



Title	The Provisional Legislative Council of the SAR
Author(s)	Chen, AHY
Citation	Hong Kong Law Journal, 1997, v. 27 n. 1, p. 1-11
Issued Date	1997
URL	http://hdl.handle.net/10722/74697
Rights	Creative Commons: Attribution 3.0 Hong Kong License

COMMENT



The Provisional Legislative Council of the SAR

One of the most crucial and yet also most controversial steps taken by China in her preparation for the resumption of the exercise of sovereignty over Hong Kong as from 1 July 1997¹ was the establishment of the Provisional Legislative Council ('PLC') of the Special Administrative Region ('SAR') of Hong Kong. This comment describes the historical background of this matter, sets out the relevant legal acts of the People's Republic of China ('PRC') leading to the creation of the PLC, and discusses the currently controversial issue of whether there exists a sufficient legal basis for the existence of the PLC.

The PLC was not provided for in either the Basic Law of the Hong Kong SAR enacted by the National People's Congress ('NPC') of the PRC on 4 April 1990 or the NPC Decision of the same date on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong SAR ('the 1990 NPC Decision').² Both documents presupposed the 'through train' scenario for the last colonial legislature of Hong Kong: the 1995 election to the Legislative Council would be conducted according to an electoral system (conforming broadly with para 6 of the 1990 NPC Decision) the details of which would be agreed on by the UK and the PRC, and the general rule would be adopted that members of this last colonial LegCo would become members of the first LegCo of the Hong Kong SAR.³ That was why this first LegCo would have a lifespan of two years only (from 1997 until 1999), whereas all subsequent LegCos of the SAR will have a term of office of four years.⁴

As revealed subsequently by the PRC side after Governor Christopher Patten in October 1992 unilaterally introduced (without prior consultation with China) his constitutional reform proposal for the 1995 LegCo election, there was an exchange of correspondence consisting of seven letters between the Foreign Ministers of the British and Chinese governments in January and February 1990.⁵ The Chinese interpretation of the correspondence was that preliminary agreement had been reached on the framework for the 1995 election, while details would still need to be worked out later by further negotiation. It was on this basis that the Chinese government felt optimistic and confident enough about the 'through train' scenario to give recognition to it in the Basic Law and the 1990 NPC Decision, both adopted by the NPC in

¹ As provided for in the Sino-British Joint Declaration on the Question of Hong Kong (1984), para 1. It should be noted that Britain did not agree to describe the reincorporation of Hong Kong into China as China's 'resumption of the exercise of sovereignty over Hong Kong': compare the language of paras 1 and 2 of the Joint Declaration.

² See *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (Beijing: Foreign Languages Press, 1991), p 159.

³ 1990 NPC Decision, para 6.

⁴ *Loc cit*; Basic Law, Art 69 ('BL69').

⁵ For the full text of the correspondence, see *Hong Kong Standard*, 29 October 1992.

April 1990. Indeed, there are no provisions in these documents that address the contingency of the 'through train' scenario becoming impossible to materialise.

The Chinese side was outraged by the Patten reform package released in October 1992,⁶ both because there was no prior discussion with the Chinese side regarding the acceptability of the proposal in the light of the 1990 exchange of correspondence, the provisions of the 1990 NPC Decision, and the 'through train' scenario, and because the content of the proposal was considered to go far beyond the limits set by the Basic Law and the 1990 NPC Decision on the pace of Hong Kong's democratisation. Sino-British relations quickly deteriorated to their lowest point since the time of the Joint Declaration. However, from the point of view of the people of Hong Kong, as well as of the two governments themselves, negotiation leading to a settlement of the dispute was obviously the most rational and satisfactory option. Such negotiation did start in April 1993, and there were altogether seventeen rounds of talks until November 1993, when the negotiations finally broke down. On 24 February 1994, the British side published its version of the positions adopted by it during the negotiations and why they failed in a White Paper entitled 'Representative Government in Hong Kong.'⁷ On 1 March 1994 the Chinese side also published its version of the negotiations and criticised the British document for distorting the facts and evading responsibility for the failure of the talks.⁸

During 1994, the Hong Kong LegCo passed the laws proposed by the Hong Kong government for the full implementation of the electoral arrangements proposed by Governor Patten.⁹ At the same time, the PRC government decided to abandon the 'through train' model for the 1997 transition and proceeded to establish a 'second stove' — a new governmental apparatus to be put in place before the moment of transition on 1 July 1997 so that it could assume the task of executive and legislative governance immediately thereafter without any political or legal 'vacuum' being allowed to arise.¹⁰

⁶ The proposal was set out in the Governor's Policy Address at the opening of the 1992-93 session of LegCo on 7 October 1992. For the text of the speech, see Johannes MM Chan, 'Hong Kong,' in Albert P Blaustein (ed), *Constitutions of Dependencies and Special Sovereignities: United Kingdom — British Dependent Territories* (Dobbs Ferry, New York: Oceana Publications, 1993), Booklet 3, p 69.

⁷ *Representative Government in Hong Kong* (Hong Kong: Government Printer, 1994), also published in *Hong Kong Standard*, 25 February 1994.

⁸ *South China Morning Post*, 1 March 1994; also published in *Facts About a Few Important Aspects of Sino-British Talks on 1994/95 Electoral Arrangements in Hong Kong* (Hong Kong: Joint Publishing, 1994) (bilingual version).

⁹ Electoral Provisions (Miscellaneous Amendments) Ordinance 1994 (No 10 of 1994); Legislative Council (Electoral Provisions) (Amendment) Ordinance 1994 (No 57 of 1994). See generally Albert H Y Chen, 'The Legal Foundation of the Legislative Council Election 1995,' in H C Kuan, S K Lau, K S Louie, and Timothy Wong (eds), *The 1995 Legislative Council Elections in Hong Kong* (Hong Kong: Chinese University Press, forthcoming).

¹⁰ As far as the judicial system is concerned, the enactment of the Hong Kong Court of Final Appeal Ordinance (No 79 of 1995) in August 1995 (in implementation of an agreement reached in June 1995 between the PRC and UK governments in the Joint Liaison Group on the composition, jurisdiction, and other aspects of the court) made it possible for the Court of Final Appeal of the Hong Kong SAR to start operating on 1 July 1997.

In fact, a few months after the Patten proposal was released in late 1992, China already took steps towards a more activist approach to the preparation for the 1997 handover. When the NPC held its annual session in March 1993, it passed a Decision to Authorise the NPC Standing Committee to Establish a Preliminary Work Organ of the Preparatory Committee for the Hong Kong SAR.¹¹ In pursuance of this decision, the NPC Standing Committee on 2 July 1993 adopted a Decision to Establish the Preliminary Work Committee ('PWC') of the Preparatory Committee for the Hong Kong SAR.¹²

The idea of establishing a provisional legislature originated in the PWC. However, it seems that the idea was not yet well-developed as of August 1994, when the NPC Standing Committee passed a Decision regarding a Motion proposed by Cheng Yiu-tong and 31 other deputies to the NPC ('1994 NPCSC Decision').¹³ This Decision, *inter alia*, states unequivocally that the last legislature of the British Hong Kong administration shall cease to exist after 30 June 1997,¹⁴ and provides that the Preparatory Committee for the SAR shall, in accordance with the 1990 NPC Decision, 'be responsible for matters relating to the preparation for the establishment of the Hong Kong SAR, prescribe the specific method for forming the first SAR legislative council, and organise the first SAR legislative council.' There is no mention whatsoever in the document of a *provisional* legislative council. The language regarding responsibility for 'matters relating to the preparation for the establishment of the Hong Kong SAR' and 'prescribing the specific method for forming the first SAR legislative council' is identical to the corresponding wording in the 1990 NPC Decision.¹⁵

By May 1995, it was clear that the PWC had decided to recommend, using the justification of a kind of 'doctrine of necessity,' the establishment of a provisional legislative council ('PLC') to perform essential functions which need to be performed by a legislature in the interim period between 1 July 1997 and the electoral formation of the 'first Legislative Council' mentioned in the Basic Law, the 1990 NPC Decision, and the 1994 NPCSC Decision. As explained by visiting mainland Chinese members of the Political Affairs Sub-Group of the PWC in a meeting with Hong Kong Affairs Advisors in Hong

¹¹ [1993] Xinhua Monthly, No 4, p 50 (in Chinese).

¹² [1993] Xinhua Monthly, No 7, p 37 (in Chinese).

¹³ [1994] Xinhua Monthly, No 9, p 17 (in Chinese).

¹⁴ The 1994 NPCSC Decision also provides for the termination of the terms of office of the existing Urban Council, Regional Council, and District Boards on 30 June 1997. Regarding the post-30 June arrangements in respect of these bodies, see the Preparatory Committee's Decision on the Establishment of Provisional District Organisations adopted on 1 February 1997 at the end of its 8th plenary session (Wen Wei Pao, 2 February 1997, p A6 (in Chinese)).

¹⁵ The official translation of the 1990 NPC Decision (which translation is less authoritative than the Chinese original: see the Decision of the NPC Standing Committee on the English Text of the Basic Law, 28 June 1990, in *The Basic Law* (note 2 above), p 164) refers to 'responsible for preparing the establishment of the Region' instead of 'responsible for matters relating to the preparation for the establishment of the Region,' but I believe that the latter is a translation that is more faithful to the Chinese original.

Kong on 19 May 1995,¹⁶ the need to establish a PLC was dictated by the following considerations:

(a) The 1994 NPCSC Decision provides for the discontinuation of all three tiers of councils (LegCo, the Urban and Regional Councils, and the District Boards) after 30 June 1997.

(b) New rules governing the right to vote need to be introduced by the HKSAR both because such right is linked to the concepts of Chinese citizenship and Hong Kong permanent resident status (the concept of Chinese citizenship is not recognised in the existing law of Hong Kong, and that of the Hong Kong permanent resident in existing law also needs to be re-defined in accordance with the Basic Law and other relevant norms),¹⁷ and because a new electoral system has to be established to replace the system introduced by Governor Patten.

(c) It would therefore take a considerable period of time to organise the elections to the first LegCo, Urban and Regional Councils, and District Boards of the HKSAR. Among these three tiers of councils, LegCo will be the last to be formed. This is because it is anticipated that the electoral system will provide for some form of 'indirect' election to a number of seats in LegCo from functional constituencies and/or an election committee.¹⁸

(d) In the period from 1 July 1997 to the formation of the first LegCo of the SAR in accordance with the rules prescribed in the 1990 NPC Decision, there will be a kind of 'legislative vacuum' in the HKSAR in the sense that there exists no legislature that can perform functions assigned to the legislature under the HKSAR's constitutional framework. These functions were said to include:

- making laws that cannot wait until the formation of the first SAR LegCo (such as laws to elaborate on Art 24 of the Basic Law regarding issues of Chinese citizenship and HKSAR permanent resident status; to give effect to Art 23 of the Basic Law regarding matters that are not yet provided for in the existing law (for example secession, subversion, foreign political organisations);¹⁹ to provide for new elections to the three tiers of councils; and to provide for interim arrangements for the Urban and Regional Councils and District Boards before they are re-elected;

¹⁶ The author was present at the meeting as a Hong Kong Affairs Advisor.

¹⁷ BL24; Interpretations of the NPC Standing Committee on Several Questions relating to the Implementation of the PRC Nationality Law in the Hong Kong SAR (adopted on 15 May 1996), and Opinion of the Hong Kong SAR Preparatory Committee on the Implementation of Article 24(2) of the Basic Law (adopted on 10 August 1996 at its 4th plenary session), both collected and re-printed in *The Post-1997 Nationality, Right of Abode and Permanent Resident Status of Hong Kong Residents* (Hong Kong: One Country Two Systems Economic Research Institute, 1996), pp 41-5 (in Chinese).

¹⁸ See 1990 NPC Decision, para 6. Since 1985, the Urban Council and the Regional Council have both been electoral constituencies. In the Patten reform package, there was an election committee consisting of elected District Board members.

¹⁹ The British Hong Kong government drafted a bill for the purpose of adapting the existing provisions on treason, sedition, and related offences in the Crimes Ordinance to the requirements of Art 23 of

- approving the budget, taxation, and expenditure of the SAR government;²⁰
- endorsing the appointment of the judges of the Court of Final Appeal and the Chief Judge of the High Court;²¹
- participating in the joint nomination of the members of the Committee for the Basic Law to be established under the NPC Standing Committee (this function is to be performed by the President of LegCo).²²

(e) There is therefore a need to establish a provisional LegCo to perform these essential functions pending the election of the first SAR LegCo in accordance with the rules regarding its composition prescribed in the 1990 NPC Decision. Otherwise alternative interim arrangements would have to be made for such essential legislative functions in respect of the HKSAR to be discharged instead by the NPC Standing Committee, the Preparatory Committee for the HKSAR, or the Chief Executive of the HKSAR. From the point of view of the SAR's autonomy and the division of executive and legislative powers within its constitutional framework, these options would obviously be less preferable than assigning the functions to a provisional LegCo (PLC).

(f) The objection that the PLC (which has to be formed quickly so as to assume its functions as from 1 July 1997, and would inevitably have to be constituted in a manner less democratic than the full-scale elections anticipated in the 1990 NPC Decision and would therefore be of dubious legitimacy) may usurp the functions of the first SAR LegCo could be overcome by limiting the PLC's legislative powers to the enactment of those laws that are essential and indispensable and cannot wait until the establishment of the first SAR LegCo, and by limiting the PLC's term of office to a maximum period of one year.

In December 1995, the work of the PWC was completed and it submitted its final report (consisting of 46 documents compiled by its five sub-groups on political affairs, economy, law, culture, and society and security respectively)

the Basic Law. The Bill was discussed at the Sino-British Joint Liaison Group, but the Chinese side did not agree to it. The British Hong Kong government then decided unilaterally to introduce the Bill into the Legislative Council: see the Crimes (Amendment) (No 2) Bill 1996, Hong Kong Government Gazette 1996, Legal Supplement No 3, p C2930 (published on 29 November 1996). The Preparatory Committee responded by deciding at its 7th plenary session in December 1996 that if the Bill were passed into law, the committee would recommend to the NPC Standing Committee that the amendments introduced by the law should not be adopted as part of the laws of the HKSAR under BL160. BL23 also requires the SAR to make a law on state secrets. As regards this aspect, the Joint Liaison Group succeeded in reaching agreement on 6 December 1996 regarding the localisation of the UK official secrets legislation that is currently applied to Hong Kong (including the amendment made by the Official Secrets Act 1989 which was made applicable to Hong Kong by the Official Secrets Act 1989 (Hong Kong) Order 1992 (S1 1992 No 1301)). Consequently, the Official Secrets Bill 1996 was introduced into the Legislative Council: see Hong Kong Government Gazette 1996, Legal Supplement No 3, p C3045 (published on 13 December 1996).

²⁰ See BL73(1), (2).

²¹ BL73(7).

²² See the Decision of the NPC Approving the Proposal by the Drafting Committee for the Basic Law of the HKSAR on the Establishment of the Committee for the Basic Law of the HKSAR under the NPC Standing Committee, passed by the NPC on the same date as the passage of the Basic Law (4 April 1990) and published together with the Basic Law.

to the NPC Standing Committee.²³ One of its recommendations was the establishment of the PLC by the SAR Preparatory Committee that was to be formed in early 1996.

On 26 January 1996, the Preparatory Committee ('PC') for the HKSAR was appointed in accordance with the 1990 NPC Decision, which provides, *inter alia*:

Within the year 1996, the NPC shall establish a Preparatory Committee for the HKSAR, which shall be responsible for [matters relating to the preparation for]²⁴ the establishment of the Region and shall prescribe the specific method for forming the first Government and the first Legislative Council in accordance with this Decision.²⁵

The Committee consists of 150 members, including 94 from Hong Kong and 56 from mainland China.

At the conclusion of the second plenary session of the PC on 24 March 1996, the PC passed a Decision on the Establishment of the Provisional Legislative Council of the HKSAR. The Decision ('the PC Decision on the PLC') expressly refers to the 1990 NPC Decision²⁶ as the legal basis for the establishment of the PLC. The PC Decision provides for the election of the PLC by the Selection Committee for the First Government of the HKSAR.²⁷ It also specifies the powers and term of office of the PLC. There is no official English translation of this Decision, but the Hong Kong government has prepared a translation which is reproduced below as an appendix to this article for ease of reference.²⁸

On 11 August 1996, the PC at its fourth plenary session passed the Measures for Forming the Selection Committee for the First Government of the HKSAR. At the conclusion of its fifth plenary session on 5 October 1996, the PC adopted the Measures for Forming the Provisional Legislative Council of the HKSAR as well as the Measures for Selecting the First Chief Executive of the HKSAR.²⁹ At the sixth plenary session of the PC on 1–2 November 1996, the Selection

²³ Wen Wei Pao (Hong Kong), 9 December 1995, p A4.

²⁴ See note 15 above.

²⁵ Para 2 of the Decision.

²⁶ Particularly the phrase 'matters relating to the preparation for the establishment of the HKSAR' in para 2 of the 1990 Decision as set out above.

²⁷ The establishment of such a Selection Committee is provided for in the 1990 NPC Decision, which provides that '[t]he Selection Committee shall recommend the candidate for the first Chief Executive through local consultations or through nomination and election after consultations, and report the recommended candidate to the Central People's Government for appointment.' There is no mention in the 1990 Decision of the role of the Selection Committee in forming the first (or provisional) legislature of the SAR.

²⁸ The author is most grateful to Mr Daniel Fung QC, Solicitor General of Hong Kong, for supplying him with this English translation.

²⁹ For the Chinese text of these Measures, see [1996] Xinhua Monthly, No 11, p 57 (in Chinese).

Committee was elected. The Selection Committee elected the Chief Executive (strictly speaking, the candidate to be recommended for appointment as the Chief Executive by the Central People's Government) on 11 December 1996,³⁰ and it elected the PLC on 21 December 1996.³¹ According to the PC Decision on the PLC, the PLC is authorised to start its work (including 'examining' and 'passing' laws that are to come into effect on the establishment of the SAR) before 1 July 1997.³²

The establishment of the PLC raised two major legal issues:

- (1) Does there exist a sufficient legal basis for the existence of the PLC?
- (2) What is the legal status of the PLC before 1 July 1997?

The legal basis of the PLC

The direct and immediate source of the PLC's authority and legitimacy is the PC Decision on the PLC, which purports to derive its own authority and legitimacy from the 1990 NPC Decision. As pointed out above, neither the 1990 NPC Decision nor the Basic Law itself provided for or contemplated the establishment of a PLC, because they presupposed that the 'through train' could work. Furthermore, even though the 1994 NPCSC Decision expressly rejected the 'through train,' that Decision simply repeated the wording of the 1990 NPC Decision regarding the tasks of the Preparatory Committee (including prescribing the electoral arrangements for the first LegCo of the SAR, and dealing with matters relating to the preparation for the establishment of the HKSAR) and did not expressly refer to any power on the part of the PC to establish a PLC.

There is therefore considerable uncertainty regarding whether the 1990 NPC Decision can be so broadly and liberally interpreted as to imply into it a power conferred on the PC to establish a PLC if the 'through train' scenario fails to materialise.³³ The issue will arise if, after 1 July 1997, the validity of any law or resolution passed by the PLC is questioned in the courts of the HKSAR. If the courts were to adopt a more literal and narrow approach in interpreting the 1990 Decision, rely on the *eiusdem generis* rule, take into account the absence of any reference to a PLC even in the 1994 NPC Decision, and consider the possible inconsistency between the existence of a PLC formed in the manner prescribed by the PC and the Basic Law itself, then the likelihood of the legality

³⁰ Mr Tung Chee-hwa was elected, and was formally appointed as Chief Executive (designate) of the HKSAR by the Premier of the PRC on 16 December 1996.

³¹ The President of the PLC was elected by the PLC when it first met in Shenzhen on 25 January 1997. Mrs Rita Fan was elected to this office.

³² See paras 1 and 6 of the Decision (note 28 above).

³³ For this view, see Zeng Yuwen, 'The Legality of the Establishment of the Provisional Legislative Council: Common Law Perspectives,' in Ta Kung Po, 21 December 1996, p A10 (in Chinese).

of the PLC being successfully challenged would by no means be minimal. This, in turn, would precipitate a constitutional crisis in the early life of the HKSAR.

Under the PRC Constitution, the NPC Standing Committee has the ultimate authority to interpret laws.³⁴ (Some of the normative enactments of the NPC as well as the NPC Standing Committee are called 'decisions' rather than 'laws,' but they have full legal force and may be regarded as laws for all purposes.³⁵) The Basic Law of the HKSAR also confirms the NPC Standing Committee's power to interpret the Basic Law, although the courts of the HKSAR also share this power to a considerable extent.³⁶ Hence the doubt regarding the legal basis of the PLC can in theory be resolved by the NPC Standing Committee exercising its power to interpret the 1990 NPC Decision, the Basic Law, and the 1994 NPCSC Decision, and confirming that the establishment of the PLC by the PC Decision on the PLC is consistent with the three former enactments.

More recently, it has been reported³⁷ that the approach which will be adopted by the Chinese authorities in clarifying the legal basis for the establishment of the PLC is to deal with the matter through the NPC itself instead of through the NPC Standing Committee. When the NPC meets in March 1997, it will receive a report from the PC regarding the latter's work. The NPC will pass a resolution or decision approving the report, and it is likely that the resolution (which will have full legal force) will contain language confirming that the PC Decision on the PLC has been validly passed on the basis of the 1990 NPC Decision, and that the PLC has legislative powers in respect of the HKSAR to the extent provided for in the PC Decision. As the resolution will, under the constitutional and legal system of the PRC, be legally binding on the courts of the HKSAR, it will suffice for the purpose of forestalling any legal challenge to the PLC mounted before the courts of the HKSAR.

This analysis, of course, is based on the presuppositions of legal positivism. It is beyond the scope of this comment to address the issue of the moral, as distinguished from the legal, legitimacy of the PLC, which will require an in-depth analysis of the chain of events leading to the breakdown of the 'through train' model of the 1997 transition of Hong Kong's legislature and the degree of responsibility of the PRC and UK governments for such breakdown.

The legal status of the PLC

The British Hong Kong government strenuously opposed the establishment of the PLC and particularly the proposal that it start operating before 1 July

³⁴ PRC Constitution, Art 67(4).

³⁵ See generally Albert H Y Chen, *An Introduction to the Legal System of the People's Republic of China* (Singapore: Butterworths Asia, 1992), ch 6.

³⁶ BL158.

³⁷ See eg Hong Kong Economic Times, 31 January 1997, p A13 (in Chinese).

1997.³⁸ The British Hong Kong government sought to maintain its authority and effective governance of Hong Kong until the handover date,³⁹ and from this point of view it was of paramount importance that there should not be two legislatures existing or being seen to exist in Hong Kong before the handover date. It has been pointed out that if the PLC were established in Hong Kong before 1 July 1997, the Hong Kong government might apply for an injunction to prevent it operating.⁴⁰

It was probably because of this threat, as well as the applicability of the Societies Ordinance to the PLC should it be set up in Hong Kong, that the PC decided that Shenzhen would be the home of the PLC before 1 July 1997. However, as was pointed by Vice-Premier Qian Qichen (in his capacity as Chairman of the PC) in his speech at the opening of the eighth plenary session of the PC on 31 January 1997,⁴¹ the PLC of the HKSAR and the existing LegCo in Hong Kong belong to 'two different legal orders; the questions regarding when the PLC should start its work and what is the scope of its work are to be decided by the relevant decisions of the NPC and the PC.'

The nature of the legal status of the PLC before 1 July 1997, as well as the nature of the constitutional and legal transition on 1 July, can probably be best understood with reference to Kelsen's theory of the grundnorm of a legal system.⁴² Before 1 July, the grundnorm of Hong Kong's legal system is a norm that presupposes the validity of all prerogative legislation (particularly the Letters Patent and the Royal Instructions which form the constitutional foundation of the executive, legislative, and judicial branches of the colonial government in Hong Kong) and Acts of Parliament. On 1 July, a shift in the grundnorm — a revolution in the technical legal sense — will occur, and the new grundnorm is one that presupposes the validity of the Constitution of the

³⁸ For Governor Patten's views on the PLC, see his policy address at the opening of the 1996-97 session of the Legislative Council on 2 October 1996, esp paras 57-63, published in *South China Morning Post*, 3 October 1996, '6-page Special on the Policy Address 96.' On 20 December 1996, the day before the election of the PLC took place, the British Foreign Secretary Mr Malcolm Rifkind issued a statement alleging that the establishment of the PLC would be contrary to the Joint Declaration and the Basic Law, and suggesting that the issue should be referred to an international court. The suggestion was however rejected by the Chinese side when the Chinese Foreign Minister, Mr Qian Qichen, met with Mr Rifkind in Singapore on 14 February 1997: see *South China Morning Post* and *Ming Pao*, 15 February 1997.

³⁹ Para 4 of the Joint Declaration provides that the UK government will continue to be responsible for the administration of Hong Kong until 30 June 1997.

⁴⁰ Section 21J of the Supreme Court Ordinance empowers the High Court to grant an injunction restraining a person from acting in a public office in which the person is not entitled to act. It is however doubtful whether this provision is applicable to the case of the PLC, which does not operate under the existing legal order of Hong Kong (based ultimately on the Letters Patent issued by the British sovereign) and which does not make laws that come into effect before 1 July 1997.

⁴¹ *Wen Wei Pao*, 1 February 1997, p A8.

⁴² For a detailed and penetrating analysis of the limits of Kelsen's and Hart's legal positivism as applied to the case of Hong Kong's 1997 transition and legal continuity after the transition, see Raymond Wacks, 'One Country, Two Grundnormen? The Basic Law and the Basic Norm,' in Raymond Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993), ch 6.

PRC (from which the validity of the Basic Law of the HKSAR is derived).⁴³

A grundnorm of a legal system provides a unity for all its legal norms existing at various levels of its hierarchy of norms (eg constitution, legislation, subordinate legislation). We can therefore identify and define a legal order with reference to the grundnorm that supplies the foundation for the legal order. The pre-1 July 1997 legal order in Hong Kong is a totally different order from the post-1 July legal order. The former is part of the legal order of the UK and shares with the UK legal system the same grundnorm, whereas the latter is part of the legal order of the PRC and shares with its legal system the same grundnorm. This, then, is the legal meaning of the political and administrative transfer of Hong Kong and sovereignty (or 'the exercise of sovereignty' as the PRC side prefers to call it) over Hong Kong from the UK to the PRC.

The PLC belongs to the PRC legal order, whereas the current LegCo in Hong Kong belongs to the UK legal order. The PLC was established by the PC Decision on the PLC, which in turn derives its authority from the 1990 NPC Decision made by the NPC pursuant to the PRC Constitution. On the other hand, the current LegCo in Hong Kong was established in accordance with the Letters Patent issued by the Crown in the UK. This existing legal order in Hong Kong recognises one and only one legislature, which is the current LegCo elected in 1995 in accordance with the Patten reform package. In this legal order, the PLC is a non-entity. The colonial LegCo and the PLC are separated by a distance as wide as the incommensurability of two different legal orders.

But when 1 July 1997 arrives, what is hitherto alien to the Hong Kong legal order will become its own. Hong Kong will be absorbed into the legal order of the PRC, and will adopt as its own the grundnorm of the PRC legal system. The courts of Hong Kong will no longer be the Queen's courts, but will owe allegiance ultimately to the Constitution of the PRC. When this time comes, the PLC no longer needs to take refuge in Shenzhen. It will assume full legal authority as the legislature of the HKSAR (subject to the point in question (1) above being satisfactorily resolved). Whereas before 1 July 1997, the Hong Kong courts can and must ignore any act done by the PLC, after 1 July the SAR courts will have to give such acts full legal recognition, including possibly acts done before 1 July. After all, such acts, whether done before or after 1 July, are acts within the same legal order: the legal order of the PRC as characterised by the grundnorm that presupposes the validity of the PRC Constitution.

*Albert H Y Chen**

⁴³ The Hong Kong Act 1985 enacted by the UK Parliament provides for the termination of British sovereignty over Hong Kong as from 1 July 1997. However, the exercise of sovereignty and jurisdiction over Hong Kong by the PRC as from 1 July 1997 is not provided for in, nor can it be derived from, this UK Act of Parliament.
*Reader, Department of Law, and Dean of the Faculty of Law, University of Hong Kong.

APPENDIX

Decision of the Preparatory Committee on the Establishment of a Provisional Legislature of the HKSAR (approved in the second plenary session of the Preparatory Committee on 24 March 1996)

According to the second paragraph of the 'Decision of the NPC on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR' adopted on 4 April 1990, the Preparatory Committee decided the following:

(1) To set up a provisional legislature of the HKSAR. The provisional legislature shall be established and start operation after the first Chief Executive of the HKSAR is chosen.

(2) The provisional legislature shall have sixty members. Chinese citizens who are permanent residents of Hong Kong and who have no right of abode in foreign countries shall form the majority, while no more than 20 per cent of the members may be non-Chinese permanent residents and permanent residents who have right of abode in foreign countries.

(3) The provisional legislature shall be elected by the Selection Committee for the First Government of the HKSAR. Detailed arrangements shall be decided by the Preparatory Committee.

(4) Members of the provisional legislature shall uphold the Basic Law, pledge allegiance to the HKSAR, and meet the relevant requirements in the Basic Law regarding qualification for membership of the legislature.

(5) The tasks of the provisional legislature are:

- 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.

(6) Laws examined and passed by the provisional legislature before 1 July 1997 shall be implemented from the date of the establishment of the HKSAR.

(7) The provisional legislature shall cease to operate after the first legislature of the HKSAR is formed; this will be no later than 30 June 1998.