

The Nature of the Constitutional Transition in Hong Kong

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On Transitions

We live in an age of transitions. Transitions represent the end of something; we have books about the end of everything. The best known is the End of History, although that is less about end as it is of consolidation. Before that there was the End of Ideology, which as with the End of History, turned out to be quite unrealistic. There are books about the End of Affluence (the author clearly had not visited Hong Kong); about the End of Mathematics (which I am told takes the line that there are no more discoveries to be made), even the End of Science (for similar reasons). There is a book entitled The Death of Economics, and recently I gave a lecture about the End of Constitutions (on the assumption that globalisation had negated state power).

The age of electronics makes us look to the future; not the past. It does not resonate with that well known prophecy: The End of the World is Nigh! And so it is with transitions: a kind of expectancy, of hope, of putting things behind us; but not always. For we also live in a risk society, risks created through our technologies and insatiable appetites. Perhaps our pre-occupation with constitution making is an anti-dote to the uncertainties of the risk society; a bold assertion of our ability to fashion our future in secure and creative ways.

Few remember or care for the transitions that so excited us when we were young, or at least when I was young, the transition to socialism with vibrant and occasionally confused debates, on the

Leninist or democratic route to that transition; a rich debate which tried to weave together strands from economy, politics and society; which tried to see the process of transition holistically.

The other great transition was the transition to independence with the collapse of western imperial systems, after the second world war. A large number of states were born, for the most part armed with constitutions with aspirations of democracy and legality, as well as of economic growth and modernity. These transitions engulfed vast numbers of world's humanity.

The transitions that dominate us now are transitions to democracy (of the return of generals to the barracks or of the dismantling of one-party states, of the resurgence of rights and accountability, of the celebration of civil society); or the transitions to market economies (with the collapse of command economies, the rise of privatisation, the globalisation of national economies). The two transitions are often seen as related, founded on the same great principles of social and political organisation. In fact the two processes are distinct and often incompatible. The political processes are intended to strengthen national capacity and identity, to re-affirm the importance of political, economic and cultural rights, and recognise the equality of citizens. The economic processes tend towards the erosion of national capacity and identity, the homogenisation of culture, the strengthening of social differentiation, the elimination of economic and welfare rights of peoples—under the hegemony of global capital.

Most of these transitions are of particular interest to lawyers, for law is a principal framework that sustains them: constitutions, codes, regulation; law seems to bind and hold the world together in our age of globalisation. Perhaps this was not true of the transitions to socialism, where constitutionalism was significant neither in practice nor rhetoric. But the case of Chile's transition to socialism under Allende was of great interest, for he tried to develop socialism within the integument of a capitalist constitution. The last decade or two has seen a great deal of activity in constitution making. Constitutional norms, procedures and institutions have played a key role in transitions; they have mediated change, provided frameworks

for negotiations and compromises, and subsequently the sanctification of settlements, under the principal guardianship of constitutional courts. The feverish activity in making constitutions has not been paralleled by reflections on constitutions; such reflection as there is has been hijacked by public choice economists, as befits the age of globalisation.

The Transition in Hong Kong

I do not intend to deal with the secondary aspect of the process of the transition in Hong Kong: the handover of sovereignty, the process that has absorbed our energies for the last thirteen years, but the long term transition. The transition in Hong Kong is in many respects of a different order from the transitions I have mentioned above. The principal theme of its key instruments, the Sino-British Joint Declaration and the Basic Law, is that of continuity, of conservation and preservation: in the economy, in political structures, in legal and social systems. These instruments are essentially exercises in the codification of current practices and policies in the economy; the entrenchment of what might be called civil society; etc. In that sense it is like the End of History. The people of Hong Kong do not want to go anywhere from where they are.

The Hong Kong transition is of a different kind in another respect: it is the accommodation to a new sovereign; and the complexity and challenge of the transition is to find new political and legal frameworks that will preserve the old system under a new sovereign. For many people the anxiety or doubt is about the nature of the new sovereign, not the worth or persistence of the old system. The transition is a form of decolonisation. But typically decolonisation leads to a new sovereignty: the sovereignty of the people formerly colonised, and the accommodation within that sovereignty of democratic values and structures, in an emphatic rejection of colonial authoritarianism. It is a time of change, of

putting the past behind us, of nursing new institutions, of fashioning a new society and playing a role in the world system, denied hitherto.

In Hong Kong the transition is to a pre-existing sovereignty, of an ancient, proud and once again powerful nation, with whom the residents of Hong Kong identify ambiguously. The primary task of transition is the accommodation of Hong Kong's economic and social systems to this new/old sovereignty. The key elements are therefore the relationship of Hong Kong to the new sovereign, and conforming to the imperatives of the new sovereign's conception of its sovereignty. But it is also about the political structures of Hong Kong, how they relate to the purpose of continuity and the resistance to change.

However, the principal constituent of transition in Hong Kong is the accommodation to the new sovereign. How to preserve the old when the new sovereign appears to have such different habits of thought, practices of governance, forms of discourse, rationalisation and ideologies from the previous sovereign, and when impulses of these political and economic systems are so directly contrary to those that emanate from that which must be preserved.

Some of these differences may be sketched briefly to indicate the scale and nature of accommodation necessary. At the time of Sino-British negotiations, China still had a command economy, while Hong Kong was regarded as an outstanding example of a *laissez-faire* economy. Until 1978 China had been isolated from world economy; Hong Kong, on the other hand, was very open and highly integrated in the global economy and international economic institutions. In both places there was a close nexus between politics and economy; but in different ways. The economic system in Hong Kong provided a private base of social power; in the PRC, it was membership in party and government which did that, and became the means to economic power.

Political systems reflected just as great differences. China was still run on Leninist principles of a one party state; without genuine elections, separation of powers, real accountability to the people, or protection of rights. There was the omnipotence of the Politburo,

formally reflected in the powers of the National People's Congress. By contrast, Hong Kong was open, but not democratic: rights reasonably well established; autonomy of groups and individuals; rudimentary separation of powers; but the overarching power of an appointed Governor. There was executive control over the legislature; while ultimate control over Hong Kong was vested in the British government and parliament. These features were moderated by some 'conventions': consultations; the influence of the business community—one could talk of a partnership between government and business; the relatively limited role of government (though greater than was acknowledged) and an active civil society.

Contrasts in law and legal system were equally striking. China was just emerging from the Cultural Revolution and its aftermath; there was little law, no legal profession, no notion of legality; no independence of judiciary; and an ill trained judiciary, enjoying little prestige. 'Democratic centralism' was the overriding principle, enshrined even in the 1982 Constitution which was heralded as the great leap into legality. On the other hand, Hong Kong had a well established, even sophisticated, system of law; its principal ideology being the Rule of Law (since it could not be democracy); a large and well heeled legal profession; independent judiciary, with appeals to the Privy Council, in a sense above the fray of local politics and policies. Law acted as discipline on government and public authorities; to a significant extent it acted to empower people.

There were contrasts not only between Hong Kong and the PRC but also between UK and the PRC as sovereign powers. The UK was for the most part not seen as a wicked colonial power (as it had been in other colonies); instead it was seen as the source of new ideas of democracy, rights and the rule of law; also as providing the framework for the market economy and the autonomy of civil society. From the 1950s onwards, considerable autonomy was granted to Hong Kong.

UK itself was seen as democratic and pluralistic, which would protect Hong Kong against excessive abuse of power. There was nothing in its constitutional principles which was incompatible with a largely autonomous system for Hong Kong (parliamentary

sovereignty notwithstanding). Its physical distance from Hong Kong was another reassuring factor, necessitating a kind of autonomy. Its economic system was similar to that which developed in Hong Kong.

The Pre-requisites of the Framework for Transition

For reasons which are implicit in the preceding discussion, the aim of continuity necessitated a certain measure of the distance of the vassal from the sovereign. There could be no simple substitution of the UK by the PRC, however much China may have desired that. That simple substitution was possible neither for practical or ideological reasons. The PRC economic system was incompatible with Hong Kong's, and the imperatives of PRC's constitution which treated deviation from socialist economy as counter-revolutionary activity, could not be extended to Hong Kong. Hong Kong's integration in the international economy was incompatible with Chinese economy, which was based on numerous economic and fiscal restrictions on international trade. Moreover Hong Kong had its own regime for the protection of property rights (including intellectual property), judicial process and assistance, based largely on its treaties. Nor could the PRC legal system sustain a market economy.

At the ideological level the PRC view of the role of class struggle, the dominance of the Communist Party, hostility to bourgeoisie etc. was highly uncomfortable, indeed frightening, to elites and the proletariat alike in Hong Kong. Hong Kong's system of rights and the rule of law had to be safeguarded for practical and ideological reasons.

In other words, what was required was One Country Two Systems, a major departure from the highly centralised, communist and ideological state in China. We tend to think of autonomy as facilitating this process of distancing of Hong Kong from China; but I want to suggest that an even more important concept is that of

'separation', or 'entrenchment', the separation of the economic, social, political and legal systems of one territory from the other through the legal entrenchment of Hong Kong's systems. There is a fine interplay between autonomy and 'separation' and 'entrenchment'; to some extent they all serve the same purpose, but when there is a conflict, it is separation or the entrenchment of Hong Kong's systems that prevails over autonomy; the 'system' is more important than autonomy. China was not agreeing through the slogan of 'One Country Two Systems' ('OCTS') to letting the people of Hong Kong do what they wanted (the other slogan, 'Hong Kong people ruling Hong Kong', was to operate within the constraints of 'One Country').

The themes of autonomy on the one hand and the establishment of Hong Kong's 'systems' and their separation from those in the PRC on the other hand (and the tensions between them) are nowhere better illustrated than in the provisions about the economy. The economy was seen as central to the Chinese understanding of the concept of OCTS (an understanding which was supported by the UK and its collaborators in the administration of Hong Kong); provisions on other aspects, like rights, political and legal system were designed to preserve the essentials of the economic system. Curiously, this approach is both consistent with Marxist ideology (the economy as base) but inconsistent with its values (the glorification of capitalism).

The principal economic provision requires that the 'previous capitalist system and way of life [in Hong Kong] shall remain unchanged for 50 years' and that 'socialist system and policies' shall not be practised (art. 5). A series of provisions implement this basic principle: protection of private property (arts. 6 and 105); the encouragement of 'investments, technological progress and the development of new industries' (art. 118); the maintenance of Hong Kong as a free port (art. 115), an international financial centre (art. 109), a shipping and international and regional aviation centre (arts. 124 and 128 respectively). The Basic Law includes various stipulations (requiring both the separation of Hong Kong's system from the rest of China and the preservation of its essentials) to

ensure that the previous system is in fact maintained: a separate and independent fiscal and monetary system (art. 110) in which however there must be a separate currency, which must be completely convertible and backed by 100% foreign reserves (art. 111), an independent tax system but which must follow a low tax policy and adopt budgets commensurate with the rate of growth of its GDP (art. 108). Additionally Hong Kong will remain a separate customs territory, with its own certificates of origin (art. 116).

So basic is the pre-occupation with maintaining the capitalist economy of Hong Kong that a number of other provisions owe their existence to this imperative. Thus while China retains responsibility for foreign affairs, Hong Kong has been vested with very considerable powers to conclude treaties with other states and international organisations to maintain and develop its economic relations with them (art. 151). It may continue its independent membership of international economic institutions like the WTO, IMF, World Bank, ILO, etc. (art. 152). The extensive international system of the enforcement of judgments and arbitral awards, and other forms of judicial enforcement (including the surrender of fugitive offenders) is to be continued with Hong Kong as an independent party to them (arts. 96 and 153). Likewise the maintenance of the previous system of law, in particular the common law, and an independent judiciary and legal profession, are stipulated (arts. 8, 85, 94 and 142). Similarly the structure of political organisations in Hong Kong is directed towards minimising the influence of workers and others less well placed, discouraging the growth and strengthening of political parties, providing a privileged access to power for business groups and their adjutants, the professions, and reducing the role of the legislature—pre-conditions deemed essential by a succession of British governors for the maintenance of Hong Kong's special form of capitalism.

It is implicit in the above analysis that the Basic Law sets up in considerable detail the economic (and legal, political and social) systems of Hong Kong (and serve to mark them off from the mainland systems). At the same time, these details constitute limitations on the powers of Hong Kong authorities. This is what I

mean by the dialectics of separateness, preservation and autonomy.

Accommodation within Chinese Sovereignty

The inscription of Hong Kong's system was relatively unproblematic. There were some quibbles about the economic straitjacket into which Hong Kong was being knotted, but the one serious controversy centred around the design of political institutions. That is not the focus of this paper, and I cannot go into its details. But some mention is necessary as the design of political institutions was also central to the issue that I want to discuss (as an essential element in Hong Kong's transition)—the accommodation to Chinese sovereignty.

By far the most difficult issues in the drafting of the Basic Law concerned the accommodation of Hong Kong within Chinese sovereignty. I have time only to set out in note form the difficulties in this process. I start with the preliminary statement that, unlike with the 'previous' economic and legal systems, there was no simple way to codify the relationship between China and Hong Kong. It would have been simple if the relationship between them was to be a replication of the previous relationship between Hong Kong and the UK. But that replication was not feasible, for a variety of ways. The UK had plenary jurisdiction over Hong Kong. The relevant legal instruments and British regime of colonial law provided no basis for autonomy; such autonomy as Hong Kong enjoyed was due to its prosperity, distance from London, the watchful eye of Beijing—but it was always possible to exaggerate its scope, since the British appointed governor had the most extensive of powers—and was truly answerable to London only.

China could not inherit that mantle. Much was made of Hong Kong being returned to a harsh communist regime; the people of Hong Kong were naturally concerned about it, and Britain had to save face by establishing that Hong Kong would enjoy rights and a considerable measure of autonomy. China took the decision early in

the process that it had to woo the people of Hong Kong by setting their fears at rest—and so agreed to limitations on its powers over Hong Kong. Even in the face of this wide consensus on autonomy, the norms, institutions and procedure to establish it were problematic—for reasons that I set out below.

The Chinese economic, political, legal and social systems are so different from Hong Kong's that a great deal of detail was necessary to define the relationship between them. Federal or autonomous systems in states which have a common set of values and a common economy (whether through the market or the plan) find it relatively easier to find the balance between the centre and regions, since the overall system is not significantly affected by slight changes in that balance. Here, on the other hand, if the balance was not right, Hong Kong's systems would be in great jeopardy. Indeed it is a question whether the Basic Law does strike the right balance; I would argue that it does not and that autonomy/separation can only be secured through self-restraint on the part of Chinese central authorities and the development of conventions for this purpose.

Secondly, China has been ruled in recent history as a highly centralised system of politics and administration. Its experiments with 'autonomous regions' have not been a spectacular success. Indeed, as with the Soviet Union which, unlike China, had impressive constitutional provisions for federalism and autonomy, it can be argued that a communist, Leninist regime is inherently incapable of accommodating diversity and autonomy. Recent economic changes in China suggest that some forms of decentralisation may be inevitable, but the form and structures for it are far from clear at present.

Thirdly, the Chinese authorities operate with a very specific concept of sovereignty which reinforces its inhospitality to autonomy. Both in its internal and external aspects, the concept relies on the most extensive of powers and jurisdiction. The leg of 'One Country' in OCTS brings in this concept in China's relationship to Hong Kong. Yet the reach of sovereignty is unclear; at one level it negates (at least potentially) the whole of the Basic Law; indeed recent opinion in high political and academic places has

leant credence to this interpretation (see the case of *HKSAR v. Ma and others* [1997] 2HKC 315). One way to resolve the ambiguity between one country and two systems that arises from this overarching concept of sovereignty would have been to clarify the relationship between the Chinese Constitution and the Basic Law (particularly given the rather insecure foundations of the scope of the Basic Law in the Chinese constitutional system). This option was urged on China by some Hong Kong members of the Basic Law drafting committee. But it was rejected by China. The result is uncertainty about the precise application of the Chinese Constitution in Hong Kong. There are several clear inconsistencies, as between the two economic and political systems ('democratic centralism' versus a constitutional democratic system, at least ultimately) entrenched respectively. Even if in these cases, one can argue that the Basic Law provisions in their application in Hong Kong must prevail over the national constitution, the same cannot be said about those national provisions which are not directly in clash with a Basic Law provision. In particular there is the omnipotence of the National People's Congress under the national constitution; does it extend to Hong Kong? The Chinese view seems to be that it does (despite art. 159 of the Basic Law which seeks clearly to circumscribe the competence of the NPC in Hong Kong) and the HKSAR Court of Appeal has leant its weight behind that view (see *Ma* case referred to above).

A further difficulty is that the Basic Law deals entirely in terms of the relationship between formal institutions. On the Chinese side, these are principally the NPC, its Standing Committee ('NPCSC') and the State Council (or the Central People's Government as it is called there). Yet we know that these institutions operate under directions from the Chinese Communist Party (the preamble of the national constitution makes this amply clear). There are no formal provisions whereby either the formal or shadow institutions may be addressed by Hong Kong. Major policies in China are made in considerable secrecy. Formal decisions may ultimately be taken by the NPC but they emanate from the Communist Party. This means that there is no guarantee that relevant considerations have been

taken into account; and the overarching formal powers of the NPC have meant that there is little concern with the 'niceties' of its jurisdiction over Hong Kong. So far it is impossible to separate the formal state institutions of China from the Communist Party; yet an imperative of Two Systems is some distancing of the Communist Party. Nor is there the prospect that the NPC would be truly impartial between Hong Kong authorities and the Central People's Government. There has been very little public discussion of this major contradiction—for perhaps obvious reasons.

The preceding discussion reinforces another difficulty in the accommodation of Hong Kong's system to Chinese sovereignty. Hong Kong's tradition of the common law suggests that the foundation of such public policy and jurisdiction must be the law. Indeed it is hard to think of any effective or meaningful system of autonomy which is not founded on fundamental laws, reinforced by a regime of legality. China, despite its commendable and in some instances far reaching legal reforms since 1979, operates with a very different concept of legality, subordinated as it still is to policy or administrative convenience. While in recent years there has developed a tendency in Hong Kong to turn political issues into legal issues (principally because we do not have a democratic system but have a good legal regime of rights), the practice in China is to turn legal questions into political questions. In relation to Hong Kong, nowhere is this more evident than in the two interpretations that the NPCSC has already made—one relating to the Chinese Nationality Law as it affects art. 24 of the Basic Law, and the other on the adoption of previous laws under art. 160. Nothing illustrates better the differences between the two legal traditions than the system for the interpretation of laws, in this case particularly the Basic Law. And yet the key to the autonomy of Hong Kong lies in the system of interpretation. It hangs precariously on the structure and exigencies of the interpretation of the Basic Law.

Briefly, the ultimate responsibility for the interpretation of the Basic Law lies with the NPCSC in the areas which are the focus of this paper (art. 158). In the common law the function of interpretation is to bring coherence to the constitution, to explicate

its underlying principles, and to harmonise other laws with it. The very rules for interpretation are designed to increase predictability of the outcome of legal disputes (although it does not always work like that; judges are, especially in the common law, often a law unto themselves). In China on the other hand, the rules for interpretation allow the NPCSC to extend the reach of pre-existing law, to add to the law, and there are no rules which facilitate predictability, especially as no reasons are given for decisions reached by the NPCSC. The Basic Law provides many points at which an act of interpretation by the NPCSC is required (see arts. 17, 18, 159, 160). Unless the procedure for the exercise of its jurisdiction is 'judicialised', there is the great danger that its successive interpretations would lead to the steady attrition of the fundamental principles of the Basic Law. It would also force Hong Kong authorities into repeated negotiations with the Central People's Government on every point which the Basic Law consigns to the autonomy of Hong Kong. That also would lead to the denial of the autonomy.

Conclusion

In brief, the constitutional transition in Hong Kong aims at the preservation of its previous systems of economy, law and social system. The task of the codification of that system was relatively simple, except that the detail which was supposed to enhance autonomy ended up as constraints on autonomy. However, the real challenge of the transition is the accommodation of those systems in a new (but pre-existing) sovereignty. That task has turned out to be extra-ordinarily complicated due to conceptual and political reasons. There is such a clash of values, concepts, institutions, and history that it is hard to say with conviction that the purposes of autonomy and separation of systems which underlie the Basic Law would be achieved. But if they were achieved, Hong Kong's constitutional transition would become a matter of great comparative

interest and much earnest study. Another hypothesis is that autonomy and separation would be achieved, but not within the framework of the Basic Law. The orientation of that Law is legalistic, inconsistent with the political approach of the mainland authorities. But by denying Hong Kong's status, the central authorities would turn it into a vassal, and between vassal and sovereign, there cannot be true autonomy.