

CONSTITUTIONAL CHANGE IN HONG KONG: THE LEGITIMACY OF THE PROVISIONAL LEGISLATIVE COUNCIL.

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I. INTRODUCTION

At midnight on 30 June 1997, the sovereignty of Hong Kong was transferred from Great Britain to the People's Republic of China. Hong Kong entered upon a new incarnation, absorbed into the People's Republic as a Special Administrative Region, with its own constitution, the Basic Law, designed to ensure "one country, two systems" in accordance with the agreement for the transfer reached by Britain and China. Under the Basic Law, Hong Kong retains as its legislature the body created by Britain known as the Legislative Council. On the transfer of sovereignty, however, the elected Legislative Council was replaced by an appointed Provisional Legislative Council. Within days the legitimacy of this body was challenged in the courts of Hong Kong. Three accused in a conspiracy case argued that the common law, under which they were charged, had, with the end of British rule, ceased to be a part of the law of Hong Kong. This argument led Hong Kong's Court of Appeal, in *HKSAR v Ma Wai-kwan, David*¹, to consider whether or not the Provisional Legislative Council was the properly constituted legislature of the Hong Kong Special Administrative Region. This article examines the decision and the circumstances which gave rise to so remarkable a matter ever coming before the courts.

II. CROWN COLONY

The territory transferred to China on 30 June, known as Hong Kong, was acquired by Britain in three stages.² Britain took possession of the island of Hong Kong in 1841³ but it was not formally ceded to Britain by China until 1842, pursuant to the Treaty of Nanking (Nanjing), at the conclusion of the First Opium War. This treaty was ratified in 1843 by both Britain and China. In 1860 China ceded to Britain that part of the Chinese mainland which faces the north shore of Hong Kong Island and is known as the Kowloon Peninsula⁴. In 1898 Britain took possession of the largest part of the territory known as Hong Kong when it leased the New Territories from China. The New Territories comprise that part of the mainland which adjoins Kowloon together with two hundred and thirty five off-shore islands. In acquiring the New Territories, Britain gained 365.5 square miles of territory, more than twelve times the size of Hong Kong Island itself.

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1 [1997] 2 HKC 315.

2 For general accounts of the history of Hong Kong see : Endacott, "A History of Hong Kong" 2nd ed, Hong Kong, Oxford University Press, 1964; Cameron, "An Illustrated History of Hong Kong", Hong Kong, Oxford University Press, 1991; Welsh, "A History of Hong Kong", London, Harper Collins, 1993.

3 26 January 1841.

4 Pursuant to the Convention of Peking.

Once the Treaty of Nanking was signed, Britain proceeded to establish a political system for its new possession. Hong Kong became a Crown Colony in 1843 when it was granted its first Charter by Letters Patent⁵: “A Charter for erecting the island of Hong Kong into a separate colony, and for providing for the government thereof”. The Charter gave Hong Kong its political system. It created for Hong Kong a full law-making body with executive, legislative and judicial arms. There was a Governor, to represent the monarch; an Executive Council to advise the Governor, and a Legislative Council to assist the Governor with his law-making function. In exercising his legislative authority, the Governor had to act by and with the advice and consent of the Legislative Council. Under this system, legislation of the Government of Hong Kong was passed under the name of “ordinances”. Members of the Executive and Legislative Councils were appointed to their posts, they were not elected to them.

In 1844, Hong Kong’s Legislative Council established a legal system for the colony. In that year it passed the Supreme Court Ordinance which was eventually replaced by the Supreme Court Ordinance of 1873. In 1966 the Application of English Law Ordinance was passed and in s3 this Ordinance provided that “the common law and rules of equity shall be in force in Hong Kong, so far as they may be applicable to the circumstances of Hong Kong or its inhabitants and subject to such modifications thereto as such circumstances may require” except in so far as they are modified or excluded by legislation, Imperial or Hong Kong. Under this system, Chinese law and custom remained a source of law in Hong Kong. In 1844 the Government of Hong Kong established the first law courts and this led to a hierarchy which comprised the Magistrates’ Courts, the District Court, the High Court, the Court of Appeal and the Judicial Committee of the Privy Council.

After the Second World War, with a new world order, Great Britain moved to dismantle its empire, turning its overseas possessions into fully self-governing, independent nations. This was not, however, to be the pathway for Hong Kong⁶. In 1946 Sir Mark Young resumed his interrupted governorship⁷. He wished to see “the inhabitants of the Territory....given a fuller and more responsible share in their own affairs”⁸. He proposed the creation of a Municipal Council which would exercise a number of the functions of government. These ideas became known as the “Young Plan”. In 1949, by which time Sir Alexander Grantham had become Governor⁹, three Bills were published setting out the Young Plan in detail. The Bills were, however, rejected by the Legislative Council and simultaneous announcements in London and Hong Kong in 1952 declared the time inopportune for major constitutional changes. The overwhelming reason for this stance was the attitude of China to Hong Kong. By this time China had become the People’s Republic of China¹⁰. Its attitude was that the treaties of 1842, 1860 and 1898, whereby the land making up Hong Kong was transferred to Britain, were not valid and that Hong Kong¹¹ was Chinese

5 Dated 5 April, 1843; see Appendix IV of the Laws of Hong Kong.

6 Welsh, *op. cit.* pp 433-440.

7 Sir Mark Young, Governor : September 1941 - May 1947; Japanese occupation of Hong Kong : 1941-1945.

8 Quoted in Welsh, *op. cit.* p 434.

9 Governor : July 1947 - December 1957.

10 Proclaimed on 1 October 1949.

11 And Macau.

territory, temporarily occupied by the British¹². Although China refused to regard the treaties as valid, it did not take any formal step to repudiate them, nor did it attempt to recover Hong Kong. Economically, Hong Kong was too valuable to China.

When the People's Republic of China took its place in the United Nations in 1972, its permanent representative asserted that Hong Kong and Macau were both a part of China¹³:

The settlement of the questions of Hong Kong and Macau is entirely within China's sovereign right....With regard to the questions of Hong Kong and Macau the Chinese government has consistently held that they should be settled in an appropriate way when conditions are ripe.

Miners¹⁴ claims that Britain and China probably came to "an informal understanding" in the 1950s about Hong Kong :

China would make no moves to interfere with British administration of the colony so long as Britain refrained from any action which might prejudice China's interests.

In these circumstances it appeared impossible for Hong Kong to become self-governing and independent: the People's Republic of China would not tolerate a democratic, sovereign state on what it regarded as its own territory¹⁵.

With the approach of 1997, though, something had to be done to secure the future of Hong Kong. The lease of the New Territories was due to expire on 30 June 1997. This event had within it the potential to cause a major economic crisis in Hong Kong. Under British rule, all land in Hong Kong was held on lease from the Crown. The individual leasehold interests in the New Territories, in consequence of the lease of the entire area by the British, were due to expire on 27 June 1997. Accordingly, the British government became concerned for the stability and prosperity of Hong Kong : if the holders of leases in the New Territories could not be assured that their leases would be extended beyond 1997, there could be a loss of confidence in the territory's future leading to a withdrawal of investment and, ultimately, to the financial collapse of Hong Kong.

When Britain and the People's Republic commenced talks in 1982 on the future of Hong Kong, they were concerned with the future of the whole of Hong Kong, not just the New Territories. Over a period of two years, Britain and China negotiated a Draft Agreement¹⁶ on the Future of Hong Kong. The Draft Agreement is expressed as a Joint Declaration¹⁷ on the Question of Hong Kong.

III. THE JOINT DECLARATION

The Joint Declaration provides that the People's Republic of China¹⁸ "...has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997" and that Britain¹⁹ "...will restore Hong Kong to the People's Republic of China with effect from 1 July 1997". In Article

12 And, in the case of Macau, the Portuguese.

13 See Miners, "The Government and Politics of Hong Kong" 5th ed, Hong Kong, Oxford University Press, 1991 (updated 1995), p 6.

14 Ibid.

15 See Young, "The Meaning of the Right to Vote in Hong Kong", (1997) 42 McGill L J 649.700.

16 26 September 1984, Government Printer, Hong Kong.

17 Ibid.

18 Art 1.

19 Art 2.

3 the People's Republic declares that Hong Kong will become a Special Administrative Region (SAR) of the People's Republic of China. In Annex I of the Joint Declaration, the People's Republic explains that Article 31 of the Constitution of the People's Republic of China enables the state to "establish SARs when necessary" and that the "systems to be instituted in SARs shall be prescribed by laws enacted by the National People's Congress in the light of the specific conditions"²⁰. Accordingly, the National People's Congress "shall enact and promulgate a Basic Law of the Hong Kong SAR....in accordance with the Constitution of the People's Republic of China, stipulating that after the establishment of the Hong Kong SAR the socialist system and socialist policies shall not be practised in the Hong Kong SAR and that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years"²¹. The National People's Congress (NPC) is the main legislative body of the People's Republic of China²². The intention is to provide for "one country, two systems"²³, leaving Hong Kong with a "high degree of autonomy"²⁴, except in matters of foreign policy and defence, to preserve the social and economic systems and "life-style"²⁵ as developed under British rule.

Hong Kong was not, then, to be absorbed into the political and economic framework of the People's Republic of China; it was not even to be combined with the Special Economic Zone (SEZ) of Shenzhen, which adjoins the New Territories²⁶. Hong Kong's border was not to be opened to the People's Republic of China²⁷. Hong Kong would be a part of China but distinct from the rest of the People's Republic.

The Draft Agreement was debated and approved by the British Parliament and Hong Kong's Legislative Council and was ratified by Great Britain and by the People's Republic in mid 1985. Britain also enacted the Hong Kong Act 1985 which provided that, as from 1 July 1997, Britain would no longer have sovereignty or jurisdiction over any part of Hong Kong. As soon as ratification of the Draft Agreement was completed, China established a committee to draft the Basic Law, the constitution of the Hong Kong Special Administrative Region, referred to in Article I of Annex I of the Joint Declaration, considered above. The committee consisted of fifty-nine members, thirty-six from the People's Republic and twenty-three from Hong Kong. China also established a Basic Law Consultative Committee to publicise the terms of the Basic Law and assess public opinion of it. China emphasised that it wanted the Basic Law to be acceptable to the people of Hong Kong. The first draft of the Basic Law was published in April 1988, the second in February 1989 and the final version was passed by the National People's Congress in April 1990.

20 Art I of Annex I.

21 *Ibid.*

22 Art 57 of the Constitution of the People's Republic of China; see Chiu, Dobinson and Findlay, "Legal Systems of the PRC", Hong Kong, Longman, 1991, pp 43 - 65..

23 Preamble to the Basic Law.

24 Joint Declaration *op. cit.* Annex I Art I.

25 *Ibid* Art 3(5).

26 Under the rule of Imperial China, Hong Kong was a part of Shenzhen County.

27 Citizens of the People's Republic residing outside the Hong Kong SAR require visas to visit the SAR.

IV. THE BASIC LAW

The Basic Law of the Hong Kong SAR, as the constitution of Hong Kong, is the source of Hong Kong's political and legal systems. The Basic Law is contained in nine chapters which deal with general principles; the relationship between the Central Authorities of the People's Republic and the Hong Kong SAR; the fundamental rights and duties of the residents of Hong Kong; political structure; economics; education, science, culture, sports, religion, labour and social services; external affairs and the interpretation and amendment of the Basic Law. The final chapter deals with supplementary provisions.

Article 1 of the Basic Law provides that the Hong Kong SAR is "an inalienable part of the People's Republic of China". Article 2 provides that the National People's Congress authorises the Hong Kong SAR to exercise "a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication," in accordance with the provisions of the Basic Law.

The political structure of the SAR is governed by Chapter IV of the Basic Law. This Chapter provides for a Chief Executive²⁸ to be the head of the SAR²⁹. The Chief Executive is accountable to the Central People's Government of the People's Republic of China and the SAR³⁰ and is to be selected by election or through consultations held locally and is to be appointed by the Central People's Government. The Chief Executive is assisted by an Executive Council³¹. The Basic Law also provides for a legislature, called the Legislative Council³², constituted by election³³. "The ultimate aim is the election of all the members of the Legislative Council by universal suffrage"³⁴. Under Article 17, all laws passed by the Legislative Council must be reported to the Standing Committee of the National People's Congress. If the Standing Committee considers that the legislation is not in conformity with the Basic Law, then it may "return" the law, which means that the law is invalidated.

Chapter IV also provides for a system of courts for the SAR³⁵. The structure is essentially the same as before, under British rule, except that the right of appeal to the Judicial Committee of the Privy Council is replaced by the establishment of a Court of Final Appeal which sits in Hong Kong. The hierarchy begins with the Magistrates Court and ascends to the High Court which comprises the Court of First Instance and the Court of Appeal and thence to the Court of Final Appeal. Under Article 19, the SAR is vested with "independent judicial power", including the judicial power of final adjudication. Trial by jury is retained³⁶ as are the right to silence and the presumption of innocence³⁷. An independent legal profession is maintained³⁸.

28 Section 1.

29 Art 43.

30 Ibid.

31 Section 2.

32 Section 3.

33 Art 68.

34 Ibid.

35 Section 4.

36 Art 86

37 Arts 87 and 88.

38 Art 94.

Within this framework, the Basic Law provides³⁹ for the system of law to be applied in the SAR. Article 18 states:

The laws in force in the Hong Kong Special Administrative Region shall be this law, the laws previously in force in Hong Kong as provided for in Article 8 of this law, and the laws enacted by the legislature of the region.

National laws of the People's Republic are not to be applied in Hong Kong, with certain exceptions⁴⁰ which include matters relating to defence and foreign affairs⁴¹.

Article 8 states that the laws previously in force in Hong Kong shall be maintained. This Article makes specific reference to the common law, the rules of equity, ordinances, subordinate legislation and customary law. If any existing laws contravene the Basic Law, they shall not be maintained and all existing laws are subject to amendment by the legislature of the SAR.

The sources of law for the SAR⁴², are, then:

- 1) the Basic Law;
- 2) the laws specified in Article 8;
- 3) laws enacted by the SAR;
- 4) laws enacted by the National People's Congress or its Standing Committee concerning defence and foreign affairs and otherwise as stated in Article 18.

These political and legal structures retain the essential elements of those which operated under the Crown Colony system. A "high degree of autonomy", though, is not full autonomy. The appointment of the Chief Executive and the principal officials of the executive authorities of the SAR are exclusively in the hands of the Central People's Government⁴³. Most significantly, the rules for the establishment of the first government and Legislative Council of the SAR were promulgated outside the framework of the Basic Law, by way of a Decision⁴⁴ of the National People's Congress. This Decision empowered the Standing Committee of the National People's Congress — that is to say, the permanent body of the National People's Congress⁴⁵ — to appoint a Preparatory Committee which would have sole responsibility for setting up the Selection Committee for the first Chief Executive and for confirming the members of the SAR's first Legislative Council. This latter power was to have far-reaching significance for the constitutional stability of Hong Kong.

V. THE "THROUGH TRAIN"

Throughout their negotiations as to the future of Hong Kong, both Britain and the People's Republic wanted to maintain the stability of the region. Both governments wanted to preserve a well established way of

39 Chapter II.

40 Those listed in Annex III of the Basic Law concern such matters as the National Anthem and flag of the People's Republic, the National Day, the Declaration on the Territorial Sea, nationality, and diplomatic privileges.

41 Article 18.

42 To this list may be added the Constitution of the People's Republic of China, given that Hong Kong is an SAR of the People's Republic.

43 But see Wesley-Smith, "The SAR Constitution: Law or Politics?", (1997) 27 HKLJ 125,127.

44 Dated 4 April 1990. Such a "Decision" is a determination with the force of law.

45 Art 57 of the Constitution of the People's Republic of China; under Art 58 of the Constitution, the National People's Congress and its Standing Committee exercise the legislative power of the state.

life. Eventually the continuity of existing arrangements came to be expressed by way of the metaphor of the “through train”. In terms of Hong Kong’s political system, the idea of the “through train” was to assume overwhelming significance.

Confidence in Hong Kong’s future under “one country, two systems” with a “high degree of autonomy” for the SAR, suffered a devastating blow in June 1989 with the repression of the demonstration in Tiananmen Square. In Hong Kong, over one million people demonstrated in support of the pro-democracy students in Beijing. In direct response to these developments, Hong Kong enacted⁴⁶ a Bill of Rights Ordinance. This legislation was intended to give effect to the rights recognised in the International Covenant on Civil and Political Rights (ICCPR)⁴⁷. The Covenant is a treaty agreed to by Great Britain which obliges participating countries to grant to citizens certain rights and freedoms⁴⁸. In 1984 Britain and the People’s Republic of China agreed that the Covenant should continue to be applied to Hong Kong after 1997⁴⁹. This is stated in the Joint Declaration⁵⁰ and it is reflected in Article 39 of the Basic Law. The enactment of the Bill of Rights Ordinance was accompanied by an amendment to Hong Kong’s Letters Patent, the colony’s then constitution. Article VII(3) was added to the Letters Patent, providing that “[n]o law of Hong Kong shall be made after [8 June 1991] that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with [the ICCPR] as applied to Hong Kong”. As Young has pointed out⁵¹, the reference to “the ICCPR as applied to Hong Kong” is equivalent to saying “the Bill of Rights Ordinance”, since the content of the Bill of Rights is taken directly from the ICCPR. All of this is consistent with Article 39 of the Basic Law and with the terms of the Joint Declaration and it seems that this was considered the most practical way of ensuring that the Bill of Rights Ordinance would continue to apply after 1 July 1997⁵².

The enactment of the Bill of Rights Ordinance was not the only response to Tiananmen Square in Hong Kong. Steps were also taken to introduce democratic representation in the government of Hong Kong. Popular representation had first been introduced in Hong Kong in 1982⁵³. The Legislative Council (LegCo), however, remained an appointed body. In 1988 the government promised in a White Paper to introduce directly elected members into LegCo. It proposed 10 seats in a Legislative Council of 60. Tiananmen Square seems to have prompted an increase in this number. This increase must be understood in the context of the passing of the Basic Law. The Basic Law was promulgated on 4 April 1990, although it would not take effect in Hong Kong until 1 July 1997. The Basic Law

46 8 June 1991.

47 Para 10, Commentary on the Draft Hong Kong Bill of Rights Ordinance 1990, Government Printer, Hong Kong, 1990.

48 Ibid.

49 Para 4, Commentary on the Draft Hong Kong Bill of Rights Ordinance 1990, *op. cit.*

50 Article XIII of Annex I.

51 *Op. cit.* p 676.

52 Ibid pp 676-677.

53 In 1982, eighteen District Boards were created to advise on such things as matters affecting public well-being, the provision of and use of public facilities and services, the adequacy and priorities of government programmes and the use of public funds for local public works and community activities. These Boards had directly elected as well as appointed members. Also in 1982, the Urban Council, concerned with social, cultural and health issues, was granted elected membership : see Young *op. cit.* pp 656 - 664.

provides for a Legislative Council of 60 members⁵⁴, and the accompanying Decision of the National People's Congress provides that 20 of them are to be directly elected⁵⁵. With the passing of the Basic Law, the People's Republic urged the British to follow a "principle of convergence" in Hong Kong so that any constitutional changes would "converge" with the provisions of the Basic Law. Britain accordingly determined to introduce 18 directly elected members into LegCo for the 1991 election and 20 for the 1995 election.⁵⁶

In 1992, Patten took up his position as the last colonial Governor of Hong Kong. In order further to secure the human rights and freedoms of the people of Hong Kong, Patten focussed his attention on reform of the electoral system. To appreciate Patten's reforms and the response of the People's Republic of China to them, it is necessary to understand Hong Kong's electoral system.

LegCo, as originally established, was an appointed body; from 1844, when the first Legislative Council was formed, to 1985, all members of LegCo owed their seats to appointment by the Governor⁵⁷. In 1985, 24 members of LegCo were elected to office. They were not, however, directly elected. Twelve of these members were returned by way of "Functional Constituencies" and twelve gained their seats by way of an "electoral college". The "Functional Constituencies" represented various professional and business interests, for example, members of the Chamber of Commerce, members of the Federation of Hong Kong Industries, doctors, lawyers, engineers and so on. In some of these constituencies the voters were individuals who were members of the particular profession or organisation, in others the organisations themselves had the right to vote and each such organisation had to nominate an authorised representative to cast a ballot on its behalf⁵⁸. The electoral college, on the other hand, was made up of local government organisations some members of which were appointed and others elected. Following the 1988 White Paper, the composition of LegCo was further reformed so that it would acquire the 18 and then the 20 directly elected members referred to above.

This was the situation when Patten arrived in Hong Kong. Patten saw his opportunity to achieve reform, while working within a policy of "convergence", in the provisions made by the People's Republic for the composition of the Legislative Council after 30 June 1997. When the National People's Congress ratified the Basic Law in 1990, its accompanying Decision provided that "The first Legislative Council of the Special Administrative Region shall be composed of 60 members⁵⁹, with 20 members returned by Geographical Constituencies through direct elections, 10 members returned by an Election Committee and 30 members returned by Functional Constituencies". Although China made these provisions for a 60 member Legislative Council, it did not define the composition of the Election Committee nor the electorate for the Functional Constituencies. It was this "silence"⁶⁰ that gave Patten the "elbow room"⁶¹ he sought to extend the right to vote.

54 Annex II.

55 Decision of 4 April 1990

56 See Young *op. cit.* p 667.

57 See Miners *op. cit.* p 114.

58 See Miners *op. cit.* p 117.

59 See n 55.

60 See Young *op. cit.* p 674.

61 The term used by Dimbleby in "The Last Governor", London, Little Brown, 1997.

In order to achieve his aim, Patten introduced nine new Functional Constituencies. These Functional Constituencies extended the right to vote to Hong Kong's paid labour force. Patten also abolished corporate voting so that the electors in all 30 Functional Constituencies were individuals. The reform of the Functional Constituencies increased the size of the potential electorate from 104,609 to approximately 2.7 million. The 20 directly elected members were returned, on a "first past the post" basis, by single-seat Geographical Constituencies in which each elector had one vote. A Boundary and Election Commission was established to address disparities in the size of the 20 Geographical Constituencies and ensure fairer boundaries, thereby correcting inequalities in voting power⁶². Patten also reduced the voting age from 21 years to 18. The remaining 10 seats went to candidates elected by an electoral college known as the "Election Committee", which consisted of representatives of District Boards who had themselves been elected to their positions. These reforms meant that the 1995 election would return a LegCo comprising 20 directly elected members, 30 elected by Functional Constituencies and 10 elected by the Election Committee. All members were, then, elected, none was appointed and, in all respects, LegCo was a more truly representative body.

Patten's idea was that the "through train" would enable Hong Kong to make the transition from Crown Colony to SAR with a democratic legislature in place, with all that that implies for the way of life of the people of the territory, within the framework of the Basic Law. The "through train" sought by the People's Republic was, however, of an entirely different kind. The People's Republic was outraged by Patten's reforms which it considered a breach of the understandings reached by Britain and China over the question of the 1995 election and beyond anything contemplated by the Basic Law and the Joint Declaration. For the People's Republic it was the end of the "through train"; China was not prepared to accept the 1995 elected LegCo as the legislature of the SAR and it set about making its own plans for LegCo after 30 June 1997.

When the People's Republic drafted the Basic Law, it was working on the "through train" theory. This is reflected in the Decision of the National People's Congress of 4 April 1990 concerning the formation of the first Government and the first Legislative Council of the SAR. That is to say, the 1995 election to LegCo would be conducted according to Hong Kong's then existing electoral system — an electoral system acceptable to both the People's Republic and Great Britain — and the members of the last colonial LegCo would become members of the first SAR Legislative Council. On this basis, the first Legislative Council of the SAR would have a lifespan of only two years — 1997-1999 — because it would already have existed for two years, the members having taken office in 1995. Thereafter, each successive Legislative Council would have a term of four years.

Patten's reforms were introduced without reference to the People's Republic of China. It seems that Patten was unaware of the exchange of correspondence between the People's Republic and Great Britain in 1990 which China regarded as settling the conditions under which the 1995 LegCo election would be conducted⁶³.

62 Young *op. cit.* gives an example at p 670.

63 This is discussed at length by Dimbleby *op. cit.*

Great Britain and the People's Republic entered into talks in 1993 in an attempt to resolve the problem but these broke down. In 1994 LegCo passed Patten's reforms into law⁶⁴. The People's Republic's response was to abandon the original conception of a "through train" and embark on a different course of action to overcome the problem of having an effective Legislative Council in place on 1 July 1997.

After Patten announced his proposals in 1992, the National People's Congress made a Decision to authorise its Standing Committee to take steps to deal with the problem it now found itself confronted with and on 2 July 1993 the Standing Committee adopted a Decision to Establish the Preliminary Working Committee (PWC) of the Preparatory Committee for the Hong Kong SAR⁶⁵. By May 1995 the PWC had decided to recommend the establishment of a Provisional Legislative Council to take the place of the elected LegCo on 1 July 1997. This proposal was necessitated by the Decision of the Standing Committee in 1994 which states that the last Legislative Council established under British rule in Hong Kong shall cease to exist after 30 June 1997. Clearly something had to be done to avoid a vacuum occurring on the transfer of sovereignty and it would take time to organise an election. There was an immediate need for a fully operational legislative body to perform essential functions under Hong Kong's new constitutional framework⁶⁶.

In December 1995 the PWC submitted its final report to the Standing Committee. One of its recommendations was that a Provisional Legislative Council should be established and that this should be done by the Preparatory Committee which was to be created in 1996. The Preparatory Committee for the Hong Kong SAR was appointed on 26 January 1996⁶⁷, in accordance with the NPC Decision of 1990 which provides :

Within the year 1996, the NPC shall establish a Preparatory Committee for the Hong Kong SAR, which shall be responsible for [matters relating to the preparation for] the establishment of the Region and shall prescribe the specific method for forming the first Government and the first Legislative Council in accordance with this Decision.

On 24 March 1996, at the conclusion of its second plenary session, the Preparatory Committee passed a Decision on the Establishment of the Provisional Legislative Council of the Hong Kong SAR. The Decision expressly refers to the 1990 Decision of the National People's Congress as the legal basis for the establishment of the Provisional Legislative Council. The Preparatory Committee's Decision provides for the election of the Provisional Legislative Council by a body called the Selection Committee for the First Government of the SAR. It also specifies the powers and term of office of the Provisional Legislative Council⁶⁸.

On 11 August 1996, the Preparatory Committee, at its fourth plenary session, passed the Measures for Forming the Provisional Legislative Council of the Hong Kong SAR. On 5 October 1996, at the conclusion of its fifth plenary session, the Preparatory Committee adopted the Measures for Forming the Provisional Legislative Council and the Measures for Selecting the First Chief Executive. The Selection Committee was

64 Electoral Provisions (Miscellaneous Amendments) Ordinance.

65 See Chen, "The Provisional Legislative Council of the SAR", (1997) HKLJ 1.3.

66 See Chen *op. cit.* pp 4-6.

67 It comprised a membership of 150, 94 from Hong Kong and 56 from the People's Republic of China.

68 There is no official English translation of this decision but the then Hong Kong government prepared a translation which is set out as an appendix to Chen's article *op. cit.*

subsequently elected at the sixth plenary session of the Preparatory Committee on 1-2 November 1996. The Selection Committee elected the Chief Executive on 11 December 1996 and the Provisional Legislative Council on 21 December 1996⁶⁹.

The Provisional Legislative Council took up residence in Shenzhen and commenced work. Under Article 160 of the Basic Law, laws in force in Hong Kong before the handover remain in force after 30 June 1997, unless they are in contravention of the Basic Law. Accordingly, the Provisional Legislative Council was immediately engaged in “examining” the existing laws in order to determine which would have to be repealed because they were in breach of the Basic Law as well as “passing” new laws to take effect on 1 July 1997.

On 1 July 1997 the Provisional Legislative Council was sworn in and replaced Hong Kong’s Legislative Council elected in 1995. That same day it passed the Hong Kong Reunification Ordinance. The long title of this Ordinance sets out its purpose :

An Ordinance to confirm the Bills passed by the Provisional Legislative Council before 1 July 1997, endorse the appointment of judges of the Court of Final Appeal and the Chief Judge of the High Court, assist the interpretation on and after 1 July 1997 of laws previously in force in Hong Kong, continue those laws and confirm certain other laws, establish the High Court, the District Court, magistracies and other courts, tribunals and boards, continue legal proceedings, the criminal justice system, the administration of justice and the course of public justice on and after 1 July 1997, continue the public service on and after 1 July 1997, assist the construction of certain documents on and after 1 July 1997, transfer the ownership of certain property and rights and provide for the assumption of certain liabilities on and after 1 July 1997, in consequence of the resumption of the exercise of sovereignty over Hong Kong by the People’s Republic of China, and for connected purposes.

On the face of it, China had taken a transfer of sovereignty over Hong Kong and under a new, written constitution, Hong Kong, as a Special Administrative Region of the People’s Republic of China, was to continue the existence it had known under British rule. Within days, though, the legitimacy of the Provisional Legislative Council was questioned in the courts. Was the Provisional Legislative Council the lawfully constituted legislature of the Hong Kong Special Administrative Region? Doubts about the legality of the Provisional Legislative Council had been raised before 1 July 1997⁷⁰; now the matter was to be put to the test.

VI. CHALLENGE THROUGH THE COURTS

Prior to 1 July, a prosecution was brought against Ma Wai-kwan, David; Chan Kok-wai, Denny and Tam Kim-yuen for conspiracy to pervert the course of public justice, a common law offence. On the face of it, this was an unremarkable case, arising from a payment to another individual as a reward for maintaining a false version of events in a prosecution for robbery. After 1 July, the alleged conspirators argued that they could not be prosecuted for an offence at common law because the common law had ceased to be a part of the law of Hong Kong with the handover. The argument proceeded along the lines that the Basic Law required adopting legislation and that the Reunification Ordinance was not effective to secure the continuity of laws in force before 30 June because the Ordinance was

69 This chronology of events is taken from Chen *op. cit.* pp 6-7.

70 See Chen *op. cit.*; Yash Gai, “Back to Basics : The Provisional Legislature and the Basic Law”, (1995) HKLJ 2; Law, “The Constitutionality of the Provisional Legislature”, (1996) HKLJ 152.

not enacted by a body competent in law to enact it. In other words, the Provisional Legislative Council was not the legitimate law making arm of government in Hong Kong. In *HKSAR v Ma Wai-kwan, David*⁷¹ the Court of Appeal for the Hong Kong SAR considered this matter.

a) The Continuity of the Common Law

The framework of the Basic Law has already been discussed. Article 8 provides that :

The laws previously in force in Hong Kong [including] the common law... shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong SAR.

Article 18 provides that :

The laws in force in the Hong Kong SAR shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region.

Argument, however, turned essentially on Article 160 :

Upon the establishment of the Hong Kong SAR, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this law. If any laws are later discovered to be in contravention of this law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law. 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 SAR, provided that they do not contravene this Law.

The alleged conspirators, the defendants in the prosecution against them, argued that Article 160, on its wording, requires a positive act of adoption either by the National People's Congress through its Standing Committee, or by the legislature of the Hong Kong SAR, or by both of these bodies. The defendants argued that this requirement had not been satisfied. Furthermore, the Standing Committee of the National People's Congress had "repealed" the Application of English Law Ordinance⁷² as legislation which contravened the Basic Law. Taking these factors together, the common law had not survived the change of sovereignty and the common law was no longer a part of the law of Hong Kong.

The question in this respect, then, was whether adopting legislation was necessary. The wording used in Article 160 is "shall be adopted". The case was heard by Chief Judge Chan, Nazareth V-P and Mortimer V-P. The decision of the court was unanimous with all three judges delivering full judgments. The leading judgment was, however, delivered by His Lordship Chief Judge Chan. In the Chief Judge's view, there was no need for an act of adoption. Article 160 had to be read in the light of the rest of the Basic Law and could not be construed to have a meaning inconsistent with the other Articles relating to the adoption of the existing laws and legal system. Article 160, on its own wording, was indicative that there was no need for an act of adoption. In its first paragraph it provides that laws found to be in contravention of the Basic Law shall be amended or cease to have force; laws which have not yet come into force cannot "cease to have force". The second paragraph of the Article puts the matter beyond doubt. The second paragraph provides that documents, certificates,

71 *Supra*, n.1.

72 See *II Crown Colony*, above

contracts, rights and obligations valid under the laws previously in force shall continue to be valid. As the Chief Judge put it, how can these continue to be valid if the laws which govern their validity cannot apply without an act of adoption? To the Chief Judge, this made no sense.

The Chief Judge found support for his view in the Joint Declaration which he used as an aid to the interpretation of the Basic Law. He contrasted Articles 3(2) and 3(12) of the Joint Declaration with the first paragraph in Section II of Annex I. Article 3(2) provides that “...The laws currently in force in Hong Kong will remain basically unchanged”. Article 3(12) refers to what will be stipulated in a Basic Law for Hong Kong. These provisions are concerned with *future* events. On the other hand, the provision in Annex I, which was to form the foundation of the Basic Law, states :

After the establishment of the Hong Kong SAR, the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong SAR legislature.

The Chief Judge concluded that in this provision “shall” is not used in the future sense but in the mandatory and declaratory sense and this was the sense in which it had been carried forward into the Basic Law.

Counsel for the Government of the Hong Kong SAR referred to the Chinese text of the Basic Law. The Chinese text prevails over the English version in the event of discrepancies⁷³. In Chinese, the question was beyond doubt but that notwithstanding, the Chief Judge considered that the English text was itself clear and without ambiguity.

In support of their case, the defendants further argued that as the National People’s Congress made a Decision on 23 February 1997 which purported to adopt the laws in force in Hong Kong prior to 1 July 1997, this indicated a need to have an act of adoption before such laws could become effective after 1 July 1997. The Chief Judge rejected this argument. He held that the true function of the Decision was to declare invalid laws which contravened the Basic Law, as provided for in the Basic Law, and that the reference to the laws to be adopted on 1 July 1997 was simply for the sake of clarity. The Decision did not indicate a need for an act of adoption.

The defendants also argued that the repeal of the Application of English Law Ordinance threw in doubt the precise scope of the common law to be adopted in Hong Kong. Clearly this Ordinance could not be adopted by the Standing Committee of the National People’s Congress: it would not be appropriate in the changed political circumstances of Hong Kong as it is an Ordinance which incorporates Imperial Acts into the legal system of Hong Kong. Accordingly, the Basic Law was expressed in terms of adopting the laws “previously in force in Hong Kong”⁷⁴.

b) The Legitimacy of the Provisional Legislative Council

The defendants also argued that they should not be tried by the Court of First Instance because it was not a properly constituted court and therefore the proceedings before it could not be continued. They argued that there are no express provisions in the Basic Law concerning the position and that, although there are provisions in the Reunification Ordinance, that ordinance was not lawfully and validly enacted by a body competent to enact it.

73 Decision of the Standing Committee of the National People’s Congress dated 28 June 1990.

74 Art 160.

The first of these arguments was rejected; there are provisions in the Basic Law which cover the position. The laws previously in force are adopted⁷⁵; the courts of the Hong Kong SAR have jurisdiction over all cases in the Region⁷⁶; the judicial system except the renaming of the Supreme Court and those changes consequent upon the establishment of the Court of Final Appeal is maintained⁷⁷; the principles previously applied and the rights previously enjoyed by parties to criminal and civil proceedings are maintained⁷⁸; under Article 160 documents and rights and obligations valid under the laws previously in force continue to be valid, recognised and protected. The Chief Judge expressly took a purposive approach⁷⁹ to Article 160 and held that this provision covered indictments, the right of the Government to prosecute offenders and the obligation of accused persons to answer to allegations made against them. In these circumstances, the criminal proceedings against the three defendants were valid and continued after the change of sovereignty.

Accordingly, the court held that the Basic Law itself provides for the automatic adoption of the laws previously in force in Hong Kong and the adoption of the legal system after 1 July 1997. This was sufficient to dispose of the case. The Court went on, however, to consider the remaining arguments put forward by the respondents concerning the Reunification Ordinance and the legitimacy of the Provisional Legislative Council.

The Reunification Ordinance is concerned with avoiding a “legal vacuum” on the transfer of Hong Kong’s sovereignty. It addresses, inter alia, the maintenance of previous laws, the establishment of courts and the continuity of legal proceedings. The Court held that the Ordinance is clear in its terms and that if the Basic Law did not effect automatic adoption of the laws previously in force in Hong Kong and the legal system, then the Reunification Ordinance made such provision. The question, then, was whether the Ordinance was lawfully and validly enacted by a body competent in law to enact it. The Ordinance was passed by the Provisional Legislative Council on 1 July 1997. The argument turned on the question of sovereignty.

The Chief Judge accepted that regional courts have no jurisdiction to query the validity of legislation passed by the Sovereign. Just as the Hong Kong courts before 1 July 1997 could not challenge the validity of a United Kingdom Act of Parliament⁸⁰, so too, now, they could not determine the issue of the validity of the Decisions or Resolutions of the National People’s Congress, or the reasons behind them, for the setting up of the Preparatory Committee. These are acts of the Sovereign. The Hong Kong courts do, however, have jurisdiction to examine the existence, as opposed to the validity, of the acts of the Sovereign or its delegate.

On this basis, the Court felt able to examine the history of the establishment of the Provisional Legislative Council. This history is recounted *supra*. In examining the history, the Chief Judge referred to the

75 Arts 8 & 18.

76 Art 19.

77 Art 81.

78 Art 87.

79 On the authority of *AG of the Gambia v Jobe* [1984] AC 689 and *R v Sin Yau-ming* [1992] 1 HKLR 127. His Lordship stated that the generous and purposive approach might not be appropriate for interpreting every Article of the Basic Law, given that it was not drafted by common law lawyers. Mortimer V-P relied on *Minister of Home Affairs v Fisher* [1980] AC 319.328, per Lord Wilberforce, as well as *AG of the Gambia v Jobe*, *supra*, in applying the purposive approach.

80 *Madzimbamuto v Lardner-Burke* [1969] 2 AC 645,

concept of the “through train”. He noted that at the time of the promulgation of the Basic Law in April 1990, it was intended that the Legislative Council elected in 1995 would continue to sit after 1 July 1997 in order to ensure continuity and cause the least possible disruption as a result of the handover. Patten’s reforms in 1994 were, however, unacceptable to the People’s Republic and this ended the “through train” for China. With the end of the “through train”, the People’s Republic had to take steps to avoid a “legal vacuum” on 1 July 1997. In consequence, on 31 August 1994, the Standing Committee of the National People’s Congress made a Decision that the Preparatory Committee “shall be responsible for matters relating to the preparation of the establishment of the Hong Kong SAR, and to prescribe the specific method for the formation of the first Legislative Council of the Hong Kong SAR in accordance with the 1990 Decision of the National People’s Congress”. This Decision expressly authorised the Preparatory Committee to organise the first Legislative Council. Under the prevailing circumstances, it was not possible for the Preparatory Committee to arrange an election in Hong Kong before 1 July 1997 in order to establish a Legislative Council which conformed with the Basic Law and the 1990 Decision of the National People’s Congress. Instead, the Preparatory Committee set up an interim body called the Provisional Legislative Council.

Given this history, the Chief Judge defined the task of the Court as one of examining :

- a) whether the National People’s Congress had authorised the Preparatory Committee to establish an interim body called the Provisional Legislative Council;
- b) whether the Preparatory Committee had done so pursuant to its authority and powers;
- c) whether the Provisional Legislative Council was the interim body set up by the Preparatory Committee.

In considering these matters, the Chief Judge found that the National People’s Congress is the highest organ of the People’s Republic of China and that the People’s Republic is the Sovereign of the Hong Kong SAR. The National People’s Congress authorised the Preparatory Committee to perform the tasks in the Decisions of the National People’s Congress made in 1990 and 1994. It is within the authority and powers of the Preparatory Committee to perform acts which are necessary and incidental to the preparation of the establishment of the SAR. When it became clear that there would be no first Legislative Council to hold office on 1 July 1997, the Preparatory Committee decided, on 24 March 1996, to set up the Provisional Legislative Council. This was done in December 1996. In these circumstances there is a distinction between the Legislative Council and the Provisional Legislative Council; the Provisional Legislative Council is not the first Legislative Council provided for in Article 68 of the Basic Law. The Provisional Legislative Council was set up to perform specific acts and to operate only until the first Legislative Council was formed, not later than 30 June 1998. The Provisional Legislative Council was created to assist the first Government of the SAR in the absence of the first Legislative Council. The Sovereign had power to act as it did. The Provisional Legislative Council was not created in breach of the Basic Law. It was created with the intention of implementing the provisions of

the Basic Law and the Decisions of the National People's Congress. In these circumstances it does not matter that the Provisional Legislative Council does not comply with Article 68 of the Basic Law. It is only an interim body formed by the Preparatory Committee under the authority and powers of the National People's Congress pursuant to the 1990 and 1994 Decisions. It was never intended to be a Legislative Council of the type and composition specified in the Basic Law. On this basis, the Court held that the Provisional Legislative Council was legally established by the National People's Congress through the Preparatory Committee pursuant to the authority and powers conferred upon it. As the National People's Congress is the Sovereign of the Hong Kong SAR, the validity of the acts of establishing the Provisional Legislative Council cannot be challenged in the Hong Kong SAR courts. Furthermore, on 14 March 1997, the National People's Congress passed a Resolution adopting the working report of the Preparatory Committee and this report sets out details of the Decision to establish the Provisional Legislative Council. This was, in effect, a ratification by the Sovereign of the Preparatory Committee's Decision. A ratification is a Sovereign act and, as such, the Hong Kong SAR courts cannot challenge it.

In all of these circumstances, the Court held that the common law had survived the change of sovereignty, as had the judicial system together with the principles applicable to court proceedings and that indictments and pending criminal proceedings continued to be valid. Accordingly, the three defendants were liable to be tried for the offence they were charged with.

In the subsequent case of *Cheung Lai-wah (an infant) and Ors v Director of Immigration*⁸¹, a further challenge was made to the legitimacy of the Provisional Legislative Council. In the event, the parties agreed that a challenge to the competence of the Provisional Legislative Council as the law-making body for the Hong Kong SAR should not be argued before the Court of First Instance as this question had been authoritatively dealt with by the Court of Appeal in *HKSAR v Ma Wai-kwan, David*. Accordingly, the Court of First Instance did not pronounce upon the matter.

The decision of the court in *HKSAR v Ma Wai-kwan, David* was foreshadowed by Chen⁸², writing before the handover of sovereignty, when he considered the legitimacy of the Provisional Legislative Council. Chen reasoned on the basis of Kelsen's theory of the *grundnorm*⁸³. The *grundnorm* is the fundamental postulate which justifies all principles and rules of a legal system. For Hong Kong, prior to 1 July 1997, the *grundnorm* of the legal system was a norm that presupposed the validity of all the prerogative legislation which formed the constitutional foundation of the executive, legislative and judicial branches of the colonial government in Hong Kong. On 1 July there was a shift in the *grundnorm*. On that date Hong Kong was absorbed into the legal order of the People's Republic of China and its *grundnorm* became that of the legal system of the People's Republic. Acts performed by the Provisional Legislative Council before 1 July 1997 are acts within that legal order, a legal order which has a *grundnorm* that presupposes the validity of the Constitution of the People's Republic of China. On this basis, such acts of the Provisional Legislative

81 [1997] 3 HKC 64.

82 Op. cit.

83 "Hauptprobleme der Staatsrechtslehre", 1911.

Council are entitled to full legal recognition by the courts of the Hong Kong SAR after 1 July 1997⁸⁴.

VII. EPILOGUE

For the moment, pursuant to *HKSAR v Ma Wai-kwan, David*, the Provisional Legislative Council stands as the legitimate law making body of the Hong Kong SAR. It seems beyond question, though, that this matter will be raised before the courts again in future cases and when it is so raised, the Court of Appeal's reasoning will not go unchallenged. Indeed, as the Chief Judge recognises in his judgment, the determination on the legitimacy of the Provisional Legislative Council may yet be classified as obiter. This, however, lies in the future and whatever the ultimate outcome may be concerning this issue, it is clear that the People's Republic of China is the Sovereign of Hong Kong. What this means in terms of the preservation of Hong Kong's way of life under the policy of "one country, two systems" will only become apparent when it is clear what a "high degree of autonomy" really means. *HKSAR v Ma Wai-kwan, David* does not help in this regard. The test will come when the courts are confronted with a case in which they find against the Government of the SAR. Until that occurs, it is worth reflecting on the fact that the reforms which gave rise to the decision in *HKSAR v Ma Wai-kwan, David* have not survived the change in sovereignty. At the time of the handover of sovereignty, Tung Chee-hwa, the first Chief Executive of the SAR, confirmed that there would be an election to return a Legislative Council in May 1998. In May 1997, though, the Preparatory Committee had proposed changes to Hong Kong's electoral laws and on 8 July 1997 the Government of the SAR confirmed its plans for reform. Reform was carried into effect by the Provisional Legislative Council in September 1997⁸⁵. Under the new law⁸⁶, the 30 Functional Constituencies are assigned to business groups in a revival of the system which existed before the Patten reforms⁸⁷. In addition, the number able to vote in the Functional Constituencies is reduced from the 2.7 million eligible in 1995 to 180,000⁸⁸. The 20 seats of the Geographical Constituencies are to be returned by a system of proportional representation, established in place of the "first past the post" system. The remaining 10 seats continue to be returned by an Election Committee⁸⁹. The reforms which brought Hong Kong's "through train" to an end were not, then, to last. *HKSAR v Ma Wai-kwan, David* may not determine definitively the legitimacy of the Provisional Legislative Council but it has served to emphasise that even if Hong Kong is left to enjoy a high degree of autonomy, its Sovereign, now, is China.

84 Chen op. cit. pp 9-10.

85 See *The Christchurch Press*, 29 September 1997.

86 See Young op. cit. pp 725-726.

87 See *The Economist*, 6 September 1997 pp 27-28.

88 Ibid.

89 See Young op. cit. pp 727 - 728 for a discussion of a revival of statutory provisions imposing restrictions on expression and assembly in the *Societies Ordinance* and in the *Public Order Ordinance*.