



The Right to Institute Legal Proceedings against the Executive Authorities in the Courts

While “judicial review” is becoming a familiar term in the media reports, how much do you know about it? And do you know that Hong Kong residents have the right to take legal action against the SAR government and government officials under the Basic Law? This article examines the scope of the right to institute legal proceedings in the court against the acts of the executive authorities and their personnel under BL 35(2), and the avenues available to Hong Kong residents for exercising this right.

Basic Law

BL 35 provides that:

“Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.”

Whereas the first paragraph of BL 35 guarantees the right of “access to the courts” and the right to “judicial remedies”, the second paragraph specifically guarantees the right to institute legal proceedings against the acts of the executive authorities and their personnel.¹

Executive authorities

The term “executive authorities” is also used in Chapter IV of the Basic Law. However, the Chinese equivalent of that term in BL 35 (“行政部門”) is different from that in Chapter IV, which is “行政機關”. Whereas the latter comprises various bureaux and departments in the HKSAR Government, the former might be construed as including quasi-

governmental public bodies in addition to government bureaux and departments.

Any public law and private law distinction?

On the face of it, the right to institute proceedings against executive authorities under BL 35(2) does not depend on the legal source of the authority’s powers, ie, whether the executive authority concerned is exercising statutory or contractual powers. Nor does it depend on whether the executive authority is performing a public function or not. It would seem that the right to institute proceedings against executive authorities under BL 35(2) exists in both the public and private law spheres, thus recognising the right of a person to bring an action against the Government in contract or restitution.

Rule of law and government according to law

It is a fundamental principle of the rule of law that no one is above the law. Officials like private citizens are under a duty to obey the law. BL 25 recognises this principle by providing that all Hong Kong residents are equal before the law. BL 16 also provides that the HKSAR must conduct its administrative affairs in accordance with the provisions of the Basic Law, while BL 64 requires that the HKSAR Government must abide by the law. The Government must therefore be conducted according to law and be subjected to sanctions if it departs from the law. Remedies should also be granted by the courts for unlawful acts of the Government.

Thus, if the police have detained a resident, the officials concerned may be challenged to show legal authority for their action and be required to discharge the resident if the action is found to be

¹ The right of access to the courts is subject to reasonable and proportionate limitations. For example, the courts have inherent jurisdiction to make an order preventing abuse of process by vexatious litigants. See *Ng Yat Chi v Max Share Ltd* [2005] 1 HKLRD 473, Court of Final Appeal.

unlawful. By the same token, acts of executive authorities may be declared invalid by the courts if they are beyond the authorities' legal powers. The Government may also be required to compensate residents whose rights have been infringed.

In *Ng Ka Ling v Director of Immigration*,² the Court of Final Appeal affirmed that the courts have the jurisdiction to examine whether acts of the executive authorities are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive branches of the Government to ensure that they act in accordance with the Basic Law.

Liability for civil wrongs

By virtue of the Crown Proceedings Ordinance (Cap 300),³ the Government is subject to civil liability as if it were a private person in respect of:

- (a) torts (ie, civil wrongs) committed by its servants or agents;
- (b) breaches of an employer's common law duties towards his servants or agents;

- (c) breaches of the common law duties attaching to the ownership, occupation, possession or control of property; and
- (d) any failure to comply with a statutory duty binding both upon the Government and upon persons other than the Government and its officers.

The Government department may therefore be sued for negligence if it has breached a legal duty to exercise reasonable care resulting in damage to the claimant. Where a person is subjected to unlawful arrest by a police officer, the continued detention of that person pursuant to the arrest would constitute the tort of "false imprisonment" (meaning the infliction of bodily restraint which is not authorised by the law).

However, a servant of the Government is not liable for the acts of his subordinates unless those acts are directly ordered by him in such a way as to make them his own, or unless the acts are necessary for the execution of his orders.

Misfeasance in public office

Of particular relevance is the tort of "misfeasance in a public office". The essential ingredients of this tort are as follows:



² [1999] 1 HKLRD 315 at 337.

³ See Interpretation and General Clauses Ordinance (Cap 1), schedule 8, for the interpretation of the term "Crown".



- (a) the defendant is a person holding public office, which includes a public body or a Government department;
- (b) there is an unlawful act or omission done or made in the exercise of power by the defendant; and
- (c) the act or omission has been done or made with the requisite mental element, ie, “targeted malice”, “untargeted malice” or “reckless untargeted malice”.⁴

The rationale of this tort is that in a legal system based on the rule of law, executive power may be exercised only for the public good and not for ulterior and improper purposes. It protects the right of an individual not to be injured by a deliberate abuse of power by a public officer and gives compensation to those who have suffered loss as a result.

Hong Kong Bill of Rights Ordinance

Where an act of the Government or a public authority constitutes a violation or threatened violation of the Hong Kong Bill of Rights (“BoR”), the aggrieved individual may seek remedies under section 6 of the Hong Kong Bill of Rights Ordinance (Cap 383).

An action may also lie against the Government for breach of the provisions of the Personal Data (Privacy) Ordinance (Cap 486) (including the data protection principles in Schedule 1 thereto) or an act of unlawful discrimination under one of the three anti-discrimination ordinances (ie, Sex Discrimination Ordinance (Cap 480), Disability Discrimination Ordinance (Cap 487) and Family Status Discrimination Ordinance (Cap 527)).

Writ of habeas corpus

Since no one, official or otherwise, may interfere with a person’s liberty without the authority of the law, an application may be made to a High Court judge for a writ of *habeas corpus* to secure the release of a person:

- (a) if he is being held in custody, and he has not yet been brought before a magistrate for bail to be considered;
- (b) if he is detained under the Mental Health Ordinance; or
- (c) if he is being held under the Immigration Ordinance in relation to deportation or extradition proceedings.

The function of the writ is to provide an efficient and speedy method to determine the legality of

⁴ “Targeted malice” involves conduct done intentionally with the purpose of causing loss to the plaintiff, being a person who is at the time identified or identifiable. “Untargeted malice” involves action by the official in the knowledge that it is an excess of the powers granted to him and that it is likely to cause injury to someone. Subjective recklessness is also sufficient. It involves a conscious indifference as to the lawfulness of the conduct and as to the injury which the conduct is calculated to produce.

a detention. It requires the person to whom it is addressed (for example, an officer in charge of a police station or the Director of Immigration) to produce at court the person named in the writ and give reasons for the detention. Where the justification for detention is found to be bad or insufficient, the person is entitled to be discharged from custody.

Judicial review

Decisions of bodies performing public functions are subject to judicial review to prevent them from abusing their powers to the disadvantage of the public. Judicial review is different from an appeal in that it is not concerned with reviewing the merits of the decision in respect of which the application for judicial review is made, but with the decision-making process itself. In other words, judicial review does not allow the court to examine the evidence with a view to forming its own view about the substantial merits of the case.

A person may apply for judicial review only if he has a "sufficient interest" in the matter, as when the decision in question interferes directly with the applicant's personal or public rights or has adverse financial consequences for him.

In principle, administrative decisions are subject to control by judicial review on the grounds of illegality, irrationality (unreasonableness) or procedural impropriety. The application of administrative law principles is dependent upon the context. The Court will always respond to the nature and circumstances of the individual case.

Illegality

A decision is illegal if:

- (a) it contravenes or exceeds the terms of the power which authorises the making of the decision; or
- (b) it pursues an objective other than that for which the power to make the decision was conferred.

In examining whether the decision-maker has strayed outside the purposes defined by the enabling statute, the courts enforce the rule of

law which requires administrative bodies to act within the bounds of the powers they have been given.

Irrationality

Although judicial review does not provide a right to appeal on the merits of a decision, the courts in judicial review will examine the evidence to see whether the decision is rational or not. A decision is irrational if the authority has acted so unreasonably that no reasonable authority would have made the decision. The question is whether the power under which the decision-maker acts, a power normally conferring a broad discretion, has been improperly exercised. This covers:

- (a) decisions taken in bad faith or for an improper purpose;
- (b) decisions where the decision-makers have failed to take account of relevant considerations or have taken into account irrelevant considerations;
- (c) decisions which are apparently illogical or arbitrary, or are supported by inadequate evidence or reasons;
- (d) decisions taken in violation of common law or constitutional principles governing the exercise of official power, for example, the principle of legal certainty (requiring the protection of substantive legitimate expectations) and the principle of equality (requiring decisions to be consistently applied); and
- (e) decisions which are oppressive by reason of their impact on individuals.

Where fundamental human rights are at issue, the basis of the decision will be subject to the most anxious scrutiny by the court. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable.

Procedural impropriety

The notion of a fair procedure is deeply rooted in our legal system. Whenever a public function



is being performed, there is an inference (subject to an express requirement to the contrary) that the function is to be performed fairly. For example, depending on the background of a particular case, the decision-maker may be required to:

- (a) give prior notice of what is proposed to those who are liable to be directly affected;
- (b) provide them with an opportunity to make written representations or to comment on the proposals;
- (c) give particulars of any prejudicial allegations to those against whom the allegations are directed before a hearing; and
- (d) provide the affected person with an adequate opportunity to put his own case and to call witnesses if he is entitled to a hearing.

A public authority which is entrusted with a discretion but disables itself from exercising the discretion by the adoption of a fixed rule of policy may offend the principle against procedural impropriety.

Further, by virtue of the rule against bias, a decision may be invalidated if the decision-maker has a pecuniary or proprietary interest in the outcome of the proceedings. A decision-maker may also be disqualified if he has an interest in the issue by reason of his identification with one of the parties, or has indicated partisanship in relation to the issue.

Legitimate expectation

Acts of executive authorities include promises and representations made by the Government as to future conduct, which generate a legitimate expectation that the promises or representations would be honoured. A legitimate expectation arises where a decision-maker has induced in a person who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is made. Subject to exceptional

circumstances where a clear representation could be withdrawn, the law requires that the expectation not be frustrated.

The protection of legitimate expectation is at the root of the principle of the rule of law, which requires regularity, predictability, and certainty in Government's dealings with the public. Failure to take account of the legitimate expectation may amount to an abuse of power and the decision in question may be vitiated on the ground that the decision-maker has failed to take account of a relevant consideration. The court may also ask the decision-maker to take the legitimate expectation into account in exercising his discretion.

Challenges to delegated legislation and bylaws⁵

The fundamental principle that all persons and institutions must abide by the law mandates that those who make the law must act legally. Delegated legislation and bylaws may therefore be challenged on the grounds that:

- (a) the making of the instrument in question was not within the relevant enabling power;
- (b) the correct procedure for making it was not followed;
- (c) it is inconsistent with the enabling legislation (the parent ordinance);
- (d) it is contrary to fundamental rights or the general law;
- (e) it is bad for uncertainty; or
- (f) it is unreasonable (eg, it is partial and unequal in its operation as between different classes, or the delegate law-maker has tried to achieve a purpose outside the purpose revealed in the enabling legislation).

Remedies in judicial review

On an application for judicial review, the court may grant an order of mandamus, certiorari or

⁵ With regard to challenges to primary legislation, see "Constitutional Review of Legislation", Basic Law Bulletin, Issue No 6, p 2.

prohibition, an injunction or a declaration. These remedial orders could be claimed as alternatives or in addition to each other, and damages could also be sought.

- (a) Mandamus is an order commanding an official, public authority or inferior tribunal to perform a public duty which appertains to his or their office.
- (b) Prohibition is an order to prevent a public authority or an inferior tribunal from acting in excess of its jurisdiction or acting contrary to law or the rules of natural justice.
- (c) Certiorari is an order to quash decisions by public authorities and inferior tribunals. By setting aside a defective decision, certiorari prepares the way for a fresh decision to be taken.
- (d) An injunction is an order requiring a party to do or to refrain from doing a particular act. It may be granted against a public authority or official to restrain unlawful acts which are threatened or are being committed.

- (e) A declaration is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs. It declares what the legal position is and what the rights of the parties are.

Conclusion

The right to institute legal proceedings against the acts of the executive authorities in the courts is deeply rooted in the principle of the rule of law. It underlines the constitutional role of the courts in acting as a check on the executive to ensure that they act in accordance with the law and are accountable to the interests that they serve.

By guaranteeing such a right, the courts could maintain the principles and parameters of the law, safeguard our rights and freedoms, control the exercise of discretionary powers, and provide remedies for unlawful acts of the Government.

