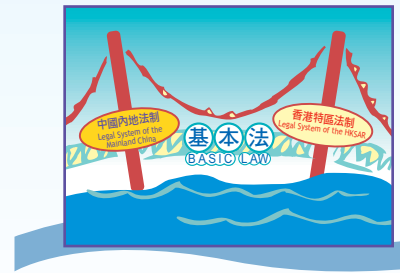


The Focus

THE BASIC LAW AS THE INTERFACE BETWEEN THE HKSAR AND THE MAINLAND LEGAL SYSTEMS



INTRODUCTION

The legal system of the HKSAR is a common law system preserved by the Basic Law, which has its origin in the British common law system transplanted into the Chinese soil in the 1840s. Since then, it has gradually acquired a life of its own through the growth of local jurisprudence. The common law system has become firmly entrenched in Hong Kong under the Basic Law since the Reunification.

BL 8 provides for the continuing application of the common law. BL 80 vests the judicial power in the courts of the SAR and BL 81 maintains the judicial system previously practised in Hong Kong except for changes consequent upon the establishment of the CFA of the HKSAR. BL 84 expressly mandates the SAR courts to “refer to precedents of other common law jurisdictions”. By these and other provisions, the Basic Law maintains the common law and the common law judicial system in the SAR, as guided by the development of legal principles in other common law jurisdictions.

The common law is not static. It is not merely a collection of propositions extracted from judicial decisions, but is also a particular judicial approach, methodology and attitude. The law evolves with time and adapts to suit local circumstances. Every common law jurisdiction breeds home-grown jurisprudence. The conjunction of a common law system under the Basic Law, a PRC national law, within the larger framework of the PRC Constitution provides an impetus for the emergence of local jurisprudence on the interplay between the Mainland legal system and the local common law system. In particular, the application of national laws to the HKSAR under the Basic Law enhances interactions between the two different legal systems.

THE MAINLAND LEGAL SYSTEM

The legal system in Mainland China is based on its Constitution. It is akin to the civil law system. The NPC is the highest organ of state power and exercises various powers, such as the powers to amend the Constitution, to enact the more important laws and to supervise other state organs. The NPC and its Standing Committee exercise the legislative power of the state, the Standing Committee having the power to interpret the Constitution and laws. The State Council is the highest executive organ in the Mainland, and various Ministries and Commissions are under it. Local governments at provincial, county and township levels are responsible to the State Council. The Supreme People’s Court, together with lower people’s courts, adjudicate cases, whereas the Supreme People’s Procuratorate, together with lower people’s procuratorates, are responsible for approving arrests and instituting and conducting prosecutions, investigating a number of specific cases provided by law and exercising the power of legal supervision over judgments and decisions of the people’s courts.

Laws in the Mainland are enacted by the NPC and its Standing Committee, whereas the State Council may formulate administrative regulations in accordance with the Constitution and the laws. Local people’s congresses may, in accordance with the Constitution, laws and administrative regulations, enact local regulations to be applied in the local levels. Ministries and Commissions under the State Council, as well as local people’s governments, may formulate rules to implement laws and administrative regulations.

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NATIONAL LAWS - LAWS OF THE MAINLAND APPLYING TO THE HKSAR UNDER BL 18



While the SAR and the Mainland legal systems operate independently of each other in their respective jurisdictions, they are not completely segregated. The Basic Law acts as the interface or link between them. The link between the SAR courts and the institutions of the PRC is provided through the power of interpretation of the NPCSC and the SAR courts under BL 158 (discussed in *The Focus* of Issue No 2 of the Bulletin). The link between the PRC national laws and the SAR legal system is achieved through the limited application of national laws in the HKSAR under Annex III of the Basic Law.

Since Hong Kong is an inalienable part of the PRC, had it not been for the Basic Law, all national laws would have been applied to the HKSAR. BL 18 specifically provides that national laws shall not be applied in the HKSAR except for those listed in Annex III to the Basic Law. The NPCSC may add to or delete from the list of laws in Annex III after consulting the Basic Law Committee (for the role of the Committee, please see *Sidelights* at p 25 of Issue No 2 of the Bulletin) and the HKSARG. Laws listed in Annex III shall be confined to those relating to:

- (1) defence and foreign affairs; and
- (2) other matters outside the limits of the autonomy of the HKSAR, as specified by the Basic Law.

The laws listed in Annex III are to be given effect by way of promulgation or legislation by the HKSAR. To date, the promulgation of listed national laws has been effected by way of a legal notice issued by the CE in the Gazette. Under this category, national laws are applied verbatim. Alternatively, national laws may be applied “by way of legislation” through the enactment by the HKSAR’s legislature. This would facilitate suitable adaptations to be made to those provisions of the national laws that are not applicable to Hong Kong, thus catering for the differences in the systems and actual situation between the Mainland and the HKSAR.³

LAWS LISTED IN ANNEX III SINCE THE REUNIFICATION

When the Basic Law was adopted in 1990, there were 6 national laws listed in Annex III. Since the adoption of the Basic Law, the NPCSC has twice decided on the addition to and deletion from Annex III. The first decision, adopted at the 26th Session of the 8th NPCSC on 1 July 1997, was to add five laws to and delete one law from the list of national laws. The second decision, adopted at the 5th Session of the 9th NPCSC on 4 November 1998, was to add one further law to the list.

³In addition to the above, the CPG may issue an order applying the relevant national laws in the HKSAR. However, it would only do so in the event that (1) the NPCSC decides to declare a state of war or (2) the NPCSC, by reason of turmoil within the HKSAR which endangers national unity or security and is beyond the control of the HKSARG, decides that the Region is in a state of emergency.

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The NPCSC consulted the HKSARG in accordance with BL 18 before deciding on the addition to and deletion from the list of laws in Annex III. After study, the HKSARG considered that the relevant national laws satisfied BL 18, ie they are confined to defence or foreign affairs, or other matters outside the limits of the autonomy of the Region as specified by the Basic Law.

For the current list of national laws in Annex III, please refer to *Sidelights* at p 33.

THE FLAG CASE

Law of the PRC on the National Flag and Law of the PRC on the National Emblem are two of the PRC laws listed in Annex III. Pursuant to BL 18, they are applied in the HKSAR by the enactment of the National Flag and National Emblem Ordinance. BL 10 provides for the use in the HKSAR of a regional flag and regional emblem. On 1 July 1997, the local legislature enacted the Regional Flag and Regional Emblem Ordinance to provide for the use and protection of the regional flag and regional emblem.

In *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442 (“the Flag Case”), the defendants faced two charges of desecration of the national flag and the regional flag contrary to s 7 of the National Flag Ordinance, and s 7 of the Regional Flag Ordinance. The particulars of each offence were that the defendants desecrated the national flag and the regional flag respectively by publicly and wilfully defiling them during a public procession from Victoria Park to the Central Government Offices held on 1 January 1998. The defendants challenged the constitutionality of the two flag ordinances as being inconsistent with the free speech guarantee under ICCPR Art 19/BoR Art 16 (applied to the HKSAR by virtue of BL 39). However, the CFA upheld the constitutionality of the two flag ordinances. A summary of the rulings of the courts can be found at *Sidelights* at p 35.

The Flag Case demonstrates that the national laws enacted under the Mainland legal system can be effectively implemented in the local common law system under the new constitutional order established by the Basic Law. In this regard, it is relevant to note the comment made by the Honourable Justice Barry Mortimer on the eve of his retirement from the CA in 1999 as follows:

“... although everybody trumpets the common law system, we all know it is not a perfect system by any means and we are always open to suggestions from other systems ... It may well be that in the long term we see, because the common law is so flexible, that good things are taken on board and bad things are rejected. So the interplay of ideas is likely to be beneficial to both the Hong Kong system and ... the Mainland system”⁴ **BLB**

⁴ See “A Conversation with Justice Barry Mortimer”, *Hong Kong Lawyer*, September 1999, p 70 at p 72.