

**Comments on the Bar Association's paper entitled
'Exempting the "State" from the application of
the Laws of the HKSAR and s.66 of Cap.1'**

The situation before 30.6.97

In paragraph 4 of the paper, the Bar Association asserts that 'Before 30.6.1997 Hong Kong's constitution did not permit it to enact laws that bound the Crown in right of the United Kingdom.' However, no authority is cited for this proposition.

2. Professor Wesley-Smith devotes 54 pages of his book, Constitutional and Administrative Law in Hong Kong, to the legislative competence of the Hong Kong's former colonial legislature. He does not refer to any such limitation. He indicates that the former legislature could not abolish 'major prerogatives', and could not enact laws that were repugnant to UK legislation that applied to Hong Kong. However, neither principle is authority for the broad proposition stated by the Bar Association.

3. The assertion in paragraph 6 of the paper that section 66 did not apply to the Crown in right of the UK 'because it was constitutionally immune from laws made by the legislature in Hong Kong' is similarly not supported by any authority.

The Basic Law

4. Paragraphs 7, 8 and 9 of the Bar Association's paper relate to Articles 2, 18 and 20 of the Basic Law. We accept that current constitutional position needs to be considered in the light of those Articles.

Definition of ‘State’

5. Paragraph 10 of the paper describes the function-based definition of ‘State’ as vague and unnecessary. The Administration has explained that this approach reflects the approach adopted by the courts when determining whether a particular organ was or was not an emanation of the ‘Crown’. Since the definition of ‘State’ (for the purposes of section 66 of Cap.1) was added as a matter of adaptation, the function-based approach was considered appropriate.

6. Paragraphs 11 and 12 of the paper discuss the extent to which the Mainland bodies can be subject to Hong Kong legislation. The Administration considers that this question must be determined in accordance with the Basic Law, and in particular with Articles 14 and 22.

7. Paragraph 13 discusses the requirement of consent before a relevant office can be established in the HKSAR. The Administration will address that issue in a separate paper.

8. Paragraph 14 states that it is a matter for the legislature to decide whether a particular body should, or should not, be subject to the laws of the HKSAR. The Administration would add that -

- (1) the decision as to whether or not particular legal provisions are applicable to particular bodies can be made on an Ordinance by Ordinance basis, and need not be the same decision for all Ordinances;
- (2) the legislature must, of course, act in accordance with the Basic Law.

Section 66 of Cap.1

9. Paragraphs 16 to 19 criticise the approach adopted in section 66 of Cap.1. However, that criticism overlooks the fact that section 66 is the result of adaptation and is not a novel provision.

10. Paragraph 17 is (with respect) illogical. It states that ‘The problem lies in seeking to apply s.66 to bodies in respect of which the presumption does not exist because they lack immunity from law making.’ The fact that a body lacks ‘immunity from law making’ is not a reason for denying that body the benefit of the presumption. In fact, only a body that lacks ‘immunity from law making’ can ever legally benefit from the presumption.

Presumption in respect of HKSARG

11. Paragraph 24 states that the presumption that the HKSARG is not bound by legislation ‘is of a residual if not dying nature’. This statement overlooks the fact that the presumption that the Crown is not bound by legislation continues to operate in almost all common law jurisdictions.

12. Paragraph 24 also states that the presumption is contrary to modern notions of equality before the law. The Administration has already demonstrated that this is not the case (see paragraphs 2 to 7 of its paper entitled ‘Binding effect of Ordinances: legal and constitutional principles, and policy considerations’ issued to Members in October 1998).

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