

Introduction and Part 1

“The Basic Law promises the survival of the common law, albeit in a potentially inhospitable setting.”¹

Given that the Basic Law (BL) of Hong Kong (HK) imported English Law (common law), it would be logical to conclude that HK shares the common law’s strong commitment to the Rule of Law (ROL) and Separation of Power (SOP). To investigate whether this conclusion is accurate, this paper will examine: 1) the historical development of laws previously in force and their adaptation to the BL; 2) the one country/two system (OCTS) model and its effect on the BL; 3) the status of the ROL and SOP post-1997; and 4) the current commitment to the ROL and SOP in the HKSAR. This analysis will illuminate the complicated structure of the BL and its application. I will demonstrate that the laws previously in force had a somewhat strong commitment to the ROL, but a weaker commitment to the SOP; that the adaptation of these laws transferred the ROL and SOP traditions to the BL without strengthening them; and that the inherent structure of the OCTS undermines the SOP. Therein, I will conclude that the importation of laws previously in force can only ensure that any ambiguities in the BL are checked against strong traditions of the ROL & SOP if the judiciary is committed to these traditions and the public is involved in safeguarding them as well as enhancing democratic processes.

¹ Raymond Wacks, *Our Flagging Rights*, (2000) 30 Hong Kong Law Journal 1, p. 4

Part I: Historical Development and Laws Previously In Force

In its capacity to serve as a constitution for the HKSAR, the BL necessarily includes (to some extent) ambiguous terms: ‘Legal certainty should not bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.’² The purpose of the BL is ‘to be ascertained from its nature and other provisions of the [BL], or relevant extrinsic materials’³ After July 1st, 1997, the inconsistencies and ambiguities of BL provisions necessitated interpretation. First, in the absence of a statute the courts define what the law is by referencing relevant precedent and second, the courts decide what the law is according to what is promulgated by statutes, ordinances and regulations. Article 158 of the BL vested the power of interpreting the BL in the National People’s Congress Standing Committee’ (NPCSC), but also stated that the NPCSC would authorize the HKSAR courts to interpret the BL provisions accorded by the region’s autonomy. Although the NPCSC holds the final power of interpretation, Article 158 splits the interpretation duties between the HKSAR judiciary and the NPCSC.

Several cases elucidate the delicate line between acceptable BL vagueness (on a constitutional level) and the need for legal certainty (on a statutory level). First, in *HKSAR v Ng Kung Siu & Another*⁴, Bokhary PJ stated: ‘Where a concept is unclear the courts must clarify it before using it as a test by which to judge what, if any, restrictions may constitutionally be placed on fundamental rights or freedoms.’ Second, in *Leung Kwok Hung and others v HKSAR*, the court examined the constitutional requirement of “prescribed by law” for restrictions under the “public order (ordre public)”. CJ Li held: ‘... it is essential to distinguish between the use of the concept

² Johannes Chan, ‘Basic Law and Constitutional Review: The First Decade’ (2007) HKLJ 407, 423

³ Johannes Chan, ‘Basic Law and Constitutional Review: The First Decade’ (2007) HKLJ 407, 413

⁴ [1999] 3 HKLRD 907 at 929

at the constitutional level on the one hand and its use at the statutory level on the other.⁵ Furthermore, CJ Li stated ‘A constitutional norm is usually and advisably expressed in relatively abstract terms.’⁶ Within this context, interpretation is to clarify ambiguities in the BL post-1997. However, many factors contravene the ROL and SOP traditions.

On June 30th, 1997, Hong Kong transferred its sovereignty over HK to China and the BL came into effect. Article 18 of the BL states that the laws in force in HKSAR are the BL as well as the ‘laws previously in force in Hong Kong, as provided by in Article 8’. Article 8 describes the laws previously in force as ‘... the common law, rules of equity, ordinances, subordinate legislation and customary law ...’, but specifies some exceptions: ‘... except for any that contravene [the BL], and subject to any amendment by the legislature of the [HKSAR].’ Article 160 states further exceptions: ‘... except those which the Standing Committee of the National People’s congress declares to be in contravention of this law.’

Ghai⁷ explains that ‘The provision in the [Sino-British] Joint Declaration for the preservation of laws ‘currently’ in force is a guarantee that the Central Authorities would not upset the laws, not that [HK] legislature may not alter them. Nor is the [BL] a charter for the complete conservation of old laws and institutions.’⁸ Preceding the transfer of HK, the Preliminary Working Committee reviewed the compatibility of laws and repealed several ordinances. In February of 1997 the NPCSC made its Decision under Article 160, which not only repeals laws, but also provides a framework and guidance for the modification of the laws that are to be adopted. According to Ghai, ‘The Decision starts by adopting previous laws and then states how far the previous laws

⁵ [2005] 3 HKLRD 164 at 192

⁶ [2005] 3 HKLRD 164 at 193

⁷ Professor Yash Ghai, Faculty of Law, The University of Hong Kong

⁸ Yash Ghai, *Hong Kong’s New Constitutional Order* (2nd edn Hong Kong University Press, Hong Kong 1999) 377

are to be qualified.’ However, the Decision does not fully succeed in clarifying the ‘scope of the application of previous laws. Its language is vague and it uses concepts (like sovereignty) whose precise meaning or reach is not self-evident, but the operation or modification of laws is dependant on them. Consequently, one cannot be sure how some laws are to be modified. There appears to be no consistency of principles.’⁹ Ambiguous terms and inconsistent modification principles were used in the modification of the BL and it was drafted in Chinese with an official English version, with the Chinese version taking priority in case of discrepancies. Essentially, the pre-1997 phase gave rise to inconsistencies and ambiguities in the BL that now have to be mitigated by interpretation.

⁹ Yash Ghai, *Hong Kong's New Constitutional Order* (2nd edn Hong Kong University Press, Hong Kong 1999) 377