

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 BL160 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 view 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

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