Exempting the "State" from the application of the Laws of the HKSAR

and S.66 Interpretation and General Clauses Ordinance, Cap.1

Basic Principles

1. It is accepted that in any constitutional model, whether hierarchical or federal, subordinate law-making bodies cannot enact laws that bind a superior organ of state unless that body consents to be bound.

2. It is also accepted that because laws are made to regulate the activities of those who are subject to governance, the body politic exercising governance ("the State' or 'the Crown') need not be bound by laws that it promotes and enacts. This constitutional principle is embedded in the common law rule of statutory interpretation that an enactment did not bind 'the Crown' unless there was an express or implied contrary intention manifest in the legislation.

The Situation Before 30.6.1997

3. There has always been a distinction in colonial legal history between the Crown in right of the United Kingdom and the Crown in right of a dependent territory. The former was the supreme body politic.[1] It decided on the nature and extent of legislative, judicial and executive powers in dependent territories.

4. 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.[2] Under *Article VII Letters Patent* the

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[1] Technically there are two 'Crowns'. The first is the monarch in his or her personal capacity. The second is the executive. It is the second that is the governing body politic. In constitutional terms, it is more properly described as the 'Queen in Parliament' because that term reflects the fact that the monarch must accept the advice of the Prime Minister of the day who is supported by a majority in Parliament: see speech of Lord Templeman in M v. Home Office [1994] 1 A.C. 377 at 395. Monarchs do not now claim a right to personal immunity from Acts of Parliament and no such right exists.

[2] There was one exception. The *Hong Kong Act 1985* made provision for Orders-in-Council to be made authorising Legco to amend and repeal UK Acts or Parliament applying to Hong Kong but only for the very

Governor was authorised, *by and with the advice and consent of the Legislative Council, to make laws for the peace, order, and good government of the Colony.* Any attempt by a colonial legislature to enact laws that conflicted with Imperial legislation or U.K. legislation applying specifically to the colony was unconstitutional on the grounds of repugnancy under the *Colonial Laws Validity Act 1865*.

5. *Articles VIII* and *IX* of the *Letters Patent* reinforced the constitutionally subordinate role of Legco. *Article VIII* contained a reservation whereby any law made by Legco could be disallowed. *Article IX* reserved a power to legislate for the colony directly.

6. The common law principle of interpretation that the Crown in right of Hong Kong was not bound by laws made by Legco was embodied in *s.66 Interpretation and General Clauses Ordinance, Cap.1. S.66* did not apply to the Crown in right of the United Kingdom because, as the donor of law-making powers and not a subject, it was constitutionally immune from laws made by the legislature in Hong Kong.

The Basic Law

7. The starting point for any constitutional analysis of the issue is the Basic Law. The *Basic Law* confers executive, judicial and legislative powers identified in the Basic Law on the HKSAR: *Article 2.*

8. The Central People's Government has reserved to itself the right to apply only certain national laws: see *Article 18.* Nothing in the *Basic Law* compares to those parts of the *Letters Patent* that reserved general powers to legislate for Hong Kong and to disallow any law made by Legco.

9. *Article 22 Basic Law* confers on the HKSAR a power (not an obligation) to enact laws that bind Mainland bodies that are within the HKSAR. These bodies can only function

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limited purpose of adapting laws to make provision for the ending of British Sovereignty and jurisdiction over Hong Kong. It did not authorise Legco to make laws for the United Kingdom.

within the HKSAR if the government of the region consents to their setting up offices in the HKSAR.[3]

Definition of 'State'

10. The legislation has adopted a function based "definition for State". This is both vague and unnecessary. The relevant provisions of the Basic Law suggest that a "list-based" approach to exemption would have been a more logical choice.

11. The HKSAR has no plenary legislative powers that would enable it to legislate so as to bind the organs of state identified in the Chinese constitution. It has only a very limited power to legislate in respect of those bodies identified in Article 22 Basic Law and then only when they are established in the HKSAR.

12. There is therefore no need for a presumption of legislative immunity for 'the State' in the Laws of Hong Kong. Subject only to *Article 22, 'the State' has legislative immunity as a matter of constitutional fact.* It is misleading to suggest, by enacting a provision like *s.66* and including 'the State' that there may be a power to legislate in respect of it in circumstances other than those arising under *Article 22.*

13. Before an office can be established in the HKSAR under *Article 22*, the consent of the HKSAR government is required. This means that the department or body that wishes to establish an office in Hong Kong must first identify itself to the SAR government which, after reviewing its request, will decide whether to consent. If it consents, it will do so, presumably, in respect of a named body or department and only after being satisfied that its functions are ones that are compatible with the constitution of the HKSAR. The government should then make public decisions made under *Article 22* identifying those bodies that it has agreed may establish offices in the HKSAR.

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[3] The relevant parts of *Article 22 are: If there is a need for departments of the Central Government, or for provinces, autonomous regions, or municipalities directly under the Central Government to set up offices in the [HKSAR] they must obtain the consent of the government of the region, and the approval of the Central People's Government. All offices set up in the [HKSAR] by departments of the C5entral Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region.*

14. Once an announcement has been made and the body identified, it will be a matter for the legislature to decide whether that body should, or should not, be bound by the laws of the HKSAR. The nature of a body's functions will be relevant to a decision whether it should be bound by the laws of the HKSAR. Because of the provisions of *Article 22,* and the fact that the government has to make an informed decision about the establishment of an office here, the promoter of a government bill should be able to satisfy any inquiries that Legco may have on this point.

15. All this suggests that a "list based" approach identifying named bodies and excluding the application of laws to them that would otherwise apply should be followed in respect matters arising under *Article 22.*

Section 66. Interpretation and General Clauses Ordinance. Cap. 1

16. For reasons already given, there is no need to use the word "State" in *s.66*.

17. 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. These are the bodies identified in *Article 22*.

18. It is wrong to use *s.66* in such a way as to create a legal fiction that on 1.7.1997, if asked, a properly constituted Legco under the *Basic Law* would have granted legislative immunity to the bodies under *Article 22* in respect of all of the Laws of Hong Kong.

19. The granting or withholding of legislative immunity is a deliberate legislative choice. The rule of interpretation contained in *s.66* comes into play only if it is not clear how that choice has been exercised. Where it is clear (as is the case) that there has been no choice, the retroactive application of *s.66* has a distorting effect by 'deeming' a legislative decision to have been made when none was.

20. The way to deal with bodies under *Article 22* is to work on the basis that the laws of the HKSAR apply to them now and that the government needs to justify legislative immunity for them on a case by case basis.

21. A first step would be for the government to identify all the Mainland bodies now operating in the HKSAR by virtue of *Article 22* and give the date when permission to establish was granted.

Continued Application of the Presumption of Immunity to the HKSAR Government

22. There is a strong case that the continued application of the presumption of immunity to the HKSAR Government should be reviewed. The principle that the Crown is not bound by statutes save by express words or necessary implication has its origin as a prerogative immunity. The constitutional rationale is that since an Act is made by the Queen in Parliament for regulating her subjects, thus, in the absence of contrary intention, the Act does not bind the Crown itself.[4]

23. Under this principle, which is no more than a presumption in statutory interpretation, the Crown (but not the Crown servants in their personal capacity) is immune from liability to income tax. Government departments, and in particular, the armed forces, do not have to obtain planning permission in order to effect a material change in the use of land occupied by them.[5] Land occupied for Crown purposes is immune from rates,[6] and the Crown is not required to comply with various building requirements including the requirements to have a certificate of compliance before lifts and escalators in Crown buildings could be put in service which otherwise would have been an offence.

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4 As Lord Diplock observed in *British Broadcasting Corporation v Johns*[1965] Ch 32 at 78: "Since laws are made by rulers for subjects, a general expression in a statute such as 'any person' descriptive of those upon whom the statute imposes obligations or restraints is not to be read as including the ruler himself."

5 *Ministry of Agriculture v Jenkins* [1963] 2 QB 317.

6 *Mersey Docks and Harbour Board Trustees v Cameron* (1964) 11 HLC 464.

24. However, like all other prerogatives, it is of a residual if not dying nature.[7] Prerogatives have been abrogated by statute; the Crown Proceedings Ordinance has deprived the Crown of certain immunities in civil litigation. The appearance of a representative legislature in a colony may result in the loss of its plenary legislative powers.[8] Since the celebrated decision in *Council of Civil Service Unions v Minister for the Civil Service*,[9] a Minister's power, be it statutory or prerogative, is now subject to judicial scrutiny. Refusal to issue a passport is now reviewable.[10] A Minister, even acting in his official capacity, can be made personally liable for contempt of court.[11]

25. Indeed, a presumption of immunity in favour of the HKSAR Government is contrary to modern notion of equality before the law. The presumption is a historical aberration and it is time to review its continued application or validity in modern days. As Professor Dicey, the father of modern English constitution, pointed out, "When we speak of the 'rule of law' as a characteristic of our country, [we mean] not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals." There is no persuasive reason or at all that the HKSAR Government should not be subject to the ordinary law of the law unless it is expressly exempted by the legislature. The presumption of immunity effectively puts the Government above the law. The HKSAR Government argued that equality before the law never applied to statutes; statutes were selective and could confine its application to a specific sector or a specific group or a specific cause. This may be the situation, but the starting point must be that all statutes apply to everyone, citizens and Government alike, unless there are justifications for the contrary.

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7 *British Broadcasting Corporation v Johns* [1965] Ch 32 at 79.

8 *Campbell v Hall* (1774) 1 Cowp 204, and the Colonial Laws Validity Act 1865, 28 & 29 Vict, c 63..

9 [1985] AC 374.

10 *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811.

11 *In re M* [1994] 1 AC 377