

Six-monthly Report on Hong Kong January–June 1999

Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty July 1999

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FOREWORD

This is the fifth in the series of six-monthly reports on the implementation of the Sino-British Joint Declaration on Hong Kong, which the Government has undertaken to present to Parliament at least until the end of the Joint Liaison Group. It covers the period from 1 January to 30 June 1999.

As co-signatory to the Joint Declaration and as a major investor in Hong Kong, we take seriously our political and moral responsibilities towards the people of Hong Kong. They underpin our continuing interest in developments there and in seeing the essential features of Hong Kong's way of life and systems maintained. As our earlier reports have made clear, the Government considers that respect for the principles and values enshrined in the Joint Declaration is the key to ensuring Hong Kong's continued prosperity and maintaining its reputation as an international city. With the passing of the second anniversary of the handover, our assessment is that the Governments of China and of the Hong Kong Special Administrative Region (SAR) remain committed to making a success of "One Country, Two Systems" and that on the whole the system is working well in practice.

This is not to say that there have not been controversial issues, most notably in legal and constitutional matters. In particular, developments surrounding the Court of Final Appeal's judgments on right of abode have led to understandable and genuine concerns both locally and internationally. The SAR Government has reiterated its commitment to maintaining the rule of law, the authority and standing of the Court of Final Appeal and the independence and integrity of the judiciary. We welcome this. We hope that all concerned will uphold their commitment to the judicial process. It is paramount that there should be no erosion of Hong Kong's reputation as a place where the rule of law is fully respected and scrupulously upheld.

We continue to address such issues in the Sino-British Joint Liaison Group (JLG), which will continue to meet until the end of this year and whose most recent plenary meeting took place in London on 16 and 17 March; the next will take place in Beijing in the autumn. We welcome the constructive role which the JLG plays as a forum for discussion with China of Hong Kong issues. Our commitment to the principles and values enshrined in the Joint Declaration will not diminish after the JLG ends its work on 31 December 1999. We are also committed to developing closer Sino-British relations, which are, I believe, in the best interests of Hong Kong.

As well as actively supporting Hong Kong's right to run its own affairs and to take its own decisions within the framework of the Joint Declaration, we want to strengthen our bilateral relationship with Hong Kong – one that is quite distinct from our pre-handover links, yet which in many respects builds on those ties. We work with the Hong Kong SAR Government and support its interests in many areas important to its continued well-being and economic success, including strategic trade controls and promoting visa-free access. A succession of senior visitors to and from Hong Kong has demonstrated the high level of co-operation and mature dialogue between us. The late Derek Fatchett, in his all too short term in office, visited Hong Kong in April and played a key role in shaping that new and modern relationship.

Our close interest in developments in Hong Kong, our responsibilities as a co-signatory of the Joint Declaration and our efforts to strengthen links between the United Kingdom and Hong Kong are the main themes of our work on Hong Kong affairs. That work will remain a priority for the British Government over the years ahead.

ROBIN COOK

Secretary of State for Foreign and Commonwealth Affairs

July 1999

SIX-MONTHLY REPORT ON THE IMPLEMENTATION OF THE JOINT DECLARATION ON HONG KONG

In the six months since the beginning of this year, we have continued to follow closely developments in Hong Kong.

RIGHT OF ABODE

The dominant issue over the period of this report was the events following two judgments by the Court of Final Appeal (CFA) on 29 January relating to appeals against Hong Kong's No 2 and 3 Immigration (Amendment) Ordinances. The background is given in Cm 3831 and Cm 4019.

The judgments covered a number of important issues relating to the right of abode in Hong Kong under Article 24 of the Basic Law, as well as a number of constitutional points. One judgment dealt with children born in mainland China, either of whose parents had right of abode in Hong Kong. The other judgment dealt with right of abode in Hong Kong for children of unmarried parents.

The judgments granted right of abode in Hong Kong to all children born in mainland China to at least one parent with right of abode in Hong Kong, even if the parent had become a Hong Kong permanent resident after the child was born. The Ordinances had excluded illegitimate children and those born before at least one parent had become a Hong Kong permanent resident. The CFA also upheld the requirement for those wishing to exercise their right of abode to obtain a "Certificate of Entitlement" before coming to Hong Kong. But the Court ruled that it was not lawful for the SAR Government to require those who had obtained a Certificate of Entitlement also to obtain a One-Way Permit (effectively a mainland exit visa) in order to come to Hong Kong. The SAR Government had justified this requirement by reference to Article 22(4) of the Basic Law. In principle, the judgments opened the way to a substantial wave of new immigration to Hong Kong from mainland China.

The CFA also found that retrospective application of the Ordinances to 1 July 1997 was unconstitutional. It found that the CFA had the jurisdiction to interpret provisions of the Basic Law which fall within Hong Kong's autonomy without reference to the Standing Committee of the National People's Congress (NPC) in Beijing. And it upheld the legality of the provisional legislature.

The judgments were widely welcomed in Hong Kong and internationally as a visible indication of Hong Kong's legal and judicial autonomy. Concerns were expressed in some quarters, however, including by mainland Chinese legal experts. Some argued that, in the *obiter dicta* to one of its judgments, the Court had arrogated to itself the right to examine and overrule acts of the NPC. There were also concerns about the immigration implications. The British Consulate-General issued a statement making clear that we welcomed the re-affirmation of Hong Kong's autonomy in judicial matters, which was enshrined in the Joint Declaration; and noted that the judgments had bolstered international confidence in the integrity of "One Country, Two Systems". It also made clear that any move to restrict the independent judicial power of the Court would be a matter of serious concern to us.

In an unprecedented move aimed at resolving the controversy arising from the CFA judgments, the SAR Government asked the CFA for clarification of specific parts of the judgment relating to the NPC and its Standing Committee. In response, the CFA found that: its jurisdiction to interpret the Basic Law was derived by authorisation from the Standing Committee of the NPC; and it could not question the authority of the Standing Committee to interpret the Basic Law, or the NPC's authority to perform acts which were consistent with the Basic Law. The substance of the original judgments was not affected; nor did the SAR Government seek this at this stage. The SAR Government welcomed the clarification, reiterating that they had been obliged to seek it because of the exceptional circumstances. The Chinese Government welcomed the clarification as resolving up to that point the controversy over their concerns.

The focus then shifted to the immigration implications of the judgments. In late April, the SAR Government released preliminary survey results which suggested that Hong Kong might need to accommodate a substantial wave of new arrivals, at significant cost, within 10 years. The methodology for obtaining their figures and the decision to release them while the survey was still continuing were criticised in many quarters. Their release provoked widespread public concern that Hong Kong would be unable to cope, and there was vigorous public discussion of the options for restricting right of abode. The SAR Government made clear that the Chinese Government hoped that Hong Kong would be able to deal with the situation on its own.

The SAR Government canvassed four options for resolving the challenge. These were: letting all those eligible under the CFA's January judgments enter Hong Kong, which was thought to carry unbearable consequences; getting the Court to revisit its judgments in the context of a new case, which was unpredictable and enjoyed little obvious support; amendment of the Basic Law in order to restrict eligibility to right of abode; and a request to the NPC to issue its own interpretation of the Basic Law's right of abode provisions.

Amendment of the Basic Law enjoyed substantial support from the Hong Kong Bar Association and a large number of legislators, particularly those in the democratic camp. They argued that it would be the most natural and acceptable solution in a common law jurisdiction, such as Hong Kong; that it would follow procedures laid out in the Basic Law; and would preserve the maximum authority of the CFA and the judiciary. The SAR Government, however, was concerned that this option would take too long, as amendment would need to be considered by the full NPC plenary, which meets once a year in the spring. It was also unsure that the NPC would be prepared to amend the Basic Law if it considered that its meaning was already clear, and that the CFA's interpretation was erroneous.

Instead, the SAR Government argued in favour of seeking interpretation. It argued that this would allow the crisis to be averted at the earliest possible date; that the interpretation would be consistent with the more restrictive approach envisaged before the handover; that the "original legislative intent" of the Basic Law could then be correctly reflected in Hong Kong's statutes; and effective entry controls once again put in place for mainland residents. The Executive Council (ExCo) on 18 May approved a proposal from the SAR Government to ask the Standing Committee to clarify:

- whether the more restrictive interpretation of Article 24(2) of the Basic Law (which defines permanent residents of the SAR) endorsed by the Hong Kong SAR Preparatory Committee in 1996 reflected the original legislative intent of the Basic Law and whether it had legal effect;
- whether, to qualify under Article 24(2)(3) of the Basic Law, both or either of the parents of children in mainland China should have acquired the status of Hong Kong permanent resident at the time of the child's birth;
- whether Article 22(4) of the Basic Law (on travel to Hong Kong by people from other parts of China) applied to children in mainland China born of Hong Kong permanent residents. The CFA had said that it did not;
- whether the interpretation would have retrospective force to the date of enactment of the Basic Law (ie 1 July 1997).

The SAR Government did not however apply for an interpretation in respect of the eligibility to right of abode of children born out of wedlock.

While some welcomed the SAR Government's decision to seek interpretation as the most appropriate means to resolve the challenge of large-scale immigration at an early date, it was sharply criticised in some quarters as undermining the authority of the CFA and confidence in the rule of law. Critics also argued that there was nothing in the Basic Law to allow interpretation to be sought after a CFA decision was made; that the procedure was thus not legal; and that it was fundamentally and constitutionally unsound, because it upset the delicate balance between "One Country, Two Systems", laid out in the Basic Law. The SAR Government rejected claims that interpretation was an unlawful solution, making clear its view that it was sanctioned by the Basic Law. It continued to emphasise the unusual circumstances in which it found itself, and the exceptional nature of the decision to clarify the intent behind the Basic Law on right of abode, a

question of great significance. It said explicitly that it would not resort to the route of seeking interpretations of the Basic Law indiscriminately. We note, however, that the SAR Government has not ruled out using this route over future issues.

On 26 June, the Standing Committee of the NPC endorsed the interpretation sought by the SAR Government of Articles 22 and 24 of the Basic Law. In its interpretation, the Standing Committee stated that the relevant provisions concerned affairs governed by the Central Authorities or the relationship between the Central Authorities and the SAR. The Standing Committee said that the CFA had not sought an interpretation from the NPC Standing Committee before reaching its judgment, as provided for in Article 158(3) of the Basic Law; and that the CFA's judgment had run counter to the original legislative intent of the Basic Law. It said that Hong Kong courts should follow the Committee's interpretation when adjudicating future cases on right of abode.

The effect of the interpretation is to restrict the eligibility to right of abode for those individuals born outside Hong Kong to those with at least one parent who was a Hong Kong permanent resident at the time of the individual's birth, thereby restoring the time of birth limitation struck down by the CFA; and to require such individuals to follow the relevant mainland procedures to exit mainland China before they may enter Hong Kong. The interpretation did not comment directly on the question of retrospectivity, on which the SAR Government had hoped for clarification. Nor did it touch on the question of children born to unmarried parents; the CFA's judgment on this aspect was not challenged and remains fully effective. The interpretation also noted that those involved in the cases on which the CFA ruled in January would retain their right of abode; and the SAR Government subsequently announced that some 3700 people who claimed right of abode in the period from 1 July 1997 to 29 January 1999 would also retain that right.

Following the ruling, Chief Executive CH Tung said that the interpretation had resolved the controversy over right of abode in a manner which was entirely legal and constitutional. He accused its opponents of trying to mislead international opinion to the detriment of Hong Kong. He also announced the SAR Government's intention to introduce legislation before the Legislative Council, planned for July, to amend the relevant immigration legislation to reflect the interpretation, and provide for children born outside marriage to apply for right of abode. It is thought that the interpretation will restrict to 170,000 those eligible to settle in Hong Kong. Opponents of the interpretation route continue to question its legality and to reiterate their concerns about damage to the rule of law and the integrity of the CFA and the weakening of the SAR Government's commitment to "One Country, Two Systems". The decision to use the date of the CFA's original judgments (29 January) as a cut-off date for application for right of abode has already been challenged by some in Hong Kong.

We have followed the serious debate on the right of abode issue closely, and note the many different views expressed. The British Government, as signatory to the Joint Declaration, has every interest in ensuring that those distinct values which underpin Hong Kong's society and constitution are upheld. We are committed too, to the maintenance of the common law in Hong Kong, as provided for in the Joint Declaration and Basic Law.

As we made clear in a statement issued by the British Consulate-General on 29 June, we have throughout these developments reiterated our highest regard for the integrity of Hong Kong's legal institutions, particularly the Court of Final Appeal. The principles of independent judicial power and of final adjudication are integral to Hong Kong's high degree of autonomy. These are principles which are enshrined in the Joint Declaration, and which provide a firm foundation for Hong Kong's continued success and reputation as a place in which companies can invest and operate with confidence.

We are aware that the SAR Government's unprecedented decision to seek an interpretation of relevant provisions of the Basic Law from the NPC Standing Committee has been the subject of considerable controversy. We also note that there was a large measure of popular support for action to reduce the number of people eligible for right of abode.

We are concerned that, following recent events, anxieties have been expressed about the authority and standing of the CFA, the independence of the judicial system and the robustness of the rule of law. Nor do we treat lightly the concerns of those who suggest that the SAR Government may resort again to interpretation in future. It is clearly important that the key principles which

underpin confidence in the judicial process in Hong Kong should continue to be upheld in the future. We welcome the fact that the SAR Government has reiterated its commitment in this respect as an imperative and a duty; and welcome the SAR Government's assurances that their request in this case was based on exceptional and unprecedented circumstances.

We hope that all concerned will uphold their commitment to the judicial process. We shall of course continue to follow developments with close attention; and will reflect these in our next report.

PROSECUTIONS POLICY

We noted in our last report that the Secretary for Justice, Ms Elsie Leung, had said that she hoped to be able to make a public statement on prosecutions policy in Hong Kong, on conclusion of the trial of three executives of the Hong Kong Standard newspaper accused of fraudulently boosting the paper's circulation figures. This case had caused particular concern because the SAR authorities had previously decided not to prosecute the Group's proprietor, Ms Sally Aw, despite evidence which suggested she was aware of the accuseds' activities.

The three co-accused were convicted on all charges and jailed in January. On 4 February, Ms Leung made a public statement on her decision not to prosecute Ms Aw before a session of the Legislative Council. In her explanation, she cited insufficient evidence as the main reason not to prosecute Ms Aw; but said she had also taken public interest factors into account, notably the fact that the pursuit of legal action against Ms Aw might have threatened the viability of her business holdings.

There was widespread negative reaction in the community to this explanation, in particular the citation of public interest arguments. Some suggested that the prosecution decision had cast doubts on equality before the law, and that the citation of public interest arguments had further undermined confidence in independent decision-making on legal matters. Ms Leung subsequently made clear that irrespective of the public interest arguments, it would not have been possible to prosecute Ms Aw, on grounds of insufficient evidence. A subsequent motion of no confidence in the Secretary for Justice was defeated in the Legislative Council.

We are satisfied that public prosecution policy in Hong Kong continues to follow internationally accepted principles, and to be fairly and rigorously implemented. It would obviously be regrettable if such controversies were to undermine confidence in Hong Kong's legal system.

FLAGS

Concern was expressed during this period about another case, in which the SAR Government has appealed against a ruling by the Court of Appeal in March that the parts of the National and Regional Flags Ordinances which created the offence of desecration of flags were unconstitutional, in that they undermined the right to freedom of expression guaranteed by the International Covenant on Civil and Political Rights (ICCPR). The judges confirmed that the flags "should be accorded due respect", but rejected the Government's argument that the legal provisions on desecration were necessary in order to protect public order. The case had arisen after two individuals were found guilty in the lower Courts of defiling the national and regional flags. The case is due to be heard before the CFA in the autumn. Local commentators have pointed to the potential constitutional significance of this case, since the National Flag and National Emblem Ordinance implemented one of the mainland laws explicitly applicable to Hong Kong.

LEGAL INTERFACE BETWEEN THE HKSAR AND MAINLAND CHINA

In our last report, we also noted considerable public debate about the interface between the Hong Kong and mainland legal systems, in particular the lack of formal rendition arrangements between the two jurisdictions. These concerns arose in connection with two high profile legal cases. The accused in one of these, mainland resident Li Yuhui, was subsequently convicted by a mainland court of murder under Chinese law and executed. While public pressure to reach a rendition agreement has now abated, we welcome the fact that talks aimed at reaching agreement on such arrangements continue, and that the SAR Government has publicly committed itself to ensuring that any agreement is acceptable to the people of Hong Kong and to the Legislative Council. We also welcome the fact that the SAR and mainland authorities signed a Memorandum of Understanding

in June on arrangements for reciprocal enforcement of arbitral awards, an issue to which the business community in particular attaches considerable importance.

ECONOMY

The SAR Government has faced a number of difficult tests in an area in which it enjoys full autonomy, economic and financial decision-making.

The recession in Hong Kong continues, and the economy is undergoing a period of considerable and prolonged readjustment. In these circumstances, there are no quick solutions, as the SAR Government has made clear. The Budget for 1999/2000, announced on 3 March, contained a number of initiatives aimed at stimulating growth and developing new industries, particularly in high-technology and tourism. These include the proposed development of a "cyberport" - Hong Kong's equivalent to a Silicon Valley - where some critics have suggested that the way in which the contract was awarded reflects a reduction in the SAR Government's commitment to its tradition of open tendering. We note that there have also been some positive economic signs, and are confident that, with the SAR Government's prudent policies and commitment to innovation, Hong Kong will recover from recession and become a more competitive international business centre. The SAR Government's commitment to upholding the rule of law will be crucial, particularly in maintaining confidence among foreign investors in Hong Kong.

CONSTITUTIONAL DEVELOPMENT

We noted in our last report the debate surrounding the reform of Hong Kong's system of local government. Following a public consultation exercise, the SAR Government will establish 18 District Councils, which will run for a four year period from 1 January 2000, and form a new Bureau, responsible for food and environmental hygiene. Concerns have been expressed about the introduction of a high proportion of appointed seats on the proposed District Councils, a decision which has been interpreted by some as being at odds with the SAR Government's commitment to the eventual goal of universal suffrage as outlined in the Basic Law. There has also been some criticism that the reforms would lead to increased centralisation and a reduction in democratic accountability. Defending their proposals, the SAR Government said that they did not contravene Hong Kong's obligations under the ICCPR, and that democracy would not be slowed because the proposals also included an increase in the total number of elected seats. We note a broad consensus in Hong Kong in favour of reform of local government, and welcome the fact that the proposals were debated thoroughly, including in the Legislative Council.

Looking ahead, the SAR Government reiterated in June that its timetable and approach to further constitutional development remained as set out in the Basic Law, which provides for the possibility of full universal suffrage and a wholly directly elected Legislative Council after 2007. We have in previous reports made clear our hope that the SAR Government will build on the achievement of the first post-handover elections and, recognising the aspirations of Hong Kong people in this respect, work towards the early realisation of the goal of universal suffrage, as provided for in the Basic Law. We continue to attach importance to this.

BASIC RIGHTS AND FREEDOMS

We continue to follow closely the SAR Government's commitment to uphold and protect the rights and freedoms of Hong Kong people, as provided for in the Joint Declaration. We welcome the SAR Government's commitment to maintaining its high reputation in this respect.

In previous reports, we have welcomed the undertaking by the Chinese Government to transmit to the United Nations without amendment reports drafted by the SAR Government under the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The first post-handover reports on Hong Kong under the ICCPR and ICESCR were submitted to the United Nations in January and June respectively. We understand that SAR Government officials will attend hearings of the reports before the relevant United Nations Committees.

We welcome the robust way in which Hong Kong people have continued to voice their views, and the way in which these are reported in Hong Kong's diverse and open media. As before the

handover, this is a major strength of Hong Kong and a vigorous spur to the government and to politicians. We welcome too the fact that Hong Kong people have continued to exercise their right to peaceful demonstration and that the Hong Kong police authorities have continued to uphold these rights. Demonstrations so far this year have included a vigil to commemorate the tenth anniversary of the suppression by the Chinese authorities of the demonstrations in Tiananmen Square. The SAR Government did, however, refuse entry to 11 mainland dissidents living abroad, who had hoped to attend a conference prior to that event.

The fact that public events can be freely organised is a positive sign of the freedoms which Hong Kong people continue to enjoy. This is particularly important given concerns expressed about restrictions on demonstrations under the Public Order Ordinance (see Cm 4190 and Cm 3831). Developments such as these help to underpin international confidence in the implementation of "One Country, Two Systems", and to enhance confidence in the protection of human rights in Hong Kong.

There has been further concern about the explicit requirement, under Article 23 of the Basic Law, for the SAR Government to enact legislation against treason, secession, sedition or subversion against the Central Government. Earlier in the period of this report, some Hong Kong NPC deputies were quoted as calling on the SAR Government to bring forward its timetable for such legislation. In its first post-handover report on Hong Kong under the ICCPR, the SAR Government noted that legislation to implement Article 23 of the Basic Law would be required, but that it had yet to formulate legislative proposals. These are not expected before the next LegCo elections in 2000. The SAR Government reiterated in its report a commitment to conduct extensive public consultation on the basis of these proposals, and stressed that these would "need to address the concernthat the requirements in Article 23 should not compromise the freedom of expression". The SAR Government noted too that they would need to be consistent with the provisions of the ICCPR as applied to Hong Kong. We welcome both this clear commitment to consult and this unambiguous statement of respect for the ICCPR.

BILATERAL RELATIONS

We are committed to maintaining Britain's close working relationship and practical cooperation in areas where the Hong Kong authorities enjoy a high degree of autonomy. Such links extend across many areas which are pivotal to Hong Kong's continued economic success.

Since the handover, the British Government has, through practical actions, supported Hong Kong's right to run its own affairs, within the framework of "One Country, Two Systems". One key area is in the field of strategic exports. We have, for example, worked hard to establish and maintain an export policy towards Hong Kong which is fair, yet does not compromise our obligations under the EU arms embargo against mainland China. Recent bilateral talks between the UK and the SAR Government have reinforced our perceptions that Hong Kong's export controls are carried out to the highest standards, and that customs procedures are rigorously enforced. We retain full confidence in the effectiveness of the Hong Kong SAR Government's independent strategic trade controls and will continue to treat Hong Kong separately for export control purposes.

We have a shared objective with the SAR Government to develop new, particularly knowledge-based, industries. Our desire to co-operate in this area has been formalised in a Memorandum of Understanding on IT Co-operation, signed by the Secretary of State for Trade and Industry, the Rt Hon Stephen Byers MP, during his visit to Hong Kong in June. We have also maintained our support for the SAR Government's continuing efforts to secure visa-free access for SAR passport holders. There are now a total of 59 countries and territories worldwide which offer such access, and 86 which offer this privilege to BN(O) passport holders. We also maintain close exchanges and share expertise with the SAR Government on a wide range of other issues, ranging from privatisation and economic dialogue, to civil service reform and cultural co-operation.

The Government continues to attach a high priority to the work of the Joint Liaison Group, which held its 45th plenary meeting in London on 16 and 17 March. As with other recent meetings, discussions took place on a wide range of Joint Declaration and Hong Kong issues. We welcome the way in which the JLG has developed into a consultative forum, and value such productive contacts with the Chinese side of the JLG.

INTERNATIONAL DIMENSION

Events in Hong Kong throughout the period of this report underline the importance of the international dimension to its continued success and prosperity. Hong Kong itself has always had a strong global outlook and has played an active role on the world scene. It is in Hong Kong's interest, and that of the wider international community, that this status be maintained and developed.

CONCLUSION

This period has witnessed a number of significant controversies. But, despite the anxieties expressed - anxieties which we understand - our assessment at the end of this period remains positive. There will inevitably be some difficulties in bedding down "One Country, Two Systems", but on the whole the SAR Government has continued to work hard to make it a reality. We therefore welcome the assurances given by the Chinese leadership to the late Derek Fatchett when he visited China in April that China remains committed to the policy of "Hong Kong people running Hong Kong" and to giving Hong Kong the high degree of autonomy promised in the Joint Declaration. We also welcome evidence that the SAR Government remains equally committed to these principles.

We look forward to Britain continuing to play a constructive role as the Hong Kong SAR evolves, up to and beyond the conclusion of the Joint Liaison Group's work at the end of this year.



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