

立法會

Legislative Council

LC Paper No. LS55/07-08

Paper for the Bills Committee on Prevention and Control of Disease Bill

At the Bills Committee's meeting on 1 February 2008, a member requested the Legal Service Division to advise on the following question arising from the Bill –

Is the requisition power proposed in the Bill consistent with Article 105 of the Basic Law (BL105)?

BL provisions protecting property rights

2. Article 6 of the Basic Law (BL6) provides that –

"The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law."

3. BL105 guarantees the right to real value compensation for lawful deprivation of property. It reads as follows –

"The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay..."

Meaning of "deprivation"

4. The concept of "deprivation" was discussed in *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277. In that case, the appellants were prohibited by new subsidiary legislation to sell water birds in their rented stalls. The Court of Appeal held that it was not deprivation but rather control of use of land. The following observations made by the European Commission of Human Rights in the case of *Baner v Sweden* App No.11763/1985, 60 DR 128 were cited with approval (at paragraph 17) –

"As regards the question whether the applicant has been deprived of property, the Commission recalls that, according to the established case-law, deprivation of property within the meaning of Article 1 of Protocol No.1 is not limited to cases where property is formally expropriated, i.e. where there is a transfer of the title to the property. 'Deprivation' may also exist where the measure complained of affects the substance of the property to such a degree that there has been a de facto expropriation or where the measure complained of 'can be assimilated to a deprivation of possessions'..."

5. Although the doctrine of de facto deprivation was alluded to in the *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation*, the court has not adopted and applied the doctrine in the decision. Instead, the court held that restrictions on the use of property by general regulatory laws do not constitute a deprivation. However, in *Fine Tower Associates Ltd v Town Planning Board* HCAL 5/2004, the Court of First Instance, for the first time in local jurisprudence, has recognized that restrictions imposed by a draft outline zoning plan is capable in law of constituting a de facto deprivation of property. In that case, Hartmann J held that whether there has been a deprivation of property is a matter of substance and not a matter of formality. He pointed out that this principle was expressed in the observations made by the European Commission of Human Rights in *Baner v Sweden*. He further held that whether the restrictions in each case do or do not amount to a deprivation of property is a matter of degree. Although the court does not set out in very clear terms what the threshold is before the doctrine of de facto deprivation can be invoked, Hartmann J (at paragraph 54) has made the following comments –

"If measures restricting the use and enjoyment of property go too far that will be recognised under long-enshrined common law principles as constituting a taking; that is, a deprivation, in respect of which compensation must be paid."

He then referred to the leading US case of *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) and concluded that "the question depends on the particular facts".

6. From the above analysis, the test for de facto deprivation would involve consideration of the following –

- (a) whether as a matter of substance (rather than formality), there is any deprivation of property;
- (b) whether the measures complained of affects the substance of the property to such a degree that there is a de facto deprivation; and
- (c) whether the measures restricting the use and enjoyment of property go too far, having regard to the extent of the diminution.

European Jurisprudence – doctrine of de facto deprivation

7. Article 1 of the First Protocol of the European Convention on Human Rights provides for the protection of property right in the following terms –

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of the property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

8. In *Sporrong and Lonnorth v Sweden* (1982) 5 EHRR 35, the European Court of Human Rights held that –

"In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearance and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are 'practical and effective', it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants."

9. Under the European jurisprudence, the concept of "deprivation" thus includes measures which can be equated with a deprivation of possessions or which detract from the substance of ownership to such an extent that they are equivalent to expropriation.¹

10. It can be seen from the above analysis that the European Court of Human Rights has adopted a high threshold in considering whether a de facto deprivation exists for the purpose of Article 1 of Protocol No.1 of the European Convention of Human Rights. The European Court has been very cautious about accepting that a de facto deprivation has been established, and would find a de facto deprivation only if the property is left without any meaningful alternative use. If the right in question has only lost some of its substance, but has not disappeared, there will not be any de facto deprivation. The European Court would take into account whether all reasonable manner of exploiting the property has disappeared or whether any possibility of selling the property still subsists.

11. In the absence of authoritative local jurisprudence on the question of de facto deprivation, in the light of the court's approach in the case of *Fine Tower Associates Ltd*, it is likely that Hong Kong courts would give due regard to the jurisprudence developed by the European Court of Human Rights. It seems likely that Hong Kong courts would refuse to find a de facto deprivation exists unless the property affected is left without any meaningful alternative use or the restrictions have denied all economically viable use of the property.

¹ One of the issues in *Sporrong and Lönnroth v Sweden* was whether expropriation permits and building restrictions in force for considerable periods had interfered with the applicants' enjoyment of their land to such an extent that they amounted to a de facto deprivation of property. The Court considered that they had not, since, although the restrictions had made it more difficult for the applicants to sell their property, the possibility still remained, and they were in any event still able to use the property in question.

Recent legislative amendments which involve consideration of BL6 and BL105

12. At the Bills Committee on the Land Titles Bill², an issue arose on whether the proposed cap on indemnity in cases of fraud is consistent with BL105. The Administration is of the view that the cap is consistent with BL6 and BL105 because –

- (a) the Bill does not have a effect of depriving property rights and accordingly there is no obligation to make adequate compensation for deprivation;³ and
- (b) in so far as the Bill interferes with or control ownership of property rights, it has achieved a fair balance between the general interest of the society and the property right of the individuals.

13. At the Bills Committee on Smoking (Public Health) (Amendment) Bill 2005⁴, an issue arose on whether the removal of the owner, occupier or lessee who smokes in the common area of his building from that common area by the manager of the building provided under section 3(3)(c) of the Principal Ordinance would be in breach of, among other things, the Basic Law, as the private property rights of the owner, etc. in enjoying the common parts of his building would be affected. The Administration is of the view that the exercise of the power of removal by the manager against the owner, etc. would not cause a formal or de facto deprivation of the latter's property right in the common area. The Administration also considers the "fair balance" test and concludes that there is sufficient justification for having the power of removal exercisable by the manager.

² The Bills Committee held meetings between 2003 and 2004.

³ The Administration's arguments that there is no deprivation are apparently threefold-

- (a) the Joint Declaration merely provides that rights concerning the ownership of property, including those relating to compensation for lawful deprivation shall continue to be protected by Law. It is then argued that this "theme of continuity" would mean that if certain interference with property rights did not give rise to any right of compensation before the reunification, it is unlikely that it would be within the scope of "deprivation" for which compensation is payable under Article 105 of the Basic Law;
- (b) it is also argued that because the present land registration system already provides for loss of interest due to the operation of the system, the new legislation should not be considered as effecting deprivation of property for the purpose of Article 105;
- (c) comparative jurisprudence of the Australian Courts and that under Article 1 of the First Protocol of the European Convention on Human Rights shows that the kind of deprivation envisaged is expropriation by the State, or authorized by the State for public purposes. It is argued that legislation of the kind as the Land Titles Bill is legislation which merely adjusts competing rights, and is not legislation providing for State or State authorized expropriation of property. Accordingly it is argued that there is no deprivation under Article 105 of the Basic Law.

⁴ The Bills Committee held meetings between 2005 and 2006.

14. At the Bills Committee on Smoking (Public Health) (Amendment) Bill 2005, there was another issue on BL105. Clause 11 of the Bill amends the Principal Ordinance by banning the use of misleading descriptors, such as "mild" and "light". Question arose on whether the proposed amendment would be consistent with BL6 and BL105 because it would cause deprivation of the tobacco brands which are registered trade marks by restricting the use of the words such as "mild" and "light". The Administration is of the view that the proposed amendment would cause de facto deprivation of the trade mark.⁵

15. At the Subcommittee on Waste Disposal Ordinance (Amendment of Fourth Schedule) Notice 2006 (LN 19 of 2006) and Public Health (Animals and Birds) (Licensing of Livestock Keeping)(Amendment) Regulation 2006 (LN 20 of 2006)⁶, an issue arose on whether the legislative amendments to ban backyard poultry keeping is consistent with BL105. The Administration is of the view that BL105 does not impose any legal obligation on it to pay compensation under the legislative amendments. The Administration's reasoning is that there is neither formal (because the legislative amendments do not by themselves effect any transfer of title of the poultry to the Government) nor de facto deprivation of property (because the small number of poultry kept by a particular owner could be slaughtered for private consumption before the coming into effect of the legislative amendments). The Administration however accepts that there is interference with or control of property rights by operation of the two legislative amendments which calls for the application of the "fair balance" test in respect of interference with or control of property rights under BL105 in non-deprivation cases.

16. In summary, when applying BL6 and BL105 to an individual case, the following considerations are relevant –

- (a) BL105 only imposes a legal obligation on the Administration to pay compensation when there is formal or de facto deprivation of property; and
- (b) When there is interference with or control of property rights by

⁵ Eventually, the Administration proposed a CSA to amend clause 11 to impose a general ban, instead of a ban on specific words, on misleading descriptors.

⁶ The Subcommittee held meetings in 2006.

operation in non-deprivation cases, the "fair balance" test is to be applied.⁷ Although local courts so far have not formally embraced the "fair balance" test developed under European jurisprudence, the "fair balance" test has been applied in the examples above when considering interference with private property rights in non-deprivation cases under BL105. Under this test, any interference with property rights must strike a fair balance between the demands of the general interest of the society – which any interference with property rights must aim to serve – and the requirements of the protection of the individual's rights. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Clause 8 of the Bill

17. Clause 8 of the Bill empowers the Chief Executive in Council to make regulation in public health emergency. Clause 8(2)(c) provides for requisitioning of property and matters relating to compensation for such requisition.

18. At common law, the term "requisition" is not a term of art.⁸ In the Administration's reply of 18 January 2008 (circulated to the Bills Committee vide LC Paper No. CB(2)926/07-08(04))⁹ and 15 February 2008 (circulated to the Bills Committee vide LC Paper No. CB(2)1170/07-08(06))¹⁰ respectively to our enquiries,

⁷ Lester & Pannick, *Human Rights Law and Practice*, 2nd edition, 2004, LexisNexis UK at p. 465.

⁸ "It should be remembered that the word 'requisition' is not a term of art, and, as Pickford LJ explained in *The Broadmayne* [1916] P64 at 73, does not connote the same state of things in every particular case. Requisitioning may be, and usually is, nothing more than a hiring of [a] ship which does not take the property in the ship out of the owner, though the owner has no alternative whether he will accept the proposition of hiring or not, or it may involve a taking over of the absolute dominion of the vessel, though this may not be ascertained in any given case until the terms are finally settled." : *The Steaua Romana, The Oltenia* [1944] P43 at 48, per Lord Merriman P. "'Requisition' is not a technical legal term. The word is used to include the taking of property in full ownership, the taking of the possession of property, and the acquisition of a right to have property used in a particular manner without any taking of possession." : *Australian United Steam Navigation Co v Shipping Control Board* [1945] CLR 508, 521, per Latham CJ.

⁹ "During a public health emergency, the Administration may need to requisition private properties such as vacant premises to be used as large scale quarantine facilities, vaccines or drugs for outbreak control, or personal protective equipment for healthcare staff. Such requisition may interfere with property rights (for example, the temporary use of vacant private premises by public health authorities would temporarily interfere with the right of the owners to use or lease the properties), or deprive the owner's property rights (for example, the requisition of vaccine, drugs and personal protective equipment)."

¹⁰ "The regulation made under clause 8 may provide for the requisitioning of property and matters relating to compensation for such requisition. As pointed out in paragraph 10 of the LegCo Brief, the proposal to explicitly provide for compensation for the requisition of any property in the present proposed legislation is to address the possible interference with or, in some cases, de facto deprivation of property rights when measures for preventing and controlling the spread of diseases are carried out. It is our policy that such compensation as is just and equitable in the circumstances of the case will be paid in respect of the requisitioned property, whether or not it is a case of interference with property rights or deprivation of the owner's property."

and the Administration's paper on "requisition of private properties in a public health emergency and matters related to compensation" (circulated to the Bills Committee vide LC Paper No. CB(2)1170/07-08(02)),¹¹ it explains in essence that compensation is payable for deprivation of and interference with property cases under clause 8(2)(c).

19. The power to make regulation in public health emergency by the Chief Executive in Council is a new power in comparing to the Quarantine and Prevention of Disease Ordinance (Cap. 141).¹² However, the term "requisition" is not defined in the Bill. Members may wish to ask the Administration to explain how the term "requisition" used in clause 8(2)(c) clearly reflects the policy intent of covering deprivation of and interference with property cases.¹³

20. In relation to formal or de facto deprivation of the owner's property right, it would be inconsistent with BL6 and BL105 unless such compensation, corresponding to the real value of the property concerned at the time, is provided for the owner of the property. As pointed out in the Administration's replies of 18 January 2008 and 15 February 2008, in relation to requisitioning of property, clause 8(2)(c) is intended to cover deprivation of property and compensation is also provided for such requisitioning. Therefore, subject to discussion below on compensation, clause 8(2)(c), for the purpose of deprivation of property, is consistent with BL6 and BL105.

21. Another aspect of the regulation made under clause 8(2)(c) is related to cases of interference with the owner's property right. In such cases, compensation is not payable under BL105 because there is no deprivation of property, though the "fair

¹¹ Paragraph 15 of the Paper reads as follows-

"It is the policy of the Government that such compensation as is just and equitable in the circumstances of the case will be paid where there is any requisition of property under the Public Health Emergency Regulation, whether such requisition amounts to "deprivation" of property for the purpose of BL105 or mere interference with property rights..."

¹² Under section 16 of the Quarantine and Prevention of Disease Ordinance, where on any occasion it appears to the Director of Health necessary for the carrying out of any provisions of the Ordinance, he may authorize any health officer to requisition temporarily any vehicle or vessel. Under section 17 of the Quarantine and Prevention of Disease Ordinance, the Director of Health may order compensation to be paid for vehicle or vessel requisitioned under section 16. Any dispute as to the amount of compensation shall, in default of agreement, be determined by arbitration in accordance with the provisions of the Arbitration Ordinance (Cap. 341).

¹³ The term "requisition" is not defined under the Quarantine and Prevention of Disease Ordinance. Under section 2 of the Oil (Conservation and Control) Ordinance (Cap. 264), the term "requisition" is defined to mean "in relation to any oil, take possession of the oil or require the oil to be placed at the disposal of the Director". Under section 2 of the Oil Pollution (Land use and Requisition) Ordinance (Cap. 247), the term "'requisition', "in relation to any property, means to require the use of the property, or to require the property to be placed at the disposal of the authority or officer requisitioning it, or to take possession of the property." In the Compensation (Defence) Act 1939 (UK), the term "requisition" is defined to mean, "in relation to any property, take possession of the property or require the property to be placed at the disposal of the requisitioning authority.

balance" test would be applied.¹⁴ To satisfy the "fair balance" test, any interference with property rights must strike a fair balance between the demands of the general interest of the society and the requirements of the protection of the individual's rights. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In the present case, requisition power is only to be exercised in public health emergency situation. Compensation, albeit details are yet to be seen, is payable to the affected persons. Therefore, it appears that clause 8(2)(c) in non-deprivation cases, is consistent with BL105.¹⁵

22. To be consistent with BL105, in deprivation cases, compensation payable shall correspond to the real value of the property concerned. Clause 8(2)(c) however is silent on the compensation scheme, such as whether there will be a cap on the compensation. Therefore, whether or not in cases of deprivation of property in respect of regulation made under clause 8(2)(c) would be consistent with BL6 and BL105 are yet to be seen. Members may wish to ask the Administration to produce a detailed compensation scheme in regulation to be made under clause 8(2)(c).¹⁶

Patented pharmaceutical products

23. Question was also raised at the Bill's Committee's meeting on 1 February 2008 on the requisition power, under clause 8(2)(c) of the Bill, in respect of patented pharmaceutical products, and whether such requisition of property is consistent with BL105. The term "property" is not defined in BL105. However, "in common law the word 'property' is of very wide import and when used in a document

¹⁴ It is noted that in relation to "deprivation", the Administration has adopted a more restrictive view that only formal or de facto deprivation imposes an obligation on the Administration under BL105 to pay compensation. In non-deprivation cases, the "fair balance" test in respect of interference with or control of property rights under BL105 is applied: see for example, *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277 and the Administration's view in the Subcommittee on Waste Disposal Ordinance (Amendment of Fourth Schedule) Notice 2006 (LN 19 of 2006) and Public Health (Animals and Birds) (Licensing of Livestock Keeping)(Amendment) Regulation 2006 (L.N. 20 of 2006).

¹⁵ It appears that the scope of protection for property right under clause 8(2)(c) is wider than that under BL105 in the sense that compensation is payable under clause 8(2)(c) for deprivation of or interference with property right; whereas compensation is only payable under BL105 for deprivation of property right.

¹⁶ The Administration may refer to the Oil (Conservation and Control) Ordinance (s. 9) and Oil Pollution (Land use and Requisition) Ordinance (ss 6-8), though they are not pieces of legislation on requisitioning of property in a public health emergency, as local examples providing for a mechanism of compensation upon requisitioning of property. It is noted that under Item G at the Annex to the Administration's paper on Emergency Powers in Legislation of other Jurisdictions (circulated to the Bills Committee vide LC Paper No. CB(2)1170/07-08(01)), it provides for a list of overseas legislation on compensation payable upon requisition of property in a public health emergency. In most of the examples, the criteria for paying the compensation are expressly provided for in the legislation.

of constitution demands wide and purposive interpretation".¹⁷ "'Property' includes goodwill, trade marks, licences to use a patent..."¹⁸ Thus, it appears that the term "property" in BL105 also covers intellectual property, such as patents.

24. Members may recall that the issue of use of patented pharmaceutical products in a period of extreme urgency has been dealt with under the Patents (Amendment) Ordinance 2007 (Ord. No. 21 of 2007) (the Amendment Ordinance). The main object of the Amendment Ordinance is to amend the Patents Ordinance (Cap. 514) (the Principal Ordinance) to implement the Protocol Amending the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organisation in relation to patents and public health. The provisions of the Amendment Ordinance relevant to our consideration are as follows –

- (a) Under new section 72B of the Principal Ordinance, the Chief Executive in Council may declare a period of extreme urgency to address any public health problem or threatened public health problem in Hong Kong, whenever the Chief Executive in Council considers it to be necessary or expedient in the public interest to do so;
- (b) Under new section 72C of the Principal Ordinance, during a period of extreme urgency, where the Director of Health considers that the pharmaceutical industry in Hong Kong has no or insufficient capacity to manufacture a patented pharmaceutical product to meet the needs for the product in Hong Kong, the Director may grant an import compulsory licence under the patent concerned, subject to such terms and conditions as he may impose, to a public officer or any other person to do in Hong Kong in relation to produce all or any of the following which appears to the Director to be necessary or expedient in connection with the extreme urgency –
 - (i) importing, putting on the market, stocking or using the product;
 - (ii) any other act which would, apart from this provision, amount to an infringement of the patent concerned.

¹⁷ *Michael Reid Scott v the Government of the HKSAR*, HCAL 188/2002, Hartmann J at p.72.

¹⁸ John B Saunders, *Words and Phrases Legally Defined*, 3rd edition, 1989, Butterworths, at p.445.

- (c) Under new section 72E of the Principal Ordinance, if adequate remuneration is paid at the exporting end, no remuneration is required to be paid at the importing end. However, an obligation to pay remuneration to the proprietor of the patent at the importing end will arise if adequate remuneration is not paid at the exporting end. The amount of such remuneration however will not exceed 4% of the total purchase price for the patented pharmaceutical product payable by the import compulsory licensee to the seller of the product in the exporting member country.

25. The effect of the foregoing provisions could be summarized by the press release of the Commerce, Industry and Technology Bureau on 30 March 2007, the spokesman explained the operation of the relevant provisions of the Patents (Amendment) Bill in a period of extreme urgency –

"...[I]f the Director of Health considers that Hong Kong is unable to produce certain medicine to contain the public health problem in question, he may grant an import compulsory licence to a suitable party to import the medicine (without the authorisation of the proprietor of the patent concerned)."

26. At the Bills Committee on the Patents (Amendment) Bill, the issue of whether the compulsory use of patented pharmaceutical products in a period of extreme urgency would be consistent with BL105 was not discussed. However, in light of compensation is payable to the proprietor of the patented pharmaceutical products concerned, it appears that the grant of import compulsory licences for patented pharmaceutical products in a period of extreme urgency is consistent with BL105.

Conclusion and Recommendations

- 27. (a) The term "requisition" is not defined in the Bill. Members may wish to ask the Administration to define the term so as to clearly reflect the policy intent that the term embraces deprivation of and interference with property;
- (b) To be consistent with BL105, in deprivation cases, compensation payable shall correspond to the real value of the property concerned.

Clause 8(2)(c) however is silent on the compensation scheme. Members may wish to ask the Administration to include a compensation scheme in a regulation to be made under clause 8(2)(c);

- (c) The term "property" is not defined in BL105. However, it appears that in the context of BL105, the term "property" includes intellectual property, such as patents. The question on compulsory use of patented pharmaceutical products in a period of extreme urgency has been dealt with under the Patents (Amendment) Ordinance 2007 (Ord. No. 21 of 2007). In light of compensation is payable to the proprietor of the patented pharmaceutical products concerned, it appears that the grant of import compulsory licences for patented pharmaceutical products in a period of extreme urgency is consistent with BL105.

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