

CHAPTER TWO

THE FRAMEWORK FOR CHANGE

The Sino-British Joint Declaration on the Question of Hong Kong 1984

2.1 In 1982, Britain initiated negotiations with the People's Republic of China on the status of Hong Kong. Despite the fact that the nineteenth century treaties¹ were not recognised by China, Britain's adherence to them and to the legal framework they provided necessitated some settlement which would accommodate the shortening leases in the New Territories. Those leases were due to expire in 1997. What began as a limited exercise in seeking an administrative extension to the lease in the New Territories² quickly developed into a consideration of the whole territory and the redressing of China's humiliations in the nineteenth century.

2.2 For Britain, the 'permanent territories' of Hong Kong island and the tip of the Kowloon Peninsula were not viable without the New Territories which contained the basic necessity of agriculture, the bulk of the industry, the power supply and the airport of Hong Kong. The negotiations lasted two years. The agreement was initialled by Britain and China on 26 September 1984, endorsed by the Legislative Council³ of Hong Kong on 18 October 1984, subsequently debated and approved by the British Parliament, and signed by Britain and China on 19 December 1984. It entered into force on 25 May 1985. On 12 June 1985 it was lodged with the United Nations as a treaty.

2.3 In China, 1982-84 was a period of reformist opening, relatively expansive in its embracing of the West. Deng Xiaoping himself took a special interest in the negotiations over Hong Kong and defined the principle of 'one country, two systems' as a way of allaying British and Hong Kong concerns about the transfer and of preserving the economic prosperity of Hong Kong which he recognised as being so valuable to China's development.

2.4 However, these negotiations were conducted in secret, without reference to the wishes of the people of Hong Kong.⁴ China objected to the inclusion of Hong Kong representatives on the basis that they would create an unwieldy situation of a 'three legged stool'. The International Commission of Jurists has described the process as intolerable:

[It was] ... intolerable for the British Government to transfer British citizens in Hong Kong to the jurisdiction of the People's Republic of

1 See para 1.7.

2 Initially, in Britain's view, the New Territories was the only area under contention as the island of Hong Kong and Kowloon had been ceded in perpetuity.

3 At that time comprised entirely of the Governor's nominees.

4 See for example, Hong Kong Human Rights Commission, Submission, p. S66; Jayawickrama, Submission, p. S322; The Frontier, Submission, p. S207. See also para 1.1 and footnote 1 in Chapter 1.

China without their own consent and without any opportunity having been given to them to participate in deciding their own future.⁵

2.5 There was a process of post-agreement ratification conducted by the British authorities after the Joint Declaration was signed. In September 1984, the Government set up an Assessment Office which sought to explain the inevitability of the agreement and the protections built into it for the continued autonomy of Hong Kong post 1 July 1997 and, therefore, after the fact, to develop a consensus in support of it. In the period between 26 September and 19 December, the Assessment Office in Hong Kong canvassed the opinion of Hong Kong people on the acceptability of the agreement.

The Government, however, attempted to control the result by narrowing the range of options available to respondents when it suggested that the only alternative to accepting the draft was a unilateral takeover by China in 1997 without an agreement. ... It is not surprising, therefore, that the Office reported that most people found the draft agreement acceptable.⁶

2.6 It is worth noting however that, when the Committee visited Hong Kong in January 1997, many of the groups which spoke to the members expressed regret and dismay at this lack of consultation on whether the transfer should take place at all.

2.7 The Joint Declaration states that, under Article 31 of the Constitution of the People's Republic of China, Hong Kong will be established as a Special Administrative Region (HKSAR). In the opening paragraph, it characterises its purpose as an agreement that was 'conducive to the maintenance of the prosperity and stability of Hong Kong'. Section 3 of the Declaration outlines China's policies towards Hong Kong. It asserts the importance of Hong Kong to the 'national unity and territorial integrity' of China and states that Hong Kong will come 'directly under the authority of the Central People's Government (CPG) of the People's Republic of China'. Beyond these two statements, most of the rest of the Joint Declaration outlines the nature of and stresses the importance of the autonomy of Hong Kong.

- Hong Kong will enjoy a 'high degree of autonomy', Article 3(2), and the policies agreed in the Joint Declaration will remain unchanged for 50 years, Article 3 (12);
- it will be vested with 'executive, legislative and independent judicial power, including that of final adjudication', Article 3 (3);
- the 'laws currently in force'⁷ will remain basically unchanged', Article 3 (3);
- the government of the HKSAR is to be composed of locals, Article 3 (4);

5 Quoted in Jayawickrama, Submission, p. S323.

6 Exhibit No. 7(d), Martin, Dr B G, *Hong Kong in Transition*, Research Paper No. 9, 1994, Parliamentary Research Service, Department of the Parliamentary Library, p. 12. See also survey evidence in Footnote 1 in Chapter 1.

7 Presumably this applies to laws as at 1 July 1997 when all these changes take effect. See Article 2 of the Joint Declaration, in Appendix 6.

- the chief executive will be appointed by the CPG on the basis of elections or consultations, Article 3 (4);
- there will be continuity of personnel in the police and the civil service, Article 3 (4);
- the 'social and economic systems' and the 'life style' of Hong Kong will remain unchanged, Article 3 (5);
- all rights and freedoms⁸ will be ensured by law, Article 3 (5);
- Hong Kong will remain a free port and a separate customs territory, Article 3 (6), will have a separate currency, Article 3 (7), independent finances, including taxation, Article 3 (8), and independent economic and cultural relations with other states, regions or international organisations, Article 3 (10);
- Hong Kong will issue its own passports, Article 3 (10); and
- it will maintain its own police force, Article 3 (11).⁹

2.8 The Annexes to the Declaration, which elaborate on its principles, serve to reinforce this emphasis on autonomy. Annex 1 notes that the legislature shall be 'constituted by elections', that the courts shall exercise judicial power independently and 'free from any interference', and that 'all' public servants can remain in employment after the establishment of the HKSAR. Much of the detail of the Annexes is devoted to the financial independence of Hong Kong and its capacity to negotiate independently a wide range of international agreements - on shipping, aviation, trade, tourism, cultural and sporting matters.

2.9 The Joint Declaration affirms that, until 30 June 1997, the United Kingdom has ongoing responsibility for the administration of Hong Kong and for its economic prosperity and social stability and that, in this, China promises cooperation (Article 4).

2.10 Finally, the Joint Declaration set up a Joint Liaison Group (JLG) to consult, discuss and exchange information on the transition. It was to operate from the time that the Declaration entered into force (27 May 1985) until 1 January 2000. Both Britain and China were to appoint a senior representative, of ambassadorial rank, and four other members as well as 20 supporting staff. It is notable that Annex II specifically stated that the JLG was not an organ of power; it could play no part in the administration of Hong Kong or the HKSAR nor have any supervisory role over that administration.

2.11 The Joint Declaration is a liberal document which covers the essential elements of an open society, albeit in broad and general terms. The International Commission of Jurists had one major criticism of it; that it did not specify that the chief executive should be a democratically elected office.¹⁰ The Declaration does suggest the appointment on the basis of

8 The list is very comprehensive - person, speech, press, assembly, association, travel, movement, correspondence, strike, choice of occupation, academic research and religious belief.

9 Exhibit No. 1(f), *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong with Annexes*, Beijing, December 1984. Reproduced as Appendix 6 to this report.

10 Exhibit No. 2. *Countdown to 1997: Report of a Mission to Hong Kong*, International Commission of Jurists, 1992, p. 14 and Chapter VIII.

'election or consultations'. A further criticism that has become significant in the last five years is that the Joint Liaison Group lacked an arbitration mechanism to settle dispute between Britain and China.

The Impact of Tiananmen Square 1989

2.12 The Joint Declaration foreshadowed the need to promulgate a law to translate the policies agreed in the Declaration into a constitution for Hong Kong. In June 1985, the Standing Committee of the PRC appointed a Basic Law Drafting Committee (BLDC). It consisted of 59 members, of whom 23, a minority, were from Hong Kong. They were not authorised by the people of Hong Kong and, as their numbers were reduced by resignations, expulsions and deaths, they were not replaced.¹¹ The first draft, presented for consultation in 1988, elicited little popular reaction. However, when the final draft was presented in April 1990, it was rejected by the Legislative Council.

2.13 The intervening factor between the apathy towards the first draft and the rejection of the final draft was the massacre of pro-democracy students in Tiananmen Square on 4 June 1989. That event had a huge and adverse impact on the international attitude towards the People's Republic of China. The comforting view of China which had prevailed in the West throughout the period of China's emergence from isolation - a view that emphasised China's long history and rich culture, its achievements in the stabilisation and unification of the country and in feeding and educating its vast population, a view that it was liberalising its political system along with its economic system - was shattered on 4 June. China could no longer be seen as a benign dictatorship. Tiananmen Square led to a reassessment of China's recent history and a closer scrutiny of the Cultural Revolution.

2.14 In Hong Kong, Tiananmen Square created profound distrust and immediate political activism. Hong Kong was shaken out of its complacency and apathy. At the time of the attack on the students, over a million people demonstrated in the streets of Hong Kong. China's assurances that it would preserve the way of life in Hong Kong under a policy of 'one country, two systems' appeared suddenly to be very doubtful. Political parties were formed in Hong Kong which demanded greater and faster democratisation.¹² Senior members of the Executive Council and the Legislative Council lobbied the British Government to enable one third of the Legco seats to be directly elected in 1991 and half the seats to be directly elected in 1995.¹³ The Foreign Affairs Committee of the House of Commons reported in March 1994 that:

We cannot overemphasise the significant change in mood and attitude that has taken place in Hong Kong. On the occasion of the then Committee's visit in 1989 Members found a clear desire for democratic progress. The events around Tiananmen Square appear to have transformed that desire into an urgent necessity.¹⁴

11 *ibid.*, p. 8.

12 Martin Lee and Szeto Wah formed the United Democrats of Hong Kong (UDHK) in December 1989. It was the first specifically Hong Kong political party to emerge in the Territory, with 220 founding members. Exhibit No. 7(d), Martin, *op. cit.*, p. 15.

13 *ibid.*

14 Exhibit No. 1(v), Foreign Affairs Committee, *Relations between the United Kingdom and China in the Period up to and Beyond 1997*, House of Commons, 23 March 1994, p. lxxxvii.

The stock market in Hong Kong declined. The growth rate of GDP declined from 8.3 per cent in 1988 to 2.8 per cent in 1989. The outflow of people reached its height. In 1990, 66 per cent of accountants and 52 per cent of architects had already applied for foreign passports and 58 per cent of doctors and 50 per cent of lawyers stated their intention to leave before 1997. The majority of people - 70 per cent in a survey in October 1990 - were pessimistic about Hong Kong's future.¹⁵

2.15 After June 1989, Britain could not ignore the urgency of the demands of the local population:

There was a consensus, not least within the business community, that the best way to guarantee the future of Hong Kong was for there to be, first, continuing economic success of the Territory and second, strong and stable democratic institutions. The 1989 report which advocated a rapid progression towards full democracy before 1997, was widely welcomed in Hong Kong.¹⁶

2.16 The government of Britain determined on programs to build political and economic confidence in Hong Kong - the enlargement of the democratic base by extending the directly elected seats in the Legco; the *British Nationality (Hong Kong) Act (1990)* offering places to 50,000 households, the *Bill of Rights Ordinance*, enacted in 1991 to implement the ICCPR and the huge infrastructure project incorporating the new airport and container terminals. Governor Patten, a well placed, practising politician and former Cabinet Minister rather than a professional diplomat, was appointed as the last Governor of Hong Kong in July 1992 to oversee the implementation of democratic reform.

2.17 China's response to international condemnation after 4 June was defensive and, in relation to Hong Kong, determined to see the confidence building measures of the British as a conspiracy to undermine their control of the territory. China's retreat from political openness, if that were ever a possibility, has become a very serious problem for Hong Kong. The House of Commons Foreign Affairs Committee reported that:

When the previous Foreign Affairs Committee visited Peking in April 1989 the Chinese officials to whom the Committee spoke emphasised that the timetable for the introduction of representative government was a matter for Hong Kong. In our discussions with Chinese ministers and officials during our recent visit it was plain that this was no longer their position.

The key to the changing attitudes on the part of China seems to lie in developments since the Tiananmen Square killings. Just as the events in Tiananmen Square had a profound effect on attitudes in Hong Kong, so the consequences of those events in Hong Kong had an effect on Chinese thinking. As the Foreign Secretary told us, "There is ... general reluctance [on the part of China] to see an increase in democracy in Hong Kong."¹⁷

15 Exhibit No. 7(d), Martin, op. cit., p. 16.

16 Exhibit No. 1(v), Foreign Affairs Committee, op. cit., p. xxxiv.

17 ibid., pp. xliv-xlv.

2.18 One example of China's about face might be seen in the progress of Article 23 in the drafting of the Basic Law over this period.¹⁸ The original draft read:

The Hong Kong Special Administrative Region shall prohibit by law any act designed to undermine national unity or subvert the Central People's Government.

2.19 According to Mr Martin Lee, who was a member of the drafting committee at that time, this text was seen to be unacceptable as subversion was not a concept in the common law and antithetical to the democratic process, where opposition to the government is a necessary and dutiful part of the role of a loyal opposition. It was redrafted in February 1989 removing the reference to subversion. The second draft read:

The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition or theft of state secrets.

2.20 After the events in Tiananmen Square in June 1989, Article 23 was redrafted a third time not only replacing the idea of subversion but adding a prohibition on contacts with foreign political organisations. The third and final draft reads:

The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organisations or bodies from conducting political activities in the Region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies.¹⁹

2.21 This has become one of the most contentious articles of the Basic Law, one most likely to be used to undermine the free and open nature of the place and to thwart its democratic development.

The Basic Law

2.22 The Basic Law²⁰ is to be the Constitution of Hong Kong. It was drafted by a committee, the Basic Law Drafting Committee (BLDC), appointed by the National People's Congress in 1985.²¹ It comprises nine chapters, three annexes and four decisions of the National People's Congress.

2.23 The chapters cover General Principles (I), the Relationship between the Central Authorities and the Hong Kong Special Administrative Region (II), Fundamental Rights and Duties of Residents (III), the Political Structure (IV), the Economy (V), Education, Science, Culture, Sports, Religion, Labour and Social Services (VI), External Affairs (VII), Interpretation and Amendment of the Basic Law (VIII), Supplementary Provisions (IX).

18 Jayawickrama, Submission, p. S346.

19 All drafts of Article 23 taken from Exhibit No. 20.

20 The full text of the Basic Law is at Appendix 5.

21 Further details in paragraph 2.12.

2.24 The annexes cover the Method for Selection of the Chief Executive of the Hong Kong Special Administrative Region (I), the Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and its Voting Procedures (II), the National Laws to be applied to the Hong Kong Special Administrative Region (III).

2.25 The decisions of the National People's Congress note the relationship of the Basic Law to the Constitution of the PRC, the date at which it will come into effect, the area covered by the Basic Law,²² the establishment of the Preparatory Committee to oversee the First Legislature, the selection of the First Chief Executive and the approval of the Basic Law Drafting Committee.

2.26 Importantly, Article 68 of the Basic Law stipulates that the legislature of the HKSAR shall be constituted by elections, although the method of election is not specified. This article also states that the 'ultimate aim is the election of all members of the Legislative Council by universal suffrage'. The Decision of the National People's Congress on the Method of Formation of the First Government and the First Legislative Council sets out the composition of the first Legislative Council, but not its method of election.

2.27 Finally, the above decision of the National People's Congress outlines the 'through train' whereby the current members of the Legco would or could become members of the first Legislative Council:

If the composition of the last Hong Kong Legislative Council before the establishment of the Hong Kong Special Administrative Region is in conformity with the relevant provisions of this Decision and the Basic Law of the Hong Kong Special Administrative Region, those of its members who uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and pledge allegiance to the Hong Kong Special Administrative Region of the People's Republic of China and who meet the requirements of the Basic Law of the Region may, upon confirmation of the Preparatory Committee, become members of the first Legislative Council of the Region.

2.28 On one level, the Basic Law must be evaluated as a more liberal constitution than that provided to Hong Kong under the colonial regime. The Chief Executive, unlike the Colonial Governor, is not to be an entirely appointed position; it is at least to be selected on the basis of consultation or elected by an electoral college system. The Chief Executive's powers are to be more curtailed than that of the Colonial Governor. The Legislature is to be able to initiate legislation and impeach the Chief Executive. The Court of Final Appeal is to be in Hong Kong rather than in London. However, under British rule, if they were dissatisfied, Hong Kong citizens had access to the democratic processes of Westminster and Britain chose, increasingly throughout the twentieth century, to leave dormant its extensive powers and to consult widely with its Hong Kong citizens.

22 It is notable that the decision defines the area of the HKSAR as Hong Kong Island, the Kowloon Peninsula and the islands and adjacent waters under its jurisdiction. No mention is made of the New Territories. It is unclear whether this is an oversight or whether in future the New Territories might not be covered by the treaty.

2.29 The completion of the final draft of the Basic Law coincided with the traumatic events surrounding Tiananmen Square. At every stage in the negotiation between China and Britain on the transfer of Hong Kong there has been a widening democratic deficit. Dr Nihal Jayawickrama expressed the view that:

We started with a flawed basis and then built on that ... at every stage you find the flaws keep magnifying; the Basic Law deviated from the Joint Declaration, and now we find, even before the Basic Law has been implemented, the Chinese authorities deviating from the Basic Law. So it looks as if agreements, laws don't seem to matter very much in the kind of regime that's to be established.²³

2.30 In 1992, the International Commission of Jurists reported on a mission to Hong Kong which took place in April 1991. The report, *Countdown to 1997*, concluded that 'the Basic Law, which is to be the post 1997 Constitution for Hong Kong, fails to fulfil in a number of important respects the undertakings that the Chinese Government gave by entering into the Joint Declaration'.²⁴ Moreover, insofar as the Basic Law is in breach of the Joint Declaration, it is enforceable only by Britain, not by the people of Hong Kong, as they are not parties to the treaty.²⁵

2.31 The British Foreign Secretary, Mr Douglas Hurd, reported on the Basic Law to the British Parliament in April 1991. He stated that:

... concern throughout the drafting process was to ensure consistency between the Basic Law and the provisions of the Joint Declaration. On the whole [the Hong Kong Government] are satisfied that this has been achieved and that the Basic Law provides a firm foundation for Hong Kong's future as a Special Administrative Region of China. But there are some provisions that they would have preferred to have seen omitted or drafted differently.²⁶

23 Dr Nihal Jayawickrama, ABC *Lateline*, 18 February 1997.

24 Exhibit No. 2, ICJ, op. cit., p. 3.

25 Dowd, Transcript, 30 January 1997, p. 127.

26 Quoted in Welsh, op. cit., p. 527.

Provisions of the Basic Law Inconsistent with the Joint Declaration

2.32 The ICJ saw these provisions in a much more serious light. In its report on a mission to Hong Kong in 1992, *Countdown to 1997*, it listed discrepancies and variations between the Joint Declaration and the Basic Law in the following terms:

Chapter II - Relationship between the Central Authorities and Hong Kong Special Administrative Region (HKSAR)

2.33 Discrepancies in this chapter have been the basis of much of the debate and concern about how effective the new system of 'one country, two systems' might be in practice. They included:

- (Article 14) Whereby the SAR can ask for the assistance of the Central Government in the maintenance of public order or disaster relief.
- (Article 17) Whereby the Standing Committee of the National People's Congress may invalidate any law seen not to be in conformity with the Basic Law regarding affairs within the responsibility of the Central Government or regarding the relationship between the HKSAR and the Central Government.
- (Article 18) While largely dealing with national symbols, also states that in the event of turmoil beyond the control of the government of the HKSAR, the laws of the Central Government will be applied to the HKSAR.²⁷

2.34 Both Articles 17 and 18 enable the decisions of the HKSAR to be overruled by the CPG. In conjunction with Articles 23, 158 and 160 they give the Central People's Government considerable potential power over the government of the HKSAR and thereby limit Hong Kong's autonomy. Dr Nihal Jayawickrama noted that:

...the Standing Committee's decision may be made independently, and in the absence of any request or suggestion from the SAR government; secondly, that the Standing Committee, in making that decision will be applying the test of 'turmoil' which is a Chinese concept unknown to the law of Hong Kong; thirdly, that upon a decision being made that Hong Kong is in a state of emergency, the relevant Chinese law (ie martial law) will be applied to the Region; and fourthly, that Chinese martial law is enforced through the People's Liberation Army.²⁸

2.35 The Foreign Affairs Committee of the House of Commons also looked closely at these articles. They reported that the Bar Human Rights Committee had expressed concern about Article 18 in that the term 'turmoil' was 'very elastic' and that, given a history of demonstrations in Hong Kong orchestrated by China, it was a loophole that could be easily exploited.²⁹

2.36 The House of Commons Committee further reported that the Hong Kong Journalists Association had expressed concerns about Article 19. They believed that it was

27 For the full text of the Basic Law see Appendix 5.

28 Jayawickrama, Submission, p. S329.

29 Exhibit No. 1(v), Foreign Affairs Committee, op. cit., p. lvi.

inconsistent with the guarantees of the Joint Declaration that the 'maintenance of public order in the HKSAR shall be the responsibility of the HKSAR government'.

- (Article 19) deals with the powers of the courts of the Special Administrative Region. It vests independent judicial power in the HKSAR courts and gives them power of final adjudication. However, the final provision states that there is no jurisdiction of the Courts of the HKSAR over matters relating to 'acts of state such as foreign affairs and defence'.

2.37 The phrase 'such as' appears potentially to expand rather than to confine the limits of power of the Central Government over Hong Kong. Justice Dowd told the Committee that:

In Article 19, which vests the power of final adjudication in the courts, there is provision at the end of it that the [Hong Kong] courts shall have no jurisdiction over acts of state. Then it says not 'as to defence and foreign affairs' but 'such as defence and foreign affairs'. So the interpretation under article 19 may be the subject of a certificate from the chief executive on consultation.³⁰

2.38 The most controversial article regarding the preservation of human rights in Hong Kong is Article 23. The history of the development of this article is outlined in paragraphs 2.18 - 2.20.

- (Article 23) Whereby the HKSAR is required to enact laws 'to prohibit any act of treason, secession, sedition or subversion against the CPG, or theft of state secrets, to prohibit foreign political organisations or bodies from conducting political activities in the region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies'.

2.39 The implications of this article for continued open political debate and democratic processes in Hong Kong are legion. Because subversion is defined by the Chinese as 'acts committed with the goal of overthrowing the political power of the dictatorship of the proletariat and the socialist system',³¹ and includes leaflets, slogans, propaganda, and demonstrations critical of the Government of the People's Republic of China, it outlaws all normal political activity in a democracy where the object of the opposition is to replace the government in power.

2.40 The last part of Article 23 which prohibits contacts with foreign political organisations and bodies has the potential, depending on the interpretation of the word political, to make illegal a large array of NGOs currently operating in Hong Kong. Many submissions to the inquiry as well as organisations who spoke to the delegation in Hong Kong itself expressed concern at this article.

2.41 Article 23 offends against and is inconsistent with a series of freedoms and rights guaranteed both by the Basic Law itself (in various articles in Chapter III, particularly

30 Dowd, Transcript, 30 January 1997, p. 130.

31 Jayawickrama, Submission, p. S345.

Articles 27 and 39), the Joint Declaration (in section 3 (5)) and the ICCPR, to which Hong Kong acceded in 1976.

Chapter IV - Political Structure

The Chief Executive

- (Article 43) That the Chief Executive is accountable to the CPG and the HKSAR 'in accordance with this law'.
- (Article 44) That the Chief Executive must be a Chinese citizen, over 40, with no right of abode in any foreign country and have resided in Hong Kong for 20 years.

2.42 Other articles, 45, 46 and 48, spell out details of selection, tenure and powers for the Chief Executive that were not made explicit in the Joint Declaration. The powers over legislation, policy and appointments are considerable. The power of the CPG over the Chief Executive is also potentially considerable and destructive of Hong Kong's autonomy. These articles taken together also limit the accountability of the Chief Executive, ultimately making the office beholden to the government of the People's Republic of China rather than to the elected legislature or the people of Hong Kong.

Chapter VIII - Interpretations and Amendment of the Basic Law

2.43 There are other articles of interest which give considerable potential power to the Central Government.

- (Article 158) vests the power to interpret the Basic Law in the Standing Committee of the National People's Congress. This is delegated to the Courts of the HKSAR but on matters relating to the powers of the Central Government or the relationship between the Central Government and the HKSAR any interpretations must be referred to the Standing Committee.

2.44 According to Justice Dowd, this article has the effect of giving to a political body, the Standing Committee of the National People's Congress (NPC),³² the power to direct the interpretation of the Court of Final Appeal of the HKSAR. This results from the requirement that the Standing Committee shall authorise the courts of the HKSAR to make an interpretation; the requirement that the courts of the region shall seek an interpretation of the relevant provisions from the Standing Committee of the NPC before making their final

32 The National People's Congress exercises the legislative power of the state in China. It comprises 2,921 deputies indirectly elected for five years by the people's congresses of the provinces, autonomous regions, municipalities directly under the Central Government, and the People's Liberation Army. It meets once a year. In the interim the legislative power is conferred on the Standing Committee of the National People's Congress (SCNPC). The SCNPC is composed of the Chairman, the Deputy Chairman, the Secretary General and members. This Committee was unable to ascertain the number of members or the composition of the SCNPC. It functions for the same period as the National People's Congress and exercises its powers, including the power to amend the constitution, to enact and amend statutes, to interpret statutes, to choose ministers and appoint judges and ambassadors and to approve the ratification of treaties. For the purpose of carrying out its work, it divides into a number of committees. *Constitution of the People's Republic of China*, 4 December 1982. Chapter Three, Section 1, Articles 57-82.

judgements; and the requirement that the Court of Final Appeal shall follow the interpretation of the Standing Committee. Justice Dowd concluded that this process would make it difficult for foreign common law judges to participate in the Court of Final Appeal if their judgements were to be subject to such political direction.³³

2.45 Dr Jayawickrama added that Articles 160³⁴ and 17³⁵ of the Basic Law empower the Standing Committee to examine both the existing and subsequent laws and determine whether they contravene the provisions of the Basic Law.

2.46 The ICJ report suggests that the Constitution of the PRC possibly makes the validity of the 'one country, two systems' concept doubtful.³⁶ To demonstrate this, it lists certain articles of the Constitution of the People's Republic of China as relevant to the continued autonomy of Hong Kong:

- (Article 1) declares that the PRC is a socialist state and the socialist system is the basic system of the PRC. 'Sabotage' of the system is prohibited.
- (Article 2) provides that the people exercise state power through the National People's Congress and local people's congresses.
- (Article 5) provides that no law or administrative or local rules shall contravene the Constitution.
- (Article 31) provides that the state may establish special administrative regions. The systems to be instituted in such regions shall be prescribed by law enacted by the National People's Congress.

2.47 A capitalist system within a special administrative region making laws contradictory to those of the Chinese Constitution would appear to contravene that Constitution.³⁷

Conclusion

2.48 The express protections of human rights, applicable under the ICCPR, embodied in the Joint Declaration and the Basic Law and further applied by the Bill of Rights Ordinance, are significant. The letter of the Joint Declaration and the Basic Law, in those articles dealing with freedoms and rights, appears to give good protection to human rights and democratic freedoms; however, many of the people who spoke to the members of the Committee who visited Hong Kong in January 1997 remarked that the institutional arrangements for the preservation of those rights exhibit considerable weaknesses. Should the Government of the People's Republic choose, and in opposition to the intention of the 'one country, two systems' policy, these contradictions and discrepancies allow for considerable control of Hong Kong by the Central People's Government. Rather than Hong Kong people governing Hong Kong, what happens in China will determine what happens in Hong Kong.

33 Dowd, Transcript, 30 January 1997. See also Jayawickrama, Submission, p. S342.

34 Article 160 states that laws previously in force in Hong Kong will remain in force, except for those which the Standing Committee declares to be in contravention of the Basic Law.

35 See paragraph 2.33.

36 Exhibit No. 2, ICJ, op. cit., p. 25.

37 *ibid.*

Therefore, the attitude of the Chinese Government, its good will and its adherence to the obligations promised in the treaty, will be pivotal to any long term protection of rights in Hong Kong.

