

discretions perform different functions. Section 63 is useful where full administration by the court is appropriate but, to save expenses on the trust, the court decides to appoint someone to work under its close supervision. On the other hand, s 42 is a back-up power given to the court to ensure the continuity of trustees. The range of its application is naturally wider. In *Re Ratcliffe*, where Kekewich J decided not to appoint a judicial trustee, he nonetheless gave an order for appointing an ordinary trustee so that someone would act jointly with the sole executrix.²³ He took the same view in *Re Martin*, where there was a sole trustee.²⁴

Conclusion

Leong Fook-ho is important for several reasons. It shows how s 63 of the Trustee Ordinance can be used to replace a recalcitrant personal representative. It is the first judicial pronouncement on the limits to the power of appointment under s 37. It also bears wider significance for other judicial powers of appointment like s 42 of the Trustee Ordinance. Finally, it reveals the inadequacies of the existing provisions concerning the appointment of trustees. In England, the relevant provisions have recently been amended to give more power to the beneficiaries to appoint new trustees.²⁵ *Leong* is a similar step in the same direction, in that, by being more ready to appoint replacement trustees in place of those who are likely to abuse the statutory power of appointment under s 37, the beneficiaries' interests are better protected. Nonetheless, in the long run, a systematic overhaul by the legislature is needed.

Lusina Ho*

The Continuity of Laws and Legal Rights and Obligations in the SAR

Introduction

In this paper I examine arrangements in the Basic Law for the continuity of laws and rights and obligations, including the Decision of the Standing Committee of the National People's Congress (NPCSC) under Article 160. These issues need careful consideration when there is a change of sovereignty to ensure certainty and clarity in the new legal regime and that vested rights are

²³ Note 20 above, p 357.

²⁴ Note 21 above.

²⁵ Sections 19 and 20 of the Trusts of Land and Appointment of Trustees Act 1996 allow beneficiaries who are of full age and capacity, and (taken together) are absolutely entitled to the trust property, to require the trustee to retire from the trust or to nominate a new trustee.

* Assistant Professor, Department of Law, University of Hong Kong.

maintained, for the change of sovereignty provides a new basis for legal authority and laws. These considerations are particularly important in Hong Kong where the basic intention as reflected in the Sino-British Joint Declaration and the Basic Law is to maintain stability and prosperity by continuing most aspects of previous systems, particularly of the laws. However, the Basic Law does not provide any systematic or comprehensive set of provisions for the continuity of laws and rights and obligations. These incomplete provisions have been confounded by the political differences between the outgoing and incoming sovereigns which have impeded the process of continuity. There has been much talk of 'legal vacuum' and many expediencies have been justified by the need to avoid it, even if few persons seem to understand the concept of a 'legal vacuum'.

There are various reasons why Hong Kong finds itself in this impasse and confusion on the eve of the transfer of sovereignty. As a veteran 'decoloniser,' Britain is well familiar with the problem of continuity and has over the decades established clear and effective precedents for dealing with it. However, the British precedents were unacceptable to the Chinese or in some respects were not feasible. In these precedents, an essential element in the continuity is the persistence of British laws and prerogative instruments previously applied to the former colony, which China regarded as offending its own sovereignty. Second, the same legal instrument (enacted by Britain) which terminates British sovereignty provides also for the continuation of old laws. Again, China found this inconsistent with its sovereignty, which required in its view, naturally, that the basis of the new regime of laws be prescribed by China itself. These difficulties arose in large part because Hong Kong was destined not for independence but transfer to another, pre-existing sovereignty, which meant both that negotiations had to be conducted with that sovereign and that the legal system and laws of Hong Kong had to be accommodated within the constitutional system of the new sovereign. An additional cause for complexity was that the accommodation to the new sovereign was to be 'partial'; the imperatives of 'one country, two systems' dictated that the external legal relations of Hong Kong (particularly the treaty regime as with trade or judicial co-operation, including the surrender of fugitive offenders) as well as many aspects of its internal administration had to be kept distinct from those of the rest of China. However, these technical and political questions could have been overcome by careful drafting. They could have been overcome even in the absence of careful drafting if the two sovereigns had been able to co-operate and if China had not decided to 'punish' Patten by effectively creating the confusion in the law by its interpretations and the disregard of the agreed procedures involving the Joint Liaison Group ('JLG').

I do not discuss all these problems now; in particular I do not deal with the external aspects of the legal regime and the difficulties that have arisen in

maintaining its continuity.¹ Instead I shall focus on the method provided for the continuation of previous laws and rights and obligations, and the decision of the NPCSC on the adoption of previous laws under Art 160 of the Basic Law ('BL160'). Since interpretation by the NPCSC is likely to continue to play an important role in the development of the legal regime of the SAR, I make some comments on the method and style of the NPCSC so far.

Basic Law provisions for continuity

The Joint Declaration provided that 'The laws currently in force in Hong Kong will remain basically unchanged' (Art 3(3)). This formulation has been the subject of considerable controversy.² However, there is little doubt that the intention was that the major sources of the law would be the same as before the transfer of sovereignty. This is made clear in Annex I in the elaboration of the treaty provisions, which define the sources of laws as the Basic Law, previous laws, and laws enacted by the SAR legislature (Sec II). When listing the sources of laws of the previous regime, the Annex does not mention British enactments and presumably they were not intended to be continued (although it was unclear whether the exclusion applied to all British enactments or only those which applied directly by their own force, thus adopting the much larger number of laws which are incorporated by ordinances). That British enactments which applied directly were excluded seems to be the general understanding of the two sovereigns, for shortly after the ratification of the Declaration, steps were taken within the framework of the JLG to review British laws that would need to be continued and to agree on their enactment as ordinances by the Hong Kong legislature. It was also specified in the Annex that previous laws which contravened the Basic Law would not be continued; and here again there seems to have been an understanding that the provisions of ordinances and subordinate legislation which contravened the Basic Law would be repealed, and replaced where necessary, in co-operation between the two sovereigns. Most of these amendments would be formal, concerned in large part with titles and the recognition of Chinese sovereignty instead of British.

The Basic Law provisions on the sources of laws and the reception of previous laws are more elaborate. To the sources of laws is added national laws applied in the SAR (BL18). The provision for the reception of previous laws (BL8) uses largely the language of the Joint Declaration, but the Basic Law provides the mechanism for determining whether any part of previous laws

¹ These and other problems are discussed in some detail in my book, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997). [See the review at pp 288–96 below — Ed.]

² See *ibid*, pp 351–4.

contravenes the Basic Law. This is set out in BL160 which is somewhat ambiguous in some respects. It gives the NPCSC the power 'upon the establishment' of the SAR to declare which part of the previous laws are in contravention of the Basic Law. The ambiguities relate to two matters: (a) whether a formal act of adoption of previous laws by the NPCSC is required or whether BL8 is sufficient authority for this; and (b) whether the power of the NPCSC to declare previous laws void for contravention of the Basic Law can be exercised *after* rather than only on the establishment of the SAR. These points are not germane to the purpose of this paper; my views on these matters, that no formal act of adoption is necessary and that the NPCSC powers under the article lapse on the establishment of the SAR, are argued elsewhere.³ Here I merely wish to make the point that the existence of such controversies adds to the confusion about the reception of previous laws and therefore to doubts concerning the integrity of the legal system.

The fullest reception of previous laws therefore required in particular two steps to be taken: the localisation of British enactments, and the adaptation of ordinances and subsidiary legislation. These steps required co-operation between Britain and China (using the machinery of the JLG) and the willingness of the Hong Kong legislature to enact the resulting legislative proposals. At first these conditions were met, and a number of British enactments were replaced by local ordinances (the Hong Kong legislature having been empowered by orders under the Hong Kong Act 1985 to repeal British enactments and to legislate with extraterritorial effect).⁴ On the other hand the adaptation of laws would formally be made only on the establishment of the SAR, for until then British sovereignty and the powers of the governor would continue to exist. But the necessary amendments could of course be made earlier provided that they did not come into effect until midnight of 30 June 1997 (that this method would be chosen appears to have been the assumption of the Legal Department of the Hong Kong government⁵). These assumptions were derailed with the rise of hostility between Britain and China, following the electoral reforms of Chris Patten and the election of a legislature in 1995 which was less sympathetic to China than its predecessor and less amenable to control by the Hong Kong administration. China then stated its new position that adaptation (and presumably also localisation) of laws was a matter of sovereignty; it was 'entirely an internal matter' which should be 'solved by China on its own.'⁶

³ Ibid, pp 356–8.

⁴ Ibid, pp 341–3.

⁵ Personal information.

⁶ Mr Guo Fengmin, leader of the Chinese delegation to the JLG, quoted in South China Morning Post, 25 October 1994.

The NPCSC decision on the adoption of previous laws

It is against this background that the Decision of the NPCSC on the Adoption of Previous Laws (23 February 1997) can be understood. The Decision incorporates recommendations of the Preliminary Working Committee ('PWC') as modified by the Preparatory Committee. The Decision was taken in circumstances not envisaged at the time of the enactment of the Basic Law. It is clear that in order to provide a satisfactory basis for the continuation of previous laws, the NPCSC had to go beyond its rather limited function under BL160 of declaring which laws were incompatible with the Basic Law and had instead to provide a new framework for dealing with previous laws despite their incompatibility with the Basic Law. In other words the NPCSC had to engage in law-making, rather than simply making a legal determination of incompatibility. Furthermore, in order to settle scores with Patten in relation to certain of his legislative initiatives (or those of his predecessor), the NPCSC transgressed against its explicit mandate under BL160 as to what laws could be declared void. It thus forced itself into a kind of opportunism and inconsistency, which provide neither secure nor clear foundations for what is now the principal provision for the reception and accommodation of previous laws. I now turn to various aspects of the Decision.

Timing

The Decision was made on 23 February 1997. The timing of the Decision was surprising, since the article envisages that the Decision would be made 'upon the establishment' of the SAR, and it had been assumed that the Decision would be taken shortly before the resumption of sovereignty. The 1995 legislature still had about four months before its termination, and had an active legislative programme ahead of it. Some bills before it (such as the amendments to the Crimes Ordinance to implement BL23) were controversial and unacceptable to China, necessitating a further Decision if they were enacted and China wished to revoke them. On the other hand, it would be argued that it was desirable to have a clarification of the scope of applicable laws in advance of the resumption of sovereignty, as considerable doubts had arisen over the matter, especially because the recommendations of the PWC and the Preparatory Committee seemed to be based less on the compatibility of previous laws with the Basic Law than with their political acceptability to the Chinese central authorities. The early announcement of the Decision also facilitated the work of the provisional legislature in reformulating the law consequent upon the NPCSC's ruling.

Contents

The Decision covers a number of points. First, it adopts the previous laws (minus British Acts and prerogative instruments) as the law of the SAR on

1 July 1997 (Art 1). This formal adoption may be unnecessary as the Basic Law is express authority for the continuation of these laws (BL8), but the reiteration of the provisions of earlier laws is not unusual in Chinese practice.

Second, the Decision lists ordinances to be repealed in their totality (Annex 1) or in respect of which some sections only were to be repealed (Annex 2).

Third, it establishes a general rule that when there is a conflict between national laws applied in Hong Kong and a Hong Kong law on foreign affairs, the national law shall prevail (Art 4(1)).

Fourth, it provides some general principles for the modification of laws or itself modifies some laws (Art 4(2)-(5)). It states that previous laws are to be 'applied subject to such modification, adaptation, limitation or exceptions' as are in line with Hong Kong's new status or are necessary to conform to the relevant provisions of the Basic Law. It goes on to say, 'For example, the New Territories Land (Exemption) Ordinance should comply with the above principles in its application.'

Fifth, the Decision enacts some rules for the interpretation of laws that are adopted (Art 4 and Annex 3). (i) It repeals provisions conferring privileges on the United Kingdom or other Commonwealth countries or territories, other than provisions relating to reciprocal arrangements between Hong Kong and them. (ii) It adopts any provision relating to the rights, exemptions, and obligations of British military forces stationed in Hong Kong which do not contravene the Basic Law and the Garrison Law and applies them to PRC military forces stationed in Hong Kong. (iii) It states that laws which may give a superior status to the English language over the Chinese language 'are to be construed as providing that both English and Chinese languages are to be official languages.' (iv) It authorises continuation of any provision applying any English law 'as a transitional arrangement' pending amendment by the SAR, so long as it is not 'prejudicial to the sovereignty' of the PRC or inconsistent with the Basic Law.

Sixth, it sets out some rules for the substitution of 'names, terms and expressions' which appear in adopted law; the rules are set out in Annex 3 and are for the most part straightforward (eg, 'Governor' being replaced by 'Chief Executive'). However, less clear is the provision whereby references to 'Her Majesty,' 'Crown,' 'British Government,' or 'Secretary of State' or similar expressions are to be replaced either by Central People's Government or appropriate PRC authority, or by the government of the SAR, depending on which of them has responsibility for the matter in question.

Repealed laws

These are discussed briefly since they define the scope of previous laws which are adopted. Fourteen ordinances are repealed in their totality. It is possible to

provide only a brief summary of the consequences of the repeal of the more important of the ordinances. The effect of the repeal of three ordinances dealing with elections (items 12–14 in Annex I) is to remove all provisions relating to the machinery for elections, providing a clean slate for the Preparatory Committee and the provisional legislature. So far as the legal system is concerned, the repeal of the Application of English Law Ordinance is particularly significant.⁷ One of the matters dealt with in that ordinance concerned various rules relating to the application of the common law and rules of equity. Its repeal throws in doubt the precise scope of the common law to be applied in Hong Kong. The ordinance provided a basis for developing a common law for Hong Kong, and it may be that its repeal would not affect the general capacity of the SAR courts to develop and sustain a Hong Kong common law.⁸

The other aspect of the decision about the ordinance concerns the repeal of the English/British Acts listed in its schedule. Many of the Acts have little significance today, but two of them were still relevant. They deal with the writ of habeas corpus. However, their repeal does not eliminate redress against unlawful detention, since the Basic Law and the Bill of Rights provide relief against unlawful detention. In anticipation of the repeal of the habeas corpus Acts, the Hong Kong administration sponsored the Supreme Court (Amendment) Bill in February 1997 to localise the provisions of these Acts.

More serious is the repeal of specific sections of Hong Kong ordinances and regulations in Annex II, of which there are ten. Four concern provisions relating to elections to District and Municipal Councils, three of which implemented the Patten reforms, and the fourth established rules against corruption in these elections. Some deal with human rights issues, four of which are examined here.

Bill of Rights Ordinance

Three sections of the ordinance are removed.

(a) s 2(3): this states that ‘in interpreting and applying the Bill of Rights regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong ...’

It is unclear what the reason for (or the impact of) the repeal is. It may be intended to eliminate an expansive view of human rights or references to international case law. It would probably not achieve that purpose (although we can argue that with possible decreasing independence of the judiciary, some judges may be tempted to rely on the repeal to argue for a narrow and less

⁷ For the role of the ordinance in the ‘previous’ system, see note 1 above, pp 339–45.

⁸ Ibid, pp 344–7.

purposive interpretation of the Bill of Rights). It may also be reflective of China's dislike of the International Covenant of Civil and Political Rights ('ICCPR') and the wish to delink the ordinance BL39.⁹

(b) s 3: this provides for a rule of construction: that all legislation pre-dating the ordinance should, if possible, be given an interpretation consistent with the ordinance, but if it cannot, then to the extent of inconsistency that legislation is repealed.

Its repeal would have little effect, since s 3 merely reproduces the common law rules of interpretation. Those rules would presumably continue to apply as part of the common law, but it is not inconceivable that some judges might take the view that its repeal was intended to disapply these rules, in which case the Bill of Rights becomes pretty meaningless, and acquires a status inferior to other ordinances!

(c) s 4: again a rule of construction which requires legislation passed after the ordinance to be construed consistently with the ICCPR. Presumably if it cannot be so construed, it is valid though contrary to the ICCPR. Such legislation would be caught by the Letters Patent until 30 June, but the ordinance itself has no effect on such legislation. It is interesting that s 3 refers to consistency with the ordinance, while s 4 to that with the ICCPR, entrenched in the Letters Patent. This shows that the ordinance as such does not have a superior status, contrary to Chinese claims, and their justification for these repeals. Again, the repeal may have little effect, for the common law will provide the replacement.

Societies Ordinance

The NPCSC repealed 'major amendments' since 17 July 1992 to the ordinance. The reference is to the amendments introduced by the Societies (Amendment) Ordinance passed in 1992. The purpose of the amendments was to bring the ordinance into conformity with the Bill of Rights Ordinance. The principal effect of the amendments was to repeal the previous system under which no society could exist lawfully without being registered or granted an exemption from registration by the Registrar of Societies. The Registrar had wide powers as regards registration; he or she also had powers to monitor societies, require them to disclose various types of information, and to enter upon their premises. The administration had broad powers to proscribe societies for security and other reasons (including connections with foreign political organisations). In relation to certain offences, the onus lay with the officers of a society.

The amendments provided a new system under which a society did not have to register or seek an exemption but merely notify the societies' officer specified (and limited) information about the society, its objects, names of office holders,

⁹ Ibid, pp 419–20.

and the address of the principal place of business. Evidentiary presumptions against a society were repealed. Most disqualifications for being a society were abolished (including political connections) but the administration kept the power to prohibit the operation of a society if such operation would be prejudicial to the security of Hong Kong, public safety, or public order.

By repealing 'major' amendments, the NPCSC Decision fails to provide clear guidance as to the scope of the law relating to societies. It is hard to distinguish major from minor. Moreover, the ordinance makes no sense after the repeal of 'major amendments'; the remaining provisions are no longer workable. The PWC had recommended the repeal of the whole ordinance; the repeal instead of 'major amendments' has in fact the same effect, for it removes the framework for the recognition of societies.

Public Order Ordinance

NPCSC repeals 'major amendments' since 27 July 1995 to the ordinance. The purpose of the amendments was to liberalise the regime governing meetings and processions. The repeal removed provisions requiring the prior permission of the Commissioner of Police to hold meetings or processions involving more than a specified number of persons, and replaced them with a notification procedure, under which the Commissioner could ban them but only in the interests of public safety or public order. There was to be no regulation of meetings involving less than fifty persons or five hundred if the meeting is held in private. It was no longer necessary to have permission to use loud hailers. The powers of search are restricted, as also those of the administration to declare closed areas. However, the amendments left the police with considerable powers to control meetings and processions.

There is no easy way to distinguish major from minor amendments. The amendments had affected only one part of the ordinance, and most of the rest of it was viable even after these repeals.

Personal Data Privacy Ordinance

The NPCSC repeals 'the provisions relating to the superior status' of the ordinance in s 3(2), which provided that in the event of a conflict or inconsistency between the ordinance and any other ordinance, the former prevailed over the latter. The section presumably referred to ordinances passed before the Privacy Ordinance, in which no special status is conferred on the ordinance.

General comments

The Decision does not succeed fully in its task, which is to clarify the scope of the application of previous laws. Its language is vague and it uses concepts (like sovereignty) whose precise meaning or reach is not self-evident, yet the

operation or modification of laws is dependent on them. For example while Chinese sovereignty replaces British sovereignty, the relationship between Hong Kong and Britain is different in fundamental respects from that between Hong Kong and the Central Authorities of the PRC. To say that references to British authorities would be replaced by appropriate authorities on the mainland or Hong Kong is not to provide any real guidance as to how the laws are to be modified (even though it is better than the recommendation of the PWC whereby all references to British authorities would have been replaced by Chinese authorities). Similarly to sanction the continuation of any provision applying any English law so long as it is 'not prejudicial to the sovereignty' of the PRC or inconsistent with the Basic Law does not help to identify or determine what provisions are still valid. Other examples of this approach are that when a Hong Kong law conflicts with a PRC law on foreign affairs, the PRC law prevails; or that British military law is to be applied except where inconsistent with the Basic Law; or more generally that laws are to be read subject to such modification, etc as are compatible with Hong Kong's new status. In many respects these statements do no more than rephrase the general principle (in BL8 and elsewhere) of the Basic Law that laws must be compatible with the Basic Law. Instead of determining which laws do not meet this test, the NPCSC Decision merely postpones the issue.

There appears to be no consistency of principle. Article 4(5) of the Decision continues in force English laws which are incorporated by reference in other ordinances but repeals those incorporated by the Application of English Law Ordinance. Again, the substantive provisions of the Bill of Rights are maintained, but changes in the law which were intended to bring them into conformity with them have been repealed.

The second general comment is that the NPCSC appears to have exceeded its jurisdiction under BL160. Its function is to declare if any laws are inconsistent with the Basic Law, not to add to these laws or to modify them. Yet the NPCSC has modified various laws. The task of modifying the law is the responsibility of the SAR legislature only.

Third, no reasons are given for declaring laws invalid, either in the Decision or an accompanying statement. It seems clear that many of the laws declared invalid are not inconsistent with the Basic Law. It would appear that they have been declared invalid simply because Chinese authorities do not like them. Indeed it could be argued that some of the repeals are themselves against the Basic Law (particularly those dealing with rights). Because the bases of particular repeals are not stated, the Decision is no guide for determination of questions regarding the validity of adopted laws that may arise in the future (or indeed for the many questions left open by the Decision itself). For example, the justification for the repeal of some laws (especially those relating to rights) is that they were passed after 1984, thus violating the stipulation that 'previous

laws will remain basically unchanged.' This ruling puts into doubt many other laws passed after 1984 and which represent fundamental departures in the system as at that time.¹⁰

The NPCSC is clearly mistaken in its view that the only laws that may continue are those in effect in 1984. There is certainly no support for this view in the Basic Law itself. The relevant article is BL8 which refers merely to 'laws previously in force'; the natural construction of this phrase would be laws in existence on 30 June 1997. There is nothing in the Basic Law which goes against this interpretation; there are numerous references in the Basic Law to previous systems or practices etc in other areas, and these are generally understood to refer to systems and practices before the transfer of sovereignty. In support of its position, China refers to Art 3(3) of the Joint Declaration which refers to 'laws currently in force.' However, there is little evidence to suggest that 'currently' was intended to refer to laws as in existence in 1984. The general scheme of the Joint Declaration is to provide for continuity, to keep in force laws and practices that prevailed under the previous sovereignty. Annex I which elaborates Art 3 of the Joint Declaration makes clear that the laws which are to continue are those on the transfer of sovereignty (there the word 'previous' is used). To read the expression 'currently' in the sense that China is using would have meant that neither Britain nor Hong Kong could change the laws in any important ways after 1984. If so, this is too important a principle to be stated in this indirect and obscure way. Nor would its natural home be in Art 3, but Art 4 which deals with the powers of the British government during the transitional period. One would also expect to find a clarification or re-statement of this principle in the Annex — but there is none. Indeed the logic of the Joint Declaration is that there would in many areas be important changes to prepare Hong Kong for the new constitutional order, as in the development of political institutions, particularly the democratisation of the legislature, the localisation of laws, and the establishment of a new, highest judicial body for Hong Kong.

¹⁰ For reasons why the NPCSC considered that the Bill of Rights Ordinance (and subsequent amendment of other ordinances) were against the Basic Law, one has to turn to statements made by two influential Chinese officials, Wu Jianfan and Shao Tianren, who have been the principal legal advisers to the Hong Kong and Macao Affairs Office of the State Council. Their statements were published in *Window* on 10 November 1995 after a visit to Hong Kong. Their principal argument is that Britain misled China during the negotiations for the Joint Declaration as to the effect of continuing the effectiveness of the International Covenant on Civil and Political Rights, assuring China that no further legislation was necessary to implement it. The ordinance itself was criticised for being in violation of the Basic Law as having a superior status over other laws. There was also a reference to Art 3(3) of the Joint Declaration which talks of 'current laws' remaining 'basically unchanged.' Professor Wu concluded that, despite wide-scale violations of the Basic Law, the legal sub-group of the PWC (of which they were key members) suggested 'abandoning only a few sections with substantial amendments and retaining most of the other sections. From that perspective, the manner in which the issue of the Hong Kong Bill of Rights Ordinance is handled has been quite tolerant and lenient' (p 13). This statement is particularly revealing, for if indeed in their view other sections were also against the Basic Law, BL160 required that they too should be repealed (the NPCSC having no discretion in the matter). It is interesting to note that in making such recommendations, the PWC was not concerned with legality, but with expediency.

It also appears from the Decision that the NPCSC is unsure that its scrutiny of laws has been sufficiently thorough, for it repeats in Art 6 of the Decision the Basic Law provision that if any laws are later 'discovered' to be in contravention of the Basic Law, 'they shall be amended or cease to have force in accordance with the procedure as prescribed by the Basic Law.' However, there is no clarification as to what these procedures are.¹¹

Fourth, the Decision suggests that the NPCSC or their advisers may not have fully understood aspects of the common law or the principles of the previous legal system (as for example in its view of the superior status of certain ordinances). This is a matter of some concern, since the NPCSC will be involved in many future interpretations in which questions of the common law or Hong Kong's legal system would be relevant.

Finally, many issues of applicable laws or the extent of adopted laws are left open. The NPCSC was unable, due to competing lobbies, to make up its mind about the New Territories (Exemption) Ordinance (which removes certain discriminations against women in the New Territories), and consequently chose to place it in Art 4, which requires laws to be applied subject to modifications, etc, thereby leaving the question of its validity unresolved. Other laws are made subject to 'Chinese sovereignty,' which does little to clarify matters. Some laws are adopted insofar as they do not contravene the Basic Law, which is equally unhelpful as there is no identification of the contraventions (which presumably was the task of the NPCSC under BL160). These doubts would have been resolved if the assumptions underlying the localisation and adaptation of laws through the initial mechanism of the JLG had been followed. Unfortunately we are now faced with great uncertainty about the scope of laws in the SAR. The problems are aggravated by the choice of the provisional legislature, whose own legality is contested, as the vehicle to settle some of these issues.

Continuity of legal obligations or legal proceedings

It is customary on the transfer of sovereignty over a territory to provide for the continuation of rights and obligations acquired or incurred under the previous regime. This has been standard practice in the decolonisation of British possessions, where there is provision not only for the maintenance of previous laws (subject to consistency with new constitutional provisions), but also for the continuation in office of members of the judiciary, the legislature, and the executive (including the public service), and of legal proceedings pending before the courts to continue. Rights, liabilities, and obligations of the previous sovereign (including those arising from treaties or contracts) are transferred to the new sovereign. These provisions appear in a separate section

¹¹ Note 1 above, pp 356-7.

of a relevant constitutional instrument dealing with transitional matters. In this way there is no legal 'gap.'

This method of providing for continuity may not have been suitable in its entirety in relation to Hong Kong. Rights and obligations could not pass directly to the new sovereign, given the high degree of autonomy of the SAR and the separation of its legal and economic systems from the new sovereign. Nevertheless it can be argued that essentially the same results were achieved in relation to the SAR. The regime for the continuity of rights and obligations consists of the relevant provisions in the Joint Declaration (as representing the agreement between the two sovereigns) and the Basic Law (setting out the position under the legal system of the SAR). In neither document is there a separate section dealing with transitional matters, but most relevant points are covered through the texts. The overriding theme of both instruments is smooth transition and the continuity of 'previous systems.' The Joint Declaration provides for the continuation of previous laws (subject to exceptions examined earlier). It also protects specific types of rights: to property, ownership of enterprises, foreign investment and inheritance (Art 3(4)), and various rights associated with Hong Kong's status as a free trade and financial centre. There is specific protection of land leases granted before 30 June 1997 (Annex III). There are guarantees for the continuation in office of public servants and judges. The Basic Law incorporates these provisions. Both the Joint Declaration and the Basic Law provide for the continuation of treaties applicable in Hong Kong, and presumably rights and obligations under them. More specifically, the Basic Law provides that 'Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognised and protected by the Hong Kong Special Administrative Region, provided that they do not contravene this Law' (BL160, second para).

These provisions, in particular BL160, were deemed to be sufficient authority for the continuation of rights and obligations. However, this assumption was thrown into doubt by two statements by the PRC authorities in November 1992. In the first statement they denied the continued validity of contracts relating to the construction of Container Terminal 9 for contravention of the Joint Declaration (presumably because they had not been cleared with the PRC government). The Chinese position was elaborated in its second statement (30 November) when it was stated that contracts, leases, and agreements signed and ratified by the Hong Kong government without the approval of China would be invalid after 30 June 1997 except for those land leases granted up until 2047 by the Sino-British Land Commission in accordance with Annex III of the Joint Declaration. The authority cited was the provision in BL160 to the effect that the continued validity of contracts depends on consistency with the Basic Law, and the failure to obtain Chinese

approval was an infringement of its sovereignty and hence the contracts were inconsistent with the Basic Law. Alternatively, it was argued that BL160 applied only to private contracts and did not cover contracts with the Hong Kong government, as otherwise the Chinese government would be bound by previous contracts (which straddled June 1997), however unfair. Nor would China be liable for these contracts under international law, presumably as the SAR government is a separate entity from the previous Hong Kong government, and there could be no succession of the rights and obligations of the previous government.

Although through this stance China achieved the reference of all government contracts, franchises etc enduring beyond 30 June 1997 to the JLG for its approval and induced many investors to seek direct clearance from Beijing (and significant concessions from Britain), there is little justification for this interpretation. Nowhere does the Joint Declaration or the Basic Law make a distinction between private and government contracts, or between contracts that expire or not before 30 June 1997. It is true that neither document explicitly provides for the succession of the new government to the rights and obligations of the previous government (or for the continuation of legal proceedings) but there are several provisions which imply the succession: continuity of laws and rights and obligations under them, the succession of treaties, and the continuity of the machinery of administration and justice, etc. Moreover, the SAR government will become the owner of the very considerable assets of the government of Hong Kong — without any legal provision vesting these assets in the new entity. This shows the artificiality of the Chinese position. Nor is it clear that under international law the rights that private parties acquired under one regime cannot be enforced against another which replaces it. The consequences of the interpretation advanced by China are so horrendous for the stability and prosperity of Hong Kong and its continued amicable and civilised relations with foreign states and the business community that their mere contemplation is sufficient to expose its inconsistency with the Joint Declaration and the Basic Law

Neither the Joint Declaration nor the Basic Law has a direct provision for the continuation of legal proceedings pending or underway at the time of the transfer. It might be assumed that the continuation of such proceedings is compatible with the general theme of continuity and stability. Their continuation could also be regarded as necessary to the safeguarding of previously vested rights or the enforcement of obligations which are guaranteed by BL160. One technical difficulty in the continuation of proceedings may lie in the fact that, at least so far as criminal proceedings are concerned, prosecutions before the transfer of sovereignty are brought in the name of the old sovereign. However, even if this technical difficulty is not remedied by legislation, the courts should be astute to disregard it in the interests of justice and stability.

There is ample justification for ignoring this technicality in the face of BL160 and the general intention of continuity of laws, rights, and obligations.¹²

Conclusion

The NPCSC Decision has done little to clarify questions concerning the reception of previous laws. On the contrary, it has considerably confused the situation. Quite what the law is will have to be established by courts and lawyers, and officials, with only perfunctory and ambiguous guidance by the NPCSC. It will, for example, be necessary to establish what are the precise repeals to the Public Order and Societies Ordinances since all that the NPCSC has done is to repeal 'major amendments' rather than take the trouble to identify the specific provisions.

The confusion arises principally because the NPCSC has exceeded its powers under BL160, which was to make a judicial determination of which previous laws are to be disregarded because they contravene the Basic Law (at the same time it has not adequately performed its function under that article of determining conclusively which previous laws are inconsistent with the Basic Law). Instead the NPCSC has used BL160 for policy purposes and has repealed laws which by no stretch of imagination could be regarded as contravening the Basic Law. China has used BL160 to settle scores with Patten. The repeals have embarrassed its own appointee as the Chief Executive. It has caused much resentment among the people of Hong Kong and has served to some extent to cause divisions among them, as China undertook subsequently to mobilise support for its actions. It has not served the cause of continuity or stability.

The Decision is the second major interpretation that the NPCSC has undertaken in relation to the Basic Law (the first concerned the implications of Chinese Nationality Law BL24¹³). Both of them suggest an opportunism and disregard of fundamental principles that does not augur well for the development of the Basic Law or the autonomy of Hong Kong. The function of interpretation is to bring coherence to the constitution, to explicate its underlying principles, and to harmonise other laws with it. It is not, as with these two interpretations, to enact new policies which run counter to its basic principles and thereby force a distortion or even the negation of these

¹² A similar but not identical issue arose in Papua New Guinea after its independence. Prosecutions were brought in the name of the state even though the Queen remained the head of state. A reference was made to the Supreme Court to decide whether this form of indictment was invalid. The Supreme Court held that under the new constitution prosecutorial powers lay in the state as representing the people and no longer in the Queen as the prerogative power of prosecution had been abolished by the Constitution. However, a few prosecutions had been initiated in the name of the Queen; these were declared valid by an Act of Parliament (see *State v Mogo Wonom* [1975] PNGLR 311).

¹³ Note 1 above, pp 168–71.

principles. It is undoubted that there is an important role for interpretation in the development of the Basic Law. But it is equally important that interpretations are made in accordance with established procedures that ensure a fair enquiry and the consideration of different views as to interpretation¹⁴ and in keeping with the fundamental principles that underpin the Basic Law. It is necessary to judicialise the work of the NPCSC (and in particular to provide for an independent role for the Committee for the Basic Law) in this regard, to ensure that it acts impartially in differences between the SAR and the Central People's Government as a kind of constitutional court, which is the function assigned to it under the Basic Law. It is also necessary to ensure that the NPCSC has better political and legal advice than it seems hitherto to have received. Otherwise in the name of interpretation there would be a steady attrition of the fundamental principles of the Basic Law.

*Yash Ghai**

¹⁴ There were various criticisms of the recommendations of the PWC and the Preparatory Committee regarding the inconsistency of laws with the Basic Law which were articulated in newspapers, public seminars, etc which showed the fallacy of the reasoning or legal analysis of these bodies. There is no evidence that these were ever presented to the NPCSC as they would have to be in any fair judicial or similar enquiry.

* Sir Y K Pao Professor of Public Law, University of Hong Kong. [We hope to publish the NPCSC Decision and other documents in the new Basic Law section in Part 3 of this volume.]