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Author(s)	Yap, PJ
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COLLATERAL CHALLENGES IN CRIMINAL PROCEEDINGS: MAYDAY FOR CITIZENS RADIO

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Po Jen Yap*

The Court of Appeal in Secretary of Justice v Ocean Technology has unfortunately cast a pall over the future of collateral challenges in Hong Kong criminal proceedings, contrary to the current trends and development of the English common law. It has conflated the criminal plea of a general defence with the constituent elements of a statutory offence; it has failed to consider a key CFA decision in Leung Kwok Hung and has misconstrued House of Lords precedents by examining whether the impugned statute authorised a collateral attack when it was the validity of the statute itself that was being challenged.

Introduction

In *Secretary of Justice v Ocean Technology*,¹ the Hong Kong Court of Appeal held that the accused in this case, Ocean Technology and five other defendants, could not impugn the constitutionality of the licensing procedure provided under the Telecommunications Ordinance by way of defence when they were criminally charged under the said Ordinance. This article seeks to explain why the learned judges erred in law and argue for the Court of Final Appeal (CFA) to reverse the court's decision if the case goes on appeal.

Factual Matrix

The facts of the case were as follows. The defendants, in 2005, had applied for a license to operate Citizens Radio, a non-commercial radio station that sought to provide sound broadcasting services to the public. Their application was rejected by the Chief Executive in Council in late 2006. It was alleged that prior to the official rejection of their license, the defendants had already engaged in broadcasting without authorisation, a statutory offence under the Telecommunications Ordinance. The accused were subsequently criminally charged in the Magistrate's Court; in their defence,

* Po Jen YAP; Assistant Professor, University of Hong Kong, LLB (NUS); LLM (Harvard); LLM (London). The author is grateful to Professor Albert Chen for his very insightful comments. All errors are the author's own.

¹ (2008) HKEC 2114.

they argued that the licensing procedure under the said Ordinance was an unconstitutional restriction on their freedom of expression as protected under Article 27 and 39 of the Basic Law.

Magistrate's Decision

The magistrate found for the accused on the following grounds. First, the decision to grant a sound broadcasting license under s 13C of the Telecommunications Ordinance rested on the unfettered discretion of the Chief Executive in Council; this was contrary to the principle of legal certainty and was thus not "prescribed by law" as constitutionally required under Articles 27 and 39 of the Basic Law. Second, the Broadcasting Authority and the Chief Executive in Council, the recommending and decision making bodies for the grant of broadcast licences were not independent of the government and this violated the requirement of legal certainty to be constitutionally "prescribed by law" under Articles 27 and 39. Third, the absence of a statutory right of appeal from the decision of the Chief Executive in the Council's refusal to grant a license was also deemed contrary to the requirement of legal certainty and violated the "prescribed by law" principle under Articles 27 and 39. Since the licensing regime was deemed unconstitutional, the magistrate concluded that any charges based upon the accused's failure to comply with the licensing regime were also unconstitutional.²

Court of Appeal's Decision

On appeal, the Court of Appeal disagreed with the magistrate's decision and reversed his constitutional findings. The crux of the Court of Appeal's decision rested on its proposition that a defendant may not challenge the constitutionality of the licensing procedure provided under the Telecommunications Ordinance by way of defence in a criminal proceeding brought

² Pending appeal, the magistrate suspended the effect of his determination of unconstitutionality. The Secretary of Justice also brought civil proceedings and obtained an eight-day *ex parte* injunction to restrain the defendants from making further broadcasts. Justice Hartmann in *Secretary of Justice v Ocean Technology*, (2008) 2 HKLRD 82 refused to extend the injunction any further. In a subsequent judicial review action, Reyes J confirmed that the magistrate had the power of to suspend his determination of unconstitutionality pending appeal. See *Ocean Technology v Secretary of Justice* (2009) HKEC 124.

against him under the said statute.³ Instead, , the Court of Appeal concluded that the applicants should have sought separate judicial review of the licensing system. The Court of Appeal advanced three overlapping reasons for their conclusion, the cogency of which will now be discussed.

First, the Court of Appeal argued that “validity of a negative licensing decision is not ... an essential ingredient of the offence.”⁴ In other words, the Court of Appeal argued that the constitutionality of the offence — creating provisions of Section 8⁵ and 20⁶ in the Telecommunications Ordinance — did not depend on the legality of the licensing system, as the legality of the licensing procedure was not an ingredient for the statutory offence to be made out. The English case of *Quietlynn v Plymouth City Council*⁷ was justified on the basis that on those facts, the legality of the decision to refuse a license was a necessary ingredient of the offence.⁸

With respect, herein the Court of Appeal had wrongly conflated two distinct legal concepts, ie they have confused the *ingredients* of an *offence* with a *defence* to an *offence*. The constituent elements / ingredients of an offence are established when the *actus reus* and the *mens rea* of the crime are established. To discover what these ingredients / elements are, one needs to consult the penal provision in question. Nonetheless, it is open for the accused to argue that certain defences, which can exculpate the defendants, are applicable, notwithstanding the fact the ingredients of the offence have

³ The Court of Appeal also held that the lack of independence of the Broadcasting Authority and Chief Executive in Council from the government and the absence of a statutory right of appeal from a licensing refusal from the Chief Executive in Council did not violate the principle of legal certainty pursuant to the “prescribed by law” requirement. The Court of Appeal was certainly right here as the requirement that a restriction upon a right be prescribed by law merely mandates that the relevant law be sufficiently specific, as far as the context reasonably permits, so that the citizen can foresee with reasonable certainty the consequences of a given action. However, one can argue that these measures, though prescribed by law, are not necessary in a democratic society and are disproportionate to the aims sought to achieve thereby. The government must still show how these abovementioned restrictions are: (1) rationally connected with one or more of the legitimate purposes ie in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others; and (2) the means used to impair the right must be no more than necessary to accomplish the legitimate purpose in question.

⁴ See n 1 above at para 76.

⁵ Section 8(1) of the Telecommunications Ordinance reads: “Save under and in accordance with a licence granted by the Chief Executive in Council or with the appropriate licence granted or created by the Authority, no person shall in Hong Kong or on board any ship, aircraft or space object that is registered or licensed in Hong Kong (a) establish or maintain any means of telecommunications ...”

⁶ Section 20 of the Telecommunications Ordinance reads: “Any person who contravenes section 8(1) shall be guilty of an offence and shall be liable (a) on summary conviction, to a fine of \$50000 and to imprisonment for 2 years; and (b) on conviction on indictment, to a fine of \$100000 and to imprisonment for 5 years.”

⁷ [1988] QB 114.

⁸ See n 1 above at para 76. On the facts in *Quietlynn*, the Divisional Court did not allow the defendants to raise by way of defence the alleged invalidity of the government’s decision to refuse a licence and the criminal convictions were upheld.

been proven. General defences that may be applicable include self defence, crime prevention, necessity and duress.⁹ These defences are found in the common law and not all of them are statutory in origin. The accused were arguing that the unconstitutionality of the statute in question was another such defence. It was highly irregular for the courts to argue that this defence failed merely because the elements of the defence could not be found in the constituent elements of the statutory offence. After all, it is axiomatic that the penal statute in question will only definitively list out all the applicable ingredients of the offence in question, not the defences.

Furthermore, even if we accept that the legality / constitutionality of the licensing procedure must also form part of the ingredients of the *offence* for the *defence* of unconstitutionality to be pleaded, the Court of Appeal's explanation of *Quietlynn* was rather peculiar. In *Quietlynn*, criminal proceedings were brought against a company for using its premises as sex establishments without a license. In particular, paragraph 28 of Schedule 3 to the Local Government (Miscellaneous Provisions) Act provided that a party who was already using the premises as a sex establishment prior to the application of the Schedule could lawfully continue to use the premises as a sex establishment "until the determination of the application." The Hong Kong Court of Appeal explained that the statutory language "determination of the application" in Schedule 3 imported an implication that there be a "lawful determination of the application",¹⁰ hence the legality of the license was an ingredient of the offence in *Quietlynn*. What was puzzling about the Court of Appeal's reasoning here was that the learned judges were amenable to reading in the word "lawful" into a determination under Schedule 3 of the English Act, but were unwilling to read the same word / requirement into s 8 of the Telecommunications Ordinance. After all, s 8 reads: "Save under and in accordance with a license granted by the Chief Executive in Council ..." Therefore, based on the Court of Appeal's own reading of *Quietlynn*, can one not also argue that the term "in accordance with a license" under s 8 of the Telecommunications Ordinance should import a similar implication that the license granted be "lawful"?

The second ground on which the Court of Appeal refused the collateral challenge was more dubious. The Court of Appeal held that it was not open to a defendant to raise by way of defence the legality of a licensing decision or scheme, as this would be "contrary to the clear policy of the legislative scheme as a whole."¹¹ The judges relied on the House of Lords decisions

⁹ Michael Jackson, *Criminal Law in Hong Kong* (Hong Kong: HKU Press, 2003), p 278.

¹⁰ See n 1 above at para 76.

¹¹ *Ibid*, at para 95.

of *R v Wicks*¹² and *Boddington v British Transport Police*¹³ for this proposition, in particular Lord Hoffman's dictum in *Wicks*. In deciding whether a defendant in criminal proceedings was entitled to challenge the vires of an administrative act done under statutory authority where its validity formed part of the prosecution's case or its invalidity would constitute a defence, Lord Hoffman held that:

"The question must depend entirely upon the construction of the statute under which the prosecution was brought. The statute may require the prosecution to prove that the act in question is not open to challenge on any ground available in law, or it may be a defence to show that it is."¹⁴

A fortiori, the judges on the Court of Appeal reasoned that they would turn to the statute in question to decide whether a collateral challenge on the facts was statutorily authorised. Therein lay the patent error committed by the Court. In both *Wicks* and *Boddington*, the House of Lords were considering whether to allow a criminal defence that sought to challenge the legality of the administrative order or byelaw, ie the accused were arguing that the respective byelaw / administrative order was *ultra vires* the enabling statute in question. Naturally one has to construe the statute, the order / byelaw's enabling legislation, to decide whether the statute authorised a collateral challenge, to the order or subsidiary legislation in question, by way of defence to a criminal charge. However, on our facts in *Ocean Technology*, the Court of Appeal was considering whether to allow a defence that impugned the constitutionality of the statute itself, ie whether the statute was *ultra vires* the Basic Law. With respect, it was illogical for the courts to examine the very instrument whose constitutionality or legality was being challenged to decide whether that instrument authorised a collateral attack on itself. After all, the House of Lords in *Wicks* and *Boddington* did not examine the byelaw to decide whether the byelaw itself allowed for a collateral challenge to its legality. Accordingly, it was illogical for the Court of Appeal to glean from *Wicks* and *Boddington* a requirement that the courts should examine whether the statute authorised a collateral attack when it was the validity of the statute itself that was being challenged.

Thirdly, the Court of Appeal seemed to imply that there was no breach of the Basic Law as no constitutional right was engaged at all. The Court of Appeal held that it was necessary for the government to regulate the

¹² [1998] AC 92.

¹³ [1999] 2 AC 143.

¹⁴ See n 10 above at 117.

airwaves or they would become overcrowded, which would impede effective communication; *a fortiori* the Court reasoned as follows:

“Given that the requirement for a broadcasting licence is a permissible fetter on the freedom of expression, and that there is no right to a licence, it is difficult to see... upon what basis it was relevant for him (the magistrate) to determine whether the discretion of the Chief Executive in Council to grant or refuse a licence was prescribed by law.”¹⁵

This was an unfortunate judicial sleight of hand. By characterising the defendant’s claim to his constitutional right of free expression as a claim for a right to a broadcast license, the Court created for itself the opportunity to dismiss the existence of such a right and avoid having to adjudicate whether the licensing scheme was a justified restriction on his free expression. By way of example, imagine if our constitutional right to free assembly is characterised as a claim for a right to a “no objections” notification from the police.¹⁶ Viewed under those terms, such a right to a “no objection” notification obviously does not exist and any bans on notified public assemblies, however unreasonable, must then be constitutional. This approach taken by the Court of Appeal certainly did not give a generous interpretation to our constitutional rights, the methodology espoused by the CFA in *Ng Ka Ling*.¹⁷ Certainly, given the nature of broadcasting, it must be regulated in technical ways that other forms of verbal expression need not. But a rights oriented approach would be for the Court to acknowledge that the defendants’ right to free expression had been curtailed by the licensing scheme and to require the prosecution to show that this restriction was both prescribed by law and necessary in a democratic society, before the impugned statutory restriction could be upheld.¹⁸

Besides the three unsatisfactory reasons the Court of Appeal gave for refusing a collateral challenge to the validity of the Telecommunications Ordinance in a criminal proceeding, this case was also wrongly decided because the approach taken by the Court was fundamentally inconsistent with the CFA decision in *Leung Kwok Hung*,¹⁹ a case which the Court of Appeal unfortunately did not consider.

¹⁵ See n 1 above at para 69.

¹⁶ Section 14(1) of the Public Order Ordinance confers the Commissioner of Police the authority to prohibit notified public processions and meetings if he reasonably considers that the objection is necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others.

¹⁷ [1999] 1 HKLRD 315.

¹⁸ See *Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164.

¹⁹ *Ibid.*

In *Leung Kwok Hung*, the defendants had organised a public procession of about 40–100 people without pre-notifying the police as required under the Public Order Ordinance (POO). After their arrests, they challenged the constitutionality of the legislation on the basis that the statutory discretions conferred on the Police Commissioner to object to a notified public possession and to impose conditions if he reasonably considered these methods to be necessary, in the interests of public order (*ordre public*), were too wide and uncertain.²⁰ The CFA upheld the notification requirement but accepted that the Commissioner's powers to restrict peaceful assembly for the public order (*ordre public*) was constitutionally vague and thus severed *ordre public* from public order in the “law and order” sense.²¹ Since the defendants had not complied with the notification procedures, the severance of the constitutional invalid provisions did not affect their appeal and their convictions in the magistrate's court were confirmed.

Three important observations can be made about this CFA case which cast doubt on the correctness of the Court of Appeal's decision in *Ocean Technology*. First, the CFA did not forbid the accused from impugning the constitutionality of the licensing procedure as provided under the POO by way of defence when they were criminally charged under the said Ordinance. Furthermore, the accused was partially successful in challenging the constitutionality of the powers vested in the Commissioner of Police to ban or restrict notified public processions even though in their case, they had not even notified the police in the first place. Finally, in deciding whether it was appropriate to determine the constitutionality of the notification scheme, the CFA did not examine the statutory context of the POO to see whether it was the legislative intention that the legality of a notification decision or an aspect of the notification scheme was an ingredient of the offence. In other words, the CFA did not examine whether the statute in question authorised a collateral attack when it was the validity of the statute itself that was being challenged. Instead, in determining whether the statutory provision was constitutional, the CFA discussed whether the restriction imposed by the notification scheme was “prescribed by law” and “necessary” in a democratic society. Fortunately, the CFA also did not characterise the constitutional right to free assembly as a claim for a right to a “no objections” notification from the police and did not cursorily conclude that no constitutional right was engaged at all.

²⁰ *Ibid*, at 176.

²¹ *Ibid*, at 196.

Conclusion

The Court of Appeal had unfortunately cast a pall over the future of collateral challenges in Hong Kong criminal proceedings, contrary to the current trends and development of the English common law.²² It had conflated the criminal plea of a general defence with the constituent elements of a statutory offence; it had failed to consider a key CFA decision and had misconstrued House of Lords precedents by examining whether the impugned statute authorised a collateral attack when it was the validity of the statute itself that was being challenged; and it had put the statutory cart before the constitutional horse by mischaracterising our constitutional rights. One can only hope that the Court of Final Appeal can someday heed this (possibly faint) distress signal and salvage the law from the current wreck.

²² See Christopher Forsyth, "Collateral Challenges and the Foundations of Judicial Review: Orthodoxy Vindicated and Procedural Exclusivity Rejected" (1998) *Public Law* 364. See also *Searby Ltd* [2003] EWCA Crim 1910 where the English Court of Appeal confirmed that the trial judge was obliged to consider a defence that the criminal provision in question was invalid because it conflicted with directly applicable EU law.