Sovereignty, Law, and National Identity
The Hong Kong Handover

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I. Why the Hong Kong Handover?

Why didn't the Hong Kong Handover make a bigger splash? It was, after all, a change in the sovereignty of a whole community, which should have had great consequences not only for the residents of Hong Kong, but also for the nations concerned, if not for the international community. It was also a peaceful handover, which again, is not often the case. The mass media did take up the case, but once the handover ceremonies were consummated, Hong Kong no longer hit the headlines. People were no longer very much interested in the subject. However, given the social scientific and lego-political import of the process, one might have expected great scholarly interest on the issue on the part of political scientists, international and constitutional lawyers, as well as philosophers of law, society and politics. However, this has not necessarily been the case. Why was this? It does seem strange given the ideal conditions it has provided for observing the transition of sovereignty and its manifold implications.

One possible answer is that the transition was carefully planned so that there would be as little shock and surprise as possible. Lack of the element of surprise, and turning what might have been an unpredictable series of social disruptions into a more or less manageable legal and political procedure might well have taken the sprite out of the whole affair. Other analyses might be proposed, but that is not the point here. We should recognise instead that the lack of galvanisation meant that the management of the transition was quite a success. On the surface, there wasn't much politics, just a

lot of law.

Does this make the handover something of little academic value? Hardly. Beside the issues mentioned above, there is a further intriguing aspect. Because the resumption of the exercise of sovereignty over Hong Kong by the People's Republic of China (PRC) meant that a thriving capitalist market economy and the social environment that makes it possible were going to be integrated into a system of "socialist market economy," where private ownership is not straightforwardly admitted and rights that safeguard the welfare and property of the right holders are still in the midst of implementation, there was much apprehension and a certain degree of exodus of human resource and capital from Hong Kong. To alleviate fears, the PRC "decided that upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established ... and that under the principle of 'one country, two systems,' the socialist system and policies will not be practised in Hong Kong."[1] The implementation of the "one country, two systems" principle, with the obvious problems concerning legal hierarchy that it involves, should have been of particular interest to the political or legal scientists and philosophers who would observe and analyse the political functions of law.

If only for the two reasons here given, interest in the issue should have been tremendous. However, even among the academics that would have gained the most from the observation of this social experiment, there was little response. Had the political or legal scholar been active, she would have observed in play the full exploitation of the functions of law such as the stabilising power it has, the increase in predictability of social interaction, and the transformation of difficult political issues involving hard choices into a series of procedure with the political significance of each of the steps not apparent. Were the difficult decisions then really sidestepped? Those that could probably were. However, the really

[1] Preamble to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter the Basic Law). The whole of the text is included as Appendix to this issue.

difficult issues, which are the raison d'être of politics, must have been settled or had been scheduled to be settled in the process of the negotiation of the Sino-British Joint Declaration, and in the ensuing drafting of the Basic Law within the Chinese government that included delegates from Hong Kong, which were to "ensure the implementation of the basic policies of the People's Republic of China." As these basic policies were based on the principle of "one country, two systems," the implementation of the Basic Law itself should have commanded great interest. This was not only an attempt to co-ordinate socialist and capitalist systems of law, but also an attempt to harmonise the civil or continental law and the common law traditions. For instance, this would have been of great value to those engaged in legal co-operation projects in transforming the legal systems of former-socialist systems into those of a market economy. It might also have given insights to those involved in the integration of British and European law into that of EC law. Again, not as much attention as would have been reasonably expected had been given to the process.

It should be noted that the implementation process had two stages: the handover of the administrative system from the British to the Chinese, which seems not to have involved much actual change in personnel. Then came the actual implementation of the Basic Law: setting up the legislative branch, reorganising and setting to work the administrative and judicial systems of the government of Hong Kong, thereby starting up the HKSAR, or the Hong Kong Special Administrative Region. Making a system of substantive law into a workable system of government involving actual people, who run it or participate in the everyday working of its organs, is no easy task. However, it is possible to judge whether a particular process in the procedure was successful or not by referring to the substantive criteria given in the law. That makes it much easier to control and to correct in case of substandard performance. This manageability, especially the ease in identifying the problem, in essence, must be what took the fizz out of the handover. Hence, it is understandable that the press and its readers were not very enthusiastic about its coverage. However, this does not justify the lack of interest in at

least the second stage of the implementation of the Basic Law by those engaged in the theoretical research of politics and law.

This volume intends to redress this lack of theoretical interest. It is therefore addressed not only to those interested in Hong Kong for practical purposes and in the area studies of the region, but also to the theorist in politics and law who would appreciate the significance of law as a political instrument, attested in its ability to take the thrill out of what might have been a precarious venture.

II. Issues raised and their significance

So, what were the issues raised, and what general theoretical significance do they have, if at all? One question that has been the object of much discussion is that of the jurisdiction of the interpretation of the Basic Law. Problems that have to do with the actual interpretation of the articles of the Basic Law obviously ensue. The first eight essays of this volume including the comments to the papers deal with these two issues. The main problem has been identified in the political circle, hence in the mass media, as striking a balance between sovereignty and autonomy. However, actual attempts at interpreting, e.g., article 158 of the Basic Law bear out the fact that this is not an accurate description. There is much that is not at stake. The economic prosperity of Hong Kong is a desideratum both for the autonomy of Hong Kong and for the sovereignty of China. Maintaining the market economy and the social infrastructure that keeps it going are in the interest of both parties. There is no problem of balance here, but a concurrence of interests.

If it is not the economic sphere, then is it the political sphere where the interests conflict? If the people of Hong Kong would aspire to become a fully independent nation, surely there is a deep conflict here. However, there is no question about independence. We are talking about the terms of returning the sovereignty over Hong Kong to China. In any modern state, a degree of autonomy by the

local governments is recognized by the central government. It is becoming more and more a popular idea if only for the reason that it would provide a cheaper central government. It should hence come as no surprise that Hong Kong, deemed a Special Administrative Region, should have a fair amount of autonomy. This should comprise of relative independence from the mainland government and a system of self-rule by its residents. However, as MOTO and others point out, this is not the case. The Basic Law is so worded that an independent legislature relatively free from the wishes of the central government and governing Hong Kong according to the will of its constituent residents would be quite a long time in coming, while the Basic Law is stipulated to be valid for fifty years only. Looking at the structure of the legislature, it would seem that there is very little question of striking a balance between sovereignty and autonomy. The system is designed so that those who would keep in mind the interests of the central government would secure the majority of the seats of the law giving body. The question seems to have been foreclosed in the process of the drafting of the Basic Law in favour of sovereignty. Autonomy is recognised insofar as it is not in conflict with the vital interests of Beijing.

However, because the policy that has been set by the central authorities is that of "one country, two systems," this does not mean that the level of autonomy allotted to the residents of Hong Kong would be so limited that it would be comparable to those of its neighbouring provinces. Rather, because there is concurrence in interests of further developing the infrastructure for the ongoing market economy, there was a wide range of consequential recognition of legal rights and freedom. Direct intervention in the limitation of rights were confined to those concerning voting rights as designated outright in the Basic Law, and those that concern national security, again spelt out in article 23 of the Basic Law. Even here, as FU argues in his paper, through the judicial intervention in the form of an interpretation of the article, it is possible that the limits placed on the rights would in practice itself be restricted through the application of the principles of the rule of law. However, regarding such a move solely in terms of the strengthening of the

power of autonomy vis-à-vis sovereignty would be one-sided. We need to keep in mind that for China, for the purpose of preserving the economic strength of Hong Kong, the "guaranteeing the rule of law and economic freedom" as infrastructure of a market economy "is essential, whereas guaranteeing other civil liberties such as freedom of expression has only derivative and/or instrumental value at most." (HASEBE) It could well be that there was more to the attitude of the central authorities than just an unwilling accommodation of the autonomy of Hong Kong.

The question has the aspect of being, as CULLEN and GHAI point out, that of separation, rather than integration of the two communities. That is, the terms that were set out has the effect of keeping the system separated and to be understood as an exception to the rest of China. This ought to be important in keeping in place the internal order of mainland China itself. As a result, the terms that are needed to define the relationship between the two systems have largely been left to be worked out on a piecemeal basis. The problems concerning the two parties that need to be sorted out range from those concerning jurisdiction to those of immigration. Who on the part of Hong Kong would be the party in charge of such matters? There of course is a good deal of room left to negotiation, which the executive would handle. There is room for legislation, as well. However, when one looks at the judiciary, and not just the executive or the legislature, one begins to see where some of the real issues between sovereignty and autonomy would arise.

In fact, the issues that have become building blocks for "creating a constitutional relationship" as CULLEN has put it are judicial judgments that have been filed with the Hong Kong courts. It is not that there is no conflict between Chinese sovereignty and the autonomy of the HKSAR: the system is so designed that it does not arise in the form of a contest between two legislative entities. A person brought up in the dogma of the civil law tradition would have thought that this would have been the obvious form of conflict, and if there weren't a conflict there, there would be little of it throughout society. However, once we open our eyes, as we do, to the fact that there is such a thing as judge-made law, and that parliamentary

sovereignty may be compromised by the powers that the judiciary may have, especially in some form of judicial review, a different outlook unfolds before us. One would go on to inquire into the possible conflict of legislative powers between that of a legislative body (in the case of China, the Standing Committee of the National People's Congress) and a judicial organ (in the case of Hong Kong, the Court of Final Appeal of the Region). If we take the common law view of the law in the characteristic form rendered above to be a regime of the rule of law, then we find that there is room for the judiciary, not the legislature, to make collective decisions for the Region in the name, not of legislation, but of the interpretation of the law. Hence, the wording of article 158: "The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region. The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating, cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall ... 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." The wording is vague, as WANG points out, and allows for contingencies where the procedure for seeking an interpretation is not clear. Legal techniques must be exercised in such circumstances. This would allow for the growth of law and articulation of the relationship between the Central Authorities and the Region.

FU contemplates the possibility of applying this thought to the area involving civil liberties and national security. "The judiciary in Hong Kong, perhaps more than anywhere else in the common law world, is burdened with an especially difficult task of protecting civil liberties. In an executive-led political system where the authority of

the legislature is restrained and the legislator is only partly directly elected, the judiciary needs to be more creative and innovative to balance executive power. The court should have the right to decide whether a matter is a genuine national security concern, whether a document is properly classified as containing official secrets and above all, whether a law enacted by the SAR legislature is consistent with the Basic Law." (p.63) However, it is not altogether clear from a reading of article 158 that jurisdiction on such matters do indeed belong in the first instance to the courts. Much depends on practice on the one hand. On the other hand, a judicial doctrine is needed to explain why it is that the judiciary may have such powers, and what the extent of such powers might be. WANG proposes such a theory in his "The Act of State and HKSAR Court" applying a principle in international law to this situation. Of course, this would comprise the beginning of the task of answering the looming question of what the relation between the central government in charge of national defence and that of the local legislature and judiciary ought to be. Work has begun.

As it is a beginning of an important process that should help define the relation in general between the central authorities and the local government of HKSAR, how the Hong Kong courts go about doing their job is very important. CULLEN has provided us with a report on the most recent movements in the field with his "Creating A Constitutional Relationship" and a Postscript thereto. The process should also be analysed as an attempt to integrate a common law system within a civil law system. From a more political point of view, the same process may be regarded as "self-restraint on the part of Chinese central authorities and the development of conventions for this purpose." (GHAI) Much depends on how we look at the process of policy implementation. As GHAI candidly describes, 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." The focus is on what to make of and to make into, the attempts by the Hong Kong courts to interpret their own role in the

interpretation of the Basic Law, hinging mostly on art. 158 cited above. Hence the tendency of the first eight essays to turn on the issue of interpretation. The autonomy of Hong Kong "hangs precariously on the structure and exigencies of the interpretation of the Basic Law." (GHAI)

For the scholar, there is a further aspect in the handover that is of special interest. Though constitutions and constitutional relationships are important as we saw above, we must take note that it does not define the whole of life in a society. Far from that, we all know from our daily lives that constitutional issues hardly every confront us directly. Thanks to the system of representative democracy, we very rarely are asked to make decisions on public matters that tend to be hard and important. However, that does not mean that we play no part in the shaping and maintaining of the public sphere. Not only do we do so passively by paying taxes and performing public duties, politically by voting and publicly airing our views, but also through our daily economic activities.

Because of the influence of Hegel and others who had followed suit, we tend to think of civil society as a sphere where principles very much different from those that govern the state rule and ought to rule. I believe this strict dichotomy between the private and public has been overdone. We should relativise and try to see how the private and the public spheres complement each other. On the one hand, we realize that our civil and commercial laws are after all, the laws of the state, and that the courts that apply these laws may have a final say in our private affairs if we so wish, and sometimes regardless of our wishes. Our private lives function within the ambit of what is deemed appropriate by the state and those interests that do fall within the ambit are protected by the state. This commonplace ought to be recognised as the fundamental form in which the private sphere exists today; not away and independently from the state, as some would wish, but as a sphere of freedom guaranteed by the state. On the other hand, though less often noticed, our activities in the private sphere dictate what public goods the state ought to provide and often how it is to be provided, without

our having to resort to political means to explicitly reveal our preferences. Not only the executive and the legislative branches, but also the courts do and ought to discern from their several points of view, what exactly the public will is on a particular issue. When doing so, one way of understanding that activity is to see the respective government organs as deciphering from our social activities what exactly the public will is on the matter.

CULLEN's paper on Hong Kong revenue law is a case in point; it shows on the one hand, what little consequence the change in sovereignty has on the economic and social life of Hong Kong. The whole debate of the powers of interpretation by the Hong Kong courts is relativised into the political sphere of life when observing how business is run on a daily basis. The important thing here is to see that extreme care was taken to see to it that there would be little change. The point is not that politics and the change of sovereignty has little to do with daily life. Quite to the contrary, because it does, great care must be taken to insure that there would be little change. Great care indeed has been taken. Hence, as repeatedly confirmed above, the social infrastructure that forms the basis of economic activity in Hong Kong has remained intact.

The singular nature of the social infrastructure and the reason it is conducive to capital investment activity cannot be made clearer than by observing its taxation system and how the revenue is spent. CULLEN has put it succinctly in section 8 of his revenue law paper. Concerning taxes, "provided a government is able to maintain fiscal prudence and avoid long-term deficit financing, it is possible to maintain a simple, low rate taxation system." Further: "The policy of successive Hong Kong Governments to access land-based revenues in [a] manner rarely if ever seen in other jurisdictions sets it apart from the start. " The Hong Kong government does not have to rely so much on tax revenue. As for spending: "The comparative economic and social self-reliance of the Hong Kong Chinese has also relieved some of the pressure for expenditures which typically occur in Western, developed economies. Next, the Hong Kong Government has not had to answer to a democratically elected legislature. This has freed it from much of the near irresistible

pressure to satisfy special interest groups experienced by democratically accountable governments. At the same time, successive Hong Kong Governments have spent heavily to address pressing needs, inter alia, in housing, education, infrastructure and health at the same time as they have resisted committing themselves to extensive programs involving transfer payments to individuals." As a result, Hong Kong has become not only a tax haven for corporations, but also a place where highly qualified workers, both in terms of education and work ethic, are easily procured.

I have spoken of the power of constitutions in the modern state to instigate social change. The limitations of the modern constitutional political power must also be kept in mind. Neither constitutions nor sovereigns of a modern state have the absolute power that some tyrants in the past had. It takes legal procedure and cooperation from the governed for modern democratic states with rule of law to transform itself. Change through political initiative is not something that can be done overnight even in the less democratic and localised polities such as Hong Kong. Law is, after all, an instrument both for change and for preservation of the status quo. It tends to take the form it has and take up the functions it performs through a process of social evolution. Law as a social institution has the function of striking a dynamic equilibrium, bringing about change at a pace that can be accommodated, preserving aspects of social life that can be tolerated. We find this balancing function of law at work in different ways in each sphere of social life.

What is most intriguing is how the ancient social system of the clan (宗族) has been preserved in the New Territories of Hong Kong. Actual clans that had migrated to the area live on to this day utilising the *Tso* (祖) and *Tong* (堂) systems of trust to provide "for the ritual or communal needs of the lineage." (MATSUBARA, p. 205) Though it has now become a mere 2% minority in the area, special privileges are still recognised to the indigenous people of the area. English law had recognised the legal status of customary law of the area, which makes many different uses of these systems of trust, often to preserve the clan, sometimes to preserve a community consisting of

different clans, and sometimes to allow sub-branches of clans to form themselves, as well as a variety of other purposes. The system of customary law and their trust systems together have long preserved a way of life in which belonging to a clan had meant so much. Since the 1960s, it is slowly withering away. Now after the handover, it is said to be awaiting extinction "in accordance with the overall social changes of the time. New Territories customary law drew closer to metropolitan law, in face of the new complexities in social relations, which involved, among other factors, shifts in the patterns of industry, and an influx of people from mainland China." (ibid.)

HASE has lucidly and vividly written how the customary law in the New Territories has changed and had weathered change during the past century. He has contributed, along with samples of traditional land-deeds of the area with their English translation and an appendix on the Tso and Tong systems in the Village of Sheung Wo Hang, a second paper focussing on the indigenous systems of trust: "The Clan and the Customary Law: Tso and Tong in the New Territories." Both are fascinating reading, providing us with "probably the most thorough survey to date of the various aspects of the Tso and Tong." (MATSUBARA, p. 239)

How the handover may affect the remaining social life-world is an interesting question highlighting the complicated relations these people have with mainland China. It also inevitably calls up the question of the social identity of the majority of the residents of Hong Kong, who may resent the privileges this minority enjoy. Who are these urban dwellers, who are affected the most by the handover? Do the change in sovereignty and the political changes that it involves bring about a change in the social conception of themselves? How does the relative stability of the economic system and the law and other norms that support it affect their social identity? Should their social identification be understood in terms of culture? Would that include legal culture as well as that created by the sharing of a common history and natural environment?

If we regard law as a cultural phenomenon and try to discuss the full significance of a change in sovereignty within the context of a

nation-state system, the problem of social identity must be taken up. Whether the identity involved would be that of a national one, or something more regional, is an interesting question that can probably be discussed in its purest form when discussing the social identity of the residents of a former colony. Here we find another reason why scholars would reap great benefits from the study of the handover. TANIGAKI provides us with food for thought. A concise history of post-war Hong Kong is presented giving us a version of how the social identity of being a "Hongkongese" took form. She also gives us raw data on the issue, drawn from telephone interviews, over which we might contemplate. KAGAMI's incisive analysis of the matter gives us a good footing to begin our own theorizing.

III. Acknowledgements

In closing, I as editor of this volume would like to express my appreciation for all those who had made this tome possible. This special issue is comprised mainly of a collection of essays presented in a series of lectures on the legal and political implications of the so-called Hong Kong Handover on 1 July 1997. To the original lectures, several essays were added to fill in on later developments, as well as this introductory essay of mine. The Basic Law is also included as appendix. The lecture series was planned and carried out by the executive committee of the Asia Pacific Regional Studies Project (AP project) as its main project for the academic year of 1997. The lectures commenced in September, and concluded in May 1998. "AP project" is a name of a series of research projects on the law and politics of the Asia Pacific area funded by an endowment to the School of Law donated by the alumni, the alumni practicing law, and the main enterprises in the greater Nagoya area. It began in 1991 and is culminating in this year 2000, when another long-term project series focussed on legal-cooperation is starting, building on the infrastructure for research and cooperation laid down by this series of projects.

I would first like to express my gratitude and admiration to the speakers, commentators and all the participants of the serial lectures, especially those who had contributed with their views in the discussions. FU Hua Ling was kind enough to send us the paper he was to read in the series, a lecture that had to be cancelled due to unforeseen circumstances. WANG Guiguo and Richard CULLEN have kindly sent me for publication papers discussing the important events since the lectures series. Patrick HASE had brought with him to his lecture original land deeds and other centuries-old documents of the New Territories. Yash GHAI and Richard CULLEN have clarified many questions I had, especially during our chance meetings in different parts of the globe. Richard HARRISON was kind enough to translate KAGAMI's commentary, Rachel BENTLEY that of TAKESHITA's, and Jonathan GREENE that of MOTO's. All infelicities in the translations are my responsibility; I did take the liberty of editing the drafts. My colleague in tax law, FUKE Toshiro, had provided me with accurate English renderings of taxation and tax law terminology. The members of the AP executive committee have firmly supported this project; I thank the present chair SUGIURA Kazutaka for his encouragement. Former chair and dean SASAKI Yuta had given me sound advice on how to proceed with the project. I also thank the editorial committee of this journal for their cooperation in setting up an English language format for the journal and their patience; and TAMURA Tetsuki in particular for his valuable technical and secretarial assistance. And last but not the least, my appreciation to HAYASHI Tohru of Arakawa Printing, who had given me support and advice at crucial stages of the publication.