

Seminar Vergleichendes Verfassungsrecht

The Legal and Constitutional Status of Hong Kong

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List of Abbreviations

BL	Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China
CE	Chief Executive
CPG	Central People's Government of the People's Republic of China
EIC	East India Company
&c.	et cetera
ExCo	Executive Council of Hong Kong
f.	following
HKSAR	Hong Kong Special Administrative Region
Joint Declaration	Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong
LegCo	Legislative Council
NPC	National People's Congress of the People's Republic of China
p.	page
PRC	People's Republic of China
SCNPC	Standing Committee of the National People's Congress of the People's Republic of China
UN	United Nations
USA	United States of America
WTO	World Trade Organization

The Legal and Constitutional Status of Hong Kong

1. Introduction

This work consists of three parts. In a first part Hong Kong is introduced to the reader by pointing out the historical development of Hong Kong throughout the last 200 years: From becoming a Crown Colony of the British Empire, through the occupation by the Japanese to becoming a Special Administrative Region of the People's Republic of China. A special focus is given to the Sino-British Joint Declaration from 1984 and its function to serve as a transitional convention to maintain Hong Kong's special status as a centre of worldwide economy and trade.

The second part is focused on the situation of Hong Kong, in particular on giving a profound view over the Basic Law, the constitutional framework of the Hong Kong Special Administrative Region, excluding the issue of civil liberty.

Emphasis is given to the political structure (executive power, legislative power, judicial power) as it stands in a narrow correlation with the degree of democracy allowed.

The focus of the third part lies in the issue of democracy and autonomy of Hong Kong in relation to universal suffrage and democratic elections of the LegCo in the near future.

2. Historical Development

2.1 Hong Kong under the First Colonial Influence

In 1600, Queen Elisabeth I put into effect a royal charter that founded the East India Company (EIC). This government controlled company held exclusive control of the trade with China until 1834. The charter gave the EIC the authority to take over the administration of territories that were essential for a running trade as well as the growth of the armed forces.¹

Later, in 1834, the monopoly held by the EIC came to an end with the introduction of the first British Chief Superintendent of the China trade, Lord Napier.

¹ TSANG, p.5.

2.2 The Opium Wars and the Nanking Convention

Opium trading created significant tensions between China and the British Empire, due to the fact that opium was a prohibited substance in China, however it was openly available and used for medicinal purposes in the British Empire.²

The dispute over the legalisation of opium came to its acme when Emperor Daoguang, under the influence of ambitious groupings of officials and literati, finally decided to start an anti-opium campaign. Lin Zexu, Viceroy of Hunan and Jiangxi, volunteered for the difficult task to enforce the anti-opium campaign on the British merchants. To guarantee the safety of the British merchants, Captain Charles Elliot, who succeeded Lord Napier as British Chief Superintendent of the China trade, bought the opium stock from the merchants. After the purchase of the newly controlled substance, Elliot handed over all the opium to Lin Zexu, who destroyed it in public.

The import of opium from India to China was the most profitable element of Britain and British India's China trade. The attempt to cut off this sizable income for the British Empire threatened the British economy. Tensions soon gave way to the first Anglo-Chinese war in 1840.³ Seeing as the Britons ran superior naval forces, a negotiation offered by the Britons, called the Chuenpi Convention, could not be refused by the Chinese. Part of the convention was the acquisition of Hong Kong to Britain.⁴ Unsatisfied, the British continued their expedition in order to obtain further concessions by the Chinese Empire. These circumstances gave rise to the Treaty of Nanking, signed on the 29th of August, 1842 and ratified on the 26th of June, 1842 in Hong Kong by both parties. Hong Kong became formally a Crown Colony of the British Empire.

Article 3 of the Nanking Treaty was of particular importance as it "cedes to Her Majesty the Queen of Great Britain, &c., the Island of Hong-Kong, to be possessed in perpetuity by Her Britannic Majesty, her heirs and successors, and to be governed by such laws and regulations as Her Majesty the Queen of Great Britain, &c., shall see fit to direct".⁵

In the era of Hong Kong's colonization, two important documents formed the constitution of the newly acquired Hong Kong; the Letters Patent of the 5th of April,

² TROCKI p.164-165, TSANG, p.6.

³ TSANG, p.7f.

⁴ INFORMATION SERVICES DEPARTMENT OF THE HKSAR.

⁵ Article 3 of the Treaty of Nanking, SCHEUER p.24.

1843 and the Royal Instructions of Queen Victoria.⁶ A Governor appointed by the Queen, supported by an Executive Council and LegCo then administered Hong Kong. This system was maintained for over a 150 years of British sovereignty.⁷ The governor's powerful position was even authorized by the Letters Patent in accordance with London's final approval to pass bills when necessary over the LegCo's objection.⁸

2.3 The Peking Conventions

The British still unsatisfied since the Treaty of Nanking, regarding legalisation over trade of opium, among other conflicts, led to this second bi-continental clash.

The opening of more ports in order to enlarge the trade added to these existing tensions. The first Convention of Peking in 1860 was a result of the Second Anglo-Chinese War between China and British-French allied troops.

Another consequence of the First Convention of Peking was the cession of a portion of the Kowloon peninsula, the tip of the mainland opposite the island of Hong Kong by the Britons under the terms of Article 6 of the Convention mentioned above.⁹

The British Empire pushed to expand their territories around Hong Kong to maintain a hold over Euro-Asian trade, especially after the French, Germans and Russians infiltrated the economy. The rest of the Kowloon peninsula, as well as 230 surrounding islands, were the targeted by Britain. These "New Territories" were ceded to Britain on the 1st of July, 1898, when the Second Convention of Peking came into effect. This "Convention for the Extension of Hong Kong Territory" implemented a ninety-nine-year lease that would expire on the 30th of June, 1997.¹⁰ Compared to the rigorous legal system of China, the more moderate British legal system for Hong Kong was attractive to Chinese immigrant workers. Despite the fact that in the nineteenth century Chinese residents were discriminated and subjected to laws, regulations and punishments that weren't equally imposed on Caucasian residents of Hong Kong, Chinese workers continued to immigrate.¹¹ However, "the rule of law determined the structure and procedures of the legal system"¹².

⁶ TSANG, p.18.

⁷ TSANG, p.18.

⁸ PEPPER, p.38.

⁹ TSANG, p.29-35, SCHEUER p.29.

¹⁰ OFFICE OF THE COMMISSIONER OF THE MINISTRY OF FOREIGN AFFAIRS OF THE PRC IN THE HKSAR, TSANG, p.39f.

¹¹ TSANG, p.47.

¹² TSANG, p.55.

The Letters Patent of the 14th of February, 1917 was interpreted as Hong Kong's constitution.¹³ The Royal Instructions of the 14th of February, 1917 held thirty seven articles that implemented the Letters Patent. The Letters Patent and the Royal Instructions constituted the basic law of Hong Kong.¹⁴

2.4 The Great War and the Japanese Occupation

On August the 8th in 1941, Japanese bombers attacked Hong Kong and the Britons were forced to surrender Hong Kong on Christmas Day. The Japanese victory humiliated the British Empire as well as destroyed the myth of superiority of Caucasians over other cultures.¹⁵ Japanese occupancy continued for almost three years and eight months. The Japanese surrendered as a consequence of the two atomic bombs dropped by the United States on Hiroshima and Nagasaki. Thus ending the Japanese occupation in 1945, the British sovereignty over Hong Kong was restored on the 16th of September, 1945.¹⁶

2.5 Hong Kong and Its Development after the War

Hong Kong's restoration to Britain was only one of several options. Another approach was to return Hong Kong back to Chinese sovereignty, as requested by Chiang Kai-Shek.¹⁷ Diplomats also investigated the possibility of maintaining a joint mandatory system between the Britons and the United States. Some argued that the best solution was to place Hong Kong under UN trusteeship.¹⁸ For the next eight months, Hong Kong came under military rule "as a transition period to prepare for the restoration of civil rule"¹⁹.

After the Communist Party of China and its leader Mao Zedong had defeated Chiang Kai-Shek as a rival, Mao Zedong wanted Hong Kong to remain a British Colony. Mao Zedong feared a self-governing Hong Kong because of open opportunity for the Americans and Chiang Kai-Shek, President of the Republic of China but in Taiwan, who claimed sovereignty over the entire Chinese territory.²⁰

¹³ SCHEUER, p.15.

¹⁴ YONGPING, p.357f.

¹⁵ TSANG, p.123f.

¹⁶ TSANG, p.133 & p.138.

¹⁷ TSANG, p.135f.

¹⁸ WESLEY-SMITH, p.237.

¹⁹ TSANG, p.138.

²⁰ TSANG, p.152f.

In the beginnings of the 1950s, a Korean war-related US & UN Embargo on China weakened the economic development of Hong Kong.²¹ Since the US embargo on the trading of non-strategic goods was lifted in 1971, Hong Kong became more attractive to the world wide trade and “developed itself into a leading financial centre”.²² The people of Hong Kong were finally able to enjoy many commonly associated with democracies including freedom, the rule of law, the protection of human rights and stability.²³

2.6 The Sino-British Negotiations

After the end of the extremist policies of the Cultural Revolution and Mao Zedong’s death in 1976, politics in the PRC took on a new and improved stage.²⁴ Margaret Thatcher, Prime Minister of the United Kingdom, and Premier Zhao Ziyang were both involved in the Sino-British negotiations from 1982 to 1984 to decide the future of Hong Kong.

Although the Britons had an interest in keeping Hong Kong as a Colony beyond the ninety-nine year lease of the New Territories, Deng Xiaoping, the leader of the PRC, acknowledged prior to the Sino-British negotiations, that the PRC would recover Hong Kong by no later than 1997.²⁵ Deng had developed the principle of “one country, two systems” in the early 1980s in order to ensure a smooth transitions of Hong Kong and its capitalistic economy into the socialistic PRC. This concept allows the possibility to reprieve Hong Kong even under the sovereignty of China from a socialist system to maintain its capitalist system for at least another fifty years.

In December 1982, the Chinese National People’s Congress (NPC) endorsed a new constitution that held in its Article 31 the possibility of turning Hong Kong into a “special administrative region when necessary”²⁶. The condition of the PRC government that it would impose a unilateral solution, if the Britons wouldn’t accept a Chinese sovereignty over Hong Kong, led the British to a drawback and smoothed

²¹ WESLEY-SMITH, p.237, TSANG, p.164f.

²² TSANG, p.176.

²³ TSANG, p.208.

²⁴ TSANG, p.211.

²⁵ TSANG, p.215.

²⁶ TSANG, p.221.

the way to further negotiations about implementation of Hong Kong's restitution to the PRC in 1997.²⁷

2.7 The Sino-British Joint Declaration

The Sino-British negotiations resulted in the Sino-British Joint Declaration, which was signed on the 19th of December, 1984 and ratified on the 27th of May, 1985. The main document of the Declaration and the three annexes are all equally binding.²⁸

The Introduction of the Sino-British Joint Declaration contains the accord of the Government of the United Kingdom and the PRC to state their common goal of “the maintenance of the prosperity and stability of Hong Kong”. Article 2 of the Declaration contains its most important passage as it assigns that it ‘will restore Hong Kong to the PRC with effect from the 1st of July, 1997.’²⁹

The basic policies in Article 3 of the declaration are of particular importance, as the policies have a great impact on the immediate future of Hong Kong.³⁰

Article 3 Paragraph 12 of the Joint-Declaration states that “the policies of the PRC regarding Hong Kong and the elaboration of them in Annex I to this Joint Declaration will be stipulated, in a Basic Law of the HKSAR, by the NPC, and they will remain unchanged for 50 years”. This status is being verified in accordance with Article 31, respectively Article 62 Paragraph 3 and 13 of the Constitution of the PRC of 1982.

As the PRC is the only participant on the constitutional process for Hong Kong after the handover in 1997, a direct exertion of its influence by the United Kingdom is not existent.

In case some Articles of the Basic Law contravene the Joint Declaration, the United Kingdom can only subsequently point out that international law has been violated. The Joint Declaration is a treaty³¹, an international agreement concluded between States and governed by international law, in accordance with Article 2 Ciper 1 Letter a of the Vienna Convention on the Law of Treaties.

The laws enforced in Hong Kong prior to 1997 shall after Article 3 Paragraph 3 remain unchanged until at least 2047 to ensure the stability of Hong Kong.

²⁷ TSANG, p.224.

²⁸ TSANG, p.225.

²⁹ SCHEUER, p.60.

³⁰ SCHEUER, p.62.

³¹ SCHEUER, p.50, as mentioned in Article 8 of the Declaration: the “Joint Declaration and its Annexes shall be equally binding”.

After Article 3 Paragraph 2 of the Joint Declaration “HKSAR is directly under the authority of the CPG of the PRC and enjoys a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the CPG”. The only way that Hong Kong would enjoy autonomy from the mainland would require that the people of Hong Kong would be able to elect the legislature and the government itself in a democratically legitimate manner.³² The “high degree of autonomy” stipulated in the Joint declaration can only be regarded as qualified, because China has succeeded in implementing its views of the Basic Law. China did not admit full autonomy, thus resulting in an absence of a concrete plan for democratic elections of the legislature or the government.³³

2.8 The Transition Period between 1984 and 1997 and the Hand Over of Hong Kong

The Joint Declaration gave the colonial government the “responsibility to administer the colony during the transition phase until 1997”, but as the United Kingdom had admitted in the Joint Declaration that Hong Kong was from now an “internal Chinese affair”, the more the British Colony was drawn to a close, the bigger became China’s involvement over the administration of Hong Kong.³⁴

In June of 1989, when the Chinese government had oppressed the democracy movement on Tiananmen Square, the future of Hong Kong and the Sino-British Joint Declaration were put to the test. This test was challenged especially after the last Governor of Hong Kong, Chris Patten, had begun to initiate democratic reforms that “pushed the grey area in the Basic Law to its limit” without contravening it.³⁵ His plan was to take a major step towards democratisation by opening half of the LegCo seats for direct elections among other measures.³⁶ China dismissed these reforms and announced that the democratic elected “LegCo was to be dissolved after the transfer of sovereignty”.³⁷

At midnight, on the 30th of June, 1997, Hong Kong was handed over from the British Empire to the PRC and became its first Special Administrative Region.³⁸

³² HORLEMAN, p.208.

³³ HORLEMAN, p.209.

³⁴ HORLEMAN, p.207.

³⁵ TSANG, p.257.

³⁶ TSANG, p.258.

³⁷ HORLEMAN, p.207f.

³⁸ TSANG, p.268.

3. The Present Status of Hong Kong

3.1 The Constitutional Status

In accordance with Article 3 Paragraph 1 of the Joint Declaration, Hong Kong became a Special Administrative Region established by the State of China as designated in Article 31 of the Constitution of the PRC. The Basic Law for Hong Kong was enacted by the NPC and adopted in April of 1990.³⁹ Article 12 of the Basic Law established HKSAR as a local administrative region⁴⁰ of the PRC. Hong Kong would enjoy a high degree of autonomy and come directly under the CPG. However, Special Administrative Regions cannot elect deputies to the National People's Congress, as they are not listed in Article 59 of the PRC's Constitution.

3.2 The Rule of Law

Hong Kong's legal system is based on the principles of the "rule of law". As a principle of law, the rule of law has certain force.⁴¹ The principle of legality is a fundamental aspect that established that the executive power derives its power from "law as expressed in legislation"⁴² and that independent courts render judicial decisions.⁴³ Equality before the law comes with the rule of law as well as the implication, that everyone of any ethnicity, religion, political association or gender shall be treated as a subject to the laws of the land.

An act of the Government that constitutes a legal wrong or affects a person's liberty can only be maintained if there is a legal justification for it, otherwise the affected party can bring an action at law. The invoked court can statue that the contested act is invalid and of no legal effect.⁴⁴

Article 18 of the Basic Law ensures, that the rule of law previously enforced will be maintained. The law previously in force consists after Article 8 BL out of the common law, rules of equity, ordinances, subordinate legislation and customary law as enforced under British sovereignty that are not in contravention with the Basic Law or have been amended by the legislature of the HKSAR itself.

³⁹ TSANG, p.243.

⁴⁰ The term „local“ is to be combined with the term „special“ as it is a matter of both. cf. SCHEUER, p.120.

⁴¹ DOBINSON, p.9.

⁴² DEPARTMENT OF JUSTICE OF THE HKSAR.

⁴³ Independent judiciary as a key element of the rule of law, BEATTY p.93.

⁴⁴ DEPARTMENT OF JUSTICE OF THE HKSAR.

3.3 Sources of law in Hong Kong

Hong Kong's legal system is based on the common law, introduced by the Britons, which is based on judgements of the HKSAR courts and other common law jurisdictions.⁴⁵

Chapter II of the Basic Law makes some reservations for the Central Authorities of China, especially when in regards to foreign affairs, the defence of Hong Kong and in case of emergency. Article 18 BL states that national laws shall not be applied in the HKSAR except for those listed in Annex III to the Basic Law including 12 paragraphs concerning several national laws of the PRC.

3.4 The Basic Law

As already discussed in CHAPTER, the idea and the creation of the Basic Law evolve from the Sino-British Joint Declaration. Hong Kong was in need for such a law as a result of the Joint Declaration and the principle "One Country, Two Systems" developed by Deng Xiaoping.

"The Basic Law of the HKSAR was adopted by the Seventh NPC of the PRC on the 4th of April, 1990. It came into effect on the 1st of July, 1997".⁴⁶

In the doctrine, the Basic Law has been designated as a mini-constitution of Hong Kong⁴⁷, "the law that provides the constitutional framework"⁴⁸ as well as serving as a constitution for fifty years⁴⁹. The doctrine provides the constitutional structure of the HKSAR and is the most important document for Hong Kong's political development.⁵⁰ All law must be in accordance with the provisions of the Basic Law.⁵¹

3.4.1 Generalities

Article 5 of the Basic Law states, as concluded in the Sino-British Joint Declaration in 1984, that Hong Kong is not placed under a socialist system, but will remain unchanged until at least 2047. In contrast to the Joint Declaration, the principle "one

⁴⁵ DEPARTMENT OF JUSTICE OF THE HKSAR.

⁴⁶ CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU OF THE HKSAR, FACTS ABOUT THE BASIC LAW.

⁴⁷ HORLEMANN, p.205.

⁴⁸ DOBINSON, p.26.

⁴⁹ YONPING, p.367, other opinion: DOBINSON, p.9.

⁵⁰ BEATTY, p.181.

⁵¹ Article 11 Paragraph 2 BL, DOBINSON, p.27.

country, two systems” is mentioned in the preamble of the Basic Law.

After Article 2 BL, HKSAR is authorized by the PRC to exercise a high degree of autonomy from the Central Government in Beijing and enjoys executive, legislative and independent judicial power, including that of final adjudication in accordance with the provisions of the Basic Law itself. The addition of “high degree” to autonomy is in fact a restriction as HKSAR is not fully autonomic, which was actually never really intended, as after Article 1 BL Hong Kong is an inalienable part of the PRC.⁵²

The slogan “Hong Kong People ruling Hong Kong” alludes to Article 3 of the Basic Law and highlights the circumstance that the “executive authorities and legislature of the HKSAR shall be composed of permanent residents of Hong Kong”. But as the number of members of the LegCo directly elected by the people of Hong Kong is limited. China has also strengthened the influence of the pro-Chinese forces, the slogan “Hong Kong People ruling Hong Kong” is more a hallow phrase.⁵³ Article 4 provides in accordance with Chapter III rights and freedoms of the people of HKSAR. The protection of the right of private ownership is nevertheless constituted in a separate Article 6, with the exclusion of land and natural resources within the HKSAR, that are property of the State.

3.4.2 Relationship Between the Central Authority & the HKSAR

The CPG is sovereign over Hong Kong The CPG is responsible for foreign affairs relating to the HKSAR and Hong Kong’s defence. The CPG has the authority to authorize the HKSAR to conduct relevant external affairs on its own as long as they are not in violation of the Basic Law.

Annex III contains a list of twelve paragraphs with national laws that shall be applied in the HKSAR with respect of its “high degree of autonomy”.

3.4.3 The Political Structure

3.4.3.1 Chief Executive

Head of the executive authority is the Chief Executive (CE) of the HKSAR. The position is accountable to the PRC, which appoints the CE in accordance with Article

⁵² HORLEMANN, p.205.

⁵³ HORLEMANN, p.209f.

15 BL, as well as to the HKSAR according to Article 43 BL. This person has to be over 40 years old, Chinese citizen and after Article 44 of the Basic Law has permanent residence status of Hong Kong with no right of abode in any foreign country. Also, the CE has to have resided in Hong Kong for a continuous period of at least 20 years.

The selection of the CE is done by election or through consultations held locally, according to Article 45 Paragraph 1 BL. Although Article 45 Paragraph 2 BL sets the ultimate aim to allow the election of the CE by universal suffrage, the method for the selection “shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress”.⁵⁴

Paragraph 3 refers to Annex I of the Basic Law. This Annex contains the information that the CE is “elected by a broadly representative Election Committee” that has been established by a Preparatory Committee⁵⁵ and appointed by the CPG. The first CE was appointed by the NPC in 1997. At present, the chief executive is still not elected by universal suffrage, but by an 800-member committee. 200,000 voters from "functional constituencies" elect 600 members for this election committee and the remaining 200 members consist of LegCo members, Hong Kong delegates to the NPC, religious representatives, and 41 members of the Chinese People's Political Consultative Conference.⁵⁶

The CE’s extensive powers are outlined in Articles 48 to 52 BL. It is not only the leader of the government and enforces the law, but also has the right to return a bill that is not compatible with the overall interests of the Region to the LegCo for reconsideration. If after a period of three months the original bill is passed again to the CE is then the CE’s responsibility to sign and promulgate the bill in one month time. The same applies if the LegCo refuses to pass a budget or any other important bill introduced by the executive power. Article 50 BL provides a solution, if a consensus cannot be found. In this case, the CE is to dissolve the LegCo after having consulted the ExCo.

The CE appoints judges of the courts at all levels except for the judges presiding in the Court of Final Appeal and the Chief Judge of the High Court.

⁵⁴ Article 45 Paragraph 2 Sentence 1 BL.

⁵⁵ That has been established by the NPC itself after Article 2 of the Decision of the NPC on the Method for the Formation of the First Government and the First LegCo of the HKSAR.

⁵⁶ UNHCR.

3.4.3.2 The Executive council

The Executive Council (ExCo) assists the CE in accomplishing its tasks, playing a strictly consultative role. The CE is the President of the ExCo⁵⁷ and presides over its meetings. This role includes the appointment, removal and disciplining of officials, the adoption of measures in emergencies, to consult the ExCo in policy decisions, introducing bills to the LegCo, making subordinate legislation and dissolving the LegCo.

Members of the ExCo are appointed and removed “by the CE from among the principal officials of the executive authorities, members of the LegCo and public figures”⁵⁸. Members of the LegCo can also be appointed to the ExCo, but is not entirely a necessary part of the checks and balances system. This is not a violation of the Joint Declaration, as this principle is not established by the Declaration.⁵⁹

At present, there are fifteen Principal Officials and fourteen non-official members of the ExCo.⁶⁰

3.4.3.3 The Executive Authorities

Articles 59 to 65 of the Basic Law describe in detail the composition of the Executive Authorities and their functions. At present, there are twelve policy bureaux and sixty-one departments and agencies staffed mostly by civil servants serving administrative and executive functions of the government. Executive Authorities administer public services and assist the CE and Principal Officials in “formulating policies and carrying out decisions”.⁶¹

3.4.3.4 The Legislature

The legislation of the Basic Law itself is provided by the NPC, independent of the United Kingdom and Hong Kong.⁶²

A Provisional LegCo was set in by the NPC in 1997 as a temporary solution in order

⁵⁷ Article 56 Paragraph 1 BL.

⁵⁸ Article 55 Paragraph 1 BL.

⁵⁹ SCHEUER, p.133.

⁶⁰ GOVERNMENT OF THE HKSAR, MEMBERSHIP OF EXECUTIVE COUNCIL.

⁶¹ GOVERNMENT OF THE HKSAR, GOVERNMENT STRUCTURE.

⁶² YONGPING p.367.

to revoke the democratic reforms that had been initiated by former Governor Christopher Patten under British sovereignty.⁶³

A Preparatory Committee was entrusted with the task of preparing the establishment of the region and the specific method for creating the first Government and the first LegCo. The Preparatory Committee was required to have a composition of members from the mainland and from Hong Kong both, who shall constitute at least fifty percent of its membership. This shows that the NPC had a major influence in the composition of powers in Hong Kong, as China had already refused to make reference to democratic elections in the Joint Declaration.⁶⁴

In distinction from the ExCo, there is a possibility after Article 67 BL that permanent residents of the region who are not of Chinese nationality or who have the right of abode in foreign countries can become members of the LegCo as long as they are not exceeding twenty percent of the entire LegCo.

Like the CE, the LegCo is also constituted by election. After the Basic Law, the method for forming the LegCo “shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress”. Again, the election of all the LegCo members by universal suffrage is the ultimate aim of Article 68 BL. Paragraph 3 of the same Article contains a reference to Annex II of the Basic Law concerning the methods of formation and voting procedures of the LegCo.⁶⁵

The first LegCo was formed “in accordance with the principles of state sovereignty and smooth transition”⁶⁶ and appointed by the Standing Committee of the National People’s Congress (SCNPC) in 1998. It was composed of sixty members, with twenty members returned by geographical constituencies through direct elections, ten members returned by an election committee, and thirty members returned by functional constituencies. Functional Constituencies consist of business and social interest groups, many of which maintain a strong relation to the PRC.⁶⁷

After the first two-year term of office, a new LegCo was elected in 2000 in

⁶³ TSANG, p.266, HORLEMANN p.208.

⁶⁴ HORLEMANN, p.206.

⁶⁵ Article 2 of the Decision of the NPC on the Method for the Formation of the First Government and the First LegCo of the HKSAR.

⁶⁶ Article 1 of the Decision of the NPC on the Method for the Formation of the First Government and the First LegCo of the HKSAR.

⁶⁷ UNHCR.

accordance with Article 1 of Annex II of the Basic Law. Twenty-four members returned by geographical constituencies through direct elections and only six through the election committee. And for the third term in the Year 2004, the LegCo consisted of fifty percent of direct elected members by geographical constituencies. The other half of the LegCo, were elected by functional constituencies, a “relatively small number of elite groups, [whose] pro-China approach is well-known”⁶⁸. There has not yet been an amendment to the Basic Law towards universal suffrage of the LegCo. Contrary to the election of the CE, the LegCo is not to be approved by the NPC, Annex II in accordance with article 68 BL.

The main functions of the LegCo are described in Article 73 BL and consist of enacting, amending or repealing laws in accordance with the provisions of the Basic Law. The authority to amend the Basic Law itself is not provided.⁶⁹ A further restriction exists in Article 76 BL, that bills passed by the LegCo have to be signed and promulgated by the CE before they may take effect. The LegCo does not have the authority of a vote of no confidence and can neither appoint nor remove the CE.⁷⁰ Apart from its main function as it is described in the doctrine, the LegCo debates issues of public interest, examines and approves budgets introduced by the Government, receives and debates the policy addresses of the CE and endorses the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court.⁷¹

3.4.3.5 The Judiciary

According to Article 81 Paragraph 1 BL, the HKSAR court system includes the Court of Final Appeal, the High Court, which consists of the Court of Appeal and the Court of First Instance, district courts, magistrates' courts and other special courts. Since Hong Kong has been placed under Chinese sovereignty, the highest court is no longer the Privy Council of the United Kingdom but the Court of Final Appeal. It has the power of final adjudication for all cases of the HKSAR. Article 81 Paragraph 2 BL states that the system previously practised in Hong Kong shall be maintained. Even judges from other common law jurisdictions can be invited to sit on the bench for the Court of Final Appeal, Article 82 BL, but “no court outside Hong Kong can

⁶⁸ HORLEMANN, p.206.

⁶⁹ SCHEUER, p.137.

⁷⁰ SCHEUER, p.137, HORLEMANN p.209.

⁷¹ GOVERNMENT OF THE HKSAR, GOVERNMENT STRUCTURE.

hear appeals from any SAR court”.⁷² The independence from any interference in the courts is stipulated in Article 85 BL. This is of great importance in order to keep up the rule of law.⁷³ Nevertheless, the “NPC reserves the right to make a final interpretation of the Basic Law” and therefore limits the power of Hong Kong's Court of Final Appeals.⁷⁴

The principle of trial by jury is one of the most important features of Hong Kong's legal system. A jury is composed of Hong Kong residents to “decide on the facts in a case on the basis of the evidence brought forward in court”.⁷⁵

3.4.4 Economy

Chapter V of the Basic Law consists of thirty-one Articles divided in four sections dealing with economic issues.

In general, HKSAR remains an international financial centre, a free port and a separate customs territory. The Hong Kong dollar is the legal tender of the HKSAR.⁷⁶

3.4.5 External Affairs

Chapter VII of the Basic Law defines the parameters of external affairs. HKSAR maintains and develops relations with foreign states and international organizations for example the WTO.⁷⁷

In accordance with Chapter II of the Basic law and specific Articles in Chapter VII, the CPG influences Hong Kong in external affairs, by deciding on international agreements, depending on specific circumstances and needs of the HKSAR.

3.4.6 Interpretation And Amendment Of The Basic Law

The Standing Committee of the National People's Congress (SCNPC) is vested with the power of interpretation of the Basic Law after Article 158 Paragraph 1 BL. The courts of the HKSAR can be authorized by the SCNPC to interpret the Basic Law within Hong Kong's autonomy after Paragraph 2.

The courts of the HKSAR are able to interpret provisions of the Basic Law in

⁷² DOBINSON, p.30.

⁷³ BEATTY, p.93f.

⁷⁴ UNHCR.

⁷⁵ GOVERNMENT OF THE HKSAR, Jury System.

⁷⁶ CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU OF THE HKSAR, Facts about the Basic Law.

⁷⁷ In accordance with Article 151 BL, Hong Kong takes part at different international and intergovernmental organisations as listed under <<http://www.cmab.gov.hk/en/issues/external.htm>> [Accessed 16 September 2008].

adjudicating cases. If the interpretations are concerning affairs which are the responsibility of the CPG or concern the relationship between the Central Authorities and Hong Kong, “the courts of the Region shall [...] seek an interpretation of the relevant provisions from the SCNPC through the Court of Final Appeal of the Region”⁷⁸ before making their final judgments. Final judgments are however not appealable and shall not be affected if they were previously rendered. The NPC holds authority over the amendment of the Basic Law after Article 159 Paragraph 1 BL. This is yet another indication, that the HKSAR’s autonomy is restricted and that NPC maintains strict control over the development of the HKSAR.

4. Hong Kong’s recent Constitutional Development

The Basic Law stipulated that executive authorities must be accountable to the LegCo in Article 64.

Tung Chee-hwa, former CE of the HKSAR, announced in his seventh policy address that a new task force would examine the question of Hong Kong’s constitutional development. The Hong Kong-Macau Affairs Office in Beijing’s response to the task force was to require Hong Kong’s consultation to Beijing before any new electoral policies could take effect. Hong Kong’s future political structure would from that point on involve HKSAR and the PRC in an effort to improve relations between the two political structures.

The pro-democratic forces speculated the possibility of an election movement that would be strong enough to win 30 of the 60 seats in the LegCo in 2004. Though the LegCo needed a two-thirds majority vote to amend the Basic Law or change existing election methods, their goal to introduce democracy in 2007-2008⁷⁹ remained strong. On the other hand, the PRC was determined to counter this plan with the “multiple resources of an experienced Communist Party propaganda apparatus”.⁸⁰ Professor Xiao Weiyun, a former mainland Basic Law drafter, announced that the drafter’s plan was not to introduce a wholly elected Hong Kong government before the mid-21st-century. It is up to the PRC *to decide on democracy in Hong Kong* as in the principle of “one country, two systems” China is prior and fundamental.⁸¹

⁷⁸ Article 158 Paragraph 3 BL.

⁷⁹ PEPPER, p.368f.

⁸⁰ PEPPER, p.370.

⁸¹ PEPPER, p.372.

The anti-democratic parties arguments against this concept revolved around the concept of the LegCo's approval by the NPC never being defined by Basic Law and therefore intended to only differentiate between universal suffrage and true democracy, leaving a gap in the law as written. Patriotism and executive leadership are the essence of Hong Kong's constitution. Supporters of democracy were called unpatriotic and it was told, that if they won a majority in the LegCo, "they would overthrow executive-led government, demand universal suffrage and use democracy as a cover for independence". This would in essence be a refusal of Chinese sovereignty.⁸²

According to the NPC, the citizens of Hong Kong enjoy "unprecedented rights of democracy" and further democratic developments, which affect the-interpretation of the principle "one country, two systems", -the Basic Law and relations between the mainland China and the HKSAR. The long-term prosperity and stability of Hong Kong shall be the essence and not the question of universal suffrage.⁸³

A decision of the National People's Congress Standing Committee of the 6th of April, 2004 stated that universal suffrage for the CE and the LegCo was not provided for the 2007-2008 election. On the 29th of December, 2007, the NPC stated that universal suffrage would neither be provided for neither the 2012 election of the CE nor of the LegCo. The composition of LegCo-members elected from functional constituencies and the directly elected legislators from geographical constituencies would however, remain unchanged.

The Hong Kong government's package of proposals-for the election of the CE in 2007 and the election of the LegCo in 2008 did not receive the required two-thirds majority support. Therefore the existing electoral arrangements were applied in the 2007/2008 elections and the electorate base will remain as written in the CE and LegCo elections in 2012.

There are presently three possibilities to change the status quo regarding the democratisation of Hong Kong; either Beijing relent to democratic elections by universal suffrage, democrats give up their goal of introducing democratic elections or they become the majority among the people of Hong Kong, capable of not only supporting their demands but also to resist the influence of Beijing.⁸⁴

⁸² PEPPER, p.373.

⁸³ <http://english.gov.cn/2007-12/29/content_847278.htm> [Accessed 16 September 2008].

⁸⁴ PEPPER, p.390.

One option towards democratisation of Hong Kong consists of increasing the numbers of LegCo-members democratically elected every selection, with full democratisation to be achieved in 2020 for example.⁸⁵ Conservative parties are thinking about the possibility to keep a constant amount of LegCo-members elected by functional constituencies while increasing the number of directly elected seats by geographical constituencies.⁸⁶ The anticipation of a bicameral system can also seem adequate. On the one hand a directly elected LegCo and on the other hand a second “elite” chamber to moderate the power of an excessive “populism”, similar to the British House of Lords. Contrary to this option, the liberal party instead wants to eliminate functional constituencies for good.⁸⁷

5. Summary

British Hong Kong was handed back to the successor state of the Chinese Empire in 1997. The main reason for this was not a failure of the colony but a “result of the changing balance of power between Britain and China”.⁸⁸

The economical importance of Hong Kong led to an agreement between the Britons and the Chinese in order to guarantee its prosperity and its capitalistic system. The Basic Law is the main document of the HKSAR that ensures the continuation of HKSAR being an important part in worldwide economy and trade.

Hong Kong enjoys “a high degree of autonomy” in many different ways, but is politically strongly dependent on China. The PRC manages the control and the containment of democracy under the cover of providing a nation-wide stability. Hong Kong`s only chance of being autonomous and not dependent on the mainland would be a Legislature and a Government chosen by the people of Hong Kong “through meaningful elections and thus in a democratically legitimate manner”.⁸⁹

⁸⁵ BEATTY, p.184.

⁸⁶ BEATTY, p.185.

⁸⁷ BEATTY, p.185.

⁸⁸ TSANG, p.268f.

⁸⁹ HORLEMANN, p.208.