

立法會
Legislative Council

LC Paper No. LS51/06-07

**Paper for the Bills Committee on
Shenzhen Bay Port Hong Kong Port Area Bill**

At its meeting on 5 March 2007, the Bills Committee discussed whether the Legislative Council may enact a Bill which seeks to provide for matters outside the territorial limits of Hong Kong, and requested the Legal Service Division to consider the issue.

2. The common law position on legislative competence of the Hong Kong legislature to enact a law with extra-territorial effect was discussed in the Court of Appeal in *R v Lau Tung-sing* [1989]1 HKLR 490. The case was in the context of the Letters Patent then applicable to Hong Kong. In that case, the Court of Appeal said it was satisfied that the position was properly stated in Halsbury's Laws of England 4th ed. Vo1. 6 at para. 1075 (the same wording is now in 6th ed. Vo1. 6 at para. 840) as follows:

"Indeed, there can be said to be a rule that, in the absence of authority expressly conferred for that purpose, dependent legislatures are incompetent to legislate with extra-territorial effect. This rule is of some what obscure extent, and its existence has been doubted but the better view is that it exists, though within a narrow field of operation. The rule is not that the territorial limits of a dependent legislature define the possible limits of its legislative enactments; rather, the rule is that those enactments which purport to have an extra-territorial operation, application or effect will be valid only if they bear a substantial relationship to the peace, order and good government of the dependent territory concerned, whether generally or in respect of particular subjects. In particular, legislation creating any liability must base that liability on some fact, circumstance, event or thing which is relevantly connected, to a sufficient degree, with the territory concerned."

The Court of Appeal held that in deciding whether a law was ultra vires the legislative competence of the then Hong Kong legislature, the court must ask whether the legislature is making a law with regard to matters that are properly its business. If it is, then the law is intra vires.

3. After the implementation of the Basic Law, the power of the Legislative Council to make laws is based on the Basic Law. Under the Basic Law, the Hong Kong Special Administrative Region (“HKSAR”) is vested with legislative power (Article 17). The Legislative Council of the HKSAR is the legislature of the Region (Article 66). The powers of the Legislative Council under the Basic Law include enacting laws in accordance with the provisions of the Basic Law and legal procedures (Article 73). The Basic Law also provides that no law enacted shall contravene the Basic Law (Article 11(2)). There is no explicit provision in the Basic Law on whether the laws enacted could have extra-territorial effect. Under Article 8, the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region. In this light it is submitted that the common law principle stated above may apply, though the constitutional background in that case is different.

4. Members may recall that the decision of the Standing Committee of the Tenth National People's Congress (“NPCSC”) on 31 October 2006, inter alia, authorized the Hong Kong Special Administrative Region to exercise jurisdiction over the Hong Kong Port Area according to the laws of the HKSAR. A reasonable implication would be that it was within the contemplation of the NPCSC that necessary steps, including enacting the necessary legislation, would be taken to implement the decision. In this context, the provisions of Article 20 of the Basic Law would be relevant. The Article provides that “the Hong Kong Special Administrative Region may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government”. It could reasonably be argued that the decision of the NPCSC could be considered to be a power granted by the NPCSC to make the necessary laws in respect of the Hong Kong Port Area.

5. It is the view of the Legal Service Division that the provisions of the Basic Law stated in the last two paragraphs and the decision of the NPCSC would enable the Legislative Council to enact laws in respect of the Hong Kong Port Area.

Prepared by

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