

**Binding effect of Ordinances:
legal and constitutional principles, and policy considerations**

In determining whether it is, or is not, appropriate for a particular Ordinance to bind the State, the following matters need to be considered.

Rule of law

2. It is a fundamental principle of Hong Kong's legal system that everyone is subject to the law. 'Be you never so high, the law is above you.' In determining the coverage of legislation, policy bureaux should not exclude any particular person or body simply because of his or its status. This does not, however, mean that it is necessary or appropriate for every Ordinance to bind every person or body. For example, when the Hong Kong Bill of Rights Ordinance was being prepared, members of the former Legislative Council decided that it was not appropriate for the private sector to be bound by it.

3. According to Professor H W R Wade (Administrative Law), one aspect of the rule of law is that -

“the law should be even-handed between government and citizen. Clearly it cannot be the same for both, since every government must necessarily have many special powers. What the rule of law requires is that the government should not enjoy unnecessary privileges or exemptions from ordinary law.”

4. The Law Reform Commission of Canada commented on this passage in its Working Paper No.40 (The Legal Status of the Federal Administration) in the following way.

“That writer considers that any exception to the ordinary law will be primarily a matter of necessity. However, this rule is too

rigid, suggesting that an exception may be justified solely by the fact that no other solution can be found. The idea of necessity refers to the concepts of the liberal period, in which administrative action was tolerated only to the extent that it was absolutely necessary. The causes and reasons for administrative action have obviously changed. Necessity then becomes unsuitable as a means of justifying what is no longer affected by an inevitable determinism.”

5. It went on to suggest that the privileges and immunities of the Administration should be subject to a ‘reasonable limit’, assessed by three criteria -

- (1) whether the privilege or immunity is such that it will achieve the objectives sought by the Administration;
- (2) whether it subjects the individuals concerned to excessive hardship in terms of the aims sought by the Administration, or is exorbitant in comparison with the real importance of the results it seeks to achieve; and
- (3) whether measures exist which can offset the extraordinary nature of the privilege or immunity.

Equality before the law

6. Article 22 of the Hong Kong Bill of Rights Ordinance (which reproduces Article 26 of the ICCPR) provides that -

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

This does not, however, mean that all legislation must be equally binding on the State and individuals.

7. This point was emphasised by the Law Reform Commission of Canada in the Working Paper referred to in paragraph 4 above.

“Although it is clear that various institutions such as Parliament, the Government and (by extension) the Crown must observe the principle of equality in application of the law, no support can be found for the assumption of a general similarity of treatment between the Administration and the individual. . . . A difference in treatment may be justified by the absence of a similar situation or by a distinct nature, which surely is precisely the situation of the executive function and the individual. The unequal positions of the parties seem to be acknowledged. Considering its legal nature, the special regimes governing its rights, duties and privileges, its origins and its political dimension, the public interest objectives which it exists to attain, and the purpose of its activities, everything is in favour of a radical distinction between the Administration and private individuals. Does making them subject to the same process as to liability or procedural safeguards not amount to denying the existence of an entity as important as the Crown in its capacity as the holder of the executive power and public authority? Surely its special nature makes the Crown “incomparable, and it could only occupy a distinct and special position created for it alone. Its nature is clearly distinct, since the concept of the Crown refers to the residual powers of the Monarch. While it is now to be under the law, as are all individuals, that does not make its nature similar to the ordinary individual. Its public nature distinguishes it from private persons even though it acts in accordance with the general rules of the common law. In terms of legal categories, public and private law persons cannot be confused, which would appear to justify a priori the existence of separate systems governing them. On the face of it, therefore, it

would not seem advisable to make the Administration and the individual subject to equality of treatment. From this standpoint, any relation between these two would necessarily be unequal and could only remain so.”

Articles 14 and 22 of the Basic Law

8. BL 14 provides that ‘In addition to abiding by national laws, members of the garrison shall abide by the laws of the Hong Kong Special Administrative Region’.

9. BL 22 provides that -

“All offices set up in the Hong Kong Special Administrative Region by departments of the Central 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.”

10. Although these articles make it abundantly clear that the stated offices and personnel must abide by the laws of the Region, they do not provide any guidance as to whether or not any particular Ordinance should be binding on them. The obligation to abide by the laws of the Region does not mean that all legislation must bind the stated offices and personnel, any more than they must all bind other persons and bodies.

International obligations

11. Where legislation is introduced in order to implement an international agreement that applies to the Hong Kong SAR, regard will be had to the terms of the relevant agreement in determining whether the legislation should, or should not, bind the HKSARG or State. For example, the Recognition of Trusts Ordinance (Cap. 76), which enables the Hague Convention on the law applicable to trusts and on their recognition to apply to Hong Kong, expressly binds the State. Similarly,

the Carriage by Air Ordinance (Cap. 500), which gives effect to certain Conventions concerning international carriage by air, also binds the State.

Territorial application

12. There is a presumption that legislation enacted in Hong Kong applies only to events, facts or circumstances within the SAR. Unless an Ordinance is expressed to apply outside the SAR, it would not therefore apply to events, facts or circumstances outside the SAR, even if it is expressed to bind the State.

Relevance

13. Some legislation has no relevance to the activities of the State (e.g. legislation relating to family law, wills and intestacy, banking and franchised transport services). Where this is the case, it is generally inappropriate for that legislation to bind the State, since no legal consequences would flow from binding it.

Mischief

14. Legislation is promoted in order to remedy some perceived 'mischief'. Policy bureaux should therefore consider whether or not the 'mischief' involves the State and, if it does, the bureau should consider the appropriateness of making the State bound by the legislation.

15. For example, the perceived mischief might be that serious accidents are often caused by people who are unable to compensate the victims. That mischief is unlikely to involve the State, since it has the resources to pay compensation. Legislation to require certain people to obtain compulsory insurance may not therefore need to bind the State.

Beneficial purpose

16. Consideration should also be given to whether or not the beneficial purpose of particular legislation would be wholly frustrated if

the State were not bound. For example, legislation relating to bankruptcy might be less effective if the statutory arrangements for dealing with the property of insolvent persons were not generally binding on the State, since the State may be one of the creditors of the bankrupt.

Special considerations

17. The State is an institution that has powers and obligations applicable to it alone. It has functions and responsibilities which have no equivalent in the private sector. As was stated earlier, it is a fallacy to consider that all laws must apply equally to the government and the community. According to Friedmann (Law in a Changing Society, 276-7) -

“The fallacy of Dicey’s assumptions lies in his contention that the rule of law demands full equality in every respect between government and subjects or citizens. But it is inherent in the very notion of government that it cannot in all respects be equal to the governed, because it has to govern. In a multitude of ways, government must be left to interfere, without legal sanctions, in the lives and interests of citizens, where private persons could not be allowed to do so... Where the borderline between governmental freedom and legal responsibility has to be drawn, is, indeed, a very difficult problem. It may be described as the key problem of administrative law. But we can only begin to understand it after having accepted, unlike Dicey, that inequalities between government and citizens are inherent in the very nature of political society.”

18. A special body of law - ‘public law’ - has developed that provides remedies for abuse of power by public authorities. In addition, special rules relating to proceedings against public authorities have developed, that recognise that it is not always in the public interest for private law remedies to be pursued against the State. As Lord Diplock

said in the landmark decision in O'Reilly v Mackman [1983] 2AC 237, the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision. To allow ordinary actions for public law remedies might subject public authorities to lengthy delays which would defeat the policy of reforms and the interests of good administration.

19. Where statutory obligations are to be imposed in respect of governmental activities (e.g. licensing, inspecting), it may be more effective to impose those obligations on named office-holders, rather than on 'the State'. This will make it possible for proceedings to be instituted against the office-holders e.g. for a mandatory order, or for contempt of court.

20. Other aspects of the State that distinguish it from other persons and institutions in Hong Kong include the fact that land and national resources are State property (BL 7); and that the CPG is responsible for the defence of the HKSAR (BL 14) and for foreign affairs relating to the HKSAR (BL 13). These provisions must be taken into account when determining whether legislation (or particular provisions) should, or should not, bind the State. It may not be appropriate simply to apply some provisions to the State, particularly if this might prejudice the State in the proper discharge of its executive functions.