

立法會

Legislative Council

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Paper for the Subcommittee to examine the implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to sanctions

LegCo's power over subsidiary legislation made under Ordinances that implement international obligations

Background

Subsequent to the last meeting of the Subcommittee, the Chairman requested the legal adviser to the Subcommittee to review Ordinances that implement international obligations in Hong Kong and LegCo's power over subsidiary legislation made under these Ordinances.

Legislation that implement international obligations

2. From 1997 to the present, there are Ordinances newly enacted to implement in Hong Kong international conventions, bilateral agreements and United Nations resolutions (see Annex I). With the exception of the following –

- (a) Fugitive Offenders Ordinance (Cap. 503) (“FOO”) (in relation to the Orders and Notices made thereunder);
- (b) Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (“MLACMO”) (in relation to Orders made thereunder); and
- (c) United Nations Sanctions Ordinance (Cap. 537) (“UNSO”) (in relation to the Regulations made thereunder);

section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) (negative vetting procedure) applies to the subsidiary legislation made under these Ordinances.

3. A point worth noting is that when the International Organizations (Privileges and Immunities) Bill was introduced into LegCo on 10 February 1999, Clause 3(2) provides that section 34 of Cap. 1 should not apply to an Order made by the Chief Executive in Council. Members considered it a retrogressive step to deprive LegCo of the right to scrutinize subsidiary legislation. The Administration agreed and CSAs were passed to delete that clause. During Second Reading debate of the Bill on 1 March 2000, the Chief Secretary for Administration said that “having carefully considered the opinions of the Bills Committee, the SAR Government thinks that section 34(2) of the Interpretation and General Clauses Ordinance has specified that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation. We believe that the Legislative Council will definitely not act beyond its statutory terms of reference. The SAR Government agrees that it is not necessary to retain clause 3(2) of the Bill, thus, the subsection should be deleted ...”. Hence, section 34 of Cap. 1 applies to the International Organizations (Privileges and Immunities) Ordinance.

A comparative study

4. On enacting the Ordinances mentioned in paragraph 2(a), (b) and (c), the Administration proposed and LegCo agreed on different ways for LegCo to scrutinize and amend the subsidiary legislation, i.e. Regulations, Orders and Notices, made under these Ordinances. A fourth Ordinance, the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) is also included for comparison purposes, because it is concerned with the implementation of UN resolutions. A summary of the relevant provisions on subsidiary legislation in the Ordinances, the enactment of these provisions, the subsidiary legislation made and the formation of Subcommittees to scrutinize the subsidiary legislation are set out below.

A. Fugitive Offenders Ordinance (Cap. 503)

(a) Relevant provisions in the Ordinance

- (i) The Ordinance is to implement bilateral agreements with other jurisdictions in relation to the surrender of fugitive offenders.

- (ii) Enforcement provisions (e.g. on power of search and treatment of persons surrendered) are provided in the Ordinance.
 - (iii) There are no offences or penal provisions in the Ordinance.
 - (iv) Enabling powers to make Regulations, Orders and Notices are provided. Section 26 provides that the Chief Executive in Council may make Regulation prescribing anything that is required to be prescribed under the Ordinance. The Regulation is subject to scrutiny and amendment by LegCo. Section 3(1) of the Ordinance provides that the Chief Executive in Council may by Order publish in the Gazette the terms of arrangement for the surrender of fugitive offenders with governments or places outside Hong Kong. The Order is subject to scrutiny by LegCo. LegCo can repeal but not to amend the Order. Section 3(15) provides that the Chief Executive (“CE”) may by Notice amend the Order and the Notice is *not (emphasis added)* subject to scrutiny or amendment by LegCo.
- (b) *Enactment of provisions on LegCo’s scrutiny of subsidiary legislation*
- (i) The Bill was introduced into LegCo for First Reading on 6 November 1996. Clause 3 (enacted as section 3) provides that the Governor in Council may by Order direct that the procedures provided in the Ordinance shall apply as between Hong Kong and other jurisdiction. The Order will annex the arrangements for the surrender of fugitive offenders between Hong Kong and other places. Under subclause (3), the Order shall be laid on the table of LegCo. LegCo may within 28 days from the date of tabling by resolution repeal but not to amend the Order. Subclause (4) provides for an extension of the scrutiny period at the end of a LegCo session. Subclause (13)

permits the Governor to amend an Order by Notice to take account of the fact that a place has become or ceased to be a party to a multilateral convention (see Paper CB(2)534/96-97(01): explanatory memorandum from the Administration to the Bills Committee). Subclause (14) (enacted as section 3(15)) specifies that sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap. 1) shall not apply to a Notice under Subclause (13).

- (ii) A Mock-up of an Order under Clause 3 of the Bill was provided to the Bills Committee for perusal. The Bills Committee was only concerned with subclause (4) and not subclause (3) or (14). Committee Stage amendments (“CSAs”) were proposed to bring it in line with the provision in section 34(3) of Cap. 1, i.e. to provide for an extension of scrutiny period at the end of a LegCo session. The Bill was passed by LegCo on 19 March 1997.

(c) *Subsidiary legislation*

- (i) As from May 1997, 3 Regulations providing respectively for notification procedures, forms and miscellaneous matters, and 19 Orders annexing agreements with governments or places outside Hong Kong or annexing conventions were made. No Notice under section 3(15) was made.
- (ii) No subcommittees were formed to scrutinize the Regulations. Only 1 Subcommittee was formed to study both the Sri Lanka Order and the Portugal Order. LegCo exercised its power under section 3(3) to repeal the Sri Lanka Order to have more time to study that Order. The Sri Lanka Order was re-gazetted later.

B. Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)

(a) *Relevant provisions in the Ordinance*

- (i) The Ordinance is to implement bilateral agreements with other jurisdictions in relation to mutual legal assistance in criminal matters.
- (ii) Enforcement provisions on search and seizure, production of materials, taking of evidence, confiscation of proceeds of crime are provided in the Ordinance.
- (iii) There are no offence or penal provisions in the Ordinance.
- (iv) Section 33 provides that the Chief Executive in Council may make Regulations prescribing anything that is required under the Ordinance. Section 4(1) of the Ordinance provides that the Chief Executive in Council may, with the approval of the LegCo, make an Order in relation to any arrangements for mutual legal assistance with places outside Hong Kong. Section 4(6) provides that the CE may by Notice in the Gazette amend an Order in relation to names of Parties to the relevant Convention. The Notice is subject to scrutiny and amendment by LegCo.

(b) *Enactment of provisions on LegCo's scrutiny of subsidiary legislation*

- (i) The Bill was introduced into LegCo for First Reading on 23 April 1997. Clause 4 is similar to Clause 3 of the Fugitive Offenders Bill. It provides that the Governor in Council may, in relation to any arrangement for mutual legal assistance, by Order to which is annexed a copy of the arrangement, direct that the Ordinance, subject to such modifications as specified in the Order, shall apply as between Hong Kong and the place outside Hong Kong.
- (ii) In September 1994, the Chinese side of the Joint Liaison Group ("JLG") agreed that Hong Kong could negotiate and conclude bilateral Mutual Legal Assistance Agreements with foreign jurisdictions. Having

completed consultation with the Chinese side in the JLG on a model agreement, the first Mutual Legal Assistance Agreement was signed with Australia in 1996. The second Agreement was signed with the U.S.A. and was submitted to the Bills Committee for perusal.

- (iii) During deliberation by the Bills Committee, members were concerned that modification to the model agreement could be made in an Order for implementing a bilateral agreement. It would give the Administration a high degree of flexibility to the extent that the provision of safeguards built into the Bill could be overridden. To alleviate members' concern, the Administration agreed to move CSAs to Clause 4 to the effect that any modification would be subject to the approval of LegCo.
- (iv) Members also had reservations about accepting the provisions that LegCo could only repeal but not to amend an Order. They considered that the ability to amend an Order would help facilitate the legislative process. The Administration explained that since the Agreement was a bilateral one, it would not be appropriate for the Hong Kong Government to unilaterally alter the terms of Agreement without consulting the other party. If the terms were not totally agreeable, the Order would need to be repealed and the terms of the Agreement would have to be re-negotiated. Members accepted the Administration's explanation.
- (v) Clause 4(10) on the disapplication of sections 34 and 35 of Cap. 1 was deleted during Committee Stage. The Bill was passed by LegCo on 23 June 1997.

(c) *Subsidiary legislation*

- (i) The Mutual Legal Assistance in Criminal Matters Regulation providing for power of magistrate to send for witnesses and things was made. 15 Orders annexing

Agreements between Hong Kong and places outside Hong Kong were made. 4 Subcommittees were formed to study the 15 Orders.

- (ii) On scrutinizing the Netherlands Order in 2003, the Subcommittee noted that there was an error in the Chinese text of the Agreement. The error was rectified by way of an Exchange of Notes with the Dutch authorities.

C. The United Nations Sanctions Ordinance (Cap. 537)

(a) *Relevant provisions in the Ordinance*

- (i) The Ordinance is to implement United Nations Security Council resolutions on sanctions on other countries.
- (ii) Provisions to implement UN sanctions are provided in Regulation.
- (iii) Provisions on powers of investigation, search and detention as well as offence and penal provisions are also provided in Regulation.
- (iv) Section 3(1) of the Ordinance provides that the CE shall make Regulation to give effect to an instruction from the Ministry of Foreign Affairs. Section 3(5) of the Ordinance provides that sections 34 and 35 of Cap. 1 shall not apply to Regulation made under the section. Regulation made is not required to be tabled before LegCo and is not subject to approval, scrutiny or amendment by LegCo.

(b) *Enactment of provisions on LegCo's scrutiny of subsidiary legislation*

When the Bill was introduced into the Provisional Legislative Council for First Reading on 9 July 1997, the Administration stated that there would be a legal vacuum if the Bill was not

enacted urgently. To expedite the passing of the Bill, the Provisional Legislative Council did not form a Bills Committee to study the Bill. No draft Regulation was provided by the Administration. It was passed by the Provisional Legislative Council on 16 July 1997 and came into operation on 18 July 1997.

(c) *Subsidiary legislation*

- (i) Since August 1997, 21 Regulations were made and some were repealed or had ceased to have effect. Regulations on Iraq, Sierra Leone, Federal Republic of Yugoslavia, Afghanistan, Liberia, Democratic Republic of the Congo, and Sudan are still in force.
- (ii) Since 2002, 2 Subcommittees were formed, 1 to study Regulations on Afghanistan and Angola and another to study the 2003 Regulation on Liberia.
- (iii) On 8 October, 2004, a Subcommittee was formed to examine the implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to sanctions. Regulations on Liberia, Iraq, Congo and Sudan made since then were referred to the Subcommittee.

D. United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)

(a) *Relevant provisions in the Ordinance*

- (i) The Ordinance is to implement a United Nations Security Council resolution as well as Recommendations from Financial Action Task Force on money laundering and terrorist property.
- (ii) There is no provision to enable the Administration to make any subsidiary legislation in the Ordinance.

(b) *Enactment of provisions on LegCo's scrutiny of subsidiary legislation*

- (i) The 2002 Bill was introduced into LegCo on 17 April 2002. Clause 19 of the Bill provides that the Secretary for Security may make Regulations.
- (ii) During deliberation by the Bills Committee, members pointed out that it was highly unsatisfactory that the freezing of property and the provisions of the necessary powers on investigation, seizure and detention should be dealt with by way of subsidiary legislation instead of by amendment to the primary legislation. The Administration agreed to introduce an Amendment Bill to deal with these matters later. The 2002 Bill was passed by LegCo on 12 July 2002.
- (iii) In 2003, an Amendment Bill was introduced. Section 19 on the making of Regulations was repealed. All provisions including power of seizure and investigation are provided in the Ordinance and no Regulation need to be made. Any amendment to the Ordinance will be by way of amendment to the primary legislation.

Observations

5. For easy reference, a table comparing the 4 Ordinances is attached in Annex II.

6. On section 3(5) of UNSO, the Administration stated that “the exclusionary power predated 1 July 1997, and its continuation or exercise of it after that date is unlikely to be inconsistent with the constitutional order provided for in the Basic Law, a central feature of which is the theme of continuity. For example, section 3(15) of the Fugitive Offenders Ordinance (Cap. 503) has an exclusionary provision similar to section 3(5) of Cap. 537” (see paragraph 13 of the Paper “Comments on the Submission from Professor Yash Ghai on the United Nations Sanctions Ordinance (Cap. 537)” (LC Paper No. CB(1)1934/04-05(01)).

7. It may not be appropriate to compare section 3(15) of FOO with section

3(5) of UNSO. Under section 3(15) of FOO, the CE is to make a Notice merely to reflect any changes of the parties to the relevant convention. Even if section 34 of Cap. 1 had not been disapplied, LegCo's power under section 3(15) of FOO is very limited since the scope of amendment has to be consistent with the CE's power to make the Notice. Regulations made under UNSO are different. They, not only reproduce the international obligations imposed by the UN resolutions, but also contain enforcement, offences and penal provisions to implement those obligations.

8. Both UN(ATM)O and UNSO are to give effect to United Nations Security Council resolutions. In UN(ATM)O, provisions that may affect the rights of citizens such as provisions on powers on investigation, seizure and detention are provided in the primary legislation. But in the UNSO, these provisions are provided in the Regulations. They are not subject to any scrutiny or amendment by LegCo.

9. Section 34 of Cap. 1 applies to Regulations made under FOO and MLACMO. However, with respect to Regulations made under UNSO, sections 34 and 35 of Cap. 1 are disapplied. Such disapplication means that LegCo's power over the making of Regulations has been specifically excluded.

10. If the UNSO is to be reviewed, the mechanisms for LegCo's scrutiny in FOO, MLACMO and UN(ATM)O, should provide a useful reference in terms of LegCo's power over Regulations made under UNSO. In particular, since UN(ATM)O was enacted subsequent to UNSO and, like UNSO, it implements UN resolutions, the approach adopted there should be of special relevance.

Encl.

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Ordinances and their subsidiary legislation implementing international obligations as from 1997

1997

1. CARRIAGE BY AIR ORDINANCE (Cap. 500)
 - To implement Warsaw Convention and Guadalajara Convention
 - No enabling power to make Regulation

2. FUGITIVE OFFENDERS ORDINANCE (Cap. 503)
 - To implement bilateral agreements with other jurisdictions
 - Section 34 of Cap. 1 applies to Regulation made.
 - Orders are subject to LegCo's scrutiny
 - LegCo can repeal the Orders but not to amend them
 - Sections 34 and 35 of Cap. 1 shall not apply to Notices made by CE

3. FREIGHT CONTAINERS (SAFETY) ORDINANCE (Cap. 506)
 - To implement International Convention for Safe Containers
 - Section 34 of Cap. 1 applies to Regulation made

4. MERCHANT SHIPPING (COLLISION DAMAGE LIABILITY AND SALVAGE) ORDINANCE (Cap. 508)

 - To implement International Convention on Salvage 1989
 - No enabling power to make Regulation

5. CHILD ABDUCTION AND CUSTODY ORDINANCE (Cap. 512)
 - To implement Convention on the Civil Aspects of International Child Abduction
 - Section 34 of Cap. 1 applies to Orders made by CE in respect of parties to Convention (originally L.N. 36 of 1998 and names of parties to Convention are updated from time to time which are subject to scrutiny and amendment by LegCo)

6. TRANSFER OF SENTENCED PERSONS ORDINANCE (Cap. 513)
 - To implement the arrangement for the transfer of sentenced persons with other jurisdictions
 - No enabling power to make Regulation

7. MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS ORDINANCE (Cap. 525)

- To implement bilateral agreements with other jurisdictions
- Section 34 of Cap. 1 applies to Regulation and Notice made
- Orders are subject to positive vetting by LegCo
- LegCo can repeal the Orders but not to amend them

8. UNITED NATIONS SANCTIONS ORDINANCE (Cap. 537)

- To implement United Nations Security Council Resolutions
- Sections 34 and 35 of Cap. 1 shall not apply to Regulation made
- Regulation is therefore not subject to scrutiny or amendment by LegCo.

2000

9. CONSULAR RELATIONS ORDINANCE (Cap. 557)

- To implement “Vienna Convention on Consular Relations”
- Section 34 of Cap. 1 applies to Orders made

10. INTERNATIONAL ORGANIZATIONS (PRIVILEGES AND IMMUNITIES) ORDINANCE (Cap. 558)

- To confer privileges and immunities to international organizations
- Section 34 of Cap. 1 applies to Orders made

2002

11. UNITED NATIONS (ANTI-TERRORISM MEASURES) ORDINANCE (Cap. 575)

- To implement United Nations Security Council Resolution and Special Recommendations on Terrorist Financing of the Financial Action Task Force
- No enabling power to make Regulation

2003

12. CHEMICAL WEAPONS (CONVENTION) ORDINANCE (Cap. 578)

- To implement Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction
- Section 34 of Cap. 1 applies to Regulation made

2004

13. MERCHANT SHIPPING (SECURITY OF SHIPS AND PORT FACILITIES) ORDINANCE (Cap. 582)

- To implement International Convention for the Safety of Life at Sea and the International Ship and Port Facility Security Code
- Section 34 of Cap. 1 applies to Regulation made

A comparison of 4 Ordinances implementing international obligations

	Fugitive Offenders Ordinance (Cap. 503)	Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)	United Nations Sanctions Ordinance (Cap. 537)	United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)
1. Date of 1 st Reading	6 November 1996	23 April 1997	9 July 1997	17 April 2002
2. Date of passage in LegCo	19 March 1997	23 June 1997	16 July 1997	12 July 2002
3. Scrutiny by Bills Committee	Yes	Yes	No	Yes
4. CSAs on provisions on LegCo's power over sub. leg.	Amending a subclause to provide for an extension of scrutiny period at the end of a LegCo session.	Amending a clause so that Orders made under the Ordinance will first be subject to approval by LegCo and not by negative vetting.	None	Repealing a clause on sub. leg. making power so that all provisions will be in the primary legislation and no sub.leg. need to be made.
5. Draft Order/draft Regulation submitted to Bills Committee for perusal	Yes	Yes	Not applicable	Not applicable
6. International obligations	Bilateral agreements in the Orders	Bilateral agreements in the Orders	Provisions implementing United Nations sanctions in the Regulation	Matters implementing United Nations resolution in the Ordinance
7. Domestic matters, e.g.- (i) enforcement provisions on investigation power, search and seizure (ii) Offences and penal provision	Provided in the Ordinance No such provisions	Provided in the Ordinance No such provisions	Provided in the Regulation Provided in the Regulation	Provided in the Ordinance Provided in the Ordinance

<p>8. Power of LegCo over types of sub.leg. made-</p>				
<p>(i) Scrutiny and amendment of Regulation, and number of regulations made</p>	<p>- Regulations on domestic matters are subject to scrutiny and amendment by LegCo.</p> <p>- 3 Regulations made</p>	<p>- Regulations on domestic matters are subject to scrutiny and amendment by LegCo.</p> <p>- 1 Regulation made</p>	<p>- Regulations including both international obligations and domestic matters are <u>not</u> subject to scrutiny or amendment by LegCo.</p> <p>- 21 Regulations made</p>	<p>Not applicable</p>
<p>(ii) Scrutiny and amendment of Orders and number of Orders made</p>	<p>- Orders annexing agreements with other jurisdictions are subject to LegCo's scrutiny. LegCo can repeal but not to amend Orders.</p> <p>- 19 Orders made.</p>	<p>- Orders annexing agreements with other jurisdiction are subject to positive vetting by LegCo and after gazettal, subject to repeal but not amendment by LegCo.</p> <p>- 15 Orders made.</p>	<p>- Not applicable</p> <p>- None</p>	<p>- Not applicable</p> <p>- None</p>
<p>(iii)Scrutiny and amendment of Notices and number of Notices made</p>	<p>- Notices in relation to names of Parties to Convention are <u>not</u> subject to scrutiny or amendment by LegCo.</p> <p>- None</p>	<p>- Notices in relation to names of Parties to Convention are subject to scrutiny and amendment by LegCo.</p> <p>- None</p>	<p>- Not applicable</p> <p>- None</p>	<p>- Not applicable</p> <p>- None</p>

9. Formation of Subcommittees to scrutinize sub. leg.	A Subcommittee was formed to scrutinize an Order on Sri Lanka and on Portugal Order.	4 Subcommittees were formed to scrutinize the 15 Orders.	Since 2002, 2 Subcommittees were formed, 1 to study Regulations on Afghanistan and Angola and another to study the 2003 Regulation on Liberia. A Subcommittee to examine the implementation of UN sanctions in Hong Kong was formed in 2004. Regulations on Liberia, Iraq, Congo and Sudan were referred to the Subcommittee.	Not applicable
10. Amendments proposed by Subcommittees	Sri Lanka Order was repealed for LegCo to have more time to study the Order and later re-gazetted without amendments.	An error was noted in the Netherlands Order by the Subcommittee. It was rectified by way of an Exchange of Notes with the Dutch authorities.	Not applicable	Not applicable