

## The Change-over of Hong Kong Sovereignty and Some Legal Implications<sup>1</sup>

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### Introduction: policy and legal background

No amount of promises and declarations have made the people of Hong Kong happy, since the Chinese man and the English lady met to decide their future. This paper outlines the basic legal arrangements that have been made in the Basic Law of the Hong Kong Special Administrative Region (The Basic Law of the HKSAR), and the difficulties encountered in matching Chinese and English law with respect to the constitutional changes taking place in Hong Kong after Deng Xiao-Ping and Margaret Thatcher had their nice chat and delicious Chinese food in Beijing fifteen years before.

Annex 1 to the Joint Declaration on the Question of Hong Kong between the UK and China (the Joint Declaration), signed on December 19, 1984, and ratified by both governments on May 27, 1985, elaborates China's policy of 'One country, Two systems' as its basic policy to solve the Hong Kong issue. The main idea of the policy is that Chinese sovereignty will cover Hong Kong which will be directly under the authority of the Central Government of China as a 'Special Administrative Region' enjoying a high degree of autonomy in executive, legislative and judicial power under its existing capitalist system. Originally, the constitutional arrangement of 'Special Administrative Region' (article 31 of the constitution of the People's Republic of China of 1982) was designed to facilitate Chinese policy towards Taiwan.<sup>2</sup> Now it is interpreted that the policy of 'One country, Two systems' not only applies to Hong Kong, Macao and Taiwan

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1 This paper was originally prepared for presentation at the University of Leuven.

2 See "Chairman Ye Jianying's Elaborations on Policy Concerning Return of Taiwan to the Motherland and Peaceful Reunification (September 30, 1981)", in *Major Documents of the PRC (Dec. 1978-Nov. 1989)*, Foreign Languages Press, Beijing 1991, pp. 204-206. See also Peng Zhen "Report on Draft of the Revised Constitution of the PRC (November 26, 1982)", in *Selected Materials on Chinese Constitution*, ed. by Xu Chongde, People's University of China Press 1990, pp. 133-156.

issues, but also provides a peaceful means to solve international conflicts. As a jurist, the author will examine the legislative, executive and judicial implications of Chinese resumption of sovereignty over Hong Kong from a legal point of view.

## **I. Chinese Laws apply to the Hong Kong Special Administrative Region (the HKSAR)**

### **1. The Constitution of the People's Republic of China (PRC) and the Basic Law of the HKSAR**

In theory, the socialist constitution of the PR of China shall be valid and applicable to the HKSAR as it is a part of the PRC, and the constitution of the PRC is the legal basis for drafting the Basic Law of the HKSAR.

China's 'One country, Two systems' policy promised Hong Kong that its 'capitalist system' and existing way of life would remain unchanged for 50 years after July 1, 1997. However, if the constitution of the PRC is valid and applicable to the HKSAR, then is the HKSAR's capitalist system constitutional? The Chinese dogmatic policy on Hong Kong, 'One country, Two systems', means one country and one sovereign, and therefore one constitution shall be solely applicable, but the constitution of the PRC provides that the National People's Congress (the NPC) will enact the law to regulate systems in special administrative regions. It implies that the socialist systems provided for in the constitution of the PRC will not be implemented in the HKSAR. The constitution of the PRC is to be enforced through the Basic Law of the HKSAR, under which the system of the HKSAR is to be established in accordance with the principle of 'One country, Two systems'.

In the early stages of the drafting of the Basic Law of the HKSAR, some of those involved wished to define therein the relationship between the constitution of the PRC and the Basic Law of the HKSAR and the applicability of the constitution of the PRC in the HKSAR, while others argued that the Basic Law of the HKSAR is unable to limit the scope of the application of the constitution of the PRC which, as mother law, has superior status to the Basic Law of the HKSAR in the Chinese legal system. As a result, a separate resolution of the NPC was adopted when the Basic Law of the HKSAR was enacted on 4th April 1990, confirming the constitutional basis of its drafting and its constitutionality.

In accordance with Article 31 of the constitution of the PRC, the systems and policies practised in the HKSAR shall be based on the provisions



of the Basic Law of the HKSAR. Article 31 does not say which part of the constitution of the PRC is not to be applied to the HKSAR; it simply says which systems and policies will be applied there and what their bases are. Article 11 of the Basic Law of the HKSAR specifies that the social and economic systems, the systems for safeguarding the fundamental rights and freedoms of its residents, and the executive, legislative and judicial systems, together with the relevant policies practised in the HKSAR shall follow the Basic Law of the HKSAR. It could be understood to imply that the socialist systems and policies, provided for in the constitution of the PRC but not mentioned in the provisions of the Basic Law of the HKSAR, will and shall not be applied to the HKSAR.<sup>3</sup>

Hong Kong people may still be confused about the concept of constitution and sovereignty, be it under UK rule or under the PRC. To some, it is still uncertain what their constitutional guarantees will be. The 1992 Hong Kong Bill of Rights is the result of such concerns and confusion. China's position is clear, the 1991 Hong Kong Bill of Rights will not survive unless it is endorsed by the Basic Law of the HKSAR.<sup>4</sup>

## 2. The applicability of national laws in the HKSAR

The 1984 Joint Declaration states that the laws of the HKSAR shall be the Basic Law of the HKSAR, laws enacted by the HKSAR legislator and existing law. The existing laws are the common law, laws of equity, ordinances, subordinate legislation and customary law.<sup>5</sup>

Generally speaking, Chinese national law enacted by the National People's Congress will not need to be enforced in the HKSAR; for example, Chinese Civil Law, Criminal Law, Civil and Criminal Procedure Law and commercial laws will not be applicable to the HKSAR.

However, Chinese laws relating to national powers as well as other matters outside the limits of the autonomy of the HKSAR will have to be applied to the HKSAR, to establish sovereignty. In other words, Chinese laws relating to defence and foreign affairs which give expression to national unity and territorial integrity will be applicable to the HKSAR. The question is: how many of these laws should be applied to the HKSAR and

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3 See also Art. 5 of the Basic Law of the HKSAR.

4 See "Britain Urged to Honour Pact", in *China Daily*, 31 Jan 1997.

5 Hong Kong's existing laws are to be maintained except for any that contravene the Basic Law of the HKSAR (Art. 8 of the Basic Law of the HKSAR). According to Art. 160 of the Basic Law of the HKSAR, the standing Committee of the NPC made decisions on dealing with laws previously in force in Hong Kong on 23 Feb 1997, in *Legal Daily*, 27 Feb. 1997. See also Xu Chongde, Chen Ke, "On Reservation of HK Laws", in *Law Review*, No. 2, 1992, p. 38-42.

by what procedures? The Basic Law of the HKSAR lists these applicable national laws in Annex 3. In this way, the Basic Law of the HKSAR itself will not have to be amended if there were new Chinese national laws applicable to the HKSAR in the future.

At present, six Chinese national laws are listed in Annex 3:

(i) The 1949 Resolution on the Capital, the Calendar, the National Anthem and the National Flag of the PRC. As from midnight on 30 June 1997 Hong Kong will fly two flags, the PR China flag and the HKSAR flag;

(ii) The 1949 Resolution on the National Day of the PRC. Hong Kong people will celebrate 1st and 2nd of October as a holiday nation-wide;

(iii) The 1950 Order on the National Emblem of the PRC, proclaimed by the Central People's Government;

(iv) The 1958 Declaration by the Government of the PRC on the Territorial Seas, according to which the territorial waters of the PRC extend for 12 nautical miles;

(v) The 1980 Nationality Law of China, under which dual nationality is not recognised. All Hong Kong Chinese, whether or not they hold the British Dependent Territorial Citizens (BDTC) or the British National (Overseas) (BNO) passport, are Chinese nationals,<sup>6</sup> who are not subject to British consulate protection within the PRC and the HKSAR.

In 1989 the British Government launched a plan to give 50,000 heads of Hong Kong families the right of abode in Britain. In its late draft version, the Basic Law of the HKSAR added the relevant provisions to restrict the right of those who will have such a right of abode. For example, only Chinese nationals will be entitled to participate in the management of state affairs and elect deputies to the National People's Congress. The posts of Chief Executive of the HKSAR, members of the Executive Council, the HKSAR government, and the principle officials and president of the Legislative Council may only be HK Chinese nationals who are permanent residents of Hong Kong with no right of abode in any foreign country.

(vi) The 1986 Regulations of the PRC concerning Diplomatic Privileges and Immunities will be the sixth national law applicable to the HKSAR. This is a law providing for the privileges of members of foreign diplomatic missions in China. Since the establishment of foreign consular and other official or semi-official missions in the HKSAR is within the jurisdiction of the Central Government of China, these consular offices and staff shall not only abide by the Hong Kong laws but also by Chinese laws.

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6 This point is confirmed by the Standing Committee of the NPC in its "Interpretation of Issues with respect to Application of the Nationality Law of China in the HKSAR" (May 15, 1996), in *Gazette of the State Council of the PRC*, 1996, No. 16, p. 630.



With regard to the procedure for applying the national laws, the Basic Law of the HKSAR confers to the Standing Committee of the NPC the power to add to or delete from the list of the national laws which shall be applied locally by way of promulgation or legislation by the HKSAR. In addition, the Central Government may also issue an order applying relevant national laws in the event of the HKSAR being in a state of emergency or a state of war (which is to be decided by the Standing Committee of the NPC). This clause was drafted after the Beijing student movement of 1989. Some Hong Kong people have lost their trust in the Basic Law of the HKSAR and burned it in public, even before it was adopted in 1990.

## **II. The Relationship between the Powers of the Central Government and the HKSAR**

The second question arising from the change-over of sovereignty is what extent of 'high degree of autonomy' Hong Kong will enjoy as authorised by the Basic Law of the HKSAR.

'One country, Two systems' plus a 'high degree of autonomy' appear to be flexible principles in dealing with the demarcation of powers between the Central Government and the HKSAR as a local authority. However, as a matter of law it is rather a difficult issue. In addition, the notion of 'Hong Kong people govern Hong Kong' seems too simple to clarify the complexity of the relationship between Beijing and the HKSAR in terms of politics.<sup>7</sup> As mentioned above, the applicability and enforceability of the constitution of the PRC and Chinese laws to the HKSAR touch directly the issue of the division of powers between the Central Government and the HKSAR as a local administrative region. The breadth of the Central Government's responsibility for foreign and defence affairs leaves enough scope for the Chinese government to have a say in the future destiny of Hong Kong, although the Basic Law of the HKSAR does provide for the HKSAR to be vested with autonomous powers in executive, legislative and independent judicial affairs.

China considers itself as a unitary state, the doctrine of residual powers in the division of the powers between Central and Local Government is not recognised jurisprudentially. China argues that if there are any residual

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7 One example is that the 1994/1995 democratic reform establishing an elected Hong Kong Legislative Council will be abandoned. See "Facts about a Few Important Aspects of Sino-British Talks on 1994/95 Electoral Arrangements in Hong Kong", in *China Daily*, 1 March 1994.

powers, they should belong to the Central Government and that, if there is any necessity to authorise such power to a Local Government such as the HKSAR, it shall be granted by the central authorities.

In the earlier draft of the Basic Law of the HKSAR there were 29 matters of administration listed as matters to be dealt with by the HKSAR. Now, matters to be governed locally are not listed. All matters in the Basic Law of the HKSAR are mentioned either as domestic or external ones.

The actual autonomy of HKSAR's administration in both domestic and external matters will be very crucial if Hong Kong is to remain a free port, an international trade and financial centre. Some internal and external matters to be governed by the future HKSAR under the existing constitutional arrangement are an example of a mixture of flexibility and rigidity.

1. With regard to the monetary and financial system, the Basic Law of the HKSAR provides for Hong Kong to have its own independent finances and that the financial revenues shall not be handed over to Beijing.<sup>8</sup> The Central Government will not levy taxes in Hong Kong (Article 106 of the Basic Law of the HKSAR). The Hong Kong government will be vested with authority to issue the Hong Kong Dollar.<sup>9</sup> At present, the Chinese RMB is not fully convertible but in practice is circulated in some Hong Kong shops and used in some transactions. It is expected that the RMB will be convertible by the year 2000. That China will offer economic assistance to the HKSAR is predictable, given the presence of Chinese investment in Hong Kong and China's long-term plan of 'insurance' of HK's prosperity and stability.
2. Shipping and aviation of paramount importance in guaranteeing the free port status of Hong Kong.

(i) Through the arrangement between China and Britain, the system of shipping management and regulation in Hong Kong will continue. In particular the HKSAR will have its own shipping register and will be able to issue certificates in the name of 'Hong Kong, China'. An interesting arrangement was made to indicate both the nationality of the ship and the fact that it is on the Hong Kong register: a Hong Kong

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8 It was reported that experts of the Sino-British Joint Liaison Group, established according to the Joint Declaration, reached consensus on Hong Kong's 1997-1998 budget at their 19th meeting. See *China Daily*, March 5, 1997.

9 The HK dollar will still be linked with the U.S. dollar in exchange rates. The People's Bank of China will support Hong Kong's monetary stability in accordance with the Agreement on the Bilateral Buy-Back of U.S. Treasury Bonds, signed in February 1996 between the People's Bank of China and the Hong Kong Monetary Authority.



registered ship will fly two flags joined together – the upper flag that of the PRC and the lower one the HKSAR regional flag.

(ii) To maintain Hong Kong's status as a centre of regional and international air services is not only a legal but also a political and financial issue. The recent disputes over the new airport construction in Hong Kong illustrate the conflicts of interest between what is guaranteed by law and how that guarantee works in practice. The HKSAR will be authorised to issue licenses to air lines incorporated in the HKSAR and having their principle place of business in Hong Kong. Whether an air line incorporated in Hong Kong will be able to be designated for scheduled services will depend on the terms of the air service agreements concluded by the HKSAR with other countries or regions. It is stipulated that the HKSAR government, acting under special authorisation from the Central Government, may renew or amend air service agreements and arrangements previously enforced and negotiate and conclude new air service agreements or provisional arrangements for air services to, from or through Hong Kong which do not operate to, from or through the mainland of China. In concluding the agreement concerning air services from and to other points in mainland China through the HKSAR, the Central Government will, or should, consult the HKSAR government and should take account of the special conditions and economic interests of the HKSAR. It should be noted that, without the relevant air service agreement, an aircraft from a foreign state would not have access to the HKSAR without previous permission from the Central Government of China.

3. With respect to entry and exit controls, the HKSAR will be authorised to issue special administrative regional passports and to conclude visa agreements with foreign states or regions. Immigration controls will still be applied. People from mainland China still have difficulties with migration but, under the recent arrangements, a PRC passport holder may stay in Hong Kong for transit within 7 days if he or she is travelling back to mainland China or is travelling overseas from mainland China with the valid relevant overseas visa.

People from Hong Kong who hold British Dependent Territory Citizenship (BDTC), which cannot be passed on to their children, will still be recognised as Chinese nationals. They will not be entitled to British consulate protection and will have no right of residence in Britain. In 1987, the British National (Overseas) Passport (BNO) was introduced to replace the BDTC; this BNO passport explicitly identifies the holder as having no right of residence in Britain, but this passport may still be

used after 1997 as a travel document with a note attached stating that the holder is also the holder of a Hong Kong permanent ID card containing a statement of right of residence in Hong Kong. This new form of passport has been recognised by an increasing number of states.

4. Hong Kong will be a separate customs territory. As 'Hong Kong, China' it may participate in relevant international organisations and international trade agreements, including preferential trade arrangements such as the General Agreement on Tariffs and Trade (GATT). The Chinese and British governments have reached agreement with GATT to the effect that Hong Kong may remain an separate customs territory and become an independent member of GATT, even though China is not a member of GATT.<sup>10</sup>
5. As regards Hong Kong's economic and trade relations and the arrangement of its future status in international society, the Basic Law of the HKSAR allows the region to establish official or semi-official economic and trade missions in foreign countries, but HKSAR will have to report these to China for the record. At present Hong Kong's representative office in Brussels is mainly responsible for Hong Kong's trade relations with Europe. The establishment of a foreign consulate and other official or semi-official missions in the HKSAR will, however, require the approval of the Central Government of China.

As representative of Chinese sovereignty the Central Government will exercise four kinds of powers in accordance with the Basic Law of the HKSAR. Firstly, the Central Government will be responsible for foreign affairs relating to the HKSAR, though the region is to be vested with powers to conduct relevant external affairs as elaborated above. Secondly, defence of the HKSAR will be the responsibility of the Central Government. The military forces from mainland China are to be stationed in the HKSAR.<sup>11</sup> Thirdly, the Central Government will have power to appoint the Chief Executive and the principle officials of the executive authorities of the HKSAR. Finally, the Central Government will have supervisory powers, e.g. the Standing Committee of the NPC will have power to supervise

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10 China is expected to restore her seat in the World Trade Organization (WTO), the successor to the GATT, in 1997.

11 See "Stationing of Army in the HKSAR", Public Announcement of the PRC State Council and PRC Central Military Commission on 28 Jan 1996, in *Legal Daily*, 29 Jan 1996. See also "Garrison Law of the HKSAR" (adopted on 30 Dec 1996), in *Legal Daily*, 31 Dec 1996.



the legislation of the HKSAR. The appointment of officials and judges shall be reported to the Standing Committee of the NPC for the record.

The policy of 'Hong Kong people govern Hong Kong' expresses its concern that the Central Government shall not interfere with the HKSAR's autonomy. Since the Chinese government warned Hong Kong against interfering with Chinese domestic affairs, in participating in the Beijing students' movement in 1989, China has placed more emphasis on the other aspect of non-interference, i.e., how to prevent the future HKSAR from interference with mainland China. The Chinese saying 'the river water does not interfere with well water' implies, in this non-interference context, that the HKSAR will not be allowed to transplant its capitalist system and its political values, into socialist mainland China. The logic behind this is that to make use of the HKSAR as a base for subverting the Central Government is against the 'Two systems' policy, which accepts at least in theory the co-existence of 'socialist water' and 'capitalist water' for a certain period of time.

In the late stages of drafting the Basic Law of the HKSAR two clauses were added to prevent the region from interfering with mainland China. Paragraph 4 of Article 18 stipulates that if the Standing Committee of the NPC decides to declare a state of war or, that the HKSAR is in a state of emergency due to turmoil within the region which endangers national unity or security and is beyond the control of the HKSAR, the Central Government may issue an order applying relevant national law in the HKSAR. It could include martial law. In addition, Article 23 provides that the HKSAR shall enact laws to prohibit any act of treason, secession, sedition or subversion against the Central Government. Theft of state secrets is also to be prohibited by law, as are foreign political organisations or bodies from conducting political activities in the HKSAR, and political organisations or bodies of the HKSAR from establishing ties with foreign political organisations or bodies.

Thus the maximum line defining the relationship between Beijing and the HKSAR has been drawn. It can be noted that the division of powers between the Central Government and the HKSAR is not entrenched, as the Basic Law of the HKSAR is an enactment under the constitution of PR China. However, the procedures for amendment to the Basic Law of the HKSAR have special requirements.

### III. Final Adjudication

The third implication of the change-over involves the judicial system and judicial independence of the HKSAR. Hong Kong's common law system and independent courts are generally considered to have dealt successfully with modern economic life and ensured minimal governmental intervention in business operations. Chinese jurisprudence held that there is no real judicial independence in Hong Kong because the sources of its judicial authority and the operation of its judicial system are the concept of colonialism. Furthermore, the HKSAR will enjoy higher judicial autonomy than it does now, since the power of final adjudication is to be vested in the HKSAR according to the Basic Law of the HKSAR and the Supreme People's Court in Beijing will not be the court of final appeal for HKSAR jurisdiction.

The HKSAR will have its own court of final appeal;<sup>12</sup> consequently appeals to the Judicial Committee of the Privy Council in London will be abolished, and additionally, English case law will only have the same precedent effect as case law from other common law jurisdictions. However, the Basic Law of the HKSAR makes it clear that the HKSAR courts have no jurisdiction over acts of state such as foreign affairs and defence; the court shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state.

There was extensive debate on the restrictions on the jurisdiction of the HKSAR court; it led to the stipulation in the Basic Law of the HKSAR to recognise that the courts of the HKSAR shall have jurisdiction over all cases in the region except that the restriction on their jurisdiction imposed by the legal system and the principle previously enforced in Hong Kong shall be maintained (Article 19). The existing restrictions on Hong Kong jurisdiction are reflected in the so-called doctrine of 'Act of the State' and 'Fact of the State'. All acts of the state fall within the scope of the responsibility of the Central Government.

Related to the restriction on the jurisdiction of the HKSAR courts is the issue of interpretation of the Basic Law of the HKSAR by the HKSAR's courts. The provisions of the Basic Law of the HKSAR regarding interpretation of the Basic Law of the HKSAR reflects a compromise between Chinese jurisprudence, which favoured vesting the power of interpretation in the Standing Committee of the NPC (legislative interpretation), and the common law position, which favoured vesting the power in the courts of

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12 It was reported that the Sino-British Joint Liaison Group reached consensus on the establishment of the Court of Final Appeal and amendments to the Court of Final Appeal Ordinances, see *Legal Daily*, 10 June 1995.



the HKSAR (judicial interpretation). It has been argued that it is impossible to maintain judicial independence and the power of final adjudication without vesting the power of interpretation of the Basic Law of the HKSAR in Hong Kong courts themselves.

According to Chinese jurisprudence, the authority of judicial interpretation is secondary to that of legislative interpretation; however, the HKSAR's courts are still independent, because the legislative interpretation of the Basic Law of the HKSAR is at the general level of broad principle, and not at specific case level which is a court task. In addition, a device for limiting the amount of possible legislative interference with the HKSAR's final adjudication with respect to the interpretation issue is 'installed' in Article 158 of the Basic Law of the HKSAR by taking account of the current practice in the courts of Britain and the European Community.

Now Article 158 of the Basic Law of the HKSAR confers the power to interpret all provisions of the Law in adjudicating cases within the HKSAR's courts. However, if the interpretation involves the provision of the Basic Law of the HKSAR concerning affairs which are the responsibility of the Central Government or concerning the relationship between the Central Government and the HKSAR, then the courts shall, before making their final judgement, seek an interpretation from the Standing Committee of the NPC. Then the courts are to apply the legislative interpretation to the case. This application shall be followed in later cases as a precedent, but judgement previously rendered shall not be affected. In addition, it was decided that a special committee called the Committee for the Basic Law of the HKSAR be set up under the Standing Committee of the NPC. The latter shall consult the special committee before giving interpretation of the Basic Law of the HKSAR. This device will be tested in practice in the very near future.

#### **IV. Concluding remarks**

The concept of 'constitution', the application of the doctrine of residual powers; the relationship between judicial interpretation and the restriction of judicial power will become more practical issues in the very near future. We might see the direct relevance of the following three points when one day we look back to the issue of Hong Kong in 1997:

- (i) how Hong Kong people govern Hong Kong under Chinese law will be an issue beyond the rule of law or the legal system itself;

- (ii) how political and legal practice safeguard economic prosperity, political stability and judicial independence in the HKSAR will depend mainly on the relationship between Beijing and HKSAR authorities;
- (iii) the Basic Law of the HKSAR only provides a legal framework, the operation of the Law will be the course of never-ending conflict of interest between various parties, including the British interest in Hong Kong, which was set out in the Joint Declaration.