

THE RULE OF LAW IN HONG KONG: SOME IMPLICATIONS FOR U.S. POLICY⁺

DICK THORNBURGH^{*}

My interest in Hong Kong dates back to the early 1980s when, during my tenure as Governor of Pennsylvania, I traveled there to help establish trade links between businesses in my state and those in China and Hong Kong. During the Bush Administration, I returned to Hong Kong as Attorney General of the United States. At that time, Hong Kong's transition, provided for in the 1984 Sino-British Joint Declaration ("Joint Declaration"), was in full swing. However, few people outside the colony were then paying attention to the setbacks the Joint Declaration was already experiencing. In 1994, I led a delegation of the International Republican Institute, a part of the National Endowment for Democracy, to conduct a study of the rule of law in Hong Kong, the guarantees for its legal system in the Joint Declaration, and the post-1997 prospects for the rule of law there.

Our report concluded that there had already been a steady erosion in the prospects for the rule of law caused by Chinese disregard of its commitments under the Joint Declaration. Since our report, violations of the Joint Declaration have continued. These include the conclusion of an agreement on the Court of Final Appeal that contravenes the Joint Declaration, the appointment of a Provisional Legislature, and the recent repeal of civil liberties and electoral laws. I regret to say that in the case of the Court of Final Appeal — as well as in a little known agreement to cap the number of directly-elected legislative seats at 20 — the Chinese were assisted in their violation of the Joint Declaration

⁺ Mr. Thornburgh presented a modified form of this essay as testimony before the Subcommittee on East Asian and Pacific Affairs, Committee on International Relations of the United States House of Representatives on February 13, 1997.

^{*} Counsel, Kirkpatrick & Lockhart LLP. Mr. Thornburgh served as Attorney General of the United States and was Governor of Pennsylvania. Mr. Thornburgh is extremely active in issues implicated in Hong Kong 1997. He is a founding member of the U.S. Committee for Hong Kong, a private and bipartisan organization, formed to monitor the reversion process.

by the British government.

I recently presented my views before the House Subcommittee on East Asian and Pacific Affairs as a founding member of the U.S. Committee for Hong Kong, a bipartisan organization formed to support the guarantees Hong Kong's people were given for autonomy, a democratically-elected legislature, the rule of law and an independent judiciary, and a free market capitalist economy.

On July 1, 1997, Hong Kong will revert to the People's Republic of China ("P.R.C." or "China"). Hong Kong's return to Chinese rule was agreed to by China and Great Britain in the 1984 Sino-British Joint Declaration. In exchange for relinquishing sovereignty over Hong Kong, including Hong Kong Island, the Kowloon peninsula, and the New Territories, China made a set of comprehensive promises to allow Hong Kong autonomy in all but defense and foreign affairs, an elected legislature, an independent judiciary, and a capitalist economy. This arrangement, which Deng Xiaoping designated "one country, two systems," appeared to ensure a bright future for Hong Kong's people, and gave the international community great confidence in the future, and, indeed, in China's ability to recognize the reasons for Hong Kong's success. For even though Hong Kong was a colony, it was a colony of Great Britain's, a country whose own long tradition of the rule of law and parliamentary democracy provided a check on arbitrary government.

As China has stepped up its attack on its commitments in the Joint Declaration, some of China's defenders, including members of the Provisional Legislature, have attempted to justify China's actions by the shortcomings of British colonial rule. Allow me to debunk that excuse once and for all. China's commitments in the Joint Declaration are clear and unambiguous. They were voluntarily undertaken in an international agreement registered at the United Nations. No alleged defect in British rule can be used to justify China's violations of its commitments to allow Hong Kong autonomy, an executive accountable to an elected legislature, an independent judiciary with the power of final adjudication, comprehensive personal and political freedoms, and a free market capitalist economy. Efforts to excuse China's string of broken promises should be seen for what they are: a determination that Hong Kong's people are not entitled to democracy, the rule of law and human rights, as they were promised in the Joint Declaration.

The most recent blow to Hong Kong's future delivered by the P.R.C. occurred in January 1997 when the legal subgroup of the Preparatory Committee, a P.R.C.-appointed body, recommended that 25 ordinances not be adopted as laws of the Hong Kong Special Administrative Region ("S.A.R.") in their current form. This recommendation contravenes the Joint Declaration's guarantee that Hong Kong's laws are to remain basically unchanged.¹ The legal subgroup's recommendations were subsequently adopted by the whole Preparatory Committee on February 2 in Beijing. The entire package will now go to the National People's Congress for likely final approval.

The Preparatory Committee recommended striking three sections of the Bill of Rights Ordinance which deal with the Ordinance's interpretation and its role in Hong Kong's common law system. The provisions that the Preparatory Committee legal subgroup proposes be struck:

- (1) state the Ordinance's purpose to incorporate the International Covenant on Civil and Political Rights ("ICCPR") into Hong Kong law [Section 2, clause 3];
- (2) direct that legislation pre-dating the Ordinance which is inconsistent with its provisions be repealed, while prior legislation which can be construed as consistent with the Ordinance, be so construed [Section 3]; and
- (3) direct that where possible, domestic law should be construed consistently with international treaty obligations [Section 4].

The Preparatory Committee legal subgroup claimed that these provisions contravene the Basic Law-Hong Kong's so-called "mini-constitution" passed by the National People's Congress in 1990.

These provisions do not violate the Basic Law. They simply state the purpose of the Bill of Rights Ordinance — which is to incorporate the ICCPR into Hong Kong law — as well as the familiar common law principle that inconsistent pre-existing laws are repealed, and others should be construed as consistent with the Bill of Rights. Indeed, the first of these provisions could hardly

¹ Joint Declaration on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., § 3(3), 1985 Gr. Brit. T.S. No. 26 (cmdnd. 9543).

be inconsistent with the Basic Law since Article 39 of the Basic Law itself incorporates the ICCPR into Hong Kong law. The only purpose of these repeals would appear to be to undermine the Bill of Rights which provides a source of authority for protecting civil rights independent of the Basic Law.

The Preparatory Committee legal subgroup also recommended repealing five electoral laws governing elections to Hong Kong's Legislative Council ("Legco") (the geographical constituencies as well as the functional constituencies), the Urban Council, the Regional Council, and the District Boards. These election laws do not contravene the Basic Law's substantive provisions in any way. The Basic Law repeats the Joint Declaration's guarantee of an elected legislature for Hong Kong. The Preparatory Committee's purpose in repealing these laws is presumably to clear the way for the newly-appointed Provisional Legislature to prepare new electoral laws.

The Preparatory Committee legal subgroup also recommended repealing the Societies Ordinance and the Public Order Ordinance. Both these ordinances protect the freedoms of association, assembly, procession, and demonstration, all of which are guaranteed by the Basic Law in Articles 27 and 39. The full Preparatory Committee decided to repeal only amendments made to the ordinances over the past few years designed to make them much less restrictive. There is some debate over the effect of the full Preparatory Committee's actions because under the common law, it is not possible to repeal a part of an ordinance and leave the rest intact. The repeal of these amendments may have left a vacuum. In that event, it will be all the more important that the business of regulating freedoms of association and assembly be addressed by an elected, not an appointed, body.

A number of other ordinances that the Preparatory Committee recommended repealing will lapse of their own accord. Their inclusion in the list of repealed recommendations may have been intended to obfuscate the serious nature of the repeals of civil liberties and electoral provisions.

The Preparatory Committee's attempt to strike certain laws on the basis of their inconsistency with the Basic Law exposes one of the most important, and least recognized, problems in the Hong Kong transition: The potentially pernicious role of the Basic Law itself. The Basic Law was provided for in the Joint Declaration as a way to enact its provisions into local Hong Kong law, not to

subvert the guarantees of the Joint Declaration itself.

In a major report in 1992, the International Commission of Jurists ("ICJ") reported that "the Basic Law is inconsistent in many important respects with the obligations accepted by the P.R.C. by its signature and ratification of the Joint Declaration."² The ICJ called on the P.R.C. to amend the Basic Law to conform it to the Joint Declaration.

The ICJ identified fifteen Basic Law articles which are inconsistent with the Joint Declaration. Among them are serious deviations from the Joint Declaration in the treatment of the jurisdiction and power of final adjudication of Hong Kong's courts as well as the limitation of democratically-elected seats in Hong Kong's post-1997 legislature to one-third.

The Basic Law created an enormous loophole in the Hong Kong courts' jurisdiction by denying them the authority to hear cases involving "acts of state such as defense and foreign affairs." As the ICJ noted, "this goes beyond the exclusion of defense and foreign affairs from the judicial power" of Hong Kong's courts by "treating defense and foreign affairs as merely examples of excluded 'acts of state.'" The Basic Law also assigns the power of interpretation and invalidation of Hong Kong law to the Standing Committee of the National People's Congress, rather than to the Court of Final Appeal of Hong Kong.

The ICJ also criticized the Basic Law's deviations from the Joint Declaration's clear provision for an elected legislature for Hong Kong. Article 68 of the Basic Law, read together with Annex II of the Basic Law and a decision by the National People's Congress, established that just one-third, 20 of 60, of the seats in the post-handover legislature would be elected. The British government, behind the scenes, acquiesced in this clear violation of the Joint Declaration,³ despite its earlier view that the transition period between 1984 and 1997 should be used to "build up a firmly based democratic administration in Hong Kong in the years between now and 1997."⁴

² *Countdown to 1997: Report of a Mission to Hong Kong*, International Commission of Jurists, 1992.

³ Martin C.M. Lee & Tom Boasberg, *Broken Promises: Hong Kong Faces 1997*, J. DEMOCRACY, Apr. 1994, at 48.

⁴ Richard Luce, Minister of State with Special Responsibility for Hong Kong, House of Commons Official Report, Parliamentary Debates, *Hansard*, at 470 (December 5, 1984).

In 1995, Great Britain and China made an agreement on the establishment of a new Court of Final Appeal which also clearly violates the Joint Declaration. Under the Joint Declaration, a new high court for Hong Kong was to be composed of judges selected by an independent commission. Judges from overseas common law jurisdictions were to be allowed to join, continuing Hong Kong's tradition of relying on expatriate judges trained in the common law to fill out the bench. However, the deal agreed to by both China and Great Britain limits the participation of overseas common law judges to just one, and gives the Chief Executive, appointed by China, an unprecedented role in judicial selection.

Finally, China and Great Britain adopted the Basic Law's statement of jurisdiction of Hong Kong's courts for the high court, agreeing that the court would not be able to hear cases involving "acts of state, such as defense and foreign affairs, et cetera." As I set forth earlier, the Standing Committee of the National People's Congress is given the power to interpret this jurisdictional statement, guaranteeing that Beijing will have the final word on Hong Kong's courts' treatment of civil liberties, or challenges to government power.

The Basic Law and the agreement on the Court of Final Appeal constituted enormous setbacks to Hong Kong's autonomy. The most serious setback of all, however, took place on December 21, when China reneged on its promise of an elected legislature, by engineering the appointment of the Provisional Legislature. The Provisional Legislature was chosen by the 400-member Selection Committee, who were in turn chosen by the 150-member Preparatory Committee appointed by Beijing and chaired by China's foreign minister. The Provisional Legislature continues to meet in Shenzhen in mainland China rather than face a probable court challenge from Hong Kong's elected Legco.

Without a concerted effort to prevent it, the Provisional Legislature will likely be used to revise Hong Kong's election laws and Hong Kong's legal protections for civil liberties. There is great concern in Hong Kong about how the Provisional Legislature will carry out the Basic Law's Article 23 which requires the Hong Kong legislature to pass laws against "subversion against the central people's government," theft of state secrets, and to prohibit Hong Kong political organizations from establishing ties with foreign political organizations. As the ICJ noted, these provisions

would violate both the ICCPR and the Joint Declaration. The prospect of new subversion laws, in violation of the Joint Declaration, has caused particular anxiety in Hong Kong in the wake of the sentencing of Wang Dan, the Tiananmen student leader recently sentenced to jail for 11 years for attempting to subvert the government. Wang's alleged subversive acts included publishing articles in foreign publications — including, I believe, *The Christian Science Monitor* — attempting to maintain contacts with other dissidents, and taking a correspondence course from the University of California at Berkeley.

Beijing's definition of theft of state secrets was demonstrated by its treatment of reporter Xi Yang, a P.R.C. national who reported for the Hong Kong paper *Ming Pao*. Xi was recently released early from jail after being sentenced to 12 years in 1993 for publishing financial data that was soon to be made public anyway.

The Provisional Legislature has been criticized by the international community and by Governor Chris Patten, who denounced it as having “no legitimacy, no credibility and no authority.” The U.S. called it “unnecessary and unjustified” since there is no basis for a Provisional Legislature in the Joint Declaration. The U.S. has also expressed its view that the Provisional Legislature should have a limited tenure and mandate. The Provisional Legislature includes 10 candidates who actually lost their campaigns for election to the Legco in 1995. While the Provisional Legislature includes a total of 33 members of the elected Legco, their presence does not confer legitimacy on the body. The willingness of some elected legislators to turn their backs on the people who elected them by participating in an illegitimate body may simply demonstrate that they feel they have no alternative but to acquiesce to China's disregard of its commitments to Hong Kong.

The issue of the Provisional Legislature touches on an extremely important, but often overlooked, issue — the wishes and attitudes of Hong Kong's people. At every opportunity, Hong Kong's people have shown support for democratic institutions, and for democratic candidates. In 1991, the first ever democratic elections to the Legco, 17 of 18 seats went to pro-democracy candidates. Fourteen of these seats were won by the Democratic Party, the territory's largest party. In the 1995 elections for Municipal Councils, Democratic Party candidates

won three times as many seats as any other party. In 1995 elections for the Legco, pro-democracy candidates won 24 seats, with 19 going to members of the Democratic Party.

Hong Kong's people do not support a role for the Provisional Legislature in revising laws governing rights of assembly and association. According to a poll conducted by the *Hong Kong Standard* newspaper, almost two-thirds of Hong Kong's people believe that the Public Order and Societies Ordinances should be handled by the post-handover elected legislature, and oppose the Preparatory Committee's recommendations reinstating repressive colonial laws. A majority of 58.6% felt that the repeals announced by the Preparatory Committee would undermine human rights—a clear rebuke to Chief Executive Tung Chee-wah, who has called the proposed revisions “fair and reasonable.” By accepting appointment as Chief Executive, Mr. Tung has accepted the responsibilities of running Hong Kong according to the terms of the Joint Declaration. In the final analysis, Mr. Tung and his government will bear the greatest responsibility for ensuring that the Joint Declaration's guarantees for an elected legislature, independent judiciary, capitalist economy, and personal freedoms are met. This is not a promising beginning.

The U.S. Congress has made support for the Joint Declaration the cornerstone of U.S. policy toward Hong Kong. The 1992 United States-Hong Kong Policy Act sets forth the policy of the United States that it should support the full implementation of the Joint Declaration, as well as democracy and human rights in Hong Kong and the continuation and expansion of bilateral ties between the United States and Hong Kong. The Act requires annual reports on the Joint Declaration's implementation and directs the President, after July 1, 1997, to determine whether Hong Kong is “sufficiently autonomous to justify treatment under a particular law of the United States, or any provision thereof, different from that accorded the People's Republic of China.” In other words, if Hong Kong is not autonomous — as measured by the “terms, obligations, and expectations expressed in the Joint Declaration” — the President may suspend the application of that law with respect to Hong Kong.

Reports submitted under the U.S. Hong Kong Policy Act have been disappointing. In 1995, the Congress, citing “deficiencies” in reports submitted under the Act, enacted specific reporting criteria requiring “detailed information on the status of and other

developments affecting, implementation of the Sino-British Joint Declaration” including the Basic Law’s consistency with the Joint Declaration, the treatment of political parties, the independence of the judiciary, and the Bill of Rights. Despite these specific directives, the 1996 report failed to address the Basic Law’s inconsistencies and other violations of the Joint Declaration. Subsequently, the Congress passed additional legislation requiring that the 1997 report specifically address China’s appointment of a provisional legislature and the expected dissolution of the Legco.

The 1997 report, due March 31, will be the last report required under the Act before reversion. I suggested to the Subcommittee that it consider holding a comprehensive hearing on this report in order to thoroughly examine not only the Joint Declaration’s implementation, but also the State Department’s treatment of the developments over the past year including the appointment of the Provisional Legislature, the status of the Bill of Rights Ordinance, and other laws affecting civil liberties, and the treatment of political parties. The Department of State should be put on notice in advance of this report that Congress expects a full and complete accounting of developments over the past year.

The State Department’s reports under the U.S. Hong Kong Policy Act reflect a much larger problem in U.S. policy toward Hong Kong. The United States claims that it cannot identify violations of the Joint Declaration because it is not a party to the Joint Declaration. The official Administration position is that “the United States does not offer legal interpretations of agreements to which it is not a party”⁵ and where the parties themselves have not stated their positions. The United States thus claims, in effect, that it cannot conclude that the Joint Declaration’s provision for an elected legislature is violated by the appointment of a provisional legislature because Great Britain itself has not said so.

It is true that Great Britain has not taken the step of calling the Provisional Legislature a violation of the Joint Declaration. Instead, Britain has attempted to pursue a kind of two-track policy, opposing the Provisional Legislature on “political” grounds while refraining from drawing a legal conclusion about its

⁵ Testimony of Assistant Secretary of State Winston Lord, Senate Committee on Foreign Relations, July 18, 1996.

inconsistency with the Joint Declaration.

This is a specious position which the U.S. must reject unequivocally. Great Britain's position, which is untenable in my view, is irrelevant. Support for the Joint Declaration is a matter of U.S. law. Even if U.S. law didn't link our policy to support of the Joint Declaration, U.S. policy toward Hong Kong should clearly be informed by China's compliance with the Joint Declaration. The Administration position toward Hong Kong is also shortsighted. U.S. interests in Hong Kong and Asia, from trade to law enforcement, will be directly affected by whether the Joint Declaration's broad guarantee of autonomy is respected by China. The concept of autonomy cannot be separated from the guarantees of an elected legislature, an independent judiciary, and a capitalist economy. Any broken promise by China will make Hong Kong's autonomy itself more fragile.

As a former Attorney General and prosecutor, I am particularly concerned with the potentially devastating impact of official corruption on Hong Kong. Hong Kong, after weathering a difficult period in the 1970s, has earned a reputation for being one of the cleanest and most honest governments in the world. However, Hong Kong is already experiencing a marked increase in complaints of corruption. The growing economic links between Hong Kong and China have exposed Hong Kong customs and immigration officials to greater opportunities for corruption. While China has committed to establish an independent anti-corruption commission after 1997, there are obvious concerns about Beijing's commitment to an apolitical body such as the current Independent Commission Against Corruption with carefully circumscribed powers.

It would be a tragedy if, at a time when democracy and the rule of law are gaining ground around the world, Hong Kong's people, a great many of whom are refugees or descendants of refugees from repression, were to be denied the future they were promised. The United States simply must stand up for the people of Hong Kong. As the strongest and most free nation in the world, our leadership is crucial. It is more than a matter of national interest, it is a matter of national honor.