng Ka Ling & Others v Director of Immigration* [1999] 1 HKLRD 315, where Li CJ (in a unanimous judgment) made the following observations (at paragraph 61):-

> "In exercising their judicial power conferred by the Basic Law, the courts of the 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 executive act is invalid at least to the extent of the inconsistency."

In somewhat stronger terms, the CFA in *Chan Kam Nga & others v Director of Immigration* [1999] 1 HKLRD 304 at paragraph 31 (per Bokhary PJ delivering a unanimous judgment) commented on the constitutionality of the Immigration (Amendment) (No. 2) Ordinance 1997 as follows:-

> "The additional words do indeed contravene Article 24 of the Basic Law. Such contravention results not only from the legislatively curable vice of using the 'right of abode' formula. Also and more

fundamentally, it results from the legislatively incurable introduction of the 'time of birth' limitation. They are therefore irremediably unconstitutional and null and void."

These two earlier decisions of the CFA adopted the usual remedy available in judicial review, i.e. a declaration of invalidity to the extent that there is an inconsistency with the Basic Law. In neither of them did the CFA have an opportunity to consider the issue of alternative constitutional remedies.

Upon the grant of a declaration of invalidity in respect of a specific legislative provision or part thereof, the consequential effect on the remaining part of the legislation will depend on the doctrine of severability. In *Ng Ka Ling*, the CFA was asked to rule on the constitutionality of certain provisions of the Immigration (Amendment) (No. 3) Ordinance which introduced a scheme to deal with permanent residents who are persons of Chinese nationality born outside Hong Kong to the first and second categories of permanent residents under BL 24(2)(1) and (2) . Having found that some of those provisions were in breach of the Basic Law, the CFA held that the unconstitutional parts of the No. 3 Ordinance could be appropriately severed from the rest of the Ordinance which was constitutional. The test, according to the CFA, is "whether the unconstitutional parts are distinct from the constitutional parts so that what is unconstitutional may be severed from what is constitutional leaving what is constitutional intact" (at paragraph 123). Having answered this question in the affirmative, the Court excised the unconstitutional parts from the No. 3 Ordinance.

Remedial interpretation

The question as to whether the Basic Law confers on the HKSAR courts a power of remedial interpretation of legislation was considered by the CFA in *HKSAR v Lam Kwong Wai* [2006] 3 HKLRD 808. More specifically, the case raised the question of whether the HKSAR courts have power or, indeed, a duty to so construe s. 20(1)

of the Firearms and Ammunition Ordinance (Cap. 238) ("the Ordinance") when read with s. 20(3)(c) thereof as to preserve its validity, even if the interpretation is one which would go beyond ordinary common law interpretation because it may involve the use of judicial techniques such as reading down, reading in and striking out.[1]

In respect of the ordinary common law interpretation, Sir Anthony Mason NPJ, delivering a unanimous judgment of the Court, observed (at paragraph 63) that:-

> "... the principles of common law interpretation do not allow a court to attribute to a statutory provision a meaning which the language, understood in the light of its context and the statutory purpose, is incapable of bearing... A court may, of course, imply words into the statute, so long as the court in doing so, is giving effect to the legislative intention as ascertained on a proper application of the interpretative process. What a court cannot do is to read words into a statute in order to bring about a result which does not accord with the legislative intention properly ascertained."

On the other hand, a remedial interpretation of a statutory provision involves the well-known techniques of severance, reading in, reading down and striking out. Sir Anthony Mason NPJ wrote (at paragraphs 71-72):-

> "These judicial techniques are employed by the courts of other jurisdictions whose responsibility it is to interpret and pronounce on the validity and compatibility of legislation which is challenged on the ground that it contravenes entrenched or statute-based human rights and fundamental freedoms… In other jurisdictions, the power to employ these techniques often has its source in express powers granted either by a constitution or a statute. That is the case in the United Kingdom and New Zealand, to mention but two examples. The circumstance that the power is express in other jurisdictions is not a reason for concluding that the power should not be implied in cases where there is no express provision."

In the context of the Basic Law, which does not contain an express provision on such power, the CFA held (at paragraph 78) that:-

> "… the courts of the Region, including this Court, possess all necessary powers to deal with all manner of questions which may legitimately arise in connection with the interpretation and enforcement of the provisions of the Basic Law, including their impact on Hong Kong legislation. It follows that the implied powers of this Court include the obligation to adopt a remedial interpretation of a legislative provision which will, so far as it is possible, make it Basic Law-consistent."

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[1] S. 20(1) of the Ordinance provides that "Subject to sub-sections (2) and (3), any person who is in possession of an imitation firearm commits an offence." S. 20(3) provides "A person shall not commit an offence under sub-section (1) if he satisfies the magistrate that … (c) he was not in possession of the imitation firearm for a purpose dangerous to the public peace, or of committing an offence …" At issue in the case of *Lam Kwong Wai* was whether s. 20(1) when read with s. 20(3)(c) imposed a persuasive onus on a defendant and was therefore constitutionally invalid.

According to the CFA in *Lam Kwong Wai*, the courts have traditionally been reluctant to engage in remedial interpretation which involves the making of a strained interpretation for fear that this may trespass into legislative activity. The justification for now engaging in remedial interpretation is that it enables the courts, in appropriate cases, to uphold the validity of legislation rather than strike it down. To this extent, the courts interfere less with the exercise of legislative power than they would if they could not engage in remedial interpretation. In that event, they would have no option but to declare the legislation unconstitutional and invalid (see paragraph 77).

On the appropriateness of alternative remedies, the CFA commented in *Lam Kwong Wai* that "[o]nly in the event that [a remedial interpretation] is not possible, will the Court proceed to make a declaration of contravention, entailing unconstitutionality and invalidity" (at paragraph 77). Adopting the above approach, the CFA on the assumption that the Ordinance had not previously been read down in any way held that s. 20(1) , in conjunction with s. 20(3)(c), should be read and given effect as imposing on the defendant a mere evidential burden.

The above approach of remedial interpretation was also adopted by the CFA in *HKSAR v Hung Chan Wa* [2006] 3 HKLRD 841, a judgment delivered concurrently with *Lam Kwong Wai*. In *Hung Chan Wa*, the CFA decided that a remedial interpretation would be applied to the presumptions of possession and knowledge of dangerous drugs under s. 47(1) and (2) of the Dangerous Drugs Ordinance (Cap. 134) by treating the burdens of proof as creating an evidential onus only. In delivering the unanimous judgment, Sir Anthony Mason made it clear (at paragraph 86) that:- "[the] remedial approach is to be based on implied powers conferred upon the courts of the Region by the Basic Law itself. There is no occasion to express an opinion on the case for remedial interpretation based on s. 3 of the [Hong Kong Bill of Rights] Ordinance which ceased to have effect before 1 July 1997."

Subsequently, in *HKSAR v Ng Po On* [2008] 4 HKLRD 176, the CFA also adopted a remedial interpretation and read down s. 24 of the Prevention of Bribery Ordinance (Cap. 201) in conjunction with s. 14(4) thereof so that they were understood as imposing an evidential burden instead of a persuasive burden[2]. In this case, the CFA recognised that the techniques of remedial

[2] S. 14(4) of Cap. 201 provides that any person on whom a s. 14(1) notice has been served for furnishing the required information, who, without reasonable excuse, neglects or fails to comply with the notice shall be guilty of an offence. S. 24 provides that under the Ordinance, the burden of proving a defence of reasonable excuse shall lie upon the accused.

interpretation necessarily have their limits. According to Mr Justice Ribeiro PJ who gave the unanimous judgment of the Court (at paragraph 47):-

> "The Court cannot take up a curative measure which is so fundamentally at odds with the intent of the legislation in question that adoption of such a measure properly calls for legislative deliberation."

Apart from the above three cases concerning burden of proof, remedial interpretation as an appropriate and just remedy was also considered by the CFA in *Koon Wing Yee v Insider Dealing Tribunal* [2008] 3 HKLRD 372 (at paragraph 111). In *Koon Wing Yee*, the CA concluded that the respondents were entitled to the protection of Articles 10 and 11 of the BoR in the insider dealing proceedings and read down ss. 33(6) and 17 of the Securities (Insider Dealing) Ordinance (Cap. 395) ("SIDO") so that questions and answers in respect of which the claim of the privilege against self-incrimination had been made might not be used in insider dealing proceedings and that there was no power to summon or to require an implicated person to give evidence. Before the CFA, the Government contended that a remedial approach should be adopted, which would, as far as possible, make the legislation consistent with the BoR and invited the Court to simply excise s. 23(1)(c) of the SIDO, a penalty provision. The declaration sought by the Government was novel because, if made, it would result in the striking down of a legislative provision which did not itself infringe the BoR.

The CFA approached the above issue by focussing on the court's power to grant remedy or relief, or make order under s. 6(1) of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("BORO") which

provides remedies for contravention of the BoR[3]. In construing s. 6(1) of the BORO, the CFA held (at paragraph 113) that the provision should be construed, in accordance with its terms, as conferring a power which will enable the courts to resolve the tension which exists between the legislative will and the protection given by the BoR by striking down only that part of the statute that causes the violation or breach, even if it does not itself infringe the BoR, when to do so best gives effect to the legislative intention. Having concluded that there is power to make the order sought, the CFA also found it appropriate and just to do so in this case. The power under s. 23(1)(c) to impose a penalty was declared invalid on the ground that it had resulted in violations of Articles 10 and 11 of the BoR.

Temporary suspension and temporary validity

The jurisdiction of HKSAR courts to grant temporary suspension and temporary validity orders was considered by the CFA in *Koo Sze Yiu v Chief Executive of the HKSAR* [2006] 3 HKLRD 455. The issue raised before the CFA were (i) whether a HKSAR court could ever, and if so under what circumstances, make an order according temporary validity to a law or executive action which it has declared unconstitutional, and (ii) whether, failing such a temporary validity order, a HKSAR court could ever, and if so under what circumstances, suspend such a declaration so as to postpone its coming into operation.

In that case, s. 33 of the Telecommunications Ordinance (Cap. 106) (providing for the Chief Executive's power, *inter alia*, to order interception or disclosure to the government of telecommunications) and the Chief Executive's Law Enforcement (Covert Surveillance Procedure) Order were struck down by the CFI as being unconstitutional. But the Government successfully persuaded the judge (Hartmann J, as he then was) to grant a temporary validity order for six months, so as to allow corrective legislation to be passed as a matter of urgency and to enable covert surveillance to be carried on as before in the meantime. The order was upheld by the CA. The applicants in that case appealed to the CFA against the temporary validity order.

According to Bokhary PJ (at paragraphs 33 and 35), the difference between the remedies of temporary validity and temporary suspension is that a declaration of temporary validity would shield the executive from legal liability arising from its continuing reliance on or adherence to the old law during the interim period. A declaration of temporary suspension, on the other hand, does not have such shielding effect.

In respect of the appropriateness of such orders, Bokhary PJ noted (at paragraphs 19 and 28) that:-

> "… Mere inconvenience in the meantime would not, however, justify temporary validity or suspension. But what if the circumstances are exceptional and the problem goes well beyond mere inconvenience? … The rule of

[3] It is of interest to note that Li CJ in his article "Reflections on the Retrospective and Prospective Effect of Constitutional Judgments" collected in Jessica Young and Rebecca Lee (ed), *The Common Law Lectures Series 2010*, pp 21-55, at p 22, wrote that it may be strongly argued that in any event, the courts have an inherent power to adopt the same remedy in such a situation.

> law involves meeting the needs of law and order. It involves providing a legal system able to function effectively. In order to meet those needs and preserve that ability, it must be recognised that exceptional circumstances may call for exceptional judicial measures. Temporary validity or suspension are examples of what courts have seen as such measures. …"

In *Koo Sze Yiu*, the effect of the declaration of unconstitutionality by the court would have resulted in the absence of any legal basis for law enforcement to conduct covert interception and surveillance operations. Leaving open the question whether there is jurisdiction to make an order for temporary validity (paragraphs 32 and 61-62), the CFA held that there was nothing to justify temporary validity in the present case, noting that the scenario concerned was "by no means as serious" as a virtual legal vacuum or a virtually blank statute book (at paragraph 34). The CFA nevertheless found that the danger to be averted in the present appeal was of a sufficient magnitude to justify suspension. The temporary validity order granted by the CA was therefore set aside by the CFA and substituted with a temporary suspension order, holding that courts have inherent jurisdiction to grant such an order, as a concomitant of the courts' power to make a declaration striking down a piece of legislation in the first place.

The temporary suspension order granted by the CFA in *Koo Sze Yiu* would have the following effect (*per* Bokhary PJ, at paragraph 63):-

> "The Government can, during that period of suspension, function pursuant to what has been declared unconstitutional, doing so without acting contrary to any declaration in operation. But, despite such suspension, the Government is not shielded from legal liability for functioning pursuant to what has been declared unconstitutional."

Apart from its decision in *Koo Sze Yiu*, the reluctance of the CFA to grant a temporary validity order was also reflected in the following remark of Li CJ in *Hung Chan Wa*, at paragraph 30:-

> "It should be noted that … [a temporary validity order] is even more far reaching than prospective overruling. With prospective overruling, the court's judgment would take effect from the date of the judgment. But where a declaration of temporary validity is made, the judgment would not even take effect at that time. It would only take effect after the expiry of the period as specified in the declaration sometime after the judgment."

Recently, the possibility of the respondents needing a temporary validity order has also been raised before Cheung J in *Chan Kin Sum v SJ* [2009] 2 HKLRD 166. The analysis of the CFA in *Koo Sze Yiu* was applied by Cheung J, who also left open the issue as to whether there is jurisdiction to grant a temporary validity order. However, Cheung J granted suspension of certain of his declarations until 31 Oct 2009. According to Cheung J (at paragraph 79):-

> "The Court's function here is to see whether there is sufficient justification for a temporary suspension order. The test is essentially one of necessity. And it involves a balancing exercise."

The considerations that are likely to prevail in constitutional challenges where the court is invited to consider a temporary suspension order were set out by Cheung J at paragraphs 80 to 86 of the judgment. It would be helpful to highlight, in particular, paragraphs 85 and 86 thereof, in which Cheung J observed that:-

> "85. The problem faced by the Government and the legislature goes well beyond mere inconvenience. Whilst the jurisdiction to make a temporary validity order (if such jurisdiction exists in Hong Kong) may well be restricted to an apprehended situation that would pose a danger to the public, threaten the rule of law or result in the deprivation of benefits from deserving persons (*Koo Sze Yiu*, *supra*, at p 460, para 58), the circumstances justifying the exercise of the Court's jurisdiction to grant a temporary suspension order are not so limited.

"The Court's function here is to see whether there is sufficient justification for a temporary suspension order. The test is essentially one of necessity. And it involves a balancing exercise."

> 86. The existence of a viable alternative to suspension is a reason for denying an order of temporary suspension. See *Koo Sze Yiu*, *supra*, at p 457, para 42. But no viable alternative has been seriously suggested in the present case."

Prospective overruling

The HKSAR courts' power to grant the remedy of prospective overruling was considered by the CFA in *Hung Chan Wa*. The previous view regarding the interpretation of s. 47(1) and (2) of the Dangerous Drugs Ordinance (Cap. 134), was that the provisions validly imposed legal or persuasive burdens on the defendant who had to discharge the burdens engaged in the particular case on the balance of probabilities. The CA decision of 23 June 2005 held that s. 47(1) and (2) properly interpreted by a process of remedial interpretation imposed only evidential burdens on the defendants. After 23 June 2005, all trials and appeals had to be conducted on the basis that

the relevant provisions imposed only evidential burdens. The CFA subsequently reached the same conclusion as the CA. Leading Counsel for the Government submitted that the CFA should make an order limiting the retrospective effect of the judgment so that only the defendants in that appeal and certain other defendants who had already appealed within time by the date of the CA judgment might benefit from it. Li CJ noted (at paragraph 5) that the order proposed by the Government represented a modified form of prospective overruling since it accepted that the judgment would have retrospective effect to the extent of covering the persons referred to therein.

Having decided that BL160 does not apply to judicial procedure and therefore does not prescribe or support the making of the proposed order, Li CJ further discussed whether judicial power under the Basic Law included the power to engage in prospective overruling. In this connection, Li CJ noted (at paragraph 17) that the issue as to whether the courts in a common law jurisdiction had the power to engage in prospective overruling had been much debated in recent years. The English decision of *In re Spectrum Plus Ltd.* [2005] 2 AC 680 (at para. 6) held in favour of its existence in all situations, whereas the decision of the High Court of Australia in *Ha v State of New South Wales* (1997) 189 CLR 465 at 503-4 and 515 rejected the notion that judicial power in Australia included such a power.

In view of his conclusion that the present circumstances did not justify the exercise of the power of prospective overruling even if it existed, Li CJ held (at paragraph 18) that it was not necessary to decide the fundamental question whether and to what extent the courts in Hong Kong had the power.

While the existence of HKSAR courts' jurisdiction to grant prospective overruling was left open by the CFA in *Hung Chan Wa*, Li CJ noted (at paragraphs 28-33) five points in respect of the exercise of such a power. Such observations,

which may be helpful guidance for future cases in which the courts are invited to consider prospective overruling, could be summarized as follows:- (1) whether judicial power includes a power to engage in prospective overruling in a particular jurisdiction is a most intricate question concerning the proper role of the courts in the jurisdiction concerned, and it is a problem which by its nature may not be susceptible to a common approach across the common law world; (2) the existence and the scope of such power may vary in different situations, as the same considerations do not apply to all situations in the different context of private law, criminal law or public law; (3) in relation to a judgment determining a constitutional issue, the question whether the power exists will have to be considered in the context of the range of remedies that may be available in this situation; (4) common law is capable of being developed by judges to meet changing needs, and developing the common law in this way cannot properly be regarded as an application of the power to prospectively overrule; (5) the power to engage in prospective overruling, if it existed, is an extraordinary power, and the courts must approach its exercise with the greatest circumspection.

In *Lam Kwong Wai*, a judgment delivered concurrently by the CFA with the judgment in *Hung Chan Wa*, the CFA noted (at paragraph 85) that the circumstances relied on in that case were very much weaker, and that it was also not a case for the exercise of the power of prospective overruling.

Conclusion

The cases discussed above indicate that, over the past 14 years, the HKSAR courts have developed the alternative remedies of remedial interpretation and temporary suspension, going beyond the traditional remedy of declaration of invalidity. Whether the HKSAR courts have jurisdiction to grant an order for temporary validity or prospective overruling is an issue to be resolved in future cases.