Dalhousie Law Journal

Volume 17 | Issue 2 Article 10

10-1-1994

Application of ILO Conventions to Hong Kong After 1997

Shin-ichi Ago
Kyushu University

Comment

Shin-ichi Ago*

Application of ILO Conventions to Hong Kong After 1997

Introduction

On July 1, 1997, Hong Kong will be returned by Britain to China. The date, established by the Sino-British Joint Declaration of 1984[1] is quickly approaching. The economic and political consequences of repossession by China are certainly of vital importance to the people of Hong Kong but the effect of various international legal obligations after 1997 is also a significant issue. In accordance with the Joint Declaration, a Sino-British Joint Liaison Group was established to address this issue.[2] It was charged with considering what action should be taken by the British and the Chinese governments to ensure the continued application after 1997 of international treaty rights and obligations which currently affect Hong Kong.

In 1986, the Joint Liaison Group set up a Sub-group of Experts on International Rights and Obligations, which by 1990 had reached agreement on twenty-seven matters.[3] In particular, it was agreed that the "Relevant International Labour Conventions (at present there are 47) will continue to apply to Hong Kong; Hong Kong will continue to participate in the activities of the ILO."[4] However, the legal implication of Hong Kong's participation is complicated by the fact that the ILO is a tripartite body, consisting of government, employer and worker representatives.[5] The adoption of ILO conventions and the supervision of their application are done by tripartite bodies that are composed of these three distinctly different constituents, two of which are non-governmental groups. In addition, the notion of "non-metropolitan territory" in the ILO Constitution[6] makes the legal situation still more confusing. This commentary

* Professor of International Economic Law, Kyushu University, Japan.

1. U.K.T.S. 1985 No. 26. Hereinafter "Joint Declaration".
2. Annex II to the Joint Declaration, *ibid.* at 14–15.
3. Achievement of the Joint Liaison Group and its Sub-group on International Rights and Obligations, 1985–May 1990, at 2.
4. *Ibid.* at 15. It was also agreed that "Hong Kong will continue to be deemed to be a separate Contracting Party to the GATT." *Ibid.* at 9.
5. *Constitution of the International Labour Organisation* (Geneva: ILO Office, 1992)art. 3.
6. *Ibid.* at art. 35.

aims to establish the extent of application of ILO conventions to Hong Kong after 1997 and to clarify the role that the concept of non-metropolitan territory plays in that process.

I. *Sino-British Joint Declaration and ILO Conventions*

Under the Joint Declaration, the Hong Kong Special Administrative Region or SAR enjoys a high degree of autonomy. Except for foreign and defence affairs, it is vested with executive, legislative and independent judicial power. Annex I to the Joint Declaration, entitled "Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong", concerns Hong Kong's relationship with international organizations and foreign states. Chapter XI of Annex I provides:

> Representatives of the Hong Kong Special Administrative Region Government may participate, as members of delegations of the Government of the People's Republic of China, in international organizations or conferences in appropriate fields limited to states and affecting the Hong Kong Special Administrative Region, or may attend in such other capacity as may be permitted by the Central People's Government and the organization or conference concerned, and may express their views in the name of 'Hong Kong, China'.[7]

The application of international agreements to Hong Kong is also treated:

> The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Hong Kong Special Administrative Region, and after seeking the views of the Hong Kong Special Administrative Region Government. International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the Hong Kong Special Administrative Region Government to make appropriate arrangements for the application to the Hong Kong Special Administrative Region of other relevant international agreements.[8]

From these provisions it is clear that the relevant ILO conventions will be applied to Hong Kong after 1997 and that the government of the SAR may participate in the activities of the ILO in the name of "Hong Kong, China". In addition, the Basic Law of the Hong Kong SAR, promulgated by China on 5 June 1991,[9] mentions ILO conventions, along with the

7. *Supra* note 1 at 11.
8. *Ibid.*
9. (1990) 29 I.L.M. 1511 at art. 39.

International Covenants on Human Rights, as international instruments to be made applicable to Hong Kong. Furthermore, the Hong Kong Bill of Rights Ordinance, 1991[10] contains a provision which presupposes the application of ILO conventions to Hong Kong.

However, the notion of a "non-metropolitan territory" found in the ILO Constitution presents a problem. When the U.K. government declared ILO conventions applicable to Hong Kong recourse was had to this notion. Under the ILO Constitution, an entity which is not a state cannot become a party to a convention. To say that 47 ILO conventions are operable in Hong Kong only means that they have been specifically made applicable to Hong Kong as a non-metropolitan territory of the United Kingdom. Indeed, in many cases appropriate modifications were made to the scope of their application.

In these circumstances, the status of Hong Kong after 1997 would seem to require special treatment under the ILO. Accordingly, both the British and the Chinese governments addressed the Director General of the ILO with communications which were intended to clarify the situation.[11] According to the Chinese communication:

> With effect from 1 July 1997 the Hong Kong Special Administrative Region, as an inseparable part of the territory of the People's Republic of China, will not be and should not be deemed to be a 'Non-Metropolitan Territory'. However, the Hong Kong Special Administrative Region will be autonomous in the enactment of labour legislation and in the administration of labour affairs. Therefore, for the purpose of enabling the Hong Kong Special Administrative Region to continue its participation in International Labour Organization activities and to continue to have international labour Conventions applied to it, the relevant articles of the International Labour Organization Constitution will be applied, by analogy, to the Hong Kong Special Administrative Region.

When the Governing Body of the ILO formally took due note of the Chinese government's intention, the issue over the application of ILO conventions after 1997 appeared to have been finally settled. However, on looking into the application of specific articles of particular conventions more concretely, there arise a number of questions which are not self-evident. Use of the phrase "by analogy" by the Chinese government is also ambiguous. It is necessary, therefore, to examine the meaning of the concept of non-metropolitan territory as used by the ILO and to determine its future applicability to the Hong Kong SAR.

---

10. (1991) 30 I.L.M. 1310.
11. Offic. Bull., 1990, Vol. LXXIII, Ser. A, No. 1 at 25–26.

II. *The Concept of Non-Metropolitan Territory in the ILO*

The ILO Constitution does not define the concept of a non-metropolitan territory (NMT). The term has been used to cover regions which are defined as non-self-governing territories or trust territories in the United Nations Charter,[12] but it may have a more expansive meaning. For example, Jersey, Guernsey and the Isle of Man have strong ties with the mainland of the United Kingdom geographically, culturally and ethnically. In fact, until 1950 these territories were inseparable parts of the United Kingdom and ILO conventions were unconditionally applied to them. However, the British government announced on October 16, 1950 that these territories were to be considered NMTs under Article 35 of the ILO Constitution, even though they clearly are neither colonies nor trust territories of the United Kingdom.

Article 35 of the ILO Constitution sets out the obligations of member states in regard to their NMTs:

> Article 35
>
> 1. The Members undertake that Conventions which they have ratified in accordance with the provisions of this Constitution shall be applied to the non-metropolitan territories for whose international relations they are responsible, including any trust territories for which they are the administering authority, except where the subject-matter of the Convention is within the self-governing powers of the territory or the Convention is inapplicable owing to the local conditions or subject to such modifications as may be necessary to adapt the Convention to local conditions. . . .
>
> 4. Where the subject-matter of the Convention is within the self-governing powers of any non-metropolitan territory the Member responsible for the international relations of that territory shall bring the Convention to the notice of the government of the territory as soon as possible with a view to the enactment of legislation or other action by such government. Thereafter the Member, in agreement with the government of the territory, may communicate to the Director-General of the International Labour Office a declaration accepting the obligations of the Convention on behalf of such territory. . . .

Member states thereby undertake that conventions which they have ratified will be applied to the NMTs for whose international relations they are responsible, except where the subject-matter of a particular convention is within the self-governing powers of the territory, or the convention is inapplicable or requires adaptation owing to the local conditions. The metropolitan government must also communicate to the ILO the extent to which the provisions of a convention shall be applied to its NMTs. Reports must be submitted to the ILO on the application of the convention

12. Art. 35(1) expressly includes trust territories.

in respect of both territories to which it was declared to extend and those to which it was not.

It is important to note that the conjunction of paragraphs 1 and 4 of Article 35 results in the creation of two categories of NMTs. If the "subject-matter of the convention is within the self-governing powers"[13] of a NMT the metropolitan government delegates its discretion whether to apply the convention to the non-metropolitan government. One consequence of this provision is that the ILO treats a NMT which has self-governing power differently from a NMT without such power. In the case of a self-governing NMT, if the NMT government decides not to apply the convention, the metropolitan government has no further obligation under the ILO Constitution. In the case of a non-self-governing NMT, the metropolitan government has the general obligation to apply the convention to the territory. However, the metropolitan government may judge the provisions of the convention to be inappropriate to the local conditions of the non-self-governing NMT and declare it inapplicable. Thus, the difference between the two categories of NMTs only concerns which level of government can determine the applicability of the convention.

In the case of Hong Kong, the U.K. government has always treated it as a NMT under paragraph 1 of Article 35, i.e., a non-self-governing NMT to which paragraph 4 does not apply. It seems from the wording of the Chinese government's communication to the ILO, however, that after 1997, paragraph 4 would apply to Hong Kong. Yet the uncertainty surrounding the Hong Kong SAR runs deeper than the question which government will decide what conventions are to be applied. There is also doubt about the extent to which Article 35 can provide a basis for the continued application after 1997 of those ILO conventions that have not been ratified by China.

III. *Application of Unratified Conventions*

The question whether an ILO convention can apply to a NMT when it has not been ratified by the metropolitan government is both an interesting issue of principle and a crucially practical matter for Hong Kong. Thirty-six of the 47 Conventions which are supposed to continue to apply to Hong Kong after 1997 have not been ratified by China.

The older version of Article 35[14] unambiguously required "ratified Conventions" to be made applicable to "colonies, protectorates and

13. Art. 35(4).
14. Treaty of Peace done at Versailles, June 28, 1919, Part XIII Labour, Ch. III, art. 366, U.K.T.S. 1919 No. 4.

possessions which are not fully self-governing" without any mention of territories which are self-governing. However, the Article was revised by the International Labour Conference held in 1946. The Conference Delegation on constitutional questions, which prepared the current text of Article 35, stated at that time:

> The number of territories which have reached an advanced stage in their progress towards self-government is increasing rapidly, and there is therefore an urgent and practical need for a procedure permitting the acceptance of the obligations of international labour Conventions in respect of such territories in a manner consistent with the degree of self-government which they have attained, and indeed, on appropriate occasions, even where the metropolitan territory has not accepted the obligations in question.[15]

The ILO Constitution was accordingly amended to take account of this need in the manner already described.

It is, however, not clear from paragraph 4 of the current Article 35 whether "the Convention" means only a ratified convention or any convention, ratified or not. The Conference Delegation specifically mentioned "any Convention" in its recommendation to revise the constitutional provision. It is not well known why "any" was dropped and substituted by "the" in the final wording of the provision. It is logically possible to interpret "the Convention" referred to in paragraph 4 as specifying "a Convention" referred to in paragraph 1, thus making ratification of a convention a prerequisite to its application to NMTs.

Evidence to the contrary is found in a report submitted to the ILO Governing Body in 1953 which indicates that "the possibility of making a declaration under article 35(4) is not dependent on the Convention concerned being ratified by the Member responsible for the international relations of the NMT concerned. Action under article 35(4) may be taken irrespective of ratification."[16] Furthermore, in 1952, Italy applied five conventions, which it had not ratified, to Somalia, an Italian NMT at the time. These facts provide strong grounds to interpret paragraph 4 of Article 35 to cover all conventions irrespective of their ratification. Even so, in the case of a NMT to which paragraph 1 applies, i.e. a non-self-governing NMT, conventions can be extended only after they are ratified. The previously mentioned report to the Governing Body also makes this point.[17]

---

15. International Labour Conference, 29th Sess. 1946, Rep. II(1), Ch. XIII, para. 95 at 77–78.
16. ILO Governing Body, Mins. of the 123rd Sess., November 24–27, 1953, para. 26 at 105.
17. *Ibid.* at para. 24, p. 105.

This view is also a logical consequence of the conclusion of The Labour Standards (Non-Metropolitan Territories) Convention, 1947 (No.83).[18] It provides for the application of 13 enumerated conventions to NMTs regardless of the ratification record of the metropolitan governments. It is obvious that this Convention would become meaningless if all ILO conventions, whether ratified or not, can be declared applicable to NMTs. The purpose of Convention No.83 is to enable metropolitan governments to declare certain unratified conventions applicable to NMTs that are categorized under paragraph 1 of article 35. The U.K. government has ratified this Convention[19] and declared 10 of the enumerated 13 conventions[20] applicable to Hong Kong by virtue of it. Conventions Nos.3, 14, 58, 59 and 90, among them, have not been ratified by the United Kingdom.

IV. *Application of Conventions with Modifications*

In applying an ILO convention to a NMT, paragraph 1 of Article 35 also allows the metropolitan government to make "modifications as may be necessary to adapt the Convention to local conditions." In effect, this power permits governments to make reservations to a convention at the time of ratification in respect of their NMTs. It consequently breaches the long standing practice of the ILO that conventions cannot be ratified with reservations unless the convention concerned provides for such modifications itself. One reason for this practice is that ILO conventions are instruments formulated jointly by the tripartite groups, namely government, employer and worker representatives, and, therefore, are not open to unilateral amendment by one party, the government. Another reason is that a reservation to an ILO Convention is not compatible with its object and purpose in the sense expressed in the Advisory Opinion of the International Court of Justice in the *Genocide* case.[21]

In spite of the existence of this firmly established practice against reservations to ILO conventions, full discretion to make reservations is, in effect, accorded to governments when they apply conventions to their NMTs. This discretion is even permitted in respect of conventions which

---

18. *International Labour Conventions and Recommendations* (Geneva: ILO Office, 1982) at 903.

19. March 27, 1950. See *List of Ratifications by Convention and by Country* (Geneva: ILO Office 1994) at 108.

20. Conventions Nos. 3, 14, 15, 16, 17, 19, 45, 58, 59 and 90.

21. *Reservations to the Convention on Genocide*, Advisory Opinion, [1951] I.C.J. Rep. 15. N. Valticos, *International Labour Law* (Derventer, the Netherlands: Kluwer, 1979) at 229 presents full documentary evidence in the footnote to para. 577.

deal with basic human rights, such as those on freedom of association, forced labour and discrimination. This is despite the fact that human rights conventions are usually given a particularly important status in the panoply of ILO standards and are not regarded as negotiable. In fact, a number of modifications have been attached to these conventions in declarations concerning their application to NMTs.[22]

Since the concept of a NMT is not limited to the colonial context, under which a temporary exemption of basic standards might, perhaps, be regarded as permissible, a state could in theory designate certain areas as NMTs and limit the application of ILO conventions to those areas as it wished. It may be noted, however, that the principle of good faith in the implementation of international treaties would also apply in this context to invalidate such a course of action.

V. *Continued Application of Conventions Not Ratified by China*

The experience of the ILO in coping with NMTs provides significant precedence for the situation surrounding the Hong Kong SAR. First to be considered are those conventions already applied by the United Kingdom to Hong Kong. The Joint Declaration and subsequent instruments determined that 47 ILO conventions would continue to be valid in Hong Kong after 1997. It is, however, not clear whether these conventions will apply by virtue of Article 35 of the ILO Constitution or otherwise. The uncertainty arises partly because the declaration by the Chinese government to the ILO Governing Body contains a statement which categorically denounces the use of the term NMT in the context of Hong Kong. On the other hand, if Article 35 does not apply, the validity of ILO conventions could only be based, in what must be regarded as an unsatisfactory manner, on the Joint Declaration.

The ILO has experienced other cases, such as the distorted application of a number of conventions to Malaysia and Tanzania owing to their former colonial status and the geographical changes before and after their respective independence.[23] The unusual form of application of conventions to the geographically different parts of these member states presented a number of difficulties. The precedent is not appropriate for Hong Kong since it will enjoy autonomous power in the administration of its region.

---

22. E.g., Convention No.87 on Freedom of Association (1948, 68 U.N.T.S. 17) was declared applicable to Hong Kong with reservations on arts. 3, 5 and 6, which are essential to that freedom.

23. For the records of application, See *List of Ratifications, supra* note 19 at 249 and 265 respectively.

Since the regime of Hong Kong SAR will continue for 50 years,[24] applying Article 35 would appear to be the most appropriate approach. New conventions could be declared applicable or appropriate modifications to existing conventions could be introduced by resort to its provisions. This approach would also assist the Central People's Government in the event that it wishes to ratify a convention whose application to Hong Kong it deems inappropriate at that time. The decision by the Chinese government to apply "the relevant articles" of the ILO Constitution "by analogy" to the Hong Kong SAR is a wise one. It should be considered to be a declaration of positive intention by the Chinese government to apply the 47 Conventions of its own initiative.

VI. *Conventions Ratified by China but Not Applied in Hong Kong*

The next question to arise concerns the status of conventions that are already effective in China but currently are not in Hong Kong. Although the number is limited there are a few conventions that have been ratified by China but either are not ratified by the United Kingdom or their application to Hong Kong has not been declared or only has been with modifications. For instance, the important Equal Remuneration Convention (No.100)[25] has not been applied to Hong Kong by the United Kingdom.

If it is accepted that Hong Kong will be "by analogy" treated as a NMT so that Article 35 is applied, these conventions will not automatically apply to the Hong Kong SAR. A declaration will be required in accordance with paragraph 4 of that Article. The same considerations also apply to conventions that may be ratified by China after 1997. There will have to be close consultations between the two governments in such situations in the future.

VII. *Continued Relevance of the Concept of Non-Metropolitan Territory?*

Since the Chinese government does not intend to use the term NMT in designating the Hong Kong SAR, problems may arise concerning legal terminology in the practice of the ILO. For instance, the supervisory bodies of the ILO may have difficulty separating the Hong Kong SAR from other NMTs in their examination of the application of standards. The problems could perhaps be solved by a technical manoeuvre, such as

24. See the Joint Declaration, *supra* note 1 at 2.
25. U.K.T.S. 1972 No. 88 (1951).

introducing the phrase "other regions" in connection with the term "NMT" in a report of the Committee of Experts. However, the difficulties should be tackled more substantively in the long run by a revision of the ILO Constitution itself. Moreover, the notion of NMT should be reconsidered because it endangers the integrity of the system of ILO standards, as mentioned earlier. A member state, tempted to apply conventions partly or gradually, may designate a certain area of the country as a NMT and thereby achieve their fractional application without resorting to the method of reservations prohibited in the ILO.

The need for a fundamental reconsideration of the concept of NMT is strengthened by the existence of many countries in the world with other inherent problems with participation in the ILO. Some countries may prefer to acquire a kind of associate membership by which they are not required to fulfill all of the ILO obligations. For instance, they may not want to send a full tripartite delegation to the Conference and pay annual contributions, but they are prepared to ratify ILO conventions and to undergo supervision of their implementation. At the same time, they do not wish to be dependent on a particular "metropolitan" government. While the future of the notion of NMT needs a thorough discussion, it should not be forgotten how useful the concept has been since 1919. It has permitted a great number of declarations which have influenced the social development of many territories and facilitated their subsequent transformation to independence and independent ratification.

VIII. *Effects of Partially Ratified or Denounced Conventions in Hong Kong*

Two other circumstances in the application of ILO conventions to Hong Kong deserve consideration. One concerns the effect of denunciation by the United Kingdom of conventions which have been declared applicable to Hong Kong and the other is about the consequences of partial acceptance of conventions.

The U.K. government has denounced a number of conventions of which two are relevant to Hong Kong. Convention No.45[26] on underground work by women and Convention No.63 on labour statistics concerning wages and working hours[27] were both denounced in 1987. The former convention had been declared applicable to Hong Kong without modifications in 1950 and the latter with modifications in 1963.[28] The question is whether the denunciation by the United Kingdom of these

26. 40 U.N.T.S. 63 (1935). For denunciation see *List of Ratifications, supra* note 19 at 68.
27. 40 U.N.T.S. 255 (1938). For denunciation see *List of Ratifications, supra* note 19, at 87.
28. See 480 U.N.T.S. 474.

two conventions automatically invalidates their application to Hong Kong. As Hong Kong is treated by the United Kingdom as a non-self-governing NMT, i.e. a NMT to which paragraph 1 of Article 35 is applied, it is natural to view the effect of a convention on Hong Kong as dependent on its status in the metropolitan territory. Thus when a convention is denounced by the United Kingdom it should automatically also cease to be effective in Hong Kong. However, in the case of these two particular conventions, an interesting phenomenon seems to support their continued application even after denunciation by the United Kingdom.

The case of Convention No.45 is very clear. It was included among the 10 Conventions declared applicable to Hong Kong by virtue of Convention No.83. As previously described, under Convention No.83, conventions can be made applicable to NMTs even if they have not been ratified by the metropolitan government. The case of Convention No.63 is more difficult. It is not one of the 10 conventions that were made applicable to Hong Kong in accordance with Convention No.83. However, its denunciation was not specific but rather the automatic result of the ratification of a later convention which revises it. Thus, the denunciation of Convention No.63 was the effect of the United Kingdom's ratification of Convention No.160.[29] Unfortunately, no declaration has been made to apply Convention No.160 to Hong Kong. However, an ILO convention continues to bind a member state as long as the revised convention has not been ratified. Perhaps if one applies this principle to this case, Hong Kong is bound by Convention No.63 as long as a declaration is not made with respect to the application of Convention No. 160.

A more complex question concerns the partial ratification of a convention. As indicated earlier, reservations to ILO conventions are not permitted. However, a kind of reservation is possible if the convention itself provides for such derogations. There are a number of conventions which are divided into parts, thus allowing states to declare at the time of ratification which part or parts they accept. There are also conventions in which some provisions allow different standards to be applied if the ratifying country so specifies in its first report on compliance to the ILO. Convention No. 102[30] consists of nine substantive parts of which ratifying states must apply at least three. The U.K. government ratified the convention specifying that it undertook to implement Parts II, III, IV, V, VII and X,[31] but the necessary declaration to apply them to Hong Kong was not made. Since paragraph 1 of Article 35 applies to Hong Kong

29. Labour Statistics Convention, 1985, ratified by U.K. May 27, 1987. See *List of Ratifications, supra* note 19 at 205.
30. Social Security (Minimum Standards) Convention, 1952, 210 U.N.T.S. 131.
31. See *List of Ratifications, supra* note 19 at 136.

before 1997 only the U.K. government can make this declaration. But the situation will change after 1997 when paragraph 4 of Article 35 is applied by analogy. The Hong Kong SAR government, with the assistance of the Central People's government, may then have parts of Convention No. 102 made applicable regardless of its ratification by China.[32]

The situation, however, is complicated by the way the U.K. government chose to adopt Convention No. 102. The government did not declare the convention "inapplicable to Hong Kong", rather it "reserved its position" by recourse to Article 80 of the Convention. According to the standard final provisions of many ILO conventions, including No. 102, the ratifying country may determine the scope of application of the convention concerned in one of four forms: "application without modifications", "application with modifications", "inapplicable", or "decision reserved." The fourth option was employed by the United Kingdom in the case of Convention No. 102.

Whether a decision is reserved or the convention is declared inapplicable, the practical effect is the same, i.e. the convention is not applied. However, in the specific case of Hong Kong, since the Joint Declaration will continue the application of existing ILO conventions after 1997, the choice of expression in the U.K. government's declaration concerning Convention No. 102 may have a different effect. If the government had declared the Convention inapplicable, it clearly would not be effective in Hong Kong before 1997. But since the government's "decision reserved" its position, it is not completely accurate to say that the Convention would not be effective. It can be alleged that the obligation to consider the application of the Convention must be transferred to China in 1997. In other words, the issue over the application of Convention No. 102 is part of the unfinished agenda between China and the Hong Kong SAR.

Conclusion

The foregoing examination has shown that the question of the application of ILO conventions to Hong Kong after 1997 could technically be solved by recourse to the notion of NMT as provided for in the ILO Constitution, thereby serving the purpose of the Joint Declaration of 1984 with respect to the ILO. At the same time, the use of the concept of NMT is not fully satisfactory in the handling of the situation both in terms of procedure and substance. Serious consideration should be given in the future to devising a more adequate legal technique for resolving the kind of situations presented by NMTs, but unforeseen at the time when the ILO Constitution was drafted.

---

32. Whether at least three parts are required to be applied is an interesting question.