

立法會
Legislative Council

LC Paper No. LS 163/98-99

**Paper for the Bills Committee on
Adaptation of Laws (No. 12) Bill 1998**

**Legal opinion on whether the reference to “the Crown” in section 56(2)(a)
of the Criminal Procedure Ordinance (Cap. 221)
be adapted as “the Government” or “HKSAR”**

I. Introduction

During the second meeting of the Bills Committee on 8 April 1999, the Legal Service Division was asked to prepare a Paper on the above issue.

2. The Administration is of the view that the reference to “the Crown” should be adapted as “the Government” since “the executive is a party to most criminal proceedings and Art. 63 of the Basic Law provides that the Department of Justice of the HKSAR shall control criminal prosecutions, free from interference. Furthermore, this adaptation is in accordance with the adaptation guidelines embodied in the decision of NPCSC of 23 February 1997 and incorporated in s.2 of Schedule 8 of Cap. 1.” We have done some researches and would present our views in the following.

II. “The Crown” and “The Attorney General”

3. Historically in United Kingdom, “the Crown” referred to the monarch in whom were united executive, legislative and judicial functions. The executive and the legislative functions now lie with Her Majesty’s Government and the Parliament. But for the quasi-judicial function such as the prosecution of crimes, it still remains with the monarch. The Chief Justice Wilmot of the Court of Common Pleas stated in 1768 that, “By our constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of society, and for that reason, all proceedings *ad vindicatam et poenam* are called in the law the pleas or suits of the Crown¹”.

¹ In *R. v Wilkes*(1768), Chief Justice Wilmot delivered in the House of Lords this notable exposition of the early conception of the office of the Attorney General. See p. 13 of “The Law Officers of the Crown” by J. Edwards, Sweet & Maxwell, 1964.

4. “For ‘the Crown’, we can substitute ‘the Queen’. Prerogative powers belong to the Queen as a person as well as to the institution called the Crown; in law the Queen is the Crown, or Her Majesty’s Government, or the State The Queen is the fountain of justice, and in relation to the administration of justice, several prerogatives remain vested in the Crown Prosecutions for indictable offences are conducted in her name. The power to enter a *nolle prosequi*, to stop or discontinue a prosecution or indictment, is exercised by the Attorney General on behalf of Her Majesty²”.

5. The Attorney General is primarily an officer of the Crown, and is in that sense an officer of the public. “As guardian of the public interest, he may institute civil proceedings in the High Court for the vindication of public rights His role in criminal proceedings is of special constitutional importance He can institute criminal proceedings, or instruct the Director of Public Prosecutions to take over a private prosecution But in performing these functions, he is obliged by convention to exercise an independent discretion, not dictated by his colleagues in the government³”.

III. Other common law countries

6. For most Commonwealth countries retaining the Queen as the Head of State, such as Canada⁴, Australia and New Zealand, criminal proceedings are brought in the name of the “Crown”.

7. For U.S.A., on P.59 of “The Attorney General, Politics and the Public Interest” by J. Edwards, it is stated that “the Judiciary Act of 1789 provided for an appointment of a ‘meet person, learned in the law, to act as Attorney General for the United States’. To this office was assigned responsibility to ‘prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned⁵.’ ”.

IV. Hong Kong

A. Pre 1 July 1997

8. As a British colony, criminal proceedings in Hong Kong were brought in the name of the Crown (R.), adopting the British convention.

² See pp.127-128 and 137-138 of “Constitutional and Administrative Law” by *Stanley De Smith & Rodney Brazier*.

³ *Ibid* p.384, also, para. 529 of Halsbury, Vol. 8(2) and this view is confirmed by the House of Lords in *Gouriet v. Union of Post Office Workers*, [1977]3 AER 70.

⁴ In Form 2 of the Federal Court Rules of Canada, C.R.C. 1978,c.663, it stipulates that actions in Federal Court are to be brought in the name of “Her Majesty the Queen”. (p.196 of “Crown Law” by *Paul Lordon*).

⁵ Act of September 24, 1789, ch.20,1 Stat.73. Due to limited time, we have not been able to research on this Act.

B. Post 1 July 1997

The Basic Law

9. Articles 59 to 65 of the Basic Law are provisions on the executive authorities. Article 62 prescribes the powers and functions of the Government of the Hong Kong Special Administrative Region. The prosecution function is not included in the Government's functions. Rather, there is an independent Article i.e. Article 63 stating that "the Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference". The separation of this function from the Government indicates clearly that this function is to be exercised independently, free from any person's control, including the executive branch of the government⁶. It does not have the effect of turning the executive into a party to criminal proceedings as suggested by the Administration. The Secretary for Justice as Head of the Department of Justice is acting in a quasi-judicial role for "HKSAR", not as an organ of the executive government but as guardian of public interest, free from any interference⁷.

NPCSC Decision of 23 February 1997 and s.2 of Schedule 8 of Cap. 1

10. Those guidelines laid down in Annex III of the Decision are of general application and are subject to Article 5 which provides that if the context otherwise requires, departure from the general guidelines is allowed. The same is also reflected in section 22 of the same Schedule in Cap. 1 which provides that "This Schedule applies unless the context otherwise requires." Sections 10 and 19 of the Hong Kong Reunification Ordinance are specific provisions on this issue and should take precedence over general guidelines.

⁶ Sir John Simon, the Attorney General addressed the House of Commons in 1924 and declared: "I understand the duty of the Attorney-General to be this. He should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute. His first duty is to see that no one is prosecuted with all the majesty of the law unless the Attorney-General, as head of the Bar, is satisfied the a case for prosecution lies against him. He should receive orders from nobody." See p.215 of "The Law Officers of the Crown".

⁷ See chapter 14 on this topic - "The Guardian of Public Interest" in "The Law Officers of the Crown" by Edwards.

Sections 10 and 19 of the Hong Kong Reunification Ordinance

11. Section 10 provides that “Subject to this Ordinance, the continuity of legal proceedings, the criminal justice system, the administration of justice and the course of public justice shall not be affected by the resumption of the exercise of sovereignty over Hong Kong by the People’s Republic of China.” Section 19 of the same Ordinance provides that “criminal proceedings may after 1 July 1997 be brought by, in the name of or against ‘HKSAR’ instead of ‘the Crown’.”. Taking both sections together, this reflects the fundamental policy of One Country Two Systems enshrined in the Basic Law in that crimes are taken to be committed against the HKSAR instead of the People’s Republic of China and HKSAR is provided as the source of legal authority for prosecuting these crimes.

Section 56(2)(a) and some other sections of the Criminal Procedure Ordinance

12. Section 56(2)(a) of the Criminal Procedure Ordinance (Cap. 221) provides:
“(2) Upon the trial of any person charged with an offence-
(a) the prosecution shall not be entitled to the right of reply on the ground only that the Attorney General or the Solicitor General appears for the Crown at the trial;”

13. This section only serves to identify a situation of fact which if happens will lead to the application of the procedural rule provided by that section. It does not change the role of the Attorney General (or the Solicitor General) when appearing for the Crown as a guardian of public interest in criminal prosecutions. Since sections 10 and 19 of the Hong Kong Reunification Ordinance have already made clear how the criminal justice system is continued, procedural provisions such as section 56(2)(a) should be adapted accordingly.

14. Other sections relevant to this issue under examination are section 59, section 83S of the Criminal Procedure Ordinance (Cap. 221), Rule 64(2) of the Criminal Appeal Rules and Rule 2 of the Criminal Procedure (Representation) Rules.

V. The view of the Director of Public Prosecutions on his role

15. In a speech delivered by the Director of Public Prosecutions to the Administration of Justice and Legal Services Panel on 15 October 1998, Mr. Cross stated that “we have emphasised to our prosecutors that they represent the HKSAR, not the government, and that they are in no sense controlled by the State or any law enforcement agency”. The statement of the DPP reflected accurately the role of prosecutors in the criminal justice of Hong Kong, both before and after 1 July 1997. A prosecutor’s role is to represent the interests of the HKSAR and not the government when they appear in criminal proceedings. His role is not to convict an accused for the executive branch of the Government but to present all relevant evidence to the court in a fair manner in accordance with established rules of evidence.

VI. Our views

16. Whilst scrutinizing the Adaptation of Laws (Courts and Tribunals) Bill 1998, we had already pointed out to the Administration that in the Form of the Charge Sheet in the First Schedule to the District Court Ordinance (Cap. 336), the reference to the “Queen” should be adapted to “HKSAR” and not “the Government”. The Administration agreed to this view and a Committee stage amendment had been proposed by the Chief Secretary for Administration and passed by this Council on 7 April 1998. We had also pointed out that the same should be made to the Criminal Procedure Ordinance. However, the Administration replied that they would do so in the next adaptation exercise. We note that in items 37 and 40 of Schedule 2 to this Bill, “the Queen” is now adapted to “HKSAR”.

17. It is our view that in the context of section 56(2)(a) of the Criminal Procedure Ordinance (Cap. 221) and other provisions on criminal procedure where the role of the Secretary for Justice in the prosecution of criminal proceedings is referred to, the term “Crown” should be adapted to “HKSAR” and not “Government” to reflect the constitutional reality. This is in conformity with past convention under British rule and provisions in the Basic Law and the Hong Kong Reunification Ordinance. Such adaptation is also consistent with other Ordinances and other proposed adaptations in this Bill.

Prepared by
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