

of English law, such as the Jury Ordinance: the law in force in England relating to juries shall in certain circumstances have force and effect within the territory. Some statutes empower Hong Kong judges to act in particular areas as would their English counterparts, and these can mean that English law, including Acts of Parliament, is received here. Such provisions will in due course be replaced, though to replace some of them will probably prove difficult. Until this happens, the imported law of the SAR includes some Acts of the Parliament of the former sovereign.

NATIONAL LAWS

Article 18 of the Basic Law states that 'National laws shall not be applied in the Hong Kong SAR except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region'. The expression 'national laws' is not defined, but it presumably means decisions, resolutions, orders, declarations, regulations, and laws made by the NPC or its Standing Committee. There were six of these when the Basic Law came into effect, and a further five were added on 1 July 1997. As national laws they presumably prevail over ordinances. They are 'imported' from mainland China, just as Hong Kong as a British colony once imported Acts of Parliament.

6. Law Made in Hong Kong

PRIMARY LEGISLATION

The Legislative Council is declared in the Basic Law to be the legislature of the SAR (BL66) and it is authorized to 'enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures' (BL73). This power to make law is exercised through legislative instruments known as *ordinances* which are enacted by means of a process to be discussed in Chapter 10. Proposed law (a *bill*) is introduced into the Legislative Council where it is read three times, discussed, perhaps amended, and, if agreed to, passed; it is then normally signed by the Chief Executive and brought into operation as part of the law of Hong Kong (BL48). The Legislative Council is a deliberative assembly; it cannot make law without the co-operation of the Chief Executive, who is not obliged to give his 'assent' (signature and promulgation) to a bill. The CE may, if he considers a bill to be incompatible with 'the overall interests of the Region', return it to the Legislative Council for their reconsideration (BL49). (The Governor could simply refuse to assent, though in practice he rarely did so.) The Legislative Council can then pass the original bill again, and if it does so by a two-thirds majority of all members the CE is required either to sign and promulgate it within one month or refuse again — and then, if consultations do not achieve consensus, he *may* (not *must*) dissolve the Council (BL50). This would indicate a crisis in government and it is unlikely ever to occur. After elections the new Legislative Council may pass the original bill again, and if it does so by a two-thirds majority, and if the CE's signature is once more refused, the CE must resign (BL52).

An ordinance is an example of formal, deliberate lawmaking. In the first edition of this book it was stated, then perfectly accurately, that the legislature could issue an ordinance on almost any topic with almost no restriction: legislators could convert into law virtually whatever precepts they wished to see enforced to guide the behaviour of Hong Kong people. But this is no longer true, because since 1 July 1997 the Basic Law limits the power of the legislature to interfere on certain matters, including fundamental rights laid

down in Chapter 3. The Hong Kong Bill of Rights also, through BL39, in effect appears to restrict legislative authority (see below). The law legislators make applies to everyone and must be obeyed by all, including themselves, the executive government, and judges, provided always that it is not in conflict with the Basic Law. It prevails over the common law. But freedom to legislate is curtailed not only by topics over which it has no legislative competence.

In the first place, all laws enacted by the legislature must be reported to the Standing Committee of the NPC. This is 'for the record' and shall not affect the laws' entry into force (BL17). Nevertheless the Standing Committee may 'return' an ordinance if it considers it 'not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region' (BL17). Any ordinance returned in this manner is immediately invalidated. (The same mechanism existed in the pre-1997 constitution, when the Queen could 'disallow' an ordinance, on any ground whatsoever; this power of disallowance was not exercised after 1913. There were also rules regarding the form of bills and limitations on the power of the Governor to assent to bills in certain categories, but these have no equivalent in the Basic Law.)

The authority to make law is very extensive. The courts may nevertheless declare an ordinance to be invalid (and thus void and of no legal significance) on the ground that it contravenes superior legislation. 'Superior legislation' certainly includes the Basic Law (BL11), and some provisions of the Chinese Constitution, and no doubt applicable national legislation as well. It does not include the Bill of Rights, unless (and this is not entirely clear) Article 39 of the Basic Law so provides. (Restrictions on the rights and freedoms enjoyed by Hong Kong residents shall not contravene the implementation of the International Covenant on Civil and Political Rights, and since the Bill of Rights is the implementation of the Covenant it has acquired a status superior to that of ordinances. This seems a sound argument, but it is not, apparently, one accepted by the Chinese authorities. The courts of the SAR have not yet had to consider it.) Inconsistency with superior legislation is perhaps the only strict limitation on the legislative competence of the Legislative Council: an ordinance may be contrary to morality, international law, or natural justice; it may be ill-considered or foolish; it may be retroactive (affecting prior events), unjust, or unenforce-

able — but it will still be valid, provided it does not contradict 'higher' laws.

Contravention of the Basic Law might be considered to arise, not solely in relation to express provisions, but where general principles of the constitution are discerned. Any ordinance which seemed to threaten the ultimate authority of the Chinese government over Hong Kong would be invalid. The doctrine of the separation of powers has been implemented in the Basic Law, and this may prevent the legislature from, for example, giving judicial power to the Chief Executive. Further, there is a common law principle which limits the territorial reach of any law of a 'dependent territory' and this principle could be adapted to apply also to the SAR. Accordingly, the legislature could enact ordinances only for Hong Kong — not for the Antarctic, or Brazil, or the Moon. This is said to be a restriction of competence to make 'extraterritorial' legislation. It does not mean that laws which purport to take effect outside the territorial limits of Hong Kong are necessarily invalid; it means that the legislature must 'mind its own business' and not interfere with someone else's. SAR ordinances which have some genuine connection with the territory would be valid (if not unconstitutional for some other reason), but ordinances with no such connection would be void and could be pronounced so by the courts. There is no mention of such a doctrine in the Basic Law and it seems unlikely that Hong Kong judges would resurrect it; in any event one may be confident that the legislature will 'mind its own business' when passing laws.

The restrictions on the power of the Legislative Council are much greater than existed under the pre-1997 system. There are many uncertainties, regarding, in particular, which provisions of the Basic Law set out principles or topics forbidden to the legislature and which provisions give guidance only. These uncertainties will be resolved by the courts, exercising their power of 'judicial review', and this reveals the important role of the courts in making the SAR constitution work.

SUBSIDIARY LEGISLATION

The primary legislature (the Legislative Council) cannot hope to enact all the statute law regarded as indispensable to a modern community. Therefore it delegates lawmaking authority, usually to

services' within the airport premises. Read literally, this would apply to a woman meeting a friend and offering to carry his bags. But no such interpretation was possible, said the judge: 'the intention which appears to be most in accordance with convenience, reason, justice and legal principles will, in all cases of doubtful significance, be presumed to be the true one.'

OTHER PRINCIPLES

There are other guidelines to which judges may refer. Most of these go under formidable Latin tags such as *generalia specialibus non derogant*, *expressio unius est exclusio alterius*, and *noscitur a sociis*. It is not necessary to explain them here: suffice it to recognize that the law of statutory interpretation is extensive and sophisticated. In theory it provides a basis for predicting how judges will construe legislation. Prediction cannot be certain, however, even where skilled lawyers are involved, and the process by which courts determine what lawmakers intended is never an automatic one.

11. Legal Personnel

Who are the people who create and maintain law and administer the legal system? What roles do they play, and how are they appointed, educated, and organized?

THE CHIEF EXECUTIVE

The Chief Executive of Hong Kong is the most significant official in the constitutional apparatus of the territory: without his signature no ordinance can be promulgated, he is the head of the SAR (BL43) and of the executive branch (BL60), and he also has a modicum of quasi judicial authority in his power to appoint judges and pardon convicted persons or commute their penalties (BL48). He is not a merely formal figure like the monarch in the United Kingdom or the Governor-General of Australia. In Hong Kong the Chief Executive *is* the government (in formal terms the government is 'the executive authorities of the Region' (BL59), but all officials must of course obey him). He is not bound by the advice he receives from the Executive Council (BL56); and although he does not preside over the Legislative Council and has not the total control over its proceedings which the colonial Governor used to possess for most of the colonial period, he can probably still dominate the Council's proceedings. (See Chapter 4 on 'gubernatorial government'.)

In relation to the law, no bill can move from ExCo to LegCo without his approval. The drafting process, carried out in the Department of Justice, is subject to the CE's instructions. He, and he alone in Hong Kong, decides whether to assent to a bill presented to him after the third reading. As the CE in Council (the Executive Council) he makes much of the territory's subsidiary legislation. The enforcement of the law, by police and ICAC and administrative officials, is ultimately his responsibility. Under the Emergency Regulations Ordinance he is given extremely wide powers to deal with situations of emergency or public danger. He may not interfere with the way judges and magistrates carry out

their functions, but through his power to pardon and commute he can interfere with judicial activity after the event.

He is, in one sense perhaps, a servant of the government in Beijing, which appoints him (he is 'accountable to the Central People's Government' (BL43) though also to the SAR), but the 'high degree of autonomy' granted to the SAR is inconsistent with regular instructions passing from the Central People's Government to the CE. In practice he does not and could not personally intervene in every detail of the lawmaking and law-enforcement processes. It would be unconstitutional for him to instruct the Secretary for Justice in the decision whether to prosecute suspected offenders (see BL63) or the Commissioner of the ICAC in investigating allegations of corruption (although the Commission is accountable to him (BL58)), and he may not suspend the operation of law generally or dispense with it in particular cases. Like every other citizen he must obey the law, even if he made it himself, and he may be sued or prosecuted in the courts if he acts illegally. Nevertheless, the CE is pre-eminent in the non-judicial portion of the legal system. (See Chapter 4 for details of his selection.)

LEGISLATORS

The Legislative Council 'shall be the legislature of the Region' (BL66). As such it considers and passes bills, but it cannot bring them into operation without the co-operation of the Chief Executive (BL76). The 'first Legislative Council' (not to be confused with the Provisional Legislative Council 1997-8 which, although it was the first legislature in fact, was not the 'first LegCo' as that term is used in various NPC decisions prior to 1 July 1997) comprises sixty members elected for a two-year term. They are elected either by:

1. geographical constituencies through direct elections (twenty members);
2. functional constituencies (thirty members); or
3. the Election Committee (ten members).

At least 80 per cent of members must be Chinese citizens who are permanent residents of the SAR with no right of abode in any foreign country; the remaining members must be permanent residents though not necessarily of Chinese nationality or without a

foreign right of abode (BL67). Candidates for election were required to uphold the Basic Law and pledge allegiance to the SAR. From the year 2000 onwards elections are to be held every four years.

Traditionally in Hong Kong the government had an assured majority in LegCo: half the members held office under the Crown and were obliged to vote with the government, and the Governor had a casting vote in the unlikely event of a tied house. The non-government appointees never attempted to act as a united opposition party, and even when non-government appointed and elected members attained a majority they could not cause the government to lose office and they did not seek to do so. With the institution in 1991 of direct elections to LegCo on a geographical basis, the Council began to look more like its counterpart in a parliamentary democracy. The legislature elected in 1995 was denounced by mainland Chinese officials as having been created inconsistently with the Basic Law and the principle of 'convergence'. Nevertheless it operated for two years and was a lively body of divergent interests which could not be described as subservient to the executive government. The Provisional Legislative Council which replaced it (until new elections in June 1998) had a rather limited role and was composed of members not disposed to challenge Tung Chee-hwa's administration. The first LegCo of the SAR has not, at the time of writing, been elected, but arrangements for the electoral process are likely to produce a more quiescent body than the last colonial legislature.

LEGAL OFFICERS

The Legal Aid and Registrar General's Departments employ a number of lawyers to administer and advise, but the majority of government lawyers belong to the Department of Justice. Some of these, under the Law Draftsman, prepare the bills which are submitted to LegCo and the subsidiary legislation enacted under powers delegated by ordinance; others, under the Law Officer (Civil Law), undertake the government's civil litigation work and advise other government departments. Perhaps better known are the prosecutors, who conduct criminal trials and appeals and are consulted by the police and other law enforcement agencies. The Director of Public Prosecutions is at the top of the Prosecutions