Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation

Power of Legislature to Amend Subsidiary Legislation – Differences between the Parliament of the United Kingdom and the Hong Kong Legislature

At the meeting on 20 April 2011, the Subcommittee asked the Administration to provide information on the following issues -

(a) since when was the Legislative Council of Hong Kong empowered to amend subsidiary legislation; and

(b) since when did the power of the United Kingdom ("UK") Parliament to amend subsidiary legislation cease and the rationale for the cessation.

Legislative Council's power to amend subsidiary legislation

The 1911 Interpretation Ordinance & 1937 Amendment Ordinance

2. The power of the Legislative Council to amend subsidiary legislation under section 34 has its origin in the Interpretation Amendment Ordinance 1937 ("1937 Amendment Ordinance"). The 1937 Amendment Ordinance amended section 40 of the Interpretation Ordinance 1911 ("1911 Interpretation Ordinance"), which was the interpretation statute current at that time, by adding the following provision -

> "(4) All regulations[1] shall be laid on the table of the Legislative Council at the first meeting thereof after the publication in the Gazette of the making of such regulations, and if a resolution be

[1] Section 40(2) of the 1911 Interpretation Ordinance defined "Regulations": (2) "Regulations" both in this section and generally in this Ordinance, as well as in all other enactments, means regulations, rules, orders and bye-laws, not inconsistent with the provisions of the Ordinance under which they are made, and includes rules of court. Section 40(2) of the 1911 Interpretation Ordinance was amended by section 6 of the Interpretation (Amendment) Ordinance 1927 to remove "orders".
Section 39 of the I911 Interpretation Ordinance:"Rules of Court" means, when used in relation to any Court, rules made by the authority having for the time being power to make rules and orders regulating the practice and procedure of such Court, together with the forms necessary thereto .

> passed at the first meeting of the Legislative Council held after such regulations have been laid on the table of the said Council resolving that any such regulations shall be ***rescinded or amended*** in any manner whatsoever, the said regulations shall, without prejudice to anything done thereunder, be deemed to be ***rescinded or amended***, as the case may be, as from the date of publication in the Gazette of the passing of such resolution." (Added emphasis.)

3. The above provision required regulations to be laid on the table of the Legislative Council ("LegCo") and gave LegCo power to either rescind or amend the regulations. Before the enactment of the 1937 Amendment Ordinance, there did not appear to have been a general law in Hong Kong that required subsidiary legislation to be tabled in LegCo.

1950 Interpretation Amendment Ordinance

4. The 1911 Interpretation Ordinance was eventually replaced by the Interpretation Ordinance 1950 (2 of 1950) ("1950 Interpretation Ordinance"). This Ordinance contained a provision equivalent to section 40(4) of the 1911 Ordinance (section 14(d)) and also introduced positive vetting procedure for the first time (section 14(e)). The relevant provisions were as follows—

> "14. The following shall apply to regulations[2]—
>
> …….
>
> (d) All regulations shall be laid on the table of the Legislative Council at the first meeting thereof after the publication in the Gazette of the making of such regulations, and if a resolution be passed at the first meeting of the Legislative Council held after such regulations have been laid on the table of the said Council resolving that any such regulations shall be ***amended***[3] in any manner whatsoever, the said regulations shall, without prejudice to anything done thereunder, be deemed to be amended, as from the date of publication in the Gazette of the passing of such

[2] Section 3 of the 1950 Interpretation Ordinance defined "regulations" – "regulations" includes rules, rules of court and by-laws;
"rules of court" means, when used in relation to any court, rules made by the authority having for the time being power to make rules and orders regulating the practice and procedure of such court.

[3] Section 3 of the 1950 Interpretation Ordinance – "amend" includes repeal, add to or vary and the doing of all or two or more of such things simultaneously or by the same instrument;
"repeal" includes rescind, revoke, cancel or substitute for.

resolution;

(e) if an enactment provides that the regulations shall be subject to the approval of Legislative Council or any other authority or contains words to the like effect then –

(i) the regulation shall be submitted for the approval of such authority; and

(ii) such authority shall have power to ***amend*** or disapprove the whole or any part of the regulations and may if it disapproves of them either in whole or in part require further regulations to be submitted for approval;". (Added emphasis.)

5. The above shows that by the year 1950, the Legislative Council's power to amend and disapprove regulations by both negative vetting and positive vetting procedures was established under the law of Hong Kong.

1966 Interpretation and General Clauses Ordinance

6. The 1950 Interpretation Ordinance was replaced by the Interpretation and General Clauses Ordinance 1966 (31 of 1966) ("1966 IGCO"), which is the current Interpretation and General Clauses Ordinance (Cap. 1). The negative vetting procedure and the positive vetting procedure were provided for by sections 34 and 35 of that Ordinance -

"34. (1) All rules, regulations and by-laws shall be laid on the table of the Legislative Council at the next meeting thereof after the publication in the *Gazette* of such rules, regulations or by-laws.

(2) Where rules, regulations or by-laws have been laid on the table of the Legislative Council, in accordance with the provisions of subsection (1), the Legislative Council may, by resolution passed at the next meeting of the Legislative Council held after the meeting at which they were so laid, provide that any such rules, regulations or by-laws shall be amended[4] in any manner whatsoever, and if any

[4] Section 3 of the 1966 IGCO—
"amend" means repeal, revoke, cancel, add or vary and the doing of all or any such things simultaneously or by the same Ordinance or instrument;

such resolution is so passed, the said rules, regulations or by-laws shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of publication in the *Gazette* of such resolution.

(3) Any resolution passed by the Legislative Council in accordance with subsection (2) shall be published in the Gazette not later than fourteen days after the passing thereof or within such further period as the Governor may allow in any particular case.

35. Where any Ordinance provides that subsidiary legislation shall be subject to the approval of the Legislative Council or any other authority, or contains words to the like effect, then –

(a) the subsidiary legislation shall be submitted for the approval of the Legislative Council or other authority; and

(b) the Legislative Council may by resolution or the other authority may by order amend the whole or any part of the subsidiary legislation."

Section 35 of the 1966 IGCO has not been amended since its enactment in 1966.

7. The 1966 IGCO contained a definition of "subsidiary legislation" and "regulations" -

"subsidiary legislation" and "regulations" mean any "proclamation, rule, regulation, order, resolution, notice, rule of court, by-law or other instrument made under or by virtue of any Ordinance and having legislative effect;".

However, section 34(1) referred to "rules", "regulations" and "by-laws" individually.

8. After its enactment in 1966, section 34 was amended by the Interpretation and General Clauses (Amendment) Ordinance 1981 (2 of 1981).

"repeal" includes rescind, revoke, cancel or replace;
"rules of court", when used in relation to any court, means rules made by the authority having for the time being power to make rules and orders regulating the practice and procedure of such court;

The purpose was to amend section 34(2) to provide that the time lapse between the laying of subsidiary legislation and any resolution seeking to amend it should be at least 4 weeks. In 1986, the whole section was replaced by the current version of section 34 by the Interpretation and General Clauses (Amendment)(No 2) Ordinance 1986 (39 of 1986). The 1986 version of section 34 used the expression "subsidiary legislation" in place of "rules, regulations and by-laws". However that Ordinance did not amend the definition of "subsidiary legislation" and "regulations". The Adaptation of Laws (Interpretative Provisions) Ordinance 1998 (26 of 1998) replaced the definition of "subsidiary legislation" and "regulations" by the current definition of "subsidiary legislation" and "subordinate legislation". The Interpretation and General Clauses (Amendment) Ordinance (No.2) 1993 (89 of 1993) amended the definition of "amend" in the 1966 IGCO by repealing "means repeal, revoke, cancel" and substituting "includes repeal".

9. Section 34 was amended by the Interpretation and General Clauses Ordinance (No. 2) of 1993 (89 of 1993) and Extension of Vetting Period (Legislative Council) Ordinance 2002 (8 of 2002). The purpose of both those amendments was to extend the period for negative vetting.

Parliament's power to amend delegated legislation in the UK

10. Our search of the literature does not show that the Parliament of the UK has ever enjoyed a general power to amend delegated legislation[5]. The negative vetting procedure, that is, a prayer for annulment of the delegated legislation, was discussed by Allen -

> "A prayer is a motion for the rejection of an entire Instrument. There is no means of moving an amendment to its provisions in detail. This has the unfortunate effect that Members who object to part, and perhaps a small part, of an Order must nevertheless pray against the whole. This has always been a nuisance, and has been the subject of many protests and suggestions for reform; but the overwhelming bulk of experienced opinion – e.g., before the Delegated Legislation Committee – is that, so long as the present form of procedure is maintained, it is impracticable to put Instruments through a kind of

[5] According to Factsheet L7, Statutory Instruments, issued by the House of Commons Information Office, statutory instruments cannot, except in extremely rare instances where the parent Act provides otherwise, be amended or adapted by either House. Each House simply expresses its wish for them to be annulled or passed into law, as the case may be. (See p. 5.)

> committee stage; for this procedure, by opening up indefinite debate, would defeat the whole purpose of delegation[6] and make intolerable inroads on the time of the House." [7] (Added emphasis.)

11. According to the observation of the same writer, the "affirmative" procedure, that is, the positive vetting procedure, is a comparatively modern invention, first employed in the Military Manoeuvres Act 1897[8]. There is no power of amendment in the affirmative procedure. As observed by Miers and Page[9], parliamentary controls of delegated legislation "are, and always have been, directed more towards the general aspects rather than the details of subordinate legislation. This is so if only because instruments must be approved or rejected in their entirety. Although instruments may be withdrawn and revised in response to points made before being re-laid, **there is no provision for their formal amendments.** The introduction of anything like a committee stage has always been resisted on the grounds that it would extend debate and defeat the purpose of delegation." (Added emphasis.)

12. During the committee stage of the Statutory Instrument Bill 1946, passed subsequently as the Statutory Instruments Act 1946, the House of Commons considered a clause proposed by a Member of the Parliament (MP) which provides power for either House of the Parliament to amend delegated legislation. This clause was negatived by the House of Commons[10]. Two MPs considered that if delegated legislation is to be flexible and convenient, it is extremely important that it should be passed with reasonable expedition. According to the Member for The High Peak (Mr Molson),

---

[6] The purposes or reasons of delegation were discussed in para. 6 of the Administration's paper, Delegation by the legislature of the power to make subsidiary legislation to an executive authority or other body, which include the saving of the legislature's time and the provision of flexibility to meet emergency and other urgent situations, etc.

[7] Allen, op cit, p. 127.

[8] Allen, op cit, p. 123. See also Bennion, F., *Bennion on Statutory Interpretation: A Code*, London: Lexis Nexis, 2008, footnote 6 at p. 248. The negative vetting procedure must pre-date 1897 but it was not clear when it was first introduced. None of the literature consulted referred to the genesis of the negative vetting procedure. The House of Commons Information Office states that the type of vetting mechanism "will usually be prescribed in the parent Act". (See Factsheet L7, op cit, p. 3). Section 5 of the Statutory Instruments Act 1946 provides that where a parent Act states that a statutory Instrument shall be "subject to annulment in pursuance of resolution of either House of parliament", then the negative vetting procedure under s. 5 of the Statutory Instruments Act shall apply.

[9] Miers, D. and Page, A., *Legislation*, London: Sweet & Maxwell, 1982, p. 159.

[10] Parliamentary Debates (Hansard), Fifth Series – Volume 417, London: His Majesty's Stationery Office, 1946, at 1167.

> "I do not believe that in the long run the House would really increase its effective control over delegated legislation and over other kinds of legislation if it deprived itself of this expeditious way of having effect given to the Acts which it passes. If on every instrument that came before the House there were unlimited opportunities of Debates and Amendment, it would mean that the House, which is **overworked** already, would be even more overworked than it is at the present time, and the effect would be that, **because of the vast volume of business laid before the House, the control, supervision and scrutiny would be less effective than at the present time.** Therefore, I suggest that this new Clause, which at first sight is so attractive because apparently it is designed to increase the control of Parliament over delegated legislation, would in point of fact not be effective for this purpose. There are other ways in which the House must make certain that its voice is effective. The executive is responsible to the House, and as long as the House retains the power either to dismiss the executive or to reject delegated legislation which is laid before it, it is in that way retaining its power far more effectively than would be done by the acceptance of this new Clause." (Added emphasis)

13. The Royal Commission on the Reform of the House of Lords (Royal Commission) considered the absence of power for the Parliament to amend statutory instruments an obstacle to effective scrutiny[11] but concluded that "there is no case for making it possible to amend Statutory Instruments once they have been formally laid before Parliament":

> "Any comprehensive system for considering detailed amendments to secondary legislation would negate the advantages of secondary legislation. On the other hand, any attempt to limit the scope for amendments in some arbitrary way (for example, by setting an upper limit on how many amendments could be debated) would be difficult to justify. Changes to proposed Statutory Instruments have occasionally been secured when Ministers have agreed to withdraw draft instruments or introduce replacement provisions. These options would remain open. The practice of consulting on proposed Statutory Instruments, which we hope to encourage, would reduce the number of occasions on which

[11] See *A House for the Future*, Royal Commission on the Reform of the House of Lords, January 2000, CM 4534, para. 7.10.

> serious criticisms might be levelled at the drafting of Statutory Instruments." [12]

Administration Wing, Chief Secretary for Administration's Office / Department of Justice

June 2011

[12] See *A House for the Future*, para. 7.29. See also the comment at p. 92 of *Making the Law, The Report of the Hansard Society Commission on the Legislative Process*, November 1992 which stated that if a power of amendment were introduced, "all the advantages of the greater flexibility of delegated legislation would be lost." There is ongoing debate on whether the Parliament should have power to amend subsidiary legislation in the UK. See for example *Delegated Legislation: the Procedure Committee Report and Proposals for Changes,* Standard Note: SN/PC/469, issued by the House of Commons Library on 12 February 2002.