

Act of State

Introduction

This note has been prepared in response to the request of the Panel on Security and the Panel on Administration of Justice and Legal Services for a paper clarifying:

- (a) whether the proscription of a Mainland organisation by the Central Authorities in accordance with national law on national security ground is an act of state as referred to in Article 19 of the Basic Law; and
- (b) if so, whether the courts in Hong Kong could deal with appeal concerning the Secretary for Security's decision to proscribe an organisation in Hong Kong which is affiliated with that Mainland organisation.

Article 19 of the Basic Law

2. Paragraph 3 of Article 19 of the Basic Law provides:
“The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.”

The proposed proscription mechanism

3. In the Consultation Document on the Proposals to Implement Article 23 of the Basic Law, it is proposed that:

- (a) the Secretary for Security be given a discretionary power to proscribe an organisation in the HKSAR if he or she believes that it is necessary in the interests of national security or public safety or public order;
- (b) the discretionary procedure could only be commenced where one of three pre-conditions applied, one of which pre-conditions is that the organisation was affiliated with a Mainland organisation which had been proscribed in the Mainland by the Central Authorities in accordance with national law on the ground that it endangers national security;
- (c) a formal notification by the Central People’s Government that a Mainland organisation has been proscribed in the Mainland on the ground that it endangers national security, be conclusive of the fact that the Mainland organisation has been so proscribed;
- (d) before exercising her discretionary power in respect of a HKSAR organisation, the Secretary for Security must be satisfied by evidence that the HKSAR organisation is affiliated to the organisation proscribed on the Mainland;
- (e) before exercising her discretionary power to proscribe an organisation in the HKSAR the Secretary for Security must reasonably believe that it is necessary in the interests of national security or public safety or public order to proscribe the HKSAR organisation (the expressions “public safety” and “public order” will be interpreted in the same way as under the ICCPR as applied to the HKSAR, and “national security” means “the safeguarding of the territorial integrity and the independence of the state” as defined in the Societies Ordinance (Cap 151)); and
- (f) the decision of the Secretary for Security to proscribe a HKSAR organisation is subject to an appeal procedure. Points of fact may be appealed to an independent tribunal and points of law may be appealed to the courts.

“Act of state” under the common law

4. Under the common law, an act of state “is a prerogative act of policy in the field of foreign affairs performed by the Crown in the course of its

relationship with another state or its subjects”.¹ It has also been suggested that an act of state is “an act of the executive as a matter of policy performed in the course of its relations with another state, including its relations with subjects of that state, unless they are temporarily within the allegiance of the Crown”.² According to *Halsbury’s Laws of England*, “[i]n general there can be no act of state with respect to a British subject”.³

5. Typical acts of state include the annexation and cession of territory, the declaration of war and peace, the making of treaties, the sending and receiving of diplomatic representatives, and the recognition of foreign states and governments. These acts performed between governments cannot be challenged, controlled or interfered with by the courts, and must be accepted without question.⁴

Certificate of fact concerning acts of state

6. The following passage is taken from *Constitutional and Administrative Law in Hong Kong* (second edition) by Professor Peter Wesley-Smith (p 99).

“Intergovernmental acts of state are normally accompanied by a declaration or statement made by the Crown, in the form of an Order in Council or Proclamation, or, for the purpose of particular judicial proceedings, an ‘executive certificate’. The Crown’s statement in such documents is conclusive: it will authoritatively determine, for example, the status of a body claiming to be a foreign government or individual sovereign or diplomat, or whether a state of war exists, or the boundaries of foreign states or the extent of British territory or the appropriate entity named in a treaty. If an issue of this sort arises in judicial proceedings the court normally asks the appropriate department for HMG’s statement. An executive certificate is not subject to judicial review. The rationale for this doctrine is that the state cannot speak with two voices on such a matter, the judiciary saying one thing, the Executive another – and the judiciary ought to defer to the executive branch because of the latter’s

¹ Halsbury’s Laws of England (fourth ed. reissue), vol. 18(2), para. 613.

² E. C. S. Wade, “Act of State in English Law: Its Relations with International Law” (1934) 15 B.Y.I.L. 98, p. 103.

³ See note 1 above, para. 618.

⁴ See note 1 above, para. 614.

responsibility for determining such questions.”

Such a conclusive certificate attests to a state of fact brought about by an act of state, and is itself a form of act of state.

Proscription of a HKSAR organisation

7. In our view, the question of “act of state” is irrelevant to the proscription mechanism as proposed in the Consultation Document for the following reasons.

8. Firstly, the proscription of a Mainland organisation is to be made by the Central Authorities in exercise of their power pursuant to the PRC national laws, and as such there is absolutely no legal basis upon which the HKSAR courts can question the decision of the Central Authorities in respect of matters that are within the jurisdiction of the Mainland.

9. Secondly, if the proposal in the Consultation Document is to be adopted, there will be no need to invoke the doctrine of “act of state” (the legal effect of which is to preclude the jurisdiction of the courts), since a formal notification from the CPG will already serve as **conclusive** evidence of the fact that a Mainland organisation has been proscribed on the Mainland by the Central Authorities on national security grounds.

10. Thirdly, the fact that the Central Authorities have proscribed a Mainland organisation on national security ground is only one of the factors which the Secretary for Security will take into account in deciding whether or not a HKSAR organisation that is affiliated to such a Mainland organisation should be proscribed. As set out in paragraph 3 above, the Secretary for Security must be satisfied that the HKSAR organisation is affiliated to the Mainland organisation and must reasonably believe that it is necessary in the interests of national security or public safety or public order to proscribe the HKSAR organisation. The decision of the Secretary for Security to proscribe a HKSAR organisation and the decision of the Central Authorities to proscribe a Mainland organisation are two separate and independent decisions, and the decision of the Secretary for Security is reviewable by the HKSAR courts,

whether by way of judicial review or the proposed appeal mechanism. Thus there is no question of the doctrine of “act of state” coming into play insofar as the Secretary for Security’s decision is concerned.

11. In any event, if the HKSAR courts are asked to adjudicate on the decision of the Central Authorities in respect of the proscription of a Mainland organisation (which is, in our view, extremely unlikely), we take the view that such a decision is not an “act of state” under the common law doctrine as set out in paragraphs 4 to 5 above.

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