



Hong Kong's Autonomy: Legality, Legitimacy, and Reconciliation

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Abstract. Hong Kong enjoys a high degree of autonomy within China under its 'One Country, Two Systems' policy. In the Chinese unitary state, Hong Kong's autonomy is authorised by the central government, and there is legally no restriction on central intervention. However, autonomy has more robust meanings as a local legitimacy, and tension exists between its legal and legitimate meanings, causing controversies in central intervention. This tension can either be resolved by constructing another local legitimacy, or be avoided by restricting the central government's residual power or by resorting to its power incidental to the power to supervise the constitution.

Keywords: Basic Law of Hong Kong; High Degree of Autonomy; Unitary State; Residual Power

1 Introduction

On 6 November 2023, in the aftermath of the *Sham Tsz Kit v Secretary for Justice* ("*Sham*") [1], where the Hong Kong Court of Final Appeal ("CFA") declared that the Hong Kong Government was under a positive duty to 'establish an alternative framework for legal recognition of same-sex partnership' within two years, a member of the Legislative Council ("LegCo") expressed the concerns that this controversial decision may lead to the intervention of the Standing Committee of National People's Congress ("NPCSC") [2]. In subsequent LegCo debates, legislations in the Chinese mainland were frequently cited to justify Hong Kong's heterosexual marriage system and to criticise the *Sham* decision [3]. Finally, when the Government proposed a registration framework, the finality of *Sham* was questioned by a LegCo member contemplating to resort to NPCSC for intervention [4].

Currently, Hong Kong is an autonomous region within the People's Republic of China ("PRC"), established by the 'one country, two systems' ("OCTS") policy. Controversies have surrounded the practice of the OCTS policy and Hong Kong's autonomy, with different emphasis on state sovereignty and regional autonomy, and different understanding of allocation of power [5]. The ongoing *Sham* saga illustrates not only its subject matter's controversy, but also the uncertainty Hong Kong's autonomy, where a

decision delivered by its final appellate court through its judicial autonomy, has been constantly questioned as to its finality, and under potential threat of central intervention.

To tackle with such uncertainty, two questions are to be addressed. On one hand, whether central intervention is legal, on the other hand, whether central intervention is legitimate. The former relates to the authorisation relationship between Hong Kong and China, the latter concerns a broader enquiry of the legitimacy of governance in Hong Kong. Part 2 discusses the former and Part 3 turns to the latter, presenting a tension to be solved in part 4, and part 5 concludes.

2 Authorisation: Legality of Intervention

2.1 Authorisation Relationship Explained

Hong Kong's autonomy derives from the central government's authorisation. This authorisation relationship is evidenced by provisions like arts. 2 and 12 of the Basic Law of Hong Kong ("BL") and art. 31 of the Constitution of the PRC ("Constitution") [6], and by the BL's legislative history [7], and can be deduced from China's unitary state nature that all local administrations' power is authorised by the central, as opposed to federal states [8-9].

There are two implications of this authorisation relationship. From autonomists' perspective, the authorisation relationship provides the normative basis for Hong Kong's constitutional order. Hong Kong enjoys a high degree of autonomy – higher than members states in a federal state – given its different socio-economic institutions from the mainland and expansive autonomous powers, and BL's conflicting wordings from the Constitution [9-10]. The constitutionality of such autonomy must resort to the authorisation relationship, tracing the normative basis to the Constitution. Moreover, the relationship also suggests that the Constitution is the only normative basis, excluding others like the Sino-British Joint Declaration 1984 ("Joint Declaration") [11-12].

From interventionists' perspective, it is the central government's final say that marks the key feature of the authorisation relationship [13], justifying the legality of central intervention. Since Hong Kong's autonomy derives from the central, it can be derogated and revoked in relation to any matter regardless of local consent [8]. Resembling the devolution relationship between the UK and its 'home nations' like Scotland, the authorisation relationship is legally more restricted. In UK's devolution system, the central-regional power relationship existed before the ongoing constitutional acknowledgement [14], whereas in China established constitutional order came before Hong Kong's reunification. Thus, power dissymmetry among local administrations is normal in UK's devolution system, but abnormal in China's authorisation system. Intervention is both legal and normative to restore Hong Kong's 'exceptional' autonomy back to China's ordinary constitutional order [10-11], preventing local separatism [12]. Moreover, there has been constitutional guarantee, such as s.63A of the Scotland Act 1998, as to the 'permanency' of autonomy under devolution relationship, and constitutional conventions restricting central intervention [14], whereas Hong Kong's autonomy is contingent on the necessity under art.31 of the Constitution, without constitutional re-

striction nor third party supervision on central intervention [9]. In short, under the authorisation relationship, Hong Kong's autonomy is more limited than that under UK's devolution relationship, and is more vulnerable to state's intervention.

Above implications have been evidenced in judicial practice. The CFA has utilised its independent judicial power to develop the local jurisprudence. For example, a line of CFA cases, including *Sham*, have upheld LGBTQ rights against discriminative measures, showing more inclusivity than other Asian jurisdictions [15]. In *W v Registrar of Marriages* [16], it recognised transgender marriage's constitutionality; it also recognised same-sex partnership as marriage for visa purpose in *QT v. Director of Immigration* [17]. Meanwhile, the courts are aware of central intervention, especially in cases involving PRC laws or Chinese sovereignty, constantly reaffirming their deference or deciding in favour of the authority. For instance, while NPCSC's co-location decision was criticised for bypassing the mechanism in art.18 of the BL [18], the Court nevertheless avoided to decide on its legality, and upheld local legislations related to it [19].

A tension exists within the authorisation relationship between central intervention and local autonomy. While 'high degree of autonomy is not full autonomy' [20], the extent of such high autonomy remains uncertain. Such autonomy probably results from comparison with other Chinese local administrations, to which powers like independent judicial power are undelegated according to the 'non-delegation principle' [11; 21]. This reveals the relative nature of Hong Kong's autonomy restricted in the Chinese context, since there is no equivalent principle in common law jurisdictions, the UK parliament can always delegate sovereign power [22]. This context-specific feature explains the different emphasis abovementioned [5], where mainlanders discuss Hong Kong's autonomy in Chinese standard and Hong Kongers view it from a common law standard.

2.2 Denial of Residual Power

Generally the legal restrictiveness of autonomy is incontrovertible, layers of authorisation can always be identified. But in borderline cases without clear authorisation, legally it is only the central government that can exercise the power [23], since there is no local 'residual power' without authorisation. However, this is counterintuitive given the limited frequency of central intervention addressing legal uncertainties locally resolved, suggesting local residual power in practice. Three categories of cases are to be considered to deny possibility of 'residual power' in legal uncertainties.

Firstly, uncertainties arise where colonial era's laws conflict with the PRC laws. In *Democratic Republic of Congo v FG Hemisphere Associates LLC* [24], the CFA was to decide on the extent of state immunity applicable in Hong Kong. Back then the PRC adopted absolute immunity whilst colonial Hong Kong recognised a restricted one. Give the issue's relevancy with arts. 13 and 19 of the BL regarding central government's responsibility of foreign affairs and act of state, the CFA referred the case to NPCSC for interpretation and decided accordingly. This is the logical result of authorisation relationship, that only the central government has the 'residual power' to address legal uncertainty.

Uncertainties may also arise in legal areas without equivalent PRC laws. The second category concerns cases where there are existing colonial era laws. For example, data privacy protection was disputed and fragmented in PRC before the enactment of Personal Information Protection Law 2021, whereas in Hong Kong it has been settled by the Personal Data (Privacy) Ordinance 1995 and local common laws [25]. Without specific authorisation, the recognition of previous laws in arts. 8 and 18 of the BL may constitute categorical and retrospective authorisation, denying residual power.

The third category concerns situations where Hong Kong autonomously develops laws absent in the mainland, represented by decisions upholding LGBTQ rights. The Court have been strategic in exercising its autonomy. Where liberalisation reform is moderate and specific, such as limited recognition of same-sex partnership in *QT*, it may exercise its interpretive power over the BL, with clear authorisation under art.158 of the BL. Where liberalisation is radical and wholistic like establishing an alternative legal framework in *Sham*, it would rather interpret local legislations like the Hong Kong Bill of Rights Ordinance, exercising power incidental to the ‘authorised’ independent judicial power under art.19 of the BL, negating the legal possibility of ‘residual power’.

Therefore, Hong Kong’s autonomy is legally restricted under the authorisation relationship, being reducible to invokable authorisation. Attempts would fail to legally restrict central intervention under the authorisation relationship, by the Constitution [12], the BL [26], the Joint Declaration [13], or constitutional customs [9]. Yet autonomy remains a key feature of Hong Kong’s constitutional order, and authorisation may not necessarily legitimise central intervention. Discussion on Hong Kong’s autonomy thus requires broader enquiries of the legitimacy effect.

3 Autonomy: Legitimacy of Intervention

Autonomy is commonly used in two senses. Used in legal sense, it describes the allocation of power between central authorities and local administrations, where there is no essential different between Hong Kong and other Chinese local administrations. But more than a technical terminology, autonomy is also a legitimacy to Hong Kongers, which may be contravened by legally justifiable central intervention. In this regard, it is better to understand autonomy as a local discourse, that Hong Kong is – or appears to be – self-governing its own affairs.

Three dimensions of legitimacy regarding specific power relationships has been analysed: conformity with established rules, justifiability by shared beliefs, and consent of the subordinate [27]. Discussion here focuses on non-legal dimensions, because of not only previous legal discussion, but also the restrictiveness of legal legitimacy without value alignment between transplanted rules and local beliefs in colonial context [28]. Notably, legitimacy is not merely an alternative governance tool besides direct exercise of power [29], it also binds the authority to act ‘legitimately’ [27]. The following sections investigate the legitimate effect of Hong Kong’s autonomy on the central-regional power relationship. Sections 1 and 2 explore autonomy as shared beliefs of non-intervention policy and local distinctiveness, while section 3 turns to the consent dimension in local struggle for democratisation.

3.1 Non-intervention Governance

For central authorities, autonomy is a governance tool over a politically and socio-economically different society. In modern history, Hong Kong had been an exceptional region for both the British and Chinese authorities. The colonial government had incentives to minimise intervention to preserve Hong Kong as a free port and to prevent PRC's potential intervention [30]. While discriminative legislations and law enforcement existed [31], intervention was relatively rare and passive since it was separation rather than intervention that was intended by colonisers [30]. In early years of the hand-over, it was also pragmatical for the Chinese to withdraw from direct intervention to avoid international and domestic crisis, and to utilise the local market economy [9]. Besides extensive commitments of autonomy in art.3 of the Joint Declaration, during the first decade, it was the BL rather than the Constitution that was emphasised as the basis of Hong Kong's constitutional order, either as a 'local constitution', a special law or a law subordinate to the Constitution, and it was not until 2007 that the Constitution 'together with' the BL was emphasised as the constitutional basis [32].

This non-intervention tradition had become entrenched, with increasing return from economic prosperity and increasing cost for intervention [9], having a path dependency effect on local governance [33]. Intervention only occurred when economically or politically necessary, and is nowadays still commonly justified by contributions to prosperity [34]. In this regard, although the Joint Declaration is not legally relevant or binding, its declared non-intervention policy is relevant to legitimacy concerns. While the PRC may not be accused of breaching, it may still be criticised for illegitimately contravening the Joint Declaration, a necessary cost of switching ways of governance and reducing the entrenchment of non-intervention policy in Hong Kong.

3.2 Local Identity

Secondly, autonomy is a distinguishing feature of local people's identity. In its final decades the colonial government granted Hong Kong substantive scope of autonomy [35], along with which was a growing emphasis on local distinctiveness from China [36], such as the common law system and 'rule of law' discourse [37]. Such historical construction was preserved by the BL's recognition of autonomous power and wider constitutional rights [11], and the promise that 'pre-existing capitalist socio-economic systems and way of life remains unchanged' [38]. Distinctiveness largely remained intact in early years of reunification, when the OCTS policy mainly emphasised on the unity of sovereignty [39-40], whereas concerns arose after such external emphasis subsequently turned into internal requirement of patriotism [20], representing a local need to be separated from other 'ordinary' Chinese local administration since the handover till nowadays [41]. Such separation demand was reflected in the interpretation of BL and the OCTS policy as a separation rather than an authorisation mechanism [37], while it has now been discredited, the legitimacy behind persists, and central intervention reducing it can be locally regarded as illegitimate.

While there is potential danger of local separatism and suggestion for partial reduction of this identity [12], there are also switching costs in doing so. In any event, recognition or denial of local identity may at best strike a balance between the local legitimacy and the state's own demand [10; 12], but cannot eliminate it absolutely.

3.3 Democratisation

Thirdly, autonomy is a symbol of local democratisation, a process enhancing local consent. Democratisation has been a sensitive issue since colonial era, when democracy generally remained restricted, and insufficient democracy has been regarded as a defect of Hong Kong's autonomy [9; 13]. The British did not transplant the representative government to Hong Kong, where power was centralised in the unelected executive-led government [42]. It was not until the post-WWII decades that the government implemented limited reforms admitting local participation in governance, such as partial direct election in the 1991 LegCo election [42]. Colonial democratisation was proven to be successful in building up local confidence, and was manipulated by colonisers in introducing radical and unrecognised representative reforms. Similarly, democracy was regarded as a local legitimacy to be upheld, and intervention decelerating it is 'illegitimately' impeding local consent.

Democratisation is also a shared belief to construct Hong Kong's identity. Internally, it distinguishes Hong Kong from other Chinese local administrations, especially in direct election. Externally, democracy secures Hong Kong's international status, as a participant in international democratisation along with Asian counterparts like Singapore and Taiwan region. Democracy mainly understood as direct election represents the 'right position', insufficient democracy damages Hong Kong's reputation – which provoked the 2014 unrest [43] – pressuring it to follow suit regardless of local conditions [44]. This does not necessarily associate with separatism, though it may be so manipulated.

4 Resolving the Tension

Two contrasted versions of autonomy have been presented, legally and legitimately. While central intervention is legally unrestricted, it is strictly restricted by autonomy as a local legitimacy. This tension causes controversies when intervention is legal but illegitimate. Then, whether there is a solution to eliminate or escape from this tension.

One solution is to construct another local legitimacy in accordance with central intervention, a deemphasis – if not total denial – of non-intervention policy and local distinctiveness. This has been an ongoing project in the growing emphasis on patriotism and autonomy's contingency [20]. However, given legitimacy's entrenchment, the OCTS policy's restriction, and international pressure, a centrally imposed legitimacy is unlikely within a few years.

Alternatively, controversies can be avoided by restricting the exercise of central intervention. One restriction comes from rules of statutory interpretation concerning

'catchall provision', such as the *ejusdem generis* principle, where wider context associated with limited statutory words should be restricted by the character of the prescribed words [45]. Accordingly, residual powers under art.62(16) of the Constitution, the legal basis for NPC's residual power after prescribing its other powers like deciding the establishment of special administrative region and its institutions, should be interpreted as proportionate to those powers prescribed. Thus, while the central government monopolise the 'ownership' of residual power, it is restricted by a proportionality requirement [23], and can only intervene with matters equivalent to the decision of Hong Kong's institutions, such as the electoral system and national security [46-47].

Admittedly, proportionality is a relatively vague restriction and is not fully persuasive given the lack of independent supervisory party. Indeed, the 'catchall provision' of art.62(16) is infrequently invoked, regarded as a constitutional custom [9]. Moreover, central intervention may not necessarily resort to residual power restricted by proportionality requirements, but can be exercise of power incidental to the supervision over the Constitution's functioning. For example, NPCSC's decision on the colocation arrangement, requested by the Central People's Government, merely declared the constitutionality of arrangements concluded by Hong Kong and Guangdong administrations.

Exercise of incidental power presented another solution to avoid controversies. Firstly, the non-intervention policy can be maintained given the passive role of the central government in deciding constitutionality while local administration taking the initiative. Secondly, different from centrally initiated interventions, locally initiated decisions may better reflect local distinctiveness. Thirdly, locally initiated decision, like the colocation arrangement, goes through the local democratic process. The main issue here is the level of democratic participation. While there were intensive LegCo debates, the co-location arrangement could have been more democratic by conducting public consultation, which is similarly lacked in the legislative proposal regarding same-sex partnership. By improving democratic participation, central intervention through exercise of incidental power may better avoid controversies by complying local legitimacy.

5 Conclusion

Hong Kong remains a special administrative region of China with a high degree of autonomy. Such autonomy is authorised by the central government, and is restrictive given the legally unrestricted central intervention. However, autonomy has more robust meanings as a local legitimacy restricting central intervention, understood as non-intervention policy, local distinctiveness, and democratisation. While tension over autonomy exists from perspectives of law and legitimacy, it can be resolved by (1) constructing a substituting legitimacy, which is the most effective but inefficient, or be avoided by (2) imposing proportionality requirement on central government's exercise of residual power, or by (3) exercising powers incidental to the supervision power over the Constitution's functioning, which is preferable given its conformity with the local legitimacy.

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