

“The Status of Hong Kong (Sar) under International Law”

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Introduction

The revolutionary transformation of the political status of Hong Kong from a British colony to Special Administrative Region of People's Republic of China¹ is a multifaceted issue. Hong Kong did not gain self-determination, unlike the other colonies of the United Kingdom. It did not become a part of Commonwealth of nations.²

The *Sino-British Joint Declaration* is considered as primary move towards the formalisation of status of Hong Kong. It was signed by both countries, and incorporated certain **basic policies** to uphold “national unity and territorial integrity of Hong Kong” but denied the right to self-determination. However, the focal point is largely resolute to the fact that Hong Kong will be directly under the authority of Chinese Government but enjoying a “high degree of autonomy” except in foreign affairs and defence. The concept of autonomy has not been described anywhere in international law. The political and judicial systems of Hong Kong SAR are independent. In accordance with the international agreement between Britain and China, the underlying principle of “*One Country, Two Systems*” has been upheld. It allows Hong Kong SAR to sustain its “capitalist economic system” and also assures the rights and freedoms of its people for next fifty years, after 1997. This means, Hong Kong has been granted on lease to the PRC for fifty years. These features have been enshrined in the Hong Kong Basic Law, which is, its Constitutional Document. However, these are, in a way controlled by interpretation and understanding of Standing Committee of the National People's Congress. (NPCSC).⁴

Hong Kong's doorway into international agreements and its participation in the various international organisations have given it a way to acquire international rights and obligations. This has the following outcomes: 1. Hong Kong can be held internationally liable for failing to act upon or disobey international obligations, 2. It has the potential bring claims that arise from the violation of international law. This region has been characterised as an entity, which is not a “State” under international law, but which has “state attributes”. It is not a sovereign but is highly autonomous.⁵

This article will answer the controversial question as to whether Hong Kong possesses international legal personality and if it does so, to what degree.

¹Herein after, PRC.

² Rod Mushkat, *The International Legal Status of Hong Kong under Post Transitional Rule*, Houston Journal of International Law, Volume 10 Number 1, Autumn 1987.

³MJA Cooray, *Hong Kong in China: The Promise of "One Country, Two Systems"*, Hong Kong University Press. (A Review of RodaMushkat, *One Country, Two International Personalities: The Case of Hong Kong*)

⁴ Sun Zhichao, *International Legal Personality of the Hong Kong Special Administrative Region*, Chinese Journal of International Law, Oxford University Press, 2008.

⁵Ibid.

Opium Wars and Cessation of Hong Kong

Hong Kong's official name is Hong Kong Special Administrative Region of Peoples Republic of China. The political history of this region is related to the defeat of China in the First Opium War. The Opium War was fought between China and Britain over their contradictory stands on issues like "diplomatic relations, business and the delivery of integrity, protection of injustice against foreign nationals."⁶

There was requirement of Chinese goods in the European market, which created trade disproportion as, the western goods were not required in China, at all, because China was self-contained. Also, China has banned the entry of Europeans into its market. Thus, the British traders began smuggling opium into China so that their purchases of exportation of tea could be stabilised in the British market. As a response to this step, China imposed prohibition⁷ in importing of opium and destroyed at Guangzhou, opium that was impounded by the Britishers. Britain retorted to it, by sending its gunboats on coastal towns of China to display its aggression. China was incapable of resisting the contemporary arms and ammunitions used by the Britishers and so it was overpowered by the Britishers. Consequently the "Treaty of Nanjing" was signed in 1842 along with the British "Supplementary Treaty of the Bogue" (signed in 1843).⁸ These treaties were entered into forcefully by China, and, provided that "the ports of Guangzhou, Jinmen, Fuzhou, Ningbo, and Shanghai should be open to British trade and residence"⁹; in addition Hong Kong was ceded to the British.¹⁰

Later on, Britain converted it into a colony. Cession of Hong Kong was followed by Kowloon some other new territories were granted on lease in 1898. After the occupation of these territories by Japan during the World War-II, the British re-acquired control over it until 30 June 1997.¹¹ As an outcome of the dialogue between China and Britain, Hong Kong was reassigned to the People's Republic of China under the Joint Declaration of 1984. Thus, Hong Kong became China's first Special Administrative Region under the theory of "one country, two systems".¹²

The Joint Declaration

"The Joint Declaration laid the groundwork which will allow the current legal, socio-economic and political structure to endure the transfer of sovereignty. The Basic Law has

⁶Tsang, Steve, *A Modern History of Hong Kong*. I.B.Tauris. p. 3–13, 29. [ISBN 1-84511-419-1](#).

⁷ China and the West: Imperialism, Opium, and Self-Strengthening (1800-1921), available at, http://afe.easia.columbia.edu/main_pop/kpct/kp_imperialism.htm, Accessed on 5th April, 2015.

⁸Fairbank, John King, *Trade and Diplomacy on the China Coast; the Opening of the Treaty Ports, 1842–1854* Harvard University Press, (1953).

⁹ China and the West (1583-2000), available at, <http://www.thelatinlibrary.com/imperialism/notes/chinalongchron.html>, accessed on 5th April, 2015.

¹⁰A. Waley, *The Opium War through Chinese Eyes* (1958, repr. 1968); H.-P. Chang, *Commissioner Lin and the Opium War* (1964); P. W. Fay, *The Opium War, 1840–1842* (1975).

¹¹Russell, Peter H.; O'Brien, David M. (2001). *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*.

¹² Basic Law, Chapter IV, Section 4, Basic Law Promotion Steering Committee.

established a constitutional structure similar to that to which the people of Hong Kong are now familiar. The Basic Law provides not only for domestic union, but also guarantees that Hong Kong will enjoy a "high degree of autonomy" as a special administrative region of China."¹³

The signatories of Joint Declaration were Zhao Ziyang, the Chinese Prime minister and Margaret Thatcher, United Kingdom's Prime Minister.¹⁴ It is an internationally binding formal agreement. It is the highest form of commitment between two countries.¹⁵ Pursuant to this declaration, Hong Kong SAR shall be directly under the authority of the Central People's Government of the PRC and shall enjoy a high degree of independence and sovereignty except in matters of foreign and defence. However, Hong Kong shall have all three important organs of a democratic state, i.e., Legislative, Executive and Judiciary, all working independently in their respective spheres. As far as regional flag and emblem is concerned, Hong Kong was allowed to use its own unique emblem and national flag in addition to the flag and emblem of PRC. The trade, industry and fiscal policies shall remain intact in Hong Kong. The laws shall also remain unaffected.

The basic policies listed out in the declaration state importance of national unity and territorial integrity in Hong Kong SAR. To state a few :

- Hong Kong's people shall constitute their government.
- CPG shall appoint chief executive on the basis of outcome of elections held.
- The employment status of Chinese and foreign nationals previously working in Hong Kong will not change and in addition the British nationals shall also have the right to serve as advisers or work in governmental departments of Hong Kong.
- The Hong Kong nationals shall be granted all necessary rights and freedom, such as of speech, of assembly, of movement, of occupation, etc.
- It will also have independent budget and final accounts.¹⁶

One Country, Two System

The constitutional theory of "One Country, Two Systems" was devised by Deng Xiaoping, leader of People's Republic of China. He recommended that

"There would be only one China, but separate Chinese regions such as Hong Kong and Macau could preserve their own capitalist economic and political systems, while the rest of China uses the socialist system. Under the principle, each of the three regions could continue to have its own political system, legal, economic

¹³YashGhai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997).

¹⁴ Constitutional and Mainland Affairs Bureau, *The Government of the HKSAR. "The Joint Declaration" and following pages*, 1 July 2007.

¹⁵ Para 19 Sino British Joint Declaration

¹⁶ N. Jayawickrama, "The Right of Self-Determination" in P. Wesley-Smith ed., *Hong Kong's Basic Law: Problems and Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1990) 85-98 at 89-91.

and financial affairs, including external relations with foreign countries. Taiwan could continue to maintain its own military force.”¹⁷

"One country is the foundation and centre of the two systems," and acknowledgment of the principle means recognition of the premise of "one country" that refers to the PRC, and that the main body of the nation will maintain the socialist system with Chinese characteristics. This policy is a vital module of the socialism with Chinese characteristics.

The One Country, Two systems rule has been put to operation in Hong Kong through the basic law. Basic Law serves as a diminutive constitution for Hong Kong and its terms are in line with the provision and promises under the Joint Declaration. It also grants constitutional protection on various fundamental human rights and freedoms. Specifically, one of the most vital conventions, the International Covenant on Civil and Political Rights is given a constitutional status through the basic law¹⁸

International Legal Personality

The rules under International law are made by states, for states. These states, being sovereign and equal in their rights (and also duties) , have the ability to formulate legally binding rules which are presented in the form of Treaty, Conventions, Declaration, etc. When one state signs and ratifies a treaty, it shows its willingness to enter into certain contractual terms and its non compliance with such rules is strictly dealt with. The capacity of a state to enter into such commitments and to make them legally bound is an outcome of “international legal personality”.¹⁹

Thus some of the essential features of an entity having internal legal personality are²⁰ :

- Its capability to approach international tribunals to claim or to act on rights granted by international law.
- To be able to put in operation commitments and duties that are imposed under international law.
- The authority to make agreements binding by international law.
- To enjoy immunities from the jurisdiction of the domestic courts of other nations.

The concept of international legal personality is not limited to states only. Over the period of time, it has been extended to other entities as well, such as international organizations, insurgent and belligerent groups, corporations, etc. But for the present topic, the concept of “states” has been focussed upon.

¹⁷<http://www.china.org.cn/english/features/china/203730.htm> ; Accessed on 5th April, 2015

¹⁸Drafting and Promulgation of the Basic Law and Hong Kong's Reunification with the Motherland , available at http://www.basiclaw.gov.hk/en/publications/book/15anniversary_reunification_ch1_3.pdf

¹⁹ <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-actors/international-legal-personality> ; Accessed on 5th April 2015.

²⁰NemanjaShukalo, *What is International Personality and why does it matter?*, University of Nicosia, available at : [http://www.academia.edu/1220009/What is International Legal Personality and why does it matter](http://www.academia.edu/1220009/What_is_International_Legal_Personality_and_why_does_it_matter) ; Accessed on 5th April 2015.

Montevideo Convention²¹ lists out the following essentials for statehood. It provides that ‘the state as a person of international law should possess the following qualifications: (a) a permanent population, a defined territory government and a capacity to enter into relations with other states.’

It means that to be called as state, existence of a permanent population is required, however, there is no specification about the minimum number. Secondly, a particular territorial base is required upon which such state can operate. Next, for an effective functioning, there should be some form of government or sovereign control. “The last criterion calls for a ‘state’ to have legal independence and territorial sovereignty. However, the essentials under the Montevideo Convention are not sufficient on their own to establish statehood. International politics further complicates it, by adding essentials like “recognition” by the other nations”.²² As explained by leading authors on international law,

Hong Kong is an appropriate example which shows how entities other than States may acquire legal personality under international law. It has always been a part of the “international civil society” that consists of international/regional organizations, multilateral treaty bodies and intergovernmental organizations.²³

Hong Kong’s international rights and obligations comprise the following²⁴: participation in diplomatic negotiations; signing and implementation of multilateral treaties; signing and implementation of bilateral agreements; participation in international organizations; agreements and arrangements for the establishment of international organizations in Hong Kong; consular agreements; and juridical relations with the Central Authorities.

Hong Kong may have acquired certain stately attributes by fulfilling criteria of international legal personality, but it is not a complete or proper state. To put in other words, Hong Kong and People’s Republic of China “cannot be treated at par”. This proposition is given on the basis of rights and duties that Hong Kong is capable of exercising. One of the classic controversies under this is provision relating to diplomatic negotiations under the Basic Law. For instance, the delegates of Hong Kong (SAR) Government participate in capacity of member of People’s Republic of China not in their own capacity.²⁵ Moreover, at the end of the day, it is the CPG that will be responsible for the foreign affairs of Hong Kong or to put in other words, the region may conduct relevant external affairs on its own only with the approval of the CPG. Another essential point is that the courts of the Hong Kong are to have

²¹ Montevideo Convention on Rights and Duties of States 1933

²² Sunniva Samdal, *The issue of legal personality within the modern international legal system*, available at <http://www.aber.ac.uk/en/media/departamental/lawcriminology/pdf/publications/auslcj2014/5---The-Issue-of-Legal-Personality-within-the-Modern-International-Legal-System.pdf>

²³ C.N. Murphy and E. Augelli, *International Institutions, Decolonization, and Development*, 14 International Political Science Review (1993), 71.

²⁴ Supra note 22

²⁵ Article 150 of the Basic Law

no jurisdiction over certain acts of State such as defence and foreign affairs although, the joint declaration grants an independent judicial setup for the region.²⁶

Conclusion

As Professor Malanzcuk pointed out, *“It is futile to ask whether an international organization has legal personality in the abstract; instead, one should ask , what specific rights, duties and powers is it capable of exercising?”*²⁷ In absence of complete rights of Hong Kong, it is uncertain, to make a proposition as to the legal status of state. The only correct proposition in regard to Hong Kong will be, that it is a territory with state attributes, it is autonomous in nature but it not a State.

²⁶ MJA Cooray, *Hong Kong in China: The Promise of "One Country, Two Systems"*, Hong Kong University Press. (A Review of RodaMushkat, *One Country, Two International Personalities: The Case of Hong Kong*)

²⁷ Prof Malanzcuk, *Akehurst's Modern Introduction to International Law*, Routledge, 2002 , pp. 93