

BASIC LAW BULLETIN

DECEMBER 2006 ■ ISSUE No. 9

Editor's Note

CONTENTS



01

EDITOR'S
NOTE



03

THE
FOCUS



09

JUDGMENT
UPDATE



26

LEGCO
PRESIDENT'S
DECISION ON
MEMBER'S
BILL

In this issue, we have reviewed the development of mutual legal assistance (MLA) by the HKSAR since Reunification under the principle of “one country, two systems” in the Basic Law.

These include MLA arrangements with the Mainland and the Macau Special Administrative Region (under BL 95) and with foreign states (under BL 96). In the *Focus*, we shall introduce the three mutual judicial assistance arrangements on civil and commercial matters that the HKSAR and the Mainland have entered into pursuant to BL 95 after Reunification and briefly describe their scope and key features. The *Sidelights* will cover the arrangement for the transfer of sentenced persons between Hong Kong and

Macau, and the application of international agreements relating to mutual legal assistance in Hong Kong. We also have our usual column on “LegCo President's Decision on Member's Bill”.



Since the last issue of the Bulletin, a number of important decisions have been handed down by the CFA which provide very valuable guidance on the interpretation of the Basic Law. There is therefore a strong emphasis on the development of constitutional jurisprudence by SAR courts in this issue. A summary of seven CFA decisions can be found in the *Judgment Update*. They cover a wide range of constitutional issues, including the following:

This publication is edited by the Legal Policy Division of the Department of Justice. It is published jointly by the Department of Justice, the Civil Service Bureau and the Constitutional Affairs Bureau for the general reference of primarily the Civil Service and is not intended to provide professional advice on any particular matter or to form the basis of any decision as to a particular course of action. While every effort has been made to ensure accuracy, no responsibility can be accepted by the Department of Justice, the Civil Service Bureau or the Constitutional Affairs Bureau for errors and omissions however caused.



This publication is published in support of the work of the Basic Law Promotion Steering Committee.



Department of Justice



Civil Service Bureau



Constitutional
Affairs Bureau



- By applying a purposive and contextual approach in the interpretation of BL 35 in respect of the right to legal representation in courts, the CFA (in the case of *The Stock Exchange of Hong Kong Ltd*) has held that the Disciplinary Committee of the Stock Exchange is not a court within the meaning of BL 35. In the light of the principle of independence of the judiciary in the Basic Law and the theme of continuity of the Basic Law in respect of the courts and judicial systems, the “courts” in the context of BL 35 refers to the courts of judicature (ie the institutions which constitute the judicial system, entrusted with the exercise of the judicial power in the HKSAR).
- The well-established constitutional principle of proportionality has been considered or applied by the CFA in the context of the right to equality before the law under BL 25 and freedom from arbitrary arrest or detention under BL 28 (and BoR Art 5(1)) (the case of *So Wai Lun*), the right to travel under BL 31 (the case of *Chan Wing Hing*), the presumption of innocence under BL 87 and BoR Art 11(1) (applied by virtue of BL 39) (the cases of *Lam Yuk Fai*, *Lam Kwong Wai* and *Hung Chan Wa*).
- The CFA has laid down detailed guidance on the issue of constitutional remedies under the Basic Law. In particular, it has applied the exceptional remedy of temporary suspension in the case of interception of communications and covert surveillance, whilst leaving open the question of whether there can be scenarios in which it would be right for the courts to accord temporary validity to a law or executive action which has been declared unconstitutional (the case of *Koo Sze Yiu*). Moreover, the CFA has elaborated on the scope of implied constitutional powers (and obligations) of SAR courts to adopt remedial interpretation of SAR legislation (eg the well-known techniques of severance, reading in, reading down and striking out) which will, as far as possible, make it Basic Law-consistent (the cases of *Lam Kwong Wai* and *Hung Chan Wa*). The CFA has also commented on the remedy of prospective overruling, but left open the question of whether SAR courts have the power to engage in a prospective overruling (the case of *Hung Chan Wa*).

Readers may recognize that we have covered in this issue a large amount of Basic Law materials. We sincerely hope that it would contribute to the greater understanding of the Basic Law and serve as a useful reference for our readers!