

**Hong Kong Bar Association's
comments on "Bills Committee on Land Titles Bill:
The Constitutionality of the Indemnity Cap"**

Background

1. By a letter dated 26th June 2003, the Bills Committee of the Legislative Council invited the Bar to submit its views on a paper prepared by the Administration elaborating its position as to the constitutionality of the proposed cap on the indemnity available in fraud cases under the Land Titles Bill ("the Second Consultation Paper").
2. The Paper was in reply to different responses including the Bar's submission (29/5/03 BCM) made on 22nd May 2003 ("the Response") commenting on the Administration's 1st paper (LC Paper No. CB(1)1664/02-03(01)) on this constitutional issue ("the First Consultation Paper").
3. The Bar and the Administration have exchanged extensive views about this issue in previous papers. In order to facilitate our further submissions herein, we summarize the arguments briefly as follows.
4. In the First Consultation Paper, in arguing that the Bill does not have the effect of depriving property rights and the proposed indemnity provisions are not in breach of Articles 6 and 105 of the Basic Law, the Administration put forward three major arguments: (1) the notion of "continuity" based upon Section VI of Annex 1 of the Joint Declaration; (2) the argument of 'pre-existing limitations on the *nemo dat* rule'; and (3) the comparative jurisprudence under the Australian Constitution and the European Convention on Human Rights ("ECHR").
5. In the Response, the Bar expressed that the proposed legislation would have the effect of depriving private property rights or ownership and any cap causing the compensation below the "real value" of the property deprived would be a breach of the Basic Law. The Bar's argument can be summarized as follows:
 - (1) The *nemo dat* principle existed before reunification but is now altered by the proposed legislation where an owner will lose ownership of his property even though the registration of title by another person is the result of fraud. Such deprivation of property right will and can only be 'justified' if 'full' compensation is provided to the aggrieved owners in accordance with Article 105.

- (2) Although the Basic Law preserves the common law principle of *nemo dat* subject to those limitations already existed prior to reunification, it does not provide for the deprivation of rights such as the right of ownership notwithstanding the effect of fraud. Rather under Articles 6 and 105, the government is specifically required to protect the right to private property.
 - (3) Section 51(xxxi) of the Australian Constitution only deals with acquisition and not deprivation and thus is unhelpful to the argument. As to Article 1 of ECHR, it does concern the deprivation of property and is therefore relevant. The Bar finds the majority of ECHR cases do not confine its interpretation of ‘deprivation’ to dispossession or formal expropriation only but go behind the appearances and investigate to see if properties are in effect deprived.
6. In the Paper, the Administration confines the issue to the proper approach to interpret the word “deprivation” or its Chinese expression “zhengyong” in Article 105. The Administration raises a new ground, namely the Chinese word “zhengyong” denotes a meaning much narrower than that of its corresponding English expression “deprivation” and according to the Standing Committee’s decision of 28 June 1990, in cases of discrepancy in the meaning of wording between the Chinese text and the English text of the Basic Law, the Chinese text shall prevail.
 7. Building upon this argument, the Administration then repeated its arguments as set out in the First Consultation Paper. The Administration’s argument can be summarized as follows:
 - (1) The meaning of “zhengyong” in ordinary language is “an act by the state or the government to resume or acquire property for public purposes”.
 - (2) As Chinese text prevails in case of discrepancy, such much narrower meaning of “zhengyong” simply does not cover the loss of title scenario as a result of the Bill and therefore the proposed legislation does not breach Article 105.
 - (3) Such interpretation of the Article 105 is also consistent with the other provisions of the Basic Law and Section XI of Annex 1 of the Joint Declaration.
 - (4) Given the long existed statutory exceptions to the *nemo dat* principle prior to the reunification and their commonplace in common law jurisdictions, the

exceptions to the *nemo dat* principle provided in the Bill are acceptable under the notion of ‘continuity’ of the Joint Declaration and are proportionate in view of the protection already provided as set out in the Administration’s First Paper and the benefits to be provided in the Bill.

- (5) The jurisprudence under the Australian constitution and that under the ECHR is also in line with the interpretation of Art. 105 based upon the Chinese text.

Interpretation of “zhengyong” other than simple literal construction

8. It is correct to say that “zhengyong” literally may mean resumption or acquisition of property by the government for public purpose. However, in interpreting the Basic Law, the court’s role is to construe the language in order to ascertain the legislative intent as expressed in the language and the language should not be looked at in isolation but in the light of its context or purpose. Whilst the courts must avoid a literal, technical, narrow or rigid approach, they could not give the language a meaning which it could not bear. (See Director of Immigration v. Chong Fung Yuen [2001] 2 HKLRD 533)
9. So in reading Art.105 as a whole and looking at the word “zhengyong” in the context of the entirety of Art.105, “zhengyong” should not and could not be construed to mean only acts of government acquiring or resuming property for public purpose. Rather it should be read in a wider context so that the general purpose of Art. 105 as reflected in the first part of the Article, namely “The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property” is served by fully compensating the title owners who are deprived of their title because of the introduction of the new system of title registration and, most importantly, at no fault of them.
10. Such interpretation is also consistent with:-
- (1) the use of the English expression “deprivation” in Art.105;
 - (2) the general provision part of Art.105, namely HKSAR “shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property” and Art.6 as well, namely HKSAR “shall protect the right of private ownership of property in accordance with law.”; and

- (3) the continuity of common law principle of *nemo dat qui non habet* and those limitations already existed prior to reunification.

The *nemo dat* principle

11. This is not a case where the statutory limitation to the *nemo dat* principle (namely no compensation from government for incidental loss) could apply because in the current situation, those aggrieved owners are deprived of their title to the land completely and their property rights are taken away definitely without any fault on their part but due to the fraud of a third party and this proposed legislation.
12. That is, even under the present land registration, these owners would and should be fully compensated or protected by the common law principle of *nemo dat* without the application of the statutory limitation because their basic right to private property includes the right to be immunized from the effect of fraud upon their title to land. If these owners are not compensated fully, the protection as guaranteed and required in Art.105 and Art.6 is in effect useless and ineffective.
13. In view of the positive notion of protecting the right of private ownership of property as stipulated in Art.6 and Art.105 of the Basic Law, the part of Art.105 concerning compensation for “deprivation/zhengyong” should not be construed in a way so that existing protection of private ownership of property enjoyed by Hong Kong people is to be limited or even frustrated by the Basic Law. This surely will not be the legislative intent of the Basic Law. Section XI of Annex I of the Joint Declaration also stipulated that private property rights which existed before reunification should be preserved and so in applying the principle of *nemo dat*, an owner will not lose his ownership of property as a result of fraud by another person.

Australian Jurisprudence

14. The Bar repeats its submission as set out in paragraphs 19 – 22 in the Response.

ECHR Jurisprudence

15. The Bar repeats its submission as set out in paragraphs 23 – 29 in the Response.

Fair Balance

16. As to the argument on fair balance, the Bar repeats its submission as set out in paragraphs 30 and 31 in the Response.

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