

COMMENT



The SAR Constitution: Law or Politics?

To what extent do the Joint Declaration and the Basic Law provide formal guarantees that Hong Kong's way of life will be maintained after 30 June this year?

We have been constantly assured, and re-assured, by both Britain and China, that the future of Hong Kong is secured by the Joint Declaration and the Basic Law. If these documents are insufficient for the purpose, we can rely on (a) the good faith and political promises of the PRC government, as expressed in the slogans 'one country, two systems,' 'a high degree of autonomy,' and 'Hong Kong people ruling Hong Kong,' and (b) the vigilance of institutions (such as the courts) and individuals (such as the Chief Executive) in the SAR to assert and promote due respect for the promises made in the documents. Failing these, the last ditch is China's economic self-interest in maintaining a prosperous and stable Hong Kong, political prestige in demonstrating that reunification can successfully be achieved — not least in reassuring the people of Macau and Taiwan — and, for individuals in Hong Kong, a precarious confidence in feng shui, guanxi, or the will of the gods. On the eve of the establishment of the SAR there appears to be much optimism that all will be well, that Hong Kong, though under a government ultimately appointed as before by an external political entity, can continue to function as a largely autonomous civil society under the rule of law.

Chinese officials, however, have stated that after 30 June this year the affairs of the SAR will be an internal matter for the People's Republic alone to deal with: the British government is to have no further role. This contradicts the fact that the Joint Declaration is a solemn international agreement binding on both parties, each party having an interest in its proper implementation, with the Sino-British Joint Liaison Group expressly maintained for a further two and a half years. It seems that, for the Chinese, the Joint Declaration is to be regarded, not as comprising commitments under international law, but as a mere statement of future policy.

The Basic Law appears to be faring no better. It is commonly claimed, for example, that the Basic Law means whatever the Standing Committee of the National People's Congress, in exercising its power of interpretation under BL158, decides it means. The Standing Committee is not a judicial body, nor is it obliged to adopt the assumptions which Hong Kong's common law system routinely makes. Any issue of legal importance, such as whether establishment of the provisional legislature is compatible with the Basic Law, can be treated as a solely political issue and given the political solution which most pleases the Chinese authorities. To rely thus on the Standing Committee's power of 'legislative interpretation' amounts to a denial that the Basic Law is in any true

sense *law*. The Basic Law is just another political statement, binding on the Central People's Government only insofar as the CPG agrees in any particular instance to be bound.

This is reinforced by the view — openly put forward now in relation to the constitutionality of the provisional legislature — that the courts of the SAR must recognise the overriding authority of pronouncements by the NPC.¹ It is apparently of no consequence if such pronouncements do not come within the national laws applicable to Hong Kong under BL18, or that they are not preceded by proper amendment of the Basic Law in accordance with BL159. Despite the promise of 'two systems,' the SAR legal system is ultimately to be regarded as part of the PRC's legal system and thus subordinate to the supreme authority of the NPC. The Basic Law, with all its restrictions, is truly binding only on the SAR government.

Further, Sir (or perhaps now Dr) S Y Chung informs us of the view of 'some legal experts in China' that formation of the provisional legislature is an act of state beyond the jurisdiction of the SAR courts. According to BL19, he continues, 'it is up to the Central People's Government to decide, not the SAR courts, whether an act is or is not an act of state.'² He also implies that exercise of the interpretive discretion of the Standing Committee can settle the matter, should the courts determine otherwise. It is immaterial that BL19 does *not* allow classification of all acts of policy, whatever their nature, as acts of state or to recognise the final authority of the CPG in the classification process. The Basic Law can be manipulated to mean what the Chinese government, consulting its own political interests, wishes it to mean.

For China's functionaries and ideologues, therefore, neither the Joint Declaration nor the Basic Law can be taken at face value. In an ultimate sense they are not legal documents at all but political manifestos, not necessarily any more enduring than party platforms in an election campaign. They may induce a temporary, albeit fragile, belief that their promises will be respected, but they are not statements of law enforceable in the courts. Still less are they sober constitutional declarations deserving of respect and obedience. They are techniques of political struggle, perhaps, which, having served their purpose, can now be largely ignored. Or, like China's constitution, they reflect what *was*, not necessarily what *is* or what *will be*. Their cynical deployment betrays both the high-minded enterprise which called them into being and the reasonable expectations of Hong Kong citizens. Or, if that seems too strong, Chinese

¹ See Albert H Y Chen, 'The Provisional Legislative Council of the SAR' (1997) 27 HKLJ 1, 8: 'As the [NPC] resolution will, under the constitutional and legal system of the PRC, be legally binding on the courts of the HKSAR, it will suffice for the purpose of forestalling any legal challenge to the PLC mounted before the courts of the HKSAR.' By thus tacitly absorbing the SAR legal system into that of the PRC, this seems to deny the principle of 'one country, two systems.'

² Letter to the Editor, South China Morning Post, 5 April 1997. See also his letter on 16 May, in which he concludes that the Preparatory Committee and its acts performed in Chinese territory are governed by Chinese law, not the common law in Hong Kong.

attitudes towards them illustrate differing conceptions of law and legality and demonstrate what has always seemed a major flaw in the arrangements for Hong Kong's future: that the Chinese government does not understand Hong Kong's mentality and the way the Hong Kong system works. To the extent that it *does* understand, it is determined to impose its own view: whenever there is a disjunction between China's constitutional and legal assumptions and Hong Kong's, China's must be seen to prevail.

Recent developments indicate that the promised 'high degree of autonomy' is already a mere chimera.

(1) When Mr Tung Chee-hwa chose his principal officials he went to Beijing to negotiate, it seemed, the Chinese government's approval. The Basic Law, however, says nothing about Beijing's approval. Under BL15 the Central People's Government shall *appoint* the principal officials of the executive authorities of the SAR, whereas BL48 empowers the Chief Executive to *nominate and report* the principal officials for appointment by the CPG. Implicit in these provisions is a formal distinction between selection and appointment. Just as the Queen in the United Kingdom appoints the Governor of Hong Kong but has no authority to make an independent choice, the Basic Law ought to be seen as denying the CPG any discretion in the appointment of principal officials. Mr Tung has waived an opportunity to assert an interpretation of the Basic Law which would further local autonomy.

(2) It is commonly stated that differences of opinion existed between Mr Tung and the local branch of the New China News Agency concerning the selection of the Chief Justice of the Court of Final Appeal. There were said to be two main candidates, one of whom was favoured by the NCNA and who had apparently lobbied for Chinese government support. But the Basic Law allows no room for the NCNA or any other Chinese government agency to be involved in the selection and appointment of the Chief Justice. This is a matter within the autonomy of the SAR.

(3) Sir Joseph Hotung and Ms Eleanor Ling have not been offered appointment to the judicial officers recommendation commission, though they are currently members of that body's predecessor. The reason is purely political, as everyone knows. China could be expected to oppose both of them as members. But why should Mr Tung oppose them, unless he has decided that he is no position to thwart the policies, or the likes and dislikes, of the Chinese authorities? Again, this is a matter solely within the autonomy of the SAR. Just as it is inappropriate for Chinese officials to pronounce upon the content of local textbooks, since educational policy is reserved to the SAR government (BL136), it flies in the face of the Basic Law and pledges of a high degree of autonomy for Chinese officials to be interfering in judicial appointments. And, of course, if the quality and independence of the SAR judiciary are among the strongest warranties we have that the rule of law will be maintained, meddling by Chinese officials in this area must cause further consternation.

(4) As is well known, the Preliminary Working Committee and the Preparatory Committee decided that the Hong Kong Bill of Rights Ordinance was contrary to the Basic Law. The reasoning for this assertion is patently false, yet it was apparently politically important to the Chinese authorities that the Bill of Rights Ordinance not pass through the transition unscathed, and Hong Kong members did not publicly challenge their determination to amend the ordinance. Despite the controversy, despite the damage to public confidence in transition arrangements, the recommendation went to the Standing Committee with no voice raised in opposition, as though the Hong Kong members of these bodies simply did as they were told by Chinese officialdom. Yet the amendments to the ordinance will make not one iota of difference to the practical or legal effect of the Bill of Rights.³

(5) Similarly, the Public Order Ordinance and the Societies Ordinance in their current (June 1997) form are alleged to be contrary to the Basic Law — but we are not told the reason, and lawyers are at a loss to explain why. Presumably they are disliked because they were made as a consequence of the Bill of Rights, which is no reason to label them as in conflict with the Basic Law. Mr Tung's discussion paper⁴ proposed certain amendments, on the understanding that, although these amendments would be made by the SAR legislature, we were not free to entertain whatever amendments we wished: there were political constraints. Yet these political constraints existed because of attitudes and policies formed in China, not necessarily in Hong Kong. Once again, it seems, the SAR government-in-waiting is simply doing what it is told. This is so even though the amended versions, being necessarily less liberal than the current law, will almost certainly be vulnerable to challenge as contravening the International Covenant on Civil and Political Rights.

In each of these instances stands revealed an indifference to local autonomy on the part of both China and the SAR government.

Taken seriously, the Basic Law establishes a highly law-dependent constitutional system. If Hong Kong's colonial constitution is in many ways the opposite, granting broad discretion rather than limiting powers by law,⁵ the Basic Law is littered with restrictions, injunctions, and procedural requirements. Its maintenance is in the hands of lawyers and judges, who have the means, and one hopes the commitment and courage, to make it work as a genuine constitution. But if the system of judicial appointment may be regulated by China, and if BL19 and 158 can be used to pervert the interpretive and adjudicative processes, and if the political authorities are not concerned to assert and defend a high degree of autonomy, lawyers and judges may be

³ Peter Wesley-Smith, 'Maintenance of the Bill of Rights' (1997) 21 HKLJ 15.

⁴ 'Civil Liberties and Social Order' (April 1997), published by the Chief Executive-designate's office.

⁵ See Yash Ghai, 'The Past and the Future of Hong Kong's Constitution' (1991) 128 *China Quarterly* 794, 799–800.

persuaded to compromise both their values and the law in the service of politics. Their performance in the first few years of the SAR period will be crucial to the legitimacy of the Basic Law.

For this reason it is particularly heartening to note Andrew K N Li QC's appointment as Chief Justice. He is widely admired in the legal profession and there is no doubt of his legal acumen and his aptitude for public service. I'm sure all readers of this journal will wish him well.

*Peter Wesley-Smith**

The Future of the Common Law

This is the last issue of the Hong Kong Law Journal to appear under Britain's rule of Hong Kong. For more than a quarter of a century the Journal has provided a forum for the analysis of our law. And we shall continue to do so. Under the principle 'one country, two systems' the Hong Kong Special Administrative Region will maintain its common law system.

There are of course a number of forces that will operate after 1 July 1997 both to preserve and undermine the prospects for the continued application of this colonial import. On the credit side, the terms of the Sino-British Joint Declaration and the Basic Law are unequivocal in their pledge that the present system continue. The resilience of the common law, its culture, tradition, ethos, along with the commitment of judges and the legal profession, the nature of legal education, and our strong links to the common law world constitute significant ramparts of the system. Economically, one might take heart from Max Weber's view that a capitalist system requires formally rational law to support and sustain it. No-one has proposed replacing our legal system with another: the law of the PRC does not present itself as a particularly attractive substitute for the common law.

But dangers lurk on the debit side. The prospect of political interpretation by the Standing Committee of the NPC under BL158 and a limited grasp by PRC authorities of the centrality of judicial independence and the separation of powers may place our system under strain. Squabbles between Britain and China over the establishment of the Court of Final Appeal, the nature of acts of state, the provisional legislature, and amendments to the Bill of Rights Ordinance and other human rights legislation, have revealed a disturbing lack of sensitivity towards the common law's essentially liberal character. Nor do some recent developments, mentioned in Peter Wesley-Smith's comment above, give cause for rational optimism about the autonomy of the Hong Kong SAR.

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