

## COMMENT



### Judges and the Through Train

What price the independence of the judiciary?

Not much, if two recent incidents are anything to go by. Although judges are not short on rhetoric concerning their independence from the executive branch, it has been revealed that at least two High Court judges are members of the Association of Expatriate Civil Servants. Hong Kong judges are in one sense civil servants, appointed by the Governor and paid from the general revenue. But attempts have been made to create a 'judicial service': a commission to advise on appointments and conditions, and an administration separate from the civil service branch, already exist. But the sentiments behind these reforms seem to have been lost on judges who join civil service unions. Do they perceive themselves as no different from other servants of the government?

That is perhaps a merely symbolic matter — though by no means therefore trivial. The best measure of a judge's independence is her or his performance in the impartial adjudication of disputes between citizen and government, and there is no documented suggestion that Hong Kong judges have failed in this respect. But their resolve will surely be put to the test by Mr Lu Ping's statement that judges will have to be re-appointed in 1997. He presumably had in mind articles 88 and 90 of the Basic Law, which state that judges of the Special Administrative Region shall be appointed by the Chief Executive and that the appointment of the Chief Judge of the High Court and of judges of the Court of Final Appeal shall in addition be endorsed by the Legislative Council and reported to the Standing Committee of the National People's Congress; accordingly, judges in office prior to establishment of the SAR would not qualify to remain in office unless the procedures of the Basic Law were carried out after 30 June 1997. The Chief Executive must act on the recommendation of 'an independent commission': is this to be the present Judicial Service Commission, or is that body to be bumped off the 'through train' as well? It would admittedly be problematic for the Chief Executive to appoint a new commission to make recommendations to him, since it is to be partly composed of local judges, whereas if Mr Lu is correct there can be no local judges in the SAR until they have been appointed by the Chief Executive on the recommendation of the commission. Are we to see a 'provisional independent commission' to break the circle? After all, we are to have a provisional legislature, unknown to the Basic Law, one of whose tasks is to endorse appointments to the Court of Final Appeal.

Perhaps Mr Lu is incorrect. Article 93 of the Basic Law ('Judges ... serving in Hong Kong before the establishment of the Hong Kong Special Administrative Region may all remain in employment ...') would suggest so. How would the Standing Committee, in which by article 158 is vested the power of

interpretation of the Basic Law, decide this issue? The Standing Committee is obliged to authorise the courts of the SAR to interpret 'on their own' provisions of the Basic Law which are within the limits of the autonomy of the Region, and a somewhat awkward scenario is easily imagined: a pre-1997 judge refuses to step down, despite not being re-appointed, and when his authority is challenged by a party in proceedings before him he interprets the Basic Law so as to give priority to article 93 (and thus preserve his own position). The matter is presumably within the limits of the Region's autonomy. Thus he is entitled so to decide, and he is not required to seek an interpretation from the Standing Committee. Will the Standing Committee be able to overrule him, and if it does, will the judgment in that case stand?

More important than these intriguing issues is the effect that Mr Lu's pronouncement may well have on pre-1997 judicial attitudes. Can any judge now sitting who is desirous of keeping his job through 1997 dare to offend pro-China sympathies?

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### Back to Basics: The Provisional Legislature and the Basic Law

The decision of the Preliminary Working Committee ('PWC') established by the National People's Congress ('NPC') of the People's Republic of China ('PRC') early in 1994 that an interim legislature for one year for the Hong Kong Special Administrative Region ('HKSAR') be established by China on 1 July 1997<sup>1</sup> was undoubtedly influenced by its view of what is best for Hong Kong. It is, however, a decision which violates the letter as well as the spirit of the Sino-British Joint Declaration and the Basic Law of the HKSAR.

#### *Against the spirit of the Basic Law*

The purpose of the Basic Law is to provide for a high degree of autonomy for Hong Kong and for the people of Hong Kong to rule themselves. Hong Kong becomes entitled to this autonomy on 1 July 1997, with the establishment of a new political system, more democratic than its people have hitherto enjoyed. The composition of the first legislature, with all its sixty members elected by the residents of Hong Kong in one form or another (twenty of them directly

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<sup>1</sup> The decision was taken at the plenary meeting of the PWC on 8 December 1994 in Beijing. From newspaper accounts it would appear that the powers and functions of the interim legislature remain to be resolved. See South China Morning Post and Eastern Express, both of 9 December 1994.