

HONG KONG STUDY

ANNEX G

CONSTITUTIONAL POSITION OF HONG KONG

Present Situation

1. Hong Kong is:
 - (a) part of Her Majesty's dominions;
 - (b) a British possession;
 - (c) a colony;
 - (d) a Dependent Territory of the United Kingdom.

UK Sovereignty and Chinese claims

2. The United Kingdom possesses sovereignty over the island of Hong Kong and the tip of the Kowloon peninsula, these areas having been ceded by China to the United Kingdom by the Treaties of 1842 and 1860. The PRC also claim sovereignty over these areas on the ground that the two Treaties were unequal treaties imposed by force but the UK has not admitted the claim. The UK possesses the New Territories, which comprise the rest of the colony, under an international lease for a term of 99 years expiring on 30 June 1997 granted by the Convention of 1898, and under the Order in Council of that year the New Territories are treated as part and parcel of the colony during the period

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of the lease. The PRC claim that the Convention of 1898 is another 'unequal treaty' and do not recognise the validity of the lease. The UK has not admitted this claim. HMG accept that the PRC is entitled to resume possession of the New Territories when the international lease expires in 1997.

The Governor

3. Hong Kong has its own constitution under the Hong Kong Letters Patent 1917 to 1982 as supplemented by the Hong Kong Royal Instructions 1917 to 1980. There is a Governor (appointed by and responsible to HMG) who is The Queen's representative in the colony and who is required to act in accordance with the instructions of the Crown through a Secretary of State. The Governor is head of the executive government of Hong Kong and is advised by an Executive Council, which he is required to consult except on unimportant matters or when the matter is too urgent to allow this. The Governor may act in opposition to the advice of the Council but any such case (which would be highly exceptional) must be reported to the Secretary of State. This has not happened for many years.

/Degree

Degree of local autonomy

4. Although formally speaking HMG could exercise control over the Hong Kong Government in respect of all matters, in fact they do not interfere in the day-to-day activities of the Government and indeed any attempt at interference would be greatly resented. In practical, though not in constitutional, terms, the colony enjoys a substantial measure of internal self-government, and but for its geographical and political situation vis-à-vis China, would long ago have become independent.

Legislative Council and Legislation from London

5. Hong Kong has its own legislature consisting of the Governor and a Legislative Council, with power to make laws for the peace, order and good government of the Colony by means of Ordinances. HMG have control over bills passed by the Legislative Council since the Governor could be instructed to refuse his assent to an objectionable bill or reserve it for the signification of Her Majesty's pleasure, as advised by HMG, while Ordinances assented to by the Governor can be disallowed by the Crown on the advice of HMG. Furthermore HMG could instruct the Governor to appoint a greater number of public officers to the Legislative Council so as to ensure the passage, or rejection, of

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particular measures by the Council. It would, however, be most exceptional and save in the gravest circumstances politically unacceptable in Hong Kong, for HMG to exercise their formal powers of control, but from time to time the Secretary of State exercises influence over legislation through the Governor. It is unusual for an Act of Parliament on any controversial matter to extend of its own force to the colony as part of its law - an example is the British Nationality Act 1981. Many Acts contain provision for their extension to Hong Kong by Order in Council - examples are the Air Navigation Acts. The Hong Kong Letters Patent and Royal Instructions are from time to time amended by Her Majesty in Council but otherwise it would be most exceptional for Her Majesty in Council to legislate directly for the colony under the Royal prerogative.

Executive Council (EXCO)

6. Nominated members are appointed by HMG by instructions from the Crown to the Governor through a Secretary of State.

Chairman

The Governor

Present Membership: 5 ex-officio members:

Commander British Forces

Chief Secretary

Attorney General

Secretary for Home Affairs

Financial Secretary

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10 nominated members (one public officer and 9 local citizens).

As the institution responsible for the formulation of government policy EXCO can be loosely compared with the Cabinet in the UK although its members do not hold portfolios comparable to those of Ministers in the UK. The nine nominated members forming a majority in the Council who are local citizens are drawn from and represent the people of Hong Kong. As such they have an effective voice in the conduct of the government of the colony and in practice take the lead in discussions. By convention, the Senior Chinese Unofficial (now Sir S Y Chung) has the right of direct access to the Governor, and has an important voice both within EXCO and in the community. The Governor in Council is also the statutory authority for making regulations, rules and orders under a number of Ordinances. He also considers appeals, petitions and objections.

Legislative Council (LEGCO)

7. This is a Parliamentary assembly which conducts its proceedings under rules of procedure similar to those of the House of Commons with the Governor or his Deputy presiding. Nominated members are appointed by HMG by instructions as in paragraph 6 above.

/Present

Present membership: 4 ex-officio members (the ex-officio members of EXCO apart from Commander British Forces);
18 nominated members who are public officers;
27 nominated members who are local citizens, including some but not all of the Unofficial members of EXCO.

Although the 27 members of the Council who are not public officers are not elected, they at present constitute a majority in the Council representing the people of Hong Kong and have been chosen from different interests and sectors of the community.

The Public Service

8. The public service (including the judiciary, the Royal Hong Kong Police Force and the Urban Services Department) consists of approximately 159,000 public officers, of all ranks from the grade of labourer upwards; of these 100,500 are permanent and pensionable and the remainder are serving on contract or other non-pensionable terms. Of these approximately 3,200 are expatriate officers, of whom about 1,000 are members of Her Majesty's Overseas Civil Service or Her Majesty's Judiciary. Some of these are specifically recruited

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or promoted to particular grades or posts on grounds of policy while others are employed because no suitably qualified local candidates are available and willing to serve. The more senior are usually appointed by the Governor on the recommendation of a Public Service Commission, but the most senior appointments require the Secretary of State's approval. Their salaries and pensions are paid from Hong Kong Government funds. About one in 33 of the total population or one in 16 of the total adult working population is employed by the Government or the Urban Council.

9. The Chief Secretary (who sits in EXCO and LEGCO) is the senior civil servant of the Hong Kong Government and head of the Hong Kong public service. The Government Secretariat has 12 policy and 2 resource branches. The Secretaries heading these branches supervise approximately 60 Departments of Government, of which the Medical and Health Department, the Public Works Departments, the Urban Services Department and the Royal Hong Kong Police Force account for 58% of the entire public service establishment.

External Relations

10. Since Hong Kong is a colony and a UK dependency, the Hong Kong Government has no international personality and external relations are accordingly the responsibility of

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HMG, though in certain areas, including trade, immigration and finance, the Hong Kong Government is entrusted by HMG with power to conduct some external relations. A Political Adviser (seconded from the FCO) advises on external policy aspects of Hong Kong Government policies.

Possible Changes

Simple Acknowledgement of Chinese sovereignty

11. A simple acknowledgement by HMG of Chinese sovereignty would imply that the UK no longer had sovereignty over the ceded areas, and also that the international lease of the New Territories had no continuing validity in international law. If it were unrequited, the UK would no longer be able in practice to administer the territory as a colony. There would be no point in making such a concession except in return for a concession by the PRC that British administration of the territory could nevertheless continue.

Acknowledgement of eventual Chinese sovereignty

12. HMG could acknowledge that sovereignty over the ceded areas should eventually be restored to China at an appropriate future time after 1997 to be agreed later with the PRC on the understanding that British administration of the whole territory should continue until the agreed date. This device could be

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acceptable to HMG if the PRC for their part were willing to acknowledge that the agreed date would not be fixed until a substantial number of years had passed and that any date fixed would be such as to allow a transitional period during which new arrangements for the administration of the territory as part of the PRC acceptable to a majority of the inhabitants could be worked out. It is, however, unlikely to be attractive to the Chinese, because it would not sufficiently meet their political requirement for tangible recognition of their sovereignty soon.

Acknowledgement of Chinese sovereignty in 1997 coupled with fresh arrangements

13. It might be possible for the UK and the PRC to enter into arrangements (whether by a formal international agreement or otherwise) under which the UK would continue to administer Hong Kong on the same lines as hitherto and have power to conduct external relations in respect of Hong Kong on condition that the UK relinquished its sovereignty over the ceded parts of the colony when the international lease of the New Territories expired.

14. There are many earlier examples of the exercise by the UK of jurisdiction in the territory of another state over which the UK did not possess sovereignty (eg Brunei, Tonga, the Persian Gulf States, the Malay States, Zanzibar) and

/provision

provision for the exercise of such jurisdiction is made by the Foreign Jurisdiction Act 1890. Such jurisdiction was however usually conceded by a weak State in the face of British imperial power and these examples would not constitute attractive precedents for the PRC, bearing in mind that China has in the past been forced to concede jurisdiction over parts of its territory to stronger foreign powers. There is no precedent for the voluntary concession of such jurisdiction by a powerful state such as the PRC. Any arrangements that might be made between the UK and the PRC would have to be divested of 'imperialist' or 'colonialist' characteristics in order to appeal to the PRC.

15. Whether such arrangements would be compatible with a situation in which Hong Kong became at the same time a Special Administrative Region of the PRC would seem to depend on:

- (a) whether the PRC could reconcile this situation with the Constitution of the PRC (Article 30 of which deals with Special Administrative Regions in brief and broad terms) and; more important,
- (b) the willingness of the PRC to conclude a 'management contract' with the UK, under which in fact Hong Kong continued to be governed internally and internationally by the UK as a 'caretaker'.

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A Management Contract

16. There is no purely legal or constitutional reason why the arrangements embodied in a management contract should not preserve the essential features of the present administration of Hong Kong with HMG as a caretaker, with UK having responsibility for the internal government and the conduct of external affairs for an agreed term, or for an indefinite period subject to termination by due notice.

17. Such an arrangement could involve the incorporation of Hong Kong into the PRC as a Special Administrative Region either from the outset or at a later stage. This would be without modern precedent, but from the UK point of view, there would be no legal impediment provided that the Chinese did not impose any unacceptable conditions.

18. Such a management contract would require changes to present arrangements, and the PRC might demand some substantial ones. Whatever arrangements were eventually agreed could be made legally effective by an appropriate British constitutional instrument, eg Order in Council. The areas which would require consideration include:

- (a) The Constitution: HMG's aim would be to retain effective control and to ensure that the PRC had no authority in Hong Kong. It might be that

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- the existing structure of government could be preserved, but with a greater degree of local autonomy;
- (b) Scope for local elections;
 - (c) Reservation of executive and legislative powers to the UK;
 - (d) The Secretary of State's position;
 - (e) The position of Parliament and of Her Majesty in Council
 - (f) The office of Governor, together with the method of appointment, title and the power of control over him;
 - (g) Composition, powers and method of appointment to EXCO and LEGCO;
 - (h) The use of emblems and flags;

External relations, the legal system, law and order, defence and security and currency and finance are dealt with specifically in other Annexes.

19. The objective, however, should be to have as little change as possible.

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THE FUTURE OF HONG KONG

A SPECIAL STUDY

BY THE FOREIGN & COMMONWEALTH OFFICE

AUGUST 1982

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FUTURE OF HONG KONG

SPECIAL STUDY

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- P. Illustrative Questions and Answers following the Prime Minister's Visit to China



PRIME MINISTER
FIRST LORD OF THE TREASURY

FUTURE OF HONG KONG

SPECIAL BRIEFING

To Be Retained
Do Not Destroy

FUTURE OF HONG KONG

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