

# **One Country Two Systems : Theory Into Practice**

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## **1. The Policy of ‘One Country Two Systems’**

China has a long history which is full of glories and glooms. In the past it suffered humiliation by foreign powers by way of series of ‘unequal treaties’ which undermined China’s sovereignty. The Opium War (1839-1842) has been considered an example of ‘humiliation’ in the Chinese recent history. After the war, China was imposed a number of unequal treaties which forced China to cede its territories to other nations. Hong Kong was ceded to the UK under those treaties. This scene of imperialism continued till 1949 when the Kuomintang Government was ousted and the People’s Republic of China was established. The period from 1842 to 1949 is considered both by the Chinese government and scholars as a “century of humiliation” during which China was demoted to a semi-colony of Western countries. Thereafter, due to ideological and political differences, China was isolated from the rest of the world for almost three decades. Its window could only be opened for countries with same ideologies. Although with a large population, the Chinese economy was very fragile before 1980, when the policy of economic reforms started to be implemented in China. As a result of such economic, political and historical reasons, China has always treated sovereignty as a matter of principle which cannot be compromised. Those who conceded territories to foreign powers in the past have always been condemned by the Chinese.

To reassume sovereignty over the lost territories and to maintain territorial integrity were always the highest political objectives of the Chinese government and leaders. After the People’s Republic was

established, to reunite Taiwan, Hong Kong and Macao was naturally stated to be one of the main tasks of the Chinese government. This task, however, could not be accomplished then due to internal and external environment.

After the Cultural Revolution, the Chinese government adopted a pragmatic attitude towards the world including the reunification of Taiwan, Hong Kong and Macao with the motherland. In September 1982, in his meeting with former British Prime Minister, Mrs. Thatcher, Deng Xiaoping said that the Hong Kong issue could be resolved through the method of 'one country two systems.' Thereafter, the policy of reunification has been referred to as "one country two systems." When the policy of 'one country two systems' was first initiated, nobody including the Chinese government, was certain as to the content of such policy. It was however commonly understood that 'one country two systems' should include Hong Kong people govern Hong Kong and high degree of autonomy.

It must be pointed out that in the view of the Chinese government, despite the 'high degree of autonomy' to be given, the special administrative regions should not be considered as states of a federal nation. They must remain as local governments. Accordingly, their powers and autonomy must be delegated by the central government. In other words, the 'one country' and 'two systems' should be balanced. As far as the latter is concerned, it is necessary as a means to reunite China. It is not the objective. For the Chinese government, sovereignty and unity of the country is the most important objective. Matters which are not within the authorities of the special administrative regions will be dealt with by the central government. In addition, the central government may intervene into the management of the special administrative regions when the principle of 'one country' is affected. The Chinese government never excluded the possibility of intervention by the central government. In their view, since the special administrative regions are part of China, when the circumstances require, the central government has an obligation to ensure the smooth operation of the special administrative regions.

The 'one country two systems' policy is a practical solution

under the current circumstance. On the one hand, the Chinese leaders wanted to have the country reunited and the principle of sovereignty to be observed. On the other hand, they were aware of the fact that people living outside the mainland of China and foreign investors were afraid of the socialist system. In order to win support of the people of Hong Kong, Macao and Taiwan and international investors, the adoption of the 'one country two systems' policy is a logical and practical solution.

When the Joint Declaration was signed in 1984, China's policy of economic reforms and opening to the outside world had just been implemented for about four years. A lot of people, in particular the conservative officials, were still suspicious of the policy. Such people did not understand the importance of carrying out the reform policy. Domestically, the establishment of special economic zones was challenged. These people compared the special economic zones with the leased territories in old China and argued the setting up of such zones being not consistent with socialism. The granting of high degree of autonomy, the maintenance of the legal system of Hong Kong after the reversal of sovereignty was bound to arouse discussions in China. Having this in mind, no sooner than after the Joint Declaration was announced, a theoretical journal of the Communist Party of China published an article to point out that in resolving Hong Kong and Taiwan issues historical facts and reality must be taken into account and that the 'one country two systems' policy is a strategic measure. To resolve the problems left over in history by way of taking into consideration the historical facts and respecting reality is a tradition of China. In the past, China adopted a similar attitude towards the solution of the territories acquired by the former Russia under other unequal treaties.

An important aspect of 'one country two systems' is that the people of the capitalist Hong Kong govern their own affairs of the territory. The Chinese government's position is that the "people" referred to are those who are patriotic. That is, in order to grant the Special Administrative Region a high degree of autonomy, the people thereof must love their motherland. In other words, the precondition of high degree of autonomy is patriotism. So long as the

people in the Special Administrative Region do not harm the sovereignty and the unity of China, they may run their own affairs freely.

To state that only patriotic people may govern the Hong Kong Special Administrative Region is not an empty slogan. It is one of the criteria for selection of the leaders of the Special Administrative Region. This became very clear to both China and Hong Kong after the 1989 student movement in China during which Hong Kong people strongly supported the students. As a result, in the last stage of drafting of the Basic Law a condition was introduced for becoming members of the first Legislative Council which stated "...those of its members who uphold the Basic Law of Hong Kong Special Administrative Region of the People's Republic of China and pledge allegiance to the Hong Kong Special Administrative Region of the People's Republic of China .... become members of the first Legislative Council of the Region."

It is to be noted that whilst the term "Hong Kong people governing Hong Kong" does not appear in the Basic Law, the Joint Declaration specifically spells out that the government of the Hong Kong Special Administrative Region will be composed of local inhabitants. This is not an over-sight of the draftsmen or change of mind of politicians. Rather, the spirit of Hong Kong people ruling Hong Kong has been incorporated in various provisions of the Basic Law. The requirement that the Chief Executive, the Chief Justice and other main officials must be a permanent resident who have lived in Hong Kong for a fixed number of years, and the resident requirement of the members of the Legislative Council are examples.

## **2. 'One Country Two Systems' under the Basic Law**

The direct implementation of the 'one country two systems' policy was the adoption of the Basic Law. Unlike the enactment of other laws in China, the drafting of the Basic Law was undertaken by a committee which included members from both mainland of

China and Hong Kong, i.e. the Basic Law Drafting Committee. In addition, during the drafting and negotiations among the members of the Committee, outside consultation was conducted both in China and Hong Kong. Since members of the Basic Law Drafting Committee were from China, and Hong Kong, the final version of the Basic Law does represent compromise and co-operation of both legal systems. In its preamble, the Basic Law lays the framework for the Special Administrative Region as:

Upholding national unity and territorial integrity, maintaining the prosperity and stability of Hong Kong, and taking account of its history and realities, the People's Republic of China has decided that upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and that under the principle of "one country, two systems," the socialist system and policies will not be practiced in Hong Kong. The basic policies of the People's Republic of China regarding Hong Kong have been elaborated by the Chinese Government in the Sino-British Joint Declaration.

Some people have argued that since the preamble of the Basic Law has made a reference to both the Chinese Constitution and the Joint Declaration and therefore the validity of the Basic Law is derived from the authorization of the United Kingdom. It is true that the Basic Law makes a reference to the Joint Declaration. It is, however, only a reflection of China's implementation of its international obligation. The validity of the Basic Law depends entirely on the authorization of the Chinese legislature, the National People's Congress and the Constitution.

According to the Basic Law, the relationship between the Chinese central government and the Hong Kong SAR government is not the one between the federal government and a state. China is a country of unitary system and the highest power is vested with the central government. Although the Hong Kong SAR is a highly autonomous administrative region of China, it has no independent sovereignty. The sovereignty of SAR belongs to China. Thus the

power over Hong Kong absolutely belongs to China and the central government delegates certain powers to the Hong Kong SAR through the Basic Law. The powers not delegated to the Hong Kong SAR remain vested with the central government.

The Basic Law of Hong Kong was adopted by the National People's Congress of China in accordance with the Constitution. It is, therefore, a law of China. But what is the status of the Basic Law in the hierarchy of law in China? Chinese hierarchy of law can be classified into four different levels, namely, the Constitution, the national laws, the administrative regulations and the provincial or local regulations. The legal authoritative value of these legal prescriptions descends accordingly. As far as the Basic Law is concerned, it should be considered as a national law, that is a basic statute purposing to regulate the establishment and operation of the Hong Kong Special Administrative Region. As such, it should have the status of other basic statutes under the Constitution. Some commentators are of the opinion that the Basic Law in the hierarchy of Chinese law is only lower than that of the Constitution.

### **3. Mechanism of Interpretation of the Basic Law**

China is a civil law country. Following the tradition of civil law countries, laws in China may be interpreted by the legislature, while the courts may only enforce the law. In practice, however, the Supreme Court of China does issue judicial interpretations for the enforcement of law which are binding on the lower level courts. The legislature's power of interpretation is derived from the Constitution. The Constitution of China empowers the Standing Committee of the NPC to interpret the Constitution and statutes.

As discussed earlier, the creation of the Basic Law has both civil law and common law bearings. This is also reflected in the interpretation of the Basic Law.

Article 158 of the Basic Law stipulates that the Standing Committee of the NPC shall authorize the court of the SAR "to

interpret on their own, in adjudicating cases, the provisions of this law which are within the limits of the autonomy of the Region.” This provision represents a compromise of the drafters of the Basic Law. It is also a trial of the ‘one country two systems’ policy. On the one hand, the provision observes the constitutional requirement that only the Standing Committee of the NPC has the power to interpret the laws of China. On the other hand, it requires the Standing Committee of the NPC to delegate, in so far as the Basic Law is concerned, the interpretation powers to the courts of Hong Kong in adjudicating cases. Thus, the existing powers of the courts in Hong Kong in relation to interpretation of law will be observed.

In practice, the power of interpretation by the courts in Hong Kong may go beyond what is stipulated by the Basic Law. According to Article 158, the courts in Hong Kong may interpret any provisions of the Basic Law in adjudicating cases except those provisions relating to the responsibility of the Central People’s Government or the relationship between the central government and the SAR Government. Essentially, the responsibilities of the central government include foreign affairs, defence and other matters which may be considered as ‘acts of state’ or concerning the relationship of the central government and the Special Administrative Region. In case the court of the Region in adjudicating a case must give an interpretation to such provisions and provided that such interpretation would affect the judgment on the case, the court “shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People’s Congress through the Court of Final Appeal of the Region.” This provision involves several issues. In the first place, the courts in Hong Kong may interpret any provisions of the Basic Law. Secondly, whilst interpreting the provisions concerning the relationship between the central and the SAR government or matters which are the exclusive responsibility of the central government, before a final judgment is made, the Court of Final Appeal must request the Standing Committee of the NPC to give an interpretation to such provisions.

Suppose a lower court of the SAR, while adjudicating cases,

interprets a provision concerning the relationship between the central and SAR government, does the court have the obligation to report the matter to the Court of Final Appeal which would then request the Standing Committee of the NPC for an interpretation? Article 158 of the Basic Law does not provide a definite answer. Under Article 158 of the Basic Law, the court in question is obliged to seek, through the Court of Final Appeal, such interpretation only when an unappealable judgment is made and when such interpretation will affect the out-come of the case. The question is before the case reaches the Court of Final Appeal; judgment made by the lower court is appealable. The parties concerned, however, may not decide to take the case to the Court of Final Appeal. Hence the judgment in question would become final as far as the parties are concerned. Under such circumstance, does the lower court handling the case have an obligation to ask the Court of Final Appeal for an interpretation from the Standing Committee of the NPC? What if the court honestly believes either the case does not involve any of the qualified situations prescribed by Article 158 or the final judgment of the case will not be affected by such interpretation? Does the Court of Final Appeal have an obligation to ensure that in such cases an interpretation by the NPC Standing Committee will be sought? If the answer to this question is positive, the Court of Final Appeal must check every case decided by the lower courts in order to ensure that the NPC Standing Committee's power under Article 158 will not be affected. This will be a practically impossible task for the Court of Final Appeal. What is possible then is that the operation of Article 158 may be avoided so long as a case does not reach the Court of Final Appeal. Another issue is what if the Court of Final Appeal and the NPC Standing Committee hold different views as to whether interpretation by the latter is required. It is arguable that in such circumstances, the NPC Standing Committee's view should prevail. In practice, however, a lower court may go ahead to interpret the Basic Law even though one of the parties to the case argues that the matter in question falls into the authorities of the central government. Under such circumstance, does the lower court or the Court of Final Appeal have the obligation to request the



NPC Standing Committee for an interpretation? What if the lower court and the Court of Final Appeal hold different views?

A closer examination of Article 158 suggests a narrower application of the Article. Paragraph 3 of the Article stipulates “when the Standing Committee makes the interpretation of the provisions concerned, the Court of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee, however, judgment previously rendered shall not be affected.” Hence, the Standing Committee’s interpretation only has binding force on the decision or judgment to be rendered by the courts in future. The interpretation itself does not affect the validity of the judgment previously made. What are the “judgments” referred to in this provision? They should include judgments of the Court of Final Appeal, although such judgments are unappealable. In any event, the courts in Hong Kong must request, through the Court of Final Appeal, for an interpretation by the Standing Committee of the NPC in case they are aware that they are dealing with provisions of the Basic Law which concern either the relation between the central and SAR government or matters within the authorities of the central government.

To empower the Standing Committee of the NPC with the authority of final interpretation of the Basic Law is in compliance with the Chinese system of legislative interpretation. As far as the Basic Law is concerned, however, such power is not without limitation. Before giving an interpretation, the Standing Committee is required to consult the Committee for the Basic Law of Hong Kong Special Administrative Region (the Basic Law Committee). According to a resolution adopted by the National People’s Congress on 4 April 1990, the Basic Law Committee is a working committee subject to the Standing Committee of the National People’s Congress. The Basic Law Committee should be composed of twelve members, six of whom must be from Hong Kong. The function of the Committee is to study the matters arising from the implementation of Articles 17, 18, 158 and 159 of the Basic Law and to give its opinion to the Standing Committee of the NPC.

#### 4. Amendments of the Basic Law

As a constitutional document, the Basic Law drafters designed a special system for its amendment. Under the Chinese Constitution, the power to amend laws is vested with the National People's Congress. The Constitution also provides that the National People's Congress may "decide on the establishment of special administrative regions...." When the Basic Law was being drafted, consensus was easily reached that the National People's Congress should have the power to amend the Law. At the same time, most people agreed that the policy of 'one country two systems' should be reflected in the scheme of amendment of the Basic Law. In other words, the amendment of the Basic Law may not follow the procedures for amending other laws. The most important questions were (1) to what extent Hong Kong might control the amendment and (2) how could China not be able to amend the Basic Law at will.

To accommodate the above situation, Article 159 envisages a system of amendment with the following characteristics. In the first place, the power of amendment is vested with the National People's Congress.

Secondly, no amendment may contravene the established basic policies embodied in the Basic Law which presumably must include those stated in the preamble of the Basic Law and the Joint Declaration such as 'high degree of autonomy', 'Hong Kong people governs Hong Kong', 'maintaining the existing system of Hong Kong', etc. The importance of this provision is to invalidate any amendment which contravenes the fundamental policies of the Basic Law. For instance, the Basic Law provides that the capitalist system will be practiced in Hong Kong for fifty years starting from 1 July 1997. If an amendment aims at introducing socialist system into Hong Kong within the fifty year period, will it be considered not in violation of the basic policies of the Basic Law and therefore as valid? The answer should be "no".

Thirdly, the procedures relating to recommending amendments of the Basic Law differ from those applicable to revisions of the laws in the mainland of China. According to the *Organic Law of the*

*National People's Congress* a delegation or group of thirty deputies may submit a bill to the National People's Congress. In addition, the Presidium, the Standing Committee and special committees of the National People's Congress, the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate are authorized to propose bills. Article 159 of the Basic Law limits the power to propose amendments to the Standing Committee of the NPC, the State Council and the Hong Kong Special Administrative Region. The effect of this arrangement is to deprive the delegations from provinces, autonomous regions and cities under the direct leadership of the central government of the power to recommend amendments. This procedural requirement is important taking into consideration that the deputies from Hong Kong will be a minority in the NPC and that all other delegations may claim an interest in matters concerning Hong Kong.

The purpose of the provision to restrict the power of proposing amendments to the Hong Kong delegation, the Standing Committee of the NPC and the State Council is to ensure that the people in Hong Kong will have a say in such matters. This can also be inferred from another provision of Article 159 of the Basic Law which stipulates that before a bill is to be put on the agenda of the NPC, the Basic Law Committee must study and cast its views on it. As discussed earlier, the Basic Law Committee is comprised of an equal number of members from Hong Kong and China. Whilst the legal effect of the views of the Basic Law Committee and the internal working procedures are not yet known, the majority view of the Committee may be able to block any proposal to be put on agenda of the NPC. This does not mean that Hong Kong members may have a veto power; rather from a moral and political point of view, under such circumstance, it would be unwise for the NPC to place the item on its agenda.

It should also be pointed out that to appoint a permanent committee looking after the interpretation and amendment of a statute is unprecedented in China. In practice, informal working groups may be formed for the drafting and revising laws. The only time that a formal committee was set up was when the Constitution

was to be rewritten in 1980. In this regard, the Basic Law is being treated very differently.

With regard to the procedures in Hong Kong for submitting bills to amend the Basic Law, consent of two-thirds of the deputies of the NPC from Hong Kong, two-thirds of the Hong Kong Legislative Council and the Chief Executive is required. Although consultation is not required, since Legislative Councilors have to go through an election one way or the other, they must be accountable to their constituencies when casting their vote. Currently, the deputies of the NPC from the SAR are appointed by the central government. With the development of the community, it is foreseeable that they will be elected in the near future.

In conclusion, the Basic Law is at its infant stage. The success of the system prescribed by the Basic Law will depend on efforts by and mutual understanding of both sides across the border. As far as the mainland of China is concerned, they must learn how to respect and implement the “two systems” concept. At the same time, people in Hong Kong must learn to understand the importance of the “one country” principle. Only by doing so, will the legal systems of Hong Kong be maintained and laws of Hong Kong including the Basic Law be effectively implemented.