

JUDICIAL DEFERENCE AT WORK: SOME REFLECTIONS ON CHAN KIN SUM AND KONG YUN MING

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“Due deference” – the giving of appropriate weight to the government’s judgment in the court’s reasoning – is a tool that courts use to maintain the separation of powers in constitutional rights review. This note aims to provide a theoretical framework for understanding the issue of deference, and to analyse the Court of First Instance (CFI)’s approach to deference in two recent cases, Chan Kin Sum and Kong Yun Ming. The author argues that the CFI has adopted a spatial approach that failed to specify the contested issues that called for deference, inappropriately considered democratic legitimacy as a factor for deference and made broad presumptions about the democratic character of primary decisions. This approach may lead to an over-deferential attitude that threatens the separation of powers, and the malleability of the approach may be subject to courts’ manipulation. The author argues for a more context-sensitive approach based purely on institutional factors.

Introduction

For as long as the history of administrative law there have been concerns that courts might overstep the boundaries of separation of powers by substituting judgment of the government. Such concerns are particularly relevant in jurisdictions where courts’ powers have been expanded to cover scrutiny of government action for conformity with constitutional rights. The United Kingdom (UK) is one such jurisdiction. The UK Human Rights Act 1998 (HRA) has laid down a new constitutional order whereby courts can review primary legislation and acts of public authorities for conformity with rights protected under the European Convention on Human Rights.¹ Hong Kong (HK) is another example

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¹ Human Rights Act 1998 (C 42) (HRA), ss 1 to 4, 6 and 8. The HRA gave effect to the rights guaranteed in the Convention for the Protection of Human Rights and Fundamental Freedoms (also called the European Convention on Human Rights), agreed by the Council of Europe at Rome on 4 Nov 1950.

of such jurisdictions. The HK Bill of Rights Ordinance (BORO) and the HK Basic Law have entrenched certain rights and empowered courts to strike down legislation and executive acts for violation of such rights.²

“Due deference” has been the preferred tool for maintaining the separation of powers under this new order.³ Despite the vigorous judicial and academic debates elsewhere as to when the court should defer to the government’s judgment, there seems little attention on this question in Hong Kong. In two recent decisions, *Chan Kin Sum v Secretary for Justice*⁴ and *Kong Yun Ming v Director of Social Welfare*,⁵ the Court of First Instance (CFI) answered this question in explicit and elaborate terms. This paper aims to provide a theoretical framework for understanding the issue of judicial deference and to analyse the Court’s approach to deference in these two cases.

Two points must be noted. First, the scope of this paper is limited to analysing the principles and realities of judicial deference *within a single legal system only*, ie HK courts’ deference towards the *HK Legislature and Executive on rights issues within the limits of Hong Kong’s autonomy*. The co-existence of the Mainland and HK legal systems under the principle of “One Country Two Systems” has raised unique problems of deference in the interface of the two legal systems.⁶ An analysis of deference in this peculiar context, or deference towards the National People’s Congress and its Standing Committee, will have to await another opportunity. Second, although analysis is conducted on two recent CFI cases only, the principles of deference proposed here are meant to be applicable to all levels of HK courts.

Principles of Due Deference

Surveying the Spectrum

Due deference refers to the giving of appropriate weight to the legislature/executive’s judgment in the court’s reasoning.⁷ There is a wide

² Section 6, Bill of Rights Ordinance (Cap 383, Laws of Hong Kong); Arts 11, 84 and 158 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China.

³ Alison L. Young, “In Defence of Due Deference” (2009) 72(4) MLR 554, 555.

⁴ [2009] 2 HKLRD 166.

⁵ [2009] 4 HKLRD 382.

⁶ For a discussion of the approach to deference in these situations, see Albert Chen, “The Court of Final Appeal’s Ruling in the ‘Illegal Migrant’ Children Case” in Johannes M.M. Chan, H.L. Fu, Yash Ghai (eds), *Hong Kong’s Constitutional Debate: Conflict Over Interpretation* (Hong Kong: Hong Kong University Press, 2001), pp 73–96, especially pp 85–90.

⁷ The HK Court of Final Appeal similarly defines deference as the giving of due weight to the government’s decision. See *Lau Cheong & Another v HKSAR* [2002] 2 HKLRD 612, p 641, paras 100–105.

spectrum of judicial and academic opinion on the question of when courts should defer. On one end of the spectrum, there are those who believe that there should not be any independent doctrine of deference.⁸ They argue that traditional mechanisms delineating the limits of judicial review (eg the non-substitution of merits, proportionality) are sufficient to ensure that the separation of powers is upheld even under the constitutional rights regime. To defer once again within this traditional framework is to defer twice. Courts need only exercise independent assessment of the substance of the case under this framework to reach the answer.⁹

On the other end of the spectrum, spatial approaches, manifested most prominently in the doctrine of justiciability, carve out certain subject areas, or “zones”, in which courts should defer (eg social and economic issues, policy areas), and others in which courts should not defer (eg fundamental rights). The spatial metaphor denotes “exclusive zones” within which one branch of the government is free from intervention by another.¹⁰ The reasons behind the specific demarcation of such zones will be elaborated below. According to this approach, the degree of deference owed depends on which subject area the case falls into.¹¹ In the middle of the spectrum lies the contextual approach, which determines the degree of deference in context, according to certain criteria (elaborated below).¹²

Controversies exist as to what reasons courts should defer for. Some believe that courts should defer for both institutional capacity and democratic legitimacy reasons,¹³ while others believe that courts should defer on institutional grounds only.¹⁴ Institutional reasons for deference arise when the primary decision-maker possesses more knowledge and expertise, information-gathering capacity and suitable decision-making procedures for resolving the issue in hand.¹⁵ Democratic legitimacy

⁸ One of the most ardent critics of the doctrine of deference is Trevor Allan. See, for instance, T.R.S. Allan, “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *CLJ* 671. Cf The UK House of Lords’ recent criticism of the concept of deference in *Huang v Secretary of State for the Home Department* and *Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11, para 14. Arguably the Court was not calling for the demise of the doctrine. See n 3 above.

⁹ Allan, “Critique of ‘Due Deference’” (n 8 above), pp 678–680.

¹⁰ Hunt, “Sovereignty’s Blight” (n 12 below), pp 339–340. Courts have in various instances adopted this approach. See for instance *R v DPP, ex p Kebilene* [2000] 2 AC 326 (hereinafter, “*Kebilene*”).

¹¹ See n 3 above, p 565.

¹² Alison Young, Murray Hunt, Jeffrey Jowell, and Jeff King are advocates of such an approach. See n 3 above; Murray Hunt, “Sovereignty’s Blight: Why Public Law Needs ‘Due Deference’” in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Oxford: Hart, 2003) p 337; Jeffrey Jowell, “Judicial deference: servility, civility or institutional capacity?” (2003) *Public Law* 592; Jeff A. King, “Institutional Approaches to Judicial Restraint” (2008) 28(3) *OJLS* 409.

¹³ See for instance Hunt, “Sovereignty’s Blight” (n 12 above).

¹⁴ See for instance Jowell, “Judicial Deference” (n 12 above).

¹⁵ N.W. Barber, “Prelude to the Separation of Powers”, 60(1) *CLJ* 59, 72.

reasons for deference arise when the primary decisions are made through a process that involves more participation by those affected and is hence more legitimate than the court's decision-making process.¹⁶ Note here that both institutional and democratic considerations are relative. In short, institutional capacity considerations ask who, the court or the primary decision-maker (legislature/executive), is more likely to reach the right answer on a particular question, whereas democratic legitimacy considerations ask whose decision-making process is more democratic.

Proposed Theory of Deference

The principles of due deference argued for in this note are contextual and depend purely on institutional factors. This position has to be defended, first, against those who call for the elimination of deference altogether. The obvious flaw of those who argue that there should not be any doctrine of deference is they assume that rights are non-contestable.¹⁷ On any question of rights, courts can always, on its own assessment, discern one right answer from the evidence. However, far from this, there can be reasonable disagreements over the definition and application of rights.¹⁸ There are times when there is conflicting evidence or a clash of values and courts are unsure what the right answer is, or when a judgment has to be made on the basis of insufficient evidence. These are cases when the traditional frameworks of judicial review (eg proportionality) fail to point the court to one answer. So the first principle of deference argued for here is that in cases of contested rights, and in such cases only, due deference is called for.

Second, a contextual approach is preferred to a spatial approach. A spatial approach is wrong in principle and futile in practice. It illegitimately imports the concept of justiciability of the old judicial review order into the constitutional rights regime, where courts have power to examine even traditionally non-justiciable issues for conformity with rights.¹⁹ It is based on *presumptions* of relative institutional capacity in various subject matters, which may be incorrect when applied in context. Such an approach is also futile in practice, as cases often cannot be neatly pigeon-holed into one subject matter.²⁰ Elements pulling in

¹⁶ See n 3 above, pp 565–566.

¹⁷ See n 3 above, pp 576–577.

¹⁸ See n 3 above, p 576.

¹⁹ See Hunt, "Sovereignty's Blight" (n 12 above), p 347; Jowell, "Judicial Deference" (n 12 above), p 599. For a discussion of how the approach to justiciability of resource allocation in human rights adjudication is diverging from that in other judicial review cases, see Jeff A. King, "The Justiciability of Resource Allocation", (2007) 70(2) MLR 197.

²⁰ Hunt, "Sovereignty's Blight" (n 12 above), p 347.

opposite directions regarding deference are often present in a single case.²¹ For example, in *Chan Kin Sum*, penal policies (deferential “zone”) are involved in the context of the fundamental right to vote (non-deferential “zone”). Once the attempt to classify cases into sole categories fails, spatial approaches offer no guidance to courts as to when to defer.

The key to a contextual approach is *specificity*: courts should narrow down as far as possible in context the *particular question* on which they are institutionally less capable of disposing. Deferring on that issue does not necessarily mean that courts will agree with the government on the final outcome of the case, which may depend on the determination of a host of other issues.

Third, institutional factors should determine when courts should defer, because the legislature, executive and courts have different forms that make them suitable for performing certain functions and not others.²² Respecting such differences is a crucial step to upholding the separation of powers, the true spirit of which is to allocate functions to institutions in a way that can most efficiently realise constitutional values.²³ As compared to the legislature/executive, courts may have less expertise and intelligence-gathering capacity in deciding, for example, whether a state’s national security is under terrorist threat. The triadic structure of the court may render it less apt to deal with what Fuller calls “polycentric” issues – issues which are interrelated with many other issues.²⁴ Depending on the right/issues involved, the immunity of courts from electoral pressure may make it more impartial than a legislature for resolving conflicts between majority and minority voices that are purely of value judgments. Courts should therefore decide in context, whether it or the legislature/executive is more likely to reach the right answer on a particular contested question.

Fourth, democratic legitimacy should not, on its own, be a factor for deference. Deferring on democratic legitimacy grounds is constitutionally illegitimate and unnecessary. The instrument that entrenches rights and endows courts with the role of protecting them (may it be a constitutional document like the Basic Law or a piece of legislation like the BORO or

²¹ *Ibid.*

²² See n 15 above, pp 71–88.

²³ Barber made a similar argument, contending that the point of separation of powers is to allocate tasks in a way that best serves the “purposes for which the state existed”. See n 15 above, pp 64, 71. Yap implicitly argued that courts should defer on institutional grounds, but for him, courts should take the separation of powers as stipulated in the *text* of the constitution as the conclusive indicator of relative institutional competence. See Po Jen Yap, “Interpreting the Basic Law and the Adjudication of Politically Sensitive Questions”, *Chinese Journal of International Law* (2007), Vol 6, No 3, pp 560–561.

²⁴ Lon Fuller, “The Forms and Limits of Adjudication” 92 *Harv. Law Rev.* 353, 393–404, see n 15 above, pp 74–76.

HRA) has fundamentally changed the constitutional order: democracy is no longer equated with majority rule, but is made conditional upon the protection of certain rights.²⁵ Constitutional rights review is introduced precisely to protect individual rights against majority intrusion. To say that a right should be defined in a certain way just because the majority wills it runs against the logic of the new constitutional order. Of course, if a range of decisions can be compatible with rights protection, then courts should respect government decisions that are within this range. However, this attitude of restraint has already been built in through the ordinary tests of judicial review.²⁶ For instance, in testing the proportionality of the government's decisions, courts should not substitute merits.²⁷ To defer on top of such principles is superfluous and risks double counting the role of the majority in formulating policies.²⁸

This is not to say that democratic factors cannot be relevant in determining the institutional capacity question.²⁹ On some issues, the fact that there has been more public participation or debate in the decision may render the decision more likely to be correct.³⁰ On these questions, courts should, for the purposes of determining whether the government is in a better position to get the right answer, consider how healthily democratic mechanisms are functioning in practice and whether relevant parties have been given genuine opportunities to participate in the primary decision-making process.³¹ It is rare, though certainly possible, that the primary decision-making process incorporates public opinion as little as the court process does. In these cases, democratic grounds for deference do not exist, even if they may be relevant in determining institutional capacity.

To summarise, and applying these principles to Hong Kong, courts are suggested to adopt the following steps in determining deference in constitutional rights review:

1. Courts should assess the totality of evidence and decide if any contested rights issue(s) is/are involved. If none is involved, then courts should decide the case on its own judgment under ordinary principles of proportionality and non-substitution of merits: there

²⁵ Jowell, "Judicial Deference" (n 12 above), p 597.

²⁶ See n 3 above, p 570.

²⁷ *Ibid.*

²⁸ See Allan, "Critique of 'Due Deference'" (n 8 above), p 680; see n 3 above, p 570, 574–575.

²⁹ See n 3 above, pp 565–566.

³⁰ Even Jeffrey Jowell, who argues that democratic factors should not be a ground for deference, acknowledges this. Jeffrey Jowell, "Judicial Deference and Human Rights: a Question of Competence" in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford: Oxford University Press, 2003) 67, p 80.

³¹ Hunt, "Sovereignty's Blight" (n 12 above), p 354.

- is no room for deference. If there is/are contested issue(s), courts should narrow down the contested issue(s) and proceed as follows.
2. The degree of deference owed should not be determined by the classification of the case as one of certain subject matter. Instead courts should assess, for *each* contested question, whether the court or the primary decision-maker is institutionally more equipped to reach the right decision. This may depend on whether the court or the primary decision-maker possesses more expertise, information-gathering capacity, and suitable decision-making processes for resolving the specific issue.
 3. Democracy legitimacy should not, on its own ground, be a factor for deference. It may only be relevant insofar as it affects the question of who is more likely to get the right answer.
 4. However, HK courts should cautiously scrutinise democratic legitimacy factors *even for the purpose* of determining whether the government is more likely to be correct, bearing in mind that only half of the HK Legislative Council is returned by universal suffrage as of today, and the HK Government does not have a particularly promising record for conducting thorough public consultations and incorporating public views reflected through consultations.

Due Deference at Work

Synopsis of the Two Cases

Principles of deference are rarely expressly elaborated in HK courts but in two recent judgments, Judge Cheung extensively discussed such principles. In *Chan Kin Sum*, the CFI held, *inter alia*, that provisions banning prisoners from voting and registering as voters under ss 31(1)(a) and (b) and 53(5) (a) and (b) of the Legislative Council Ordinance constituted unreasonable restrictions on the right to vote guaranteed by Art 26 of the Basic Law and Art 21 of the HK Bill of Rights.³² Applying the proportionality test, the Court found that crime prevention, encouraging citizen-like conduct and enhancing civic responsibility and respect for rule of law could be legitimate objectives.³³ However, no evidence was adduced to show that there was a rational connection between such aims and the means.³⁴ Moreover, the automatic and indiscriminate restrictions on the prisoner's right to vote were arbitrary and disproportionate. They failed to take account of the

³² See n 4 above at p 231, para 202.

³³ See n 4 above at pp 197–201, paras 88–97.

³⁴ See n 4 above at pp 213–215, paras 139–145.

nature and seriousness of the crime, the type and duration of imprisonment imposed and the individual circumstances of the case.³⁵

The Court conceded that the Government had better expertise to resolve whether prisoner disenfranchisement could achieve the stated objectives, and that “if there is competing evidence before the Court, and the Court finds it difficult to determine the dispute, it might well be wise for the Court to defer to the wisdom of the legislature and experts”.³⁶ Yet the Government adduced no evidence at all to illustrate a rational connection.³⁷ The Court also conceded the Government’s argument that prisoner disenfranchisement was a policy issue that the Government was more apt to settle because: (a) the latter was more likely to reach a decision acceptable to majority of the public; and (b) the issue had widespread ramifications and the Government was more equipped in making a decision that dealt with them.³⁸ Yet this concern was found to be irrelevant since the Court was only examining, not settling, policies.³⁹ Later in the judgment, the Court remarked that it had given due deference to legislative choices but this could not relieve the Court of its responsibility to examine whether the restrictions were justified.⁴⁰

In *Kong Yun Ming*, the same court held that the seven-year residence requirement for obtaining Comprehensive Social Security Assistance (CSSA) did not violate the right to equality under Art 25 of the Basic Law and Art 22 of the HK Bill of Rights, and constituted a due restriction to the right to social welfare guaranteed in Art 36 and in accordance with Art 145 of the Basic Law. Maintaining the sustainability of the social welfare system was held to be a legitimate aim and rationally connected to the means.⁴¹ On the question of proportionality and the Government’s discretion to restrict the right to welfare, the Court explained that it should defer substantially for both institutional and constitutional reasons in a case such as this that involved social and economic matters.⁴² Such matters are a question of politics for officials, not for courts.⁴³ The Court thus found the restriction proportionate.⁴⁴ Clearly, the fact that the Director of Social Welfare had the discretion to waive the residence requirement was an important consideration in the Court’s assessment on proportionality.⁴⁵

³⁵ See n 4 above at pp 207–213, paras 112–138.

³⁶ See n 4 above at p 215, paras 142–143.

³⁷ See n 4 above at p 215, para 143.

³⁸ See n 4 above at p 217, paras 148–149.

³⁹ See n 4 above at p 217, para 149.

⁴⁰ See n 4 above at pp 219–220, paras 155–157.

⁴¹ See n 5 above at p 415, paras 124–126.

⁴² See n 5 above at pp 416–417, paras 127–131.

⁴³ *Ibid.*

⁴⁴ See n 5 at p 418, para 135.

⁴⁵ See n 5 at p 417, paras 133–134.

Examining the Court's Approach to Deference

It is possible to distill four characteristics (if short of principles) of judicial deference from the two judgments.

Spatial Approach

First, in both cases, there is a strong spatial flavour with the Court's approach. The degree of deference due is determined automatically by the subject matter involved. Both cases cited with approval the oft-quoted passage of Lord Hope in *R v DPP, ex p Kebilene*, which advocated a spatial approach to deference: courts should recognise that there is an "area of judgment within which the judiciary will defer"; it would be easier to recognise such "discretionary area of judgment" in issues of qualified rights and social or economic policy, and less so in questions of unqualified rights, constitutionally important rights and rights that courts were particularly good at assessing.⁴⁶ So, in *Kong Yun Ming*, the Court emphasised repeatedly that it should defer since *social and economic matters* were involved.⁴⁷ Similarly, the Court in *Chan Kin Sum* accepted that there is "force" in the contention that courts should give the government a wide "margin of appreciation" when judging issues of *penal policy*.⁴⁸

As argued above, one of the many problems with determining the extent of deference based on classification of the case as one of certain subject matter is, deferential and non-deferential "zones" often intermingle in the same case. In *Chan Kin Sum*, penal policies were considered in the context of assessing restrictions on the fundamental right to vote. In *Kong Yun Ming*, socio-economic policies were relevant in evaluating limitations to the right to welfare, which has (whether one agrees with such categorisation or not) been categorised as a fundamental right in the Basic Law. Just which "sphere" should override in determining the amount of deference due is unresolved. In fact, the spatial approach advocated in *Kebilene* has been subject to much academic criticism in the UK,⁴⁹ and UK courts have in some cases departed from such approach.⁵⁰ It is time that the Court steps out of the shadows of justiciability and fully navigate its role vis-à-vis the government in a constitutional democracy.

⁴⁶ *Kebilene* (n 10 above), at 380E to 381D.

⁴⁷ See n 5 above at pp 411, 414, 416, paras 102, 117–119, 127–131.

⁴⁸ See n 4 above at pp 216–217, paras 148–149.

⁴⁹ See for instance, Hunt, "Sovereignty's Blight" (n 12 above), p 345. Murray Hunt dubbed Lord Hope's spatial approach in *Kebilene* as the "wrong turn".

⁵⁰ See for instance, *Porter v South Bucks District Council* [2002] 1 All ER 425 and commentary in Hunt, "Sovereignty's Blight" (n 12 above), pp 366–367.

Failure to Specify Contested Rights Issue and thus Justify Why Deference is Called for

This leads to the second feature of the approach to deference in *Chan Kin Sum* and *Kong Yun Ming*: failure to specify the contested rights issue, and hence justify why deference was called for. In both cases, the Court proclaimed broad principles of deference that applied to the whole case without delineating what *specifically the Court was having trouble deciding on and thus why deference was necessary* (an exception to this criticism was when the Court in *Chan Kin Sum* specified (in the form of a concession) that resolving the question of whether prisoner disenfranchisement could achieve the stated aims required expertise and the Court was prepared to defer if there was competing evidence).⁵¹ This, coupled with the fact that the evidence *as revealed in the two judgments* was so lopsided in favour of the (eventually) winning parties, encourages suspicions that these cases did not involve contested rights and there was no room for deference in the first place.

In *Kong Yun Ming*, what *precisely* was the socio-economic question that the Court was having difficulty resolving? The Court reiterated the Government's evidence in length.⁵² The Government provided abundant evidence to justify why the residence requirement was a proportionate means to achieve the sustainability of social welfare scheme. The Government showed that the residence requirement reflected an applicant's contribution to the HK economy, a rational basis for allocating scarce resources. The Director of Social Welfare retained the discretion to waive the residence requirement, thus mitigating any disproportionality that might be caused in extreme cases. The Court failed to specify what the contested issue was. On the evidence revealed from the judgment, there seems none.

In *Chan Kin Sum*, the question of rational connection between means and ends was not an issue of contested rights since the Government provided no evidence at all to prove a rational connection between the stated aims and the restrictions.⁵³ This was rightly acknowledged by the Court.⁵⁴ Yet the concept of deference continued to haunt the Court as it later remarked that it should defer to the fact that the Legislature had "twice voted down attempts to remove the same or similar restrictions".⁵⁵ But deference on what contested question? The Court failed to tell. This failure to specify the disputed issue leads to some difficulties with the Court's reasoning.

⁵¹ See n 4 above at p 215, paras 142–143.

⁵² See n 5 above at pp 388–395, paras 12–32.

⁵³ See n 4 above at p 215, para 144.

⁵⁴ *Ibid.*

⁵⁵ See n 4 above at pp 219–220, paras 155–157.

First, it led to the apparent redundancy of deference. The Court indicated that it had deferred to legislative choices to keep the restrictions, but this did not relieve it of its duty to examine such restrictions to see if they were justified.⁵⁶ The Court eventually found that they were not.⁵⁷ A possible interpretation of these statements is that the Court was saying deference to legislative choices on *one issue* of proportionality should not absolve it from the responsibility to examine *other issues* of proportionality, the scrutiny of which eventually led to a finding of disproportionality. However, without specifying what issue the Court deferred on, a more natural reading of these statements is that deference applied to the whole issue of proportionality, but it ultimately became a consideration external to, and thus played no part in, the Court's assessment of proportionality.

Second, it led indirectly to an unconvincing attempt to classify the case as an exception to the enunciated principles of deference. The Court accepted a general principle of deference in judging penal philosophy and policies.⁵⁸ However, the evidence was so clear on the facts that there was nothing to defer on. The Court justified its non-deference by arguing that it was only examining penal policies (where it need not defer), not settling penal policies (where it had to defer).⁵⁹ Yet this distinction is insufficient to justify non-deference because when the Court examines the policy and strikes it down for unconstitutionality, it in effect overrides the Government's expertise and legitimacy in no less way than settling a policy would. This flaw in reasoning would have been avoided if the Court either pinned down a contested issue or admitted that there was no contested issue.

All this is not to say that deference *would not have* been relevant in the two cases. Rather, the point is that the Court failed to specify what exactly the issue it was deferring on is and hence justify why deference was called for in the two cases.

Democratic Legitimacy Considered as a Ground for Deference

Both judgments used institutional as well as democratic reasons to justify deference. In *Chan Kin Sum*, the Court deferred on the ground that the Legislature had voted down attempts to lift the restrictions.⁶⁰ It also accepted the Government's argument that we should defer judgment on penal policy

⁵⁶ See n 4 above at pp 219–220, paras 156–157.

⁵⁷ See n 4 above at pp 207–212, paras 112–134.

⁵⁸ See n 4 above at pp 216–217, paras 148–149. The Court accepted that there was force in the contention that the Court should defer in judging penal philosophy and policy.

⁵⁹ See n 4 above at p 217, paras 149.

⁶⁰ See n 4 above at p 219, para 155.

for both institutional and democratic reasons.⁶¹ Democracy was relevant for both legitimacy and institutional reasons: the Court accepted the argument that the Government and Legislature could better reach a position that most people could accept (legitimacy reason for democracy),⁶² and that the Government was better equipped in collecting different views to understand and solve the polycentric issue (institutional reason for democracy).⁶³ In *Kong Yun Ming*, democracy was relevant, clearly for legitimacy reasons, although it is not clear whether it was also relevant for institutional reasons: “striking a balance is by nature a political job for the Government and the Legislature with the involvement of public opinion ... [Increasing the length of the residence requirement] is not something the courts are constitutional entitled and institutional equipped to interfere with”.⁶⁴

In any case, the point to be made is democratic legitimacy should not, on its own, be a factor for deference. The Court is abdicating its role under a constitutional democracy by deferring on rights issues to majority opinion for its own sake. Also, if, for example, the residence requirement in *Kong Yun Ming* is within the range of decisions compatible with protecting the equal right to welfare, then under traditional principles of non-substitution of merits and proportionality, the Court would have upheld it anyway. If, however, the residence requirement is outside such range of decisions, then under ordinary principles of rights review it would have been struck down in any case. Deferring on democratic legitimacy grounds is unnecessary.

These two cases revealed that the Court has yet to fully grasp its constitutional role in protecting rights against majoritarianism. This may in part be due to the Court’s reliance on English authorities, in which deference on democratic grounds is a recurring theme. Yet the English debate on deference is set against a background of lingering parliamentary supremacy. Arguably, the HRA has not swept away such notion, as UK courts still do not have the power to strike down legislation (exercising “weak” judicial review only)⁶⁵ and the UK parliament remains free to legislate contrary to rights.⁶⁶ Even in the UK, though, there have been calls for courts to discard democracy as a ground for deference.⁶⁷ The situation is different in Hong Kong, where our constitutional order lays

⁶¹ See n 4 above at pp 216–217, paras 148–149.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ See n 5 above at pp 414, 416, paras 118, 129.

⁶⁵ The distinction between strong and weak judicial review was introduced in Jeremy Waldron, “The Core of the Case Against Judicial Review” (2006) 15 *Yale Law Journal*, 1346, 1354.

⁶⁶ Jowell, “Question of Competence” (n 30 above), p 70.

⁶⁷ See for example Jowell, “Question of Competence” (n 30 above).

down unequivocally that courts have the final word in protecting rights within the limits of Hong Kong's autonomy (exercising "strong" judicial review),⁶⁸ and where there is no tradition of legislative supremacy within Hong Kong's own territory. Arguments for non-deference on democratic grounds are therefore much stronger in Hong Kong than in the UK.

Presumptions of Democratic Legitimacy

Even assuming for the sake of argument that democracy was relevant solely for assessing institutional capacity in the two cases, the CFI erred in making broad presumptions about the primary decision's democratic pedigree. To be fair, the Court in *Kong Yun Ming* did purport to have considered the breadth and quality of public participation in the design of the CSSA.⁶⁹ Yet the Court in *Chan Kin Sum* suggested conclusive presumptions of the democratic character of the Legislature's decisions:

"One should be very slow ... to evaluate the *quality* of the legislative debate, particularly with a view to *lowering* the deference or respect that the courts should have, in a given case, for the choice made by the Legislature. **Once the Legislature has spoken, the courts should generally take it from there**".⁷⁰

Courts should be more context-specific in evaluating whether the primary decision is the outcome of a democratic process. The fact that the decision is one of the Legislature or came about after public consultation (eg the ban on prisoner's right to vote) or public deliberation (eg the seven-year residence requirement for CSSA) is no **conclusive** evidence of a decision's democratic legitimacy. This is especially true in Hong Kong given its democratic deficit. Courts should be ready to assess whether public views have been genuinely accounted for.

It is understandable that courts, as an unelected body, might want to use deference to legitimise their decisions, especially those in areas that are traditionally considered less or non-justiciable (such as resource allocation (eg *Kong Yun Ming*)). However, popular acceptance must not come at the price of constitutional illegitimacy.

Consequences

Did the Court's erroneous approach to deference lead to wrong decisions in the two cases? Probably not. As explained above, the evidence of both cases as revealed seems overwhelmingly imbalanced in favour

⁶⁸ See n 65 above.

⁶⁹ See n 5 above at p 401, para 64.

⁷⁰ Emphasis in bold added, see n 4 above at p 219, para 154.

of the winning party. The Court seems to have exercised a good sense of judgment, hidden under the veneer of deference. Had the suggested contextual approach to deference been applied, the outcome of the cases would probably have been the same.

However, there are inherent dangers in the Court's approach to deference. If it is used by courts that exhibit less common sense and low sensitivity to rights protection, an over-deferential attitude may result. Deferring in a wholesale manner within certain "zones" without specifying the question which called for deference, and deferring whenever the government's decision-making process is more democratic, which is nearly always the case, as well as deferring with presumptions about the government's democratic legitimacy, may lead to an over-deferential attitude that threatens the separation of powers as much as over-judicial activism does.⁷¹

In addition, the Court's approach to deference is so indeterminate that it may be subject to judges' manipulation. A case may be classified as one involving policy or right, depending on whether courts are willing and brave enough to interfere. Rather than supplementing the traditional judicial review framework to delineate the proper boundaries of separation of powers, deference may become yet another malleable justificatory device for courts.

Conclusion

A proper approach to deference is crucial to upholding the separation of powers. The Court in *Chan Kin Sum* and *Kong Yun Ming* has adopted a spatial approach to deference that failed to define specifically the contested rights issue, inappropriately took into account democratic legitimacy factors and made broad presumptions about the democratic character of primary decisions. This approach may lead to an over-deferential attitude that threatens the separation of powers, and may be subject to courts' manipulation. It is hoped that HK courts would in the future adopt a more context-specific approach to deference based purely on institutional features. Democratic legitimacy should not, on its own strength, call for deference.

⁷¹ Johannes Chan remarked that unchecked deference to the Legislature might lead to a highly limited role for courts because "in theory, every piece of legislation must be a result of careful thoughts and balance by the Legislature". Johannes Chan SC, "Basic Law and Constitutional Review: The First Decade" 37 *HKLJ* 407, 425. Brabyn argued that courts should not be "intimidated by 'the counter-majoritarian argument'" in protecting fundamental freedoms, and that "a weak judiciary is as much a threat to the separation of powers as an overactive one". Janice Brabyn, "The Fundamental Freedom of Assembly and Part III of the Public Order Ordinance" (2002) 32 *HKLJ* 271, p 291.