

SOME REFLECTIONS ON REMEDIES IN ADMINISTRATIVE LAW



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This article argues that some of the existing procedural requirements in traditional judicial review proceedings will have to be modified in light of the increasing number of challenges against constitutionality of legislation. It also argues for a more flexible approach to the granting of declaratory relief and damages in judicial review, and while it advocates in favour of a power to grant a stay of a declaration of unconstitutionality of legislation, it queries whether such an approach has been adopted in practice.

Introduction

With the introduction of the Bill of Rights in 1991 and the Basic Law in 1997, the demarcation between constitutional law and traditional judicial review in administrative law has become increasingly blurred. In one sense, a challenge against an administrative decision for being contrary to the Basic Law is nothing more than an application of the doctrine of *ultra vires* under traditional judicial review. Yet the possibility of challenging the *vires* of the enabling legislation has considerably widened the scope of judicial review, as an administrative decision can be challenged, not just by attacking the decision itself, but also by attacking the *vires* of the source of powers. This possibility presents new challenges to the judiciary in granting remedies, as the consequences and implications could be much far-reaching. At the same time, the trend of combining constitutional challenges in traditional judicial review applications raises the question of to what extent the existing procedure for judicial review is able to meet this new challenge.

Apart from the ability of the judicial review procedure to meet the new constitutional challenges, this article also explores the extent to which the court could make prospective rulings or suspend the operation of its declarations, and how far the court can order damages against a third party.

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Adequacy of Judicial Review Procedure

In *Leung v Secretary for Justice*, the applicant challenged by judicial review the constitutionality of certain sexual offences which were said to be discriminatory against homosexuals.¹ The Respondent took procedural points that no judgment, order, decision or other proceedings had been identified for challenge; that the applicant did not have sufficient interest to bring the judicial review; and that there was undue delay in bringing the application. Any of these grounds would allow the court to exercise its discretion to refuse the application.

On the first point, the court held that the requirement of identifying a judgment, order, decision or other proceedings was a matter of form, in which there was considerable flexibility.² It is understandably difficult to identify a judgment, order or decision when the challenge is on the legality of the legislative provision. An artificial decision that could be identified would be the assent of the Chief Executive to the bill which has been passed by the Legislative Council,³ but this is rather artificial and challenges to assent to a bill have not prospered in other jurisdictions.⁴ At the same time, focusing on the assent would create great difficulty on the question of delay, especially when the challenges on constitutionality of the legislation are brought well after the bill has become law. Yet without a decision, it is not easy to determine when time begins to run. In the *Leung* case, the criminal sanction may apply when the Applicant turned 16, but his judicial review was only lodged four years later. The court eventually decided that, provided that the point was arguable and the applicant had sufficient interest, the time factor, whilst relevant, was nevertheless not as compelling a consideration as in other situations and, accordingly, it dismissed the relevance of delay in this context. While the flexible approach of the court is to be commended, it does highlight the problem of applying the existing procedural requirements that are designed for challenging an administrative decision to a challenge against the constitutionality of a statutory provision. It is clear that the identification of a specific order, judgment, decision or proceedings and the requirement of bringing the application without delay have to be modified for this type of application. Under the revised Order 53 rule 1A of the Rules of High Court, which came into effect on 2 April

¹ [2006] 4 HKLRD 211.

² The court also seems to suggest that there is no statutory requirement to identify a judgment, order, decision or other proceedings. This is doubtful, as Ord 53 r 3(2) requires the proceedings to be commenced in the statutory form – Form 86A – which refers to the “judgment, order, decision or other proceeding in respect of which relief is sought”.

³ This was suggested by V.P. Litton in *Lee Miu Ling v Att Gen* (1995) 5 HKPLR 585 at 596.

⁴ *Westco Lagan Ltd v Att Gen* [2001] 1 NZLR 40; *Boscauwen v Att Gen* [2008] NZHC 949.

2009, it is now possible to challenge the lawfulness of a legislative enactment. The amendment, however, does not address the problem of delay and when time begins to run in the case of such a challenge.⁵

Declaration and Future Conduct

Another issue raised by the *Leung* case is how far the court can grant a declaration in the absence of any *lis* between the parties. It is axiomatic in the common law system that a court will not entertain a hypothetical or academic question in the sense that there are no events that have occurred that form the basis for the question to be answered.⁶ The court exists to resolve a real, not an imaginary, dispute, and it is considered undesirable or even dangerous for a court to engage in giving advisory opinion in the abstract.

Notwithstanding this general principle, the court is increasingly prepared to determine a question even when the *lis* has disappeared, provided that there is good reason in the public interest to do so.⁷ This is said to be a matter of discretion, not of jurisdiction.⁸ The absence of a *lis* would in most cases also give rise to issues concerning justiciability, standing or even jurisdiction. Thus, in *Lee Miu Ling*,⁹ the Court of Appeal rejected the applicant's challenge against the constitutionality of functional constituency partly on the ground that the applicant, not being a member of any functional constituency, had no standing or interest to challenge the inequality of voting power in different functional constituencies. This part of the decision could easily be justified as posing a hypothetical question. On the other hand, while the questions of hypothetical issues, standing or jurisdiction are often inextricably linked and substantially overlapped, they may sometimes require different considerations and approaching the matter from one perspective such as standing, as shown below, may sometimes cloud the real issue to be determined.

⁵ The amended statutory form in Appendix 1 of the Rules of the High Court still requires the party to identify the "judgment, order, decision or other proceeding in respect of which relief is sought".

⁶ See, eg, *R v Secretary of State for the Home Department Ex p Wynne* [1993] 1 WLR 115 at 119–120 where Goff LJ said that "it is well established that this House does not decide hypothetical questions." See also *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 194, per Bridge LJ and *Ainsbury v Millington* [1987] 1 WLR 379 at 381 where Bridge LJ remarked that "it has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved." Note that the absence of a *lis* is sometimes addressed as an issue on justiciability or lack of standing: see *Lee Miu Ling v Att Gen* (1995) 5 HKPLR 585, n 9 below.

⁷ *R v Secretary of State for the Home Department Ex p Salem* [1999] 1 AC 450 at 457A–B, per Slynn LJ.

⁸ *Leung v Secretary for Justice* [2006] 4 HKLRD 211 at 228A–C, para 28(8), per Ma CJHC.

⁹ *Lee Miu Ling v Att Gen* (1995) 5 HKPLR 585 at 595.

In *Chit Fai Motors Co Ltd v Commissioner for Transport*,¹⁰ the applicant was a commercial operator of public light bus that was licensed to run a number of fixed routes in Hong Kong. It complained against a decision of the Commissioner for Transport approving the operation of a free bus service between a major shopping centre and various nearby residential areas on the ground that this had materially and adversely affected its business and that the decision of approval was made without consultation of the applicant. It sought a declaration that the Commissioner was under a duty to consult the applicant on this kind of decision, but the application was dismissed at first instance on the ground that by the time of the hearing, the approval to run the free bus service had already expired. This decision was reversed on appeal. The Court of Appeal held that while the decision being challenged was a one-off decision, it was clear that the dispute was an ongoing and real one as there appeared to be other decisions involving the provision of free bus service that might affect the applicant. In determining whether or not to exercise its discretion to make a declaration, the court would closely examine the relevance or utility of any decision. In this regard, the court held that this would be easier to demonstrate in the public law sphere, as “very often in public or administrative law cases, the duties of public bodies fall to be exercised on a continuing basis not only in relation to the parties before the court but also perhaps to others in the future.”¹¹

The point was re-visited in the recent decision of the Court of Appeal in *Leung v Secretary for Justice*. The applicant, who challenged the constitutionality of certain sexual offences that were targeted at homosexuals, was not charged with any offence in that case. The respondent argued that the application was purely academic, alongside other procedural challenges.

The court reaffirmed that it could grant declaratory relief relating to future conduct which may or may not happen, although it would do so only in exceptional circumstances.¹² These circumstances would include, as in that case, a situation that access to justice could only be achieved by transgressing the law,¹³ or when it is undesirable or prejudicial to force interested parties to adopt a wait and see attitude before dealing with the matter.¹⁴ In that particular case, the court took into account that the applicant, being

¹⁰ [2004] 1 HKC 465.

¹¹ *Ibid*, p 472, para 20(3), per Ma CJHC.

¹² See also *R (Pretty) v DPP & Secretary of State for the Home Department (Intervener)* [2002] 1 AC 800 at 851, para 116, per Hobhouse LJ; *R (Rusbridger) v Att Gen* [2004] 1 AC 357 at 366–367, paras 16–19, per Steyn LJ, and at 370, para 32, per Hutton LJ; *NHS Trust v Bland* [1993] AC 789, at 862–863, per Goff LJ.

¹³ [2006] 4 HKLRD 211 at 227, para 27(5).

¹⁴ *Ealing London Borough Council v Race Relations Board* [1972] AC 342 at 347; *Gillick v West Norfolk & Wosbech Area Health Authority* [1986] AC 112; *Rediffusion (Hong Kong) Ltd v Att Gen of Hong Kong* [1970] AC 1136.

a homosexual, had been living under a cloud of uncertainty, not knowing whether and when he would be prosecuted, and that he could only test it by committing the criminal offence of buggery or gross indecency, the constitutionality of which was the subject matter of his challenge. His life has been seriously affected by the legislation, and the application involved largely a matter of law the determination of which was not fact-sensitive. It also involved a most intimate part of personal privacy. There was undoubted public interest and the issue potentially affected a large number of people. Accordingly, the court granted a declaration that the statutory offences in question contravened the right to privacy and equality under the Basic Law and the Bill of Rights.

While this is a welcomed decision, the court seemed to suggest that this is a matter of standing. This seems to be a rather artificial way of approaching the matter. The difficulty for the court is that it is trying hard to fit the application for review of constitutionality into the traditional procedural requirements of judicial review in terms of forms, interests and delay. The case highlights that the existing procedure for judicial review is not entirely suitable for review of constitutionality of legislation, which is an increasingly common feature in judicial review applications. As the court is right in pointing out that this is not a matter of jurisdiction but one of discretion, a better approach is to treat the matter as one of relief. Once the court is satisfied that the applicant has sufficient standing, which is usually not a problem, it is better to approach the application as one whether the court should exercise its discretion to grant declaratory or other relief. The discretion may be exercised when a discrete point of statutory construction arises which does not depend on specific facts, or when there are a number of conflicting decisions,¹⁵ or where a large number of similar cases exist or are anticipated so that the issue will most likely have to be resolved in the near future,¹⁶ or where the same issue is likely to arise as between the same parties,¹⁷ or when access to justice could only be achieved by transgressing the law.¹⁸

The courts are also right in emphasising that a declaratory relief in relation to future conduct will only be granted in exceptional circumstances.

¹⁵ *R v Birmingham City Juvenile Court Ex p Birmingham City Council* [1988] 1 WLR 337.

¹⁶ *R v Secretary of State for the Home Department Ex p Salem* [1999] 1 AC 450 at 457A–B, per Lord Slynn.

¹⁷ *R v Canons Park Mental Health Review Tribunal Ex p A* [1995] QB 60; *Chit Fai Motors Co Ltd v Commissioner for Transport* [2004] 1 HKC 465. In *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413, the court was prepared to determine the validity of a restraint of trade clause in the English Football Leagues restricting the transfer of a football player from one club to another when the player in question had already moved from his former club (Newcastle) to Arsenal on the basis that this issue was likely to arise in relation to other players.

¹⁸ *Leung v Secretary for Justice* [2006] 4 HKLRD 211.

At the same time, the courts are less resistant to invoke this exceptional jurisdiction in recent years, and have pointed out that advisory declarations are “valuable tools to reduce the danger of administrative activities being declared illegal retrospectively and to assist public” (sic).¹⁹ Given that declaratory relief is available in both private law and public law, the nature of the issue in question may also be relevant in determining whether to exercise the discretion to grant declaratory relief in relation to future conduct only. The court should be more ready to entertain an application in the public law context when constitutionality of legislation is in issue, as Ma CJHC put it, “if a law is unconstitutional, the sooner this is discovered, the better.”²⁰

Suspension of Declaratory Relief

A different scenario is that the court is prepared to grant a declaratory relief, but the consequences may be such that it would be inappropriate to allow the declaratory relief to take effect immediately. It is well known that the court can take into account the demand of good public administration in determining whether to exercise its discretion to grant remedies in judicial review.²¹ How far can a court allow an executive act to take legal effect when it is based on a statutory provision that the court has concluded to be unconstitutional? This question arose in *Koo Sze Yiu v Chief Executive*.²² For many years, the Government had relied upon section 33 of the Telecommunications Ordinance for conducting covert surveillance. This section was heavily criticised for its excessive breadth.²³ A private member bill was introduced in 1997 to amend this section against the will of the Government, and the Government refused to bring the amendment into force. It was only when the courts refused to admit evidence obtained by covert surveillance in some criminal cases that the Government was prepared to introduce, by way of an Executive Order, a tightened authorisation and review procedure.²⁴ Both the Court of First Instance and the Court of Appeal found section 33 a violation of the right to private communication under

¹⁹ *(CND) v The Prime Minister of the UK* [2002] EWHC 2777 (admin) at para 46.

²⁰ *Ibid*, at 230, para 30.

²¹ *R v Monopolies and Mergers Commission Ex p Argyll Group plc* [1986] 1 WLR 763; *Caswell v Dairy Produce Quota Tribunal* [1990] 2 AC 738.

²² (2006) 9 HKCFAR 441.

²³ See, eg, Law Reform Commission, *Privacy: Regulation of Interception of Communications* (Dec 1996), paras 2.20–2.24, 3.43–3.46.

²⁴ *Secretary for Justice v Shum Chiu* [2006] HKEC 2335. See also *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400 and *HKSAR v Mo Yuk Ping* [2005] HKEC 1318; *HKSAR v Li Man Tak* [2005] HKEC 1309.

Article 30 of the Basic Law. While the Executive Order prescribing a new procedure was an improvement over the old regime, it was not in accordance with “legal procedures” as required by Article 30. The Government argued that if section 33 and the Executive Order were declared unconstitutional, the law enforcement agencies would immediately be left with no power to conduct or continue covert surveillance and there would be disastrous consequences on the maintenance of law and order. As a result, the Court of First Instance (and affirmed by the Court of Appeal) granted an order of temporary validity so that section 33 and the Executive Order remained valid with legal effect for a period of six months so as to afford the Government time to introduce remedial legislation. On further appeal, the Court of Final Appeal set aside the temporary validity order and replaced it with an order to suspend the declaration of inconsistency for the same period of time.

The decision is controversial in two respects. First, it is unclear on what basis can a court claim to have jurisdiction to suspend a declaration or to grant a temporary validity order? Secondly, when could the court ever justify upholding the validity of a legislative provision, even temporarily, when it has unequivocally found the provision to be unconstitutional?

Hartmann J (as he then was) rested his decision on a general notion of the rule of law. He referred to a number of cases from the Federal Court of Pakistan, the Canadian Supreme Court and the House of Lords, and notably *Re Manitoba Language Rights*²⁵ where the Canadian Supreme Court, after holding that all laws in Manitoba were unconstitutional as they failed to provide both official languages versions, was prepared nonetheless to deem these legislations valid and to grant the Government a period of five years to translate and re-enact all necessary legislation. Hartmann J held that when the very fabric of the rule of law was threatened, the court would have the power to avoid a situation where there would be no rule of law. This is a rather sweeping and vague formulation which did not really provide any useful guidance. Given the exceptional nature of this power, it is better that the circumstances and the need for the exercise of such power be more specifically defined. Instead of relying on a general notion of the rule of law to confer temporary validity, the Court of Final Appeal was prepared to rely on an inherent jurisdiction, arguing that “the power to suspend a declaration is a concomitant of power to make the declaration”.²⁶ The Court drew a distinction between temporary validity and suspension, which, as argued below, is a dubious distinction. It suggested that temporary validity

²⁵ [1985] 1 SCR 721; (1995) 19 DLR (4th) 1.

²⁶ See Bokhary PJ, at 456, paras 32–34. See also Bokhary PJ, “The First Decade of the Basic Law – A Judicial Perspective” (2007) 15(2) *Asia Pacific Law Review* 125, p 133.

should be reserved for situations when there was a virtual legal vacuum or a virtually blank statutory book,²⁷ which was not the situation in that case. This left the issue of suspension, and the Court asserted that there was an inherent jurisdiction to suspend a declaration. While this seems to provide a better jurisdictional basis than a vague notion of the rule of law for the exercise of this power, there is no consideration other than a self-serving statement if such “inherent jurisdiction” exists in the first place.

Another way of approaching this issue is to ask if the court can exercise a power of prospective overruling, ie, imposing a temporal restriction on its order so that it would only apply prospectively.²⁸ A purely prospective order does not make practical sense, as the applicant in the case must be seeking relief in relation to certain acts that took place in the past. To this extent it may be more accurate to describe it as a “modified prospective application”, namely, that the order will apply prospectively except that it will apply to the immediate parties to the proceedings and, perhaps, parties in other cases that are pending the resolution of the subject proceeding.²⁹ Whether there is jurisdiction to make a prospective or modified prospective order is controversial.³⁰ In some jurisdictions, such as South Africa or Scotland, there is an express power in the constitutional instrument to limit the retrospective application of a declaration of inconsistency.³¹ Short of an express statutory power, the starting point is that judgments would always have retrospective and prospective effect, as the court in any judicial decision must necessarily be deciding on the rights and obligations of the parties in relation to events that happened before the action was brought to the court.³² It was said that the court would be usurping a legislative power if it could declare what the law was yesterday and what the law is as from today or will be at some time in the future.³³ The High Court of Australia drew a distinction between adjudication of rights, which was the proper role of a court, and creation of

²⁷ *Koo Sze Yiu v Chief Executive* (2006) 9 HKCFAR 441 at 456, para 34.

²⁸ It can be argued that prospective overruling is more drastic than suspension of declaratory relief, as the latter declaration will still take immediate effect with a temporal limit, whereas a prospective ruling will only take effective some time in the future. As argued below, such a distinction, if it ever exists, has probably no practical consequences.

²⁹ *HKSAR v Hung Chan Wa* [2006] HKEC 183, para 12 (CA). See also Dame Mary Arden, “Prospective Overruling” (2004) 120 LQR 7. It may also benefit those who are still in time to lodge an appeal.

³⁰ It may be noted that this issue is sometimes disguised under the notion of various theories of invalidity, and the general trend, including Hong Kong, is to move away from the use of the concept of nullity.

³¹ See Scotland Act 1998, s 102, and the Constitution of South Africa. Similarly, such a power exists under the Indian Constitution. A good summary was provided by Stock JA in *HKSAR v Hung Chan Wa* [2006] HKEC 183, at [28]–[29].

³² *Kleinwort Benson Ltd v Lincoln County Council* [1999] 2 AC 349; *Lau Kwong Yung v Director of Immigration* (1999) 2 HKCFAR 300 at 326.

³³ Lord Reid, “The Judge as Law Maker” (1972–73) 12 JSPTL 22, 23; *R v Governor of Brockhill Prison Ex parte Evans (No 2)* [2001] 2 AC 19 at 48, per Lord Hobhouse.

rights, which fell outside the remit of the court. It held that the court has no inherent jurisdiction to make a prospective order, holding that it would be a perversion of judicial power to maintain in force unconstitutional law, especially when non-compliance with the unconstitutional law exposed one to criminal prosecution.³⁴

In contrast, while Lord Goff suggested barely 10 years ago that prospective overruling has no place in English legal system,³⁵ the House of Lords recently held that such a power existed in all situations, but it could only be exercised in exceptional circumstances.³⁶ It cautioned that this power could only be exercised “where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that the House of Lords would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions.”³⁷ The Canadian court denied such a power,³⁸ but it was able to achieve a similar result in *Re Manitoba Language Rights* by invoking the doctrine of necessity.³⁹ In the United States, where this power is more enthusiastically invoked, there is a mixed record. The US experience was described by Lord Nicholls in *Re Spectrum Plus Ltd* as being “waxed and waned”, particularly in the context of criminal law when liberty of the subject is involved.⁴⁰ The European Court of Human Rights also seems to accept such a power in order to avoid “re-opening legal practice or situations that antedate the delivery of its judgment.”⁴¹ In Hong Kong, the Court of Final Appeal appeared to accept that it has such an inherent power, although it has not made any firm decision in this regard.⁴² It recognised that this question might depend on the understanding and extent of sepa-

³⁴ *Ha v New South Wales* (1997) 189 CLR 465 at 503–504 and 515. See also *Boddington v British Transport Police* [1999] 2 AC 143 at 165; *Ruddock v Taylor* (2005) 222 CLR 612 at 672–673.

³⁵ *Kleinwort Benson Ltd v Lincoln County Council* [1999] 2 AC 349 at 379. The existence of this power was also acknowledged by the House of Lords in *R v Governor of Brockhill Prison Ex parte Evans (No 2)* [2001] 2 AC 19.

³⁶ *National Westminster Bank plc v Re Spectrum Plus Ltd* [2005] 2 AC 680. It is of interest to note that this is a private law case. The power of prospective overruling has never been invoked since this case. It is also interesting to note that this case has escaped the attention of leading English works on judicial review and administrative law, such as Paul Craig, *Administrative Law* (Oxford University Press, 6th edn) and Lord Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith's Judicial Review* (London: Sweet & Maxwell, 6th edn, 2007).

³⁷ [2005] 2 AC 680, at 699, para 40, per Lord Nicholls.

³⁸ *Edward and Edward* (1987) 39 DLR (4th) 654.

³⁹ (1985) 19 DLR (4th) 1.

⁴⁰ [2005] 2 AC 680 at 693, paras 18–19. Prospective overruling was upheld in *Linkletter v Walker*, 381 US 618 (1965), but its application to criminal law was restricted by *Griffiths v Kentucky* (1987) 107 S Ct 708.

⁴¹ *Marckx v Belgium, Series A, No 31*; (1979) 2 EHRR 330 at 353. See also a similar approach adopted by the European Court of Justice: *R (on the application of Bidar) v Ealing LBC* (C-209/03).

⁴² *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614.

ration of powers and the particular relations between the Legislature, the Executive and the Judiciary in different jurisdictions, and as a result, this was not a question that might yield to a common answer in different parts of the common law world.

The existence of a power to make prospective overruling is ultimately a matter of achieving competing notions of justice. As it is familiar in administrative law, a court may sometimes refuse relief because no injustice has been done and the grant of relief would not be conducive to good administration or would unfairly upset vested rights of third parties. Likewise, there must be cases where injustice would result if a declaration of invalidity is allowed to operate retrospectively. Legal certainty is particularly important in private law matters such as land, contract or property. There may be undesirable economic repercussions if decisions relying on a statutory provision which has since been declared unconstitutional would upset such decisions in the past.⁴³ Likewise, if a legislative provision on divorce is struck down with retrospective effect, it may result in numerous cases of illegitimate births which are otherwise legitimate.⁴⁴ In some of these cases, the principle that vested rights should not be affected may come to an aid to avoid such undesirable consequences, but this may not work in all cases, such as a situation when there would be a legal vacuum or extraordinary administrative dislocation as in *Re Manitoba Language Rights* or allegedly in *Koo Siu Yiu*. On the other hand, prospective overruling may cause injustice when liberty of the person is at risk. This is particularly the case when someone whose liberty is deprived of by an impugned legislative provision in a criminal process is denied the benefit of a declaration of unconstitutionality. This may have to be balanced against the desirability of finality in criminal law.⁴⁵ There is also the legitimate concern that the courts may, in making prospective overruling, be engaged in a legislative rather than a judicial process. The reply is that the court is no more engaged in a legislative process in prospective overruling than in striking down a legislative provision. If it is accepted that the court can legitimately strike down a legislative provision without being engaged in a legislative process, it cannot be said that the court is engaged in a legislative process if it holds that the legislation is only null and void in respect of its future operation. On the whole, balancing all these factors, it seems that the case for the existence of such a power to allow flexibility and to serve the ends of justice is overwhelming, so long

⁴³ *Hill v Atlantic* (1906).55 SR 854.

⁴⁴ *Bingham v Miller* (1848) 17 Ohio 445.

⁴⁵ Compare *R v Kwok Hing Man* (1994) 4 HKPLR 186 and *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614. See also Nicholls LJ in *Re Spectrum Plus Ltd* [2005] 2 AC 680 at 696, paras 26–27.

as it is a power that could only be exercised in extraordinary circumstances and as last resort.

Even if such a power exists, its exercise may vary depending on the nature of the issues involved. For instance, in statutory interpretation, under the declaratory theory, an interpretation by the judiciary will relate back to the time when the legislation was first enacted and therefore a prospective order in the context of statutory interpretation would not be appropriate.⁴⁶ Lord Steyn and Lord Scott held the same view in their dissenting judgment in this regard in *Re Spectrum Plus Ltd*.⁴⁷ On the other hand, it was argued that the declaratory theory had no place when there was a new constitution under which previous law was adopted save to the extent of inconsistency with the new constitution. This is the situation under the Basic Law. Under Article 160 of the Basic Law, any pre-existing law that is discovered to be inconsistent with the Basic Law after the Basic Law has come into effect shall cease to have force. It was argued that the effect of any order of inconsistency could, as mandated by Article 160, only be prospective as from the date when the law was declared unconstitutional. It followed, as contended, that convictions made pursuant to a statutory provision before that statutory provision was held unconstitutional should not be affected by the court's declaration of unconstitutionality. This argument was rightly rejected by the Court of Appeal as it would lead to illogical and absurd consequences. If Article 160 mandates prospective overruling, it creates an illogical distinction between pre-1997 and post-1997 laws. In any event, most legislative provisions that are inconsistent with the Basic Law will also be inconsistent with the ICCPR as applied to Hong Kong, and will be repealed by the Bill of Rights Ordinance (if it was enacted before 1991) or prevented from coming into force by the Letters Patent (if it was enacted after 1991). In either case, such impugned statutory provision would not form part of the pre-1997 laws and would therefore not be adopted in the HKSAR. The Court of Final Appeal, somewhat artificially, rested its decision on the uncon-

⁴⁶ *Kleinwort Benson Ltd v Lincoln County Council* [1999] 2 AC 349; *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 at 326; *National Westminster Bank plc v Spectrum Plus Ltd* [2005] 4 All ER 209 at 225.

⁴⁷ *National Westminster Bank plc v Spectrum Plus Ltd* [2005] 2 AC 680.

vincing basis that Article 160 applied only to legislation and not judicial decision.⁴⁸ The Court of Appeal's reasoning is far more convincing.

Without deciding if such a power exists, Li CJ provided a helpful summary of the exercise of such power. He held that (1) if such a power exists, it is an extraordinary power that the court would approach its exercise with the greatest circumspection; (2) whether this power exists depends on the particular constitutional framework of the jurisdiction concerned, and there may not be a common approach across the common law world; (3) the existence and 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; (4) the existence of the power may also be dependent on the range of remedies that may be available; and (5) common law is developed by an evolutionary process and such development cannot be regarded as an application of the power to prospectively overrule.⁴⁹

Temporary Validity v Suspension

In the *Koo Sze Yiu* case, the Court of Final Appeal drew a distinction between a temporary validity order and suspension of a declaration, and emphasised that the level of necessity required for suspension was substantially lower than that required for a temporary validity order. This is a doubtful proposition. Be it a temporary validity order or suspension, the practical result is the same that an otherwise unconstitutional legislative provision is allowed to continue to operate, albeit for a definite period of time. In both cases this can only be justified on very compelling grounds. Thus, it would be difficult to find, conceptually and practically, what difference there would be between a temporary validity order and suspension. The suggestion, which the Court of Final Appeal appeared to make, that a temporary validity order should be reserved for the more extreme cases such

⁴⁸ *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614 at 629–630, paras 7–14. The court held that the phrase “shall be amended or cease to have force” once the pre-1997 law was found to be in contravention of the Basic Law suggested that Art 160 applied only to legislative process. This begs the question of how the inconsistency was found in the first place. In most cases the inconsistency is discovered only in the judicial process and it is strange that Art 160 would not apply to the most usual situations where inconsistency is found. The Court of Appeal's reasoning is far more convincing. If Art 160 mandates prospective overruling, it creates an illogical distinction between pre-1997 and post-1997 laws. In any event, most legislative provisions that are inconsistent with the Basic Law will also be inconsistent with the ICCPR as applied to Hong Kong, and will be repealed by the Bill of Rights Ordinance (if it was enacted before 1991) or prevented from coming into force by the Letters Patent (if it was enacted after 1991). In either case, such impugned statutory provision would not form part of the pre-1997 laws and would not be adopted in the HKSAR.

⁴⁹ *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614 at 634.

as when there is a virtual legal vacuum, is difficult to sustain in practice, given that both a temporary validity order or suspension could only apply in very exceptional circumstances in the first place. How exceptional should the exceptional circumstances be before it is justified to sail from suspension to a temporary validity order? It is more likely that they are just different ways of putting the same idea.⁵⁰

The court suggested that a temporary validity order shields the executive from legal liability while acting under the unconstitutional law, whereas the executive has no such shield under a suspension. While such a distinction is arguably valid in theory, it is of doubtful practical value. In the context of covert surveillance, most people under surveillance would not be able to find out that they have been subject to such surveillance, let alone to bringing an action for damages or injunction. Injunctive relief is unlikely to be available, as an injunction is contrary to the grant of a stay of declaration in the first place. The only other possible remedy is a claim for damages, but why should the Government be liable for substantial compensation for doing something that the court is prepared to tolerate on strong public interest ground?⁵¹ Therefore, in all cases where a court is prepared to suspend its declaration of unconstitutionality, any damages, if available, would likely be nominal only.

As the power should only be exercised in the most extraordinary circumstances, it is doubtful if the circumstances of this case justified a temporary validity order or suspension. The Government knew full well that section 33 was unconstitutional at least since the Bill of Rights came into force in 1991. A private member bill amending section 33 was successfully introduced on 27 June 1997, and the amendment would come into effect on a day to be appointed by the Chief Executive, who failed to appoint an operation date after seven years. It was only when the District Court declared inadmissible certain evidence obtained from covert surveillance that the Government was finally moved to action. Even so, it refused to bring the amended legislation into force or to introduce new legislation; instead, it introduced an Executive Order. In such circumstances, if the law enforcement agencies were put in a difficult position to detect and investigate crimes, the Government has only had itself to blame. Besides, even if section 33 and the Executive Order were declared unconstitutional, the Government could easily bring the 1997 amendments into force. The fact

⁵⁰ Professor Peter Hogg took the same view that temporary validity was synonymous with suspension: Peter W. Hogg, *Constitutional Law of Canada* (Carswell, 5th edn, 2007), vol 2, para 37.1(d). Professor Kent Roach regarded delayed declarations of invalidity as a form of prospective overruling: Kent Roach, *Constitutional Remedies in Canada* (Canadian Law Books Co, 2008).

⁵¹ See also Po Jen Yap, "Constitutional Review under the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong" (2007) 37(2) HKLJ 449 at 470-471.

that the Government did not like the 1997 amendments would not be a sufficient ground to suspend a declaration that section 33 and the Executive Order were unconstitutional.

Remedies and Third Parties

Whether a remedy should be granted or refused in judicial review when third parties are involved is always a difficult question. It is probably not controversial that the effect on third parties is always a relevant consideration for the court in exercising its discretion to grant or refuse remedies.⁵² The more difficult question is when the court can grant remedy, including damages, against a third party in judicial review proceedings.

This issue arose in *Harvest Good Development Ltd v Secretary for Justice*.⁵³ The second and third respondents were squatters who claimed a title to the applicant's land by adverse possession. After the Court of Final Appeal has decided in favour of the squatters,⁵⁴ the applicant commenced judicial review proceedings against the Secretary for Justice on the basis that the statutory provisions allowing the respondents to acquire a title against the applicant contravened the principle against deprivation of property without compensation in Article 105 of the Basic Law. The second and third respondents were joined as interested parties in the judicial review proceedings. It was argued that in order to protect rights under the Basic Law, if the only effective remedy is an award against a directly affected third party rather than the public body whose decision is impugned, then this should be encompassed by judicial review if it is just and convenient to do so. Accordingly, it argued that if the applicant were successful in their judicial review application, the court has an inherent jurisdiction to make an order of damages against the second and third respondents in light of the windfall they had enjoyed in acquiring a title to the land in question for free. In an application for setting aside leave granted against them, the second and third respondents argued, inter alia, that damages could not be claimed against them in public law proceedings. Hartmann J found the applicant's argument prima facie arguable, but he considered it unnecessary to decide the point and acceded to the application for setting aside leave on the ground of an abuse of process.⁵⁵

⁵² *Society for Protection of the Harbour Ltd v Chief Executive in Council* [2003] 3 HKLRD 960.

⁵³ HCAL 32/2008, 19 December 2006.

⁵⁴ *Chan Tin Shi & Others v Li Ting Sung & Others* [2006] 1 HKLRD 185.

⁵⁵ HCAL 32/2006 (19 Dec 2006), paras 66–68.

There seems to be neither legal principle nor valid policy reason to deny the award of damages against private persons in public law proceedings. An injunction may be granted in judicial review proceedings against a private person who is an intervenor or is properly joined as a party because he has a direct interest in the matter. In *R v Secretary of State for Health and Norgine Ltd Ex parte Scotia Pharmaceuticals Ltd (No 1)*, where a pharmaceutical company sought an order against the company to whom it alleged that a licence had been unlawfully granted, the court held that an order corresponding to the order which was sought against the public body could be granted against the private company, which had intervened and become a party to the proceeding.⁵⁶ Evans LJ said:⁵⁷

“What is said, secondly, is that there can be no order against Norgine by reference to the decision in *Siskina* [1979] AC 210, because the plaintiffs do not have or at least assert any cause of action against Norgine. On the other hand, that submission to my mind has an air of unreality about it when it is Norgine who have sought to become a party to these proceedings, yet they now assert that no order should be made against them in the proceedings to which they have become, on their own volition, a party. It seems to me also a relevant consideration that what is sought essentially against Norgine is at most what I would call a corresponding order, that is to say an order corresponding to the order which is sought against the Department as the first respondent. I would, if necessary, be prepared to hold that, by virtue of their status as a party to these proceedings, the applicants would be entitled to an order, if otherwise justified, against Norgine, notwithstanding *Siskina*.”

In *R v Medicines Control Agency Ex parte Smith and Nephew Pharmaceuticals Ltd (Primecrown Ltd as interested party)*, the court assumed that an order of injunction may be granted against a third party intervenor.⁵⁸

The court's power to make an order against a private person in judicial review is not limited to those cases when the private person intervenes as a party. The test is rather whether it is just and convenient to do so. In *R v The Licensing Authority Established by the Medicines Act 1968 Ex parte Rhone Poulenc Rorer Ltd and May & Baker Ltd*, Laws J held:⁵⁹

“There is no requirement that an applicant for an injunction must show a private cause of action against his respondent, nor, given the nature of the judicial

⁵⁶ [1997] *European Law Reports* 625.

⁵⁷ *Ibid*, at 645H-646C.

⁵⁸ [1997] *European Law Reports* 657, at 659C-660C and 664B-H.

⁵⁹ [1998] *European Law Reports* 127 at 142F.

review jurisdiction, could there be. Nor is there any rule that an injunction in judicial review may be granted only against the public body whose decision is impugned; a third party, such as the importers in this case, who are ‘directly affected’ within RSC Order 53, rule 5(3), may be enjoined if it is just and convenient to do so.”

These authorities show that, where a decision of a public body is challenged by way of judicial review, an interim order may be made against the public body as well as against a private person who is benefiting from the decision of the public body. Such an order may be granted whether the private person is made a party to the claim or is joined as a person directly affected. There is no good reason why this principle should be confined to an order of injunction. It is accepted that the question of damages in public law is a controversial subject, and the prevailing approach is to deny any claim for damages in the absence of fraud, abuse of power, malice, bad faith or improper purpose.⁶⁰ This seems to be an exceedingly restrictive approach. Given that administrative decisions in a modern administrative state could have far-reaching impact on the lives or well-being of an individual, the relevance of the conventional wisdom in maintaining a relatively restrictive approach to damages, which was developed at the time of a relatively simple society with few state or quasi-state organs exercising administrative powers, is at least questionable.⁶¹ If damages are the most effective or the only available remedy to protect rights under the Basic Law, there is no good reason why that should not be made available against the private persons as against the State, as long as it is just and convenient to do so. As damages against the third party are premised on a breach on the part of the public bodies, such damages may perhaps be granted only as a corresponding order the scope of which will be dictated by the order against the public bodies.

⁶⁰ For an example of this approach, see *Three Rivers District Council v The Governors and Company of the Bank of England (No 3)* [2003] 2 AC 1; *Yuen Kun Yeu v Att Gen of Hong Kong* [1988] 1 AC 175 at 198D, per Lord Keith; *Cheng Chung Kiang (transliteration) v Securities and Futures Commission*, CACV 236 of 202, para 17; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 739, per Lord Browne-Wilkinson; *Tang Nin Mun v Secretary for Justice* [2000] 2 HKLRD 324. See also Wade and Forsyth, *Administrative Law* (Oxford University Press, 9th edn, 2004), p 787, and G. Ganz, “Public Law and the Duty of Care” [1977] *Public Law* 306 at 309.

⁶¹ The Law Commission in England and Wales is consulting the public on this very issue. The Law Commissioner proposed that the court should be provided with a discretion to award damages as an ancillary remedy in judicial review under certain circumstances: Law Commission Consultation Paper 187: *Public Bodies and the Citizen* (2008). The consultation period ended on 7 November 2008.

Epilogue

A great strength of judicial review procedure lies in its simplicity. There are no elaborate interlocutory procedures, and the approach of the courts to minimise technical arguments and to determine issues on merits has much to be commended. At the same time, traditional prerogative remedies in judicial review may not address the real issues in judicial review when the dispute is not really about the vires of an administrative decision or order, or not even between the applicant and the public body concerned as such (eg when the mistake or breach of duty of the public body is not the direct or sole cause of the applicant's loss). The introduction of constitutional review presents further challenges to the court, and declaratory relief is a powerful tool in the hands of the judiciary to balance competing interests. It is encouraging that the judiciary has responded to this challenge with innovation and flexibility. At the same time, as the court in *Hung Chan Wa* remarked, how declaratory relief is to further develop may depend on the constitutional framework of different jurisdictions, and this may be an area where common law may develop in different directions whilst sharing the same root. In this regard, it may be worthwhile to bear in mind the observations of Lord Nicholls in *Re Spectrum Plus Ltd*.⁶²

“Rigidity in the operation of a legal system is a sign of weakness, not strength. It deprives a legal system of necessary elasticity. Far from achieving a constitutionally exemplary result, it can produce a legal system unable to function effectively in changing times. ‘Never say never’ is a wise judicial precept, in the interest of all citizens of the country.”

⁶² [2005] 2 AC 680 at 699.