**LegCo Subcommittee to Examine
the Implementation in Hong Kong of Resolutions of
the United Nations Security Council in relation to Sanctions**

**Comments on the Submission from Professor Yash Ghai
on the United Nations Sanctions Ordinance (Cap 537) ("UNSO")**

This note sets out the Administration's comments on the captioned submission, with specific reference to the fundamental question of whether the disapplication of ss 34 and 35 of the Interpretation and General Clauses Ordinance (Cap 1) in respect of regulations made by the Chief Executive ("CE") under the UNSO is constitutional under the Basic Law.

Conclusion of Professor Ghai's Submission

2. Professor Ghai has concluded in paragraphs 9 and 10 of his submission as follows:

> "[para 9] I conclude from the above discussion that:
> (a) the principle of the separation of powers underlies the Basic Law;
> (b) the power to scrutinize and if necessary, amend subsidiary legislation is vested in the LegCo; and
> (c) an Ordinance which takes away the power of the LegCo to vet or amend subsidiary legislation is void.
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> In view of the above conclusions, I turn to the issues that have been referred to me for my opinion by the Subcommittee.
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> [para 10] It is my opinion that the exclusion by UNSO of sections 34 and 35 is unconstitutional (for reasons given above).
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> [para 11] Even if the exclusion were not unconstitutional, it would seem desirable to provide for LegCo's scrutiny. …
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> [para 12] I also consider that UNSO might be deficient in another respect. It does not give the CE sufficient guidance on how the

CE may exercise his or her powers under the Ordinance. …"

Overview

3. The UNSO was enacted to provide for the imposition of sanctions against places outside the People's Republic of China ("PRC") arising from Chapter 7 of the Charter of the United Nations, and to provide for matters incidental thereto or connected therewith. Under section 3(1), CE is empowered and required to ("shall") make regulations for a specific purpose, namely giving effect to a relevant instruction given by the Ministry of Foreign Affairs ("MFA") to him to implement, cease implementing, modify etc certain mandatory sanctions decided by the Security Council of the United Nations ("UNSC"). Under section 3(5), these regulations are excluded from the Legislative Council ("LegCo")'s scrutiny of subordinate/subsidiary legislation ("sub-leg") provided for in ss 34 and 35 of Cap 1.

4. For the detailed reasons set out below, we consider that s 3(5) of the UNSO is not inconsistent with the Basic Law. In brief:-

(a) While there is division of powers and functions among various organs of the Hong Kong Special Administrative Region ("HKSAR") under the Basic Law, the Basic Law does not institute a rigid separation of powers.

(b) Therefore, while LegCo is entrusted with the power and function to enact laws, the Basic Law does not prohibit the delegation of law-making power/function to other bodies or persons to make sub-leg, which is clearly contemplated by BL 56(2), BL 62(5), BL 8 and BL 18.

(c) In line with the theme of continuity of the Basic Law and s 2(1) of Cap 1, LegCo may disapply s 34 (negative vetting procedure) and s 35 (positive vetting procedure) of Cap 1 in relation to sub-leg made by the CE under and in accordance with s 3 of the UNSO to give effect to the relevant directive of the Central People's Government ("CPG") and implement the relevant UNSC sanction.

(d) It is considered that sufficient guidance is laid down in the

UNSO as to how the CE may exercise his powers/functions under the UNSO.

5. In assessing the constitutionality of s 3(5) of the UNSO, it is important to have regard to the relevant constitutional and statutory context.

Division of powers and functions under the Basic Law

6. Firstly, while there is a division of powers and functions among various organs of the HKSAR under the Basic Law, the Basic Law does not institute a rigid separation of powers.

7. As explained in the Administration's paper dated 19 February 2004 to the LegCo Subcommittee on United Nations Sanctions (Liberia) Regulation 2003, the Basic Law does not embody a strict doctrine of separation of powers. In *Lau Kwok Fai Bernard v Secretary for Justice*, HCAL Nos. 177 of 2002 and 180 of 2002, Hartmann J further considered the principle of separation of powers in the Basic Law. He, at para 20, expressed agreement to Professor Wade's observation in his work *Administrative Law* (7th ed, 1994), at p 860 that there was an infinite series of graduations, with a large area of overlap, between what was plainly legislation and what was plainly administration. He considered that the same must apply when looking to the relationship between what was plainly the function of the judiciary contrasted with the function of the legislature and the administration. At para 23, he said:

> "While … I accept that the Basic Law incorporates the principle of separation of powers (subject of course to the meaning and purpose of specific articles which may act to modify that principle), it is apparent that whether the [Public Officers Pay Adjustment] Ordinance, in respect of any individual article or in respect of the Basic Law generally, offends that Law is a matter which may only be determined by looking at the Ordinance 'in context'. As the Privy Council said in … [*Liyanage v R* [1967] 1 AC 259]: each case must be decided in the light of its own facts and circumstances, including the *true purpose of the legislation*

and the situation to which it is directed." (emphasis original)

8. While Professor Ghai has taken the view that the Basic Law is based on a separation of powers, he has pointed out as part of his argument that the separation of powers is "a matter of degree" (para 8 at p 4).

9. The Basic Law provides for division of powers and functions among various organs of the HKSAR (see Chapter IV of the Basic Law which prescribes, inter alia, the powers and functions of the CE, the executive authorities, the legislature, the judiciary etc). However, the Basic Law does not follow a rigid separation of powers. For example, the delegation of law-making power/function to other bodies/persons by LegCo is clearly contemplated in the Basic Law. BL 56(2) provides for the making of subordinate legislation by CE in consultation with the Executive Council. BL 62(5) entrusts the HKSAR Government ("HKSARG") with various powers/functions, including "[t]o draft and introduce bills, motions and subordinate legislation". In addition, BL 8 and BL 18 maintain subordinate legislation as a source of law of the HKSAR.

10. The absence of a rigid separation of powers under the Basic Law is consistent with the theme of continuity under the Basic Law. Before the reunification, neither the British nor the Hong Kong systems were based on a rigid separation of powers. The introduction of such a rigid system would radically change many established features of our political and legal system, and there is no indication that this was the intention. If a rigid system of separation were adopted by the Basic Law, it would mean that even legislative amendments by way of a LegCo resolution would be unconstitutional (See Wesley-Smith, "The Separation of Powers" in Wesley-Smith (ed) *Hong Kong's Basic Law - Problems & Prospects* (1990), p 75 where it is argued, on the assumption that a rigid separation of powers were provided for in the Basic Law, that "[w]hile delegation of legislative authority to the executive branch is permissible, provided a genuine limitation is imposed by the statute, ordinances empowering the Legislative Council to act by resolution may well conflict with the Basic Law".) Such a radical position could not have

been the intention of the Basic Law which, contrary to Professor's Ghai's view (para 15 of the Submission), carries the overwhelming theme of seamless transition and continuity. See the Court of Appeal decision in *HKSAR v David Ma* [1997] HKLRD 761 which is summarised below:

> "Ma Wai Kwan, David and the others ("Defendants") argued, among other things, that the common law had not survived the Reunification and therefore prosecutions brought against them before the Reunification for a common law offence were no longer valid, since under the Basic Law it was necessary to have a positive act of adoption (which was missing as contended by the Defendants) before laws previously in force in Hong Kong became laws of the HKSAR. They also challenged the legality of the Provisional Legislative Council ("PLC") and the Hong Kong Reunification Ordinance ("Reunification Ordinance") passed by it to preserve the continuity of prosecutions.
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> The Court of Appeal held that the common law had survived the Reunification. Continuity after the Reunification was of vital importance. Both the Joint Declaration and the Basic Law carried the overwhelming theme of a seamless transition. The effect of BL 8 was that the common law continued and that it did so under BL 8 and 18 (rather than BL 160). BL 160, whether construed by itself or in conjunction with BL 8, 18, 19, 81 and 87, did not have the effect of requiring the laws previously in force to be formally adopted in order to be effective after 30 June 1997. The use of the word "shall" in these articles could only be used in the mandatory and declaratory sense, otherwise anomalous results would occur.
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> The indictments against the Defendants survived the Reunification and the pending proceedings continued. In the light of the predominant theme of a seamless transition, the expression "documents", "rights" and "obligations" under BL 160(2) covered indictments, the right of the Government to prosecute offenders and the obligation of an accused to answer to the allegations made against him respectively. The HKSAR courts stood established by the imperative words of BL 81(1). By virtue of BL 8, 18, 19, 81(2) and 87, the legal and judicial systems continued after the Reunification."

Delegation of Legislative Powers/Functions and LegCo's Scrutiny of Subsidiary Legislation

11. In the light of the above, it is considered that while LegCo is entrusted with the power and function to enact laws, in line with the theme of continuity, the Basic Law does not prohibit the delegation of law-making power/function to other bodies or persons to make sub-leg, which is clearly contemplated by BL 56(2), BL 62(5), BL 8 and BL 18.

12. In this regard, Professor Ghai has argued (under para 8, at bottom of p 5 and top of p 6 of the submission) that "[a]n Ordinance which takes away from LegCo the ultimate control over the enactment of subsidiary legislation would therefore be unconstitutional. The LegCo has been given its legislative responsibilities by the NPC and it cannot divest itself of that power ('*delegatus non potest delegare*')." Reading this argument in the light of para 9 of his submission (set out in para 2 above), Professor Ghai does not appear to rely literally on the principle of '*delegatus non potest delegare*' [a delegate cannot delegate – ie "a person to whom powers have been delegated cannot delegate them to another" – see *Osborn's Concise Law Dictionary* (9th ed, 2001) p 129)]. There was no doubt that, under the former system, the pre-1997 legislature (although itself a delegate) could authorize others to make delegated legislation (see the Privy Council decision in *Hodge v The Queen* (1883) 9 App Cas 117 as discussed in Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (2nd ed, 1994) p 188). There is similarly no doubt that the Basic Law envisages that subordinate legislation will be made (see BL56(2) and BL 62(5) cited above).

13. It appears that Professor Ghai's focus is on the disapplication of the negative vetting procedure under section 34 of Cap 1 to sub-leg. However, the provisions in Cap 1, including sections 34 and 35, apply unless a contrary intention is discerned in an Ordinance (section 2(1)). In other words, the LegCo may, if it sees fit, exclude certain delegated legislation from its scrutiny under sections 34 and 35. This exclusionary power predated 1 July 1997, and its continuation or exercise of it after that date is unlikely to be inconsistent with the constitutional order

provided for in the Basic Law, a central feature of which is the theme of continuity. For example, section 3(15) of the Fugitive Offenders Ordinance (Cap 503) has an exclusionary provision similar to section 3(5) of Cap 537. The above provision predated the reunification.

14. Similarly, it has been held by the court in *English Schools Foundation v Bird* [1997] 3 HKC 434 that regulations made under s 10 of the English Schools Foundation Ordinance (Cap 1117) are subsidiary legislation despite a provision to the effect that it is not necessary to publish them or lay them on the table of the LegCo. (The issue was discussed in the context of Government's policy on subsidiary legislation by the LegCo Panel on Administration of Justice and Legal Services on 24 January 2005.)

15. It is also relevant to note that under the UK Parliamentary system, it is common practice for subsidiary legislation to remain entirely unvetted by Parliament. See *Griffith & Ryle on Parliament* (2nd ed, 2003), paras 6 – 162 & 3:

> "Under the Statutory Instruments Act 1946, the great majority of (these) forms of delegated legislation are defined as statutory instruments….. The parent Act defines the way, and by whom, a statutory instrument may be made and the nature of parliamentary control, if any, to which it is subject.
>
> *Some statutory instruments…. are not laid before Parliament at all; some are not even printed.* Other less important instruments are laid before Parliament, *but are not subject to any parliamentary proceedings*….." (emphasis added)

16. Professor Ghai's reference (para 8, top of p 6 of his submission) to LegCo's role in checking the vires of sub-leg does not detract from the above position. This is one of its functions when it does vet sub-leg, but that does not mean that it may not give up the task of vetting it in the light of s 2(1) of Cap 1.

17. Professor Ghai's reference (para 8, top of p 6) to LegCo's constitutional powers/functions under BL 73(6) and (5) also does not

detract from the Administration's position in respect of the UNSO. LegCo can continue to raise questions on, or debate, UNSO sub-leg even if it has no power to vet it.

18. Another provision relied on by Professor Ghai is BL 62(5) (para 8, bottom of p 5). According to Professor Ghai, "the draft of subsidiary legislation has to be introduced to the LegCo (BL 62(5))". However, BL 62(5) does not say that it requires the draft of sub-leg to be introduced to LegCo. BL 62 relates to the powers and functions of the HKSARG, one of which is "[t]o draft and introduce bills, motions and subordinate legislation". There is no reason to read into this provision a requirement that all sub-leg must be introduced into LegCo. In the light of the theme of continuity of the Basic Law and s 2(1) of Cap 1, BL 62(5) could and should be read as providing that, where sub-leg needs to be introduced into LegCo, the HKSARG may/shall do so.

19. In passing, it is noted that Professor Yash Ghai (para 8, middle of p 5 of the submission) has made the following remark: "**CE's permission is required** for private members bills on public expenditure or political structure or the operation of the government" (emphasis added). To clarify, BL 74 provides that "[m]embers of the LegCo of the HKSAR may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council". The constitutional prohibition against members' introduction of bills relating to "public expenditure, political structure or the operation of the government" reflects the constitutional principle of executive-led government in the Basic Law (See Mr Li Fei's "Explanatory Note on the Draft Interpretation by the NPSCS of Article 7 of Annex I and Article III of Annex II to the Basic law of the HKSAR of the PRC" delivered to the NPCSC on 2 April 2004: "In the political structure established by the Hong Kong Basic Law, the HKSAR is executive-led. The CE is the head of the HKSAR. He represents the HKSAR and is accountable to the CPG and the HKSAR. At the same time, Article 74 of the Hong Kong Basic Law also provides that 'members of the LegCo of the HKSAR may introduce bills in accordance with the provisions of this Law and legal procedures. Bills

which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council' …").

20. In addition to the principle of executive-led government, the following aspects are also relevant when the captioned matter is considered in its constitutional and statutory context:

(a) Section 28(1)(b) of Cap 1 provides that no subsidiary legislation shall be inconsistent with the provisions of any Ordinance.

(b) The delegation of law-making power by LegCo is not without constitutional limits. Under the doctrine of effacement applicable LegCo before the Reunification, as pointed out in Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (2nd ed, 1994), pp 204-5, "while the legislature of Hong Kong may freely delegate its legislative powers, the delegation must not be total or complete. The legislature may not abolish or extinguish or 'efface' itself. To do so would be to amend or conflict with the Letters Patent, which deposit legislative authority in the Governor as advised by LegCo. A delegate must always remain under the control of the legislature, and its powers must always remain less than the legislature's powers (or so it seems from the strong hint given by the Judicial Committee in [*Re the Initiative and Referendum Act* [1919] AC 935, at 945]: 'it does not follow that [the Manitoba legislature] can create and endow with its own capacity a legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise'). The constitutional limit imposed by the doctrine of effacement is likely to be applicable to LegCo under the Basic Law given its theme of continuity and the authorisation by the National People's Congress to the HKSAR to exercise, inter alia, legislative power (BL 2 and BL 17).

(c) The relevant instructions given by the MFA fall within the scope of "directives issued by the Central People's Government" under BL 48(8), which CE has a power and function to implement. The above instructions clearly concern foreign affairs relating to the HKSAR, for which the CPG is responsible under BL 13(1). In the case of sub-leg implementing MFA directions in respect of foreign affairs, it must be lawful and constitutional for LegCo to authorize the HKSARG to make the sub-leg without any vetting requirement. This reflects the fact that, although legislative authority derives from LegCo, the subject matter is outside the high degree of autonomy conferred on the HKSAR.

Guidance

21. Professor Ghai (para 12 of his submission) states that the UNSO might be deficient because section 3 confers on CE too general the power to make regulations for giving effect to MFA's instructions: "As a general rule, if the delegation is in very broad terms and without guidance on how the power is to be exercised, the delegation is unlawful."

22. We do not agree that the UNSO is deficient in the above respect, since sufficient parameters have been laid down in that ordinance to enable CE to exercise his power/function of making regulation under section 3(1). The exercise of such a power/function is limited by the terms of an MFA's instruction which is made to adopt UNSC resolutions about imposing sanctions against any places outside PRC (see s 2(2) read with s 3(1)). The maximum penalties that may be imposed for contravention or breach of the regulations are also prescribed (see s 3(3)).

Desirability

23. One of the HKSARG's arguments in favour of the current arrangement is that it ensures prompt implementation. In paragraph 16 of his submission, Professor Ghai rejects this on the basis that negative vetting takes place only after the coming into force of the regulations. This overlooks the standing arrangement, requested by LegCo, that

sub-leg should not come into operation until after the negative vetting period has expired. Even if it is suggested that the standing arrangement with LegCo should be disapplied in case the negative vetting procedure is applied to the UNSO, it is considered that the current arrangement under the UNSO should be maintained for the reasons set out above.

Conclusion

24. In line with the theme of continuity in the Basic Law and s 2(1) of Cap 1, it is considered that LegCo may disapply s 34 (negative vetting procedure) and s 35 (positive vetting procedure) of Cap 1 in relation to sub-leg made by the CE under and in accordance with s 3 of the UNSO to give effect to the relevant CPG directive and implement the relevant UN sanction. In short, it is considered that the current arrangement under UNSO is consistent with the Basic Law and should be maintained.

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