



In my view, it would be contrary to that promise if the exercise of presidential power is above the interim Constitution and is not subject to the discipline of the Bill of Rights.



The judge said that it would offend the Basic Law if, for example, those advising the CE in respect of his discretion under BL 48(12) were able “with impunity to subvert the honesty of that advice on the basis of racial, sexual or religious grounds or were able with impunity to refuse to put before the [CE] evidential material which did not for whatever reason suit their private ends. If such was the case, the [CE] would not, in making a determination on the basis advice, be discharging his obligations in terms of the Basic Law. That is because the Basic Law,

as a document of constitution that safeguards the rights and freedoms of all residents in accordance with law (BL 4³), does not permit such pollution of lawful process, executive or otherwise.”

Conclusion

The judge was satisfied that under the Basic Law, while the merits of any decision made by the CE pursuant to BL 48(12) were not subject to the review of the courts, the lawfulness of the process by which such a decision was made was open to review. Accordingly, the applicant’s challenge in respect of BL 48(12) was not vitiated by a lack of jurisdiction.



SIDELIGHTS

Constitutional Review in Leading Common Law Jurisdictions

For those of us living under the rule of law, legislation has our trust and respect. And indeed, statutory laws are enacted after meticulous deliberations. But what would happen if a certain law were found to be inconsistent with another law, or even with the constitution? Who would have the final say on matters like this? In this article, we will take a look at how leading common law jurisdictions such as the US, Canada and Australia handle the subject of constitutional review.

United States

In *Marbury v Madison* (1803) 5 U.S. 137, Marshall C.J., when delivering a landmark judgment of the Supreme

Court of the United States in 1803, said that it was the duty of the courts to say what the law was; that if both a particular law (which was in opposition to the Constitution) and the Constitution applied to a certain case, then the court had to either decide the case in accordance with the law, disregarding the Constitution; or decide the case in accordance with the Constitution,



³ BL 4 provides : “The [HKSAR] shall safeguard the rights and freedoms of the residents of the [HKSAR] and of other persons in the Region in accordance with law.”

disregarding the law. He said that the court had to determine which of two conflicting rules (ie, the particular law and the Constitution) governed the case and that such determination was of the very essence of judicial duty. The Supreme Court held that as the Constitution was a paramount law, in a conflict between the Constitution and a statute, the Constitution had to prevail. After the *Marbury* case, it was accepted in the United States that the courts had the power to declare invalid laws passed by the Congress which were inconsistent with the Constitution.

Canada

A united Canada was first created by the British North America Act, 1867 (now called the Constitution Act, 1867). In the years after 1867, the Judicial Committee of the Privy



Council in the United Kingdom (as the ultimate court of appeal for Canada) and the provincial courts in Canada assumed the right to review the validity of legislation enacted by the Canadian legislative bodies. In addition to relying on the principle adopted in the *Marbury* case mentioned above, the courts relied on the Colonial Laws Validity Act 1865. As a result, legislation enacted by the Canadian legislative authorities which was repugnant to a UK statute extending to Canada was invalid. The Supreme Court of Canada assumed the same power after it was established in 1875. Such a doctrine of repugnancy was subsequently replaced by the supremacy clause in section 52(1) of the Constitution Act, 1982, which added a Charter of Rights and Freedoms to the Canadian Constitution. Section 52(1) stipulates

that the "Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". Accordingly, section 52(1) is the current basis of constitutional review in Canada.

Australia

The situation in Australia is similar to that in the US and Canada. Though there



is no specific reference to the constitutional role of the High Court of Australia in the Constitution, the High Court of Australia (as the highest court in the Australian judicial system) has been regarded as the interpreter of the Constitution and the arbiter of the constitutional validity of both legislation and executive actions since it was established in 1903.

adjudication might, by implication, be regulated and limited by statutes. But such limitation could not be imposed arbitrarily by the legislature. The limitation imposed had to pursue a legitimate purpose and there had to be reasonable proportionality between the limitation and the purpose sought to be achieved. These dual requirements were collectively called “the proportionality test”.

In ascertaining the purpose of a particular limitation, matters such as the subject matter of the dispute, whether it concerned fact or law, whether it related to substantive rights and obligations or only procedural matters, what was at stake, the need for speedy resolution and the cost implications of dispute resolution, including any possible appeals, would have to be considered. In applying the test, it would be necessary to examine the nature and

extent of the limitation and whether such limitation was consistent with the public interest, which had many facets including the proper administration of justice.

Whether a particular limitation imposed by statute satisfied the proportionality test would depend on an examination of all the circumstances. There might be instances where a statutory limitation providing that a decision of the CA or the CFI on appeal, whether from a statutory tribunal or a lower court, shall be final might be able to satisfy the test.



SIDELIGHTS

Constitutional Review on the Mainland

The Constitution of the PRC¹ (the “Constitution”) empowers the NPC and the NPCSC to supervise the implementation of the Constitution². The Legislation Law³ prescribes the powers of the NPC and the NPCSC to annul laws or regulations which contravene the Constitution. In particular, the NPC has the power to alter or annul any inappropriate laws enacted by the NPCSC, and to annul any

autonomous regulations or separate regulations which have been approved by the NPCSC but contravene the Constitution⁴. Likewise, the NPCSC has the power to annul any administrative regulations which contravene the Constitution; and any local regulations, autonomous or separate regulations which contravene the Constitution, the law or the administrative regulations.⁵

The Legislation Law also provides a mechanism by which any of the following organisations or units



¹ Adopted by the NPC in 1982 and amended in 1988, 1993, 1999 and 2004.

² Articles 62 and 67 of the Constitution.

³ Adopted by the NPC on 15 March 2000 and effective as of 1 July 2000.

⁴ Article 88(1) of the Legislation Law.

⁵ Articles 67(7) and 67(8) of the Constitution and Article 88(2) of the Legislation Law.

may submit written requests or suggestions to the NPCSC when it considers that any administrative regulations, local regulations, autonomous regulations or separate regulations contradict the Constitution or laws : ⁶

- a** the State Council;
- b** the Central Military Commission;
- c** the Supreme People's Court;
- d** the Supreme People's Procuratorate;
- e** the standing committees of the people's congresses of the provinces, autonomous regions and municipalities directly under the Central Government;
- f** State organs other than the ones mentioned above;
- g** public organizations, enterprises and institutions; and
- h** citizens.

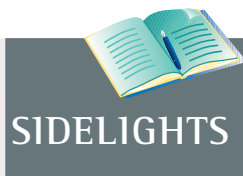
Upon receipt of the submissions, the working offices of the NPCSC shall, in the cases of (a) – (e), refer them to the relevant special committees for examination and suggestions; and shall, in the cases of (f) – (h), study them and shall, when necessary, refer them to the relevant special committees for examination and suggestions.

Under Article 91 of the Legislation Law, if a special committee of the NPC considers that the relevant regulation contradicts the Constitution or laws, it may submit written suggestions to the organ that has formulated the regulation for examination.

Alternatively, the Law Committee of the NPC and other relevant special committees may convene a joint meeting for examination and request the said organ to attend the meeting and provide an explanation, and thereafter, submit to the organ written comments and suggestions. The organ that has formulated the regulations shall, within two months, study and put forth suggestions as to whether to revise the regulation, and shall give feedback to the Law Committee and other relevant special committees of the NPC.

If, after examination, the Law Committee and other relevant special committees of the NPC consider that the regulation contradicts the Constitution or laws and the organ that has formulated such regulation refuses to make revision, they may submit written comments and suggestions on the basis of their examination and propose a motion for annulment of the regulation to the Council of Chairmen of the NPCSC, which shall decide whether to submit the motion to a meeting of the NPCSC for examination and decision.

⁶ Article 90 of the Legislation Law.



SIDELIGHTS

The Constitutional Court in South Africa

In the South African judicial system, there is a specialized court called the Constitutional Court (the “Court”). Established in 1994 under the interim Constitution of 1993, the Court is the highest court in all constitutional matters. A constitutional matter is defined to include any issue involving the interpretation, protection or enforcement of the Constitution. The Constitution is the supreme law of the Republic of South Africa, and accordingly, any law or conduct which is inconsistent with the Constitution is invalid.

The Court consists of 11 judges, ie, a President, a Deputy President and 9 other judges. Any matter before the Court must be heard by at least 8 judges. Each judge may serve for a non-renewable term of 12 years but must retire at the age of 70.

The Court played an important role in the adoption of the 1996 Constitution. Under the interim Constitution of 1993, Parliament (sitting as the Constitutional Assembly) was required to produce a new constitutional text, and the Court was required to certify that the text complied with the 34 Constitutional Principles agreed upon by the negotiators of the interim Constitution. In September 1996, the Court ruled that the constitutional text adopted by the Constitutional Assembly could not be certified. The Constitutional Assembly then amended the text and sent the amended text to the Court for certification. In December 1996, the Court held that all of the grounds for non-certification of the earlier text had been eliminated in the amended draft and accordingly certified that the text

complied with the requirements of the Constitutional Principles. The text came into effect in February 1997 as the Constitution of the Republic of South Africa, 1996.

When deciding a constitutional matter, a South African court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. In addition, it may make any order that is just and equitable, including: (a) an order limiting the retrospective effect of the declaration of invalidity; and (b) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. Moreover, it is the Court which makes the final decision as to whether an Act of Parliament, a provincial Act or the conduct of the President is constitutional, and which must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before such order has any force. The Court exercises exclusive jurisdiction in respect of certain matters, eg, (a) deciding on the constitutionality of any amendment to the Constitution; (b) deciding disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of such organs; and (c) deciding that Parliament or the President of the Republic has failed to fulfil a constitutional obligation.





The CFA was of the view that the procedure adopted by the Director was not authorized by the Ordinance and the actions of the Director amounted to an interference with the exercise by the respondent of her constitutional freedom to travel because (a) such actions were based on an administrative decision that her permission to remain in Hong Kong had been procured by fraud; and (b) such decision was taken under a procedure which

did not incorporate the safeguards appropriate to the determination of the important issue of status under the Basic Law.

Conclusion

The appeal by the Director was dismissed.



Margin of Appreciation

The doctrine of margin of appreciation is an integral part of the supervisory jurisdiction over national conduct by the supra-national European Court of Human Rights established under the European Convention on Human Rights. The doctrine applies where an international court gives a margin of appreciation (ie, a degree of deference) to the executive, legislative or judicial organ of a nation. In other words, when an international court is exercising its supervisory function over national institutions, it recognizes that, because of their direct and continuous contact with the vital forces of their countries, national institutions are in principle better placed to evaluate local needs and conditions than an international court.

Although a national court cannot directly apply the doctrine when considering issues arising within its own country, the underlying principle of the doctrine has been adopted by the English courts. For example, Lord Hope in *R v DPP, ex p Kebilene* [2000] 2 AC 326 at p 381B commented as follows :

“

In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the [European] Convention.

”

Accordingly, the English courts have recognized that just as an international court gives a margin of appreciation to a national institution (be it an executive, legislative or judicial organ), a national court will give a degree of deference to the national legislature or executive. This approach was adopted by the CFA in the domestic context when deciding the constitutionality of the mandatory life sentence provisions for the offence of murder in *Lau Cheong & Another v HKSAR* [2002] 2 HKLRD 612 (for a summary of the case, see p 10 of Issue No 4). The CFA said at p 641G:

“ It is also established that when deciding constitutional issues, the context in which such issues arise may make it appropriate for the courts to give particular weight to the views and policies adopted by the legislature. ”

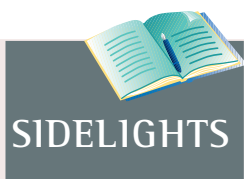
The CFA referred to the *Kebilene* case and said at p 642F:

“ The context and circumstances of the present case render this approach relevant and justify the courts giving proper weight to the decision of the legislature. ”

The CFA acknowledged at p 642G-H:

“ ... the question of the appropriate punishment for what society regards as *the* most serious crime is a controversial matter of policy involving differing views on the moral and social issues involved. The legislature has to make a difficult collective judgment taking into account the rights of individuals as well as the interests of the society. It has to strike a balance bearing in mind the conditions and needs of the society it serves, including its culture and traditions and the need to maintain public confidence in the criminal justice system. ”

In the *Lau Cheong* case, the legislative judgment was that, having regard to its gravity, the offence of murder called for a mandatory life sentence, even allowing for the different circumstances in which it might be committed. The CFA therefore decided that the legislative judgment was tenable, rational, and should be respected by the court.



Scrutiny of Legislation and Government Policies

A simple search on the Internet on the rule of law and human rights will immediately direct you to millions of websites and articles. While people are increasingly aware of these internationally hot topics, we will see in this article how they relate to us in the context of legislation and government policies in Hong Kong.



What the law says

Under BL 11(1), in accordance with Article 31 of the PRC Constitution, the systems and policies practised in the HKSAR are based on the Basic Law. These systems include the social and economic systems, the executive, legislative and judicial systems, as well as the system for safeguarding the residents' fundamental rights and freedoms. BL 11(2) further provides that no law enacted by the legislature shall contravene the Basic Law. Under BL 48(2), the CE is responsible for the implementation of the Basic Law.

Article 31 of the PRC Constitution

The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the [NPC] in the light of specific conditions.

The Government is therefore under a duty to ensure that its proposed policies and legislation comply with the Basic Law. In this regard, the Department of Justice, in particular its Basic Law Unit and Human Rights Unit, plays an active role in advising the Government on the Basic Law including the provisions concerning human rights.

Proposed legislation

There are well-established procedures within the Government to ensure that the Basic Law be complied with and that individual rights and freedoms be respected. For example, to promote new or amending legislation, a Head of Department must first secure the appropriate Policy Secretary's support by clearly demonstrating :

- a that all major implications of the proposal, including human rights and the Basic Law, have been considered; and
- b that the proposal is not inconsistent with the Basic Law.

The Policy Secretary should then ensure that the proposal is in conformity with the Basic Law, including the provisions on human rights, before approving the corresponding drafting proposal.

The Basic Law Unit and the Human Rights Unit also work closely with all the relevant parties to ensure that the proposed legislation is not inconsistent with the Basic Law.

Advisory services

In practice, Government bureaux and departments may consult the Department of Justice at any stage when formulating and implementing legislation and policies if any Basic Law or human rights issue arises. Examples of advice which has been given by the Basic Law Unit are questions relating to the powers of the CE, external affairs of the HKSAR and property right protection. Advice on legislation and policies given by the Human Rights Unit focuses on questions relating to the consistency of such legislation and policies with the human rights provisions of the Basic Law, the provisions of the ICCPR, ICESCR and other international human rights treaties applicable to the HKSAR.



Abbreviations

BL	Basic Law / Basic Law Article
BoR	Hong Kong Bill of Rights
CA	Court of Appeal
CE	Chief Executive
CE in C	Chief Executive in Council
CFA	Court of Final Appeal
CFI	Court of First Instance
CPG	Central People's Government
ExCo	Executive Council
HKSAR	Hong Kong Special Administrative Region
HKSARG	Government of the HKSAR
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LegCo	Legislative Council
NPC	National People's Congress
NPCSC	Standing Committee of the NPC
PRC	People's Republic of China

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