

Ordinances binding the State by necessary implication

The Administration has been invited by the LegCo Panel on Administration of Justice and Legal Services to consider conducting a review of Ordinances which may bind the HKSARG or the State by necessary implication.

Necessary implication

2. Section 66(1) of Cap.1 provides as follows.

“No Ordinance (whether enacted before, on or after 1 July 1997) shall in any manner whatsoever affect the right of or be binding on the State unless it is therein expressly provided or unless it appears by necessary implication that the State is bound thereby.”

3. The phrase ‘necessary implication’ is ‘vague and troublesome’ (Thornton, Legislative Drafting, 4th ed, p 213). The question is always what the legislature intended. According to the Privy Council decision in Province of Bombay v. Bombay Municipal Corporation [1974] AC 58, in the absence of an express provision, an intention to bind the Crown can only be implied where ‘it was apparent (from the statute’s) terms that the beneficial purpose must be wholly frustrated unless the Crown were bound’ (at 63). It would not be a simple task to determine whether an Ordinance (including subsidiary legislation) is binding on the State by ‘necessary implication’. The fact that one provision in an Ordinance is binding on the ‘State’ does not necessarily mean that other provisions have a similar binding effect. It would be even more difficult to generalise the binding effect on the ‘State’ of an Ordinance in its entirety. Any opinion on whether a particular provision or a particular Ordinance is binding or not binding on the State is likely to be controversial.

Practicality of identifying Ordinances?

4. There are hundreds of Ordinances that are not expressed to be binding on the HKSARG or State. It is possible that some of these Ordinances, or some provisions in some of these Ordinances, are binding by necessary implication. In order to identify these, it would be necessary for relevant bureaux, in conjunction with the Department of Justice, to consider all sections in all these Ordinances in order to form a view whether the ‘beneficial purpose of the legislation would be wholly frustrated’ if the HKSARG or State were not bound by them.

5. This would be an extremely time-consuming and legally difficult task. Even if it were performed, and views formed as to which Ordinances, or parts of Ordinances, are binding by necessary implication, it is not clear what purpose this would serve.

Review of those Ordinances?

6. Assuming that some Ordinances were thought to be binding on the State by necessary implication, what would be the purpose of reviewing those Ordinances? No reason to alter the binding effect would have been identified.

7. Assuming that some Ordinances were thought to be binding on the HKSARG by necessary implication, this would be because the beneficial purpose of those Ordinances -

- (1) would be wholly frustrated if the HKSARG were not bound by it; but
- (2) would not be wholly frustrated if other relevant PRC organs were not bound by it.

It is considered that such a conclusion would be no reason for reviewing the binding effect of the Ordinances, which evidently reflects the intention of the legislature.

Reviewing other Ordinances

8. The Administration stands by its undertaking to review any Ordinance in respect of its binding effect when the need to do so has been identified.

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