

(Revised)
立法會
Legislative Council

LC Paper No. LS 93/98-99

**Paper for the Bills Committee on
Adaptation of Laws Bill 1998**

Meeting on 15 January 1999

Legislative Provision on Saving the Rights of Her Majesty, etc.

Introduction

This paper sets out the nature of the rights of Her Majesty, etc. as referred to in the legislative provision on saving such rights and highlights certain related issues in order to assist members of the Bills Committee in their consideration of the adaptation of the said provision.

Background

2. According to our research, such savings provision can be found in 142 Ordinances. The provision reads:

“Nothing in this Ordinance shall affect or be deemed to affect the rights of Her Majesty the Queen, Her Heirs or Successors, or the rights of any body politic or corporate or any other persons except such as are mentioned in this Ordinance and those claiming by, from or under them.”

3. By virtue of Annex 3 of the Decision of the Standing Committee of the National People’s Congress on Treatment of the Laws Previously in Force in Hong Kong made in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, the above savings provision shall be construed as a reference to “nothing in this Ordinance shall affect or be deemed to affect the rights of the Central (People’s Government) or the Government of the Hong Kong Special Administrative Region under the Basic Law or other laws.”. This construction is now incorporated into item 21 of Schedule 8 to the Interpretation and General Clauses Ordinance (Cap. 1).

4. The Bill proposes to adapt the savings provision by repealing “Her Majesty the Queen, Her Heirs or Successors” and substituting “the Central People’s Government of the People’s Republic of China and the rights of the Government of the Hong Kong Special Administrative Region under the Basic Law or other laws or other rights of any body”. Members may however note that in other adaptation Bills such as the Adaptation of Laws (No. 14) Bill, the savings provision is adapted by repealing “Her Majesty the Queen, Her Heirs or Successors” and substituting “the Central People’s Government or the Government of the Hong Kong Special Administrative Region under the Basic Law or other laws”.

Nature of Ordinances containing the savings provision

5. Most of the Ordinances containing the savings provision provide for the incorporation of religious, voluntary, educational and professional bodies; the establishment of charitable trusts and other trusts and the incorporation of their respective trustees; the vesting of land in those corporations and trustees; and the vesting of certain property in commercial undertakings. Members may find these Ordinances from Cap. 1001 onwards.

6. Other Ordinances which do not fall into the above categories but contain the savings provision grant to corporations rights relating to public land; confer on corporations the power to acquire and dispose of land; the power to construct, excavate, etc. from Government land and the power to collect tolls and fares. Examples of these Ordinances are:-

- (a) Tramway Ordinance (Cap. 107) and Peak Tramway Ordinance (Cap. 265) - empower the respective tramway company to construct, excavate, etc. for the purpose of the respective tramway and grant to the tramway company the right of user of roads along and across which the tramway is laid;
- (b) Cross-Harbour Tunnel Ordinance (Cap. 203) - grant to the Tunnel Company a wayleave through the tunnel area and the power to collect tolls; and
- (c) Credit Unions Ordinance (Cap. 119) and the Federation of Hong Kong Industries Ordinance (Cap. 321) - provide for the incorporation of the Credit Union League of Hong Kong and the Federation of Hong Kong Industries respectively and give power to the Corporations to acquire and dispose of land.

7. The savings provision is also found in the Protection of Non-Government Certificate of Origin Ordinance (Cap. 324) and the Trading with the Enemies Ordinance (Cap. 346). The former empowers approved bodies to issue certificates of origin relating to articles manufactured, processed or produced in Hong Kong. The latter prohibits trading with any state or enemy territories at war with Her Majesty.

Rights of Her Majesty, etc.

8. “Her Majesty”, “the Queen”, “the State” and other similar expressions are in practice used indiscriminately and often interchangeably as encompassed within the general notion of “the Crown”¹. The Crown enjoys many special privileges by virtue of the royal prerogative. Royal prerogative is “the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.”² The prerogative is derived from the common law and is subject to statutory law adopted by Parliament, which can increase or remove a prerogative.

9. In respect of the Ordinances which contain the savings provision, it appears that the rights saved to Her Majesty, etc. may include, but not limited to, the following:

(a) *Foreign affairs*

The Crown has certain prerogative powers in the field of foreign affairs, including the power to declare war and peace and the power to act in defence of the realm during wartime by, for example, interning or deporting enemy aliens and regulating trade with the enemy.

(b) *Title to lands in the colonies*

Lands in the colonies belong to the Crown and the Crown may thereby make grants of lands by charter or letters patent. The Crown also has a prerogative power to administer and dispose of public property including Crown lands, subject to the provisions of legislation.

(c) *Precious metals in land granted by the Crown*

The Crown has a prerogative right to the precious metals found in land. Unless otherwise specifically provided, a grant of land by the Crown does not operate to vest in the grantee any right, title or interest in the

¹ Lordoe, P., *Crown Law* (1991), P.5

² Dicey, A.V., *Law of the Constitution*, 10th edn.

precious metals contained therein. The Crown's prerogative includes the right to remove the precious metals from the land and to take all necessary action to accomplish this.

(d) Reversion of lands to the Crown and the Crown's right to unclaimed property

Where there is no one competent to inherit lands, the lands will be reverted to the Crown. Regarding things in which no one can claim a property, the Crown enjoys a prerogative right to the personal property of a person who has died without heirs, the property and rights of a dissolved corporation, etc.

(e) Other prerogatives

- (i) the Crown's legal power to overrule the local legislature in the colonies on the advice of the Secretary of State;
- (ii) the Crown's right to incorporate companies by royal charter;
- (iii) the Crown's right to collect tolls from bridges, ferries and highway, etc.; and
- (iv) the Crown's right of protecting charitable trusts through the Attorney General acting for and on behalf of the Crown in legal proceedings.

Other related issues

Discrepancy between the proposed adaptation of the savings provision and item 10 of Annex 3 of the Decision of the Standing Committee of NPC

10. According to the Chinese text of Annex 3 of the Decision of the NPC Standing Committee, the rights of “中央”, etc. are to be saved. The Bill, however, proposes to adapt the savings provision to make it read saving the rights of the “Central People's Government” (中央人民政府) etc. The question is whether “中央” is the same as “中央人民政府”. There is no definition of “中央” in the Constitution of the People's Republic of China (“PRC”). However, according to the Constitution, the State Council of the PRC (中華人民共和國國務院), as one of the State organs (國家機構), is the Central People's Government (中央人民政府). It would therefore appear that the Central People's Government does not include the National People's

Congress and its Standing Committee. Nor is “Central People’s Government” the same as “State”. According to the definition of “State” in Cap. 1, the Central People’s Government is only one of the organs of the State. Members may wish to consider the following issues:-

- (a) the reason for the discrepancy between the proposed adaptation and the Chinese text of Annex 3 of the Decision of the Standing Committee in respect of the savings provision; and
- (b) what are the rights of the Central People’s Government.

11. While Annex 3 of the Decision of the Standing Committee refers to saving “the rights of the Central (People’s Government) or the Government of the HKSAR under the Basic Law”, item 21 of Schedule 8 to Cap. 1 substitutes “and” for “or” in the above context. The proposed adaptation in this Bill uses “and” which departs from the Decision of the Standing Committee but is consistent with the version in Cap. 1. Members may wish to consider the reason for this discrepancy. On the other hand, Members may also wish to consider the reason for adopting “or” in the adaptation of the savings provision in other adaptation Bills.

Legal basis for the inclusion of the savings provision in private bills

12. Before Reunification, the Royal Instructions provided the legal basis for the requirement to have the savings provision included in private bills. Such requirement was reflected in Standing Order No. 38(7) of the Standing Orders of the Legislative Council before Reunification. The Royal Instructions ceased to apply on Reunification and such requirement has not been provided for in statutes. Although Rule 50(8) of the Rules of Procedure of the Legislative Council provides for the inclusion of a clause saving the rights of the Government, etc. in private bills, the Rule itself lacks the same legal basis as SO 38(7) of the Standing Orders. Members may wish to recommend consideration of this issue in an appropriate venue outside this Bills Committee.

Prepared by

FUNG Sau-kuen, Connie
Assistant Legal Adviser
Legislative Council Secretariat
11 January 1999