

JULY 1st, 1997

Handover – The sovereignty over Hong Kong is transferred from the United Kingdom to the People's Republic of China.

JANUARY 2002

The central government approves the idea of a Guangzhou -Shenzhen - Hong Kong Express Rail Link and establishes working committees in collaboration with the Hong Kong SAR government.

JANUARY 2010

Beginning of the construction works on the Express Rail Link.

SEPTEMBER – DECEMBER 2014

Umbrella Movement.

DECEMBER 27, 2017

The Standing Committee of the National People's Congress approves the "co-location" agreement, which plans to lease part of the West Kowloon station to the central government.

JANUARY 1st, 2018

Between 6,000 and 10,000 people demonstrate during the traditional New Year's Day pro-democracy march in order to voice their concern about the loss of Hong Kong's autonomy and to protest against the implementation of the "co-location" plan.

3rd QUARTER OF 2018

Planned opening of the West Kowloon railway station and of the Express Rail Link.

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Good for China, Good for Hong Kong? The Guangzhou-Shenzhen-Hong Kong Express Rail Link and the Joint Check- point Controversy

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As Hong Kong celebrated its 20-year anniversary as a Special Administrative Region (SAR) under the People's Republic of China (PRC) on the 1st of July 2017, Xi Jinping, General Secretary of the Central Committee of the Communist Party of China (CCP), paid tribute to the efficiency of the "one country, two systems" principle,¹ "the best solution to the historical question of Hong Kong and the best institutional arrangement to ensure Hong Kong's long-term prosperity and stability after its return".² However, he admitted, "it is yet to build public consensus on some major political and legal issues".³ As a matter of fact, Hong Kong has faced an important number of challenges since the handover in 1997, starting with the demonstrations against the implementation of a national security

¹ The "one country, two systems" principle is a constitutional principle agreed on the 19th of December 1984 in the Sino-British Joint Declaration, which set up a framework for the handover of Hong Kong sovereignty back to the People's Republic of China. Under the principle, Hong Kong could retain its own economic and administrative system, while the PRC implements its "socialism with Chinese characteristics".

² "Full text of President Xi Jinping's speech on 'one country, two systems' and how China rules Hong Kong," *South China Morning Post*, 1 July 2017, <http://www.scmp.com/news/hong-kong/politics/article/2100856/full-text-president-xi-jinpings-speech-one-country-two>

³ "Full text of President Xi Jinping's speech on 'one country, two systems' and how China rules Hong Kong," art. cit.

law in 2003 and reaching a climax during the Umbrella Movement in 2014. Debates over the alleged growing influence of mainland authorities over Hong Kong's autonomy have divided large portions of the population, opposing pro-Beijing supporters to pan-democrats.

The forthcoming inauguration of the Guangzhou - Shenzhen - Hong Kong high-speed railway, whose opening is expected to take place at the end of 2018, has further exacerbated the relations between Hong Kong and the central government. Planned since 2002, the high-speed railway seeks to provide a transportation link of forty-eight minutes between Hong Kong and Guangzhou, as opposed to the timeframe of less than two hours guaranteed by the Kowloon - Guangzhou traditional railway. The information disclosed on the 27th of December 2017 during the 31st Session of the Standing Committee of the National People's Congress (NPCSC) in relation to the arrangement of the new train station that will be inaugurated in West Kowloon, also referred to as the "co-location" agreement, sparked a wide outcry among Hong Kong lawmakers.

Indeed, although immigration formalities up to this point have been led by the Hong Kong Immigration Department at the boarding gate of the train to Guangzhou - travelers going through the mainland Chinese immigration checkpoint upon arrival - authorities in Beijing have announced their intent to enforce immigration checks at the newly created train station. Thus, part of the West Kowloon terminus of the high-speed railway will be leased to the central government. Mainland

laws and regulations will consequently apply as soon as visitors have passed the immigration checkpoint, while still being on the territory of the Hong Kong SAR. According to Hong Kong and Mainland officials, this arrangement will speed up passengers' journey but for some observers, the NPCSC's real intention is to end Hong Kong's autonomy. Based on this context, the subsequent paragraphs will provide an analysis of a controversy that epitomizes a decade of Hong Kong's history.

A breach against the Hong Kong legal order?

Since the promulgation and approval of the "co-location" program, some legal scholars and politicians in Hong Kong have been fiercely debating its legitimacy, emphasizing the unlawfulness of the program with regard to the Basic Law.⁴ The Hong Kong Bar Association (HKBA), the only professional regulatory body for barristers in Hong Kong, issued a strongly-worded statement on the 28th of December 2017 that refuted the "co-location" agreement, stipulating that "the integrity of the Basic Law has been irreparably breached!"⁵ In this statement,

⁴ The Basic Law is short for "the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" which is the constitutional document of the HKSAR. It came into effect on 1st July 1997. The Basic Law stipulates the basic policies of China regarding the HKSAR. According to the "one country, two systems" principle, Hong Kong would continue its capitalist system and way of life for fifty years after 1997.

⁵ "Statement of the Hong Kong Bar Association on the decision of the NPCSC of 27 December 2017 on the Co-operation

the HKBA provides a detailed analysis of how the “co-location” agreement breaks the Basic Law. The fact that the Chinese legal system applies in parts of the West Kowloon train station⁶ is for instance considered to be inconsistent with the specific provisions of the Basic Law, including Articles 4, 11, 19, 22(3), 31, 35, 38, 39, 41, 80, 87. Furthermore, the HKBA argues that the NPCSC should not exercise power “out of a vacuum” and that it must abide by the relevant legal provisions.⁷ As the HKBA explains in its public statement, the NPCSC has failed to provide any credible source of authority or constitutional legitimacy for the agreement. Thus, the co-location plan is declared legal “just because the NPCSC says so.”⁸

Agreement between the Mainland and the HKSAR on the establishment of the port at the West Kowloon station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for implementing ‘co-location’ arrangement,” *Hong Kong Bar Association* (HKBA), 28 December 2018, http://www.hkba.org/sites/default/files/20171228%20-%20Bar%20%20%20co-location%20Arrangement%20Statement%20%28English%29%20FINAL_0.pdf

⁶ According to the “co-location” agreement, the checkpoint at the West Kowloon Station will be split into two main areas: the “Hong Kong Port Area” (HKPA) and the “Mainland Port Area” (MPA). The MPA would be established by Mainland authorities and be subject to its jurisdiction in accordance with the “co-location” agreement and relevant Mainland laws.

⁷ According to the HKBA, the NPCSC’s functions and powers are provided in Article 67 of the Constitution of the People’s Republic of China, and its functions and powers are prescribed (and circumscribed) in Articles 17, 18, 20, 90, 158, 159 and 160, and Annexes I and II to the Basic Law.

⁸ Statement of HKBA, art. cit.

In addition to the criticisms voiced by the HKBA, some jurists and politicians in Hong Kong also expressed concerns about the unlawfulness of the plan. For instance, Martin Lee Chu-ming, known as “Father of Democracy” in Hong Kong,⁹ evoked the unconstitutionality of the “co-location” plan among the six “deadly sins” of the plan he listed in an article published on the 8th of November 2017 in the *Apple Daily*.¹⁰ As he argues, setting up a Mainland port area is equivalent to ceding territory, which constitutes the greatest contempt for the Basic Law. Similarly, Johannes Chan Man-mun, Professor of Law and former Dean of the Faculty of Law at the University of Hong Kong, explains in *Citizen News*, an independent online media outlet in Hong Kong, that according to article 22 all offices set up by the Mainland Government in the HKSAR and the personnel of these offices shall abide by the laws of the Region.¹¹ “It is very pathetic for the NPCSC to distort the Basic Law,” Johannes Chan commented.

⁹ He is the founding chairman of the United Democrats of Hong Kong and was a member of the Legislative Council of Hong Kong from 1985 to 1997 and from 1998 to 2008.

¹⁰ As he stated, 1) The NPCSC rejects public consultation; 2) The governments of HKSAR and Mainland China deliberately ignore other options; 3) The plan deprives Hong Kong people of legal protection at the Mainland Port Area; 4) The plan is unconstitutional; 5) The plan castrates Hong Kong’s high degree of autonomy; 6) It may bring endless trouble in the future. See Martin Lee Chu-ming, (李柱銘), “Six deadly sins of ‘co-location’” (一地兩檢的六宗罪), 8 November 2017, *Apple Daily* (蘋果日報), <https://hk.news.appledaily.com/local/daily/article/20171108/20207574>

¹¹ Editorial, “Johannes Chan: ‘co-location’ plan does not comply with the Basic Law” (一地兩檢拍板, 陳文敏: 不符合《基本法》), 28 December 2017, *Citizen News*, <https://www.hkcnnews.com/article/9089/一地兩檢-陳文敏-李飛-9094/一地兩檢拍板-李飛: 人大「一言九鼎」-陳文敏: 不符合《基本法》>.

A “legal and pragmatic” choice

The “firm legal basis” of the co-location plan

In response to these criticisms, both the Chinese government and the government of the Hong Kong Special Administrative Region justified the decision, claiming that the “co-location” plan was in compliance with the laws of China and Hong Kong. At a press conference held on the 28th of December 2017, Carrie Lam Cheng Yuet-ngor, Chief Executive of Hong Kong, voiced her approval and said that “the ‘co-location’ plan [had] a firm legal basis.”¹² As Carrie Lam explained, since the “co-location” plan is the result of joint negotiations and consultations by both the Hong Kong SAR and Mainland China, it is precisely the embodiment of the autonomy of the HKSAR. Official Mainland media outlets have also vigorously supported the plan and its legal basis. *People’s Daily*, the official newspaper of the Chinese Communist Party, issued an editorial on the 4th of January 2017, stating that “this arrangement accords with the principle of ‘one country, two systems’ and is also consistent with the Chinese Constitution and the Basic Law of the HKSAR.”¹³ *People’s Daily* also argued that

¹² “‘Co-location’ has a firm legal basis”(一地兩檢具堅實法律基礎), *News.gov.hk* (香港政府新聞網), 27 December 2017, http://archive.news.gov.hk/tc/categories/admin/html/2017/12/20171227_170600.shtml

¹³ Editorial, “Regard ‘co-location’ program in a rational and pragmatic way” (理性務實看“一地兩檢”), *People’s Daily* (人民日報), 4 January 2018, http://paper.people.com.cn/rmrb/html/2018-01/04/nw.D110000renmrb_20180104_2-20.htm

the NPCSC has a constitutional status in the implementation of the Basic Law and its decision has the highest legal force.

Former Legislative Council member (centrist) and barrister Ronny Tong invokes in particular article 18 of the Basic Law in order to justify the arrangement.¹⁴ In the *South China Morning Post*, the main English-written newspaper in Hong Kong, he explained that article 18 allows the Hong Kong government to apply national laws under the special circumstances specified in Annex III of the Hong Kong mini-constitution. For instance, certain Mainland laws can be applied in Hong Kong if they are necessitated by the region’s economic development, which is the case of the Guangzhou – Shenzhen – Hong Kong high-speed railway.

A necessary adaptation of the “one country, two systems principle” to the current development

Another argument highlighted by the Chief Executive Carrie Lam is that the joint checkpoint is a new situation in the implementation of the “one country, two systems” principle. Consequently, it had not been foreseen in the drafting of the Basic Law. This view is partly shared by Feilong Tian, Associate Professor at Beihang University’s Law School in Beijing and an arch-nationalist. In an article published on the 7th of January 2018 in

¹⁴ Tong R., “Hong Kong lawyers can oppose the joint checkpoint plan for the high-speed rail, but they should not deny its legal basis,” *South China Morning Post*, 2 January 2018, <http://www.scmp.com/comment/insight-opinion/article/2126470/hong-kong-lawyers-can-oppose-joint-checkpoint-plan-high>

the *South China Morning Post*, he blamed Hong Kong's lawyers for failing to take into consideration the evolution of the "one country, two systems" principle.¹⁵ For Professor Tian, the Basic Law did not anticipate the increasing interconnection of the special administrative region of Hong Kong to the Pearl Delta Region. It could therefore not provide any legal backing to the "co-location" plan required by the Guangzhou – Shenzhen – Hong Kong high-speed railway. In Professor Tian's opinion, any interpretation of the Basic Law needs to apprehend the original intent of the "one country, two systems" principle, i.e. preserving Hong Kong's autonomy. As long as this autonomy is not under threat, there is no reason to reject the co-location plan. Tian Feilong encourages Hong Kong's legal elites to adopt a better understanding of the Chinese national legal system:

*Back when Mainland China still relied on Hong Kong as a launch pad for its globalisation, (...), Hong Kong was free to indulge in its arrogant defiance of the nation's legal system and its emotional attachment to its colonial past. Today, however, a rising China has entered a new era of global governance. By contrast, the outlook of this group of Hongkongers – whether on the nation, the world, or legal matters – appears narrow.*¹⁶

¹⁵ Tian Feilong (田飞龙), "China has changed, and so should Hong Kong's lawyers," *South China Morning Post*, 7 January 2018, <http://www.scmp.com/comment/insight-opinion/article/2126992/china-has-changed-and-so-should-hong-kong-lawyers>

¹⁶ Tian Feilong, art. cit.

As the balance of power between Hong Kong and China has changed, it is time for Hong Kong lawyers to change too, Mr. Tian underlines.

A solution in the interest of both parties?

Many supporters of the plan pointed out that the arrangement is a win-win solution, which is in the interest of both Hong Kong and Mainland China. In this sense, as outlined by *People's Daily*, people who question or demonize the plan are irrational. According to the editorial, Mainland China and Hong Kong should "regard the 'co-location' plan in a rational and pragmatic way."¹⁷ From a "pragmatic" point of view, *People's Daily* believes that the joint checkpoint is convenient and efficient. In a "rational" sense, the "co-location" plan is the best arrangement for both China and Hong Kong in terms of current developments.

Edgar Yuen, Associate Professor of International Journalism at the United International College in Zhuhai, also emphasized the practical benefits of the plan, in particular with reference to the integration of the region, which is, according to him, much more important than the legal considerations involved. As he points out in an article published on the 2nd of January 2018 in the Hong Kong newspaper *Ming Pao*, "if we still clasp the thinking of the legal system, we will

¹⁷ Editorial, "Regard 'co-location' program in a rational and pragmatic way" (理性务实看"一地两检"), *People's Daily*(人民日报), 4 January 2018, http://paper.people.com.cn/rmrb/html/2018-01/04/nw.D110000renmrb_20180104_2-20.htm

never get a satisfactory solution.”¹⁸ From his perspective, the plan of the NPCSC provides an interesting opportunity to improve the connection of Hong Kong to Mainland China and presents a psychological benefit for both Hong Kong and Guangdong people. It allows both regions to be further connected to each other, therefore improving mutual understanding at times of controversy.

*When the Basic Law was enacted, many problems were not taken into account. There will be more problems in Hong Kong in the future and we all need creative thinking to implement it.*¹⁹

A political decision, more than a legal one

A display of authority against a rebellious city

For some other commentators, far from serving the interests of Hong Kong, the NPCSC’s plan to implement immigration checkpoints in Hong Kong would rather be a well-thought political decision towards the goal of reasserting China’s authority over Hong Kong. Jake van der Kamp, a Canadian journalist who has lived in Hong Kong for forty years, explains that the economic benefits of the plan for Hong Kong are very limited.²⁰ Therefore, both

legally and pragmatically, the plan cannot be justified. And even if the construction of a high-speed railway was necessitated by the region’s economic development, it does not automatically imply that part of Hong Kong’s territory should be leased to the central government, as he points out in an essay published at the beginning of January. Joint checkpoint structures exist in other parts of the world, such as in Canadian airports. In such locations, American immigrations officials are given the right to refuse the entry of any citizen into the territory of the United States. Nevertheless, they are not given any power of arrest.

According to Mr. van der Kamp, what is at stake here is the willingness of the central government to display its authority over Hong Kong.

What Beijing sees here is a rebellious city where dissidents can openly dishonor the national flag and national anthem and where policemen are thrown in jail for trying to stop their political riots.²¹ Hong Kong thus needs to be taught a lesson about what constitution comes first in China.²²

South China Morning Post, 7 January 2018, <http://www.scmp.com/comment/insight-opinion/article/2127151/when-it-comes-co-location-its-all-about-who-control>

¹⁸ Yuen, Eggar, “Political issues, Political solutions” (政治問題, 政治解決), *Ming Pao* (明報), 2 January 2018, https://news.mingpao.com/ins/instantnews/web_tc/article/20180102/s00022/1514810288312

¹⁹ Yuen, Eggar, art. cit.

²⁰ Van der Kamp, Jake, “When it comes to ‘co-location’, it’s all about who is in control,”

²¹ Some policemen have been condemned for clashing with protestors during the Umbrella Movement. See for example : Lau, Chris, “Ex-policeman guilty of assaulting Hong Kong Occupy protest bystander with baton in 2014,” *South China Morning Post*, 18 December 2017, <http://www.scmp.com/news/hong-kong/law-crime/article/2124766/ex-policeman-guilty-assaulting-hong-kong-occupy-protest>

²² Van der Kamp, Jake, art. cit.

A “devil plan” to fully control Hong Kong?

Some Hong Kong voices went further by stating that the plan was not only a display of authority from Beijing but also an additional step towards the political control of Hong Kong by Mainland China authorities. According to Martin Lee Chu-ming, Hong Kong citizens simply do not have the time or opportunity to clearly understand the “devilish” details of “co-location”.²³ Similarly to Martin Lee, Eric T. M. Cheung, Principal Lecturer and Director of the Clinical Legal Education Program at the Faculty of Law of the University of Hong Kong, expressed his fears about the future direction of the Hong Kong high-speed railway controversy on his personal Facebook page.²⁴ Both he and Martin Lee believe that there are hidden motives behind the plan, since the central government deliberately bypassed other options and persisted in choosing a controversial solution. Eric Cheung argues that the plan’s real purpose is to emasculate the power of constitutional review of the Hong Kong courts. In his view, the Chief Executive and the legislature in Hong Kong are fully under the control of the central government. The only thing Beijing authorities cannot intervene on is the independent constitutional review of Hong Kong courts (within the limits of the NPCSC interpretation powers). What the

²³ Martin Lee Chu-ming, art.cit.

²⁴ Eric Cheung T. M. (張達明), “‘Co-location’: act with a hidden motive” (「一地兩檢, 項莊舞劍, 志在閹割香港法院的違憲審查權 落實中央對港全面管治權」), Facebook Post, 1 January 2018, <https://www.facebook.com/Tmcheungeric/posts/1681034451939721>

central government wants is to acquire full control of the HKSAR.

Many other Hong Kong scholars have expressed similar criticisms.²⁵ They fear that the implementation of the “co-location” plan could lead to the “chronic suicide” of Hong Kong. For instance, Benny Tai Yiu-ting, Associate Professor of Law at the University of Hong Kong and one of the organizers of the Umbrella Movement, pointed out that the purpose of the central government was to suppress the rising democracy force in Hong Kong since the Umbrella Movement and ultimately achieve full control over the HKSAR.²⁶

As indicated by the diversity of opinions described above, multiple controversies have erupted from the publication of the details of the co-location arrangement by the NPCSC on the 27th of December. Many more are expected to arise until the opening of the West Kowloon station at the end of 2018. As a matter of fact, the “Guangzhou-Shenzhen-Hong Kong Express Rail Link (‘co-location’) Bill” has been introduced in the Hong Kong Legislative Council on the 31st of January 2018. Taking into account the comparatively disadvantageous position of

²⁵ For instance, Bruce Lui (呂秉權), “‘Co-location’ equals to suicide” (「一地兩檢」三上釣), *Ming Pao*, 3 January 2018, https://news.mingpao.com/ins/instantnews/web_tc/article/20180103/s00022/1514897770524; Benny Tai Yiu-ting (戴耀廷), “The purpose of ‘Co-location’ is to achieve a fully control over Hong Kong” (一地兩檢就是要實現全面管治), *Apple Daily* (蘋果日報), 31 October 2017, <https://hk.news.appledaily.com/local/daily/article/20171031/20199681>.

²⁶ Benny Tai Yiu-ting, art.cit.

Hong Kong and the strong determination of the central government to push forward with the plan, the implementation of the joint checkpoint seems to be only a matter of time. In fact, this controversy is not only a continuation of the hidden conflicts between the central government and Hong Kong over the years, but also a manifestation of the division of the social stratum in Hong Kong. The impact of this issue on the future relations between the central government and Hong Kong is unpredictable. There is no doubt that if the construction of a high-speed railway cannot bring tangible benefits to ordinary people, the public discontent in Hong Kong will be further exacerbated. Internal dissensions in Hong Kong might intensify and the relationship between Hong Kong and the central government might turn into a tense confrontation.