

THE LAW SOCIETY'S SUBMISSIONS ON THE BINDING EFFECTS OF ORDINANCES - SECTION 66 OF CAP.1

The Law Society refers to its earlier submissions on the adaptation of the “Crown” in Section 66 of Cap.1 by the word “State”. These can be found in letter from the President of the Law Society to the Secretary for the Justice dated 3 April 1998 and in the Law Society’s Submissions to the Panel dated 20 October 1998 (attached).

The Law Society wishes to highlight the following two points raised in those submissions:

1. Certainty

It is the Administration’s *duty* to ensure that any uncertainties in the legislation should be removed during the current adaptation exercise.

2. Subordinate Organisation of the Central People’s Government

The Law Society re-iterates its recommendation that the Subordinate Organs of the Central People’s Government should be clearly identified and their names placed into a schedule attached to the Ordinance.

**The Law Society of Hong Kong
19 January 1999**

Letterhead of THE LAW SOCIETY OF HONG KONG
香港律師會的信頭

PA0005/98/9625

From the President

BY FAX,

3 April 1998

Secretary for Justice
Department of Justice
Queensway Government Offices
Hong Kong

Dear

**RE: THE ADAPTATION OF LAWS (INTERPRETATIVE PROVISIONS) BILL
("the Bill")**

The Law Society has reviewed the definition of "State" as defined in section 4(b) of the Bill and it is of the view that, as drafted, there is cause for concern. It is noted that the Administration intends to introduce Committee Stage Amendments ("CSA") to the definition of "State" and the Society welcomes the narrowing of the definition.

The Society has the following comments:

1. Substitution of the word "Crown" by the word "State"

The Administration has stated that the term "State" is narrowly defined so that it corresponds to the meaning of "the Crown", however as defined in the CSA the definition is too wide (see comments in paragraph 2 below). At Common Law "the Crown" is recognised as a mixture of: the role of the Monarch within the Constitutional framework and also the exercise of power by the Executive branch of the Government.

The proposed amendment does not address the exercise of "prerogative power" which is "*the residue of discretionary power left at any moment in the hands of the Crown, whether such power is in fact exercised by the King himself or by his Ministers*" (see Dicey's Introduction to the Study of the Law (8th ed. 1915) as cited in Council of Civil Service Unions v. Minister for the Civil Service [1985]AC 374.

The definition of the "State" does not in fact achieve the Administration's stated intention to make its definition "*correspond to the commonly understood meaning of "the*

Crown".

2. The Definition of "State"

The Administration stated in its Press Release that "*..... the purpose of the Bill is limited to adaptation of Cap. 1. Since July 1 1997, the reference to "the Crown" in section 66 of Cap.1 should be interpreted as referring to all organs of the People's Republic of China, that correspond to the organs that were part of "the Crown".*

The CSA now defines "State" as including :-

- (a) The President of the PRC
- (b) The Central People's Government
- (c) The Government of the HKSAR
- (d) The Central Authorities of the PRC that exercises functions which the Central People's Government has responsibility under the Basic Law
- (e) Certain Subordinate organs of the Central People's Government of those Central Authorities

The Law Society queries the inclusion of "Central Authorities" ("中央當局") which does not exist in the Chinese version of the Basic Law. In fact, "Central Authorities" is only referred to in the English version of the Basic Law, namely in Articles 17, 48(9), and 158. The Chinese characters for Central Authorities are "中央" and, in our opinion is a reference to the Central People's Government. It is submitted that in relation to the HKSAR there is no state organ which corresponds to the "Central Authorities". If it is to be retained, it will require specific definition.

In *The Constitution of the People's Republic of China* adopted by the National People's Congress on 4 December 1982 (and subsequently amended in 1988 and 1993) the structure of the State was cited in Chapter 3 as being comprised of the following :-

1. The National People's Congress
2. The President
3. The State Council (including the Foreign Ministry)
4. The Central Military Commission
5. The Local People's Congresses and Governments
6. The Organs of Self-Government of National Autonomous Areas
7. The People's Courts And The People's Procuratorates

It is submitted that only the first four cited organs are relevant to Hong Kong under the Basic Law and therefore the current CSA should be amended to delete any reference to the "Central Authorities" as they do not appear to have any constitutional basis. Article 22 of the Basic Law is clear that "no department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law".

3. Executive Functions

In paragraphs (e) and (f) of the CSA there is reference to the exercise of “*executive functions*” by the “subordinate organs” of the Central People’s Government:

- e) *Subordinate organs of the Central People’s Government*
 - i) on its behalf, exercise *executive functions* of the Central People’s Government or functions for which the Central people’s Government has responsibility under the Basic Law; and
 - ii) do not exercise commercial functions, when acting within the scope of the delegated authority and the delegated functions of the subordinate organ concerned; and
- f) *Subordinate organs of the Central Authorities of the People’s Republic of China referred to in paragraph (d)*
 - i) on behalf of those Central Authorities, exercise *executive functions* of the Central People’s Government or functions for which the Central People’s Government has responsibility under the Basic Law; and
 - ii) do not exercise commercial functions, when acting within the scope of the delegated authority and the delegated functions of the subordinate organ concerned.

The Law Society has grave reservations on the inclusion of the words “*executive functions*” in (e)(i) and (f)(i) as cited above as “*executive functions*” are clearly defined in Article 19 of the Basic Law. Their presence carries an implication that there are other executive functions which are outside those reserved in Article 19 of the Basic Law. The Law Society therefore recommends the deletion of the words “*executive functions*” in order to prevent any potential conflict with the provisions of Article 19 of the Basic Law.

4. Subordinate organs of the Central People’s Government

- a) The Administration has stated in its Press Release that it considers the following entities as “Subordinate Organs of the Central People’s Government :-
 - the Office of the Commissioner of the Ministry of Foreign Affairs of the PRC in the HKSAR
 - the Office of the Chinese Senior Representatives of the Sino-British Joint Liaison Group
 - Xin Hua Agency (Hong Kong Branch)

- the PLA Garrison

As the Administration has indicated that these organs would be officially recognised, the Law Society suggest that all recognised subordinate organs which come within this definition be named in a schedule attached to the Ordinance.

b) Xin Hua Agency (“Xin Hua”)

The present role of Xin Hua is unclear to the public and unless a parallel can be drawn between the function of Xin Hua with the other sub-organs of the Central People’s Government, the Law Society has reservations on whether this body should be included. It is undesirable for this uncertainty to remain and be left to the Court to resolve. The Administration *has a duty* to remove the uncertainty at this stage rather than face challenges in the future.

5. Definition of “crown lease”

Section 32 of the Hong Kong Re-unification Ordinance (Ordinance 110 of 1997) states :-

“The Chief Executive may on behalf of the Government of the HKSAR lease or grant land and natural resources within the HKSAR which are *State property*” (emphasis added)

It is submitted that including the HKSAR within the definition of “the State” in the CSA will cause confusion. Under Article 7 of the Basic Law all land is State property and the HKSAR is the Administrator of the State property.

6. Section 14 of the Conveyancing and Property Ordinance (“CPO”): “Conversion of the equitable interest to legal estate where right to Crown lease”

It is submitted that the definition of “crown lease” in the Bill is defective as it does not make any provision for the statutory provisions contained in Section 14 of the CPO which makes provisions for “Crown leases” which have “.... *deemed to be issued.....*”. If this matter is not resolved it would of cause confusion to the existing conveyancing system.

7. Section 30 of the Bill: “Reference to subsidiary legislation under national laws applying in Hong Kong”

The amendments to the existing Section 38 by sub-paragraph (b) states:

“by repealing “Order in Council” and substituting “resolution”.

It is noted that there is no definition of “*resolution*”. Is this a reference to the resolution(s) of the Standing Committee of the National People’s Congress as referred to in Article 18 of the Basic Law? If so, the Law Society recommends that the word “*resolution*” be defined as “*resolution of the Standing Committee of the National People’s Congress*” and the words “rule, regulation, proclamation, order, notice, rule of court, by-law or other instruments” in Section 78 of Cap. 1 be deleted.

8. S.1(2) of the Bill - Retroactivity

Although the issue of retroactive criminal liabilities has been dealt with in S.1(4) of the Bill, it is of concern that the Bill departs from the established legislative principles as enshrined in S.23 of Cap.1 in so far as they affect civil rights and liabilities by retroactive operation on 1 July 1997. As the Hong Kong Re-unification Ordinance passed on 1 July 1997 dealt with the enactment of the necessary transitional provisions, it seems that the Bill does not require retroactive operation.

9. The definition of “common law”

It is not clear if the definition of “common law” in the Bill includes the rules of equity which are part of the laws of HKSAR under Article 8 of Basic Law. We recommend clarification in the Bill.

10. Definitions of “solicitor” and “counsel”

For avoidance of doubt, it seems to be appropriate to add the words “or deemed to have been admitted” after the words “a person admitted” in the definitions of “solicitor” and “counsel” in the Bill.

The Law Society believes that it would be very difficult for practitioners to advise their clients on the legislation as drafted and that a high degree of certainty is desirable but is still missing from the CSA’s.

It is hoped that the Administration would adopt the above recommendations.

Anthony Chow
President

c.c Provisional Legislative Council

The Submissions of the Law Society on the Binding Effect of Ordinances on the State and Government of HKSAR: Legal and Constitutional Principles

1. Presumption of Exclusion

The Law Society does not agree with the Bar Association that BL22 “*replaces the colonial presumption of exclusion of the Crown by a presumption of inclusion of PRC organs under the HKSAR law.*”

The Law Society submits the following:

It is firmly established at Common Law that the Crown is not bound by legislation except by express words or by necessary implication (Lord Advocate v Dumbarton District Council (HL) [1990]2AC580, 604).

NPCSC’s decision of 23 February 1997 on the treatment of laws previously in force in Hong Kong (“the Decision”) pursuant to BL 160 constitutionally preserves the common law presumption of exclusion and applies it to the Central People’s Government or its other competent authorities and the Government of HKSAR.

Paragraph 10 of Annex 3 of the Decision provides that

“Any provision to the effect of ‘nothing in this Ordinance shall affect or be deemed to affect the rights of Her Majesty the Queen, her heirs or successors’ shall be construed as “‘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 any other law.’”

Also under paragraph 1 of Annex 3 of the Decision, it provides that

“in the case of any provision in which any reference is made to ‘Her Majesty’, ‘Crown’, ‘British Government’ or ‘Secretary of State’ or similar names, terms or expressions, where the content of the provision relates to Hong Kong land title or involves affairs for which the Central People’s Government is responsible and relationship between the Central Authorities and the Hong Kong Special Administrative Region, those name, terms or expressions shall be construed as the Central People’s Government or other competent authorities of PRC or, in other cases, as the Government of HKSAR.”

BL22 which provides that “all offices set up in HKSAR by departments of the Central Government, or by provinces, autonomous regions, or municipalities

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directly under the Central Government, the personnel of these offices shall abide by the Laws of HKSAR; and similarly, BL64 which provides that “the Government of HKSAR must abide by the law” do not appear to have altered the common law on the presumption of exclusion.

2. Functional Test of Subordinate Organs of the Central People’s Government (“CPG”) or relevant Central authority (“CA”)

The Law Society refers to its submission dated 3 April 1998 in relation to the executive functions by the subordinate organs of the CPG and the CA. “Executive functions” are defined in the Basic Law.

(a) The need for certainty

The Society maintains its view that the existing definition of executive functions carries an implication that there are other executive functions which are outside those reserved in the Basic Law.

(b) Burden of proof

It will be a heavy burden (if not impossible) for litigants to bear in any judicial review or court proceedings to prove and identify the ambiguities against the subordinate organs as these would not be easily discernible by litigants.

(c) Executive function of CPG and relevant CA

Other than foreign affairs and defence, the Central People’s Government has executive functions:

- (i) to appoint the Chief Executive and the principal officials of the executive authorities of HKSAR (BL15);
- (ii) to issue an order applying the relevant national laws in HKSAR in the event of a declaration of a state of war by NPCSC or by reason of turmoil within HKSAR which endangers national unity or security and is beyond the control of the Government of HKSAR (BL18);
- (iii) to provide or issue a certifying document to the Chief Executive on a question arising in an adjudication which concerns an act of state such as defence and foreign affairs pursuant to BL19;
- (iv) to grant other powers to HKSAR (BL20);
- (v) to determine after consulting with the Government of HKSAR the number of persons for entry into HKSAR for the purpose of settlement from other parts of China (BL22).

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It seems that any analysis of issue of “Executive Functions” must be dealt with regard to these provisions.

(d) The Garrison

The Law Society queries whether the Garrison falls within the functional test. But, BL14 provides (*inter alia*) “... In addition to abiding by national laws, members of the Garrison *shall abide by the laws of the HKSAR.*”

(e) “All offices” and “personnel” be identified

Article 22 of the Basic Law states

“No department of the CPG and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the HKSAR administers on its own in accordance with this Law ...

It goes on to state:

“All offices set up in the HKSAR by departments of the CG or by provinces, autonomous regions, or municipalities directly under the CG, and the personnel of these offices shall abide by the laws of the region.”

It is a constitutional requirement of Article 22 that all offices, and personnel of these offices, shall abide by the laws of the HKSAR. The Law Society therefore queries why the offices and the personnel should not be identified pursuant to Article 22 as this would clarify the situation in relation to which of the subordinate organs these provisions apply, e.g. Xin Hua News Agency.

3. Rights and Obligations of the State

The Society submits that the Administration has confused the rights and the obligations of the State in relation to the HKSAR.

(a) Obligations

Article 10 of BORO refers to the equality of all persons before the courts and the right to a fair and public hearing.

It is submitted that Government actions are amenable to judicial review at Common Law and under Article 10 of BORO and BL35, which states: “Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.”

In effect, every citizen may challenge the actions of the Government.

(b) Article 10 of BORO states that such proceedings are to be heard by an “independent and impartial tribunal established by law.”

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4. NPC Decision dated 23 February 1997

The Society refers to the NPC decision dated 23 February 1997 as recited in the Hong Kong Reunification Ordinance (Ordinance No. 110 of 1997) and referred to in paragraph 1 above.

“The National People’s Congress, in exercising its powers under Article 160 of the Basic Law on 23 February 1997, resolved which of the laws previously in force in Hong Kong are to be adopted as the valid laws of the HKSAR and the principles on which those laws should be construed and adapted.”

It is submitted that the exercise by the NPC of its powers under Article 160 of the Basic Law is a constitutional decision in the HKSAR’s constitutional framework and must be considered and given due regard during the Government’s adaptation of laws exercise.

The Law Society of Hong Kong

Dated 20 October 1998