

Speech by SG at University of Pennsylvania Law School

Following is the speech by the Solicitor General, Mr Bob Allcock, on Hong Kong's Unique Constitutional Status at the University of Pennsylvania Law School, Philadelphia, on March 16 (Philadelphia time):

Ladies and gentlemen,

I am honoured to be invited to talk at this famous law school during my short trip to this country. The main purpose of my visit is to participate, as a member of Hong Kong's delegation, at a hearing by the United Nations Human Rights Committee of Hong Kong's latest report under the ICCPR. The fact that this reporting takes place, even though China has not yet ratified that convention, is itself an example of Hong Kong's unique constitutional status. The purpose of my talk today is to discuss that status, and some of the implications of that status.

I. Constitutional framework

Historical background

In order to understand these matters, it is necessary to look back at the position before reunification in 1997. For over 150 years, Hong Kong had been administered by the British, and had developed its own successful economic and legal systems. It also had its own currency, its own customs and immigration controls and so on.

When Britain and China were negotiating over the future of Hong Kong, both sides wished to ensure that, after reunification, Hong Kong would remain stable and prosperous. The visionary concept that was agreed upon to facilitate this was "One Country, Two Systems". The Sino-British Joint Declaration, signed in 1984, provided that China should resume the exercise of sovereignty over Hong Kong on the basis that Hong Kong would retain its capitalist system and its common law legal systems, and would exercise a "high degree of autonomy". Except for foreign and defence affairs, which were to be the responsibility of the Chinese Central People's Government, the Hong Kong Special Administrative Region was to be vested with executive, legislative and independent judicial power, including that of final adjudication.

New constitutional order

When China resumed the exercise of sovereignty over Hong Kong in 1997, a new constitutional order was put in place. This is found in the Basic Law of the Hong Kong Special Administrative Region, a law enacted by the National People's Congress, based upon the Sino-British Joint Declaration. The Basic Law faithfully reflected the guarantees contained in the Sino-British Joint Declaration. As a result, the law in Hong Kong is fundamentally different from that in the rest of China.

You may think that this is not in itself unique. There are many other examples of a territory within a state having different laws from the rest of the state. Quebec and Louisiana would be two examples. However, there are important differences between the constitutional arrangements in Hong Kong and those in other jurisdictions. Let me briefly mention some of the special features of Hong Kong's arrangements.

First, the People's Republic of China is a unitary system. Under such a system, there is only one state, and powers enjoyed by local governments are conferred by that state. The Hong Kong SAR was established by the National People's Congress (NPC) under Article 31 of the PRC constitution. It was the NPC that enacted the Basic Law, and thereby conferred upon the SAR its executive, legislative and judicial powers.

This contrasts with the position in federal jurisdictions where several individual states co-exist within another state. Within some (but not all) federations, specifically enumerated powers are assigned to the central government by the individual states – as in Australia and the USA. This is the reverse of the position in a unitary system.

Secondly, although the Basic Law concerns the Hong Kong SAR, it is a national, not a regional law - in two senses. First, it was made by the NPC and, secondly, other parts of China must comply with it.

The third special feature is the concept of "One Country, Two Systems". Separate regions within other countries normally share the same, or similar, economic or legal systems. But Hong Kong's economic and legal systems are both fundamentally different from those in the Mainland. The Basic Law preserves Hong Kong's different systems, and confers on the SAR an extraordinarily high degree of autonomy. Under the Basic Law, the Central People's Government is expressly responsible for the

foreign affairs and defence of the Hong Kong SAR and for certain other matters, such as the appointment of the Chief Executive and the principal officials of the SAR Government. But most other matters are within Hong Kong's autonomy.

Hong Kong probably has the highest degree of autonomy of any territory that is not sovereign. It certainly has much greater autonomy than the states within a federal jurisdiction, such as the United States of America. The Hong Kong SAR is a separate customs territory, it has its own currency, its own taxation system and, with the authorisation of the Central People's Government it can even enter into bilateral treaties with other countries in areas such as extradition and mutual legal assistance. Some 200 multilateral treaties apply to Hong Kong even though many of them do not apply in the rest of China.

Whereas in federal jurisdictions it is common to list the powers of state governments, Hong Kong's high degree of autonomy is such that we tend to list the powers that Hong Kong does not have.

And whereas, in federal jurisdictions, a large volume of federal laws apply in each state, in Hong Kong (apart from the Basic Law itself) only twelve Mainland laws apply. Those laws relate to matters such as nationality, the territorial sea of the PRC and other topics falling outside Hong Kong's high degree of autonomy.

The Basic Law

The provisions in the Basic Law relating to the legal system are of particular interest. Article 8 provides as follows:

"The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

In addition, there are specific guarantees in the Joint Declaration and Basic Law relating to the legal system. These include:

* provision for a Hong Kong-based Court of Final Appeal, to replace the Privy Council in London as the final appellate court for Hong Kong; and

* a requirement that the International Covenant on Civil and Political Rights as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

Since the Basic Law came into operation on July 1, 1997, Hong Kong has, for the first time, a detailed written constitution, containing 160 articles and three annexes. This has had great significance for our legal system. The Basic Law is not simply a statement of intentions nor is it merely a policy document. It is part of Hong Kong's domestic law and it has created a new era of constitutional law in Hong Kong.

So far as the judiciary is concerned, Article 81 of the Basic Law provides that the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong SAR. Our judges are to be appointed on the recommendations of an independent commission, and are to have security of tenure. Judicial independence is fully protected by the Basic Law.

II. The experience

So much for the constitutional framework. What about the experience since reunification? Before 1997, there were many sceptics who thought that the guarantees in the Basic Law would be of no value. Those sceptics have now been proved to be wrong.

The guarantees in the Basic Law, particularly those relating to human rights, have been the source of much litigation. The courts have interpreted and enforced those guarantees without fear or favour. For example, they have made rulings on the constitutionality of:

- * provisions on right of abode in the Immigration Ordinance;
- * the law prohibiting the desecration of the national and regional flags;
- * village elections;
- * the abolition of the two former municipal councils; and
- * a reduction in civil service salaries.

The decisions in these cases, some in favour of the government and some against, demonstrate that the Basic Law is not a piece of window-dressing. It is a powerful and enforceable constitutional document.

The promise of continuity in the laws and legal system has also been honoured. Hong Kong remains a common law jurisdiction. The English language continues to be one of the official languages and is still the predominant language of the law. The judiciary and legal profession remain strong and independent.

Every single judge who had been in office on June 30, 1997, was re-appointed the following day. New judicial appointments since then have, I believe, been entirely uncontroversial. It is particularly noteworthy that judges from overseas common law jurisdictions are appointed as non-permanent members of the Court of Final Appeal, and they are of the highest international standard. They include five serving members of the House of Lords (the highest court in Britain). One of these non-permanent judges sits as a full member of the Court of Final Appeal in each of its sittings.

In short, Hong Kong's legal system remains firmly in place and offers a safe haven for all foreign businessmen and investors. Those from the US will feel particularly familiar with the common law concepts, the language, and the judicial oversight of government action and legislation. There is no doubt that the rule of law prevails in Hong Kong, and that rights and obligations are fairly protected by an independent and unbiased judiciary.

III. Controversial issues

I would not, however, wish you to think that the new constitutional order has not given rise to any controversies. Every jurisdiction that is open and pluralistic will face controversies. In Hong Kong's case, its unique status has led to some fascinating issues.

NPCSC interpretations

Perhaps the most significant legal issue has been the power to interpret the Basic Law. Under Article 158 of the Basic Law, the ultimate power to interpret the Basic Law is vested in the Standing Committee of the National People's Congress. Hong Kong courts are authorised to interpret the Basic Law in adjudicating cases, although

in certain situations they must seek an interpretation by the Standing Committee before deciding a case.

The Standing Committee of the National People's Congress is a legislative, not a judicial, body. Lawyers trained in the common law tradition may be uncomfortable with the idea of a legislative body interpreting the law. But this reflects the Chinese Constitution. All national laws in China are subject to interpretation by the Standing Committee. However, this type of interpretation does not occur as part of judicial proceedings. It is a type of clarification of the relevant legislation, and is therefore described as "legislative interpretation".

(a) Right of abode

Since Reunification, the Standing Committee has on three occasions interpreted provisions in the Basic Law. In 1999, Hong Kong's Chief Executive requested an interpretation by the Standing Committee of provisions relating to the right of abode in Hong Kong of Chinese citizens born in the Mainland. This followed a Court of Final Appeal interpretation that was causing insurmountable problems for Hong Kong. It was estimated that the effect of the court's interpretation was that, within 10 years, about 1.67 million people born in the Mainland would have the right to live in Hong Kong. That could have meant a 25% increase in Hong Kong's population.

Faced with this massive immigration problem, and being unable to solve the problem in Hong Kong, the Chief Executive sought an interpretation by the Standing Committee. The Standing Committee confirmed that the provisions in the Basic Law were to be interpreted narrowly. The immigration problem was therefore solved.

Some lawyers claimed that the request for the Standing Committee's interpretation was unconstitutional. However, the Court of Final Appeal itself rejected that claim, deciding in a subsequent case that the interpretation was valid and binding on Hong Kong courts.

Nevertheless, the government recognised that the authority of Hong Kong's courts could be affected by a Standing Committee's interpretation, and made it clear that it would not lightly seek such an interpretation in future.

(b) Constitutional development

The second interpretation of the Basic Law by the Standing Committee occurred in April 2004, and was not the result of any request from Hong Kong. It related to the provisions in the Basic Law concerning Hong Kong's democratic development.

Annexes I and II of the Basic Law set out the methods for selecting Hong Kong's Chief Executive, and for electing members of the Legislative Council. Both Annexes state that, if there is a need to amend these methods after 2007, certain procedures are to be followed. Those procedures include obtaining the approval of the NPCSC (in the case of the selection of the Chief Executive), and reporting to the NPCSC (in the case of elections for the Legislative Council).

A number of aspects of the procedures for amending the Annexes were unclear. For example, did the reference to "after 2007" include the election of the Chief Executive that is scheduled to take place in 2007? How is it to be determined whether there is "a need to amend" the Annexes?

The interpretation by the NPCSC in April 2004 clarified these issues. There were few, if any, allegations that this interpretation was unconstitutional. Some did allege that it was contrary to Hong Kong's high degree of autonomy. However, it is clear that Hong Kong's high degree of autonomy does not preclude the Standing Committee's power of interpretation. As one American constitutional law expert has said, it is not surprising that the Basic Law, which is a national law of China, should be subject to interpretation by a national body.

(c) CE's term of office

The third NPCSC Interpretation occurred in April 2005 and related to the length of office of a Chief Executive who is selected after the previous Chief Executive did not complete his original five-year term. This issue arose after the State Council accepted the resignation of the second-term Chief Executive in March last year. Two views had emerged as to the term of office of his successor – namely a full five-year term and the remainder of the original five-year term. The Basic Law does not expressly deal with the situation in question.

In order to avoid any uncertainty concerning last year's selection of the Chief Executive, the acting Chief Executive requested an interpretation of the Basic Law by the NPCSC. The Standing Committee ruled that, having regard to Articles 53 and 45 and the current version of Annex I of the Basic Law, the term of office of the new

Chief Executive shall be the remainder of the original five-year term.

(d) Concern over interpretations

All three NPCSC Interpretations were lawful and constitutional, and reflected the unique concept of "One Country, Two Systems". Each of them helped to resolve constitutional issues that might not otherwise have been successfully resolved. Nevertheless, it must be accepted that the Standing Committee's power of interpretation has caused concern about the integrity of our legal system. Hong Kong's current Secretary for Justice, who was appointed in October last year, is on record as saying that he will try his best to avoid the need to seek another interpretation. And, if there is one, he will do his best to minimise its effect on the rule of law.

Article 23 of the Basic Law

Another cause of passionate debate a few years ago was Article 23 of the Basic Law. Since Hong Kong is part of China, there is a need for laws in Hong Kong that protect China's national security. Instead of applying the Mainland laws on this subject, Article 23 of the Basic Law provides that Hong Kong shall, on its own, enact relevant laws. Proposals for such laws were set out in a public consultation paper issued by the SAR Government in September 2002. The government emphasised that the new laws would need to comply with the human rights guarantees in the Basic Law. Indeed, an opinion was obtained from a London Queen's Counsel, who specialises in human rights, to the effect that the proposals were consistent with those rights.

The public consultation exercise nevertheless revealed strong concerns about some of the proposals. As a result, the proposals were restricted in many ways before they were incorporated in the draft legislation. For example:

- * the offence of treason was limited to times of war or the instigation of an armed invasion;
- * an express provision was added, requiring the laws to be interpreted in accordance with the ICCPR; and
- * trial by jury was to be available for all offences.

After being introduced into the Legislative Council, the Bill was scrutinised by a committee in meetings lasting over 80 hours. Over 100 individuals or NGOs made representations to that committee. More than 90 papers relating to the Bill were prepared by the Government for legislators.

As a result of that process, the government agreed to further restrictions on the provisions. However, despite assurances that the Bill would not undermine human rights, public concern grew. On July 1, 2003, more than half a million people took to the streets in protests against many things, including the proposed legislation.

In the face of this concern, the Government announced three further liberalisations. However, even those amendments were not sufficient to ensure the passage of the Bill. Eventually, in September 2003, the Chief Executive announced that the Bill would be withdrawn.

There is, as yet, no timetable for the resurrection of this project but the Government has promised to learn from its experience. The implementation of Article 23 will, however, be one of the greatest challenges in the implementation of "one country, two systems". The challenge is to provide for China's national security in a way that not only satisfies international human rights guarantees, but also assures the public that their current freedoms will not be impaired.

IV. The future

Ladies and gentlemen, July 2007 will be the 10th anniversary of reunification. I believe the experience to date is that Hong Kong's high degree of autonomy has been fully respected, and that the guarantees in the Basic Law have proved to be effective in guaranteeing human rights, the rule of law, and other aspects of Hong Kong's way of life. The concept of "One Country, Two Systems" is working well.

Of course, there are still challenges ahead – including the need to take steps to implement universal suffrage and to enact laws on national security. Both tasks involve many political difficulties, including some that arise from Hong Kong's unique status.

For those of you who are viewing events from afar, I hope that you will appreciate the peculiar political context within which Hong Kong operates. The Hong Kong SAR has a high degree of autonomy, but the limits on that autonomy must be

respected. Your support in Hong Kong's continuing development will be most effective if it reflects Hong Kong's unique constitutional status.

Ends/Friday, March 17, 2006

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