

Discuss whether Hong Kong has a written, unwritten, concrete and/or abstract constitution.

A constitution is a system for the government that establishes the rules and principles of an autonomous political entity. It defines the fundamental political principles and establishes the structure, procedures, powers, and duties, of a government. It also determines the relationship within the government institutions as well as relationship between government and individual citizens.

Different countries have different types of constitution. The U.S.¹ has one that is called a written or codified constitution, meaning that there is one document or a collection of documents which blatantly sets out such fundamental rules and principles. On the other hand, some countries such as UK do not have such document, and constitutional rules and principles have to be extracted from different sources, including enacted law, judicial decisions and conventions. They are said to belong to another type of constitution, namely the unwritten or uncoded constitution.

In addition to the written and unwritten classification, there exists another distinction, namely a concrete and an abstract constitution. A concrete constitution is the document that comprises the written constitution, in which the most basic rules are stated. However, not all institutional precepts and government attributes can be expressed in this concrete fashion. In most cases, the legislation and court decisions will supplement the written outline, providing what is known as the abstract constitution.

Hong Kong received its first constitution in 1843 from Britain with little participation from the colony itself. Over time, advancements in constitutionalism began to develop. First was the setting up of advisory committees and consultative organisation which allowed the public to involve more in policy-making processes. Later saw the appointment of Chinese unofficial members to the Legislative Council, and an election system had later been introduced² in 1984. During the 90s, structural reforms in Legislative Council and Executive Council, such as the restructure of internal committees and separation of executive authority, as well as further development in human rights and judicial system, were carried out not without frictions between the Chinese and British government. Such developments in liberalising the governmental system and social reforms were vastly important in shaping Hong Kong's constitution after the handover in 1997, notwithstanding a process that is deemed as slow and painful.

The democratic development in Hong Kong was laid out in the 1984 Sino-British Joint Declaration when dealing with the future of Hong Kong. It puts in play China's

¹ The Constitution of the United States of America is the supreme law of the United States.

² *White Paper: The Further Development of Representative Government in Hong Kong*

design of 'one country, two systems'. Based on this principle, a Hong Kong Special Administrative Region (HKSAR) would be created upon China's resumption of the exercise of sovereignty. The socialist system and policies shall not be practised in the HKSAR and Hong Kong's previous capitalist system and lifestyle shall remain unchanged for 50 years (BL5). The Joint Declaration provides that these basic policies shall be stipulated in a Basic Law of the HKSAR, enacted by the National People's Congress (NPC) in accordance with the Constitution of the People's Republic of China.

The Basic Law enshrines within a legal document the important concepts of "One Country, Two Systems", "a high degree of autonomy (BL 2)" and "Hong Kong People ruling Hong Kong (BL3)". It also prescribes the various systems to be practised in the HKSAR. For instance, Article 43 states that the Chief Executive is the principal executive officer and all government personnel in Hong Kong owe him obedience. Article 56 provides that the Chief Executive is advised by, and is in most circumstances enjoined to consult, the Executive Council. He signs bills into law (BL76) and may return a bill to the Legislative Council (BL49). Hence, the Chief Executive, the Executive Council and the Legislative Council form the essential institutions of the executive and legislative branches of the Hong Kong government. They have also combined to form the courts of justice, which exercise independent judicial powers. The formation process of Chief Executive (Article 45) and government institutions are also set out in the Basic Law. The Basic Law is clearly a document containing many fundamental rules and institutions of government, and is therefore defined as the written, concrete constitution of Hong Kong when it came into effect on 1st July 1997.

Nevertheless, this constitution is far from completely elaborative on all the rules and principles affecting the government. It is hence the abstract constitution which plays an important role in providing the additional precepts to explain them. There are several sources of abstract constitution, for instance, some decisions of the NPC are constitutional in nature. A valid example is the appointment and ratification of the work report of the Preparatory Committee which provided for establishment of the Provisional Legislative Council in 1997 to 1998.

Another source is the common law, since it is judges who have traditionally drawn the boundaries between the various branches of government and between government and citizens. Hence, the common law acts as a supplementary source of defining the government power in Hong Kong. Many of the rights and liberties of Hong Kong citizens are created and maintained by judges exercising common law powers in the course of settling dispute. Both the Joint Declaration and the Basic Law implicitly require the exercise of constitutional judicial review by the Hong Kong courts and such power was acknowledged by the Hong Kong Court of Final Appeal (CFA) in the right of abode case³. Although CFA's decision of annulling some of the provisions of the amended Immigration Ordinance in contravention with the Basic Law was

³ *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 315

ultimately overruled in subsequent cases, it did highlight the importance of judicial review and the exercise of common law power by judges to interpret the ambiguity of the concrete constitution.

Ordinances of the Hong Kong legislature are also capable of laying down constitutional rules and regulation on governmental institutions. For example, the Crown Proceeding Ordinance (Cap 300) sets out rules regarding proceedings against the SAR government; the High Court Ordinance (Cap 4) consolidates the law relating to the constitution, jurisdiction, practice and power of the High Court. Similarly, the Standing Orders of the Legislative Council set out the practice of the legislative branch and are thus constitutional in nature.

The sources of abstract constitution discussed above are nevertheless enacted and formally declared precepts. In order to enhance the smoothing of their functions in the government system, supplementation called 'conventions' play an important role. Although breach of conventions does not result in consequences of illegality, it is nevertheless regarded as unconstitutional and inappropriate. Conventions develop over time, and their significance in the politics and constitution of HKSAR may change. Perhaps a valid example is the idea that the executive branch of government must not attempt to influence the way judges interpret and apply the law. This convention prohibits civil servants from succumbing to the temptation to tell the judiciary how to behave, thus has far-fetching influence on the currently enacted statute law.

As we have seen, Hong Kong has in effect two constitutions: one, being the Basic Law, that is written and concrete, and an abstract constitution that compliments it.

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