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Hong Kong Court's role in judicial review of legislative process: reassessing the Hong Kong jurisprudence and the relevance of the Israeli experience

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Introduction

The doctrine of separation of powers and the rule of law are core values in many modern jurisdictions, such as the United Kingdom, Hong Kong and Israel. The court's role is to ensure that laws are followed by everyone in the jurisdiction, while also protecting the integrity of the legislature by not undermining its legislative competence. Tension between these two principles is not uncommon. One classic example is where the legislature in the law-making process does not abide by the rules of procedure it has adopted.

An approach to resolve the tension is by setting the boundary of judicial review, which is now set by three main techniques: jurisdiction – defining the jurisdiction of the courts, justiciability – holding some functions to be non-justiciable, and discretion – exercising discretion to refuse some claims.¹ Hong Kong and Israeli courts use these techniques differently to answer the question whether, and to what extent, the court should judicially review the legislative process to inquire whether the legislature complied with the rules of procedure (in addition to constitutional procedural requirements).

This essay will analyse the jurisprudential differences and argue that a modified Israeli approach would better fit Hong Kong in light of the unique political, doctrinal, and historical, social and cultural attributes of the HKSAR. With respect, Hong Kong courts at all three levels (Court of First Instance, Court of Appeal and Court of Final Appeal) failed to consider these unique attributes in reaching their decisions in *Leung Kwok Hung v President of the Legislative Council*.²

Comparative analysis of Hong Kong and Israeli jurisprudence

In defining Hong Kong courts' jurisdiction, the courts held in *Leung Kwok Hung* that they do not

¹ Lord Woolf et al, de Smith's Judicial Review (7th edn, Sweet & Maxwell), para 3-013.

² [2014] HKEC 1604 (Court of Final Appeal, "CFA"); [2013] HKEC 155 (Court of Appeal, "CA"); [2012] 3 HKLRD 470 (Court of First Instance, "CFI").

intervene to rule on the regularity of the internal processes of the legislature but leave the issue of regularity to be determined exclusively by the legislature itself (the non-intervention principle).³ The non-intervention principle is derived from parliamentary privilege in the United Kingdom⁴ and recognised in other jurisdictions.⁵ The courts noted that Hong Kong has the Basic Law as a written constitution, which is supreme, so the courts have the jurisdiction to inquire whether the legislative process followed constitutional procedural requirements.⁶ In view of the non-intervention principle, however, where ambiguity exists in the constitutional provisions, the courts lean against regarding those provisions as mandating procedural requirements.⁷ Article 73(1) of the Basic Law,⁸ as observed by the courts,⁹ carries such ambiguity in that it does not expressly provide that non-compliance with “legal procedures” will invalidate the law so enacted, especially when read in conjunction with article 75(2).¹⁰ Hence, article 73(1) is not treated as a constitutional procedural requirement, and the effect of the non-intervention principle will absolutely pre-empt the courts’ jurisdiction to inquire whether the Rules of Procedure, the “legal procedures” enacted by the Legislative Council (“LegCo”) itself, were complied with in the LegCo’s legislative process.¹¹

In contrast, Israeli courts adopted a different starting point. Instead of the non-intervention principle, Israeli courts relied on section 7(b)(2) of the Courts Law 1957 (which was later incorporated into section 15(d)(2) of the Basic Laws: The Judiciary 1984) to hold that the courts have jurisdiction over all state authorities which “exercise any public functions by virtue of law”. Since the Knesset Procedure Rules are a “law” prescribed by the Knesset (the Israeli legislature) itself which regulates the procedures of the Knesset, the courts have the jurisdiction to inquire whether those Rules were

³ *Ibid.*, CFA, [28]; CA, [19]; CFI, [30].

⁴ *Ibid.*, CFA, [27]; CA, [20]-[22]; CFI, [30].

⁵ *Ibid.*, CFA, [34]-[35]; CA, [25]; CFI, [44].

⁶ *Ibid.*, CFA, [32]; CA, [24]; CFI, [29], [31].

⁷ *Ibid.*, CFA, [31]-[33]; CA, [24]-[25]; CFI, [44].

⁸ Which provides that the Legislative Council shall exercise the powers and functions to “enact, amend or repeal laws in accordance with the provisions of [the Basic Law] and legal procedures”.

⁹ *Leung Kwok Hung*, CFA, [36]-[38]; CA, [47]-[57]; CFI, [44].

¹⁰ Which gives LegCo the power to determine what rules it wishes to follow “on its own”.

¹¹ *Leung Kwok Hung*, CFA, [43]; CA, [58]; CFI, [36].

followed in the Knesset's legislative process.¹² Although the Hong Kong Basic Law lacks such explicit provision as in the Israeli Courts Law 1957, it is not the reason for the difference between the two jurisdictions, as it is uncontroversial for Hong Kong courts to assert jurisdiction over the executive branch which exercises public functions. The major difference between the two jurisprudences lies in that Israeli courts, in defining their jurisdictions, did not even make any reference to the non-intervention principle, which Hong Kong courts applied closely.

Having concluded that the courts have no jurisdiction to investigate LegCo's compliance with the Rules of Procedure, Hong Kong courts have little room to use the techniques of justiciability and discretion, while Israeli courts discussed these two techniques in some detail. Israeli courts are of the view that the decision of the Knesset Chairman exercising the power vested with him by the Knesset Procedure Rules is justiciable because the decision is of an administrative character and the decision's legality can be judged by legal standards.¹³ In determining how discretion should be exercised to refuse claims, Israeli courts tend to strike a balance between the rule of law and the separation of powers: the courts will hear a claim only when the alleged defect in the legislative proceedings "goes to the heart" of the matter, harming the basic values of the democratic system that underlie the legislative proceedings.¹⁴ To assess whether a defect "goes to the heart" of the matter, the courts will consider the nature of the defect and the extent of the defect's violation of the basic values.¹⁵ However, there seems to be no successful example in Israel to demonstrate what sort of defects can surmount the discretion threshold.

Hong Kong jurisprudence revisited – what should be the law?

In order to answer the question posed at the beginning of the essay, it is of assistance to first explore

¹² HCJ 652/81 *M.K. Sarid v Chairman of the Knesset*, [4]; *Israel Poultry Farmers Association v Government of Israel* [2004] Isr LR 383, [15].

¹³ *M.K. Sarid*, [5]-[8].

¹⁴ *M.K. Sarid*, [9]; HCJ 5131/03 *Litzman v Knesset Speaker* [2004] Isr LR 363, [10]-[14]; *Israel Poultry Farmers Association*, [16]-[17].

¹⁵ *Ibid.*

some general principles. Hong Kong courts typically rely heavily on the non-intervention principle, which is derived from parliamentary supremacy and well recognized with modification in other jurisdictions with a written constitution. As to whether principles found in other jurisdictions can be imported to Hong Kong, Sir Anthony Mason NPJ suggested that caution must be taken as there are strong countervailing considerations including political differentiations, doctrinal differences, and historical, social and cultural differences.¹⁶ Conceivably, the unique constitutional order of the HKSAR is a significant factor in all the above considerations.

The non-intervention principle should not be generally adopted in Hong Kong. From a political perspective, in the United Kingdom, as well as in Australia, elections of Members of Parliament (MPs) are mostly by universal suffrage, who in turn elect the Speaker of the Parliament to administer standing orders and rules of procedure. If the Speaker held the meeting in such an inappropriate and controversial way that the Speaker's decision aroused tens of thousands of protesters, the Speaker's party would be likely to lose seats and risk becoming a minority party in the next election. The political balance achieved by a fair and democratic electoral system is an important basis for the non-intervention principle. Hong Kong regrettably lacks the political balance with only slightly more than half of the LegCo members elected by ordinary citizens. In practice, the pro-Beijing camp has always secured more than half the seats of the LegCo, despite the fact that about 60% of the seats of the Geographical Constituencies are usually held by the pro-democracy camp. Under the current system, the President is bound to come from the pro-Beijing camp. Acting in Beijing's interest, the President can effectively ignore any rules of procedure without risking his incumbency. Having recognized the consequence of non-intervention being that the checks and balances within the legislature can only be attained politically,¹⁷ Hong Kong courts fail to appreciate the reality of Hong Kong politics. If the courts refuse to ensure the Rules of Procedure

¹⁶ Sir Anthony Mason NPJ, "The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong" (2007) 37 HKLJ 299, 303-306.

¹⁷ *Leung Kwok Hung*, CA, [22].

obeyed by the LegCo, there will be no other feasible political ways to balance LegCo's power. Rule of law must override separation of powers in this regard.

A doctrinal analysis will also support the abandonment of the non-intervention principle. In 1970, Lord Diplock laid down the principle governing the separation of powers in colonial Hong Kong. LegCo only enjoys as much immunity as is needed to enable it to carry out its functions under the constitution.¹⁸ After handover, without express modifications afforded by the Basic Law, this principle still arguably applies. The issue in this context is whether LegCo's immunity from the court's intervention in the legislative process is essential to enable LegCo to carry out its Basic Law functions. In light of the socio-political analysis above, the court can exercise self-restraint (i.e. discretion, which will be discussed in detail in later part of this essay) to strike a balance between maintaining the rule of law and respecting the integrity of LegCo, instead of absolutely withholding its powers to intervene. The suggested immunity is unessential and unnecessary, and therefore LegCo has no such immunity. Since the non-intervention principle is obviously incompatible with this position derived from Lord Diplock's principle which has already formed part of the Hong Kong common law, the non-intervention principle should not be imported. Hong Kong courts also failed to conduct this analysis in reaching their decisions in *Leung Kwok Hung*.

It is even more undesirable to apply the non-intervention principle to interpret article 73(1) of the Basic Law. Mason NPJ pointed out that the relevance of international law principles for constitutional interpretation depends upon, in addition to the considerations above, many other factors, notably norms and concepts which a constitution reflects.¹⁹ Article 73(1) expressly mandates that the legislative process comply with both the Basic Law and legal procedures (which include the Rules of Procedure). The language is plain and clear, reflecting the norm that LegCo must observe the Rules of Procedure in enacting laws. With respect, it is difficult to identify the

¹⁸ *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136, 1154F-1157G.

¹⁹ Sir Anthony Mason NPJ (above), 317.

ambiguity as Hong Kong courts did. Application of the non-intervention principle will subvert the norm that article 73(1) reflects since there would be no other effective check or balance against LegCo's power in Hong Kong's legal-political dynamics.

Based upon these arguments, the rest of this essay will consider the "three techniques" to address the question posed in the beginning. The courts ascertain their jurisdiction through an interpretation of the Basic Law. In view of the foregoing background that the non-intervention principle should not be adopted, a fair interpretation of article 73(1) would positively mandate the court to ensure LegCo's compliance with legal procedures in the law-making process, and thus the court should have the relevant jurisdiction. As for the issue of justiciability, it is as true in Hong Kong as in Israel that decisions of the LegCo President, as well as the Knesset Chairman, in administering the rules of procedure in a legislative process are of an administrative character and the decisions' legality can be judged by legal standards. There is no reason not to follow the Israeli courts' reasoning that the issue is justiciable.

As mentioned above, although the issue falls within the court's jurisdiction and is justiciable, the court should exercise discretion to set a threshold in order to strike a balance between the conflicting considerations of the rule of law and the separation of powers. Mason NPJ's considerations are still relevant in the discussion of discretion. Despite the necessities of the courts' intervention in the law-making process as submitted above, both Hong Kong and Israeli courts pointed out the overwhelming downsides of the intervention, including causing damage and disruption to the proper functioning of the legislature and thus harming public interest,²⁰ and resulting in politicization of the judicial process due to the heavily loaded political content in the legislative process.²¹

²⁰ *Leung Kwok Hung*, CFI, [32].

²¹ *M.K. Sarid*, [7].

The Israeli threshold should not be adopted in whole in Hong Kong. Its benchmark (harming the basic values of the democratic system) seems too vague and uncertain as noted by the Hong Kong Court of Final Appeal,²² and there has been no successful case that has demonstrated how high the threshold is.

In determining how Hong Kong courts should exercise the discretion, regard must be had to the role of the Standing Committee of the National People's Congress (NPCSC), as a special consideration in the unique HKSAR constitutional order. Although the Basic Law is supreme, the final interpretation power is vested with NPCSC, arguably acting with self-restraint though,²³ whose interpretation will inevitably be a backlash against the rule of law in Hong Kong. This jurisdiction, therefore, suffers from the inherent flaw of a judiciary on a leash, undermining the judicial independence at the foundation of the rule of law. The courts must not intervene in the legislative process too intrusively to attract NPCSC's interpretation of the Basic Law to expressly and permanently restrict the judicial power. A related consideration is the developing social dichotomy in Hong Kong. Partly due to the lack of sufficient democracy in elections, the legislature sometimes, if not always, passes laws against the will of the majority of citizens, which would likely result in a litigation rush to collaterally attack an enactment by challenging its legislative process. However, even after the law has been struck down by the court for procedural defects in its legislative process, it is perfectly constitutional for LegCo to re-enact the exact same law, provided that the substance of the law is constitutional and the re-enactment process is conducted without procedural defect. If that is the case, one may argue it is a waste of judicial resources. Therefore, the threshold to review the legislative process must not be too low to avoid opening the litigation floodgate and to prevent waste of valuable judicial resources.

²² *Leung Kwok Hung*, CFA, [51].

²³ Albert Chen, "The interpretation of the Basic Law: common law and Mainland Chinese perspectives" (2000) 30 HKLJ 380.

The Hong Kong threshold should be that the courts will not intervene in the law-making process unless the legislative outcome *might* have been different had there not been the non-compliance with the Rules of Procedure. From a practical perspective, such a relatively certain and high threshold filters out the unmeritorious claims where LegCo can surely re-legislate the exact same law, so that it lowers the chance of wasting courts' time. It poses no risk of opening the litigation floodgate. From a principled perspective, it is the courts' duty to review decisions with legal consequences rather than those with mere political consequences. A procedural defect that would probably not change the legislative result (e.g. forbidding lawful speech of a law-maker) would only give rise to *political* consequences rather than legal consequences. Yet, a defect that might affect the outcome (e.g. putting a motion to vote amid chaos where some lawmakers were unable to vote) would lead to a real danger that there would also be *legal* consequences because LegCo might not have passed the same law without the defect. The suggested threshold is justified both practically and in principle.

Conclusion

In defining the courts' role in the judicial review of the legislative process to ensure that the legislature observes internal rules of procedure in addition to constitutional procedural requirements, Hong Kong courts deemed such jurisdiction outside of their remit. Conversely, Israeli courts treated this issue within their jurisdiction and justiciability but held that they would exercise discretion to refuse claims when the defect does not go to the heart of the matter. In light of Hong Kong's unique constitutional order together with political, doctrinal and social considerations, Hong Kong courts should also treat the issue within jurisdiction and justiciability as Israeli courts did, but should exercise discretion, differently from the Israeli position, to hear claims only where the legislative outcome might have been different had it not been for the procedural defect.