

## But Hong Kong Should Seek A Better Way...

By Fu Hualing and Richard Cullen

### Introduction

During the nearly nine years since Hong Kong became the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China, one curious aspect of the relationship is more clear than ever: Hong Kong's primary political and legal difficulties in maintaining as much autonomy as possible stem, most of all, from an "insufficiency of One Country."

In the debates about Hong Kong's post-1997 relationship with Beijing, "One Country" usually signifies (depending on where one stands in the debates) either: (a) the need to adhere to the primacy of the PRC in the One Country, Two Systems (OCTS) formula; or (b) excessive Beijing dominance, directly or indirectly, of political life in the HKSAR. However, there is quite another way of looking at One Country. When one considers the wide range of other jurisdictions with powerful regional governments and identities (Canada, Switzerland and the USA, for example) almost always there is basic agreement on the central-regional, *legal* relationship within *one country*. This is, too often, still not the case regarding the relationship between Hong Kong and Beijing. If we did have fundamental agreement on the detail of the political-legal relationship within One Country, we would be far better placed. That, indeed, is what both sides should be working towards.

This paper sets out to explain why this is so, under three main headings:

1. The constitutional position of the HKSAR within the Chinese constitutional structure.
2. The lack of adequate institutional arrangements to facilitate negotiations and settle disputes between Hong Kong and Beijing.
3. The relative success of cross-border, Mutual Legal Assistance (MLA) measures - which highlight the direction of possible reform by demonstrating what can be achieved.

### The Constitutional Position of the HKSAR

The One Country, Two Systems concept has been a familiar one for the Chinese Communist Party for over 60 years. During the anti-Japanese War of the late 1930s and early 1940s, the tiny region that was under Communist control was actually the "other system" in a country controlled by the Nationalist Party. This first OCTS experiment failed after seven years and China plunged into a prolonged Civil War. Immediately following the Communist victory 1949, the party applied the system to Tibet. Once, more, seven years after implementation, the experiment terminated. The Dalai Lama went into exile in India, taking the Tibetan government with him.

OCTS as practised in Hong Kong has fared much better. Hong Kong remains a prosperous international financial city, with substantial civil liberties, eight years after the transfer of sovereignty. But it has encountered a number of cross-border, constitutional crises since July, 1997. These problems have their origins in the fundamental design of the Basic Law - the mini-Constitution of the HKSAR. Notwithstanding several amendments to the PRC Constitution, including the incorporation of certain market economy principles and statements about the rule of law and the protection of property rights, the Communist Party remains the repository of ultimate political power.<sup>1</sup>

The Basic Law was passed by the National People's Congress of China to implement basic policies regarding Hong Kong as stated in the Sino-British Joint Declaration. Article 5 of the Basic Law states that: '[t]he socialist system and policies shall not be practiced in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years'. Although Article 31 of the PRC Constitution authorizes the state to establish a Special Administrative Region whenever necessary, it is not clear to what extent any newly established region may deviate from the socialist system.<sup>2</sup> As Professor Yash Ghai has noted, the question is, what limits may apply to the congress' broad powers to establish new political-economic systems in a SAR<sup>3</sup> -- does the national Constitution authorize it to create any system it deems fit? Given the express statements about socialism and the dominant role of Communist vanguard in Chinese society, and given the clear superiority of the Chinese Constitution, certain questions arise with respect to the constitutionality of the Basic Law. That is, if one reads the Preamble and Article 1 of the PRC Constitution as prescribing fundamental limits on what governance and economic structures are permitted, Article 31 has to be read as subject to the Preamble and Article 1.

The compatibility between the Basic Law and the Constitution was regarded as a particularly ambiguous point when the law was drafted. The Basic Law was adopted by the NPC in April, 1990 and took effect on July 1, 1997. It provides that the Hong Kong is to have competence over all matters apart from foreign affairs and defence, and guaranteed the continuation of Hong Kong's legal system. To ensure that its constitutionality would not be challenged, the National People's Congress formally declared that the Basic Law is consistent with the Constitution on the same day it passed the law—a move designed to set aside doubts about its constitutionality.

But the political-legal system created by that law is fundamentally antagonistic to the political-legal system created by the Chinese Constitution. Although political expediency (especially since 1997) may have produced a 'weakening' of the textual (and substantive) antagonism between these two systems, current modes of legal interaction between the Basic Law and the Constitution clearly lack doctrinal support within the Constitution itself. Thus

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<sup>1</sup> Preamble, the PRC Constitution.

<sup>2</sup> Article 31 of the PRC Constitution states that, '[t]he state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions'. Article 62(13) further provides that the NPC has the power "to decide on the establishment of special administrative regions and the systems to be instituted there".

<sup>3</sup> Yash Ghai, *Hong Kong's New Constitutional Order* (Hong Kong: Hong Kong University Press, 1997), 89.

it has been forced to give birth to a deviant political system so different that it has to be kept at a distance. The Basic Law is thus both a wedge to separate the two systems and at the same time a bridge to connect Hong Kong and China.

Given the contradictions between them, then to what extent is the Constitution applicable in Hong Kong? The argument that it applies as a whole to Hong Kong must be rejected because the Constitution allows only one system. A more popular argument is that it applies only partially, but this theory is difficult to apply. A convenient, but not principled, argument is that the Basic Law is a national law passed by the congress, when decided, pursuant to an international treaty, to exercise its supreme power only through the framework of that de facto constitution.

It is now settled that, as far as Hong Kong courts are concerned, the Basic Law forms the only valid constitutional cord connecting Hong Kong's laws to the national constitution. There is no other official means by which Chinese laws (including the Constitution) may be applied in Hong Kong. As the Hong Kong Court of Final Appeal has authoritatively stated: "the Court accepts that it cannot question the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein."<sup>4</sup>

Unfortunately, the constitutional problems have not been resolved by this *modus vivendi*. The Basic Law is not self-contained – it has not established a complete constitutional "firewall" around the HKSAR. There remain several means by which China's laws – and legal mores – may cross the border and mingle adversely with Hong Kong's common law regime. The most detrimental conduit has been and remains Article 158 of the Basic Law, which allows the Standing Committee of the NPC to interpret the Basic Law and which has been used from time to time to narrow the scope of rights and to arrest the promised democratic development.

Another means is when Chinese laws are applied in Hong Kong based on their own wording and the application of internationally accepted rules allowing the offshore application of certain types of Criminal Law – in other words, through the extra-territorial application of certain Chinese laws.

Given the close social and economic ties between these two parts of China and the fast changing nature of economic and social relations on the Mainland, it is inevitable that stresses will arise and have a significant impact on the constitutional relationship between them. We are bound to see more such tensions in the future. The politically driven gaps in the formal constitutional relationship outlined above are amplifying the problems derived from these recurring tensions. All this makes the need for effective, agreed institutional dispute-resolving mechanisms that much more urgent

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<sup>4</sup> *Ng Ka Ling (an infant) & Anor v. Director of Immigration; Tsui Kuen Nang v. Director of Immigration; Director of Immigration v. Cheung Lai Wah (an infant) (No. 2)*, [1999] 1 HKC 425.

## The Institutional Infrastructure

The Basic Law, to a large degree, recognizes and preserves the internal differences noted above. But it lacks an institutional structure to generate a positive consensus between the mainland and Hong Kong to manage and accommodate the regional differences.<sup>5</sup>

The Basic Law Committee and, to a lesser degree, the National Peoples Congress deputies from Hong Kong, are the only institutions within the law's framework that bridge the two legal systems on constitutional matters. This is both 'a concession to the "One Country Two Systems" doctrine and an attempt to marry two different legal (and political) traditions.'<sup>6</sup>

The Basic Laws Committee is an advisory committee of the Standing Committee of the Congress. It was established on April 4, 1990, the same day the Congress passed the Basic Law. It has 12 members, six each from the mainland and Hong Kong<sup>7</sup>, and serve five-year terms. The Standing Committee should, under the relevant Basic Law provisions, consult the this committee before it: finds any Hong Kong law inconsistent with that Basic Law (Article 17); adds to, or deletes from, the list of national laws in Annex III of the Basic Law applicable to HKSAR (Article 18); interprets the Basic Law (Article 158) or amends the Basic Law (Article 159). Given the qualifications of the committee members, the advice it gives will be more political than legal, however.

The committee was set up at the request of Hong Kong members of the Basic Law Drafting Committee to ensure that, when the Standing Committee of the NPC made its decisions, it would consider and respect the autonomy of Hong Kong and the rule of law as practised there. Although there have been high expectations that the committee would become a (quasi) constitutional court linking the differing legal systems and traditions, its performance over the past eight years has been disappointing. There was also fear that the Basic Law Committee 'could become another instrument for the co-option of Hong Kong members, and serve to legitimize inroads into autonomy'.<sup>8</sup> This has not, however, come to pass. Instead, the Standing Committee has effectively reduced it to being a rubber stamp – it is not treated seriously. Its reputation and legitimacy have suffered as a consequence.

The second bridging institution is the congressional delegation from Hong Kong. Within China's socialist state, all powers, according to the national constitution, are vested in the Congress. Given its legal importance, one might expect that its Hong Kong delegation might

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<sup>5</sup> We have not extended this review to cover the position of the Macau SAR – which saw sovereignty revert to the PRC from Portugal in December, 1999. Many of the comments made here would relate, in principle, to the relationship between Macau and Beijing, though. Macau is, of course, has less than 10% of the population of the HKSAR and its relationship with Beijing pre-and-post- handover has been much less strained than that between Hong Kong and Beijing over the same relative period.

<sup>6</sup> Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: University of Hong Kong Press, 1999.) 196.

<sup>7</sup> Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: University of Hong Kong Press, 1999.) 196.

<sup>8</sup> Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: University of Hong Kong Press, 1999.) 197.

represent the voice of Hong Kong in this organ of supreme state power and also serve as a bridging institution between them. But the Hong Kong deputies, selected through a small circle election, do not genuinely represent the territory, as the existing electoral rules effectively limit membership to the “pro-China” faction within Hong Kong. These deputies also do not enjoy any legal authority in either the mainland or Hong Kong in terms of supervising the Hong Kong Government. For the most part, they lack sufficient political and social standing in the community. Moreover, the Congress has decided unequivocally that China’s congressional system does not directly apply in Hong Kong. Thus the Deputies, despite efforts to make their role more meaningful, act essentially in a symbolic capacity.

### **Mutual Legal Assistance**

Despite this constitutional logjam and the institutional weakness outlined above, cross-border mutual legal assistance in civil and commercial law areas has improved substantially over the past eight years. Hong Kong’s thriving legal sovereignty (and ability) and the operational independence of its legal system have underpinned this progress. Hong Kong has now negotiated and concluded agreements across a range of matters including: the service of judicial documents; mutual recognition and enforcement of arbitral awards; avoidance of double-taxation and it is close to reaching an agreement on recognition and enforcement of certain court decisions.

Progress has been incremental, but sound established frameworks have been found which allow steady improvement. For example, the double-tax arrangement between the two entities used the OECD model treaty as a basic template.

### **Conclusion**

Federalism and autonomy systems fail when: (a) there is no common framework to accommodate differences; and (b) no independent institutions to settle disputes. The Basic Law recognizes and preserves Hong Kong’s internal political, economic and social differences. But, by design, it lacks a detailed institutional structure to generate positive consensus between Beijing and Hong Kong.<sup>9</sup> In particular, it lacks institutional mechanisms to restrain mainland authorities from possible interference in the political-legal operation of the Hong Kong region. These need to be developed anew. The two originally-established bridging institutions, the Basic Law Committee and the Hong Kong delegation to the National Peoples Congress, have proved to be inadequate. The delegation is mainly symbolic and has not been taken seriously by either side, while the committee is too passive and seems to have, to a degree, discredited itself in the eyes of many.

The real achievements made in civil and commercial legal agreements show that where there is a framework within which to work – and some level of mutual agreement about given problems – genuine, workable solutions can be effectively be built up over time.

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<sup>9</sup> Given that the world’s largest ever, one party state was absorbing a common law based, liberal (though non-democratic), first-world city state, it is hardly surprising that much of the legal detail governing the future relationship was left in the “too hard basket”.

Another aspect of the dynamic interplay shaping Hong Kong's political development which should be kept in mind is the impact of the gradual transition from "bad" to "better" (if not actually "good") communists on the Mainland. When Hong Kong was dealing with Beijing politicians who were major actors in the violent clearing of Tiananmen Square in June, 1989, it was not difficult to tap into deep reservations across most of Hong Kong about those leaders. In 2006, though, we are engaging with Beijing leaders who, though still wedded to the one party state, are better informed, better trained, better advised and possessed of high order political understanding and sophistication.

The Basic Law is not just the primary but is the only realistic, fundamental instrument available to act as a means to bridge, over time, the great structural divide separating two very different legal systems and legal cultures. In order that it be deployed as constructively as possible, we badly need a much improved, agreed framework for working through the existing (and coming) Beijing-Hong Kong constitutional tensions. Both have much to gain from "de-polarizing" the constitutional interaction – by agreement. This is the goal toward which constructive actors across the divide need to strive. ■

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