

Speech by Secretary for Justice

Following is the speech delivered today (November 18) by the Secretary for Justice, Mr Wong Yan Lung, SC, at a luncheon of the Chinese General Chamber of Commerce to commemorate the 20th Anniversary of the Sino-British Joint Declaration coming into effect:

Chairman Fok, Mr Zhou, ladies and gentlemen,

I would like to thank the Chinese General Chamber of Commerce for giving me the opportunity to share with you a general review on the occasion of the 20th Anniversary of the coming into effect of the Sino-British Joint Declaration. In this address, I will only talk about the law, which is my profession and the steps and measures that have been taken to ensure the continuity of the legal system, the rule of law and the independence of the Judiciary in Hong Kong after the Joint Declaration came into effect. I will also review the effectiveness of such steps and assess the future development in these aspects.

But, first of all, it may be helpful if I refresh your memory of the main features of the Joint Declaration.

The Sino-British Joint Declaration

Content of the Joint Declaration

The Joint Declaration consists of only eight paragraphs, plus three Annexes. Its key purpose, of course, was to provide that the Chinese Government would resume the exercise of sovereignty over Hong Kong with effect from July 1, 1997.

As Mr Zhou Nan has said just now, "One Country, Two Systems" is the key concept of the Joint Declaration. The Chinese Government stated 12 "basic policies" regarding Hong Kong, and emphasised that these would remain unchanged for 50 years. These basic policies included the decision to establish, in accordance with Article 31 of the PRC Constitution, a Hong Kong Special Administrative Region, which would enjoy a high degree of autonomy, except in foreign and defence affairs, which were to be the responsibilities of the Central People's Government.

Those basic policies were further elaborated in Annex I of the Joint Declaration. And most important, of course, was the provision for the enactment by the National People's Congress of a Basic Law of the Hong Kong SAR, as stipulated by the main text and Annex I of the Joint Declaration.

Annex II set out the arrangements for the Sino-British Joint Liaison Group.

Annex III contained provisions relating to land leases granted in Hong Kong both before and after the entry into force of the Joint Declaration, and the establishment and functions of a Land Commission.

At the international level, the Sino-British Joint Declaration was a remarkably successful way to resolve problems left over from history. Its implementation required not only many practical steps, but also many legal arrangements and corresponding measures so as to ensure the continuity of the legal system and the stability of the society.

Bilingualism in the Law

In 1985 when the Joint Declaration was signed, all of Hong Kong's hundreds of ordinances were expressed only in the English language. In order to prepare for reunification, it was decided that all our laws should be bilingual, and that all of our courts should be able to operate in either English or Chinese.

The process of producing an authentic Chinese text for hundreds of ordinances was extremely challenging. Given the many obscure English terms used in the law, many new Chinese expressions had to be invented. Nonetheless, the mammoth task, which lasted about 10 years, was finished shortly before reunification, thanks to the hard work of my colleagues in the Department of Justice. Starting from 1989, all new legislation has been produced in bilingual form.

Legislation was also passed enabling all courts to operate in either Chinese or English, at the choice of the court itself. Even where English is used, translation to and from Chinese is of course available where a party or witness needs it.

Localisation of laws

As I mentioned earlier, the Joint Declaration provided that the laws currently in force in Hong Kong will remain basically unchanged. Annex I of the Joint Declaration further states that the laws previously in force in Hong Kong shall be maintained, save for any that contravene the Basic Law, and subject to any amendment by the Hong Kong SAR legislature.

This theme of continuity was reassuring. However, as the definition of "laws previously in force" did not include UK legislation that applied to Hong Kong, a lot of legislative work still needed to be done to achieve this. Before 1985, Hong Kong's law in many important areas was found in UK legislation. For example, its laws relating to civil aviation, merchant shipping and copyright were all UK laws.

The challenge was to ensure the continued application of those laws by re-enacting them as Hong Kong legislation before reunification. Again, that challenge was taken up, and the task of localising the laws was completed before July 1, 1997. As a result, there was no legal gap resulting from the disapplication of UK laws.

International rights and obligations

The international rights and obligations that applied to Hong Kong also called for action. Before reunification, over 200 multilateral agreements, and a large network of bilateral agreements, had been extended to Hong Kong by the United Kingdom. If nothing were done, Hong Kong would lose the protection guaranteed by all these agreements at the time of reunification.

The multilaterals were of particular importance to Hong Kong's status as an international trade and financial centre. A sub-group of the Sino-British Joint Liaison Group worked with a goal that China should take over those multilaterals in respect of Hong Kong, and on the mechanism for doing so. This goal was ultimately achieved after China and Britain made concerted efforts to submit diplomatic documents to the United Nations and other international organisations at the same time. By doing so, assurances were made that the more than 200 multilateral agreements previously in force in Hong Kong would continue to apply, and we can continue to participate in international organisations such as the WTO, the Customs Co-operation Council, and the International Maritime Organisation after 1997.

The position in respect of bilaterals was different. It was not possible for bilateral agreements entered into by Britain to be transferred to China. It therefore became

apparent that the network of agreements in such areas as extradition, air services, and mutual legal assistance would all fall away on reunification. The challenge we faced, therefore, was how to replace them with new ones as soon as possible.

The Joint Liaison Group again proved to be the key to this process. Under an agreement reached in the JLG, Hong Kong was authorised to sign new bilateral agreements in the areas I have mentioned, and those agreements would be recognised after 1997. As a result of that agreement, negotiations for new bilaterals began and, by the time of reunification, Hong Kong had concluded more than 10 air services agreements, a handful of fugitive offenders agreements and one mutual legal assistance agreement. The process of developing further bilaterals is an ongoing one.

Establishment of the Court of Final Appeal

I must mention the courts of the SAR when talking about the arrangements for the transition. When the Joint Declaration came into force in 1985, the final avenue of appeal for cases heard in Hong Kong was the Privy Council in London. That position clearly could not survive the reunification. The Joint Declaration provided that the power of final judgment of the Hong Kong SAR should be vested in the HKSAR's own court of final appeal, which may as required invite judges from other common law jurisdictions to sit on that court.

The goal to be achieved was not only the establishment of the Court of Final Appeal in Hong Kong, but also its official operation on July 1, 1997.

The composition of the Court of Final Appeal was an issue of paramount importance. As I have just said, the Joint Declaration provided that the Court of Final Appeal may invite judges from other common law jurisdictions to sit on it. In September 1991, the Sino-British Joint Liaison Group decided that, for each hearing, the court should consist of the Chief Justice, three permanent judges, and a fifth judge who could either be a judge from another common law jurisdiction or a retired Hong Kong judge. This became known as the "4+1" formula.

After lengthy discussion by the Sino-British Joint Liaison Group, it was agreed that the legislation to establish the Court of Final Appeal could be passed before reunification, but the legislation should come into effect on July 1, 1997. The Hong Kong Court of Final Appeal Ordinance was finally enacted in August 1995, and this laid the foundation for the establishment of the Court of Final Appeal immediately

after the reunification.

As I am sure you are aware, that court rapidly established an international reputation for its independence and professionalism. That in turn has helped the Hong Kong SAR to gain the confidence of international businessmen and investors.

Basic Law

The drafting of the Basic Law

The enactment of the Basic Law is at the core of the implementation of the Joint Declaration. The drafting of the Basic Law involved consultation and interaction between two places practising different legal systems. It was a long, thorough and historic process. The Basic Law Drafting Committee, under the chairmanship of Director Ji Pengfei, was established in 1985, and was assisted by the Basic Law Consultative Committee, which consisted of 180 Hong Kong people. Two drafts of the Basic Law were published, in April 1988 and in February 1989, for public consultation. More than 130 revisions were made after the first and second consultations.

The final draft was adopted by the National People's Congress on April 4, 1990 and promulgated the same day by the President, Yang Shangkun.

The implementation of the Basic Law

The establishment of the Hong Kong SAR of the People's Republic of China on July 1, 1997 was a momentous event. So far as the legal system and rule of law is concerned, the implementation of the Basic Law has been a great success.

Before reunification, the colonial constitutional instruments were brief and rather antiquated. In contrast, the Basic Law is a detailed, modern constitution that creates many justiciable rights that did not previously exist.

Nevertheless, after the promulgation of the Basic Law, many people predicted the fall of Hong Kong after 1997. They said that opposition politicians would be jailed; that the constitutional guarantees vouchsafed to Hong Kong people would be worthless; and that fugitives surrendered to Hong Kong would be handed over to the Mainland. None of this has happened.

The fact is that the highly visionary concept of "One Country, Two Systems" is being faithfully implemented in the HKSAR. Hong Kong's legal system, based on the common law, the rule of law and an independent judiciary, remains intact under the new constitutional order although it is different from the system in the Mainland.

Legal system

The Basic Law faithfully reflects the Central Government's basic policies regarding Hong Kong. So far as the legal system is concerned, the essential feature of the Basic Law is continuity.

- * The common law and laws previously in force are to be maintained, unless found inconsistent with the Basic Law or amended by the legislature.
- * The independence of the judiciary is guaranteed, and judges are given full security of tenure.
- * Hong Kong residents are assured of the right to bring legal proceedings against acts of the executive authorities.

These, and other guarantees, ensure that the rule of law prevails in Hong Kong.

The Basic Law not only safeguards the legal system and the political structure, but also provides constitutional guarantees in respect of the economy, education, science, culture, sports, religion, labour and social services. Government action or legislation in respect of any of these areas can therefore be challenged in court as being inconsistent with the Basic Law.

This is no longer a hypothetical possibility. Challenges alleging inconsistency with the Basic Law have often been brought, for example, in respect of:

- * legislation to reduce civil servants' salaries
- * the abolition of municipal councils
- * legislation requiring social workers to be registered

* a statutory provision precluding an appeal to the Court of Final Appeal in respect of a lawyers' disciplinary decision.

These examples indicate that the rule of law, and constitutionalism, have not only survived reunification, but are stronger than ever.

Human rights

Of particular importance is Chapter III of the Basic Law. This contains 19 articles guaranteeing particular human rights, such as freedom of speech, freedom of association, freedom of religious belief and so on. Article 39 is of particular importance, since it provides for the continued application of the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong and their implementation through the laws of the Hong Kong Special Administrative Region.

At the international level, the six major human rights treaties continue to apply to Hong Kong, and the Hong Kong SAR Government continues to report regularly to the treaty monitoring bodies. The preparation of those reports is done entirely by the Hong Kong SAR Government. Hearings of the reports, and the monitoring bodies' concluding observations, are the subject of wide media coverage in Hong Kong.

Human rights are therefore protected at the domestic, constitutional and international levels. Again, this is not merely theoretical protection. Here are some examples of court challenges concerning the protection of human rights made in the past seven years.

* A provision in immigration legislation, the electoral arrangements for villages in the New Territories, and the system for allocating secondary school places, were all successfully challenged as improperly discriminating between males and females.

* Provisions making it an offence to desecrate the national or regional flags were unsuccessfully challenged on the basis of freedom of expression.

* A decision to refuse entry to a non-permanent resident who was returning to Hong Kong after a foreign visit was successfully challenged as being inconsistent with residents' right to travel and to enter Hong Kong.

These examples demonstrate that human rights are fully protected in Hong Kong.

Conclusion

More than eight years have now passed since reunification. The unique concept of "One Country, Two Systems" has naturally created novel challenges and occasional controversies. But, overall, the new constitutional order has been a resounding success.

This demonstrates how effectively the Chinese Government has implemented the Sino-British Joint Declaration. Twenty years after that instrument came into effect, we can see indeed what a firm foundation it created for the continuing prosperity and stability of Hong Kong under the visionary concept of "One Country, Two Systems".

The common law legal system of Hong Kong remains firmly in place; the rule of law is vigorously defended by the Government; the Judiciary is strong and independent; and fundamental human rights are fully protected. With these solid fundamentals in place, I believe that the prospects for the future are bright. In my capacity as the Hong Kong SAR's Secretary for Justice, I will do my utmost to uphold the rule of law and social justice.

Thank you.

Ends/Friday, November 18, 2005

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