

What impact has the return to Chinese sovereignty had on Hong Kong's criminal justice system?

As is well known, the underlying principle of the Joint Declaration and Basic Law is 'one country two systems'. This principle recognises the very different nature of the 'system' that existed prior to the changeover in Hong Kong, and which still exists, compared to that on the mainland. As stated in the Joint Declaration, Hong Kong will retain this system for 50 years from 1 July 1997. 'System' in this sense has a multitude of forms. The Basic Law makes provision for the continuation of the legal, political and economic systems, as well as systems relating to education, science, culture, sports, religion, labour and social services. By clear implication, this is equally true for Hong Kong's 'criminal justice system'.

The simple answer to the above question is therefore 'not very much'. But this is both unsatisfactory and misleading. It is inevitable, for example, that the Hong Kong criminal justice system will be affected by political decisions made in Beijing. How it will be affected and the extent to which decisions and practices in China will impact on Hong Kong's criminal justice system are as yet unknown. The Basic Law and recent legislative changes, however, allow for some postulation about the impact that the change of sovereignty will have on some aspects of criminal justice in Hong Kong.

To begin, it is probably convenient to assess the impact of the changeover by taking a traditional approach to the notion of any country's 'criminal justice system'. In this regard, one can initially assess changes to criminal law and procedure and then the various criminal justice agencies; the judiciary, the police and correctional services.

Criminal law and procedure

Article 18 of the Basic Law states that the laws of the Hong Kong Special Administrative Region (SAR) shall be the Basic Law, laws previously in force, as provided for in Article 8, and laws enacted by the SAR legislature. According to Article 8, the laws previously in force that are retained include the common law, rules of equity, ordinances, subordinate legislation and customary law that do not contravene the Basic Law. In this sense, the vast majority of Hong Kong's criminal law and procedure has been retained both in its common law form as well as ordinances, rules and regulations, although with some important exceptions.

There have been two major legislative amendments that require mention. These are the Societies (Amendment) Ordinance 1997 and the Public Order (Amendment) Ordinance 1997. In the six months prior to the changeover there was considerable local and overseas media coverage of these legislative changes in terms of their adverse implications for human rights and civil liberties in Hong Kong. The legislative effect of these two amendments was to return the relevant legislation, in part, to a form which predated its earlier amendment by the outgoing Territory administration. Such earlier amendments (Societies (Amendment) Ordinance 1992 and Public Order (Amendment) Ordinance 1995) had been enacted to bring both Ordinances in line with the International Covenant on Civil and Political Rights as encompassed by the Bill of Rights Ordinance. The principle effect of these amendments was to abolish the compulsory registration requirement for societies and the need to obtain a license from the police by those intending to hold public demonstrations involving over a certain number of persons. The requirements were seen to contravene the freedoms of association and assembly, respectively. Both original amendments

were criticised by the Chinese. This was based partly on their wider opposition to the Bill of Rights, and any legislation that was changed by it, as well as their contention that the 1992 and 1995 amendments significantly weakened the future administration's ability to control public order in Hong Kong. While such arguments were largely spurious, the amendments were not agreed to by the Chinese and they reserved the right to repeal them. Without providing a detailed analysis of the recent amendments, this has been the legislative effect of the 1997 Ordinances: a reintroduction of a registration requirement for all societies, with power being vested in the Commissioner of Police (the Societies Officer) to refuse registration, cancel registration and prohibit the operation of a society where this is deemed necessary in the interests of 'national security or public safety, public order (*ordre public*) or the protection of the rights and freedoms of others'. The same provisions are also used in the Public Order (Amendment) Ordinance 1997 regarding the Commissioner of Police's powers to prohibit public meetings or processions.

There has been considerable concern raised by the use of the term 'national security' and its definition as 'the safeguarding of the territorial integrity and the independence of the People's Republic of China'. How this definition will be interpreted and applied by the SAR administration could have wide ranging effects on expressions of public dissent in Hong Kong. The extent to which this may in turn lead to problems in public order will obviously have a considerable impact on many aspects of criminal justice in the SAR.

Related to this issue is the requirement under Article 23 of the Basic Law that the SAR government enact laws to prohibit treason, secession, sedition and subversion. It is the last two 'offences' that have again caused considerable alarm among those concerned about civil liberties in Hong Kong. The reason for this is the very different approach taken to the interpretation of such crimes in China, the fear being that if the mainland approach was to influence that taken in the SAR then this would also pose a serious threat to civil liberties and human rights.

The enforcement of these new laws will also impact on the police and the judiciary. Given the considerable discretion afforded the Commissioner of Police under both the Ordinances mentioned above, it is also apparent that the police will play a critical role in the continued existence and operations of various political groups in Hong Kong, for example pro-democracy in China groups such as the Alliance in Support of the Patriotic Movement in China. The laws' reform and expansion of police discretion will impact not only on the activities of such groups in the form of public displays of opposition to local and mainland decisions but the question of whether or not such groups are even allowed to continue in the form of lawfully registered societies.

The judiciary

In these circumstances the judiciary will play a vital role as 'watchdog' over possible executive and legislative excesses. An example of this role may occur very soon given a likely challenge to the legitimacy of the amendments to the Societies and Public Order Ordinances on the basis that they contravene the International Covenant on Civil and Political Rights and, therefore, the Basic Law (see Article 39). This raises the extremely important question of the continued independence of the judiciary in Hong Kong.

As far as the Basic Law is concerned the judiciary in Hong Kong will exercise its power independently, 'free from interference' (Article 85). Article 86 continues the practice of trial by jury, and the principles and rights of parties to criminal or civil proceedings enjoyed prior to the changeover have also been retained. This includes the presumption of innocence, which is specifically mentioned in Article 87, and others such as the right to silence.

The pre-changeover process of appointing judges has also been maintained with the Chief Executive making such appointments as recommended by the Judicial Officers Recommendation Commission. This relates to judges of the District Court, Court of First Instance (previously the High Court), the Court of Appeal and the Court of Final Appeal. This last court is by far the most significant change to the judiciary and has far reaching implications for the role of the courts in the new SAR. It replaces the Judicial Committee of the Privy Council as the court of final appeal for the SAR and is quite similar to that court in its procedural rules and regulations, and the type of case heard. As Hong Kong's principal constitutional court, the Court of Final Appeal's decisions will obviously have a significant bearing on many aspects of the criminal justice system (for example, the legitimacy of new criminal laws, and the powers of police in enforcing such new provisions). It would be hard to imagine, however, that like many other supreme courts around the world judicial appointments will not be politically influenced. The concern for Hong Kong is that such political influence will come not from within the SAR but will emanate largely from Beijing.

The police

The most obvious change for the police force in Hong Kong is its name. The word 'Royal' has been dropped to give, simply, the Hong Kong Police Force (HKPF). It should also be noted that there is no specific mention of the police in the Basic Law. The Police Force Ordinance has been retained subject to a few minor amendments, for example the removal of the word Royal, in accordance with Articles 18 and 8. The Police Force Ordinance presently includes the important amendments of 1992, which incorporated similar changes to some of the provisions of the English *Police and Criminal Evidence Act* (PACE). Of interest, however, is the fact that just prior to the handover the government put on hold further Law Reform Commission proposals to introduce additional reforms to the Police Force Ordinance along the lines of PACE. On 23 June, the outgoing administration also used its executive powers to withdraw a bill from the Legislative Council which would have seen the establishment of an independent statutory police complaints body (Police Complaints Council). This decision was not because of concerns over the changeover, but rather because the administration opposed the establishment of such a body and the replacement of the internal police complaints process. The same, however, may not be true for the reforms to the Police Force Ordinance which were shelved so as not to antagonise the Chinese so close to 1 July.

Mention should also be made of Hong Kong's 'second' police force, the Independent Commission Against Corruption (ICAC). Under Article 57 of the Basic Law the word Independent is not used, and reference is made only to a Commission Against Corruption which is to function independently. This led to the recent dropping of the word 'Independent' from the name of the organisation, something which was opposed by many both within and outside of the ICAC. Apart from the fact that the word does not appear in Article 57, it has never been made clear why such a change was deemed necessary.

Corrections

The law relating to corrections in Hong Kong has been almost totally retained by virtue of Articles 18 and 8 of the Basic Law. The changes that have been made to various pieces of legislation have been technical and minor (note, for example, the abolition of the Queen's Birthday remission). In this regard, the changeover has had little if any effect on the running of Hong Kong's correctional institutions or other associated agencies such as the

probation service. Of some note, however, is the unresolved issue regarding a small number of offenders who are currently serving indeterminate prison terms 'at the Governor's pleasure'. The proposal made prior to 1 July was that such sentences would be converted to determinate periods of imprisonment.

The most important question that has been raised regarding punishment relates to the possible reintroduction of the death penalty. Since its abolition in 1993, there have been continued calls in Hong Kong for its reintroduction for certain crimes. While this is of relevance, the main concern arises from the regular use of capital punishment in mainland China for a fairly large number of crimes and the possible extension of this approach to Hong Kong. This has led to fears by those, for example, who are serving long sentences for drug trafficking, regarding the retrospective impact of any such move.

An associated issue, which is as yet unresolved, is the effect that the above factors will have on extradition of offenders from Hong Kong to China and also from overseas jurisdictions to Hong Kong.

Conclusion

It is early days, and there are many unresolved issues that are likely to have an impact on the transition of criminal justice in Hong Kong at a later stage. It is also inevitable that the influence of Beijing will be felt by Hong Kong in terms of the enactment of new criminal laws and their subsequent interpretation and enforcement by the various criminal justice agencies. The major issue here is the extent to which new laws will be introduced that will adversely affect civil liberties and human rights in Hong Kong, and the consequent effect on Hong Kong's criminal justice system.

It is certainly hoped that such influence (or interference) will be kept to a minimum and that there is true adherence to the principle of 'One country, two systems'. In this regard, it is further hoped that Hong Kong's criminal justice system will be able to operate and develop independently, free (or largely free) from mainland politics and practices. The maintenance of such independence will, I believe, be what ultimately determines Hong Kong's future.

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