

**Preparatory Courses for PCLL  
Admission Conversion  
Examinations (2012/2013)**

**Hong Kong Constitutional Law**

**Lecture notes 2**

**Resumption of Sovereignty**

## **Resumption of Sovereignty**

### **Important Issues to Revise**

Please note here important issues to revise.  
These will be identified during the lectures.

- ① Joint Declaration
- ② Status of HK Basic Law

### **Relevant Past Exam Questions:**

Please note here relevant past exam questions.  
These will be identified and answered during the lectures.

- June 2009 - Q.1 (Annex 1).  
Jan 2011 - Q.1 (Status of HKBL).

## Reading Materials → Joint Declaration.

- 1) Georg Brunner, *The Functions of Communist Constitutions: An Analysis of Recent Constitutional Developments*, (1977) 3 Rev. Soc. Law 12 1-153
- 2) Johannes Chan, *The Jurisdiction and Legality of the Provisional Legislative Council* (1999) 27 HKLJ 374
- 3) Albert H Y Chen, *The Provisional Legislative Council of the SAR*, 27 HKLJ 1
- 4) Fu Hualing, *Supremacy of a Different Kind: The Constitution, the NPC and the Hong Kong SAR*, in Chan, Fu & Ghai (eds.) *Hong Kong's Constitutional Debate: Conflict over Interpretation*, (Hong Kong University Press, 2000) at pp 97-111
- 5) Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (HKU Press, 2nd edition 1999), Chapter 2
- 6) Yash Ghai, *Litigating the Basic Law, Jurisdiction, Interpretation and Procedure*, in Chan, Fu & Ghai (eds.) *Hong Kong's Constitutional Debate: Conflict over Interpretation*, (Hong Kong University Press, 2000) at pp 37-41
- 7) Hurst Hannum, *Autonomy, Sovereignty and Self Determination* (University of Pennsylvania Press, 1990), Chapter 3
- 8) Siu K Lee, *Much Ado About Something*, (Hong Kong Lawyer, July 1999) at p. 27
- 9) Qiao Xiaoyang, "My Views on the Correct Understanding and Handling of the Relationship between the Central Authorities and the HKSAR under "One Country, Two Systems" (April 1, 2000).
- 10) Wang Shuwen, *Introduction to the Basic Law of the Hong Kong Special Administrative Region*, (Law Press China, English edition, 2000) at pp. 151-4

Treaty by duress  
→ China didn't recognise → Joint D. (Treaty NOT law)

\* 90% of HK Basic Law.  
3  
↑

June 2009 @.1

## Sino-British Negotiations and Joint Declaration

The Chinese government, and the British government agreed to begin discussions over Hong Kong's future after British Prime Minister Margaret Thatcher's meeting with Deng Xiaoping (鄧小平) in September 1982.

This was at a time of increasing concern about what would happen after the expiry, on 30 June 1997, of the Beijing Convention of 1898 under which Britain had leased the New Territories from China for 99 years. In particular, there was concern business confidence was being undermined because this prevented the Hong Kong government from issuing land leases that continued beyond 1997.

The talks initially made little progress because of Britain's insistence on retaining either sovereignty or administration over Hong Kong beyond 1997. This led to the Hong Kong dollar crisis of September 1983 that resulted in its pegging to the U.S. dollar.

After Britain dropped these demands, in December 1983 China put forward its Twelve Point Plan as the basis for further discussions and these resulted in the Sino-British Joint Declaration on the Question of Hong Kong, which was signed in Beijing on 18 December 1984 and ratified on 27 May 1985. Largely due to China's reluctance to go into any greater detail than its Twelve Point Plan, the Joint Declaration is a relatively short document, consisting of only eight articles, three annexes and two memoranda.

Article 3 sets out 12 Basic Policies of the People's Republic of China regarding Hong Kong. These state that Hong Kong will:

- (1) Become a Special Administrative Region of the People's Republic of China from 1 July 1997.
- (2) Enjoy a high degree of autonomy, except in defence and foreign affairs.
- (3) Enjoy executive, legislative and independent judicial power, including final adjudication. Current laws will remain basically unchanged.
- (4) Have a government of Hong Kong people and a chief executive chosen by elections or consultations in Hong Kong. Foreign nationals can also work for the government.
- (5) Retain its social and economic systems and life-style. Basic rights and freedoms will be protected by law.
- (6) Remain a free port and a separate customs territory.
- (7) Remain an international financial centre, with a free flow of capital and a freely convertible Hong Kong dollar.
- (8) Enjoy independent finances and not pay taxes to the Central People's Government.
- (9) Establish economic relations with the United Kingdom and other countries.
- (10) Develop economic and cultural relations with other countries and international organisations. Issue its own travel documents for entry into and exit from Hong Kong.
- (11) Enjoy sole responsibility for maintaining public order in Hong Kong.
- (12) Have these basic policies enshrined in a Basic Law of the Hong Kong Special Administrative Region passed by the National People's Congress. These basic policies will remain unchanged for at least 50 years. *historical origins of HKBL*

These Basic Policies are elaborated in considerably more detail in Annex I of the Joint Declaration, while Annex II provides for the creation of a Sino-British Joint Liaison Group to

\* J.D. Art. 3  
fundamental  
promises  
of  
IC 25.

economic

# ① International dimension of HKBL (came from international treaty → J.D.)

handle further negotiations between China and Britain over matters relating to the transfer of sovereignty.

The Joint Declaration is an international treaty that is registered with the United Nations and binding on the two governments that signed it. It is signed by Margaret Thatcher on behalf of the British government and by Zhao Ziyang on behalf of the Chinese government, in his then capacity as Premier and head of the State Council (國務院), the executive arm of the Central People's Government.

However since the Joint Declaration is an international treaty, it is not part of Hong Kong law and does not, in itself, confer any rights enforceable under Hong Kong Law.

*Tang Ping Hoi v. Attorney-General [1987] HKLR324.*

But in *Ng Ka Ling v. Director of Immigration [1999] 1 HKLRD 315*, the Court of Final Appeal recognized that the Joint Declaration could be used to interpret provisions in the Basic Law.

This is because the fundamental purpose of the Basic Law is to enact the Basic Policies of the People's Republic of China regarding Hong Kong as set out in the Joint Declaration. This is reflected in the Preamble to the Basic Law, which states that the purpose of the law is "to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong." Article 159 of the Basic Law also prevents the Basic Law being amended in any way that contravenes these Basic Policies.

The courts have shown a readiness to attach particular weight to the People's Republic of China's Basic Policies regarding Hong Kong, when deciding cases involving interpreting the Basic Law. In upholding a challenge to a decision by the Immigration Department as contrary to Article 31 of the Basic Law guaranteeing the freedom of travel, the Court of Appeal noted in *Gurung Kesh Bahadur v. Director of Immigration [2001] 3 HKLRD 32* that freedom of travel was one of the basic policies laid down in the Joint Declaration.

JD is registered at the UN.

Tang Ping Hoi  
JD is an intl treaty enforceable under HK Law

Ng Ka Ling  
CFA: JD v interpret BL

explanation

e.g.

minority part of question

## ② Domestic dimension of HKBL (drafted by China) → NPC

### Drafting of Hong Kong Basic Law

In April 1985, China announced the establishment of a 59 member Basic Law Drafting Committee (基本法起草委員會). This was a committee of the National People's Congress charged with preparing a Basic Law for it to adopt. The Basic Law Drafting Committee had five sub-groups covering:

1. Relationship between the Central Authorities and the Hong Kong Special Administrative Region
2. Fundamental Rights and Duties of the Residents
3. Political Structure
4. Economy
5. Education, Science, Culture, Sports, Religion, Labour and Social Services.

These sub-groups closely reflect the final structure of the Basic Law (Chapters II-VI of the Basic Law have the same titles).

5 sub-com of BL Drafting Committee

members appointed by NPCSC  
23 HK ; 35 mainland

1985-early 1989: conciliatory. (Szeto Wah, Martin Lee  
June 1989-1990: less conciliatory put on drafting comm.)  
(HK supported student protest → china: strict  
Drafting comm: 5 mainly mainland Chinese → ART 23).

A 180 member Basic Law Consultative Committee was also set up by the Basic Law Drafting Committee, consisting entirely of Hong Kong people. Its role was simply to canvass views in Hong Kong and not to participate in the drafting process.

The members of the Basic Law Drafting Committee were appointed by the National People's Congress Standing Committee (全國人民代表大會常務委員會). Only 23 came from Hong Kong and 35 from the mainland. This meant that even if the Hong Kong members were united (which was rarely the case), they were still outnumbered by mainland members.

The Chairman of the Basic Law Drafting Committee was Ji Pengfei, who was then Director of the Hong Kong and Macau Affairs Office of the State Council, China's top policy-making body on Hong Kong affairs. Many of the other mainland members were also Chinese government officials.

There were also several Chinese legal scholars such as Professor Xiao Weiyun (蕭蔚雲) and Zhang Youyu among the mainland drafters. According to an article in Wen Wei Po on 19 June 1985, they had been involved in drafting the People's Republic of China Constitution 1982 and understood the background to Article 31, which provides the legal authority for the Basic Law. In later years (and even after 1997) these legal scholars have been an important source of information on how China believes the Basic Law should be interpreted.

Business people dominated the Hong Kong members of the Basic Law Drafting Committee, but there was also an attempt to include some representatives of a wider range of opinion, including barrister Martin Lee and trade unionist Szeto Wah, who were later to become leaders of the pro-democracy movement in Hong Kong.

The drafting of the Basic Law was a highly controversial process, with strong differences emerging between the mainland members of the Basic Law Drafting Committee (supported by many of the more conservative Hong Kong members) and other Hong Kong members, particularly Martin Lee and Szeto Wah.

Differences were particularly pronounced over how much democracy Hong Kong should be allowed and how soon. This was reflected in the First Draft of the Basic Law published by the Basic Law Drafting Committee in April 1988, which included four options for electing the Legislative Council after 1997 and five options for choosing the Chief Executive. In the case of the Chief Executive, these ranged from election by all voters in Hong Kong to selection by an advisory group of only 50-100 people.

This was followed by a five-month consultation period in which the BLCC received more than 74,000 submissions. Some of these suggestions were adopted and 100 revisions were made before the Second Draft of the Basic Law was published in February 1989.

Controversy intensified over the pace of democratization following the 1989 student protests in Tiananmen Square (which were widely supported in Hong Kong) and their crushing by the People's Liberation Army (人民解放軍) on June 4. After this, Legislative and Executive Councillors put aside past differences and agreed on the Omelco Consensus. This stated that the Chief Executive and all members of the Legislative Council should be chosen by universal suffrage no later than 2003.

China rejected this (although it did agree to allow slightly faster democratization in the Legislative Council than previously planned) and responded with a much harder line on a number of issues. It accused Hong Kong of encouraging the student protestors and expelled Martin Lee and Szeto Wah from the Basic Law Drafting Committee.

China also introduced new restrictions in the Final Draft of the Basic Law, which was adopted by the 7th National People's Congress on 4 April 1990. These included a ban on foreign political

→ HKBL

Drafting period  
issues over  
democratization  
&  
universal  
suffrage.

NOT mentioned in JD

organizations having any ties to Hong Kong after 1997 (Article 23) and restrictions on foreign passport holders sitting in the Legislative Council (Article 67).

### Structure of Hong Kong Basic Law

The Basic Law begins with a Preamble stating its legal authority is derived from Article 31 of the People's Republic of China Constitution 1982) and its purpose, of ensuring the implementation of the People's Republic of China's basic policies regarding Hong Kong as outlined in the Joint Declaration.

After this, the structure of the Basic Law resembles that of the Basic Law Drafting Committee (基本法起草委員會) sub-groups that were largely responsible for its drafting. It is divided into nine chapters and three annexes:

Chapter I: General Principles (11 articles)

Chapter II: Relationship between Central Authorities and Hong Kong Special Administrative Region (12 articles) *Domestic dimension*

Chapter III: Fundamental Rights and Duties of Residents (19 articles)

Chapter IV: Political Structure (divided into six sections: Section 1: Chief Executive; Section 2: Executive Authorities; Section 3: Legislature; Section 4: Judiciary; Section 5: District Organizations; Section 6: Public Servants) (62 articles)

Chapter V: Economy (31 articles)

Chapter VI: Education, Science, Culture, Sports, Religion, Labour and Social Sciences (14 articles)

Chapter VII: External Affairs (8 articles)

Chapter VIII: Interpretation and Amendment of the Basic Law (2 articles) *→ Domestic dimension*

Chapter IX: Supplementary Provisions (1 article)

Annex I: Method for Selection of the Hong Kong Special Administrative Region Chief Executive

Annex II: Method for formation of the Hong Kong Special Administrative Region Legislative Council

Annex III: National Laws to be applied in the Hong Kong Special Administrative Region

Note that length is not an indication of relative importance. For instance, Chapter VIII on Interpretation and Amendment consists of only two articles, but has been the cause of far more discussion and controversy than the 31 articles in Chapter V on the Economy.

It is also instructive to compare the structure of the Hong Kong Basic Law with the structure of the 1982 Chinese constitution which is, in some respects similar:

Chapter I: General Principles

Chapter II: Fundamental Rights and Duties of Citizens

Chapter III: Structure of the Chinese State

Chapter IV: National Flag, Anthem, Emblem and Capital

*Constitutional dimension*

*Elections*

③ Domestic & Constitutional dimensions of HKBL

June 2011 @.1.

7 Debates:

### Nature of Hong Kong Basic Law

BL = Constitution?

The Hong Kong Basic Law is commonly called a constitution in Hong Kong, and the Court of Final Appeal has described it as Hong Kong's constitution in several cases. See, for example, Ng Ka Ling v. Director of Immigration and Another [1999]:

*The Basic Law of the Hong Kong SAR of the PRC was enacted pursuant to Article 31. It was adopted by the PRC and was promulgated on 4 April 1990. It became the constitution of the Hong Kong SAR upon its establishment on 1 July 1997 when China resumed the exercise of sovereignty over Hong Kong.*

Chinese Legal System:  
BL = law passed by NPC (X NPCSC)

But, under the Chinese legal system, the term basic law (基本法律) refers not only to the Hong Kong Basic Law but to all laws passed by a full session of the National People's Congress using its powers under Article 62(3) of the People's Republic of China Constitution 1982 "to enact and amend basic laws governing criminal offences, civil affairs, the state organs and other matters."

Other examples of basic laws include the Nationality Law 1980, Administrative Litigation Law 1989, Civil Procedure Law 1991 and Legislation Law 2000. There is also the Basic Law of the Macao Special Administrative Region 1993, which is modelled on (although not identical to) the Hong Kong Basic Law and provides for the application of 'one country, two systems' in Macao.

These laws are the most important in the Chinese legislative hierarchy and the term basic law is used to distinguish them from laws passed by the National People's Congress Standing Committee or other parts of the government apparatus.

∴ X Cons.

BUT =

Since the Hong Kong Basic Law is only one of many basic laws, some Chinese academics argue that it is wrong to call it a constitution. According to former Basic Law Drafting Committee member Professor Zhang Youyu:

*[T]he Basic Law is not in and of itself a constitution. Although the Basic Law will have the highest legal effect among Hong Kong's laws, it will neither be constitutional in character, nor, in any way, be placed on an equal plane with the People's Republic of China Constitution."*

YET

But compare the structure of the Hong Kong Basic Law with the Chinese Constitution—in many respects very similar.

Structure of HK BL  
Content of HK BL

Look also at the content of the Hong Kong Basic Law. Particularly Chapter III on Fundamental Rights and Duties of Residents and Chapter IV on Political Structure, In many respects, the Hong Kong Basic Law is much more detailed than other constitutions.

⇒ ✓ Cons.



## Scope of Application of Chinese Constitution

Like all laws in China, the Hong Kong Basic Law can only be enacted under the authority of the Constitution of the People's Republic of China, the latest version of which was enacted in 1982 and has since been amended four times (1988, 1993, 1999 and 2004).

The main authority for existence of one country, two systems and the provisions of the Hong Kong Basic Law comes from Article 31 of the Chinese constitution. This states that:

"The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions."

But see also Article 62(13) of the Constitution, which gives the National People's Congress the authority "to decide on the establishment of special administrative regions and the systems to be instituted there."

Article 31 of the Chinese constitution is explicitly referred to in the Hong Kong Basic Law. See the Preamble:

"The People's Republic of China has decided that upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and that under the principle of "one country, two systems," the socialist system and policies will not be practiced in Hong Kong."

See also Article 11:

"In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law.

No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law."

However most of the provisions in the Chinese constitution refer to the other system that exists in the rest of China, and which is clearly in conflict with the provisions of the Hong Kong Basic Law.

See the Preamble, which refers to the dominant role of the Chinese Communist Party and Article 1 describes the People's Republic of China as a "socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People's Republic of China."

The wording of the Preamble and Article 1 of the People's Republic of China Constitution cause problems for the application of one country, two systems in Hong Kong. If these general principles of leadership of the Communist Party and a socialist system apply to the entire constitution (as would usually be the case) then it is difficult to understand how Article 31 can provide the authority to breach these principles by establishing an SAR such as Hong Kong, where the Communist Party and socialist system have no role.

This leads to the obvious conclusion, from a common law perspective;

"It is thus clear, at least in the eyes of an English lawyer, that the Chinese Constitution and the Basic Law will inevitably be in conflict"

(Sir William Wade, eminent public lawyer in Cambridge, England).

Chinese Constitution

1 country  
2 systems

2) HK SAR

HKBL vs.  
Chinese Cons

✓ final power of interpretation  
 NPC says (1990)  
 HKBL v Chinese Cons  
 ✓ consistent  
 consistent

This conflict caused considerable concern during the drafting of the Basic Law and China responded with a Decision of the National People's Congress on the Basic Law on 4 April 1990, which expressly stated the Basic Law was consistent with the People's Republic of China Constitution. Since the National People's Congress, through the National People's Congress Standing Committee, has the final power of interpretation over both documents this means the Basic Law does not violate the People's Republic of China Constitution, although a literal interpretation of the two documents would suggest otherwise.

It remains unclear how much of the People's Republic of China Constitution does apply in Hong Kong. Since some parts of the constitution conflict with the Basic Law, it is clear the constitution cannot apply in its entirety.

stance:  
 Chinese Cons  
 / extend to HK

Some Hong Kong academics have suggested that the most logical conclusion is that the People's Republic of China Constitution does not directly apply at all and is instead implemented in Hong Kong through the Basic Law. But the Court of Final Appeal has applied some parts of the People's Republic of China Constitution; so suggesting they do apply in Hong Kong.

E.g. 1

In Ku Chia Chun v. Ting Lei Miao [1998] CACV178/1997 a case on recognition of a Taiwanese court judgement which had begun under British rule and continued after the handover, the Court of Appeal cited the reference in the constitution's Preamble to the "duty of the entire Chinese people" to encourage Taiwan's reunification with the rest of China and described the Taiwan government as a "rebel administration.":

"Taiwan is part of the sacred territory of the People's Republic of China. It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland."

In citing the constitution's reference to Taiwan, Rogers J.A. specifically stated (at para. 65) that "clearly parts of the Constitution are applicable in Hong Kong," although he also suggested that the application of other parts of the constitution is restricted by the Hong Kong Basic Law. Although this was part of a dissenting judgment, there is nothing to suggest the other two judges disagreed on this point.

E.g. 2

In the landmark right of abode case of Ng Ka Ling and Another v. Director of Immigration [1999] the Court of Final Appeal cited, in addition to Article 31, Articles 57 and 58 of the constitution on the status of the National People's Congress and its Standing Committee.

E.g. 3

Then, in accepting an interpretation by the Standing Committee that reversed important parts of that judgement, in the case of Lau Kong Yung and Others v. Director of Immigration [1999] the court cited Article 67(4) on the Standing Committee's power to interpret laws.

E.g. 4

As Professor Ghai concedes (in "The NPC Interpretation and Its Consequences," in Chan, Fu & Ghai (eds.) *Hong Kong's Constitutional Debate: Conflict over Interpretation*, (Hong Kong University Press, 2000 at p. 210) in relation to that last case, this: "denies the self-contained nature of the Basic Law" and leaves open the issue of what other parts of the constitution the Hong Kong courts might choose to apply in future.

E.g. 5

Qiao Xiaoyang (喬曉陽), Vice-Chairman of the National People's Congress Standing Committee Legislative Affairs Commission, has also dismissed the idea that the constitution does not directly apply in Hong Kong:

"If the legal effect of the Constitution is not extended to Hong Kong, the Basic Law will become water without a source and a tree without roots. It will be very difficult to explain why the policy of one country, two systems and the Basic Law of Hong Kong, detached from the Constitution, could have legal effect by itself."

In "*My Views on the Correct Understanding and Handling of the Relationship between the*

*Central Authorities and the HKSAR under "One Country, Two Systems"* (Available at [www.info.gov.hk/basic\\_law/upload/977134889/Qiao%20Xiao-yang.doc](http://www.info.gov.hk/basic_law/upload/977134889/Qiao%20Xiao-yang.doc)), a April 1, 2000 speech at a symposium marking the 10<sup>th</sup> anniversary of the Basic Law, he stated that all the provisions in the Constitution on the central authorities of the state, as well as those covering defence, foreign affairs, nationality, the national flag and capital, apply in Hong Kong.

These amount to at least 40 of the 138 articles in the Constitution.

E.g. 6

Another attempt to provide more guidance comes from former drafter Professor Wang Shuwen, who has suggested (in *Introduction to the Basic Law of the Hong Kong Special Administrative Region*, (Law Press China, English edition, 2000) at pp. 151-4) that three types of provisions in the constitution that apply in Hong Kong.

The first are provisions on the status of China's central authorities, such as the National People's Congress and its Standing Committee, the State Council, which functions as the executive branch of China's government, and the Central Military Commission which controls China's armed forces, including the Hong Kong garrison. The second is provisions on foreign affairs and national defense, including the power to appoint diplomats, conclude treaties with foreign states, declare war and mobilize in the event of an attack.

These first two categories are relatively uncontroversial. After all, the Hong Kong courts have already cited several provisions on the power of the National People's Congress and its Standing Committee, and the Hong Kong Basic Law makes quite clear that foreign affairs and defence lie outside the scope of Hong Kong's autonomy.

So too are some of the articles that fall into Professor Wang's third category of, "other provisions in the Constitution on safeguarding state sovereignty, unity and territorial integrity." As he points out, this includes provisions in the constitution on Chinese nationality, the national capital, flag and emblem—all of which are matters that, under Annex III of the Hong Kong Basic Law, are governed by some of the handful of Chinese national laws which apply in Hong Kong. However Professor Wang suggests that it also includes the duties imposed on all Chinese citizens under Article 52 to safeguard China's unity, under Article 53 "to safeguard the security, honor and interests of the Motherland" and not commit any acts detrimental to this, and under Article 54 "to defend the Motherland and resist aggression."

## Transitional Issues

JD  
1984 - 1997

Although the Joint Declaration provided that Britain would continue to be "responsible for the administration of Hong Kong" (Article 4) until 1 July 1997, it also envisaged that China would play a role in handling transitional issues. This was reflected in the agreement on the establishment of a Joint Liaison Group (Article 5) containing representatives of both governments, which would meet at least three times a year to discuss transitional issues (Annex II, para 9).

The official remit of the Joint Liaison Group was (Annex II, para 3) to:

- (a) to conduct consultations on the implementation of the Joint Declaration;
- (b) to discuss matters relating to the smooth transfer of government in 1997;
- (c) to exchange information and conduct consultations on such subjects as may be agreed by the two sides.

In addition, the Joint Liaison Group was specifically tasked with the following issues (Annex II, paras 4 and 5):

- (1) action to be taken by the two Governments to enable the Hong Kong Special Administrative Region to maintain its economic relations as a separate customs territory, and in particular to ensure the maintenance of Hong Kong's participation in the General Agreement on Tariffs and Trade [now the World Trade Organisation], the Multifibre Arrangement and other international arrangements; and
- (2) action to be taken by the two Governments to ensure the continued application of international rights and obligations affecting Hong Kong.
- (3) procedures to be adopted for the smooth transition in 1997;
- (4) action to assist the Hong Kong Special Administrative Region to maintain and develop economic and cultural relations and conclude agreements on these matters with states, regions and relevant international organisations.

In practice, despite the Joint Declaration's provision on Britain remaining responsible for the administration of Hong Kong until July 1, 1997, China quickly asserted a major role over transitional issues.

The most contentious of these was democracy. A limited degree of democracy was introduced in 1982 with elections for one third of the seats on the District Boards (now known as District Councils). This was increased to two-thirds of the seats in 1985.

In July 1984, the Hong Kong Government published a Green Paper on *The Future Development of Representative Government in Hong Kong*. This adopted an optimistic tone about the early introduction of democracy in Hong Kong and floated radical suggestions such as the election of Executive Councilors by Legislative Councilors, and even the eventual election of the Governor by Executive and Legislative Councilors.

This was followed by a White Paper in November 1984. Although it dropped these radical suggestions, the White Paper still broke new ground by proposing the first elections for some seats in the Legislative Council in 1985. These were all indirect elections—12 seats elected through functional constituencies (seats where voting is confined to members of a particular profession or group of society e.g. lawyers, teachers), 10 seats elected by members of District Boards, and one each by the Urban and Regional councils. But the White Paper also raised the possibility of some seats being directly elected through universal suffrage in 1988.

Discussion of  
democracy  
during transition  
(Election)

The 1985 indirect elections were held on schedule in September 1985. But China demanded that any further moves toward democracy wait until the Hong Kong Basic Law had been drafted by the Basic Law Drafting Committee, and "converge" with its provisions.

In a November 21, 1985 press conference, Xu Jiatao, head of the local branch of the New China News Agency, publicly accused Britain of "deviation from the Joint Declaration" by contemplating political reforms that might differ from the Hong Kong Basic Law.

Britain backed down. In another White Paper, *The Development of Representative Government: The Way Forward*, published in February 1988, it abandoned any plans for directly elected seats in 1988 (although the number of functional constituency seats was increased to 14). Instead it stated the need for "prudent and gradual change" and that any reforms needed to "converge" with the provisions of the Hong Kong Basic Law. This remained British Government policy until the arrival of Chris Patten as the last Governor of Hong Kong in 1992.

The Hong Kong Basic Law was promulgated by the National People's Congress on April 4, 1990, to come into effect on July 1, 1997. After last-minute negotiations between Britain and China, the accompanying *Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region* provided that the first Legislative Council of the Hong Kong SAR to be elected after 1997 would consist of:

- 20 directly elected seats;
- 30 functional constituency seats;
- 10 seats returned through an election committee.

Under Annex II of the Hong Kong Basic Law, the number of directly elected seats would then rise to 24 seats in the 2<sup>nd</sup> Legislative Council of the Hong Kong SAR and 30 seats in the 3<sup>rd</sup> Legislative Council.

The Hong Kong Government then announced that 18 seats would be directly elected at the next Legislative Council elections in 1991, rising to 20 seats in 1995 in order to converge with the Hong Kong Basic Law. The number of functional constituency seats would also rise to 21 in the 1991 elections and 30 in the 1995 elections, again in order to converge with the Hong Kong Basic Law.

The first direct elections to the Legislative Council were held on September 15, 1991. They resulted in an overwhelming triumph for the pro-democracy camp. The United Democrats of Hong Kong won 12 seats, while Meeting Point won a further two. The two parties subsequently merged to form the Democratic Party in 1995.

China also exerted increasing influence over other transitional issues. Following the announcement of plans to build a new airport at Chek Lap Kok in the policy address of then Governor David Wilson in October 1990, China insisted on being given a role in approving all major contracts for the project. This resulted in the *Memorandum of Understanding Concerning the Construction of the New Airport in Hong Kong and Related Questions* which was signed by the British and Chinese Prime Ministers in Beijing on September 3, 1991. This created an Airport Committee under the Joint Liaison Group to vet all major airport-related franchises, contracts and debt straddling June 30, 1997.

## Patten's Political Reforms in the 1990s

In December 1991, Britain announced that Governor David Wilson was being replaced. In April 1992, former Conservative Party chairman Chris Patten was appointed as the last British Governor of Hong Kong.

In his first policy address to the Legislative Council, *Our Next Five Years: The Agenda for Hong Kong* (October 7, 1992) proposed major changes to the system for electing the Legislative Council in 1995 that had not been agreed beforehand with China.

The most important changes were:

- 1) The nine new functional constituency seats (needed to increase the total number of functional constituencies to the 30 required under the Hong Kong Basic Law) would be very different from the 21 that were elected in 1991. While these existing functional constituencies all had very restricted franchises (in most cases only a few thousand, or fewer, voters) these nine new functional constituencies would cover the entire working population, resulting in a total electorate of 2.7 million;
- 2) The electorate in many of the existing functional constituencies would be expanded through the replacement of "corporate voting" (where only organizations in the sector of society covered by that functional constituency are usually allowed to vote) with "individual voting" (where anyone working in that sector of society can vote);
- 3) The election committee required to choose 10 seats under Hong Kong Basic Law would consist of members of the 18 local District Boards (now known as District Councils). The composition of the District Boards would also be changed to ensure that almost all its members are themselves elected;
- 4) A single seat single vote system for the 20 directly elected seats would replace the previous system of large constituencies which each elected several legislators.

These changes complied with the overall structure for the first Legislative Council of the Hong Kong SAR laid down in the *Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region* of 30 directly-elected seats, 20 functional constituency seats, and 10 election committee seats.

But they were very different from the system for electing functional constituencies that had existed until then, and the type of election committee (more similar to the 800 member Election Committee that currently chooses Hong Kong's Chief Executive) envisaged in an exchange of seven letters between the Foreign Ministers of the British and Chinese governments in January-February 1990.

As a result, China denounced Chris Patten's proposals as being in breach of the Hong Kong Basic Law, Joint Declaration and other previous agreements between the British and Chinese governments (this was a reference to previous discussions on the composition of the Election Committee).

Seventeen rounds of negotiations were held between the British and Chinese governments from April to December 1993, in which Britain indicated a willingness to significantly modify Mr. Patten's original proposals.

However it proved impossible to reach an agreement and, insisting time was running out to make arrangements for the District Board elections in 1994 and the Legislative Council elections in 1995, in December 1993 the Hong Kong Government introduced the Electoral Provisions (Miscellaneous Amendments) (No. 2) Bill 1993 in late 1993, which included the single seat single

vote system that China objected to. China responded by refusing to continue the talks, and in early 1994 the Hong Kong Government then introduced the Legislative Council (Electoral Provisions) (Amendment) Bill 1994, which included the functional constituency and Election Committee reforms.

The Legislative Council (Electoral Provisions) (Amendment) Act 1994 was passed by the Legislative Council on June 29, 1994, although only after an amendment which would have greatly reduced the size of the nine new functional constituencies was narrowly defeated with 28 votes in favor and 29 against.

As a result, the elections on September 17, 1995 for the last Legislative Council under British rule were held based on Mr. Patten's proposals, which had not been agreed with Beijing. And the pro-democracy camp scored another major triumph, with the Democratic Party winning 19 seats. Several of the new functional constituencies were also captured by pro-democracy politicians.

### Breakdown of Through Train model

One of the principal purposes of the Joint Declaration had been to provide for as smooth a possible transition on July 1, 1997. This was reflected in provisions trying to ensure a high degree of continuity in the three branches of government: the executive, judiciary and legislature.

For the executive, Article 99 of the Hong Kong Basic Law guaranteed the continued employment of all civil and other public servants.

Although the principal officials holding the top posts in the Hong Kong SAR Government had to be appointed by China (under Article 15 of the Hong Kong Basic Law), with the sole exception of the departing British Attorney General, China reappointed all those who had been holding these posts before July 1, 1997.

For the judiciary, Article 93 of the Hong Kong Basic Law guaranteed the continued employment of all judges serving in Hong Kong before July 1, 1997.

The Hong Kong Basic Law also contained provisions aimed at allowing what was called a "Through Train model" for the Legislative Council. Exceptionally, it provided (under Article 69) that the term of the first Legislative Council would be only two years, whereas the term of all subsequent Legislative Councils could be four years. This was to allow for a possibility of a "through train" under which Legislative Councillors elected in 1995 to the last Legislative Council under British rule, and who would already have served two years before the July 1, 1997 handover, could complete a four year term by remaining in office for a further two years after the handover.

This was elaborated on in paragraph 6 of the *Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region (April 4, 1990)*:

"The first Legislative Council of the Hong Kong Special Administrative Region shall be composed of 60 members, with 20 members returned by geographical constituencies through direct elections, 10 members returned by an election committee, and 30 members returned by functional constituencies. If the composition of the last Hong Kong Legislative Council before the establishment of the Hong Kong Special Administrative Region is in conformity with the relevant provisions of this Decision and the Basic Law of the Hong Kong Special Administrative Region, those of its members who uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and pledge allegiance to the Hong Kong Special Administrative Region of the People's Republic of China, and who meet the requirements

- 20 geographical
- 10 election committee
- 30 functional

Executive  
(BL 99)

Judiciary  
(BL 93)

Legislature  
(BL 69)

The "Through Train Model"

Legislative Council  
1995-1999  
- 2 yrs before  
2 yrs after  
handover

→ Through Train

↓  
Opposed by NPC

set forth in the Basic Law of the Region may, upon confirmation by the Preparatory Committee, become members of the first Legislative Council of the Region.”

However although the Legislative Council elected in 1995 complied with the overall structure of 30 directly-elected seats, 20 functional constituency seats, and 10 election committee seats, China’s objections to the method used for electing these seats under Mr. Patten’s reforms meant that it was unwilling to allow any of the Legislative Councillors elected under these reforms to remain in office beyond June 30, 1997.

This was reflected in the *Decision of the Standing Committee of the National People’s Congress on the proposal advanced by Zheng Yaotang and 32 other deputies to the National People’s Congress on August 31, 1994* (two months after the enactment of Mr. Patten’s reforms in the Legislative Council (Electoral Provisions) (Amendment) Act 1994. This completed the breakdown of the “Through Train model” by declaring that:

“The participants hold that the last Legislative Council, Urban Council, District Urban Council and District Legislature of the British Hong Kong Government shall terminate on June 30, 1997 and that the election arrangements for the last Legislative Council, Urban Council, District Urban Council and District Legislature of the British Hong Kong Government decided unilaterally by the British Government violate the Sino-British Joint Declaration and contravene the Basic Law of the Hong Kong Special Administrative Region and the Decision of the National People’s Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region.”

Breakdown  
of Through  
Train model

- Terminates  
on 30 June 97



PLC

## Provisional Legislative Council and its Legality

The collapse of the "Through Train model," and cooperation between Britain and China on the issue of political reform, made it impossible for the first Legislative Council of the Hong Kong SAR to come into existence on July 1, 1997.

Under Article 68(1) of the Hong Kong Basic Law, the Legislative Council of the Hong Kong SAR had to "be constituted by election." But China had rejected the elections held under British rule in 1995, and the Legislative Council they produced. And arrangements for elections for a new Legislative Council could not be made in Hong Kong without British cooperation (which China was unwilling to request, and Britain would have been unlikely to give before July 1, 1997).

Under paragraph 2 of the *Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region*, the decision on the formation of the first Legislative Council of the Hong Kong SAR was the responsibility of the Preparatory Committee for the Hong Kong SAR. This was a committee of the National People's Congress, established on January 26, 1996, and consisting of 150 members--Hong Kong and mainland members.

At its 2<sup>nd</sup> meeting on March 23, 1996, the Preparatory Committee decided to establish a Provisional Legislative Council to fill the vacuum that would otherwise exist until new elections could be held. This was a temporary body that would serve for a maximum of one year after the July 1, 1997 handover and, since it was only an interim body rather than the first Legislative Council of the Hong Kong SAR, it was argued that this was not subject to the requirement under Article 68(1) of the Hong Kong Basic Law of being "constituted by election."

The creation of the Provisional Legislative Council was justified as necessary to avoid a legal vacuum, since some laws would need to be passed immediately on or after July 1, 1997 (including the laws providing for fresh elections for the first Legislative Council of the Hong Kong SAR) while other decisions would also require the endorsement of a Hong Kong SAR legislature, notably the appointment of judges to the Court of Final Appeal and the Chief Judge of the High Court (under Article 90(2) of the Hong Kong Basic Law).

It was argued that, if a Provisional Legislative Council was not established, the only alternative would be to have these essential tasks instead undertaken directly by either the Chief Executive or the National People's Congress Standing Committee.

Paragraph 5 of the Preparatory Committee's *Decision on the Establishment of a Provisional Legislative Council of the Hong Kong SAR* (March 23, 1996) strictly limited the Provisional Legislative Council's remit to the following tasks:

- in accordance with the Basic Law, to pass laws essential to the normal operation of the HKSAR, and to amend and repeal laws where necessary;
- to examine and approve the budget introduced by the government;
- to approve taxation and public expenditure;
- to receive and debate the policy address of the Chief Executive;
- to endorse the appointment of the judges of the Court of Final Appeal and the Chief Judge of the High Court;
- The Chairman of the provisional legislature to participate in the nomination of six Hong Kong members to the Committee for the Basic Law under the Standing Committee of the NPC; and
- other issues which must be handled before the establishment of the first legislature of the HKSAR.

Creation

Formation of  
1st Legco  
> responsibility  
of Prep. Comm.  
(NPC)

Prep. Comm.  
✓ PLC  
(interim body)

Justification

Limited  
scope of  
powers

controversy

Paragraph 6 of the Preparatory Committee's Decision provided that the Provisional Legislative Council would cease to exist not later than June 30, 1998.

The Preparatory Committee subsequently decided in its *Measures for the Formation of the Provisional Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China* (October 5, 1996) that the members of the Provisional Legislative Council should be chosen by the Selection Committee. This was a 400-member body established by the Preparatory Committee under paragraph 3 of the *Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region* (April 4, 1990). Under paragraph 4 of this Decision, the Selection Committee was also responsible for choosing the first Chief Executive of the Hong Kong SAR.

On December 21, 1996 the Selection Committee chose the 60 members of the Provisional Legislative Council. These included 33 members of the existing Legislative Council, which the National People's Congress had resolved to dissolve from June 30, 1997. However the Democratic Party and most other members of the pro-democracy camp refused to put forward any candidates, and as a result had no representation on the Provisional Legislative Council. The only member of the Democratic Party, Dominic Chan, to stand for the Provisional Legislative Council (and who was chosen as a member) was promptly expelled from the Democratic Party.

On January 25, 1997 the Provisional Legislative Council began meeting in Shenzhen. On July 1, 1997 its meetings transferred to Hong Kong, beginning with a meeting in the early hours of July 1, 1997 to enact the Reunification Ordinance which confirmed decisions taken by the Provisional Legislative Council before that date and the continuity of the Hong Kong legal system (see, for instance, s10 on the continuation of all legal proceedings that had begun under British rule and s11 on the validity of court decisions reached before July 1, 1997).

The creation of the Provisional Legislative Council caused considerable controversy, since it meant that the Legislative Council which was elected by so many voters in 1995 was replaced (at least initially) by a body chosen only by the 400 members of the Selection Committee. Critics contended its creation violated the Hong Kong Basic Law, which contained no provisions explicitly allowing for a Provisional Legislative Council and instead (under Article 68(1)) required the Legislative Council of the Hong Kong SAR to be "constituted by election."

However in *HKSAR v. Ma Wai Kwan David and Others*, (29/07/1997, CAQL1/1997) Reported at [1997] HKLRD 761 the Court of Appeal held that it had no power to question decisions of the National People's Congress or its Standing Committee. It reached this conclusion largely on the basis of the fact that it claimed that the courts of Hong Kong, while Hong Kong was under British rule, had no jurisdiction to question acts of the British parliament and Article 19(2) of the Hong Kong Basic Law provided that restrictions on the jurisdiction of the Hong Kong courts "imposed by the legal system and principles previously in place shall be maintained":

"I would accept the arguments put forward by Mr Fung, SC, that regional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign. There is simply no legal basis to do so. It would be difficult to imagine that the Hong Kong courts could, while still under British rule, challenge the validity of an Act of Parliament passed in U.K. or an act of the Queen in Council which had effect on Hong Kong"

This meant that it had no power to question whether the creation of the Provisional Legislative Council by the Preparatory Committee, a committee of the National People's Congress, violated the Hong Kong Basic Law:

"In the context of the present case, I would accept that the HKSAR courts cannot challenge the validity of the NPC Decisions or Resolutions or the reasons behind them which set up the

Controversy:  
BL x allow  
PLC

Ma Wai Kwan  
COA: HK courts  
& challenge  
Prep. Comm. (NPC)

Before 1997  
courts x challenge  
British parliament  
By BL Art. 19(2)  
legal system  
principles  
unchanged.

Reasoning into  
reversal

Preparatory Committee. Such decisions and resolutions are the acts of the Sovereign and their validity is not open to challenge by the regional courts. I am thus unable to accept Ms Li, SC's argument that the regional courts can examine those decisions and resolutions to see if they are consistent with the Basic Law or other policies. Nor, in my view, can the HKSAR courts examine why the Preparatory Committee set up the Provisional Legislative Council in exercising the authority and powers conferred on its by the NPC to carry out the Sovereign's decisions and resolutions."

cf.  
Ng Ka Ling  
Wrong interpret  
by COA

The Court of Appeal's reasoning on this point was reversed by the Court of Final Appeal in *Ng Ka Ling and Another v. Director of Immigration* (FACV14/1998) Reported at [1999] 1 HKLRD 315). It held that the situation under British rule could not be readily equated with the situation after July 1, 1997 and that Hong Kong courts did have the power to question (and even invalidate) actions of the National People's Congress and its Standing Committee:

If inconsistent  
w/ BL v NPC/SC  
/ declare invalidity

"What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People's Congress or its Standing Committee (which we shall refer to simply as "acts") are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found. It is right that we should take this opportunity of stating so unequivocally."

"The analogy drawn with the old order was misconceived. Prior to 1 July 1997, Hong Kong was a British colony. According to the common law, the United Kingdom Parliament had the supreme authority to legislate for Hong Kong and the courts in Hong Kong could not have questioned that authority.

For the reasons already explained, the position in the new order is fundamentally different. Article 19(2) of the Basic Law provides for the limitation on the constitutional jurisdiction of the courts "imposed by the legal system and principles previously in force in Hong Kong". This cannot bring to the new order restrictions only relevant to legislation of the United Kingdom Parliament imposed under the old order."

Held:  
PLC v consistent  
w/ BL

However this did not affect the decision on the legality of the Provisional Legislative Council because the Court of Final Appeal held that the creation of the Provisional Legislative Council was within the powers of the Preparatory Committee under the *Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region (April 4, 1990)*:

within the  
power of  
Prep. Comm.  
under  
1990 Decision

"The Basic Law provided that the First Legislative Council should be formed in accordance with the 1990 Decision. That Decision conferred on the Preparatory Committee the authority to prepare for the establishment of the Region and to prescribe the specific method for forming the first Government and the first Legislative Council in accordance with that Decision. In our view, the formation of the PLC by the Preparatory Committee was within the 1990 Decision and, that being so, was consistent with the Basic Law. The ambit of the Preparatory Committee's authority in para 2 of the Decision was sufficiently wide for this purpose.

At the time of the 1990 Decision, the expectation was that there would be a through train. The term of the first Legislative Council was therefore two years. But the second part of para 6 of the 1990 Decision provided for a through train only if certain conditions were met. In the absence of a through train, the Preparatory Committee established the PLC with limited functions and for a limited time as an interim measure in order to fill the legislative vacuum before the first Legislative Council in accordance with the Basic Law and the first part of para 6 of the Decision could be formed. The PLC was not established as the first Legislative Council in accordance with the Basic Law, and the first part of para 6 of the Decision, as is accepted by Mr Ma SC for

the Director. It was a body established for the very purpose of enabling the first Legislative Council to be formed. The formation of the PLC was therefore consistent with the Basic Law.”

The Legislative Council Ordinance was enacted by the Provisional Legislative Council on October 3, 1997.

This laid down the electoral system to be used for the elections for the first Legislative Council of the Hong Kong SAR, in accordance with a previous decision of the Preparatory Committee, *Measures for the Formation of the First Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China* (May 23, 1997).

These, in effect, reversed the Patten political reforms and provided for:

- 1) The introduction of nine much smaller functional constituencies (one covering agricultural and fisheries, for instance, had only a few hundred voters) to replace the nine large functional constituencies covering 2.7 million workers that were used in the 1995 elections;
- 2) A return to the use of “corporate voting” instead of “individual voting” in those functional constituencies where “corporate voting” had been used prior to the 1995 elections
- 3) The creation of an 800 member Election Committee along the lines envisaged in Annex I of the Hong Kong Basic Law to replace the one used in the 1995 elections;
- 4) The use of proportional representation to choose the 20 directly elected seats, instead of the “single seat, single vote” system used in the 1995 elections.

The Provisional Legislative Council held its final meeting on April 8, 1998 and was then dissolved to make way for the elections for the first Legislative Council of the Hong Kong SAR.

PLC laid  
down:  
(Oct 1997)

1st Legco  
Election  
Mechanism