One Country, Two Systems, Three Legal Orders - Perspectives of Evolution
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Essays on Macau’s Autonomy after the Resumption of Sovereignty by China
"One Country, Two Systems, Three Legal Orders" – Perspectives of Evolution – :
Essays on Macau’s Autonomy after the Resumption of Sovereignty by China” can be said, in a short preamble-like manner, to be a book that provides a comprehensive look at several issues regarding public law that arise from, or correlate with, the Chinese apex motto for reunification – One Country, Two Systems – and its implementation in Macau and Hong Kong.

Noble and contemporary themes such as autonomy models and fundamental rights are thoroughly approached, with a multilayered analysis encompassing both Western and Chinese views, and an extensive comparative law acquis is also brought forward. Furthermore, relevant issues on international law, criminal law, and historical and comparative evolutions and interactions of different legal systems are laid down in this panoramic, yet comprehensive book. One cannot but underline the presence, in the many approaches and comments, of a certain aura of a modern Kantian cosmopolitanism revisitation throughout the work, especially when dealing with the cardinal principle of «One Country, Two Systems», which enabled a peaceful and integral reunification ex vi international law – the Joint Declarations – that ended an external and distant control. Yet, a dominant embodiment of values have continued to be upheld and respected, such as local fundamental rights, autonomy, social, cultural and economical differentiation and tolerance in several distinctive and unique fields in the Special Administrative Region, in which one may say that the Confucian Analects are in a salutary coexistence and intersection with, e.g., the Kantian and Lockean heritage.

The book that is now published has its genesis in the International Conference «One Country, Two Systems, Three Legal Orders” – Perspectives of Evolution», and the papers and comments produced are for and because of the Conference. Hence, some words on the Conference are due. The Conference was held in Macau on 5, 6 and 7 February 2007 and it was organized by the following institutions: International Law Office (GADI), the Legal and Judicial Training Centre (CFJJ) of the Macau government, and the Institute of European Studies of Macau (IEEM). The event was part of the large-scale “European Union-Macau Cooperation Programme in the Legal Field” and was the Programme’s formal closing event. Having said this, the contributions of the European Union on the one hand and the
Macau Special Administrative Region Government on the other hand, in the person of H.E. Florinda Chan, are invaluable.

The Conference had approximately 30 speakers and also about the same number of chairpersons and commentators, all of whom are solid experts from various continents on the issues addressed by the Conference; in particular, the Conference fielded participants from Macau, Hong Kong, Mainland China, Australia, United States, and Cape Verde, as well as from several European countries such as Portugal, Italy, Finland, United Kingdom, Germany, France, and Spain, amongst others.

It must be mentioned here the work of so many who contributed to the Conference’s success given complex organization. Many thanks go to these individuals (and other contributors whom they represent): Paulo Godinho, Manuel Escovar Trigo, Maria do Céu Esteves, and Sales Marques. These individuals are some of the people, aside from the editors, who were heavily involved in the Conference’s organization. Additional thanks are due to Johnathan Horne, who performed the English proof-reading on a significant number of papers and comments in here published.

The proven success of the Conference and the importance of so many of its themes called for the immediately need for the publication of its proceedings by a respectable international publisher. That was our solid intention in spite of the unusually large number of contributors from around the globe, which posed some difficulties in arriving at good port in good time.

At the end of the day, however, we managed to have ready for publishing the vast majority of papers and comments presented at the Conference. In the meantime, we would like to thank the Macau Foundation for its financial support, without which the publication of this book would not have been possible. And, with the constant support of our publisher, Brigitte Reschke, as well as the contributions of many others, of which it is only fair to underline all the authors, the project finally landed in the printed pages of a Springer Verlag book.

Macau

Jorge Costa Oliveira and Paulo Cardinal

June 2009
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Opening Ceremony
Welcome Address by the Secretary for Administration and Justice

Florinda Chan

Honourable Head of the Office of the European Commission for Hong Kong and Macao, Ambassador Thomas Roe

Respectable Delegates,

Distinguished Guests, Ladies and Gentlemen,

Good morning.

I feel honoured to be here today to join you in the opening session of this international conference “One Country, Two Systems, Three Legal Orders – Perspectives of Evolution”.

On behalf of the Government of the Macao Special Administrative Region, please allow me to give my warmest welcome to all the participants to this Conference. There are participants coming from Mainland China, the Hong Kong SAR, several EU Member States, Australia, Cape Verde, Canada, Mexico, as well as those delegates from the Macao SAR. Your presence undoubtedly means a lot to us and gives us renewed confidence and support in the consolidation of our legal system. My gratitude is extended to the Office of the European Commission for Hong Kong and Macao for their assistance towards the overall EU-Macau Legal Cooperation Programme in the Legal Field. My congratulations also go to the Conference Organizing Committee for all your efforts, which shall contribute to the success of the conference.

In pace with the rapid economic development fueled by the gaming and tourism industries, the Macao SAR has gradually integrated its trade with the Mainland, other regions, and countries namely the EU Member States.

On the other hand, we have demonstrated and will continue to embrace our mission for the protection of the “Historical Centre of Macao” under the guidance of UNESCO to opportune our social and cultural exchanges. In the course of time, we believe our role is gradually unfolding and expanding as a gateway for Europe and the Portuguese speaking countries to cooperate with China.

In addition, the Government of the Macao SAR sets its priority to carry out its international legal activities and pledges to fulfill its international responsibility.
Encountering the diversified opportunities with the global-driven challenges each day, it clearly recognizes that the rule of law for our Region would need to be further widened and deepened subsequent to the challenges brought along in our eco-societal development. Our Government reaffirms its stance of “One Country, Two Systems” and maintains its principle of the “Basic Law of the Macao SAR” which guarantees “a high degree of autonomy” and “fundamental rights” of its residents.

In the near future our legal order shall, under the principle of continuity of the legal system, be updated and reformed in order to improve its overall efficiency and to more appropriately accommodate the demands for all sectors in the Region. To this purpose, we perceive a comparative legislative approach with case studies of models and reforms undertaken in other jurisdictions are of the utmost importance to us.

I am delighted that our long-term strategic partnership fostered with the European Union continues and is further strengthened in the field of legal cooperation. This partnership has been extremely positive for the Macao SAR and many local jurists and other professionals have benefited from it. In addition, we are also expanding governance of legal regime to cover more cross-border co-operation with the Mainland and with our neighbouring regions.

The aim of this conference opens to all possible reviews to be shared. May I take this opportunity to give my sincere compliments to all the delegates, professionals and scholars, who are present here today, on your valuable legal thoughts.

Macao is a historic centre with its world heritage enlisted by UNESCO. I hope all of our distinguished guests from abroad will have a chance to visit our city and be impressed by its peculiar charm. In any case, I take this opportunity to wish you all a pleasant and enjoyable stay in Macao.

Thank you!
Florinda Chan, Secretary for Administration and Justice; and Jorge Oliveira, thank you very much for arranging this conference and for all the work in the past on this aspect about cooperation with Macao and with Mainland China.

I am very pleased to make some brief comments here to contextualize this conference for the delegates. The European Union has an ongoing relationship with Macao and also with Hong Kong, which is completely compatible with the One Country Two Systems principle. We maintain this relationship in open discussion with both SARs. And I would like just to make a couple of comments about the future because today’s closing session of the European Union Legal Cooperation Program is not an end; it’s not even a beginning, is just part of an ongoing process.

Tomorrow we will have with the Macao Administration led again by Florinda Chan the 12th Annual Joint Cooperation Committee to discuss cooperation between Macao and the European Union, and we look forward in that discussion and in the months and years to come to identifying further aspects of cooperation with Hong Kong and with Macao which were specified in a document which was put into the public domain in October – a proposal for future cooperation with Macao. And in fact, that proposal which went into the public domain was also in parallel with a similar document regarding cooperation with Mainland China. These documents interlink and they reflect a deepening relationship with China and with Macao and with Hong Kong.

In particular, there are seven sectors proposed in that area. One of them is Trade and Customs Cooperation which is already quite deep with Macao; Legal areas are also provided therein; Issues to do with Immigration where we already have some ongoing cooperation with Macao; and finally, Linguistic, Translation and Interpretation Cooperation which we already have. We also have notions of developing possibly in International Health Issues, International Food Safety Issues, Education and Research, possibly in other areas of Trade & Customs Cooperation.

So today is a conference which is a good example of the depth and the quality of our cooperation. We very much appreciate the Macao Government superb cooperation with the Union and we look forward to identifying and coming up with future actions which will be in other sectors as well as in the legal sector.
I wish you a good conference and I look forward to listening to Jorge’s comments which will bring you I think more into the specifics of this event.

Thank you very much.
Address by the Project Director

Mr. Jorge Costa Oliveira

Right Honourable Secretary for Administration and Justice, Ms. Florinda Chan

Honourable Head of the Office of the European Commission for Hong Kong and Macau, Ambassador Thomas Roe

Respectable Delegates,

Distinguished Guests,

Ladies and Gentlemen,

Good morning.

Five years ago we embarked into a great adventure – to implement the “EU-Macau Co-operation Programme in the Legal Field”.

The transitional period prior to the resumption by the P. R. of China of full sovereignty over Macau lasted 12 years. Its goal was to allow time enough for a smooth transition and handover. The overall purpose, in the legal field, was to guarantee the continuity of the legal system. In Hong Kong this was somewhat easy to accomplish; in Macau, though, it soon became clear that, in order to grant the Special Administrative Region to be created with appropriate tools to enable it to exercise the large degree of autonomy that it enjoys under the Sino-Portuguese Joint Declaration and the Basic Law, many endeavours would have to be undertaken.

A faculty of law had to be created.

Extensive legal training – both general and specific – had to be made.

A new judicial system had to be set up, with three instances.

New institutions had to be created within the Executive branch of Government.
Electoral laws had to be reviewed.

A massive programme for the localization of the laws had to put in place, involving roughly 170 laws and regulations enacted from Portugal.

Amongst which we had the five ‘big codes’ and several more ‘medium codes’, which are the pillars of our legal system.

Many laws and regulations had to be modernized, adapted to local reality and needs or put in conformity with the new-coming constitutional order of the Macau SAR.

Over 200 international treaties had to be made applicable to Macau.

And, on top of all this, most of these tasks had to be the subject of negotiations between the Governments of Portugal and of the P. R. of China, within the Sino–Portuguese Joint Liaison Group for Macau, where Macau experts also seat.

Looking back, it is nothing less than amazing that almost everything was done. After all, under the umbrella of the ‘principle of continuity’, what actually took place was a major revolution of Macau’s legal system. Thus laying the legal foundations that allows the present economic development to occur without ruptures or major setbacks.

But common sense recommended that several additional tasks and measures be undertaken after the establishment of the Macau SAR on 20 December 1999.

One of these additional tools that were put in place is precisely the “EU-Macau Co-operation Programme in the Legal Field”, whose subtitle clarifies its goal – the “consolidation of the Macau legal system”.

Under this programme, six sub-programmes were executed.

Sub-programme A, whose purpose is to increase the legal system awareness by Macau residents, had 29 activities and included several leaflets and brochures, media campaigns, the edition of 6 textbooks and the publication of 12 special issues of the ‘Macau Law Journal’.

Sub-programme C aimed at improving the legislation of the Macau SAR.

It encompassed 6 activities, amongst which the broader law-making courses ever taking place in Macau.

It also contributed significantly to reinforce the Centre for Comparative Legal Documentation and Comparative Law at the International Law Office.
Sub-programme D included a seminar on management of simultaneous legal translation.

Sub-programme E aimed at disseminating the MSAR legal system in China’s Mainland.

Four seminars took place enabling hundreds of Mainland legal practitioners to understand that, albeit Macau and Hong Kong are both, as regards the economic system, in the ‘second system’, as regards the legal systems they are different – Macau has a Romano-Germanic legal system whilst Hong Kong has a common law system.

Sub-programme F included 7 activities aiming at “developing a modern and effective system of IPR protection”.

Last, but certainly not the least, Sub-programme B, whose scope is specific legal training for local jurists, covered 36 activities. A plethora of conferences, seminars and workshops in the most diverse legal areas took place along these last five years.

The current Conference was scheduled to be the closing conference of this vast Programme.

More than seven years after the establishment of the Macau SAR and almost ten years into the handover of Hong Kong, it seemed appropriate to have an event that would enable us to make a global balance of our autonomic experiences.

To ascertain where we are and where we are heading to.

In order to make this exercise more complete, and more interesting, we invited several experts from abroad, namely from the European Union. In some cases we’ll hear from somewhat similar experiences of legal transition; we’ll also be told of other cases of special autonomy; finally, we’ll have many colleagues analysing specific issues that are relevant for our journey and for the collective destiny of the several communities that live and work in Macau and Hong Kong.

To all these colleagues, be them experts from China or from abroad, a very warm ‘thank you’ for accepting our invitation to participate in this conference.

On behalf of the organizing committee I’d like also to extend our gratitude to all the people that had to work hard for this event to take place and to be as successful as we all expect.

Secretary Florinda Chan,

Ambassador Thomas Roe,
Distinguished Guests,

The success of the implementation of the “EU-Macau Co-operation Programme in the Legal Field”, the very positive evaluation of the project, either done directly by the participants or by the Evaluation Committee (designated by the University of Macau), the high participation at every of its events, including today, the generalized acknowledgement that a lot remains to be done, all point into one direction – the convenience of setting up another programme of legal cooperation with the European Union.

Thank you!
Panel 1

Evolution and Interaction of the Three Legal Systems: Romano-Germanic, Common Law, Socialist
The Intersection of Chinese Law and the Common Law in the Special Administrative Region of Hong Kong: Question of Technique or Politics?

Yash Ghai

1 The Argument

One of the principal concerns of the Hong Kong people as China resumed sovereignty over Hong Kong was the future of the common law (an expression meaning not only judge-made law, but the entire legal and judicial system, including what were perceived to be the values and procedures of the common law). People saw the common law as the principal protection against what they regarded as unjust and oppressive Chinese practices. British policy and strategy during the colonial period was to dampen demands for democracy but emphasise the benefits of the British system of justice. Under this approach, the Rule of Law became the main source of the legitimacy of British rule. The common law and the Rule of Law acquired almost mystical qualities as China repressed the democracy movement in Beijing in 1989, and, with the connivance of Britain, refused a recognisable democratic system for the Hong Kong Special Administrative Region (HKSAR). The celebration of the common law was matched by the demonisation of Chinese law. Mainland authorities and their Hong Kong supporters tried (and they continue) to detract from the Leninist features of the Chinese system by claiming that it was rooted in the civil law tradition.

The common law was also valued by Hong Kong’s business community who regarded (as they had been told endlessly during the colonial period) that a “sound” legal system was the key to the success of Hong Kong’s economy (often by contrast with neighbouring countries which had “poor” legal systems offering no predictability or protection of contractual or other commercial rights). However, by the late 1980s the tycoons of Hong Kong had made their deals with the leaders of the Chinese Communist Party, and realised that it was these deals and the connections that they
promoted ("guanxi") rather than the law, which would provide security for their investments (as a species of "Confucian capitalism"). In any case, China valued Hong Kong for its market economy, and the ways in which it could help China’s own transition to some version of the market. So, as if schooled by Max Weber, the Chinese readily agreed to the preservation and development of the common law, and insulated the Hong Kong judiciary from Chinese institutions (except of course that Weber had serious doubts about the contribution of the common law to capitalism).\(^1\)

As a result, the common law came to be valued more for its protection of human rights than for safeguarding the economy, although the latter was not unimportant, particularly given the many ways in which Hong Kong was tied to the global economy where Confucian or Chinese notions of guanxi would be less useful.

This Article examines the place of the common law in Hong Kong (as an aspect of the separation of Hong Kong’s legal system from that of China, manifest in the underlying principle of the constitutional structuring of Hong Kong, “One Country Two Systems”). This is done by examining the points of intersection between Hong Kong’s legal and judicial system with that of the Mainland. This approach is somewhat different from that which has dominated legal scholarship on the subject. The interaction has so far been examined largely in terms of the similarities and contrasts between the “common law” in Hong Kong and the “civil law” in the Mainland. This dichotomy has been particularly favoured by Chinese scholars close to the Beijing government and their friends in Hong Kong, who think that civil law sounds less threatening than Leninist law. Presented in this way, much of the debate has been about the different approaches and techniques of common law and civil law, a principal concern in comparative legal studies.

The approach taken in this Article can be called “political economy”, meaning that the interaction between the two systems of law can be explained more convincingly by the political forces behind each system of law than the superiority or otherwise of each system. This approach is influenced by the author’s upbringing, in colonial Kenya. The British introduced the common law to Kenya and it became the bedrock of a rather perverse rule of law. Kenya’s common law (either judge made-principles or legislation) did not demonstrate any great concern with its black and brown people. Both judges and legislators sanctioned discrimination against the non-white people (and discriminatory and arbitrary acts of public and private bodies were duly upheld by that august body in London, the Privy Council, the final arbiter of imperial justice). Britain also introduced Hindu law for Indians it brought from India under a system of indenture (a rather distorted version of a contract, unequal and backed by criminal sanctions against the worker), and recognised pre-existing systems of customary and Muslim law. But the relationship it established between these streams of laws was hierarchical, with the “common law” at the apex, which also regulated the scope of the application of other laws\(^2\).

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\(^1\)“Quanxi capitalism” and the relevance of the rule of law to capitalism under administered markets is discussed in Ghai (1993).

\(^2\)These matters are explored in detail in Ghai and McAuslan (1970).
The common law encountered other streams of law (customary, religious and civil laws) in most parts of the empire – and somehow the common law always came out on top. In places as diverse as North America (where the common law vanquished aboriginal and civil law), Sri Lanka and South Africa (where it worsted the Roman–Dutch law) or India, Australia and Africa (where it subordinated religious and customary laws – even the mighty French law in Mauritius and the Seychelles), or even closer to home, Scotland (where the civil law was displaced from the public sphere), the common law triumphed. British administrators explained this triumph in terms of the moral and technical superiority of the common law. In *The Spirit of the Common Law* (1921) Roscoe Pound (then dean of the most prestigious common law faculty in the world) wrote that the “triumph of the common law” was due to “its vitality and tenacity” and “even treatment of concrete controversies”. Edward Epstein (1989, p. 60) had another explanation: the answer, Epstein wrote, “lies in the political, economic, and sometimes the cultural advantage of protagonists of the common law” (although this author would concede that the coherence and robustness of a legal system are not irrelevant, as this Article will show).

It was also apparent that in the plural legal orders that the British established, the common law governed the domain of state and public affairs. It is well known that effective social and political power is exercised primarily in the private domains in market economies, but the state plays a critical role in colonies or societies in transition from one economic system to another. Britain kept its purchase on the common law to control the political power of the state, as well as to regulate the relations between different streams of law (and therefore to a considerable extent, between different communities).

This author believes that a similar “political economy” approach is necessary to understand the intersection of Hong Kong’s legal system with China’s. China has accommodated vast “quantities” of private law (with its common law origins) in the Basic Law – doctrines of contract, tort and commercial and corporate law are almost untouched, as are matters of family law. Normally critical issues of legal pluralism arise from the interaction of regimes of personal or religious laws or commercial law. Under the scheme of the Basic Law, Hong Kong and Chinese laws do not interact in these fields (and issues of Chinese customary law are purely internal to Hong Kong’s legal system, and a remnant of the colonial system) (Wesley-Smith 1998, pp. 50–53) – other than under private international law.

Although the common law occupies a big place in the Basic Law, it has been stripped of its place in the public sphere which defines the relations between China and Hong Kong. Another paper3 focuses on one critical aspect of the interaction of legal systems: the interpretation of the Basic Law. Most scholars and politicians have said that the two systems must somehow be harmonised or integrated, as if these are technical matters. By tracing the origins of judicial review (and therefore of the interpretation of the constitution) in the Philadelphia Convention and of legislative interpretation in the French Constituent Assembly, barely 3 years apart, this

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3“The Political Economy of Interpretation” in Hualing et al. (2007).
Article attempts to show the importance of the political factor. The well-established bourgeoisie in the United States had a pretty tight control over the economic and social system (and had ousted the distant monarch) and judicial review suited their conservative agenda. But the French bourgeoisie was incipient, not yet fully embedded in the economy, and facing strong resistance from the King and the other feudal elements. It wanted therefore to hold on to its one secure seat of power, the Assembly, to avoid the vicissitudes of courts still under the control of the old order.

One of the principal arguments in this Article is that the purpose of the Basic Law was not to integrate the legal systems of Hong Kong and China but rather to keep them apart, so the framework of legal pluralism does not apply in Hong Kong. Any “convergence” that may have happened in the area of private or commercial law between Hong Kong and China is not the result of the Basic Law but the impact of external, global forces and China’s entry into world markets. The rules and procedure in the Basic Law that separate Hong Kong’s legal system from China’s will be traced, as will rules and procedures which produce interaction between the two systems. From the comparative perspectives of a scholar of mixed systems or legal pluralism, the chief interest in the Basic Law would lie in the mechanism for dealing with the interface or interactions between the two legal systems, and not integration. There is almost no emphasis on integration or even harmonisation of laws in the Basic Law, and yet the purpose of the resumption of sovereignty was to establish Beijing’s dominance over Hong Kong. The critical issues in this regard concern institutional relationships within Hong Kong and between Hong Kong and China (which are of greater interest to constitutional lawyers), but these are not discussed in this article.

2 The Context of the Common Law

After the colonisation of Hong Kong by the British in the middle of the nineteenth century, the common law (of a colonial variety) (see for example Wesley-Smith (1994)) began to develop. By the time of the return of Hong Kong to China in 1997, the common law system had achieved robustness, and having shed many of its colonial relics, became the bearer of liberal values. China had a chequered political history, passing

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4 This is not to underestimate the interest shown in Hong Kong’s common law system by Chinese scholars and to some extent policy makers. Edward Epstein has argued that it is not easy to transplant Hong Kong law in, for example, the Shenzhen Special Economic Zone, because China lacks the understanding of or the commitment to ideological forms of law, as opposed to some form of instrumentalism, in his chapter “Instrumental and Ideological Forms of Law: Implications for China’s Transplants of Hong Kong”, in Wacks (1993).
5 Some aspects of institutional relationships are discussed in Ghai (2007, p. 3)
6 For the racist and anti-liberal period of the common law in Hong Kong, see Wesley-Smith (1994) and Jones (2006 unpublished)
7 One of the best accounts of the “liberalisation” of the common law, as part of the strategy of legitimacy through the rule of law is Jones (2006). An important element of this development was the enactment of a Bill of Rights in 1990 which led to the rapid growth of judicial review and a review of legislation for conformity with the Bill (see Byrnes (2000), Chen (2006, p. 627)).