

LEGAL CULTURE AND LEGAL TRANSPLANTS
HONG KONG REPORT

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INTRODUCTION

Hong Kong not only has a curious fused legal culture, but its legal history is dynamic and entrancing. It is commonly assumed that Hong Kong, with its long colonial history, is a pure common law jurisdiction that has been influenced heavily by a system of English common law. But, with close scrutiny, this cultural-historical study challenges the prevailing wisdom. It is argued that in order to gain an insight into the Hong Kong legal system, much greater attention needs to be paid to the legal transplant process. In particular, attention has to be paid to the process by which the legal transplant of English Common law has evolved, as well as the cultural differences between the city's local Chinese and the English institutional system. Moreover, when China resumed its sovereignty over Hong Kong in 1997, its legal system became more complicated with the "one country, two systems" policy engineered by the former Chinese leader, Deng Xiaoping.⁴ This study also provides a twelve-years-on retrospective assessment of the abovementioned policy. In addressing these issues, the questions originally designed by the General Reporter have been restructured as follows.

I. HISTORICAL DEVELOPMENT OF HONG KONG LEGAL SYSTEM

1 *Before colonization—Qing Law*

Qing law was applied to Hong Kong before its British colonization in the early 1840s. A key constitutional principle is that in ceded colonies, pre-cessional law remains in force until replaced by a new sovereign.¹

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There were two types of Imperial Chinese law (Qing Law); first, there was statutory law in the form of unified codes and regulations, and second there was local custom.² The *Da Qing Lü Li* (The Code of the Qing Dynasty) was primarily a code of punishments and had little in the way of civil law.³ Local custom filled the gap left by the penalty-orientated code in resolving civil and commercial matters. However, law might conflict with custom. This was partly because Confucian concepts of government weakened the authority of the state,⁴ and partly because government administration was inadequate in such remote areas as the New Territories.⁵ Soon after Great Britain established its rule over Hong Kong, the government when administering in the New Territories had to distinguish Chinese law from Chinese custom. After this was done the law or custom was applied selectively, depending on the political purpose that was to be served.⁶

2. 1841-1843 British occupation

Even before the British claimed Hong Kong in 1841, Common Law had already been introduced. On 9 December 1833, an Order in Council was passed under the authority of the “Act to Regulate the Trade to China and India” in order to create a court with criminal and admiralty jurisdiction for offenses committed by the British in Hong Kong.⁷

The British formally occupied the island of Hong Kong on 26 January 1841. Captain Charles Elliot, Chief of Superintendent and Plenipotentiary, issued two proclamations on 29 January and 1 February, 1841.⁸ The first proclamation provided that natives of China were to be governed by Chinese law and custom, and all British citizens and foreigners were to enjoy full security and protection under British law. The second proclamation stated that Chinese inhabitants of Hong Kong would enjoy the free exercise of religion and social custom; and that pending her Majesty’s

¹ *Blankard vs Galdy* (1693) 4 Mod 222,225; 87 ER 359, 361; *Campbell vs Hall* (1774) 1 Cowp 204. The practice of continuing to apply pre-cessional laws was advantageous since if they were abolished the people of the colony would be loath to obey a new legal system with which they were unacquainted. Green “The Common Law and Native Systems of Law”, *International and Comparative Law of the Commonwealth*, in Robert R. Wilson (ed.), 1968, p. 82.

² Wesley-Smith, Peter, *The Sources of Hong Kong Law*, 1994, p. 213.

³ Tay, Alice E. S., “Law in Communist China – Part I”, *Sydney Law Review*, vol. 6, num. 2, 1969, pp. 153, 160.

⁴ Freedman, Maurice, “Colonial Law and Chinese Society”, *The Study of Chinese Society*, in G. William Skinner (ed.), 1979, p. 96.

⁵ Faure, David, “Custom in the Legal Process: The Inheritance of Land and Houses in South China”, *Proceedings of the Tenth International Symposium on Asian Studies*, 1998, p. 477.

⁶ Wesley-Smith, Peter, *The Sources of...*, *cit.*, p. 215.

⁷ Hsu, Berry, *The Common Law in Chinese Context*, 1992, p. 8.

⁸ The proclamations are contained in Appendix IV of the Laws of Hong Kong.

pleasure they were to be governed according to the laws, customs, and usages of the Chinese by village elders under the control of a British magistrate.⁹ These proclamations were Captain Elliot's effort to create a dual legal system in Hong Kong where non-Chinese were ruled by British law and Chinese, at the discretion of the British, were subject to Chinese law and custom.¹⁰

On 29 August 1842, the Chinese government signed the Treaty of Nanking with the British government and ratified it in 1843. Hong Kong was formally ceded to Great Britain under the Treaty. The Charter of Hong Kong was declared on 5 April 1843 under the authority of Queen Victoria.

3. 1844-1966: anglicization of Hong Kong legal system

On 21 August 1844, Ordinance No. 15 was enacted declaring that "the law of England shall be in full force in the said Colony of Hong Kong except where the same shall be inapplicable to the local circumstances of the said Colony or of its inhabitants".¹¹ This is the first legislation that provided for the reception of English law in Hong Kong. However, the implication was that Chinese imperial law and local customary rules remained in force until they were removed by British legislation. This is the root of legal pluralism in Hong Kong. Subsequently, the territory of Hong Kong was extended under the Convention of Peking in 1860 by which the Kowloon Peninsula was ceded to Great Britain. An Order in Council was passed on 4 February 1961 to impose Common Law jurisdiction over this newly acquired territory. Later, under the Convention of 1898, the area of the New Territories was leased to Great Britain for ninety-nine years. Consequently, an Order in Council was enacted the same year and the Common Law jurisdiction was extended to the New Territories.

4. The application of English Law Ordinance 1966

As already shown, 5 April 1843 (the date of the Charter of Hong Kong) became decisive in determining the law in force in Hong Kong. Acts of Parliament then in effect in England were to be introduced in Hong Kong automatically unless they were unsuitable for Hong Kong's social, economic and political conditions. Thus, the lawyers in Hong Kong always had to determine whether local legislation had displaced any English statutes.¹² This became the "applicability of statutes" test.

⁹ William, James and Kyshe, Norton, *The History of the Law and Courts of Hong Kong*, 1970, vol. 1, pp 4-6. Wesley-Smith, Peter, *Constitutional and Administrative Law in Hong Kong*, 1987, vol. 1, pp. 34-35.

¹⁰ Yigong, Su, *Chinese Law Applied by Westerners – Traditional Chinese Law and Custom in Hong Kong*, 2002, 71 (Chinese version); Wesley-Smith, Peter, *The Sources of Hong Kong Law*, 1994, p. 88.

¹¹ This is also known as the Supreme Court Ordinance of 1844.

¹² Wesley-Smith, Peter, *The Sources of...*, *cit.*, p. 115.

In order to resolve this tedious and cumbersome procedure to determine applicable laws, the Application of English Law Ordinance 1966 was enacted. Section 3 provided that “the common law and the rules of equity shall be in force in Hong Kong, so far as they may be applicable to the circumstances of Hong Kong or its inhabitants and subject to such modifications thereto as such circumstances may require”. Section 4 applied the English Acts of Parliaments specified in the schedule. This was a milestone in Hong Kong’s legal development. With this Ordinance, the vague notion of English laws was categorized into two types. The first category is common law, or case law and rules of equity and the second, Acts of Parliament or legislation. With regard to the English Acts of Parliament, the date of April 5, 1842 ceased to play any role. Only those Acts included in the Ordinance schedule would apply in Hong Kong. More significantly, after 1966, instead of the original wording of “except so far as the said laws are inapplicable to the local circumstances of the Colony or of its inhabitants” stated in the Charter of Hong Kong, the Ordinance provided that the English laws applied “so far as they may be applicable to the local circumstances of Hong Kong or its inhabitants.” The emphasis changed from negative to positive.¹³ In other words, after 1966, the Hong Kong local legislature enjoyed greater discretion in selectively making use of English legislation.

5. *China’s resumption of sovereignty in 1997- one country, two systems*

The concept of “one country, two systems” (OCTS) was originally conceived and developed by Deng Xiaoping as a policy to be used with Taiwan – the two systems are the socialist system on the mainland, and the capitalist system in Taiwan.¹⁴ The 1982 Constitution of the People’s Republic of China (PRC) contained an article allowing different systems to be practiced in different regions.¹⁵ This concept was elaborated during the Sino-British negotiations in 1982-1984 on the constitutional status of Hong Kong. After the re-unification of Macau and Hong Kong with China, the structure of the PRC came to consist of a national or Central Government, 28 provincial governments, including governments of 5 autonomous regions and 4 governments of municipalities directly under the Central Government, and 2 Special Administrative Region (SAR) governments. The PRC is not a true federal system since the constitution does not provide for dividing and

¹³ *Ibidem*, p. 92.

¹⁴ Chen, Albert “The Concept of *One Country, Two Systems* and Its Application to Hong Kong” *Understanding China’s Legal System: Essays in Honor of Jerome A. Cohen*, 2003, p. 353.

¹⁵ Art 31 of the PRC Constitution.

allocating powers between the Central Government and provincial, municipal and SAR governments.¹⁶

The juridical basis of Hong Kong's autonomy is the Basic Law of the National People's Congress (NPC) of the PRC, pursuant to Article 31 of the PRC Constitution. The Basic Law is called the "mini-constitution" in the sense that it provides for how the Hong Kong SAR (HKSAR) government is to be formed and operates and identifies the sources of law in the HKSAR. It guarantees its residents human rights and stipulates the social and economic systems and policies to be practiced. More importantly, it defines the relationship between the HKSAR and the Central Government as well as the scope of Hong Kong's autonomous powers.

The OCTS policy is generally workable and its implementation has been successful.¹⁷ The HKSAR government has been able to exercise its powers and make decisions without interference from Beijing.¹⁸ In May 2000, a report issued by the European Commission assessed Hong Kong's status and found that the OCTS principle has generally worked well.¹⁹ The Basic Law is the primary constitutional document for the SAR. Its Article 8 provides: "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region".

Notably, English law is not expressly mentioned, and Acts of Parliament, their subsidiary legislation, and prerogative legislation have ceased to be part of Hong Kong law. However, English law continues to exist, if "common law" is defined as the law of England and provisions granting the practice and procedure, powers, or jurisdiction of English courts are maintained. HKSAR judges would consider themselves to be bound by the decisions of the House of Lords and the Privy Council. If the rules of precedents are part of common law and common law is preserved in the HKSAR under Article 8 of the Basic Law, then Hong Kong courts have the discretion to determine whether to follow the decisions of the House of Lords and the Judicial Committee of the Privy Council on common law matters.²⁰

¹⁶ The Law on Legislation (Lifa Fa) of 2000 with article 8 provides for a list of subject matters that only can be regulated by laws enacted by the national legislature, and may not be dealt with laws and regulations at the provincial level.

¹⁷ Chen, Albert, *op. cit.*, p. 362.

¹⁸ *Ibidem*, p. 363.

¹⁹ South China Morning Post, 19 May 2000, at p. 6.

²⁰ Wesley-Smith, Peter, *The Sources of...*, *cit.*, pp. 199-201.

II. EVALUATIONS ON THE RECEPTION OF ENGLISH LAW IN HONG KONG

1. *The passive reception of Common law through colonization*

The passive reception of common law in Hong Kong occurred because of Great Britain's colonization. From the time of colonization, the British adhered to a policy of non-interference with local custom. Therefore, the Hong Kong common law system is a "fused" legal system in which common law as well as Chinese law and custom were jointly in use. Chinese law and custom applied primarily in family and succession matters. But with minor exceptions in the New Territories, there was no separate judicial administration. The court procedures were English and expatriate judges tended to apply English legal reasoning and cultural values in interpreting Chinese law and custom.

The transplant of "alien" English law into Hong Kong was quickly achieved with gunpowder, but the post-transplant integration of two different legal cultures was problematic and time-consuming. The contrast between Chinese legal culture and Common law culture is found in the adversarial system and independent legal profession. The traditional Chinese legal culture was overwhelmingly influenced by the overarching Confucian principle of social harmony. Therefore, the adversarial system which brought up confrontation between parties was not regarded as the best way to resolve disputes. As a result, the Chinese trial system has always been inquisitorial in nature.²¹ This social harmony concept has no parallel in the individualistic and confrontational Common law judicial system. Not only was traditional China never a legalistic society, but the people looked upon law with contempt. With this attitude towards law, seeking judicial remedies has never been popular in traditional Chinese legal culture. Against this background, traditional China has not had an independent legal profession as in the west.

2. *Means of legal transplant: legislation and language*

Notably, in Hong Kong, common law arrived by Royal prerogative or by legislation. The 1843 Charter established a law-making body: the Governor, acting by and with the advice of the Legislative Council.²²

The English language was universally used as a legal language when common law was introduced and practiced in the colonial period.²³ This led to problems upon the retrocession of the sovereignty of Hong Kong to

²¹ Hsu, Berry, *The Common Law...*, *cit.*, p. 45.

²² Wesley-Smith, Peter *The Sources of...*, *cit.*, p. 89.

²³ Chan, Ming K., "The Imperfect Legacy: Defects in the British Legal System in Colonial Hong Kong", *U Pa J Int'l Econ L.*, num. 18(1), 1997, pp. 134 and 135.

China. As one example, it is of some concern that only people who are better-educated, highly English proficient, and usually middle class who are able to qualify for jury service. Another concern was the lack of official Chinese translations of English legal documents that were enacted in the colonial era.²⁴

3. *Hybrid Jurisdiction: English common law, Qing code and Chinese custom*

Hong Kong's social structure and legal system went through fundamental change during the colonization period. While the law at the time was mainly common law, Chinese law and custom still applied unless it was altered by legislation under the authority of the Crown or was inconsistent with fundamental common law principles.²⁵ Various ordinances provided exceptions so as not to interfere with local customs.²⁶ Therefore, during colonization legal pluralism existed in Hong Kong where common law, Chinese law and local custom was administered under a "fused" common law system.²⁷

The reception of common law in Hong Kong had to account for Chinese customs with variations to common law with consideration of local conditions. For example, Chinese traditional family law and succession law were retained under the common law system until the early 1970s.²⁸ In Hong Kong Island, since the policy of a British policy of non-interference with local custom proved to be practical, this policy was repeated in 1860 when Kowloon Peninsula was ceded to Great Britain by the Convention of Peking. Nevertheless, after the Convention of 1989, the Hong Kong colonial administration discovered that the Chinese in the New Territories were very different from the people on Hong Kong Island economically and socially.²⁹ Consequently, an "Ordinance for the Better Regulation of the New Territories from the Operation"³⁰ was enacted exempting the New Territories from certain Hong Kong ordinances, and maintained some Chinese customs in the New Territories that were not maintained on Hong Kong Island or in Kowloon.³¹ In addition to the ordinances that clearly provided that Chinese law and custom were to remain in force, case law also

²⁴ *Ibidem*, p. 135.

²⁵ Roberts-Wray, Kenneth, *Commonwealth and Colonial Law*, 1966, pp. 541 and 542.

²⁶ The policy of non-interference was implemented in Hong Kong island and Kowloon at first, then gradually extended to the New Territories, see Hsu, Berry, *The Common Law...*, *cit.*, p. 14.

²⁷ *Ibidem*, p. 10.

²⁸ Bokhary, Kemal, "Judicial Notice and Other Facts of Life in Hong Kong", *Hong Kong Law Journal* 5.1, 1975, p. 178.

²⁹ Endacott, G. B., *Government and People of Hong Kong 1841-1962*, 1964, pp. 130 and 131.

³⁰ Ordinance num. 10 of 1899.

³¹ Endacott, G. B., *Government...*, *cit.*, pp. 132 and 133.

illustrated Chinese law and custom applied when English law was held to be inapplicable to the particular nature of Hong Kong and the people who resided there.³²

British policy gradually departed from the original intention to maintain a dual legal system. This can be ascribed to a number of factors.³³ Firstly, in 1858, the British government issued a nondiscriminatory policy that prohibited any class or race from being dominant in the colonies.³⁴ The doctrine of equality meant that Chinese law and customs would remain as a source of law in Hong Kong. Secondly, Evangelicals were influential advocates of a humanitarian policy that safeguarded the interests of people in the colonies. Thirdly, it was impractical to have a separate Chinese judicial administration because the poorly-paid Chinese adjudicators would have to deal with voluminous criminal trials. This would make the Chinese judicial administration inefficient. Fourthly, certain Chinese laws and customs, particularly family law and succession law, did not fit into the pattern of Hong Kong society. Most Hong Kong Chinese lived alone rather than with a family. Hence the patriarchal system that was the foundation of Chinese custom and law would not apply. Fifthly, Hong Kong society was made up of groups with different cultures and customs. For example, the Taiping Rebellion (1851-1864) led to an influx of refugees from various parts of China into Hong Kong.³⁵ Finally, the British realized that allowing Chinese to have their own leaders would conflict with British interests and pose a danger to British rule.

The application of Chinese law and custom often involved family and succession law, while criminal jurisdiction was subject to common law without application of Chinese law and custom.³⁶ Some legislation incorporated Chinese law and custom on family and succession matters,³⁷ such as the New Territories Regulation Ordinance of 1910 that incorporated Chinese customs in dealing with land in the New Territories.³⁸ Another example was the Chinese law dealing with the institution of concubines that continued to be employed long after colonization.³⁹ Nevertheless, the judiciary encountered difficulties in establishing what Chinese law and custom was without sufficient legislative guidance and precedents.⁴⁰ Different

³² *Wong Kam Ying and Ho Po Chun v Man Chi Tai* [1967] *Hong Kong Law Reports* p 201.

³³ Hsu, Berry, *The Common Law...*, *cit.*, pp. 13 and 14.

³⁴ Endacott, G. B., *History of Hong Kong*, 1987, pp. 124 and 125.

³⁵ Collins, Charles, *Public Administration in Hong Kong*, 1970, pp. 85 and 86.

³⁶ Hsu, Berry, *The Common Law...*, *cit.*, p. 16.

³⁷ Strickland, G., *Chinese Law and Custom in Hong Kong, Report of a Committee*, 1948, pp. 108-111.

³⁸ *Ibidem*, p. 100.

³⁹ In the Estate of Chan Yan alias Chan Yung, the status of a concubine was acknowledged by the court, *Hong Kong Law Reports*, 1925, p. 35.

⁴⁰ Hsu, Berry, *The Common Law...*, *cit.*, p. 16.

cultures and customs developed in different regions with differing economic levels. Customs were not static and continued to change with economic and social development. Moreover, most of the British expatriate judges were poorly informed about Chinese culture before their arrival in Hong Kong.⁴¹ There were difficulties in translating Chinese technical rules into juristic English.⁴² Moreover, judges were inclined to resort to English legal reasoning and cultural values when interpreting Chinese law and custom.⁴³

In 1948, Alexander Grantham, the governor of Hong Kong, appointed a committee chaired by George Strickland to review the application of Chinese law and custom in Hong Kong and to make recommendations to modernize it. After wide ranging consultation with a number of public bodies, the committee made several recommendations, primarily in the area of family and succession law as well as land law.⁴⁴ It suggested a more equitable distribution of an estate for women in a Chinese family, as well as modernizing other areas of law while maintaining many features of Chinese law and custom.⁴⁵ However, since Chinese law and custom affected only a minority in Hong Kong, the recommendations attracted little of the public's attention.⁴⁶ Subsequently, in the 1970s a number of reports produced by various bodies under government mandate re-examined many legal issues and paved the way for the legal reforms of Chinese law and custom.⁴⁷

In the early 1970s, the Chinese law and custom on marriage, concubines, divorce, adoption, and succession was abolished by a series of legislative measures.⁴⁸ At the same time, the Application of English Law Ordinance⁴⁹ remained in operation. Therefore, Chinese law and custom that had not been abolished was still in force. Nevertheless, the traditional Chinese family pattern was changing in Hong Kong along with economic and social developments, particularly during the quickening industrialization.⁵⁰ Nowadays, the prevalence of Chinese law and custom in family and succession matters based on traditional family values is rapidly diminishing.

⁴¹ Evans, Emrys, *Common Law in a Chinese Setting – The Kernel or the Nut?*, 1971, p. 12.

⁴² Cohen, Jerome, *Contemporary Chinese Law: Research Problems and Perspectives* (1970) p 9.

⁴³ Lewis, D. J., "Requiem for Chinese Customary Law", *The International and Comparative Law Quarterly*, vol. 32, num. 2, April, 1983, p. 378.

⁴⁴ Hsu, Berry, *The Common Law...*, *cit.*, p. 17.

⁴⁵ Strickland, G., *Chinese Law...*, *cit.*, p. 81.

⁴⁶ Hsu, Berry, *The Common Law...*, *cit.*, p. 17.

⁴⁷ Hsu, Berry, *The Common Law...*, *cit.*, pp. 17 and 18.

⁴⁸ Marriage Reform Ordinance, Cap. 178, Laws of Hong Kong, 1971; Intestates' Estate Ordinance, Cap. 73, Laws of Hong Kong, 1971; Adoption Ordinance, Cap. 290, Laws of Hong Kong, 1972; Lewis "Requiem for Chinese Customary Law".

⁴⁹ Cap. 88, *Laws of Hong Kong*, 1987.

⁵⁰ Hsu, Berry, *The Common Law...*, *cit.*, pp. 27 and 28.

III. ASSESSMENT OF THE “ONE COUNTRY, TWO SYSTEMS” MODEL

The Sino-British Joint Declaration granted Hong Kong a high degree of autonomy, except in foreign affairs and defence.⁵¹ Since intentional treaties does not have an authoritative definition for ‘autonomy’, Mushkat lays out minimum standards for an autonomous entity.⁵² He argues the principal standards include: a locally selected chief executive, but who may be subject to the Central Government’s approval; a locally elected legislative body with limited legislative authority; and an independent local judiciary. An autonomous entity should also have joint authority with the Central Government in areas of concern to both the semi-autonomous authority and the Central Government.

Hong Kong meets these basic requirements in the sense that it is vested with “executive, legislative and independent judicial power, including that of final adjudication”.⁵³ More specially, Hong Kong has a locally elected chief executive who is approved by the central government.⁵⁴ The legislature is constituted by election and authorized to enact laws in accordance with the provisions of the Basic Law and legal procedures.⁵⁵ Judicial power is to be exercised by the local courts “independently and free from any interference”.⁵⁶ Various provisions pertaining to judiciary members’ appointment, removal from the office and immunity from legal action have been included in legal documents to guarantee the judiciary members’ independence.⁵⁷ In addition to meeting the basic requirements, Hong Kong also enjoys some extent of “higher autonomy” for it has self-governing powers and independent decision-making capacity over wide ranging fields including education, science, culture, sports, religion, labour, and social services.⁵⁸

Nevertheless, Mushkat has observed autonomy-diluting currents from sources of Central Government’s interference. Three constraints over the legislative powers are: (1) laws enacted by the local legislature are subject to invalidation by the Standing Committee of the National People’s

⁵¹ *The Sino-British Joint Declaration* Art. 3 (2).

⁵² Mushkat, Roda, *One Country, Two International Legal Personalities*, 1997, p. 16, citing Hannum, Hurst, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, 1990, pp. 467 and 468.

⁵³ JA art 3(3). BL art 2.

⁵⁴ *The Sino-British Joint Declaration* Annex I, art. I, para 3; also see the *Basic Law* art. 45.

⁵⁵ *The Sino-British Joint Declaration* Annex I, art. II, para 2.

⁵⁶ *The Sino-British Joint Declaration* Annex I, art. III, para. 2; also see the *Basic Law* art. 85.

⁵⁷ *The Sino-British Joint Declaration* Annex I art. III, para. 3; also see the *Basic Law* arts. 88, 89, 85.

⁵⁸ The *Basic Law* Chap VI. For more details, see Mushkat *One Country, Two International Legal Personalities* (1997) pp. 17-19.

Congress; ⁵⁹ (2) PRC legislation may be applicable in Hong Kong; ⁶⁰ (3) the power to amend Hong Kong's "constitution", that is, the Basic Law is vested in the NPC.⁶¹ The NPC's power to interpret the Basic Law and the assumed derivative power to disallow a piece of legally enacted legislation undermined Hong Kong's autonomous judicial competence and the "final adjudication" to be exercised by local courts.

In very similar vein, Albert Chen indicates two principal weaknesses of the "one country, two systems" model.⁶² One is that the autonomy of Hong Kong is constitutionally and legally less secure than in a federal system. Under federalism, the division of powers between federal and state governments is written into a constitution which cannot be easily altered. The Supreme Court serves as the final arbiter when jurisdictional disputes arise. However, under the "one country, two systems" model, the division of powers is regulated in the Basic Law which is enacted by the NPC. Therefore, if the NPC acts to change the Basic Law to substantially curtail the autonomy of Hong Kong, there is no constitutional or legal remedy. Under Articles 17, 18 and 158 of the Basic Law, it is the Standing Committee, not a court, that has the discretion to determine whether a HKSAR law is *ultra vires*. It is the Standing Committee that determines when to apply a national law to the HKSAR, and how to interpret the Basic Law.

The other weakness is HKSAR's limited democratization. On the one hand, the domestic political system does not meet the generally accepted standards of democracy. ⁶³ On the other hand, the Basic Law does not provide a clear map for democratization. ⁶⁴ Although Article 45 stipulates that the ultimate aim of the Basic Law is the election of Chief Executive ("CE") and Article 68 provides that legislators be elected as well, there is a screening stage for CE candidates. Moreover, the Central Government reserves power to appoint the CE who invariably plays a vital role within the HKSAR political system, for it is an "executive-led system".⁶⁵ Clearly, when the latter occurs, the Central Government would not appoint a person to be a CE it believed to be untrustworthy.

In summary, Hong Kong's "one country, two systems model" has a high degree of autonomy.⁶⁶ And this model has been applauded as "a

⁵⁹ The *Basic Law* art. 17.

⁶⁰ The *Basic Law* art. 18.

⁶¹ The *Basic Law* art. 159.

⁶² Chen, Albert, *The Concept of ...*, *cit.*, p. 365.

⁶³ Ghai, Yash, *Hong Kong and Macau in Transition: (II) Exploring the New Political Order*, 1995, p. 291.

⁶⁴ *Ibidem*, p. 367.

⁶⁵ Shuwen, Wang, *Xianggang Tebie Xingzhengqu Jibenfa Daolun* (Basic Introduction to the Basic Law of the HKSAR), 1997, pp. 207-209. (Chinese version)

⁶⁶ Mushkat, Roda, *One Country...*, *cit.*, p. 22.

significant breakthrough for the Chinese political and legal system".⁶⁷ Although it is deficient in providing a framework of democracy and rule of law for Hong Kong if assessed by western liberal standards, this model has provided Hong Kong's residents with human rights, economic freedom, open society, and pluralistic culture.

According to the Joint Declaration and the Basic Law, after 1997 the civil and commercial law in Hong Kong was to be developed based on the existing common law system. First, portions of the laws with unfair colonial rulings were to be replaced with new HKSAR legislation. Second, the HKSAR legislature was to enact laws similar to the English laws that had been applied and were widely accepted in Hong Kong. Third, land law was to be amended under the guidance of the Basic Law.⁶⁸

One study showed that an overwhelming majority of Hong Kong's Chinese population accepted the common law judicial system and believed it would be maintained after China regained sovereignty over Hong Kong.⁶⁹ Generally, Chinese culture is not regarded as a barrier to the operation of a common law system and Chinese traditionalism has not affected people accepting common law values.⁷⁰ In general, despite an ongoing clash of two distinct legal cultures, the common law system has taken root in Hong Kong to a considerable extent.

Not only has the Chinese population in Hong Kong accepted the common law system, the Basic Law has also absorbed a great many common law values and principles. The most significant that have been absorbed are: (1) individual and legal rights. Article 27 of the Basic Law has a provision very similar to Article 35 of the PRC Constitution that guarantees Hong Kong residents with freedom of speech, freedom of association and demonstration, and freedom to form and join trade unions and to strike. Article 39 of the Basic Law provides that the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and international labor conventions that apply to Hong Kong must be implemented through legislation. Restrictions imposed on rights and freedom cannot contravene international covenants and conventions.⁷¹ (2) The rule of law. The Basic Law has specific provisions stating that "[a]ll Hong Kong residents shall be equal before the law".⁷² The

⁶⁷ Chen, Albert, *The Concept of ...*, *cit.*, p. 368.

⁶⁸ Tian, Lan, *Yiguo Liangzhi Fain Wenti Yicinjn* (A Study of Legal Issues Concerning One Country, Two Systems), Beijing, Legal Publishing House, 1997, pp. 10 and 11.

⁶⁹ Hsu, Berry, *The Common Law...*, *cit.*, p. 94.

⁷⁰ *Ibidem*, p. 104.

⁷¹ This is enshrined in *Secretary for Justice vs. Chan Wah and Tse Kwan Sang* [2000] 2 H.K.L.R.D. 641 and involve the New Territories local village election system.

⁷² The *Basic Law* arts 25& 35; *The Sino-British Joint Declaration* JD para II, Sec XIII, Annex I.

rule of law includes having democratic elections, assuring freedom of the press and the certainty of the law. It is Albert Chen who believes that the autonomy of Hong Kong, the Rule of Law, human rights and civil liberties have been successfully carried out after 1997 under the constitutional framework of “one country, two systems” and the Basic Law.⁷³ The common law system, judicial independence and the Rule of Law tradition continued to flourish in post-1997 Hong Kong. However, the legislative exercise to implement Article 23 of the Basic Law with three judicial interpretations was both significant and controversial.⁷⁴ It has been pointed out that each one of the interpretations has its own rationale and justification so that none can be regarded as the NPC Standing Committee’s arbitrary or irrational exercise of power. (3) Judicial independence. Article 85 of the Basic Law provides that Hong Kong courts exercise judicial power independently, free from any interference. Moreover, members of the judiciary are immune from legal action in performing their judicial functions. This is particularly important for the doctrine of the separation of power has been rejected by Marxist jurists in mainland China. Although Article 126 of the PRC Constitution provides for judicial independence, a following article ⁷⁵ contradicts this and requires the Supreme People’s Court to be responsible to the NPC and its Standing Committee. The Standing Committee has the constitutional authority to interpret the constitution and statutes of the PRC, ⁷⁶including the Basic Law of Hong Kong. This raises the issue of potential legal conflicts in which China’s socialist legal system will override Hong Kong’s common law legal system.⁷⁷

Article 158 of the Basic Law provides a mechanism authorizing the Standing Committee to give Hong Kong courts the authority to interpret, the provisions of the Basic Law when adjudicating cases. This is allowed under the limited autonomy granted Hong Kong. This appears to be a solution to the question of the jurisdiction of the Court of Final Appeal in Hong Kong. However, the power of the Standing Committee is limited since the NPC can alter or annul decisions of its Standing Committee.⁷⁸ Therefore, the final interpretation of the Basic Law and relevant laws and

⁷³ Chen, Albert, “The Rule of Law under ‘One Country, Two Systems’: the Case of Hong Kong 1997-2009” available at SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474748 pp 18-19.

⁷⁴ Article 23 of the *Basic Law* requires the Hong Kong SAR to enact laws to prohibit any act of treason, secession, sedition, and subversion against the Central Government. It also concerns state security issues and activities of foreign political organizations in Hong Kong. Unsurprisingly, the issuance of HKSAR government’s proposal to implement Article 23 of the Basic Law led to public anxiety over the tightening up of the Hong Kong human rights standard.

⁷⁵ Art 128 of the PRC Constitution.

⁷⁶ The PRC Constitution, art 67 (1) & (4).

⁷⁷ Hsu, Berry, *The Common Law...*, *cit.*, p. 119.

⁷⁸ The PRC Constitution, art 62(11).

regulations largely depends on how much leeway Beijing will give Hong Kong courts in interpreting laws.⁷⁹ Moreover, Article 158 provides that in cases involving the interpretation of the Basic Law regarding affairs which are the responsibility of the Central Government or the relationship between the Central Authorities and Hong Kong, have to be referred to the Standing Committee for an interpretation before the courts make their final judgments. Here, Hong Kong courts do not have the final authority. Article 19 of the Basic Law also ensures that Hong Kong courts have no jurisdiction in cases relating to acts of the Central Government. A prime example is the legal battle over Hong Kong abode rights of mainland-born children of Hong Kong residents.⁸⁰ The Court of Final Appeal of the HKSAR held in this case that any interpretation made by the Standing Committee of the NPC under Article 158 of the Basic Law binds the Hong Kong Courts to interpret the Basic Law.

IV. SPECIFIC INSTITUTION: CHINESE CUSTOMARY TRUST OVER LAND

Hooker demonstrated that when Common law system was imposed on South East Asia, “even though English law was introduced as common law, there always remained substantial exceptions, as to both content and procedure, in favor of the indigenous populations. This was especially true in the areas of most direct conflict: family law, the law of property...”⁸¹ This is also relevant to Hong Kong. As family law matters have already been touched upon, this part examines land issues to illustrate Hong Kong’s legal pluralism.

The sources of land law in Hong Kong include English common law, local legislation and case law as well as customary Chinese law. The traditional way Chinese deal with land is subject to Section 13 of the New Territories Ordinance (Cap 97). One of the basic principles of customary Chinese law is that of the maintenance and preservation of family property through the male line. An example of this patrilineal system is that of the customary trust over land, the t’so (族) or t’ong (堂). Traditionally, t’so was a trust where land was held for the benefit of the clan or the lineage and was created posthumously by the heirs of the deceased landowner for various purposes, particularly ancestral worship. T’ong was thought to have been created by the landowner inter-vivos with the intention to ensure that the land was held by the clan in perpetuity for such purposes as education, business and social relationships. Therefore, the fundamental purpose of the two types of customary law is to venerate the common ancestor or the family

⁷⁹ Hsu, Berry, *The Common Law...*, *cit.*, p. 120.

⁸⁰ See *Ng Ka Ling vs. Director of Immigration* [1999] 1 H.K.L.R.D. 315.

⁸¹ Hooker, Barry, *Legal Pluralism: An Introduction to Colonial and Neocolonial Laws*, 1975, p. 182.

clan. Both customary rules have now been preserved in Section 15 of the New Territories Ordinance, which provides:

Whenever any land is held from the Government under lease or other grant...in the name of a clan, family or t'ong...or t'ong shall appoint a manager to represent it...the said manager...ha[s] full power to dispose of or in any way deal with the said land as if he were sole owner thereof, subject to the consent of the Secretary for Home Affairs...Every instrument relating to land held by a clan, family or t'ong, which is executed or signed by the registered manager thereof in the presence of the Secretary for Home Affairs and is attested by him, shall be as effectual for all purposes as if it had been executed or signed by all the members of the said clan, family or t'ong. The Secretary for Home Affairs may on good cause shown cancel the appointment of any manager and select and register a new manager in his place. If the members of any clan, family or t'ong holding land do not within 3 months after the acquisition of the land make and prove the appointment of a manager, or within 3 months after any change of manager prove the appointment of a new manager, it shall be lawful for the Government to re-enter upon the land held by such clan, family or t'ong, which shall thereupon become forfeited.

It can be seen that t'sos and t'ongs are not subject to the rule against perpetuities, which has no counterpart in customary Chinese law.⁸² Also, the land held by a t'so or t'ong in customary Chinese law is intended to be inalienable.⁸³ In practice t'so and t'ong land may be sold but this only happens under exceptional circumstances for the family clan benefits from the sale, and all members must agree to sell.⁸⁴ It is worthwhile noting that the abovementioned customary Chinese law continues to be applied and enforced only in the New Territories. A t'so or t'ong may hold land in other parts of Hong Kong, but customary Chinese law does not apply.⁸⁵

V. CONCLUDING REMARKS

Shown above is that customary Chinese law is somewhat entrenched in certain fields and geographical areas by legislation. However, the general trend is that the use of customary Chinese law is diminishing. This is the case for metropolitan Hong Kong Island and for the Kowloon Peninsula.

Hong Kong's passive reception of English Common law differs from mainland China's reception of a civil law tradition for the legal transplant of civil law was not just a historic accident. China's acceptance of the civil law tradition was neither a function of colonization nor driven by the prestige of

⁸² Nield, Sarah, *Hong Kong Land Law*, 1997, p. 221.

⁸³ *Idem*.

⁸⁴ *Kan Fat-tat v Kan Yin-tat* [1987] H.K.L.R. 516 at 534.

⁸⁵ *Ibidem*, p. 516.

having civilian codes.⁸⁶ It was only after the civil law system had been introduced to mainland China did the Chinese government and jurists begin to value its prestige. China's acceptance and use was not passive, but rather it was an intentional policy as the legal and academic communities realized the country's need for civil law. In contrast, Hong Kong's legal transplant was driven primarily by external forces rather than by internal necessity.

It is often argued that Hong Kong's law still is comfortably swathed in Common Law under the OCTS policy. The English legal legacy remained largely intact in Hong Kong's legal system after a switch in sovereignty. But, then again, law is not isolated from the community where it is applied. The interaction, if not integration with mainland China's civil law system, in view of the burgeoning business transactions between the two, has just begun. It would be no surprise that Hong Kong, a vibrant world financial centre, could eventually become a mixed jurisdiction. What is worth noticing is the way its legal system is becoming mixed. For this reason, there is a pressing need to have more nuanced studies on how law should address changing culture.

⁸⁶ Lei, Chen, "The Historical Development of the Civil Law Tradition in China: A Private Law Perspective", *Legal History Review*, 2010.