

HONG KONG STUDY

ANNEX L

LEGAL SYSTEM IN HONG KONG

PART I: THE LAWS OF THE TERRITORY

Present Position

1. The municipal law of Hong Kong, like that of most colonies, derives from English common law, as modified by:-

- a) UK statutes extending to Hong Kong of their own force or applying there by reason of their adoption;
- b) United Kingdom Orders in Council made in respect of Hong Kong either under United Kingdom Statutes or the Royal prerogative;
- c) Ordinances enacted by the local legislature;
- d) Subsidiary legislation under the foregoing under United Kingdom statutes, UK Orders in Council or local Ordinances.

2. There are no laws of Chinese origin operating in the colony except where Chinese custom has (to a limited extent) been incorporated into the municipal law, in other words the system of law has a British stamp and is administered by courts of a British type (see Part II of this Annex). Written laws are in English and the courts administer them in English, with the assistance of interpreters.

/Effect

Effect of Relinquishment of Sovereignty

3. On a cession of territory, the existing corpus of law normally remains in force subject to the powers of competent authorities to amend or replace particular laws thereafter as occasion may require.

Requirements of the United Kingdom

4. The United Kingdom will need to ensure that the existing corpus of law in Hong Kong remains in being in this way (subject to any adaptations rendered necessary by the change of status) and that Hong Kong will continue to have its own properly-constituted legislature.

5. The UK will also wish to preserve legislative authority exercisable by Act of Parliament or Order in Council to the extent that it has powers and jurisdiction under a 'management contract'.

6. This need not however exclude constitutional arrangements for Hong Kong under which the local legislature has a substantial degree of autonomy, subject to any necessary safeguards, limitations and exceptions.

Unacceptable changes

7. In the exercise of its powers to administer the territory, the UK and the Hong Kong Government must be free from interference from PRC both in the executive and the legislative fields. It would not therefore be acceptable for the PRC to assume legislative powers in respect of Hong Kong nor to exercise any control over the

/proceedings

proceedings of the local legislature.

Conclusion

6. As a 'caretaker' under a management contract the UK will need to retain a substantial measure of legislative power. The extent of this will depend in part on the extent it can exercise positive and negative controls over legislation by the local legislature. It should be possible to meet the essential requirements of the UK without necessarily insisting on the retention of plenary legislative powers over all matters or control over the local legislature in respect of all matters. A considerable degree of local legislative autonomy may be conceded, so long as the UK has the means of exercising its jurisdiction under the management contract effectively without interference from the PRC.

PART II: THE ADMINISTRATION OF JUSTICE

Present Position

7. Hong Kong has its own courts of justice, which are established under local laws and financed locally. These are principally:-

- a) a Supreme Court, consisting of a Court of Appeal and a High Court;
- b) District Courts;
- c) Magistrates Courts.

Appeals lie from the Hong Kong Court of Appeal to Her

/Majesty

Majesty in Council, so that effectively the Judicial Committee of the Privy Council, sitting in London, is the final court of appeal.

8. The Chief Justice and other judges of the Supreme Court are appointed by the Governor on instructions from the Crown through a Secretary of State, ie from HMG. HMG approve appointments of District Court judges and other senior judicial appointments made by the Governor, who is advised by a local Judicial Service Commission.

9. The administration of justice is conducted on the English pattern and care is taken to ensure the independence and impartiality of the courts. Many of the senior judges and many of the magistrates are expatriates; while a substantial number of local appointments have been made, not enough suitably-qualified local persons are willing to accept judicial appointments on present salaries to staff the courts completely. The proceedings of the courts are normally conducted in English, with the assistance of interpreters. Since the courts administer the common law and statutes of an English type (written in English), the judges are required to possess qualifications as barristers or solicitors obtained in the United Kingdom or in other parts of the Commonwealth, or since 1972 from Hong Kong University.

10. Confidence in the courts reposes in their independence, impartiality, uncorruptibility and considerable expertise in commercial law.

/Effect

Effect of Relinquishment of Sovereignty

11. If the United Kingdom were to continue to administer Hong Kong as a 'caretaker' under a 'management contract' with the PRC, it would be necessary to maintain the essential features of the present system.

Possible Changes

12. It would be possible to give a more 'autonomous' character to the courts in various ways:-

- a) they need not formally be 'Her Majesty's courts';
- b) local machinery for the appointment and removal of judges and magistrates could be established, eg by means of a suitably-constituted judicial service commission, provided that it secured the appointment of suitable and qualified persons and ensured the independence and impartiality of the judiciary (there has already been a considerable devolution in practice over the selection of candidates to the local authorities and a greater measure of local autonomy would be consistent with recent developments);
- c) it would be possible to abolish appeals to the Judicial Committee in London. Many former United Kingdom dependencies have on independence maintained the appellate jurisdiction of the Judicial Committee and some independent members of the Commonwealth still do so, even when not (or no longer) part of Her Majesty's dominions. Examples are Malaysia, which has its own monarchy, and Singapore, The Gambia and Trinidad and

/Tobago

Tobago, which are republics. Confidence is more likely to be maintained if arrangements are made to keep the Judicial Committee as a final court of appeal but it is not an essential constitutional requirement.

Unacceptable Changes

13. While it would be possible to 'localise' the judiciary to some extent and thus to give it a more Chinese character, it would not be acceptable to accord jurisdiction to the courts of the PRC or to allow the establishment of a system of justice modelled on those courts.

Conclusion

14. It is desirable either to maintain the existing machinery of justice more or less as it is or to create local machinery of a more or less autonomous character that effectively preserves its essential features.

PART III: THE ATTORNEY-GENERAL

Present Position

15. Hong Kong, as is normal in a British colony, has an Attorney-General, who is a legally-qualified public officer appointed by the Governor with the approval of HMG. As a member of the Hong Kong public service, he is employed and remunerated by the Hong Kong Government. Up to date, the post of Attorney-General has always been held by an expatriate who is a barrister; the present Attorney-General was the first to be appointed directly from the English Bar.

/16.

16. The Attorney-General is the principal legal adviser to the Government and is regarded as the titular head of the local bar. He is normally a Queen's Counsel. His department, consisting of 160 lawyers with an ancillary staff, is responsible for legislative drafting and civil litigation to which the Government is a party.

17. Although the Attorney-General and the staff of his department are primarily concerned with legal matters, the Attorney-General, as a senior ex-officio member of the Executive and Legislative Councils, participates in the formulation of government policy.

18. The Attorney-General is also responsible for public prosecutions and in that capacity is autonomous in that the final decision in respect of the institution, conduct and discontinuance of public prosecutions rests with him alone and he is not subject to the direction or control of any other person or authority.

Requirements of the United Kingdom

19. Under any new constitutional arrangements for Hong Kong, provision must be made for the proper discharge of the functions now discharged by the Attorney-General and his staff.

Possible Changes

20. It is not essential for the office of Attorney-General to be held by an expatriate - a local barrister could be appointed if he were properly qualified and a

/suitable

suitable local candidate (possibly Chinese) could perhaps be found in due course, though probably not in the near future.

21. If Hong Kong were accorded a greater degree of local autonomy, appointments to the office of Attorney-General could be made locally without being subject to UK control.

22. In some dependent territories and most independent countries the office of Attorney-General is a political appointment and the Attorney-General is not, or need not be, a civil servant.

23. This would be possible in Hong Kong, but, if a politician were made Attorney-General, it might be necessary to consider transferring the ultimate control of public prosecutions to a Director of Public Prosecutions who was a public officer independent of political control, so that his independence and autonomy in respect of criminal proceedings were seen to be adequately safeguarded.

Conclusion

24. The essential features of the present set-up need to be preserved. There is no necessity to maintain UK control over appointments to the office of Attorney-General but any new constitutional arrangements must include provision to ensure that ultimate control of public prosecutions remains in proper hands.

/PART IV

PART IV: GENERAL CONCLUSIONS

25. The requirements indicated in the conclusions to Parts I, II and III of this Annex can be met notwithstanding relinquishment of sovereignty by the United Kingdom provided that arrangements are made with the PRC giving adequate powers and jurisdiction to the UK in the territory under a management contract, exercisable without undue interference from the PRC.

26. Whether those requirements could be met after the incorporation of the territory into the PRC as a Special Administration Region would depend on the willingness of the PRC to allow the United Kingdom to exercise such powers and jurisdiction in part of China under a management contract without attempting also to exercise their powers, ie would require an unusual kind of forbearance.

SECRET

COPY No: 1.

THE FUTURE OF HONG KONG

A SPECIAL STUDY

BY THE FOREIGN & COMMONWEALTH OFFICE

AUGUST 1982

SECRET

FUTURE OF HONG KONG

SPECIAL STUDY

Contents

Paragraph No.

MAIN PAPER

PART I

The Problem	1
British Interests	6
The Chinese Position	8
Interests of the People of Hong Kong	12

PART II

Strengths and weaknesses in the British and Chinese Positions	14
Time Factor	18
Impracticable Options	20

PART III

British Aim	21
Possible approaches to the problem of sovereignty	22
A possible solution	26
Detailed Studies	31
Conclusions	33

PART IV

Recommendations for the Prime Minister's visit to Peking	34
Public Presentation	44

Contents (continued)

ANNEXES

- A. Treaties of 1842 and 1860
- B. Convention of 1898
- C. Map showing the New Territories
- D. Chinese Proposals on Taiwan
- E. Consultation in Hong Kong
- F. Options for Solution and Legislative Requirements
- G. Constitutional Position of Hong Kong
- H. External Relations
- I. Currency and Finance
- J. Defence and Internal Security
- K. Citizenship, Nationality and Immigration
- L. Legal System
- M. External Trade
- N. Civil Aviation and Shipping
- O. Crown Land Leases in the New Territories
- 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

LIST OF BRIEFS

1. Introduction. Tactics
2. Labour Government Statements on HMG Commitment
3. Draft Press Statement on Hong Kong
4. Draft Aide Memoire
5. Chronology of Major Events and Statement
6. Draft Opening Statement
7. Form and Structure of Negotiation
8. Further Defensive Points
9. Possible Acceptable Package
10. Possible Concession which might be made during negotiation
11. Possible Chinese objections and suggested responses
- 11a. Answers to Criticisms Chinese Leaders may make
12. FCO Special Study
 - (a) Treaty of Nanking 1842
 - (b) Text of Second Convention of 1898
 - (c) Map of New Territories
 - (d) Chinese Proposals on Taiwan
 - (e) Consultation on Hong Kong
 - (f) Options and Solution and Legislative Requirements
 - (g) Constitutional Position of Hong Kong
 - (h) External Relations
 - (i) Currency and Finance
 - (j) Defence and Internal Security
 - (k) Citizenship, Nationality, Immigration
 - (l) Legal System on Hong Kong
 - (m) External Trade
 - (n) Civil Aviation and Shipping
 - (o) Crown Land Leases in New Territories
 - (p) Illustrative Questions and Answers Following Prime Minister's Visit to China.