

HONG KONG'S  
**TRANSITION**

*Problems & Prospects*

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**HONG KONG  
IN TRANSITION**

**PROBLEMS AND PROSPECTS**

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# **HONG KONG IN TRANSITION**

## **Problems and Prospects**

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**Proceedings of a seminar held at  
the University of Hong Kong  
on 28 November 1992**

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## Preface

Early in 1992 the One Country Two Systems Economic Research Institute invited academics and others to prepare papers for a three-day conference in October on the theme 'Hong Kong in Transition.' Papers were accordingly submitted and accepted for presentation. The day before the conference was due to begin, however, the organisers cancelled it, citing the controversy surrounding the 'Patten proposals' in which the governor put forward various suggestions for constitutional reform. Some of us thought that the public interest in transition issues which was then current made it an ideal time to hold a conference, and we were therefore surprised and dismayed at the cancellation. It seemed that the One Country Two Systems Economic Research Institute was acting more like a political pressure group than a genuine and independent research organisation. The Faculty of Law at the University of Hong Kong, prompted by its Public Law Research Group, decided it would be a waste if papers touching on legal and constitutional issues from Day Three of the proposed conference could not be presented at a colloquium open to the public. Thus the seminar on November 28 was organised and its proceedings are published in this volume.

This is the third collection of seminar papers to be made available by the Faculty. Once again it is a pleasure to acknowledge the organisational skills of Mrs Betty Lam and her staff. Thanks go to them and to Professor Raymond Wacks, who chaired the seminar.

Peter Wesley-Smith

February 1993

# The Common Law

Henry Litton

## INTRODUCTION

I am constantly being asked this question, as I am sure are many other lawyers: 'What will the legal system be like after 1997?' The reply 'the same as it is today' is often met with suspicion, and in some cases cynicism. Such a reaction, I venture to suggest, springs from ignorance and fear of change, rather than some far-sighted appreciation of things that will eventuate in the future.

The Basic Law is quite clear as to what the legal system of the Hong Kong SAR is to be. Article 8 says:

'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 HKSAR.'

This paper will focus on the common law.

## THE COMMON LAW IN THE NINETEENTH CENTURY

If you go back no further, say, than the middle of the last century and ask the question: 'What do you mean by the common law?' the answer would have been relatively simple: 'It is that system of law developed through the use of precedents in the common law courts.' At that time the legal system in England was not unified: there were many different courts with their own jurisdictions including the common law courts, such as the courts of Queen's Bench, and the court of Chancery, which dispensed justice by following the rules of equity. The Supreme Court of Judicature Act of 1873

created a unified system so that all the divisions of the High Court of Justice had jurisdiction to apply common law and the rules of equity: and when there was any conflict, the rules of equity prevailed.

### THE COMMON LAW SPREADS ITS WINGS

The common law was traditionally thought of as having existed from time immemorial, going back to a time when no human memory could reach, and was merely declared by the judges from time to time. For example, in Willis v Baddeley<sup>1</sup> Lord Esher said:

‘There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable ...’

This of course is something of a fiction but it does express fairly neatly this concept: that there are certain fundamental principles of law which are universal and can be made applicable to the dealings of mankind, whether they be in the Bronze Age or in the Computer Age. It then became easy, as international trade expanded in the 19th century, and Britain’s process of colonization spread across the globe, to propagate the English common law - to the extent that in today’s world the common law is no longer considered a uniquely English creation.

### FUNDAMENTAL PRINCIPLES OF COMMON LAW

I will not attempt in this talk to enumerate all the propositions which come

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1. [1892] 2 QB 324, 326.

within the expression 'fundamental principles of common law.' I will give three examples:

(1) It is said, for instance, that a citizen in all matters not contrary to law may regulate his own affairs according to his own discretion and choice. The proposition was put thus by Griffith CJ in the High Court of Australia in Clough v Leahy:<sup>2</sup>

'every man is free to do any act that does not unlawfully interfere with the liberty or reputation of his neighbour or interfere with the course of justice.'

This proposition has been carried to extremes in Hong Kong, to include not only citizens but statutory bodies such as the ICAC: in a recent case concerning the jockey Greg Hall, who tried to prevent the ICAC from disclosing confidential material to the stewards of the Jockey Club, Cons VP said:

'England, - [and I would interpolate Hong Kong] - it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden.'<sup>3</sup>

Carried into the criminal law, what this means is that acts which are merely anti-social, or immoral, or offends one's notions of propriety, cannot be punished as crimes unless there is a specific piece of legislation prohibiting

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2. (1904) 2 CLR 139, 157.

3. Hall v ICAC [1978] HKLR 210, 213 (quoting Megarry VC in Malone v MPC [1979] 1 Ch 344, 357).

the act. If it were otherwise, as Lord Simon explained in Withers,<sup>4</sup> the concept would enjoin a criminal court to act like 'a people's court in a totalitarian regime, and to declare punishable and to punish conduct held at large to be extremely injurious to the public.'

(2) In the area of public law, a principle - very important in ensuring open government and fairness in administrative procedures - is the right to be heard. It has been put thus recently by the High Court in Hong Kong: 'It is axiomatic now that if a person will be adversely affected by a decision of someone in authority, he should be informed of the case that it is proposed to make against him and afforded an opportunity of a fair hearing.'<sup>5</sup> This is a very wide proposition.

(3) In the area of civil law, the courts in applying principles evolved over a long period of time attempt to give effect to honest bargains made between contracting parties and protect people from violation of their rights. It is said, for instance, that there is 'no wrong without a remedy.' The emphasis is upon practical solutions rather than abstract justice.

#### THE CHANGING FACE OF THE COMMON LAW

Many of the great judgments in the 19th century - judgments which have established the corner-stones of our law today - were delivered by the judges orally in court from notes they had made. Everything written had to be copied by hand, using a quill pen. The judgments were not handed down in written form as they are today. The language tended to be crisp and to the point. This made for easy assimilation into foreign cultures: and may

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4. [1975] AC 842, 870.

5. Tong Ping-chuen v AG [1990] 1 HKLR 551, 560.

explain why, even today, at the end of the 20th century, this great system of law still presents a more-or-less uniform face across the globe: the common law is very much the same in Chicago as in Chittagong or Singapore.

In Hong Kong the common law system is governed by the Application of English Law Ordinance, section 3(1) of which says:

‘The common law and the rules of equity shall be in force in Hong Kong:

- (a) so far as they are applicable to the circumstances of Hong Kong or its inhabitants;
- (b) subject to such modifications as such circumstances may require ...’

Plainly, these provisions of law are totally consistent with the Basic Law and will therefore remain in force after 1997.

The real concern to my mind is not whether the common law will apply in Hong Kong in the 21st century, but whether it is capable of adapting itself to the changing circumstances as time goes on and Hong Kong as an SAR of the PRC becomes more and more assimilated into the culture of the mainland. In this regard, there are cross-currents that will influence its development:

(1) The tendency of the common law to grow in a uniform manner - a tendency which will increase with time as reported decisions from other jurisdictions become more and more easily available. At present there is a service offered by the law publishers Butterworths called LEXIS (not to be confused with the car of the similar name which is spelt LEXUS) which has its data-base in Baton Rouge, Ohio and gives access to cases reported in many common law jurisdictions (at a price).

The tendency towards uniformity is also seen in the approach which judges themselves adopt to the resolution of cases. Judges are concerned with the practical working environment of the courts, not with notions of abstract justice. The attitude expressed by Lord Eldon, Lord Chancellor in the early 19th century, that 'it is better the law should be certain than that every judge should speculate upon improvements in it' is still an attitude which is very much alive today.

This means that where there is a precedent for a case in, say, Australia or Canada, the courts are inclined to follow it. Nowhere is this tendency more apparent than in the new branch of law which has sprung into existence since the Bill of Rights was enacted in June last year. There you will see the courts at all levels, magistracies, District Courts, High Court, and Court of Appeal, clinging to decisions from other jurisdictions, particularly from Canada, as shipwrecked sailors might cling to the flotsam and jetsam, in a sea where there is no clearly visible horizon.

This tendency towards uniform development is shown clearly in a case decided in the final court of appeal in Australia called Piro v Foster<sup>6</sup> where Latham CJ said:

'This Court is not technically bound by a decision of the House of Lords, but ... [the] House of Lords is the final authority for declaring English law, and where a case involves only principles of English law which admittedly are part of the law of Australia, and there are no relevant differentiating local circumstances, the House of Lords should be regarded as finally declaring that law ...'

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6. (1943) 68 CLR 313, 320.

What is expressed here will remain a strong guiding principle for the courts in Hong Kong after 1997.

(2) Given the peculiar circumstances of Hong Kong, there will be strong tendencies pulling the development of the common law away from the mainstream, the most important of which is the use of Chinese language. It must be remembered that, ultimately, the judiciary and the legal system are functions of government. The community is governed by law; the law is administered by the courts. At the moment the government departments in Hong Kong operate, by-and-large, through the medium of English. The tendency is however for the greater use of the Chinese language. As the statute laws of Hong Kong progressively get translated into Chinese, the government departments which administer these laws will gain increasing confidence in the use of Chinese.

In the long run I doubt whether it is possible for a legal system to exist in one language - English - when the language of government is in a different language - Chinese. If there is to be 'convergence' in this regard, the courts will have to adapt to the changing circumstances.

#### WAYS TO ACHIEVE 'CONVERGENCE'

Although courts appear, with all their archaic costumes and arcane rituals, to be rigidly incapable of moving with the times, they are in fact among the most flexible institutions in the world. This is because the practice and procedures are left very much to the discretion and judgment of the individual judge. Without having to pass laws or effect any radical change in the rules, there are a number of ways whereby courts can help to mould the common law to the changes that will come, when Hong Kong becomes an SAR of the PRC. I venture to make a few suggestions:



(1) The cutting edge of the law. It is, I believe, important that the cutting edge of the law should be kept sharp. This does not mean that the system has to be harsh or brutal; but it does mean that it must be practical and effective. It is well to remember that in court, though perhaps not in the class-room, an ounce of application is worth a ton of abstraction. There are powerful forces in the community which the law has on occasions to control and regulate; certain institutions and corporations, and their controllers, wield enormous power; they cannot be allowed to be a force unto themselves. The court's response, should the occasion arise, must be measured and moderate but also robust. Courts should generally be reticent and slow to condemn; but when they do speak, they must speak clearly and decisively. This is particularly important in the criminal law. In the commercial world one can choose whether or not to deal with the opposite party; in the criminal law, the victim has no choice.

As was said by Sir James Stephen in writing The History of the Criminal Law of England in the 1880s:

'Criminal law is itself a system of compulsion on the widest scale. It is a collection of threats to life, liberty and property if people do commit crimes.'

It is only right that people who are entrusted by the community to wield such powers over others - judges - must do so in a robust fashion, with no backward glances and self-doubt. The community deserves no less. A vibrant and successful HKSAR requires the underpinning of a robust judiciary.

(2) The simplicity of language. When you read a statute such as the Sale of Goods Ordinance you will see that it is expressed in only 22 pages. It puts together the principles of the common law relating to the sale of

goods found in hundreds of cases, decided over a period of more than a century. The law is stated in short and simple sentences.

When you contrast that with contracts that solicitors draw up for the sale of land, it is enough to make angels weep. Land is by far the most valuable commodity in Hong Kong today, and the rights to land depend ultimately upon the court's interpretation of those rights as expressed in conveyances, leases, and mortgages. And yet, solicitors who draw up these instruments continue to express them in the most obscure of language, using forms devised by conveyancers in the 19th century when everything was handwritten, and scribes were paid by the word.

I was reading a judgment the other day concerning a dispute between a PRC supplier of steel plates and a Taiwanese buyer. For obvious reasons the contract was channelled through a Hong Kong intermediary. The issue was whether the steel plates were up to the contract specifications regarding dimensions. The seller argued that the Japanese Industrial Standards applied to the contract. If it were so, it meant that a considerable tolerance in terms of dimensions was allowed. The contract did not expressly refer to the Japanese Industrial Standards, but the seller said that those standards applied by implication. The written contract itself set out the dimensions of the steel plates and their thicknesses down to the last millimetre. Commonsense would suggest that when the parties had, by their own contract, specified the exact dimensions of the goods to be supplied, there was no room for any contrary implication. As I was reading the judgment, I found myself wishing: 'Pray God; let the learned judge express his reasons in a straightforward way, without the use of Latin words.' And, as I came to the end of the passage, there was the dreaded Latin phrase that I hoped so much not to see: '*Expressio unius est exclusio alterius.*' How do you translate that into Chinese? Why use a Latin tag to express what should be a

commonsense proposition, which any reasonable contracting party would have understood? This was a judgment expressed in the English language which, to be intelligible to the litigants, probably had to be translated into Chinese.

To ensure the proper growth of the common law in Hong Kong in the 21st century, it must be a cardinal principle to be applied in all courts, where the users are likely to be non-English speakers, that the language should be simple. It must be easily translated into Chinese. This means short sentences. No verbal flourishes, purple passages, and above all no Latin tags. In saying this it would be fair to add that the law has developed its own shorthand language: for example, when you say to a lawyer: 'Wednesbury unreasonableness,' that carries a wealth of meaning. It conveys concepts in the growing branch of administrative law which would need several paragraphs to explain. The use of such language is economical and at times inevitable. But, as far as possible, judgments must aim to communicate the logic and sense of its conclusion to the parties affected. Only in this way can respect for the law grow.

## CONCLUSION

What I think is clear is that, for the common law system to remain successful in Hong Kong in the 21st century (barely seven years away), the courts at all levels and the legal profession as a whole must become more aware of the changing needs of the community, and of the cultural gulf that exists between the law and the people governed by it. But the common law system itself is robust; you may huff and puff, it will not easily be blown away.

# The Constitutional Framework

Yash Ghai

## INTRODUCTION

From the time that the Joint Declaration between the People's Republic of China ('PRC') and the United Kingdom of Great Britain ('UK') was ratified on 28 May 1985, Hong Kong entered the period of 'transition.' The Declaration provided that on 30 June 1997, sovereignty over Hong Kong would pass from the UK to the PRC, allowing for a twelve-year period of transition. The mere transfer of sovereignty could be accomplished in a shorter period, but the Joint Declaration provides in addition for a special status for Hong Kong under the constitutional and political system of the PRC the establishment of which requires a somewhat longer time. Hong Kong will be a Special Administrative Region of the PRC with a high degree of autonomy, which includes its own institutions.<sup>1</sup> The period of twelve years was not chosen because it was felt that that was the time necessary for the transition, but for other reasons, primarily to set at rest uncertainties about the future status of Hong Kong in view of the expiry in

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1. For the constitutional and political system under the Basic Law, see Ghai, 'Constitutional Law' in J Sihombing (ed), Annual Survey of the Law (Hong Kong: Hong Kong Law Journal Ltd, 1992), and Hsin-chi Kuan, Hong Kong After the Basic Law (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, The Chinese University of Hong Kong, 1991). For a useful analysis of institutions under the draft Basic Law, see Peter Wesley-Smith and Albert Chen (eds), The Basic Law and Hong Kong's Future (Hong Kong: Butterworths, 1988).

1997 of the lease over the New Territories.<sup>2</sup> However, the result was that the PRC and the UK had ample time to plan the transition of Hong Kong from a British colony to a Chinese special administrative region.

The aim of this paper is to examine the purposes and the framework for the transition period and the difficulties that have attended them. Many countries have had to cope with the transition to a new constitutional order. Sometimes this has involved significant shifts of power or a major transformation of institutions (as when there is a transfer of power from a military to a democratic civilian regime).<sup>3</sup> A special kind of constitutional transition occurs with the end of the colonial empires, of which we have many examples following the second world war (each colonial power adopting procedures peculiar to its national traditions).<sup>4</sup> It is difficult to generalise over this range of experiences (which depend on the complexity of the new institutions and the political difficulties of the change of power and authority). However, it can be stated that the purpose of the transition may be narrow or broad. The narrow purpose would be merely the

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2. See for example the Preface by Professor Wesley-Smith in the 1983 reprint of his Unequal Treaty (Hong Kong: Oxford University Press, 1983) and Kevin Lane, Sovereignty and the Status Quo (Boulder: Westview Press, 1990), chapt 1.

3. There is now considerable literature on the transition from authoritarian to democratic regimes. See for example G O'Donnell and P Schmitter (eds), Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies (Baltimore: Johns Hopkins Press, 1986).

4. See, for a comparison of the British and the French practices of decolonisation, M Morris-Jones and G Fischer (eds), Decolonisation and After: The British and French Experience (London: Frank Cass, 1980).

establishment of institutions under the new constitutional dispensation and the election or appointment of office-holders under it (and the termination of sovereignty of the metropolitan power when the transition is from a dependency to a new state). The broader purpose would be to facilitate the establishment of new institutions through the development of political conditions (including the organisation of parties and electoral systems), negotiation of differences, the promotion of civic education and the mobilisation of legitimacy for the new order, a period of tutelage, etc.

It is clear from the key constitutional instruments regarding Hong Kong that some but not necessarily all of these broader purposes are on the agenda. The transition in Hong Kong is unusual (though not unique),<sup>5</sup> in that it involves the transfer of sovereignty from one state to another, in relation to a territory which is to enjoy considerable autonomy under a new set of institutions. The consequence is that the arrangements for transition are complex, and have been made even more problematic due to the frequently uneasy relations (arising from mutual suspicions) between the PRC and the UK. In order to bring out the specificity (and the difficulties) of constitutional transition in Hong Kong, it will be contrasted with the standard British model of decolonisation.

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5. The transfer of sovereignty over Aland Islands from Russia to Finland and the merging of Eritria (from Italian sovereignty) with Ethiopia in a federation are examples; see Hurst Hannum, Autonomy, Sovereignty, and Self-Determination (Philadelphia: University of Pennsylvania Press, 1990), chaps 16 and 17 respectively.

### CONSTITUTIONAL TRANSITION IN BRITISH DECOLONISATION

The general aim in the British practice has been to give independence on the basis of a constitution which incorporates the principles and rules of parliamentary democracy (there have been very few exceptions to this aim).<sup>6</sup> This involves a fundamental change (towards democratic principles and practices) in governmental institutions, particularly the legislature and the executive, which are constituted on the principle of the supremacy of the governor and are manifested in his powers of appointment to the two councils. The grant of independence is based on negotiations with local political leaders. There are no external parties (although in the case of trust territories, and later also colonies, the UN looks at the constitutional settlement).<sup>7</sup> There is no referendum, but at some point the issue of independence (but rarely the specific constitution) is made the subject of general elections (and so in this indirect way the views of the public are secured). The general theory has been that the people (and their leaders) must be trained for the responsibilities of self-government. Thus once the goal of independence is conceded, Britain embarks on the transitional period with a view to preparing for the exercise of those responsibilities. This typically involves identifying leaders who would assume high office. These leaders emerge through competitive elections, although Britain tries to, and

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6. Cyprus and Zambia were allowed independence under semi-presidential systems (the former due to its complex racial characteristics and the latter because there seemed a high degree of domestic consensus on it).

7. Cyprus is again an exception, where the Greek and Turkish governments played an important role in order to secure the agreement of its two ethnic communities and to provide a system of international guarantees.

sometimes is able to, influence the outcome (for it is concerned to ensure that power passes to those who identify with its interests or are amenable to its influence). By this time 'representation' through nomination has been discontinued. At the same time the localisation of the public services is undertaken.

The constitutional path is, on the whole, relatively well chartered, guided by the aim of a parliamentary system (a particular colony may of course have specific problems, like ethnicity or land, which may need to be constitutionally accommodated, but these are done through the parliamentary system, even if that framework may not be suitable for multi-ethnic states). The colonial legislative and executive councils lend themselves particularly well to the direction to as well as the pace along this path, as the principle of nomination is abandoned in favour of general elections, and the proportion of elected members to official members is progressively increased. Once there is a majority of elected members in the legislature, there is a fundamental shift in the metropole-colony relationship. The government is no longer able to control the legislature, and the principle of gubernatorial rule has to be drastically modified. Henceforth the responsibility for securing legislative approval of bills and appropriations passes to the politician designated the chief minister (who commands the greatest degree of support among the elected members). Certain responsibilities like defence remain with the governor, and he may if necessary legislate directly for them. But the division of powers between the chief minister and the governor is based increasingly on the salutary (parliamentary) principle that the government which is not in control of the legislature cannot govern effectively. Responsibility moves to where power is. This change is reflected in the composition of the executive council, where the overwhelming majority of the members are parliamentarians of



the ruling party or coalition (the governor nominating official members for the few responsibilities left to him), thus establishing the link between the executive and the legislature which is fundamental to the parliamentary system. At the same time during this transitional period, the relations between the governor and the chief minister are crucial, if the different responsibilities are to be well co-ordinated and the remaining hurdles to independence smoothly negotiated.

The process of transition takes place within the framework of British (colonial) constitutional law (which is a mixture of legal doctrine, political practice, and constitutional conventions).<sup>8</sup> Although rooted in firm principles, it allows for flexibility in the relations between the colonial authorities and local leaders, and the progress to independence through well defined stages, particularly between self-government and independence. Self-government is seen as a period of tutelage, when the local political leaders work together with the governor and senior civil servants, being inducted into the system of government and the increasing assumption of responsibilities and decision-making. Since so much of the parliamentary system depends on 'conventions' which imply an element of political discretion<sup>9</sup> (and a specific, but not always unambiguous, relationship

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8. See Kenneth Roberts-Wray, Commonwealth and Colonial Law (London: Stevens, 1966), pp 260-7 for a discussion of the technical legal issues in the transition to independence.

9. There has been a tendency towards the greater specification of 'conventions' in the constitution. The earlier dominions and India are examples of reliance on 'conventions': see Stanley de Smith, The New Commonwealth and Its Constitutions (London: Sweet and Maxwell, 1964), pp 82-90. For more recent instances when the conventions are spelled out,

between ministers and civil servants), the period of tutelage is considered important. Consequently at the terminal stages of colonial rule, decisions are increasingly politicised, persons to become the leaders of government on independence have been identified and educated in the practice of administration, and are responsible to an elected legislature. The transfer of sovereignty is thus, from a governmental point of view, uneventful. The grant of independence and the attendant constitutional arrangements are the consequence of British legislation; this ensures that changes during the transition can easily be consolidated in the law (though this does not prevent the new leaders from altering these arrangements after independence). There is normally a general provision that continues in office existing office-holders and in effect maintains existing laws (subject to compatibility with the new constitution, a matter to be resolved by the judiciary).

It must be admitted that the above account is a social construct of an ideal model, of how the British like to think they have conducted the end of their empire. The reality, however, has frequently been different. Changes have been forced upon the British, and they have seldom been able to control the pace of constitutional progress. Indeed in the first post-war decolonisation, the Indian sub-continent, they left in something of a hurry, before any constitutional instruments were in place, leaving it to the Indians and the Pakistanis to do their own transitions to constitutional

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see Ghai and Cottrell, Heads of State in the Pacific (Suva: University of South Pacific, 1990).

government.<sup>10</sup> There is also another contradiction in the model which has undermined one of its premises, that of a measured change from self-government to independence. Although during the stage of self-government the chief minister must take some responsibility for policy and administration, the ultimate responsibility for law and order and stable change remains that of the governor. But his authority has been diminished by the constitutional and political process; and it is frequently the case that not enough of it remains to enable him to carry out his responsibility. In these circumstances it is sometimes expedient to speed up the process to independence, sacrificing the tutelage functions of the transition (it is interesting to note that Michael Heseltine proposed many months ago that the UK should quit Hong Kong immediately, as the problems of governance would become increasingly intractable). Consequently, in few instances have the new leaders gained the experience of operating a democratic system, and the authoritarian and bureaucratic habits of administration have shown greater resilience than the new liberal constitution.

#### PRINCIPLES AND FRAMEWORK FOR TRANSITION IN HONG KONG

There are various, obvious reasons why the traditional British model could not be applied to Hong Kong. For one, Hong Kong is not destined for independence, but for return to Chinese sovereignty. China is a key party to the transitional process (with clear views of its own on method and goal), creating a triangular rather than a bilateral relationship. The goal of constitutional development is not a Westminster parliamentary system. In

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10. See V P Menon, The Transfer of Power in India (Calcutta: Orient Longmans, 1957). In Burma too the British left before a constitution could be drafted: Maung Maung, Burma's Constitution (The Hague: Martinus Nijhoff, 1961), chapt 3.

fact, as we shall see, there is some haziness about the ultimate constitutional system (which complicates the process of transition).

The basic goals and the framework for the constitution of the Hong Kong Special Administrative Region ('HKSAR') is the Joint Declaration. The purpose of the Declaration (as stated in the preamble) is 'the maintenance of the prosperity and stability of Hong Kong.' The political, economic, and social goals are spelled out in considerable detail. The underlying principle is that, within the context of the sovereignty of the PRC, the HKSAR will, for fifty years, enjoy a high degree of autonomy, except in foreign affairs and defence.<sup>11</sup> Another basic principle is that 'the current social and economic systems in Hong Kong will remain unchanged, and so will the life-style.'<sup>12</sup> The guarantees to maintain these systems are spelled out in great detail.<sup>13</sup> The judicial system would continue largely as at present, except for the abolition of appeals to the Privy Council and the Privy Council's replacement by a new court, the Court of Final Appeal.<sup>14</sup> The principle relating to the political system is less well defined. The government of the HKSAR will be composed of local inhabitants, and the chief executive will be appointed by the PRC on the 'basis of the results of elections or consultations to be held locally.'<sup>15</sup> It is provided, though not

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11. JD3(2).

12. JD3(5).

13. Annex I of the Declaration.

14. Part III, Annex I.

15. JD3(4).

in the text of the Declaration but in Annex I,<sup>16</sup> that the legislature shall be 'constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature.'<sup>17</sup>

The Declaration makes several provisions for the transition. The responsibility for giving effect to the goals and the constitutional framework is that of the PRC, to be discharged by the National People's Congress ('NPC') through a Basic Law.<sup>18</sup> The process is to be conducted within the framework of the PRC Constitution.<sup>19</sup> However, the responsibility for the administration of Hong Kong ('with the objective of maintaining and preserving its economic prosperity and social stability') until the transfer of sovereignty will be that of the UK; the PRC will 'give its co-operation in this connection.'<sup>20</sup> The Declaration establishes a Sino-British Joint Liaison Group ('JLG') to 'ensure a smooth transfer of government in 1997' and the

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16. The Annex is of course as equally binding as the Declaration (JD8), but the 'relegation' of the statement of the principle of political organisation to an annex perhaps demonstrates that it was considered less important than the principle of economic organisation.

17. Part I of the Annex.

18. JD3(12).

19. JD3(1) says that Hong Kong would become a special administrative region of the PRC 'in accordance with the provisions of Article 31 of the Constitution of the PRC.'

20. JD4.

effective implementation of the Joint Declaration.<sup>21</sup> A separate joint commission is established to deal with land matters.<sup>22</sup>

The tasks of the transitional period therefore are the establishment of a constitutional framework for the HKSAR, the administration of Hong Kong until the transfer of sovereignty, and the smooth transfer of government in 1997. These tasks are not necessarily easy. Unlike other British experiences of decolonisation (where rapid economic and political changes are imperative), in one, and paradoxical, sense the over-riding theme of the transition in Hong Kong is the maintenance of the status quo and of codifying present practices. However, reform of the political system is inscribed in the Declaration (a legislature 'constituted by elections,' the chief executive appointed after election or consultations, the executive accountable to the legislature), both reinforcing and moderating UK initiatives in the 1980s towards constitutional progress. There is considerable tension between the maintenance of the social and economic systems and political and constitutional reform, especially as it is widely perceived that political reform (involving a wider franchise, the development of parties, and the mobilisation of groups with specific economic and social demands and hitherto left out of the circles of influence and power) has a logic that undermines the basis of these systems. The tension has been heightened by the skeletal provisions of the Declaration on political reform, leaving most issues open and others ambiguous.

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21. JD5.

22. JD6 and Annex III.

There is another, related contradiction in the Basic Law, between Hong Kong's autonomy and the detailed prescription of social and economic policies. It is not unfair to say that the principal function of the Basic Law is to entrench an economic system, not to confer autonomy upon the people of Hong Kong.<sup>23</sup> Insofar as the 'prosperity and stability' of Hong Kong is said to lie in the preservation of that economic system, attempts during the transitional period at laying the political and legal foundations of that autonomy can be characterised as inconsistent with both the Joint Declaration and the Basic Law. This tension complicates the problems of the transition.

A further difficulty lies in the division of responsibilities between the PRC and the UK. The PRC is to formulate the Basic Law (in conformity with its undertakings in the Declaration) while the UK is to administer Hong Kong to facilitate a smooth transfer of government. No provision was made for any role of the UK in the formulation of the Basic Law (although the UK could, and did, claim that it had a right under the Declaration to be consulted and to be satisfied that the provisions of the Basic Law were a faithful implementation of its provisions).<sup>24</sup> Nor does the Declaration

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23. Ghai, 'The Past and the Future of Hong Kong's Constitution' [1991] *China Quarterly* 794, p 808.

24. The degree of British involvement in the drafting of the Basic Law became obvious with the publication in October 1992 of the secret communications between it and the PRC after Governor Patten's proposals for the next phase of constitutional reform. See note 54 below. British involvement is also acknowledged by one of its principal negotiators, Mr Paul Fifoot; see 'China's Basic Law for Hong Kong' [1991] *International Relations* 301, esp footnote 3.

stipulate any procedure for its drafting (other than to vest the responsibility for it in the NPC), thus giving the PRC a free hand. The UK authority for the administration of Hong Kong, on the other hand, would seem to be circumscribed, as the object of the administration is to maintain and preserve its economic prosperity and social stability; and it may also be said to be under an obligation to ensure a smooth transfer of government in 1997. Although these restrictions are not reflected in the British or Hong Kong constitutional instruments, that they exist seems to represent the Chinese view.<sup>25</sup> By accepting the doctrine of 'convergence' (discussed below), the UK considerably limited its powers during the transitional period. Further restrictions are implied in the provision of the Joint Declaration that after 1997 'the current social and economic systems in Hong Kong' will remain unchanged, if 'current' is taken to mean the systems at the time the Declaration was ratified, as China has frequently argued, as this would seriously impair the ability of the UK or Hong Kong

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25. The Chinese criticism of various UK or Hong Kong initiatives, like the British nationality legislation in 1990, the reform of the committee system of the Legislative Council, the possible appointment of the members of the United Democrats of Hong Kong to the Executive Council, the Bill of Rights Ordinance, or the privatisation of the RTHK, have generally been based on their incompatibility with the Declaration or the Basic Law or the stability of Hong Kong. For useful surveys of Chinese attitudes to these questions (and other problems in the implementation of the Declaration) see the relevant chapters in the annual The Other Hong Kong Report (Hong Kong: The Chinese University Press).



governments to take new initiatives in a wide variety of fields.<sup>26</sup> China has suggested another restriction on the powers of the UK, in relation to issues and projects that 'straddle' July 1997. China claims the right to be consulted on these matters; in practice consultation means more than being informed and given the right to comment, as Chinese consent is deemed necessary.<sup>27</sup> The claim has wide implications, as many projects (including various forms of franchises, and most major investments) would straddle 1997. The UK has to some extent conceded this claim, whether out of considerations of the law or expediency; the most dramatic example is the Memorandum of Understanding on the new airport, which gives China a major role in the project.<sup>28</sup>

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26. The Declaration and the Basic Law use several 'temporal' points; there is dispute as to whether these refer to the dates of the Declaration, the adoption of the Basic Law, or the transfer of sovereignty.

27. It would appear that in the view of the PRC this claim is based not only on the Joint Declaration but also on certain undertakings given by the UK as to transitional constitutional provisions during secret negotiations over the drafting of the Basic Law. See the discussion in the Conclusion, below.

28. For the Memorandum, see Margaret Ng, 'The Implementation of the Sino-British Joint Declaration' in Sung Yun-wing and Lee Ming-kwan (eds), The Other Hong Kong Report 1991 (Hong Kong: The Chinese University Press, 1991).

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, para 2). This gives a wider scope for

The Declaration made a fundamental distinction between the goal and the arrangements for the transition, and administration during that period, which has been productive of misunderstanding, confusion, and recriminations. However, it would appear that the difficulties of this distinction were recognised for the Declaration set up, as noted above, a Sino-British Joint Liaison Group ('JLG') 'to ensure a smooth transfer of government in 1997.' Its functions are to (a) conduct consultations on the implementation of the Joint Declaration; (b) discuss matters relating to the smooth transfer of government in 1997; and (c) exchange information and conduct consultations on such subjects as may be agreed by the two sides. Its principal task is to ensure that Hong Kong's international economic status is maintained through the negotiation of treaties and membership of international economic organisations. Although the English language version of the Declaration makes clear that the JLG is a consultative body without any 'power' in the administration of Hong Kong or supervision over it, its precise role has become controversial, with the PRC claiming that it is a decision-making body. The PRC is undoubtedly right in the sense that it is a forum where certain kinds of decisions (eg authorising the conclusion of treaties which bind the HKSAR) are reached. But it is unlikely that it was intended to have any responsibility for the current administration of Hong Kong (as that would detract from the UK's mandate to administer it), although as we shall see, it has now assumed some role in the decision-making process in Hong Kong.

The Declaration establishes another joint body, the Land Commission, with responsibility for certain land matters. It has the power

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initiatives by the Hong Kong government during the transitional period.

to authorise the grant by the government of more than 50 hectares of land in any year (the limit prescribed in the Declaration) as well as the use of the income from land sales attributed to the HKSAR (which is half of the total income).<sup>29</sup> In addition it has general supervision over land policies set out in the Declaration (including the amount of land granted to the Hong Kong Housing Authority for public rental housing). Since land is such an important instrument of policy and a source of public revenue (and crucial to the infrastructural development, including the airport), the restrictions in the Declaration on land alienation and the disposal of that revenue and the decision-making and supervisory role of the Commission have a large, negative significance for the administration of Hong Kong in the transition period.

The scope of the authority of the UK is therefore far from clear. Similarly ambiguous is the role of the PRC in policy and administration of Hong Kong. These ambiguities are compounded by the role of the Hong Kong government. The Declaration is an international treaty which provides no role for the government of Hong Kong, although it must be taken to assume the existence and functions of that administration. The people and institutions of Hong Kong have been excluded from the key decisions on their future. However, as much of the legislation (including that to replace

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29. By September 1991, the share of the future HKSAR government was over \$25 billion: Hong Kong 1992 (Hong Kong: Government Information Services, 1992), p 48.

imperial laws that would lapse on the transfer of sovereignty)<sup>30</sup> during the transitional period would have to be passed by LegCo, it is unrealistic to write off its influence (or that of political and other groups in Hong Kong).

This leads to a fragmented framework, which in turn is subject to political manipulation (so that political constraints are placed on the exercise of legal powers). Nor is the ultimate goal of the constitutional transition particularly clear. As we have seen, there is some haziness about the ultimate constitutional system (which complicates the process of the transition). For these and other reasons, that process is somewhat disorderly, occasionally confusing, and sometimes contentious. The process is geared more towards the establishment of the necessary institutions than in providing some grounding or experience in their operation. Although the doctrines of 'convergence' and 'through train' have been agreed by the PRC and the UK, the PRC is undoubtedly hesitant about a tutelage period (which, given the legal position up to the end of the transition, would have to be provided by the British administration in Hong Kong).

A smooth and successful transition thus places a heavy premium on goodwill and co-operation between the UK and the PRC. There was no good reason to assume that the co-operation would be forthcoming (over the long period of the transition). It was clear that the UK would come under heavy pressure from lobbies in the UK, Hong Kong, and the international community to accelerate the pace of democracy, while the PRC had wanted as far as possible to freeze the situation as in 1984. The PRC distrusted the

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30. Both the Declaration (Part II, Annex I) and the Basic Law (art 8) provide for the continued effectiveness only of Hong Kong ordinances and subordinate legislation thereunder.

motives of the UK for its policies of transition, convinced that it would use the period to exploit Hong Kong's wealth and lay the foundations for future influence. The UK did not really believe that the PRC would honour its undertakings in the Joint Declaration. It was not unlikely that both sides would compete for the 'soul' of the emerging leaders of the HKSAR, promoting its protégés (although this may not be a serious source of conflict since both sides favoured the business and professional leaders, the differences among them emerging later during the drafting of the Basic Law). The UK is better placed to choose the public servants who would provide administrative leadership, while the PRC has an advantage over nominating political leaders (both as incoming authority and with the responsibility to institute the HKSAR through the Preparatory Committee, discussed below).

A further problem of the Joint Declaration is that it provided no role for the people or the administration of Hong Kong. The transitional matters were conceived of as the exclusive preserve of the two sovereign powers. There was a great danger that the process would be marked by horse-trading between them (on issues which may be unrelated to Hong Kong), to the detriment of the people of Hong Kong and their future government. A particular casualty would be the government of Hong Kong, which since the second world war had achieved considerable autonomy from the UK administration.<sup>31</sup> It is ironic that an instrument conceived in a high degree of autonomy for Hong Kong should be the means for undermining it. A

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31. The autonomy of the Hong Kong administration from British control is one of the themes of Norman Miners' The Government and Politics of Hong Kong (Hong Kong: Oxford University Press, 5th ed 1991).

sensible transition would have involved the leaders of Hong Kong in an increasingly active role in policy and administration within an enlarged scope of autonomy. Instead it has led to a situation where administration in Hong Kong is largely dictated by the policies and politics of the PRC and the UK. Even more serious is the absence of any role for the people of Hong Kong. There can have been hardly any instance since the second world war when the transfer of sovereignty has involved so little the people primarily concerned in the transfer. Unfortunately the process has served to reinforce the sense of political helplessness of the people, which colonialism had first produced (while in most cases elsewhere the process of transition is used for the empowerment of the people). The bilateralism of the process has also meant that it is not subject to the international standards on the transfer of sovereignty. The success of the PRC in 1972 in taking Hong Kong off the list of colonies under the purview of the UN meant that it not only escaped the principle of self-determination, but also the test, on transfer, of a democratic constitution (which the UN had established as early as 1960 when W Samoa was given independence without universal franchise, requiring a referendum of the people).<sup>32</sup>

A further criticism of the Joint Declaration as regards the transition is that it left many issues relating to the final constitutional system for the HKSAR unresolved. While democracy and elections seem to be accepted as the ultimate goals, it was not clear that they would be fully operative at the end of the transition period. The scope therefore of constitutional reforms during the transition period was uncertain. It was likely that this would

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32. J W Davidson, Samoa mo Samoa (Melbourne: Oxford University Press, 1976).

become a matter of some contention, since the primary responsibility for the transitional period lay with the UK (which might have a different agenda from the PRC, as we have seen). The PRC was in a position to pre-empt the UK and restrict its competence through the provisions of the Basic Law which it was authorised to enact. This suggested some urgency in getting it formulated and passed; but important initiatives might be taken in the meantime. The UK had already announced proposals for wide-ranging constitutional reform.<sup>33</sup> The PRC tried, successfully, to meet this contingency through the doctrine of 'convergence'.<sup>34</sup> It is therefore necessary to provide a brief account of the Basic Law and 'convergence' before taking the story further (only a brief account is necessary since there is now considerable literature on both).

In chronological terms, 'convergence' came before the Basic Law. Its principal claim is that political, social, and economic changes in Hong Kong during the transition period must be such as are compatible with structures and policy to be established in July 1997 in the HKSAR. To some extent these are spelled out in the Joint Declaration (though not with sufficient particularity in the political sphere), and would be given further specification in the Basic Law. The UK agreed to this proposal at the

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33. The Future Development of Representative Government in Hong Kong (Hong Kong: Government Printer, 1984) (Green Paper, July 1984 and White Paper, November 1984). See Miners, 'Moves Towards Representative Government 1984-88' in K Cheek-Milby and Miron Mushkat (eds), Hong Kong: The Challenge of Transformation (Hong Kong: University of Hong Kong, 1989).

34. Joseph Y S Cheng, 'Hong Kong: The Pressure to Converge' (1986-7) 63 *International Relations* 271.

second meeting of the JLG in 1986, and consequently abandoned its plans for significant constitutional reform.<sup>35</sup> The initiative for constitutional reform therefore passed to the PRC, and gave a special weight to the Basic Law (then still to be formulated) even during the transitional period. This tendency was reinforced by the related doctrine of the 'through train' whereby, if the last legislature of Hong Kong were compatible with the provisions of the Basic Law for the first legislature of the HKSAR, the former would be carried over into the post-1997 period (thus ensuring a 'smooth' transition).

The Basic Law was promulgated in April 1990 after some discussion with the people of Hong Kong and the participation of some of its leaders in the drafting process (who did secure some concessions from the PRC), although essentially that process was managed and controlled by the PRC.<sup>36</sup> Several points about its implications for the transition are worth emphasising (I do not discuss the question whether the Basic Law faithfully implements the provisions of the Joint Declaration, on which there is some

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35. John Walden, 'The Implementation of the Sino-British Joint Declaration' in T L Tsim and Bernard H K Luk (eds), The Other Hong Kong Report (Hong Kong: Chinese University Press, 1989).

36. Emily Lau, 'The Early History of the Drafting Process' in Wesley-Smith and Chen (note 1 above); Ming K Chan, 'Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90' in Ming Chan and David Clark (eds), The Hong Kong Basic Law (Hong Kong: University of Hong Kong Press, 1991). For an alternative view, which argues that the people of Hong Kong played a major role in drafting the Basic Law, see Fang Da, 'Basic Law and Democracy' [1990] Beijing Review, March 19-25.



literature).<sup>37</sup> First, it provides a fuller picture of the political system of the HKSAR. It is to be executive-led, with a vast concentration of power in the chief executive. The executive and the legislature are to be completely separate, although the chief executive is in some respects accountable to the latter, and may even be removed by it, although through a process that is designed to minimise the chances of a successful removal. More probable is his/her control over the legislature, which includes the power of dissolving it. The provisions for his/her appointment are intended to give the PRC a significant, if not a decisive, influence. The legislature is designed to be weak and fragmented, with a built-in conservative bias, relying upon a double system of voting that would diminish the importance of directly elected members, and providing an extremely limited role for 'legislators' in legislative initiatives. The PRC has put a gloss on 'elections' by including indirectly elected members. It has also established a timetable of constitutional progress, by specifying the composition of the first three legislatures after 1997 and keeping for itself the change in the method for the appointment of the chief executive (which in any case cannot be contemplated before 2007). However, while the principles of the system are clear, the details are not always so. In particular the systems of election of the chief executive and the legislature need further elaboration. The Basic Law, by providing a gradual progress towards further democracy, sets up a further period of 'transition' after July 1997. Also unclear is the precise

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37. See particularly the trenchant criticism of Mr Martin Lee in the LegCo debate on the 1988 draft of the Basic Law, reproduced in Chan and Clark (note 36 above), pp 104-16.

composition and role of the executive council which is to advise the chief executive.

Although the Basic Law intended to model these provisions on the present system in Hong Kong, it is clear that the role of the chief executive would be different from the governor in important respects. It is also the case that the Basic Law itself has triggered changes to LegCo and other aspects of the present constitutional system that modify the system as it was in the 1980s. The task of convergence is difficult in these circumstances, as a brake on change is hard to apply. Also, as we see below, there is no provision which would identify the chief executive (the linchpin of the system of administration in the HKSAR) except shortly before the transfer of sovereignty, leaving little room for his/her experience or planning. Another irony of the transitional arrangements is that the lesser of the two bodies, the legislature, will have had a much greater experience of the new arrangements and perhaps organisation and confidence to put the chief executive on the defensive at the start. This may in turn force him/her to rely on the PRC for the maintenance of his/her authority, thus undermining the autonomy of the HKSAR.

A second implication of the Basic Law is somewhat technical, in the provision, already noted, that would disapply imperial legislation (eg Orders in Council or UK Acts extended to Hong Kong) in the HKSAR. This requires the localisation of such imperial legislation as it is desired should continue to apply after the transfer of sovereignty. The legislation for electoral changes are also the responsibility of LegCo. From our present point of view the interesting result is that it vests the present LegCo with a key role in the transition, interposing the people of Hong Kong

uncomfortably (from the perspectives of the metropolitan states) into their bilateralism.<sup>38</sup>

The third implication is that the Basic Law gives the PRC a kind of retrospective veto over changes in the transition that it does not approve of. Article 11 states that the validity of a law depends on its compatibility with the Basic Law, while article 160 gives the Standing Committee of the National People's Congress the right to determine whether any of Hong Kong's laws as at the time of transfer is invalid on the ground of incompatibility. This veto could be used to nullify constitutional changes made now, but that would render 'transition' a messy, cumbersome, confusing, and uncertain process. Therefore its value, as a control on transition, lies less in its operative use than as a device to influence changes now, with the threat of subsequent repeal.

The final point to note is that the Basic Law provides (in the form of a decision of the National People's Congress) machinery for (and tight PRC control over) the establishment of the first government and legislature for the HKSAR through the establishment by the Congress in 1966 of a Preparatory Committee composed of both mainland and Hong Kong members (with at least 50 per cent of the latter, but including a significant

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38. The rejection by LegCo of the decision by the JLG on the Court of Final Appeal, that the Court would be able to invite only one overseas judge, was a dramatic illustration of its power to influence the transitional process. See Frank Ching, 'The Implementation of the Sino-British Joint Declaration' in Joseph Y S Cheng and Paul C K Kwong (eds), The Other Hong Kong Report 1992 (Hong Kong: Chinese University Press, 1992). As we observe in the Conclusion of this paper, Governor Patten's proposals of October 1992 have also cast LegCo in a key role.

number who are members of the NPC and the National Committee of the Chinese People's Political Consultative Conference, 'CPPCC').<sup>39</sup> The Committee would in turn set up a Selection Committee of 400 members (all drawn from Hong Kong) representing the following four major 'constituencies' in equal proportion: (a) industrial, commercial, and financial sectors; (b) the professions; (c) labour, grass roots, religious, and other sectors; and (d) former political figures, Hong Kong deputies to the NPC, and representatives of the Hong Kong members of the National Committee of the CPPCC. The Selection Committee would recommend a candidate to the Central Government in Beijing for appointment as chief executive. It may decide on that nomination either after 'local consultations' or through 'nomination and election after consultations.' Since the method of local consultations or elections (in particular whether the voting is to be restricted to its own members) is not specified, it would presumably fall to the Selection Committee to decide on the methods. Once appointed, the chief executive would be responsible for forming his/her government.

The provisions for the formation of the first legislature are even more skeletal. It is specified that it would consist of 60 members, 20 representing geographical constituencies through direct elections, 30 representing functional constituencies, and 10 elected by an election committee. Nothing is said about the nature of the electoral systems or the functional interests to be represented or the composition of the election committee. It seems to have been assumed that it would be unnecessary to hold elections for the first legislature, as the NPC decision provides that if

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39. Decision of the NPC on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR, 4 April 1990.

the last legislature of Hong Kong reflects this composition its members would constitute the first legislature (for two years). However, whether a member continues in this way depends (apart from upholding the Basic Law and pledging loyalty to the HKSAR) on confirmation by the Preparatory Committee (whose discretion appears to be unfettered).<sup>40</sup> Presumably, if a member is so disqualified it would be necessary to hold by-elections to fill the vacancy. If the composition of the last legislature does not conform to the NPC Decision, the task of the Selection Committee would indeed be highly significant as well as formidable. Again, it would be fair to say that this provision exists not so much because it was intended to be used, as a means to control changes in the transitional period (although the PRC reaction to the Patten proposals, discussed below, emphasis its potency).

#### THE STRUCTURE AND POLITICS OF THE TRANSITION

The goals and the process of transition have to be negotiated through a complex set of structures. The principal structures are (subject to overriding UK sovereignty) the Letters Patent and Royal Instructions which constitute the framework for the present administration of Hong Kong;<sup>41</sup> the undertakings in and the machinery of the Joint Declaration (particularly the

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40. Para 6 of the NPC Decision, *ibid.*

41. For a succinct account of the Letters Patent and the Royal Instructions, see Miners, The Government and Politics of Hong Kong (note 31 above).

JLG); the half-yearly meetings of the foreign ministers of the PRC and UK<sup>42</sup> (and PRC-UK contacts); and the institutions for the establishment of the first administration of the HKSAR. A smooth transition requires the co-ordination of these structures, which in turn depends upon an identity of goals. A detailed analysis of the legal competencies and procedures of these structures would be of limited value in the highly politicised environment in which they now operate. However, a brief account may serve to illustrate the complexity of the task of transition.

We start first with the present constitutional framework for administration in Hong Kong. One is struck by various paradoxes. In legal terms the authority of that framework has been enhanced in recent years, just as its political authority has declined. The PRC was attracted to that framework as it seemed to operate in 1984, with the potential of the UK's control over it, and at home, the dominance of the executive over a largely appointed and, on the whole, compliant legislature. That framework has changed in a number of respects. The Court of Appeal has dismissed claims that the Letters Patent are a form of delegated legislation empowering the local institutions only in a limited way; rather they are full constitutional documents of a largely self-governing territory.<sup>43</sup> The scope of the competence of LegCo has been enlarged by removing most restrictions on legislation having extraterritorial effect as well as enabling it to displace or

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42. These meetings were agreed in the Memorandum of Understanding Concerning the Construction of the New Airport in Hong Kong and Related Questions (September 1991).

43. David Chiu v Attorney General (1991) CA, Civ App No 63 of 1991 (see the paper by Peter Wesley-Smith in this volume).

derogate from imperial legislation.<sup>44</sup> LegCo now has a majority of elected members, so that the executive has lost control over the legislative process and financial appropriations, and has been forced into negotiations (and compromises with it).<sup>45</sup> An official majority also gives LegCo the competence (under imperial laws) to change its constitution, powers, and procedure (although the UK has a veto).<sup>46</sup> It is now heavily influenced by party politics and claims to be the authentic voice of the people of Hong Kong.

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44. In 1985, when the UK Parliament passed the Hong Kong Act providing for the transfer of sovereignty over Hong Kong to the PRC in 1997, it authorised the Crown to enable the Hong Kong legislature to repeal or amend any enactment so far as it is part of the law of Hong Kong and to make laws having extraterritorial operation (para 3(b) of the Schedule). An Order in Council was issued in 1989 which authorises the Hong Kong legislature to amend any imperial legislation and to enact legislation with extraterritorial operation 'to the extent required in order to give effect to an international agreement which applies to Hong Kong ...' (the Hong Kong (Legislative Powers) Order (SI No 153)).

45. For some of the difficulties of administering Hong Kong under these conditions, see the speech by Sir David Ford, Chief Secretary, to LegCo on 6 November 1991.

46. s 5, Colonial Laws Validity Act 1865. The above conclusion would depend on the view one takes of the status of functional constituency members; it may be argued that the Colonial Laws Validity Act contemplates directly elected members from general constituencies with broad franchises, although it has to be admitted that at the time of the Act there were many 'fancy franchises.'

While, legally, the executive powers of the governor are unaltered, the political context within which they operate has changed, and they can no longer be exercised without due deference to what LegCo will wear. As we have seen, the domestication of imperial laws requires its consent (as dramatically evidenced by its rejection of the compromise on the Court of Final Appeal negotiated by the UK and the PRC in the JLG). It has come to play a more important role in the transition process than was envisaged. It is, however, necessary to avoid exaggerating its importance (the public and major project in the territory being effectively out of its purview). Nor is its role uncomplicated, due to its non-recognition by the PRC<sup>47</sup> and the attempt by the PRC, in a move to counteract its growing importance, to establish an alternative group of leaders, the Hong Kong advisers to the PRC, looking more towards the patronage of the rising authority of its new sovereign.<sup>48</sup>

Another major change in the constitutional framework has been the enactment of the Bill of Rights and the parallel amendment of the Letters Patent which entrenches it until 30 June 1997. The Bill represents a major transformation in the triangular relationship between the executive, the legislature, and the courts. By acknowledging the jurisprudence of a number

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47. The PRC has never acknowledged the legitimacy or the constitutional status of LegCo or ExCo, and has refused to have any dealings with their members as such.

48. The Chinese advisers do not have any official status; the justification for their appointment was that they would enable China to keep in touch with public opinion in Hong Kong (since it rejects the claims of the members of LegCo to do so).



of liberal democracies, the Bill could impose restraints on administrative discretion and legislative competence that may be deemed necessary to manage the transitional period. However, its potential impact on the transition process, especially stemming from the equality provision, has not been tapped. Nor has its potential impact on the legacy of administrative powers that would be bequeathed to the chief executive on 30 June 1997 through the persistence of colonial laws.<sup>49</sup>

Although these developments are sometimes seen as running contrary to the Basic Law (and therefore violative of 'convergence'), in fact they are consistent with a sensible policy of transition, for they are implicit in the logic of the Basic Law (this is why the opposition to the Bill of Rights and the proposals for the new committee structure of LegCo<sup>50</sup> was misconceived in terms of the Basic Law, whatever their other justification). Even the untrammelled legal powers of the governor (contrary to the usual practice of decolonisation) are of one piece for, in somewhat similar form, they will be the patrimony of the chief executive. But as I have pointed out, the chief executive will lack the experience of the governor, and will confront a better established LegCo. It should also be remembered that the

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49. For a review of the impact of the Bill in its first 18 months, see Johannes Chan and Yash Ghai, 'Introduction' in Chan and Ghai (eds), The Hong Kong Bill of Rights in Comparative Perspective (Singapore: Butterworths, 1993).

50. The committee system was recognised in 1991, both to emphasise the separation between ExCo and LegCo and to provide a more effective role for LegCo. The PRC objected to the re-organisation as it would increase the scrutiny and policy role of LegCo and undermine the principle of an 'executive-led' government.

untrammelled powers of the governor remain at the service of the UK (as the recent change of governors and the change of their policies so clearly illustrate), and indeed another reason for their retention is that in the complicated process of transition, the UK wants to retain maximum flexibility. These very powers, ostensibly located in Hong Kong, have been the means for the emasculation of the power and authority of the Hong Kong administration (which the present governor may be attempting to reverse).

However, because these developments are seen to be inconsistent with the scheme of the Basic Law (and no doubt for other reasons), attempts have been made to move the centre of gravity to the other major framework, the bilateral framework through the JLG. The most striking case of this is the airport and ports development, under which a new structure for policy-making and supervision has been established under the auspices of the JLG.<sup>51</sup> Working in secrecy, it sets a bad precedent for

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51. The Memorandum of Understanding establishes an Airport Committee under the JLG, where the UK has to consult with the PRC on the grant of major airport-related franchises or contracts or guarantees straddling 1997. Projects which are not listed in the schedule to the MOU require the consent of the PRC if the bulk of the expenditure on them after 1997 falls on the government. No loans (to be repaid after June 1997) in excess of HK\$5 billion may be incurred without the consent of the PRC. The Hong Kong government must leave fiscal reserves of no less than HK\$25 billion on the transfer of sovereignty.

The PRC is to be consulted on any legislation on the airport, and to provide for the membership of a nominee of the PRC on the Airport Authority. A Consultative Committee with PRC membership has been set up with a general advisory function on airport development.

public participation, policy-making, and accountability, just at a time when it is necessary, in preparing for the autonomy of Hong Kong, to emphasise and cultivate these values. It also promotes a style of confrontation and polemics (and the subordination of the leaders and people of Hong Kong) which cannot augur well for the post-1997 period.

### CONCLUSION

Given 'convergence' and the Basic Law, is it possible to change this trend and recover some initiative for the people of Hong Kong (not an unreasonable goal given that the ultimate goal of the Joint Declaration is a high degree of autonomy of the HKSAR)? What are the spaces left for democratisation in the transition period? For concluding perspectives on transition, we may turn to Mr Chris Patten's speech of 7 October 1992 to the Legislative Council which sought to set the agenda for the transition period.<sup>52</sup> What effect will his proposals, if carried through, have on the Basic Law and its operation? Are they compatible with the Basic Law and the Joint Declaration?

The principal effect of the proposals is to quicken the pace of democratisation. The governor makes a distinction between changes that can

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Some of the other matters discussed or decided in the JLG include treaty obligations and succession, Hong Kong's membership of international and regional economic organisations, localisation of British legislation, the privatisation of the Radio and Television Authority of Hong Kong, and the Court of Final Appeal.

52. Chris Patten, Our Next Five Years: The Agenda for Hong Kong (Hong Kong: LegCo, 1992).

be made now, and those which must wait until 1995 when new elections are due (and which require consultations with the PRC). The governor hopes to achieve greater democracy both by changes in the electoral system and more democratic practices, including a more autonomous finances and organisation for LegCo, decentralisation, and accountability. The changes which in his view are possible within the present framework are the lowering of the age of voting to 18; a clearer relationship between the Legislative and Executive Councils (and between the governor and LegCo); and fully directly-elected District Boards which will be vested with certain executive responsibilities relating to local matters. Changes proposed for the 1995 elections (and therefore to the LegCo that might become the first legislature of the HKSAR) would provide for very broad-based electorates for the nine additional constituencies, encompassing all workers in specified sectors of the economy (geared to giving every worker a vote for a functional constituency); the widening of the electorate for the existing functional constituencies; and the composition of the Election Committee (to elect ten members) so that all or most of its members would be drawn from the directly-elected District Boards.

The effect of the electoral changes would be to increase the participation of the people in the electoral process and to expand the degree of democratisation. The lowering of the voting age would enfranchise more people, and such new voters are more likely to want change (and more democracy than possibly the older voters). In that sense the change would affect the general political environment. The effect of broader electorates for the functional constituencies and the composition of the Election Committee would be to increase the role of political parties and decrease the influence of corporate and other special interests. If so, the distinction

between the directly-elected members and other members of LegCo would diminish, thus providing greater coherence to and less fragmentation in LegCo. This would undermine one of the central assumptions of the Basic Law provisions about LegCo, that indirectly-elected members would provide a conservative counter-weight to the more liberally and radically inclined directly-elected members, and tend to negate the expected consequences of double voting in the Council whereby private bills, amendments, and motions will have to be passed by majorities of both the functional members and the rest (I say tend to because the majority of the functional constituencies are still likely to produce conservative members, as the scope for the broadening of the electorates in many cases is limited).

The effect of the separation of ExCo and LegCo is harder to fathom. The governor's intention is to eliminate the confusion in the roles of individual members (and consequently of parties) who would sit in both the councils (particularly given the present fragmented and relatively under-developed party system), and the tendency that might develop for key issues to be resolved in the secrecy of ExCo. He would trade off the influence that elected members might have on the government through their participation in ExCo for greater and clearer accountability of the government to LegCo (including the governor's own appearances in LegCo to explain policy and answer questions). Under his scheme, policy-making will become (or more accurately we should say, remain) a matter for bureaucrats and experts. It would appear that the governor has opted for a vigorous administration in the transition period as against an opportunity for senior politicians, potential candidates for chief executive, to gain experience in policy-making and administration (the governor's proposal to set up a LegCo-Government Committee for liaison, recognising the need to persuade and cajole a

legislature it cannot control through votes, does not meet this goal). Perhaps some messiness in ExCo might be a price worth paying for that experience.

While Mr Patten is perfectly right in saying that the important area in the transition period is the development of a vigorous LegCo, it is also the case that while the powers of the office of the governor provide the prototype for the chief executive, the transition is not going to produce a chief executive until late in the day, when it will be too late to gain the valuable experience of political negotiations and compromises that he/she would have to acquire for effective government (far more necessary for him/her than the governor, who will never become accountable to the legislature as would the chief executive). The relationships between LegCo and ExCo and between the chief executive and LegCo are particularly important since the Basic Law provisions on these are complex, unwieldy, and contradictory. There is no reason to believe that sensible practices now might provide precedents for the HKSAR (since the PRC is precluded from the present developments), but a bolder (if messier) initiative in developing some understandings of these relationships would be worth the risks.

One effect of the manner in which the proposals were made and the subsequent PRC attacks on them has paradoxically been to increase the importance of LegCo in the transitional period. The governor presented the proposals to it before he had consulted the PRC, and he has constantly reiterated its obligation to decide on their acceptability. The view that LegCo takes on them has become central to the way in which the controversy over the proposals may be resolved. Its members are courted by the administration as well as by the PRC. For long kept out of discussions on the constitutional future of Hong Kong, LegCo (and through

it the people of Hong Kong) have suddenly been cast in a key role of great constitutional moment.

Would these changes (and the manner in which the governor proposed them) be incompatible with the Basic Law or the Joint Declaration? As to procedure, the powers and functions of the JLG under the Joint Declaration have been mentioned; these include the discussion of matters relating to the smooth transfer of government in 1997 (which has been accepted by both sides as requiring 'convergence'). The governor has not denied the right (or indeed the propriety) of the JLG discussing and, if necessary, modifying his proposals, but his style of going public without prior consultations with the PRC appears to break with traditional practice (and may seem to the PRC as an attempt at pre-empting decisions).

As to the age of voting, since the Basic Law does not specify it,<sup>53</sup> the grant of the franchise to eighteen-year-olds would be valid. The composition of the Election Committee (for the first legislature) is not specified either, although that for the second legislature (which would be the last to have this category of members) is and consists of the same interest groups as for the committee to elect the chief executive. It could therefore be argued that it is inconsistent with the spirit, if not the actual letter, of the Basic Law. It would certainly be odd to change so fundamentally the nature

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53. Art 26 provides that 'Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with the law.' The PRC does not appear to have objected to the lowering of the age (its own constitution gives the vote at 18 (art 34)), but it may be possible to argue that the change of age represents a fundamental change in the political and social system of Hong Kong and is thus incompatible with the Joint Declaration.

of representation of this category of members from the first to the second legislature. The PRC has argued that the governor's proposals are inconsistent with the Basic Law, for the provisions on the Election Committee (for 1999) were agreed with the British in advance of the conclusion of the Basic Law on the understanding that the committee for 1995 would be similarly constituted.<sup>54</sup> As for the changes in the functional constituencies, the Basic Law does not say anything about them during the transitional period and, even after that, it leaves them to be spelled out by legislation proposed by the government and passed by the LegCo of the HKSAR. So from a strictly legal point of view, the governor's proposals are valid. However, it could be argued that the adoption of functional constituencies in the Basic Law (and presumably for the transitional period) was based on their assumptions in the 1980s, when they were seen to represent conservative corporate interests (incompatible with the governor's

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54. The record of secret negotiations and letters between the PRC and UK prior to the finalisation of the Basic Law was released on 28 October 1992 (SCMP, 29 October 1992) which show that Foreign Secretary Douglas Hurd assured the PRC Foreign Minister Qian Qichen on 12 February 1990 that 'I agree in principle with the arrangements which you propose for an Electoral Committee, which could be established in 1995. The precise details of how this should be done can be discussed between our two sides in due course.' The Chinese argument is that Patten has violated the agreement both on the composition of the committee and the assurance of prior discussions. Patten's response is that Hurd's assurance was part of a wider set of electoral and voting arrangements which the PRC did not accept. It is hard for an outsider to reach a conclusion on these claims, but it would appear that the UK was in the end satisfied with the final form of the Basic Law and Hurd felt able to recommend it to the UK Parliament.



current proposals).<sup>55</sup> The proposals for decentralisation are compatible with the Basic Law which authorises that they may be responsible for providing services in such fields as culture, recreation, and environment.<sup>56</sup>

That leaves the vexed problem of the ExCo-LegCo relationship. The membership of the present ExCo would of course terminate on the transfer of sovereignty and the chief executive would be free to appoint to his ExCo (no through train here), and so the question of compatibility may not arise. On the other hand, in the interests of 'smooth' transition, there is an advantage in the continuity of principles and procedures. In the HKSAR the ExCo would contain some members of the LegCo (presumably the chief

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55. Even as late as 1991, there was a pronounced bias in favour of conservative commercial and professional interests, operating on a small electorate. The 21 functional constituencies were distributed as follows: companies (ie, their management) in the commercial, industrial, financial, tourism, and construction sectors (8), elitist professions (7), trade unions (2), social services (1), Urban and Regional Councils (2), rural interests (ie, Heung Yee Kuk) (1). When the government introduced the functional constituencies, it justified them on the need to give representation to the economic and professional sectors of Hong Kong society which 'are essential to future confidence and prosperity.' They were intended to transmute the informal system of selecting unofficial members of LegCo from functional constituencies to formal representation. See White Paper, The Further Development of Representative Government in Hong Kong (Hong Kong: Government Printer, 1984), para 12.

56. BL97.

executive would be bound to have some such members).<sup>57</sup> Moreover, an underlying theme of the Joint Declaration and the Basic Law is continuity rather than change (which is what the governor is proposing). It could, however, be argued that since the position of the governor is, in political terms, so different from that of the chief executive, that a new scenario will in any case be established on 1 July 1997. It could be also be argued that the governor's proposals are more compatible with another principle of the Basic Law, that of an executive-led system rather than the somewhat confused system of shared responsibility.

The governor's initiative shows that there may be some legal scope for change in the transition period. The controversy surrounding his proposal has rather exaggerated their potential for democratising Hong Kong (suggesting that the PRC has a wide agenda). Equally the adverse Chinese reaction and opposition to it demonstrate the political constraints on change. The controversy that has surrounded the proposals (as indeed the airport business) demonstrate that the institutional structures for transition are messy, which render policy-making difficult and lead to polemics and the hardening of attitudes. But more fundamentally it shows that the Basic Law can be different things to different people (and, in view of recent controversies, the question may be raised if it can weather such widely different interpretations and expectations). The political system it seeks to establish is a result of compromises; it is novel; and is pregnant with

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57. Art 55 of the Basic Law says, 'Members of the Executive Council of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive from among the principal officials of the executive authorities, members of the Legislative Council and public figures ...' This seems to make the appointment of some LegCo members mandatory.

instability. Perhaps no understandings on institutional relationships established during the transitional period can serve as precedents for it. For better or worse, the Basic Law will, in certain important respects, be tabula rasa.

# Constitutional Interpretation

Peter Wesley-Smith

## INTRODUCTION

What principles of interpretation should apply to a written constitution? In one sense a written (or codified) constitution is merely a statute: a form of words in which the law is laid down by a competent legislature for the guidance of citizens, lawyers, and officials. 'Statutory interpretation' is a much-studied subject which seeks to identify and elaborate upon the manner in which words and sentences ought to be understood when, as is often the case, their meaning is not obvious, and although approaches can differ, in accordance with different situations and circumstances, and indeed may even contradict each other, a fair measure of consistency can be expected in most cases when judges are required to give an authoritative ruling. But do the same rules and principles apply when it is not an ordinary statute, dealing with ordinary matters of state or everyday relations between citizens, but a written constitution which is being considered?

A constitution generally deals with large questions: it establishes and empowers the organs of government, defines and regulates their relationship with each other, and sets out the relationship between government and citizen. Further, it is not only a legal instrument but also a political document, one of the symbols, like the national flag or anthem, through which a polity proclaims to itself and to outsiders: "This is who we are." It is a focus of loyalty, a statement of national beliefs, ideas and aspirations.<sup>1</sup> It is concerned with a framework rather than detailed

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1. David Gwynn Morgan, 'Constitutional Interpretation: Three Cautionary Tales' (1988) 10 *Dublin University LJ* 24.

provision, and it is intended to endure though general ideas of government may change, dominant political philosophies may vary with the fortunes of the political process, and economic and social circumstances may develop. Its function is to supply the bedrock upon which sands, however shifting, can maintain a degree of stability, or a foundation securing an edifice whose construction details can accommodate changes in architectural fashion. Broad principles, not detailed rules, are its province. Thus one might expect a constitution to be approached in a generous spirit and construed, not in a narrow and crabbed manner, but liberally, to preserve the framework and the fundamental aspects of the design without interfering unnecessarily with the details of the structure which it supports. As Marshall CJ of the United States said,

‘A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose these objects be deduced from the nature of the objects themselves.... In considering this question, then, we must never forget that it is a constitution we are expounding.’<sup>2</sup>

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2. McCulloch v Maryland, 4 US 316 (1819).

For Justice Holmes,

‘the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.’<sup>3</sup>

All this is a truism of constitutional law and theory. Judges frequently speak in such terms - though they may adopt different metaphors - when confronted with the task of interpreting a written (codified) constitution. Colonial constitutions, however, including the Letters Patent and Royal Instructions which together make up the written constitution of Hong Kong, have not attracted this kind of comment - unsurprisingly, since they are scarcely symbols of ‘national’ identity or statements of ‘national’ beliefs, ideals, and aspirations. Yet in 1991 the Hong Kong Court of Appeal expressly embraced general remarks made by other judges about other constitutions and applied them to the Letters Patent. The purpose of this paper is to explore the ramifications of pursuing a liberal approach to constitutional interpretation in Hong Kong.

Two preliminary points ought to be briefly addressed before going further. First, it is assumed in this paper that Hong Kong has a constitution now and that the Basic Law will be a constitution for the 1997-2047 period. This is rejected by some mainland commentators on the ground that only a

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3. Gompers v US, 233 US 604, 610 (1914), quoted by James A Thomson, ‘Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes’ (1982) 13 Melbourne University LR 597, 602.

sovereign entity can have a constitution.<sup>4</sup> But in bourgeois legal theory and English linguistic usage all sorts of bodies, including colonies and special administrative regions, can, indeed must, each have a constitution. Simply put, each is 'constituted' in some way, whether the rules are written down or not; ergo, each has a constitution. Secondly, questions of constitutional interpretation often arise during judicial review of legislative action, a process which is available now and which is assumed to be available under the Basic Law.<sup>5</sup> This assumption may nevertheless be unacceptable to the Chinese authorities.<sup>6</sup>

#### THE CHIU CASE

In David Chiu v Attorney General the issue was whether the governor had authority to delegate his power to appoint magistrates and, if so, whether he had properly delegated it to the Chief Justice such that the appointment of a particular magistrate by the Chief Justice was valid. The relevant constitutional provision was Article XIV of the Letters Patent: 'The Governor may constitute and appoint such Judges, Justices of the Peace and

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4. Zhang Youyu, 'The Reasons for the Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and its Essential Contents and Modes of Expression' (1988) 2 *Journal of Chinese Law* 5, 7-8.

5. See Peter Wesley-Smith, 'The Legal System and Constitutional Issues' in Peter Wesley-Smith and Albert H Y Chen (eds), The Basic Law and Hong Kong's Future (Hong Kong: Butterworths, 1988), pp 184-5.

6. See Liu Yiu-chiu, 'Interpretation and Review of the Basic Law of the Hong Kong Special Administrative Region' (1988) 2 *Journal of Chinese Law* 49, 55-6.

other public officers as may be lawfully appointed ...’ Clough JA remarked that ‘this court should, in my opinion, construe the Hong Kong Letters Patent in a purposive manner as an organic basic constitutional instrument which was intended to be fleshed out by local legislation and given the flexible interpretation which changing circumstances require.’ He called in support the authorities previously referred to by Fuad VP, from which the following passages were quoted:

- (1) Attorney-General for Ontario v Attorney-General for Canada:  
‘It is, as their Lordships think, irrelevant that the question is one that might have seemed unreal at the date of the British North America Act. To such an organic statute the flexible interpretation must be given which changing circumstances require, and it would be alien to the spirit, with which the preamble to the Statute of Westminster is instinct, to concede anything less than the widest amplitude of power to the Dominion legislature under s 101 of the Act.’<sup>7</sup>
- (2) Attorney-General of the Gambia v Jobe:  
‘A Constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.’<sup>8</sup>
- (3) Edwards v Attorney-General for Canada:  
‘The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to

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7. [1947] AC 127, 154.

8. [1984] AC 689, 700. See also Thornhill v Attorney-General of Trinidad and Tobago [1981] AC 61, 69.



Canada.... Their Lordships do not conceive it to be the duty of this Board - it is certainly not their desire - to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.<sup>9</sup>

Fuad VP concluded that he had no doubt 'that a generous and purposive construction must be put upon Article XIV and the rest of the Letters Patent ...' He does not go on to state expressly the use he makes of this principle, but Clough JA is more explicit:

'Adopting the purposive approach ... I am unable to accept that Article XIV is properly to be construed as conferring on the Governor a bare personal power which he may not delegate even if delegation of part of his power should in his opinion become a practical necessity.'

And:

'construing the Letters Patent broadly and purposively as a constitutional and forward looking instrument I conclude that it must be within the spirit and intendment of Article XIV that the Governor should by that Article have been given a power which included, as a necessary incident to the due performance of his office, the authority to delegate the power where circumstances were considered by him to make this necessary.'

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9. [1930] AC 124, 136-7.

A narrower interpretation might have led the court to accept that the intention of the Crown, when enacting the Letters Patent in 1917, was to require the governor to appoint public officers personally, a task which in 1917 would have been quite feasible but which in more modern times was practically impossible. A liberal conception of constitutional interpretation liberates the courts from consistent application of the meaning which the document was once assumed, in rather different circumstances, to have had or was originally intended to have.

It will have been observed that the cases cited by Fuad VP are relatively modern and that none relates to the constitution of a colony. Edwards concerned Canada after the Balfour Declaration of 1926 when it had been well recognised that the Dominions were de facto independent; the A-G of Ontario case dealt with Canada after the Statute of Westminster had converted the de facto situation into de jure independence. The Gambia was a fully sovereign nation when its constitution was being construed in 1984. Other cases in which statements to similar effect have been made have involved constitutions on the Westminster model<sup>10</sup> or constitutional provisions protecting fundamental freedoms and modelled on broad human rights conventions and declarations.<sup>11</sup> No case, to my knowledge, can be cited in which the courts have recognised the necessity of interpreting the core parts of a constitution of a fully dependent territory such as Hong Kong in a broad manner. So far as independent states are concerned, the written constitution is the final authority (as interpreted by the judges) and

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10. Ong Ah Chuan v Public Prosecutor [1981] AC 648, 669-70.

11. Minister for Home Affairs v Fisher [1980] AC 319, 328; Thornhill [1981] AC 61, 69; Riley v A-G of Jamaica [1982] 3 All ER 469, 474.

may be very cumbersome to amend ('It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one"<sup>12</sup>). In ceded colonies like Hong Kong the Crown can make or unmake the colonial constitutional documents at any time and without impeding formality, and thus there is no need for broad interpretations to infer additional powers to colonial governments. Indeed, to make such inferences might be seen as weakening the ultimate principle of colonial constitutions: that is, the preservation of control by the metropolitan power. That the Court of Appeal in Hong Kong was prepared to do so in the Chiu case might be a judicial response to the political reality of Hong Kong in which the colonial government has a high degree of autonomy during the last days of the British raj.

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12. Hunter v Southam (1984) 11 DLR (4th) 641. This quotation, and some others (particularly from USA courts) referred to in this paper, were culled from Chester James Antieau, Constitutional Construction (London: Oceana, 1982). Antieau, incidentally, distinguishes between interpretation (ascertaining meaning) and construction (determining legal significance) and considers the latter process far larger and more important. In this paper interpretation and construction are used as synonyms.

## THE HONG KONG BILL OF RIGHTS ORDINANCE

In R v Sin Yau-ming<sup>13</sup> Silke VP considered Ministry of Home Affairs v Fisher<sup>14</sup> and adopted the more radical view of the court's interpretive task which the Privy Council had there asserted. Lord Wilberforce had stated that it was quite consistent with respect for the language used, 'the traditions and usages which have given meaning to that language,' and 'the recognition that rules of interpretation may apply' to 'take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms' contained in the Canadian constitution. Applying Lord Wilberforce's words, the Hong Kong Bill of Rights Ordinance is 'sui generis, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law.' Silke VP said: 'We are no longer guided by the ordinary [canons of construction] of statutes nor with the dicta of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the [International] Covenant [on Civil and Political Rights] and give "full recognition and effect" to the statement which commences that Covenant' (p 141). He referred to an 'entirely new jurisprudential approach,' one which Kempster JA identified by quoting from A-G of The Gambia v Jobe<sup>15</sup> that 'A constitution, and in particular that part of it which

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13. [1992] 1 HKCLR 127, 139-41.

14. [1980] AC 319.

15. [1984] AC 689, 700.

protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction' (p 155). That is, the same general attitude which the Court of Appeal assumed in relation to Article XIV of the Letters Patent is to be assumed also in relation to the Hong Kong Bill of Rights.

### THE ORGANIC THEORY

Judges presiding over constitutional adjudication face a perplexing dilemma: how to achieve a result which is consistent with both the law and the needs, demands, and interests of the nation. Law is not arbitrary, it is not based on whim or an official's philosophical or moral predilections; it achieves its purpose through pre-established principles consistently and durably applied, and a judge who abandons principle in favour of individual preference loses respect and the ability to command consent. Archibald Cox refers to the danger that

'fascination with the lawyer's art may divert us from the human goals of the enterprise. Legal logic has no value for its own sake. Law is a human instrument designed to meet men's needs. The ultimate goals of the law are no different from those of a Council of Wise Men. The question is, how much and how fast can a court pursue what it sees as the goals of society without impairing the long run usefulness of judge-made law in contributing to their achievement.'<sup>16</sup>

As Learned Hand wrote, 'A judge must manage to escape both horns of this dilemma: he must preserve his authority by cloaking himself in the majesty

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16. The Warren Court: Constitutional Decision as an Instrument of Reform (Cambridge, Mass: Harvard University Press, 1968), p 22.

of an over-shadowing past; but he must discover some composition with the dominant needs of his time.<sup>17</sup> The organic theory, or 'living tree' doctrine recently adopted in the Hong Kong courts, is the principal means used in the attempt to effect a compromise between law and politics. It is not a radical theory, advocating the ignoring and manipulation of the text and utilizing values foreign to it,<sup>18</sup> but an attempt to look at the constitution in context, to discern its underlying assumptions and purposes, to give effect to its fundamental objectives and make it work in a dynamic environment, and to reconcile permanence and change.

But how does the organic theory, with its assertion that the constitution 'contains within itself the capacity for growth,'<sup>19</sup> operate in fact? It is easy to quote general statements about the need for a generous interpretation of constitutional provisions, but what is their effect? It must be admitted that an effect is not always apparent. Edwards, the case which gave the 'living tree' metaphor to constitutional interpretation, turned on

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17. Quoted in *ibid*.

18. In the United States the dominant dichotomy is between 'interpretivism' (strict reading of the constitutional text, what is referred to below as legalism or textualism) and 'non-interpretivism' (going beyond the text to find enforceable norms). For the most influential account and critique of interpretivism, see John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge, Mass: Harvard University Press, 1980). The organic theory perhaps stands between these two poles, though it is closer to interpretivism than to non-interpretivism; its critics worry, however, that in practice it tends to slide towards the latter.

19. Daryl Dawson, 'Intention and the Constitution - Whose Intent?' (1990) 6 *Aust Bar Rev* 93, 100.

whether the expression 'qualified persons' included women such that they could become members of the Canadian Senate. The Privy Council noted the ambiguity of 'persons,' sections in the constitution where 'person' was obviously intended to include females, other sections where the qualification 'male' was used where women were to be excluded, and the presumption that words in legislation are not gender-specific.<sup>20</sup> These are sufficient reasons for the decision, and it is difficult to see how the fact that the object of the British North America Act was to provide a constitution for a 'responsible and developing State' could in any way assist. In other cases, however, the following practical consequences of application of the organic theory can be identified:

(1) The preservation of fundamental rights and freedoms must not be diminished by a narrow, literal interpretation.<sup>21</sup> In Jobe's case the constitution of The Gambia stated that 'no property of any description shall be taken possession of compulsorily.' Did 'property' include a chose of action such as a debt owed by a banker to the customer? Could the

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20. [1930] AC 124, 143.

21. See Justice Bradley in Boyd v US, 116 US 616 (1885); Chowdbury v East Pakistan, PLD 1957 SC (Pak) 9; Re Southam Inc (1983) 146 DLR (3d) 408, 418: 'The spirit of this new "living tree" planted in friendly Canadian soil should not be stultified by narrow technical, literal interpretations without regard to its background and purpose; capability for growth must be recognized ... Although said in a very different connection, it is apposite here: "For the letter killeth but the spirit giveth life"' (deciding that free access to courts, though not listed in the Canadian Charter as a fundamental freedom, is an integral part of freedom of expression); Reference re Education Act of Ontario and Minority Language Education Rights (1984) 10 DLR (4th) 491, 518.

legislature confer on a public servant power to prevent the customer from exercising his contractual right to draw on his account on demand? A generous interpretation of the word 'property' required the wider definition in order to promote constitutional protection against compulsory acquisition.<sup>22</sup> The constitution of Trinidad and Tobago preserved rights which had previously existed: did this refer only to rights previously enforceable in a court of law? The Privy Council in Thornhill, adopting an organic approach, included rights which had in fact been enjoyed by the citizen prior to the constitution, whether de jure or de facto, whether established by law or settled executive policy and practice.<sup>23</sup> Similarly, in Ong Ah Chuan v Public Prosecutor the word 'law,' in the Singapore constitution's guarantees of equal protection of the law and freedom from deprivation of liberty save in accordance with law, referred not to enactments but a system of law which incorporated fundamental rules of natural justice.<sup>24</sup> In all these cases a disputed word or phrase which bore both a wide and a narrow meaning was given the interpretation which favoured the citizen.

(2) Constitutional grants of legislative power are construed to give maximum authority to the legislature.<sup>25</sup> This is a presumption of validity

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22. [1984] 1 AC 689, 701.

23. [1981] AC 61, 71.

24. [1981] AC 648, 670.

25. See Re Central Provinces 1939 AIR 203. For a discussion of liberalism and the 'principle of efficacy' in interpretation of the Northern Irish constitution, see Harry Calvert, Constitutional Law in Northern



for legislation.<sup>26</sup> The issue in A-G for Ontario v A-G for Canada was whether the Canadian dominion legislature could abolish appeals to the Privy Council, or, stating it more broadly, whether Canadian sovereignty must continue to be impaired by recourse to a tribunal in whose composition the Canadian people had no say; the changed circumstance induced by the Statute of Westminster's gift of independence to Canada dictated that legislative power to abrogate the appeal be conceded.<sup>27</sup> (This principle might in some circumstances conflict with the first, in which case it should normally give way. 'It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed.... The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and

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Ireland: A Study in Regional Government (London and Belfast: Stevens, 1968), pp 125-30.

26. Shell Co of Australia Ltd v FCT [1931] AC 275, 298; Suntharakiniam v Inspector of Police [1972] AC 370, 375. Courts may construe the challenged statute as incorporating, by necessary implication, words which would give effect to the inferred intention of the legislature, provided the words of the law itself are not contradicted and failure to do so would defeat legislative intention by depriving the law of all legal effect: A-G of The Gambia v Jobe [1984] AC 689, 702; Hector v A-G of Antigua [1990] 2 WLR 606, 610. But things may not be read into a statute that are not there: Public Service Alliance of Canada v R (1983) 11 DLR (4th) 339, 349. See Joseph Eliot Magnet, Constitutional Law of Canada (Toronto: Carswell, 2nd ed 1985), vol i, pp 343-6.

27. [1947] AC 127, 154.

purpose.<sup>28)</sup>

(3) The constitution must be able to accommodate changing political circumstances. This is the Chiu situation: the constitution-makers in 1917 may have envisaged appointment of all public officers personally by the governor, but once the civil service has grown to nearly 200,000 employees the courts must read the constitution as permitting delegation.

(4) The constitution must be able to accommodate 'new circumstances arising with the progress of history and science.'<sup>29</sup> Wynes calls this 'generic interpretation'; it 'asserts no more than that new developments of the same subject and new means of executing an unchanging power do arise from time to time and are capable of control and exercise by the appropriate organ to which the power has been committed.'<sup>30</sup> Thus, for example, a power to make law with respect to 'postal, telegraphic, telephonic and other like services' embraces legislative authority over radio broadcasting, though radio broadcasting did not exist when the constitution was adopted.<sup>31</sup>

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28. Rhode Island v Massachusetts, 37 US (12 Pet) 657 (1838).

29. W A Wynes, Legislative, Executive and Judicial Powers in Australia (Sydney: Law Book Co, 5th ed 1976), p 25.

30. *Ibid*, p 26.

31. R v Brislan, ex p Williams (1935) 54 CLR 262. In Wynes' view, 'the question whether a novel development is or is not included in the terms of the Constitution finds its solution in the application of the ordinary principles of interpretation, namely, what is the meaning of the terms in which the intention has been expressed?' (note 29 above, p 26).

### BRIEF CRITIQUE OF THE ORGANIC THEORY

A number of objections can be raised against the technique of giving a broad reading to words and phrases in a written constitution, and these may be briefly considered.

(1) Uncertainty. As circumstances change and with them the scope of the constitution, precedents lose their effect and the means of predicting how judges will decide become less viable. Constitutions can be amended to accommodate change and thus the organic theory is not necessary to keep them in touch with ideas (Justice Hugo Black in the United States complained that the notion of a 'living constitution' is 'an attack not only on the great value of the Constitution itself, but also on the concept of a written constitution which is to survive through the years as originally written unless changed through the amendment process which the Fathers wisely provided'<sup>32</sup>). An alternative approach - 'legalism' or 'literalism' which emphasises strict construction, close adherence to the text, abstract legal reasoning in preference to value considerations - appears to offer objectivity and greater predictability. To stray from the objective intent of a constitution's framers is to deny the purpose of the constitution, which 'is surely to provide fundamental law of an enduring kind, the function of the court being to interpret rather than prescribe.'<sup>33</sup>

(2) Undemocratic nature. Legalism also offers greater authority, for

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32. Dissenting in Harper v Virginia State Board of Elections, 383 US 663 (1966).

33. Dawson (note 19 above), p 95. See generally Greg Craven, 'The Crisis of Constitutional Literalism in Australia' in H P Lee and George Winterton (eds), Australian Constitutional Perspectives (Sydney: Law Book Co, 1992), chapt 1.

judges are obeying the 'rule of law' injunctions which sustain their role. Once they begin to adjust the constitution according to new ideas, or give prominence to particular values in deriving new meanings from the constitutional text, they appear to be unelected and unaccountable legislators. This is particularly so where rights are concerned, for in expanding by interpretation and application the rights incorporated in the constitution the judges are in danger of imposing minority views.<sup>34</sup> Critics who take this line usually prefer a historical analysis, emphasising fidelity to the original intention of the framers and the meaning which their words meant at the time the constitution was adopted.<sup>35</sup> 'When the Court

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34. See F L Morton and Rainer Knopff, 'Permanence and Change in a Written Constitution: The "Living Tree" Doctrine and the Charter of Rights' (1990) 1 SCLR (2d) 533; William H Rehnquist, 'The Notion of a Living Constitution' in Murphy et al (see note 37 below), pp 163-8.

35. The dispute on this issue seems to be one of the constants of American constitutional debate. See, for example, Larry G Simon, 'The Authority of the Constitution and its Meaning: A Preface to a Theory of Constitutional Interpretation' (1985) 58 Southern California LR 603 and 'The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?' (1985) 73 California LR 1482; Raoul Berger, 'New Theories of "Interpretation": The Activist Flight from the Constitution' (1986) 47 Ohio State LJ 1; Judith A Baer, 'The Fruitless Search for Original Intent' in Michael W McCann and Gerald L Houseman, Judging the Constitution: Critical Essays on Judicial Lawmaking (Glenview, Illinois: Scott, Foresman, 1989), pp 49-71; Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law (Cambridge, Mass: Harvard University Press, 1988), pp 22-45; Eulis Simien, Jr, 'It is a Constitution We Are Expounding' (1990) 18 Hastings Constitutional LQ 67; Louis E Feldman, 'Originalism through Raz-Colored Glasses' (1992) 140 University of Pennsylvania LR 1389.

disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.<sup>36</sup>

(3) Incoherence. A generous interpretation of one aspect of the constitution usually results in a strict interpretation of another aspect; one cannot settle conflicts between branches of government, for example, by liberally construing the powers of each.<sup>37</sup> Thus it cannot be the case that the constitution as a whole is a 'living tree,' its terms all to be accorded a broad meaning. Some terms could be read widely, others strictly, but which ones? '[T]he metaphor of a living tree does nothing to tell the judge where he should allow growth to take place or where he should apply the pruning knife.'<sup>38</sup> Consider, for example, article 18 of the Letters Patent, requiring all inhabitants of the colony to be 'obedient, aiding and assisting unto the Governor,' a provision which has never been pronounced upon by a court and which conflicts with the constitutional independence of judges and the Attorney General when deciding whom to prosecute. Should it be generously interpreted to amplify the authority of the governor or narrowly in accordance with general ideas of constitutional propriety? How do we decide such a question?

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36. Harlan J in Oregon v Mitchell, 400 US 112, 203 (1970), quoted by Berger (note 35 above), p 15.

37. See Walter F Murphy, James E Fleming and William F Harris II, American Constitutional Interpretation (New York: Foundation Press, 1986), p 314.

38. Dawson (note 19 above), p 97.

(4) Limited effectiveness. Many statements of the organic theory are not much more than 'nebulous platitudes' which are of little value where difficult problems of interpretation arise. They tend to mask other influences in the decision-making process. Further, they do not assist in the resolution of 'higher tier' issues, such as the relationship between articles of the constitution, what remedies are available, or which sources may be consulted.<sup>39</sup> Judges in Hong Kong, when interpreting an ordinary statute, are already enjoined to give it a 'fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit,' which to a limited extent is the non-constitutional equivalent of the organic theory, yet despite occasional ritual incantation it has had virtually no influence on judicial decision-making.<sup>40</sup>

#### APPLYING THE ORGANIC THEORY

It is in interpretation of the Bill of Rights that the organic theory will be mostly employed and its impact will be greatest (and most controversial). How will it affect attitudes towards the Letters Patent and Royal Instructions?

We should first note that the provisions of Hong Kong's written constitution rarely call for interpretation and application in the courts. Apart

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39. D L Mathieson, 'Interpreting the Proposed Bill of Rights' [1986] NZLJ 129 and 160 at 163-4.

40. See Peter Wesley-Smith, 'Literal or Liberal? The Notorious Section 19' (1982) 12 HKLJ 203.

from LP7(1), relating to legislative authority,<sup>41</sup> LP13 (which was amended after judicial exegesis),<sup>42</sup> LP16 (dismissal and suspension of public officers),<sup>43</sup> and now LP14 in the Chiu case, no provision of the Letters Patent has been the object of judicial scrutiny. Only the general effect of the Royal Instructions has had to be considered by the courts.<sup>44</sup> In the remaining few years of the written constitution's life it is not probable that constitutional adjudication will become necessary. Most provisions are specific rather than open-ended; there are no broadly-stated affirmations of fundamental freedoms and little that is vague or ambiguous; uncertainties do not always, or often, give rise to litigation. Nevertheless, as the Chiu case demonstrates, constitutional questions can unexpectedly emerge, and even 'simple and obvious' issues can become problematic if seriously contested, which can happen when they appear in some new context where the interests at stake are considerable.<sup>45</sup> It has recently been suggested that common law developments now render the Governor's exercise of his

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41. See Peter Wesley-Smith, 'Legal Limitations upon the Legislative Competence of the Hong Kong Legislature' (1981) 11 HKLJ 3.

42. Ho Po-sang v DPW [1959] HKLR 632 (Full Court).

43. Lam Yuk-ming v AG [1980] HKLR 815.

44. Pong Wai-ting v AG (1925) 20 HKLR 22; Rediffusion (HK) Ltd v AG [1970] AC 1136, 1157.

45. Andrzej Rapaczynski, 'The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation' (1988) 64 Chicago-Kent LR 177, 194-5.

prerogative to pardon and reprieve offenders subject to judicial review,<sup>46</sup> and any such proceedings would inevitably involve analysis of LP15 and RI34.

One illustration of how an organic approach could be used prior to 1997 would arise if an ordinance were passed to establish the Court of Final Appeal and abolish appeals to the Judicial Committee of the Privy Council. It is doubtful, for a number of reasons, whether the Hong Kong legislature can accomplish the latter without legislative support from the United Kingdom. But political circumstances have changed dramatically in the last few years, drastically affecting the context in which legislative competence in Hong Kong falls to be discussed. A flexible interpretation of LP7(1) which took account of the broader political considerations legitimized by the organic theory would justify according the widest authority to the legislature in determining the structure of the territory's judicial system.<sup>47</sup> Constitutional adjudication on such an issue and in such a manner, and application of the organic theory to disputes arising under the Bill of Rights, would operate as a dress rehearsal for interpretation of the Basic Law - and this is the real importance of my topic.

#### THE ORGANIC THEORY AND THE BASIC LAW

The power of interpretation of the Basic Law vests in the Standing Committee of the National People's Congress (BL158). How the Standing

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46. Philip Dykes, 'For the Term of His Natural Life' (Faculty of Law, University of Hong Kong; Law Working Paper No 4, 1992).

47. Peter Wesley-Smith, 'Colonial Abolition of Appeals to the Privy Council' (1992) 22 HKLJ 118, 130-1.



Committee will approach its interpretive task, whether it will adopt some general theory to guide its deliberations as opposed to making its rulings in an ad hoc manner in accordance with expediency or the interests of the central government, or indeed whether it will play much of an interpretive role at all - none of these is known. Under Chinese law the Standing Committee has the power of 'legislative interpretation' which permits the making of new rules going beyond the original text to be interpreted; thus no clear distinction between legislative power and interpretive power can be maintained<sup>48</sup> and there is clear incompatibility with the rule of law, the separation of powers, and the common law notion of judicial interpretation.<sup>49</sup> This must give rise to considerable apprehension, if not alarm, when the Standing Committee is called upon to interpret the Basic Law. Be that as it may, the courts of the Special Administrative Region will in any event, under the authority of the Standing Committee, be much involved in interpreting the Basic Law, and the obvious initial questions are whether they will, and whether they should, follow the organic theory.

As to the first, the courts (including the Court of Final Appeal if established prior to 1997) are on the 'through train': the judges will remain in office, most of the law they administer will continue, and their general assumptions and habits and techniques will be carried on as before. This is likely to mean that the principles of constitutional construction recently

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48. Kong Xiaohong, 'Legal Interpretation in China' (1991) 6 Connecticut Journal of International Law 491, 503-4.

49. Albert H Y Chen, An Introduction to the Legal System of the People's Republic of China (Singapore, Malaysia, Hong Kong: Butterworths, 1992), p 95.

adopted will be applied also to the Basic Law. In any event, the inexactness of language generally, the lack of detail which many provisions display, the reality of rapid technological, social, political, and economic change, and the fact that all interpretation is to some extent inescapably creative require employment of at least a limited version of the organic theory.

The second question can be approached by considering the objections to the organic theory noted above. As to the lack of certainty, this may be an acceptable price to pay for a constitution which remains relevant to the evolving society it directs. Amendment of the Basic Law is a simple process but it is utterly controlled by the National People's Congress as limited by the Joint Declaration (BL159); the citizens of the Special Administrative Region have no voice, and the procedure required of amendment bills from the SAR is extraordinarily restrictive. And the opposing technique of legalism is simply not appropriate to constitutional interpretation, especially where open-ended provisions are being considered, and does not lead to any great degree of certainty anyway.<sup>50</sup>

The objection that it is undemocratic for judges to exercise creative powers when interpreting a written constitution is a strange one in the

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50. '... the idea that the text controls its own interpretation, that it is a closed world which can be read without recourse to anything outside of itself, is out of tune with any respectable philosophy of language or theory of interpretation. And so is the idea that if the text cannot control its own interpretation, it can be firmly controlled by a finite number of rules, a comprehensive methodology, which makes the process of interpretation into something "truly objective": Rapaczynski (note 45 above), p 194. For a critique of 'textualism' in relation to the interpretation of statutes, though applicable also to the interpretation of constitutions, see Steven R Greenberger, 'Civil Rights and the Politics of Statutory Interpretation' (1991) 62 University of Colorado LR 37, 51-70.

context of a Basic Law which fails to offer genuine democracy anyway. If one complains that the will of elected legislators is to be thwarted by unelected judges, the response is that the legislature will not fully represent the people of Hong Kong and in any event will be dominated by the executive branch which is even less representative. Even if the legislature did truly reflect majority views, democracy is not necessarily identical with majoritarianism, since some restriction on government power may be essential to maintain the rights upon which expression of the popular will depends.<sup>51</sup> The Basic Law itself authorises interpretation by judges, and Hong Kong judges may well be more sensitive to local views than was the (unelected) Basic Law Drafting Committee and will be the NPC when it exercises its power to amend. Thus the argument from democracy has little purchase in the Hong Kong context. As for reverting to the original intention of the framers, there are well-recognised epistemological difficulties in discovering what the intentions were or even in accepting that intentions actually existed, as well as major methodological problems in finding and using and interpreting the materials in which intentions must be found.<sup>52</sup> In any event, as Ronald Dworkin has suggested, it is reasonable

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51. For a discussion of the compatibility of judicial review generally (not merely adoption of a broad interpretive style in the process) with democratic theory, see Samuel Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990-1) 9 *Law and Philosophy* 327. See also Bruce Ackerman, We the People: Foundations (Cambridge, Mass: Belknap, 1991) and its review by Michael J Klarman, (1992) 44 *Stanford LR* 759.

52. See, for example, Baer (note 35 above); Katherine E Swinton, The Supreme Court and Canadian Federalism (Toronto: Carswell, 1990), chapt 4.

to suppose that the original intention was to leave interpretation of at least some parts of the constitution to judges exercising considerable creativity according to changing circumstances.<sup>53</sup>

The objection of incoherence is not insurmountable. The principle of constitutionalism - that government powers must be limited to prevent their abuse and to protect citizens' rights - is inherent in the very nature of a written and rigid (controlled) constitution, and, along with the broad objectives of the Basic Law (principally Chinese sovereignty, 'one country, two systems,' and a high degree of autonomy for the SAR), it permits judges to choose which articles are to receive a broad interpretation and which are to be strictly construed. The assertion that the organic theory can have only limited effectiveness can be admitted without denying that, in certain cases, it can be highly appropriate, useful, and unavoidable.

The practical operation of the theory - in preserving rights, ensuring broad legislative authority, and accommodating the constitution to new political, technological, and other conditions - will be essential to the legitimacy and value of the Basic Law as a constitution for the Hong Kong SAR. A narrow, pedantic, unimaginative interpretation of the Basic Law would stultify it and render it an obstacle to implementation of the promises made in the Joint Declaration which, we are assured, it is designed to respect. The organic theory to which Hong Kong judges are now committed, though of relatively recent provenance, is part of the common law, and it may well prove one of the common law's greatest contributions to achievement of the 'one country, two systems' ideal.

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53. Dworkin, 'The Forum of Principle' (1981) 56 NYULR 469, 496-7, cited by Dawson (note 19 above), p 95.

After the first draft of this paper was completed, controversy arose as to the 'Patten proposals' (the governor's suggestions for further, though very limited, democratisation in pre-1997 Hong Kong). Officials and polemicists in China and their supporters in the colony have condemned the proposals as violating the Joint Declaration, the Basic Law (which of course is not in effect until 1997), and agreements said to have been reached between China and Britain. Although closely-reasoned arguments do not seem to have been provided, leading one to doubt the genuineness of such allegations or at least the commitment to 'legality' which they reveal, the Chinese view is apparently that the Patten proposals infringe the spirit of the various documents because they are contrary to understandings at the time the documents appeared. (I leave aside Mr T S Lo's opinion that the governor's rather mild suggestions constitute a fundamental breach of the Joint Declaration and the Basic Law by 'destroying the fabric of Hongkong's society as we know it and negating the attractions that made it great.'<sup>54</sup>) This is not the occasion for a full-scale examination of the issue, but the organic theory is obviously relevant to interpretation of the Basic Law - given the apparent inability of polemicists to point to particular clauses which the Patten proposals offend - and might be called in aid by those who would deny the commanding force of any 'original intention' which might be discovered.

## EPILOGUE

The American legal theorist Frederick Schauer has posed what he calls the central question of constitutional decision-making in the following terms:

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54. [1992] Window, October 16.

‘Should that process be substantially rule-free, using the raw material of constitutional text, history, and case law for education and guidance, but not as intrinsically weighty rules, capable of interfering with what appears at the time of decision to be the best reading of all the relevant sources of constitutional decision? Or should some or all of these materials be treated as rules, in a strong sense, capable of formalistically interfering with the ability of sensitive justices to make the best constitutional decisions?’<sup>55</sup>

Schauer points out that ‘neither answer is necessary and neither answer is illegitimate’;<sup>56</sup> the choice between them is determined, not by the norms of constitutional materials themselves, but by other factors, ultimately dependent on the circumstances and the values of the community in which the choice is exercised. And the question ‘cannot be abstracted from a somewhat more concrete context’: we will, or should, be affected by the identity of the actual decision-makers and ‘the power that a society wishes to give them.’<sup>57</sup> This is the issue we must confront when deciding whether the Basic Law should be interpreted according to a rule-bound approach (constrained by text, original intent, and *stare decisis*), a relatively unconstrained approach trusting in the wisdom and integrity of decision-makers to find appropriate solutions to constitutional conflicts, or what is perhaps the middle ground of the organic theory. In short, how much

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55. ‘Rules, the Rule of Law, and the Constitution’ (1989) 6 Constitutional Commentary 69, 82.

56. *Ibid.*

57. *Ibid.*, p 85.

confidence do we have in the Court of Final Appeal when it deals with questions fundamental to the well-being of our society?

It is as well to be reminded, finally, of the limitations of abstract constitutional theorising.

‘There is no magic formula to fix constitutional meaning and set the country to rights. That is a continuing process, one that demands more than occasional democratic consultation and frequent judicial declarations.

It requires a lasting and regular commitment to popular participation in the affairs of state. Constitutions are about people, not legal texts.’<sup>58</sup>

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58. Allan C Hutchinson, ‘Legal Text is a Launching Pad’ [1992] *Globe and Mail*, October 2.

# The Sources of Law in the SAR

Zhou Wei<sup>1</sup>

## INTRODUCTION

The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China was promulgated by the National People's Congress in April, 1990. The Law prescribes the fundamental political, economic, and legal systems of the HKSAR and confirms the basic policies of the PRC regarding Hong Kong elaborated in the Sino-British Joint Declaration. The Law will be the most important and authoritative law of the Region, whatever its criticisms or flaws; for example, it determines changes to the sources of law.

The phrase 'sources of law' has several meanings. Because of various research methods and different origins of law, it may refer to (1) historical sources of law, (2) theoretical or philosophical principles which have influenced law, (3) documentary sources (the documents containing the authoritative statements of rules of law), (4) literary sources, the books to which one turns for information as to the law on any matter, and (5) formal sources of law.<sup>2</sup> However, the basic and principal meaning of the phrase

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1. I gratefully acknowledge the assistance of Professor Peter Wesley-Smith, who offered helpful suggestions and improved the language of the paper. I have also to express my thanks to Professor Raymond Wacks, who encouraged me to do the research and to present this paper at the seminar. I have also benefited from discussions with Mr Albert H Y Chen in preparing the final version of the paper.

2. See David M Walker, The Oxford Companion to Law (Oxford: Clarendon Press, 1980), pp 1156-7.



is the means of creation of law, that is, what organ of a state makes the law, through what process and with what form?<sup>3</sup> This is called formal sources of law. The formal sources are authoritative - they are 'the law,' being made by, or emanating from, recognised law-creating and law-declaring agencies. Each legal system develops a recognised set of authoritative legal sources, which can be set out in a hierarchical order, according to which, in case of conflict, one takes priority over others.<sup>4</sup> This is the definition to which this paper refers. Accordingly, I will examine the future sources of law in the HKSAR and their authoritative hierarchy by analysing the status of law-makers and the methods of making law. We can see there are two changes in the sources of law, express and implied, if we examine provisions of the Basic Law carefully. And these sources will form a new authoritative hierarchy.

#### SOURCES OF PRESENT HONG KONG LAW

Present Hong Kong law is colonial in nature since 1843 because its main sources are from Great Britain. Many scholars have discussed the sources of law of Hong Kong. Peter John Lesser divided them into five principal sources: legislation passed by the United Kingdom Parliament or ordered by the Crown; decisions of the English courts; legislation passed by the Hong Kong Legislative Council and assented to by the governor; decisions

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3. Chinese Encyclopedia: Law Volume (Beijing: China Encyclopedia Press, 1984), p 86.

4. Walker (note 2 above), p 1157.

of the Hong Kong courts; and Chinese law and custom.<sup>5</sup> The first four sorts of sources are legislation or decisions from the UK and Hong Kong respectively. The classification separates decisions of the English courts from those of the Hong Kong courts, which is of practical significance. Professor Peter Wesley-Smith holds that sources of Hong Kong law can be seen as two principal kinds: imported and local. The former includes English primary legislation and subsidiary legislation; Letters Patent, Royal Instructions and Prerogative Orders in Council; and common law and equity. The latter includes Hong Kong ordinances and subsidiary legislation and Chinese law and custom.<sup>6</sup> He separates primary legislation from subsidiary legislation, which are of different authority. Some other scholars have made similar divisions.<sup>7</sup> These divisions, with slight differences, have covered all sources of present Hong Kong law.

Creators of present Hong Kong laws include the English, British, and United Kingdom Parliaments, the Crown, the Judicial Committee of the Privy Council, the English courts in respect of England, the governor and the Legislative Council, the governor and the Executive Council (making

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5. Peter John Lesser, 'The Legal System of Hong Kong' in Modern Legal Systems Cyclopedia (New York: William S Hein & Co, 1989), para 2.40.17.

6. Peter Wesley-Smith, An Introduction to the Hong Kong Legal System (Hong Kong: Oxford University Press, 1987), p 47.

7. See Albert H Y Chen, 'Constitution, Basic Law and Common Law' in Albert H Y Chen and Johannes M M Chan, Human Rights and the Rule of Law - The Challenges of Hong Kong's Transition (Hong Kong: Wide Angle Press Ltd, 1987), pp 6-7; Li Qixing (ed), Law of Hong Kong: A Textbook (Guangzhou: Zhongshan University Press, 1991), pp 20-2.

subsidiary legislation), and the courts of Hong Kong in respect of Hong Kong. The authority of each source of law in the hierarchical order is determined by the status of its creator.

#### EXPRESS CHANGES TO THE SOURCES OF LAW OF THE SAR

With the transfer of sovereignty over Hong Kong from the UK to the PRC on 1 July 1997 Hong Kong will be a highly autonomous Special Administrative Region of the People's Republic of China. The sources of law will change accordingly. The British Crown, Parliament, Privy Council and courts will not be law-makers of the HKSAR. Laws that are colonial in nature will no longer be valid in this territory, such as British statutes and subsidiary legislation, Letters Patent, Royal Instructions, and prerogative Orders in Council, etc.

The law-makers of the SAR, in accordance with the Basic Law, will be the National People's Congress of the People's Republic of China and its Standing Committee, the Legislative Council, the executive authorities, and the courts of the SAR.

The sources of law of the SAR will change expressly, as the Basic Law specifies the laws that shall be in force in the SAR in articles 18 and 8. According to BL18, the law in force in the SAR shall be (1) the Basic Law, (2) the laws previously in force in Hong Kong as provided for in BL8, (3) the laws enacted by the legislature of the Region, (4) national laws listed in Annex III to the Basic Law, and (5) strictly limited decisions or orders declared by the Standing Committee of the National People's Congress (referred to hereafter as SCNPC).

Article 8 of the Basic Law defines the 'laws previously in force in Hong Kong' as 'the common law, rules of equity, ordinances, subordinate legislation and customary law' 'except for any that contravene this [Basic]

Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.’ It is clear that ‘the laws previously in force in Hong Kong’ will not maintain those of colonial character, since they obviously contravene the Basic Law. ‘The common law and rules of equity’ include decisions previously made by English courts which have been adopted by the courts of Hong Kong and decisions by Hong Kong courts as well. The former will be authoritative if not contravening the Basic Law. Decisions from the UK will not be valid in the HKSAR after 1997 because they are not ‘the laws previously in force in Hong Kong.’ They will be treated as precedents from other common law jurisdictions. Decisions by Hong Kong courts which are underived from English and other precedents constitute Hong Kong’s own common law.

#### IMPLIED CHANGES TO THE SOURCES OF LAW OF THE SAR

Besides laws clearly mentioned by articles 18 and 8 of the Basic Law, there are some other implied sources of law in other articles. These implied sources will surely play important roles in the legal system of the HKSAR. The first is the Constitution of the People’s Republic of China. It is the fundamental law authoritative all over the state (which undoubtedly includes the HKSAR after 1977). but not all articles are applicable to the SAR. The authority of the Constitution over the SAR can be seen clearly from the Decision of the National People’s Congress on the Establishment of the Hong Kong Special Administrative Region, the Decision of the National People’s Congress on the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, the third paragraph of the Preambles and article 11 of the Basic Law, etc. Besides article 31, the rest of the articles of the Constitution (for instance articles about safe-guarding state sovereignty or territorial integrity) will be binding

upon the SAR unless they contravene the previous capitalist system and way of life or high degree of autonomy of the SAR.

The second is the interpretation of the Basic Law by the SCNPC. Article 67 of the Chinese Constitution declares that the power of interpretation of the Constitution and statutes vests in the Standing Committee of the NPC; so does article 158(1) of the Basic Law. Theoretically, the Standing Committee's interpretation of the Basic Law is as authoritative as the Law itself.

Thirdly, interpretation of the Basic Law by the courts of the SAR will be a source of SAR law. It is a common law tradition that courts are entitled to interpret law, and the courts of the SAR will keep on doing so in accordance with BL158(2), which authorises the SAR courts to interpret on their own, in adjudicating cases, the provisions of the Basic Law within the limits of the autonomy of the Region.

The fourth is subordinate legislation made by the executive authorities of the SAR. Subordinate legislation is characteristic of modern legal systems. In accordance with BL62(5) the executive authorities of the SAR are empowered to make subordinate legislation.

The fifth will be decisions of the courts of the SAR. In accordance with BL19 and 82 the SAR shall be vested with independent judicial power, including that of final adjudication (vested in the Court of Final Appeal). Decisions of the Court of Final Appeal shall be binding on all courts of the Region. Apart from the establishment of the Court of Final Appeal and abolition of appeals to the Privy Council, the judicial system of Hong Kong shall be maintained.<sup>8</sup> Thus, besides decisions of the Court of Final Appeal,

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8. See BL81(2).

decisions of the High Court of the SAR shall be binding on all lower courts of Hong Kong.

Sixthly, precedents from other common law jurisdictions (the United Kingdom is surely included) are sources for reference. The impact of precedents from other common law jurisdictions can be seen from two angles. First of all, BL84 prescribes that the courts of the SAR may refer to precedents in other common law jurisdictions. It should be noticed that these precedents are not binding under the principle of *stare decisis* unless they are adopted into the decisions of the courts of the SAR. Secondly, BL82 prescribes that the Court of Final Appeal may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal; BL92 prescribes that judges and other members of the judiciary of the SAR may be recruited from other common law jurisdictions. These judges should carry out the laws of the SAR in dispensing justice; on the other hand, they will certainly bring to Hong Kong the influence of precedents from other common law jurisdictions. These may be called 'sources for reference,' which are not binding.

These sources of law will be laws of the SAR though provision about laws that shall be in force in the SAR do not mention them. They will be significant elements in the legal system of the SAR.<sup>9</sup>

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9. As far as the Sino-British Joint Declaration is concerned, it will not be one of the sources of SAR law or a direct element to influence the changes. Because China's policies concerning Hong Kong which were elaborated by the Joint Declaration have been incorporated into the Basic Law, its impact on affairs of the SAR is indirect.

AUTHORITATIVE HIERARCHY OF SOURCES OF LAW IN THE SAR

The sources of law of the SAR mentioned above will set up a new authoritative hierarchy. Among all law-makers of the SAR, the National People's Congress is supreme because it is the supreme legislature of the state. It is not only the maker of the Basic Law but the authoritative organ to interpret the Law.<sup>10</sup> Laws applicable to the SAR made by the NPC include the Constitution (some articles), the Basic Law of the HKSAR, and six national laws applicable to the SAR. The Constitution is the supreme source of law in the SAR and is on the top of the authoritative hierarchy. The Basic Law, which prescribes the basic social and economic systems of Hong Kong, is a law for the SAR and a national one as well (because some provisions are binding upon the whole country). It is inferior to the Constitution and second in authority over the SAR. The six national laws that shall be applied in the SAR are enacted by the NPC through the process of making basic laws of the state; though they are applied through the Basic Law they are as authoritative as the Basic Law, at the second level of the authoritative hierarchy.

The Standing Committee of the NPC is vested with limited legislative power over the SAR. Laws enacted by the legislature of the SAR must be reported to it for the record.<sup>11</sup> It may make a decision or issue an order to the SAR in specific cases<sup>12</sup> and it may interpret the Basic Law.<sup>13</sup> These

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10. See BL159. Interpretation by the legislature itself is called, in Chinese legal theory, 'legislative interpretation.'

11. See BL17(2).

12. See BL18(4).

powers are derived from the Constitution of the PRC and the Basic Law as well.<sup>14</sup> Interpretation of the Basic Law and decisions made by the SCNPC are also at the second level of the authoritative hierarchy.

The Legislative Council is the legislature of the SAR. Laws enacted by the Legislative Council are authoritative in the SAR and superior to any other forms of laws made within the Region. The legislation of the Legislative Council cannot contravene the Basic Law, the interpretation of the SCNPC, or the six national laws applied to the SAR. It is at the third level of the authoritative hierarchy. Subordinate legislation is derived from the powers conferred by the legislature and therefore it is inferior to the legislation of the Legislative Council. It is at the fourth level of the authoritative hierarchy. Decisions of the courts of the SAR are superior to Chinese custom but inferior to all legislation. It is at the fifth level and Chinese law and custom are at the bottom.

Interpretation of the Basic Law by the courts of the SAR is authorised by the SCNPC in accordance with BL158(2). Are these interpretations superior to the legislation or subordinate legislation? The answer is negative. Because one of the premises for the courts of the SAR to interpret the provisions of the Basic Law is 'in adjudicating cases,' this at least means that (1) it is judicial in nature, which cannot interfere with legislation, and (2) the interpretation is equal to the decisions of the courts. Thus, they cannot override the legislation of the Region. If legislation or subordinate legislation contravene the Basic Law, then as BL17(3)

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13. BL158.

14. Article 67 of the Constitution vests 21 powers in the Standing Committee of the NPC.



prescribes it will be returned by the SCNPC, not overridden by the interpretation of the court of the SAR. However, when the interpretations of the Basic Law and the legislation or subordinate legislation are in conflict, the courts may apply the law superior in the hierarchy. If the interpretation of the Basic Law by the SAR courts, for example, is in conflict with legislation by the Legislative Council of the SAR, the courts may not apply the legislation but cannot override it. These interpretations are, as decisions of the courts, at the fifth level of the hierarchy.

Laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation, and customary law, shall, after 1997, be laws of the SAR, except for any that contravene the Basic Law, and subject to any amendment by the legislature of the SAR. Laws previously in force in Hong Kong do not constitute a simple source of law, therefore they cannot be put into the hierarchical order as a single one. Each of them will be attached to the hierarchical order with its own.

## CONCLUSION

As analysed above, the sources of law of the Hong Kong SAR will change, either expressly or impliedly, and shall form a new hierarchical order in accordance with their authoritativeness. On top of the hierarchy is the Constitution of the PRC (some provisions). At the second level are the Basic Law of the SAR, the national laws applicable to the SAR, decisions and orders (if any) made by the SCNPC, and interpretation of the Basic Law by the SCNPC. Laws at this level are national and made by the NPC or SCNPC, mainly relating to concrete affairs of 'one country.' The legislation promulgated by the Legislative Council of the SAR is at the third level. Subordinate legislation is inferior to the above sources, at the fourth

level. The fifth level includes decisions and interpretation of the Basic Law by the courts of the SAR. Chinese custom is at the bottom.

Sources originating from the Central Government are superior to the ones from the SAR, but not absolutely. What characterises this authoritative hierarchy is that the sources of law (except the Basic Law) at the first two levels are not absolutely binding on the sources at the lower levels because all these laws must be consistent with the principle 'one country, two systems.' No laws or provisions of laws shall be binding if they contravene this principle even though they are at a higher level in the authoritative hierarchy. The Constitution prescribes that the state may establish special administrative regions when necessary, and the systems to be instituted in special administrative regions shall be prescribed by law enacted by the NPC in the light of the specific conditions.<sup>15</sup> Thus, though the Constitution is the most authoritative, not all provisions are applicable to the SAR. Provisions that incorporate the principle 'one country,' such as safeguarding state sovereignty or territorial integrity or national unity, will be binding upon the SAR. Articles that contravene the high degree of autonomy of the SAR or the capitalist system and way of life, that is, contravene the principle 'two systems,' shall not be binding.

Decisions and orders made by the SCNPC in accordance with BL18(4) are at the second level of the hierarchy and are superior to the laws created by the SAR. But these decisions or orders can only be made when national unity or security is in danger and beyond the control of the government of the SAR. It is obvious that the decisions or orders must deal only with affairs relating to the principle 'one country'; otherwise they are

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15. See Article 31 of the Constitution of the PRC.

not binding. National laws applicable to the SAR are also at the second level and binding upon the lower sources. However, these national laws are confined to those relating to defense and foreign affairs as well as other matters outside the limits of the autonomy of the SAR. BL18(3) prescribes that the SCNPC may add to or delete from the list of laws in Annex III but only within the mentioned scope. National laws that contravene the principle 'two systems' will not be binding upon the SAR.

It may be concluded that the authoritative hierarchy of the sources of law in the SAR is, on the one hand, absolutely binding when practising the principle 'one country.' In this case, the Constitution and laws at the first two levels are superior to the laws at lower levels. In other words, the laws at the third to the sixth levels cannot contravene the sources of law at the first two levels. On the other hand, this order is relatively binding in practising the principle 'two systems.' Laws at the first two levels are not binding in dealing with affairs within the limits of the autonomy of the SAR. Therefore, there will be a small authoritative system of sources of law within the limits of the autonomy of the SAR, the core of which is the Basic Law, including interpretation by the SCNPC and all sources from the SAR.

# The Dilemmas of Governing

Jane C Y Lee

## INTRODUCTION

Since the signing of the Sino-British Joint Declaration on the Question of Hong Kong in 1984, Hong Kong's government processes have inevitably been shaped by various problems relating to the arrangements for the political transition. According to the agreement, Hong Kong will become a Special Administrative Region of the People's Republic of China from 1 July 1997 and the territory will be allowed to enjoy a high degree of local autonomy. The political arrangement agreed in 1984 has brought about a unique process of decolonisation in Hong Kong in which the transfer of power is not simply arranged by the training of local politicians and administrative personnel but also through cumbersome diplomatic negotiations on various issues between two sovereign powers - Britain and China. Parallel with the course of power transfer is the development of a system of representative government in the territory, which leads to significant changes in the characteristics of the local political processes, including the emergence of electoral and quasi-party politics.

The transfer of government in Hong Kong also generates special dilemmas for the senior government officials in Hong Kong who remain as the de facto 'governing elite' in the overall political processes. Government officials in Hong Kong are therefore confronted with increasingly complicated tasks. On the one hand they are required to equip themselves with skills and techniques as efficient 'managers'; on the other hand, they are required to act as effective 'public administrators' by responding more sensitively to the changing socio-political environment in Hong Kong in which they operate. It is thus the intention of this paper to discuss a few

major dilemmas handled by public administrators in Hong Kong in relation to the changing political factors in the 1980s and 1990s. In the following section, I shall provide a background to the colonial administrative system and the characteristics of public administrators in Hong Kong. I shall then elaborate on four major themes, namely the dilemma of maintaining continuity and stability, the dilemma of improving efficiency and productivity of the public sector, the dilemma of representative government, and the dilemma of public administration theory. The case of Hong Kong suggests that public administrators must not divorce themselves from an understanding of the territory's relationship with evolving political circumstances.

#### BACKGROUND: CHARACTERISTICS OF THE COLONIAL ADMINISTRATIVE SYSTEM

The traditional paradigm of public administration stresses the concepts of 'efficiency,' 'effectiveness,' and 'procedural regularity.' The system of public sector administration in Hong Kong has long been characterised as approximate to the classical Weberian model which emphasises efficient and effective performance of administrative tasks and hierarchical legal authority.<sup>1</sup> Such a system requires a high degree of centralisation and is therefore strongly compatible with a colonial administration in which the executive branch of the government dominates almost all of the major functions in the political processes, including policy initiation, formulation, and implementation. The administration is run by the administrative

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1. Ian Scott and J P Burns (eds), The Hong Kong Civil Service and its Future (Hong Kong: Oxford University Press, 1988), p 4.

officers, principally the Chief Secretary and the Secretaries, under whom the heads co-ordinate the functions of various departments. The head of the administration is the governor, who is appointed by and solely accountable to the Queen in London, although he is required by the constitution to consult the Executive Council on all major policy matters and to obtain the consent of the Legislative Council for all legislation. Academics like Peter Harris describe Hong Kong as an 'administrative state' which 'should not be thought of as a state devoid of legislative and judicial organs but as a state in which administrative organization and operations are particularly prominent.' Similarly, S K Lau describes the political system in Hong Kong as a 'bureaucratic polity' in which the bureaucracy is almost immune from institutional checking by other political actors like political parties, an elected legislature, and politicians.<sup>2</sup> Until 1985, the Legislative Council was constituted by appointed members, who were merely exercising very limited monitoring functions in the overall political processes. In other words, there are virtually no checks and balances among the three branches of government with the governor acting as the head of the executive and the legislature.

The traditional paradigm of modern public administration also emphasises a clear dichotomy between politics and administration. In Hong Kong such a politics-administration dichotomy, however, does not exist in practice, with the administration basically capable of exercising control over a predominantly passive Chinese society. Until 1984-5 there were basically no eminent politicians or political parties in Hong Kong. Although a

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2. Peter Harris, Hong Kong: A Study of Bureaucratic Politics (Hong Kong: Heinemann Asia, 1978), p 55; S K Lau, Society and Politics in Hong Kong (Hong Kong: Chinese University Press, 1982), p 25.

minority elite group were co-opted into the political processes, they could never become a dominant group of politicians exercising effective opposition to the powerful civil servants. By 1992, pressure groups in Hong Kong were also very fragmented; they were narrowly-based and did not command mass support. The civil servants were therefore not merely responsible for decision-making and implementation but also for playing the role of the politicians in defence of their own policy decisions. Yet there were basically no institutions which could provide an effective mechanism to monitor the decisions of the bureaucrats.

Under such a system, in which the executive government dominates, a distinctive set of characteristics is manifest among civil servants in Hong Kong. First, Hong Kong civil servants are generally conceived of as the 'masters' rather than the 'servants' of the people. Under the influence of the British tradition, senior administrative officers are the decision-makers and are considered the most intelligent and distinguished class of people in society. So the administrator-servants generally regard themselves as the ruling class in Hong Kong with a strong sense of superiority. Secondly, the administrators are trained to adhere strictly to regulations and the efficient performance of administrative tasks. Having seen their authority as principally derived from legal and procedural sources, they tend to orient themselves primarily towards the objective of managing a government rationally and efficiently. By insulating themselves from the 'irrational demands' of the politicians, they claim to make decisions according to the 'public interest' rather than 'political interests.' In this regard, they also claim to maintain impartiality and neutrality in political controversies. Even though selected public consultation exercises have been conducted on different policy issues, public criticism and opposition do not always affect the decisions of the bureaucrats. Civil servants are therefore often described

on the one hand as 'complacent and technocratic' and on the other hand as 'introverted, conservative, and apolitical.'<sup>3</sup>

It has been argued that the classic colonial system has gradually been changing since the 1970s and is in the process of further dramatic change in the 1980s and 1990s. The riots of 1966 and 1967, which were largely a spill-over from the cultural revolution in China, were generally seen as representing a turning point from the traditional colonial bureaucracy to a more responsive, albeit still conservative and defensive government.<sup>4</sup> After 1971-2 the colonial bureaucracy began to introduce a number of reforms. These included the establishment of the City District Office scheme to improve communication with the public, and the initiation of a number of policy changes such as massive construction of public housing units after 1972 and the introduction of nine years of compulsory education for suitable age groups between 1974 and 1979. To meet these policy initiatives a considerable expansion of the bureaucracy became inevitable. Coupled with a favourable economic situation in the 1970s, the size of the civil service establishment increased by 66.5 per cent in the ten years between 1973-4 and 1983-4.

These reforms, however, did not cause immediate upheaval to the bureaucratic system until the Sino-British negotiations over the future of Hong Kong started in September 1982. With the signing of the Joint Declaration in September 1984, such issues relating to the future local

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3. T T Lui, 'Changing Civil Servants' Values' in Scott and Burns (note 1 above), p 42. See also Lau (note 2 above), pp 45-64.

4. Ian Scott and J P Burns (eds), The Hong Kong Civil Service (Hong Kong: Oxford University Press, 1984), p 6.



autonomy of the Hong Kong Special Administrative Region began to affect the operation of the bureaucracy. A basic question became: how should the civil service respond to the changes concerning the transfer of sovereignty and power? Other practical issues and dilemmas are: (1) How could the government maintain the confidence of its own 180,000 staff towards the existing and the future political system, and hence ensure continuity and stability within the civil service? (2) How could civil servants ensure that they will continue to perform their tasks efficiently in the transition to 1997 and beyond? (3) What should be the role of the non-elected civil servants in the overall political processes? How, when, and to what extent should they retain control over major policy decisions? (4) To whom should civil servants be responsible - their own immediate superior, the people of Hong Kong, or their future sovereign master, China?

#### THE DILEMMA OF MAINTAINING CONTINUITY AND STABILITY WITHIN THE CIVIL SERVICE

When the Sino-British Joint Declaration was publicly announced on 26 September 1984, the overall direction of all parties concerned - the British, Hong Kong, and Chinese governments - was to seek to establish public confidence in the agreement. To achieve this, the Hong Kong government hoped to prove that it was still performing as successfully as it had previously been. Therefore its primary objective was, and is, to maintain a high degree of efficiency and effectiveness in decision-making and policy implementation; and one of its strategies was to emphasise the stability and continuity of the civil service system. In fact, the Sino-British Joint Declaration has provided for the preservation of the existing civil service system, with a view to guaranteeing job security and a high level of satisfaction to its staff. Nevertheless, there remained a great deal of tension

which was generated by the lack of confidence of staff in their own future careers, hence stirring up potential troubles for the operation of the bureaucracy. The dilemma becomes whether or not the management should give priority to satisfying the demands of its staff while inevitably disrupting the original assumptions and practice within the civil service system.

The payment of pensions after 1997 has been a major concern for many civil servants and, in 1987, a New Pension Scheme was agreed between China and Britain which recognised pensions as a 'right' rather than a 'privilege' subject to the pleasure of the Crown.<sup>5</sup> The agreement temporarily satisfied the civil servants but soon the staff association lobbied the government again for more secure pension arrangements. All such proposals as setting up a pension fund to be separated from the general revenue, or converting the pension scheme to a Central Provident Fund etc, were in fact directed to one common anxiety, especially after China's suppression of the student movements in Beijing in June 1989: would the future Special Administrative Region government be affected by political changes in China and be able to honour the pension agreements? The Hong Kong government was in general sympathetic to the concern of the civil servants but any concessions to the civil service associations might cause further tensions to Sino-British relations. After all, the problem of 1997 has

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5. For example, a better formula for the calculation of pension was suggested which allowed retirees to draw up to half instead of a quarter of the pension in the lump-sum gratuity at the time of retirement; it was also suggested to extend the normal retirement age from 55 to 60 and introduce a 'deferred pension scheme' for civil servants leaving the service after ten years prior to retirement age. See A Cheung, 'The Civil Service' in R Wong and J Cheng (eds), The Other Hong Kong Report 1990 (Hong Kong: Chinese University Press, 1990), pp 93-6.

already disturbed the stability of the civil service structure. The basic assumption that the civil service pension scheme was an attraction, guaranteeing security after retirement, became invalid. The pension-payments were financed on a recurrent basis but such an arrangement could only be worked out smoothly with a stable source of revenue contributed by serving staff. Lack of confidence of the civil service staff might mean that the government would have to commit a large sum of cash in the immediate future and possibly before 1997. Any economic recession due to unprecedented political or economic reasons could reduce the government's ability to pay, hence affecting public confidence in the transitional government as well as stirring up more industrial actions in the civil service and causing more problems to the volatile staff-management relations.

The lack of confidence towards the future government has had a significant effect on the existing civil service system. The advantages of the civil service system like the pension scheme and job security are dealing in terms of attracting new staff and retaining serving staff. Since 1988-9, the government began to admit that it was confronted with problems of retaining as well as attracting people to the service.<sup>6</sup> For example, wastage in the police force increased from less than 5 per cent and 8 per cent in 1988, for police inspectors and constables respectively, to 18.5 per cent and 11.1 per cent in 1989. The number of applications for these posts also

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6. The official record of civil service staff wastage in 1984-5 was 6,459 (3.8%) but sharply rose to 10,797 (5.9%) in 1988-9 and 10,790 (5.9%) in 1989-90. The wastage rate slightly dropped in 1990-1 to 9,823 (5.2%) which was partly an effect of slower economic growth and a tightened labour market. See A Cheung, 'The Civil Service' in R Wong and J Cheng (eds), The Other Hong Kong Report 1991 (Hong Kong: Chinese University Press, 1991), pp 34-5.

dropped dramatically by 50 per cent and 30 per cent respectively. Other positions like doctors, nurses, social workers, system analysts/programmers etc also experienced a serious wastage. Meanwhile, in 1989-90 the government tried to enhance its competitiveness with the private sector by paying a temporary allowance to the fresh intakes of certain grades like system analysts/ programmers, executive officers, social workers, nurses, and police constables, with a view to attracting more applications. The measure, however, disrupted the stability of the civil service system which had been heavily emphasising seniority and years of service. Under the contingent scheme, some of the existing staff who have been working for two to three years or even ten years might receive the same level of payments as the newly-recruited and inexperienced employees. Such arrangements also paved the way for further contingency negotiations between the staff and management in case new problems arose from changing economic and political circumstances. A concession to increase special allowances for police constables in early 1992 was an example, in this case a measure to boost the morale of the police force in handling the increasingly violent nature of criminal activity in Hong Kong in 1991-2. Any such further concession however began to arouse the discontent of comparable grades within the disciplinary forces in other departments, who criticised the government for upsetting the long-established pay policy based on internal comparability and fairness.

Indeed, pay and conditions of service became an increasingly sensitive issue, especially after the June 4 events in Beijing in 1989, leading to six major industrial actions including a hunger strike in Hong Kong in March 1990. These industrial actions could also be explained by a slow-down of the rate of economic growth from 7.9 per cent in 1988 to 2.5 per cent in 1991, thus causing a tightening of the labour market in the private

sector. In any case, the increase in the number of industrial disputes began to raise doubts about the original arrangements for staff-management relations, which were built upon a system of consultation rather than collective bargaining. The inability of the management to satisfy the demands of staff jeopardised the operation of the system. Staff associations increasingly criticise the government as evading their responsibility and complained about the ineffectiveness of the consultative channels to address their grievances.<sup>7</sup> The breakdown of effective communications therefore sparked off a series of collective actions by the staff side, who demanded a more equal bargaining position with the management on such issues as salaries and the conditions of service of individual grades.

Increased collective industrial action in the civil service indicated that the government was unable to maintain the kind of stability desired. The dilemma lies mainly in the government's commitment and hence ability to pay. The problem is often exacerbated by the inability of the civil service pay system to adjust to the rapidly changing market mechanism. Intense competition for jobs in the private sector would greatly reduce the responsiveness of the government to the demands for better conditions of service and pay which would in turn cause disruption to the long-established civil service personnel system. In the case of economic growth, civil service pay would lag behind the market because of the government's policy of being a market-follower rather than a market-leader. In the case of economic decline, the cost of running the civil service would, however, be severely criticised as creating further inflation. Thus the issue of civil service pay always gives rise to a heated public debate on the size of the

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7. Ibid, p 38.

civil service establishment. In fact, the growth of the Hong Kong civil service has already been limited since 1983-4 to an increase of less than 2.5 per cent per year, and is further limited to less than 1 per cent between 1991 and 1995. In principle, civil service expenditure would not exceed the rate of economic growth as measured by Gross Domestic Product. The end result is that departments are often more concerned with tight controls rather than value for money.<sup>8</sup> Yet given the small size of the Hong Kong civil service, there is very limited scope for the government to reduce the establishment, which would mean a reduction of the existing scope of service delivery. In times of political uncertainty, the government needs to further demonstrate its commitment to the well-being of the general public; and thus even in the case of slow economic growth, any reduction in public services becomes a politically unacceptable and unwise strategy. The governor, for example, announced his intention to build a second airport in his inaugural speech to the Legislative Council in October 1989, claiming to aim at further boosting economic and political confidence in Hong Kong after the June 4 events had occurred in Beijing in June of the same year. Yet the Ports and Airport Development Strategy (PADS) was introduced when Hong Kong began to experience a period of slower economic growth. The whole question was how to finance the airport project with the same source of revenue while upkeeping the other public services. Given such circumstances, 'value for money' has emerged to become a major factor within the Hong Kong government since 1988-9, which principally called

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8. C Sankey, 'Improving Productivity in the Hong Kong Civil Service,' a paper presented to an international workshop, 'Civil Service Systems in Asia-Pacific,' organised by the Centre of Asian Studies, University of Hong Kong (April 1991), p 1.

for improving civil service efficiency and productivity within the same level of spending. Such an effort to improve public sector management further raises another dilemma of whether or not public confidence would be secured by merely maintaining the same level of services with less financial input.

#### THE DILEMMA OF IMPROVING THE EFFICIENCY AND PRODUCTIVITY OF THE PUBLIC SECTOR

A report on 'Public Sector Reform' was published in February 1989 by the Finance Branch with the purpose of improving efficiency and productivity within Hong Kong's civil service. The report was, however, more than a financial management reform package because it sought to turn bureaucrats into 'managers.' First of all, the Finance Branch managed to delegate authority to various departments which would have more autonomy in allocating their own funds. Secondly, departments were encouraged to re-evaluate their policies, and to review service areas which could possibly be provided with better quality within the same level of spending. This was expected to maintain the same kind of public service without asking the Finance Branch for more money. In return, the departments were given more autonomy to make their decisions in resource allocation. Moreover, departments were encouraged to undertake commercial attitudes towards public services or consider allowing greater private sector participation in public projects of various scales. Since 1989, a few departments like Marine and Electrical & Mechanical Services have developed new positions for business managers who were given the authority to make decisions to promote the means of service delivery. The modes of service delivery took various forms, including (1) the setting up of 'trading funds' departments which operated on a quasi-commercial basis with revenue accruing to a

separate trading fund; (2) the setting up of public corporations which were wholly owned by government but operated on commercial principles; (3) the introduction of non-departmental public bodies which operated at arms' length; and (4) the promotion of private sector participation through various forms of contracting-out, ranging from service contracts and management contracts to harbor crossings and tunnels.

Under the Public Sector Reform programme, 'managers' were made accountable for their own decisions. This measure required a fundamental change not merely in the structures and procedures in the civil service, but also in the attitude of the civil servants at various levels, including developing the initiative to assume more responsibility for their own activities and decisions within a bureaucratic system which used to require its staff to strictly follow orders, regulations, and procedures. At the time when the Public Sector Reform report was published, it was not clear whether civil servants were ready to take on more responsibility in the course of political transition. Yet it was evident that the thinking of Public Sector Reform was not readily welcomed by the civil servants, who remained sceptical of the government's intention to cut more staff and further control the size of the civil service establishment, thus inhibiting the opportunity for promotion and career development. Inevitably, the implementation of some of the Public Sector Reform concepts even caused additional complications to the already shaky civil service personnel system. Corporatisation of the Hospital Authority, for example, has aroused staff dissatisfaction over the terms and conditions of transferring from the status of a civil servant to that of an employee of the Authority. The announcement to privatise the management of government tunnels in early 1992 also aroused protests by staff because of the possibility of loss of jobs and poorer pay in the private sector. Staff resistance towards the



privatisation of the existing services became a sensitive issue which further led to public scepticism towards the intention of the government to relinquish its responsibility for providing public services to Hong Kong people. In any case, the success of the Public Sector Reform arrangements very much depended on a fundamental reorientation of the senior administrators in Hong Kong towards a more complex, yet more open, attitude by not merely getting themselves involved more regularly in communicating and discussing with the middle-level or junior staff but also receiving comments from the public in the course of decision-making.

Although the concept of public sector reform was not driven originally by ideological commitment, the initiative has served to remind Hong Kong public administrators of the fundamental issue of 'accountability,' that is, in this context, their responses towards rapidly changing expectations of the community. It also required civil servants to make judgements about tactics for the introduction of further reforms at different levels of the civil service. Again, the Public Sector Reform initiatives missed the opportunity for reorienting the civil servants towards public accountability. Instead, it remained to emphasise the 'managerial' rather than the 'public' aspect of accountability. Since public managers are required to achieve more results from within limited resources, their performance is not assessed according to the level at which the aspirations of the public are satisfied. Nevertheless, other changes like the gradual introduction of more elected representatives into the Legislative Council since 1985, though not fundamentally oriented towards a 'liberal-democratic system' in the Western sense, have provided a practical environment for the changes in the role and attitudes of the civil servants in the course of political transition. Again, the senior administrators have been too slow to respond to the political changes and are caught in the dilemma of whether

or not to allow the emerging groups of increasingly ambitious elected politicians to become involved in the governing processes.

#### THE DILEMMA OF REPRESENTATIVE GOVERNMENT

A system of representative government was first introduced in Hong Kong in July 1984 in the form of a Green Paper and subsequently became a policy in the form of a White Paper in November of the same year. Accordingly, elected members would gradually be introduced to the Legislative Council after 1985. Developing an elected legislature was generally welcomed by the Hong Kong community as a first step towards attaining local autonomy in the post-1997 government, yet it was quickly over-shadowed by the controversy over direct elections in the next five years until the Basic Law was promulgated in April 1990. Consequently, the first direct election was held in September 1991. Between 1991 and 1994, although directly-elected representatives only constitute eighteen out of sixty members in the Legislative Council (with the rest of the seats being formed by appointed and functional representatives), they have proved to be much more ambitious and critical of government policy.

While most of the public's attention has been focussed on the newly elected members of the Legislative Council, senior administrators are confronted with the dilemma of whether or not greater public participation would affect the efficiency of the administrative processes. A former Director of Home Affairs, John Walden, remarked as early as 1984-5 on the attitude of civil servants towards a representative government, arguing that the Hong Kong government has no intention to develop a system in which policies and actions of the government in Hong Kong are determined and controlled by the people of Hong Kong or their elected representatives before 1997. He said:

'The Hong Kong Government's political reforms make no provision at all for the monopoly of executive power to be shared with members of a representative legislature.... Nor has the government shown any inclination at all to subject this concentration of bureaucratic power to the discipline of institutional monitoring, although many countries claiming representative governments have found this an essential supplement to the democratic process.'

Walden implied that the senior administrators in Hong Kong have been one of the strongest forces against the democratisation of the political system because they are the most obvious losers from political reform. Therefore he concluded that the representative system is simply cosmetic and illusory because civil servants are reluctant to relinquish political power to the elected legislature. Even with the introduction of direct elections to the Legislative Council, elected members are not given the power to govern. The result is that LegCo could only claim to be capable of more effectively monitoring the performance of the government rather than more effectively governing Hong Kong. Hong Kong's situation becomes neither a parliamentary nor a presidential system where the majority rules. Unlike the parliamentary system in Britain, the principle of legislative supremacy is not practised in Hong Kong. Also unlike the presidential system in the United States, there remain no genuine checks and balances between the executive and the legislative branches in Hong Kong. The power and the status of the Legislative Council remain subordinate to those of the executive. Since

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9. John Walden, 'Hong Kong Chases a Democratic Mirage' [1984] *Asian Wall Street Journal*, March 7, p 4. See also Walden, Excellency, Your Gap is Growing! (Hong Kong: All Noble Company Ltd, 1987), pp 71-82.

elected members do not actually become part of the government, they are merely playing a 'psuedo-leadership' role in confronting and opposing the executive officials in power.

The dilemma becomes increasingly clear: although the partially-elected legislature is handicapped by a lack of genuine political power, the position of the executive is inevitably weakened in this process. Soon after the first directly-elected Legislative Council was established in September 1991, the administration has been subject to even more intensive criticism from the directly-elected members. The situation remains one in which the executive is always challenged and opposed by the elected members and, by implication, the society at large. This has certainly affected the efficiency as well as effectiveness of the policy-making processes even though political power is retained in the hands of the executive officials. The legitimacy of the governing elite is jeopardised. No effective leadership could be identified either in the executive or in the legislature. In any case, having introduced elections to the legislature, it inevitably facilitates a more open government and invites greater public interest in the operation of the public sector which civil servants resent.<sup>10</sup> As the administrative process becomes more open and accountable, decisions of the executive become more vulnerable to public scrutiny. The dilemma of introducing representative government further raises questions about political accountability: in what ways and to whom should civil servants be accountable? To what extent should civil servants make concessions to the policy proposals of the emerging politicians in an executive-dominated system?

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10. Based on Jane C Y Lee, 'The Politics of Transition in Hong Kong: Elections and the Mobilisation Process, 1982-85,' an unpublished PhD thesis (Canberra: Australian National University, 1988).

### THE DILEMMA OF ACCOUNTABILITY

The ultimate question is how to define accountability in public administration and how to make it work. Practically speaking, accountability means requiring civil servants to act in the public interest, to explain policies, to answer questions, and to receive comments.<sup>11</sup> An increased public profile, however, conflicts with the inherited 'apolitical' value of the civil servants who are reluctant to openly defend their policies. In Western liberal-democratic systems, this responsibility is vested with the elected politicians rather than with the civil servants. Civil servants are therefore basically required to uphold accountability in a legal and procedural sense by implementing policies according to the original intentions of the legislators. In Hong Kong civil servants are however required to be accountable in both legal and procedural as well as in political senses. Even with the introduction of elections to the Legislative Council the senior administrators remain a dominant group of actors in the political system. The dilemma of the civil servants becomes increasingly obvious. On the one hand, the civil servants are still de facto decision-makers on all major policy issues. On the other hand, accountability means civil servants being responsible to the elected politicians as well as to the public. In this regard accountability refers to a political connotation but its degree also depends, in practice, on the extent to which civil servants are held responsible to the public. With the introduction of direct elections to the legislature in Hong Kong, civil servants are increasingly challenged by the emergence of

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11. See G E Caiden, 'The Problem of Ensuring the Public Accountability' in J G Jabbon and O P Swivedi (eds), Public Service Accountability: A Comparative Perspective (West Hartford, Connecticut: Kumarian Press, Inc, 1988), pp 19-21.

various contending actors who tend to be performing a more effective monitoring role in the policy processes. It is certainly beyond the competence of the Weberian-style administrators who do not have the skills or experience to handle decisions unrelated to managerial or professional matters. Nevertheless, civil servants are required to become more conscious of their relations with the emerging groups of politicians. The ultimate issue is whether or not they should defer their major policy decisions to the elected politicians or continue to retain control over the whole political process. The result is that civil servants are prone to becoming even more conservative in the process of political democratisation. By pledging to remain 'neutral and apolitical' in major public controversies, they are reluctant to accept, or sometimes even tend to resist, the idea of political accountability.<sup>12</sup>

On a more fundamental issue, the apprehension felt over China's involvement in major policy areas in Hong Kong adds another dimension to the problem of 'accountability.' To what extent should public administrators in Hong Kong be accountable to a future sovereign power, even before 1997? The issue of local autonomy has often resulted in controversial debate in Hong Kong. The practical concern for civil servants is whether they should consult with China on major decisions affecting the territory in the course of transition to 1997. By 1989-90, the dilemma became increasingly clear: should civil servants in Hong Kong strive to retain their autonomous position in the decision-making processes or should they seek the co-operation of China in the interest of the smooth running of

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12. Based on an interview with B Wiggham, Secretary of Civil Service of the Hong Kong government, [1991] *Hongkong Standard*, May 5, p 9. See also Lui (note 3 above), pp 157-68.

the administration? Until 1990-1, Hong Kong officials openly claimed on various occasions that the Hong Kong government would continue to be the ruler of Hong Kong. It has been evident, however, that since 1984-5 civil servants are increasingly concerned with China's subtle influence (rather than direct control) over Hong Kong's internal affairs - for example, disallowing the future legislature to be constituted entirely by direct elections and criticising the handling of Vietnamese refugees by British and Hong Kong officials. China's concern over corporatisation of Radio Television Hong Kong (RTHK) was an example in which a major policy decision in Hong Kong was seen as successfully interfered with by China. Comments of Chinese officials not merely delayed the administrative schedule but also demoralised RTHK employees who were reluctant on the one hand to lose their security of tenure and on the other hand to subject its internal management to the influence of the Chinese government.

The debate over PADS since 1989-90 was another example. In a memorandum signed between Britain and China in July 1991, China endorsed the construction of a second airport in Hong Kong with a number of conditions, including the setting up of an Airport Authority in which a Bank of China Groups official would have a seat. More significantly, Britain and China agreed in the same memorandum to intensify consultation and co-operation with each other over various other matters occurring in Hong Kong in the run-up to 1997. Logically, China continued to express its concern over many other issues in Hong Kong government which were originally regarded as internal managerial arrangements. In March 1992, China criticised the budget of the Financial Secretary, Hamish Macleod, as incompatible with the Basic Law. It also became gradually evident in May/June that China would not agree with the financial arrangements on the PADS core projects unless Hong Kong agreed to back down from the

demands for more direct elections in the 1995 Legislative Council elections. Again, when Alistair Goodlad, the British Foreign Minister responsible for Hong Kong, protested against China's suggestion in the Joint Liaison Group to talk about the appointment of the new Governor's Executive Council, China legitimately claimed that such arrangements have been agreed upon by both diplomatic powers in the 1991 Memorandum of Understanding. Consequently, China not merely heavily criticised the policy proposal of the new governor in October, but also the debates in the Legislative Council which voted on 11 November in favour of further political reforms. By the end of 1992, China's increasing involvement in Hong Kong's internal affairs not only aroused more arguments and diplomatic deadlock, but also further delays in, and hence greater escalation of the cost of, the airport development projects.

The primary concerns which have been arousing anxiety among the people in Hong Kong were highlighted by the major contentions between 1985 and 1992. Where should the boundary be between autonomy and consultation? On what issues should the Hong Kong government's autonomy be respected? On what issues should Beijing be consulted: a civil service pay rise or the construction of a new hospital? Is such consultation ultimately detrimental or beneficial to the interests of the Hong Kong people? In case there is a conflict of interests between Hong Kong and China, whose interests should Hong Kong civil servants be accountable to? By 1992 when the new Financial Secretary, Hamish Macleod, gave his inaugural budgetary speech and began to commit the government to accumulate the level of reserve as promised in the Sino-British airport memorandum, the public was increasingly sceptical that the airport would be constructed at the expense of the quality of life of the ordinary citizens in Hong Kong. The distrust of the Hong Kong public towards the



government is an inevitable result of a lack of participation of local representatives - either by the senior administrators or by the newly-elected politicians - in any of the negotiations with China concerning Hong Kong's future. By 1992, there have been in fact no systematic official channels in which Hong Kong officials could communicate with their Chinese counterparts. By contrast, the newly-emerged politicians in Hong Kong have already been arranging numerous informal discussions with Chinese officials of various levels with a view to getting better access to the policy centre at Beijing. The more fundamental question remains: after 1997, who should be involved in the process of consultation with China - Hong Kong civil servants or elected politicians?

The case of Hong Kong suggests that the issue of accountability deserves much greater attention from both academics and practitioners of the field. Political accountability which appears to be the role of politicians is also essential to the effective performance of administrative tasks. Public sector administrators in Hong Kong have been pre-occupied with the objective of upholding efficiency and effectiveness, and thus under-estimate the ultimate aim of public accountability. Yet the case of Hong Kong is further confused by an uncertainty about the future accountability of public administrators to the people of Hong Kong or China. Therefore, the top management should seek quickly to clarify the existing and future roles and positions of civil servants within the overall political system. While civil servants are generally opposed by the newly-emerged politicians, they are also increasingly challenged by China over major policy issues in Hong Kong. All these uncertainties have been jeopardising the traditional decision-making structure of the Hong Kong civil service. Such an uncertain political environment not only reduces the efficiency of decision-making, but also discourages civil servants from contemplating innovative policy changes

when necessary. Inability to resolve the dilemmas of accountability has already been raising doubt about the ability of the government to maintain the degree of efficiency and effectiveness of which it was once proud.

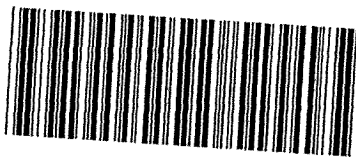
## CONCLUSION

What could be concluded from the dilemmas encountered by public sector administrators in Hong Kong? While the civil servants primarily attempt to preserve the degree of efficiency and effectiveness they achieved in the 1960s and 1970s, they are not able to do so in the 1980s and 1990s because of their inability to resolve the various dilemmas of maintaining continuity and stability within the civil service, improving the efficiency and effectiveness of public services, handling the relations with the newly-emerged politicians, and enhancing public accountability.

In any case, the example of Hong Kong revives a fundamental issue in the study of public administration. Public sector administration is different from private sector management in that it is not merely concerned with managing the largest organisation in a society, but is also concerned with governing the society at large. Although Hong Kong's case is complicated by a process of power transfer, it suggests that maintaining the stability of internal management and staff relations would have significant effects on the quality of service provision as well as the level of public confidence towards the administrative system. Moreover, the Hong Kong government should not primarily rely on the traditional assumption that its legitimacy is based on an authoritarian distribution of bureaucratic power. Instead, it should seek political and constitutional changes to enable the whole political system to become more adaptable to evolving aspirations in society. By the 1980s and 1990s, Hong Kong society has been dramatically transformed by political, economic, and social changes which have

altogether produced a more educated and conscientious population. The outmoded classical bureaucratic system is no longer capable of coping with all these changes. What is required is not only an efficient administration but also a more responsive and accountable government which is always prepared to receive comments from groups and individuals and discuss new ideas with the public and its staff about necessary policy change. The dilemmas confronted by the public administrators are a result of their reluctance to open up the governing processes to allow greater input from both its staff and the public. Given that Hong Kong is experiencing an unconventional course of power transfer, these dilemmas may not be totally resolved but could be carefully handled by a more determined leadership from within the top management by developing a more open government, or even fundamentally clarifying the constitutional functions of the executive branch, and its relationship with the legislature in the near future.

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