

ESSAYS

THE LEGAL SYSTEM OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

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1. INTRODUCTION

1997 will be a momentous year for Hong Kong — a year dominated by the great and historic event: the transfer of sovereignty from Britain to the People's Republic of China on July 1. It will be a year in which Hong Kong people become the inhabitants of the Hong Kong Special Administrative Region of the People's Republic of China — a year in which the vision “one country, two systems” will move from the theoretical to the actual, and the soothsayers will be confronted with their predictions — both gloomy and glowing.

The legal system is at the heart of the concept of “one country, two systems.” In this paper, I will outline the essential features of Hong Kong's current and future legal systems; I will describe the legal work that has been done to ensure a smooth transition; and I will give my personal assessment of the changes that will take place in the months and years to come.

2. THE PRESENT LEGAL SYSTEM

American lawyers will find much that is familiar to them in the law and its practice in Hong Kong. I refer to the content of the law; the underlying values and ideals of the common law; and the nature of the legal profession in Hong Kong.

The underlying values and ideals of the common law are

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epitomized in the concept of the rule of law. The Governor of Hong Kong has referred to *two bedrock principles* underpinning his program. The first is the economic principle that Hong Kong must first create wealth before spending a share of it on improving its public services. The second is the rule of law. Let me quote what the Governor said about the rule of law in a speech he made in 1994:

The rule of law is essential for Hong Kong's future. It begins with individuals and their right to seek the protection of the Courts, in which justice is administered by impartial judges. It protects the freedom of individuals to manage their affairs without fear of arbitrary interference by the Government or the improper influence of the rich and powerful. Its starting point is the individual but it encompasses the whole of society. For the business community in particular, the rule of law is crucial. Without it, there is no protection against corruption, nepotism or expropriation. Only under the rule of law are businessmen guaranteed the level playing field and the competitive environment which they need.¹

There are several vital principles under the umbrella of the rule of law, all of which are alive and well in Hong Kong. One is that laws operate separately from the political system; they are published and are accessible; and they provide a degree of certainty and predictability as to how disputes are to be resolved. A second principle is that everyone, no matter what station, is subject to the law, and that a person can only be punished for conduct that is a breach of the law. A third principle is that of equality before the law: no one receives better or worse treatment under the law because of his or her status, wealth, race, and so on. A fourth principle is that the settlement of disputes is in the hands of judges who are independent of the executive and who are not subject to pressure from any source in carrying out their duties.

¹ Governor Christopher Patten, 1994 Policy Address, in *Looking Far Beyond the Final Thousand Days of British Rule*, S. CHINA MORN. POST, Oct. 6, 1994, at 6.

Hong Kong's commitment to the rule of law is underpinned by the existence of justiciable human rights. The Hong Kong Bill of Rights Ordinance, enacted in 1991, allows anyone to challenge pre-existing laws, or current government policies and practices, as being inconsistent with the Ordinance. In addition, laws enacted after the Bill of Rights Ordinance can be challenged under Hong Kong's main constitutional instrument, the Letters Patent, if they are thought to be inconsistent with the International Covenant on Civil and Political Rights.

3. THE FUTURE

I have described the essential nature of Hong Kong's *current* legal system. But what of the future? On July 1, 1997, Hong Kong will become a Special Administrative Region ("S.A.R.") of the People's Republic of China ("P.R.C."). The transfer of sovereignty, the future administration of Hong Kong, and the preservation of Hong Kong's economic, political, and legal systems, are governed by the Sino-British Joint Declaration signed in December 1984, a binding international treaty registered with the United Nations. For fifty years beyond 1997 it guarantees "one county, two systems." Except in respect of defense and foreign affairs, which will be the responsibilities of the Central People's Government, the S.A.R. will enjoy a high degree of autonomy. It will have its own government and legislature composed of local inhabitants. It will retain the status of a free port and separate customs territory. Its independent role in economic and trade fields will be preserved. The Hong Kong S.A.R. will mirror, in all significant institutions and policies, the Hong Kong of today.

The Joint Declaration guarantees the continuance of the legal system. This is repeated in the Basic Law — the law enacted by the National People's Congress of the P.R.C. as the constitutional framework for Hong Kong as from July 1, 1997. Article 8 of the Basic Law is worth citing in full:

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

There are specific guarantees in the Joint Declaration and Basic Law relating to the legal system, including:

- An independent judiciary with security of tenure;
- The use of the English language, in addition to Chinese, in the courts;
- Reliance on precedents from other common law jurisdictions;
- An independent public prosecution service;
- The continuing ability of overseas lawyers and law firms to practice in Hong Kong;
- A Hong Kong based Court of Final Appeal, which will replace the Privy Council in London as the final appellate court for Hong Kong; and
- Requirement that the International Covenant on Civil and Political Rights as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

4. PREPARING FOR THE FUTURE

These guarantees of the continuity of our legal system are of crucial importance to the community. But that continuity can only be realized in practice through the work being done to prepare for the transition of the legal system. Hong Kong has prepared itself, and prepared itself well, for the legal aspects of the transition in a number of vital areas.

4.1. Bilingual Laws

One historic and unique task we are undertaking is the production of bilingual laws. In the past, legislation in Hong Kong was enacted only in the English language. But since 1989 all new Ordinances have been drafted in English and Chinese, with both texts equally authentic. Work is also in hand to translate into Chinese the Ordinances which were enacted in English only. There are about twenty-one thousand pages of such legislation. We have authenticated nearly half of them. In view of the progress made and the remaining work to be done, I am confident that we will have a fully bilingual statute book by the

transfer of sovereignty.

4.2. *Localization of Laws*

The localization of law is needed because a number of the laws of Hong Kong are United Kingdom statutes which have been extended to Hong Kong. Many of these cover areas of major importance to Hong Kong, such as civil aviation, merchant shipping, and copyright. These statutes will cease to have effect in Hong Kong after June 1997. Therefore, it will be necessary to "localize" them — that is, to replace them by legislation enacted in Hong Kong.

We are achieving this through a number of localization Ordinances. We have already enacted many of these, and I am reasonably confident that our work in this area will be completed before July 1, 1997.

4.3. *Adaption of Laws*

Another exercise is under way to ensure that all local Ordinances are in conformity with the Basic Law. We need to comb through all our Ordinances — numbering around 640 — to pick up all points that may conflict with the Basic Law. Many of these involve simple changes of language: "Governor" to become "Chief Executive" and dropping the word "Royal," for example. Other changes will involve substantive and, in some instances, complex questions.

So far, adaptation proposals covering about 470 Ordinances have been handed over to the Chinese side in about 130 papers. We aim to hand over proposals for the remaining Ordinances in the near future. As most of those are uncontroversial, it should not be difficult for agreement to be reached on the substance of these proposals.

We have also sought to discuss with the Chinese side the mechanism for bringing the necessary adaptation provisions into force on July 1, 1997. It is essential that the modalities for the adaptation of laws are made known at an early date and that the necessary amendments to individual ordinances are achieved in a proper and timely manner. Exchanges of views between experts of the two sides have been held, and I look forward to a satisfactory outcome.

It is clear that a great deal of work has been done in the two areas of localization and adaptation of laws, and more remains to

be done. My department is pushing ahead with the work and our programs will allow us to complete the work in a timely fashion. I am confident that as a result of our work, the integrity of the Hong Kong statute book will be maintained after June 30, 1997.

4.4. *International Rights and Obligations*

Another important area of the work in preparing for the transition is that of international rights and obligations. The United Kingdom has, over the years, extended more than two hundred *multilateral* international agreements to Hong Kong. Many of these agreements are important to Hong Kong and play a vital role in facilitating its legal and commercial links with the international community. These arrangements cover such fields as civil aviation, merchant shipping, private international law, protection of labor standards, and customs cooperation. We needed to take action in order to ensure the continued application of these arrangements after June 30, 1997.

The Sino-British Joint Liaison Group has established a Sub-Group on International Rights and Obligations in order to carry out this task. The work is nearing completion. So far, the two sides have reached agreement, in principle, on the continued application of some two hundred treaties, including those relating to many international organizations in which Hong Kong participates, such as the World Trade Organization, the Customs Cooperation Council, the International Maritime Organization, and the World Intellectual Property Organization. Work on the mechanism needed to effect the continued application of these treaties has either been done or is now taking place in the Joint Liaison Group.

Over the years Britain also extended a large network of *bilateral* agreements to Hong Kong in a variety of practical areas, for example, air services, extradition, and enforcement of judgments in civil and commercial matters. On July 1, 1997, all these agreements will automatically lapse, unless renegotiated to continue beyond 1997. This would have serious implications. For example, if Hong Kong had no extradition agreements, we could not seek the return of fugitive criminals to stand trial in Hong Kong and, more importantly, criminals or those accused of serious criminal offenses who fled to Hong Kong could not lawfully be extradited. Hong Kong could become a haven for the world's crooks.

In order that bilateral agreements can be in place on the transfer of sovereignty, agreement has been reached in the Joint Liaison Group for Hong Kong to negotiate and conclude bilateral agreements in areas such as air services, investment promotion and protection, surrender of fugitive offenders, mutual legal assistance, and transfer of sentenced persons. A number of bilateral agreements have already been signed. These include fifteen air services agreements, eleven investment promotion and protection agreements, six surrender of fugitive offenders agreements, and one mutual legal assistance agreement. Further agreements have been cleared or are awaiting clearance in the Joint Liaison Group for signature. Negotiations are continuing as quickly as possible with additional partners in order that a reasonably comprehensive framework of bilateral agreements can be in place by July 1, 1997. Many of these agreements will need to be supported by new domestic legislation, for example those in respect of surrender of fugitive offenders, mutual legal assistance, and transfer of sentenced persons. The necessary bills are being prepared and promoted with a view to their enactment before the transfer of sovereignty.

4.5. *Mutual Understanding*

Another necessary task in relation to the transition is that of enhancing mutual understanding with our legal counterparts in the People's Republic of China and establishing a good working relationship with them. After 1997, two different legal systems will co-exist in China. It is most important that lawyers and officials should get to know how the two systems work. Strengthening the contacts and exchanges between the two sides over legal issues will bring mutual benefits springing from greater understanding. Channels for achieving these goals include organizing visits to and from China, and holding briefings for visitors from China.

In 1995, my department organized a total of twenty incoming visits and ten outgoing visits. One of these was my own visit to Beijing and Shanghai, where I had the opportunity to discuss many issues of common interest. In 1996, there were forty-one incoming visits and nine outgoing ones. I am convinced that these contacts will help to foster the mutual understanding that is essential to a smooth transition.

5. THE ADOPTION OF EXISTING LAWS

As I mentioned earlier, Article 8 of the Basic Law provides that the laws previously in force in Hong Kong shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region. We have been reviewing the existing Hong Kong laws in order to ascertain how the relevant provisions should be adapted to comply with the Basic Law. Most adaptation amendments only involve changes of terminology, for example, replacing "Governor" with "Chief Executive."

We are disappointed by the recent decision of the Standing Committee of the National People's Congress that twenty-four existing Ordinances wholly or in part contravene the Basic Law and, to the extent of that contravention, should not be adopted as the laws of the Special Administrative Region. Those provisions include three sections in the Bill of Rights Ordinance, and the provisions relating to freedom of assembly and freedom of association in the Societies Ordinance and the Public Order Ordinance.

There is no legal basis for the assertion that those provisions contravene the Basic Law. On the contrary, the freedom of assembly and the freedom of association currently provided for in the Societies Ordinance and the Public Order Ordinance are themselves guaranteed by the Basic Law. Mr. C.H. Tung, who will be the Chief Executive of the Special Administrative Region, has promised that new legislation will be put forward in due course to replace the repealed provisions, and this will take account of the views of the Hong Kong public as expressed through a consultation exercise. We hope the resulting legislative proposals will reflect the wish of the community to preserve civil liberties in line with the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as currently applied to Hong Kong. Those provisions, as promised in the Joint Declaration and Basic Law, will remain in force after the transfer of sovereignty.

6. A PERSONAL ASSESSMENT

I mentioned earlier that 1997 will bring some changes to the law. Let me now give my personal assessment of the main changes

that will occur.

6.1. *The Introduction of a Detailed Written Constitution*

Hong Kong's current constitution is based on the Letters Patent and Royal Instructions, which are broadly framed documents which trace their origins to late 19th century models produced in London for use in a wide diversity of territories. This constitution will be replaced as from July 1 this year, when the Basic Law comes into operation. That document, which contains 160 articles and three annexes, is a detailed constitutional framework for the Hong Kong Special Administrative Region for the next fifty years. Hong Kong will, for the first time, have a modern constitution and one specifically written for it.

This will have great significance for our legal system. The Basic Law is not simply a statement of intentions nor is it a policy document. It will be part of Hong Kong's domestic law and a law which touches so much of Hong Kong's way of life. It will be a law which the Hong Kong courts and judges will have to apply, uphold, and interpret. Lawyers will need to have a full and confident familiarity with it.

Litigants will be able to base their arguments on provisions in the Basic Law and challenge actions that are believed to be inconsistent with them. Judicial review of government administrative action will take on a new lease of life.

Working with and understanding the Basic Law will present a new experience for the legal profession and for the courts. The Basic Law will create a new era of constitutional law and constitutional litigation. The profession will need to abandon ingrained ways of thinking and to adapt to this new legal order. I have every confidence in its ability to do so.

6.2. *The Appellate System*

As from July 1 this year, appeals to the Judicial Committee of the Privy Council will not be possible. Instead, Hong Kong will have its own Court of Final Appeal. The fact that this court will be in Hong Kong, not Beijing, and will be composed of judges imbued with the values of the common law, is one of the most reassuring aspects of "one country, two systems."

Much work has already been done to prepare for the setting up of the court. The legislation needed to establish the court was enacted in 1995, following a Sino-British agreement made in June

of that year. Detailed rules governing the procedures of the Court have been drafted and are being considered by a working group set up by the Judiciary and including representatives of the Law Society, Bar Association, and my department.

The Sino-British agreement on the Court of Final Appeal, made in June 1995, provided that the team designate of the Hong Kong Special Administrative Region should be responsible for the preparation for the establishment of the Court of Final Appeal on July 1, 1997, with the British side (including relevant Hong Kong Government departments) participating in the process and providing its assistance.

Now that the Chief Executive (designate) has been appointed, it will be possible for this agreement to be implemented. The establishment on July 1, 1997, of a strong Court of Final Appeal is a development that is important for the continuity of our judicial system. The British side, including relevant government departments, will provide full assistance in this process.

6.3. *The Greater Use of Chinese in Hong Kong Courts*

The process of using Chinese in the courts has been a gradual one. It started in the magistracy in 1974, and later was extended to some proceedings in the higher courts. Provided that necessary amendments in respect of the language ability of jurors are enacted before July 1 this year, it should be possible by that date for all courts and tribunals to operate in Chinese in all types of proceedings.

The language to be used in court proceedings is governed by the Official Languages Ordinance. That Ordinance provides that, subject to certain transitional provisions, a judge may use either or both of the official languages (Chinese and English) in any proceeding, or a part of any proceeding, before him as the judge thinks fit. It then goes on to state that, regardless of which language the judge chooses to use, a party to, a witness in, and a legal representative in, any proceeding or a part of any proceeding may use either or both of the official languages. In other words, a judge could decide to use Chinese when hearing evidence and English when giving directions to a jury. And a legal representative before him could choose to use either language as he or she thought fit. No one is therefore required to abandon the use of English in court.

The bilingual laws program and the increasing use of Chinese

in the courts are of immeasurable value to the community, for they remove a language barrier, help to de-mystify the law, and promote the ideal that the law belongs to the people. For the first time, the vast majority of Hong Kong's population will have access to the law in their own language. And if they are ever involved in a court case, it will be possible for the proceedings to be heard in their own language. These worthy developments can, I believe, be achieved without compromising the quality or integrity of our legal system.

6.4. *The Increasing Links Between the Legal System of Hong Kong and the Legal System of the People's Republic of China*

The concept of "one country, two systems" implies one country and two *legal* systems. Two entirely different legal systems will co-exist within the same country. However, there will inevitably be growing links between the systems. Given the economic and social ties between the two jurisdictions, this is to be welcomed, but we also need to ensure that the interface between the two legal systems does not undermine the integrity of the S.A.R.'s common law system.

The Hong Kong Special Administrative Region will need to have effective mechanisms in place for mutual legal assistance, including the surrender of fugitive offenders between it and the rest of China. These arrangements must be based firmly on proper legal procedures. Once they are in place, it will be possible to enforce Hong Kong judgments and arbitral awards in the mainland and vice versa; to serve in one jurisdiction judicial documents issued in the other jurisdiction; and to obtain from one jurisdiction the surrender of a fugitive who is found in the other.

Alongside these mechanisms for legal cooperation, there will be a continuing expansion of contacts between lawyers from the mainland and Hong Kong, and increasing understanding by those lawyers of the two different systems. Again, this can only be to the benefit of both jurisdictions.

7. CONCLUSION

The changes to Hong Kong's legal system that I have highlighted will not, I believe, alter in any fundamental way the fabric of the law. The changes will be part of the change from a British dependent territory to a Special Administrative Region, with its

own legal system and way of life separate from those of China.

The work that the Hong Kong Government has done to prepare for 1997 has been directed toward the smooth transfer of sovereignty, the preservation of our common law system, and the continued maintenance of the rule of law. Over the past years, we have worked to preserve and enhance the rule of law in Hong Kong and to make it a better place for all to live in, both now and in the future. Hong Kong is now well-prepared to realize the vision of "one country, two systems."