Yash Ghai and the Constitutional Experiment of "One Country, Two Systems" in Hong Kong

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In 1997, Hong Kong was returned to Chinese sovereignty after over 150 years of British colonial rule. The Sino-British Joint Declaration – the international treaty that underpinned the handover – guaranteed that Hong Kong shall, for 50 years (until 2047), practise different economic, social and legal systems and enjoy a high degree of autonomy, an arrangement known as 'One country, two systems'. These guarantees were elaborated in the territory's post-handover constitutional charter, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (BL). The governing framework of 'One country, two systems' is novel, not in that it accommodates two systems of law within the same sovereign state – such arrangement can be found all over the world – but in that it seeks to fit a vibrant capitalist economy and a liberal common law legal system within a one-party state that practices a 'socialist market economy' and a legal system of Soviet lineage – a unique arrangement that saw no precedent. The key challenge facing Hong Kong's constitutional order has been that of maintaining the distinctiveness of Hong Kong while accommodating Chinese sovereignty.[1]

In his 16 years as Sir Y K Pao Chair of Public Law at the University of Hong Kong (1989-2005), Yash Ghai made an enormous contribution to the understanding of Hong Kong's constitutional order. His works have been cited with approval by post-handover Hong Kong courts extensively. His monograph, *Hong Kong's new constitutional order: The resumption of Chinese sovereignty and the Basic Law*, first published in 1997 (second edition 1999) remains to this day the authority on the constitutional law of the Hong Kong Special Administrative Region (HKSAR). Ghai insists that only a contextual approach to the study of law would enable us to understand how the law came about, what it means, what its implications are, and how it should be applied.[2] This approach is all the more important in the case of the HKSAR, whose sovereign treats law as a tool for facilitating political agenda rather than as an independent discipline. Ghai's analysis of the Basic Law was informed by economics, politics, history, and sociology. Unlike some critical legal scholars, however, he does not denigrate the role of law or argue that everything is politics. Rather, he believes that we should acknowledge both the power and limits of the law; he affirms the 'legal character of the Basic Law' and propounds 'the role of legality in its application'.[3] He draws on a wide array of sources, including Chinese documents, and his wide knowledge of and experience in drafting and implementing constitutions elsewhere. Situating Hong Kong's constitutional order in the Chinese and comparative contexts, he analyses the unique *nature* of

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[1] Yash Ghai, *Hong Kong's new constitutional order: The resumption of Chinese sovereignty and the Basic Law*, second edition, Hong Kong University Press, Hong Kong, 1999) (hereinafter 'Ghai, *Hong Kong's new constitutional order*'), 139.
[2] Ghai, *Hong Kong's new constitutional order*, 495.
[3] Ghai, *Hong Kong's new constitutional order,* 495-496.

that order, projects what the likely *risks* of that order are, and the *possibilities* that might ensue, and offers the first, and perhaps so far only, *theory* of how that order should be understood and developed.

In what follows, we will first discuss Ghai's work on 'One country, two systems' and the Basic Law. Given space limitations, we will not be able to do justice to Ghai's rich and sophisticated analyses of a wide range of issues in Hong Kong constitutional law, but we will seek to identify and describe the main themes of his scholarship on the constitutional order of the HKSAR. We will then review briefly what we consider the most significant constitutional developments in the HKSAR since the last edition of Ghai's book on *Hong Kong's new constitutional order* was published in 1999.

I. Autonomy and separation of systems

A major theme in Hong Kong's constitutional law that Ghai debunks is autonomy. On the face of it, the Basic Law gives Hong Kong a large degree of autonomy vis-à-vis the Chinese Government. The powers it enjoys are wider than many autonomous regions in the world. Hong Kong has its own executive, legislative and independent judicial powers (BL article 2). It seems that except for foreign affairs and defence, all subject matters fall within the territory's purview. Even in relation to the excluded matters, the Basic Law distinguishes external affairs and public order from foreign affairs and defence respectively, and authorises Hong Kong to conduct the former on its own (BL 13, 14).[4] Hong Kong can issue its own passport (BL 154) and its own currency (BL 111), does not need to pay tax to the Chinese Central Government (BL 106), and can control the movement of population across its own border (BL 154). The Basic Law grants Hong Kong people an extensive list of rights and freedoms (BL ch 3), entrenches international human rights treaties (BL 39), and even guarantees eventual universal suffrage of the territory's top executive post, the Chief Executive, (BL 45) as well as its legislature (BL 68). Apparently, the Basic Law bears out promises of 'Hong Kong people ruling Hong Kong'. It is common for scholars to treat autonomy as singularly the thrust of 'one country, two systems'.

On this perception, four important observations by Ghai should be highlighted. First, he argues that '"autonomy" suffered something of a sea change in the transformation of the Joint Declaration into the Basic Law.'[5] The international treaty envisages a spatial delineation of powers: Hong Kong 'will enjoy a high degree of autonomy except in foreign affairs and defence which are the responsibilities of the Central People's Government',[6] suggesting that other matters will be within Hong Kong's purview. It guarantees what appear to be free-standing powers of governance without stipulating an overarching supervisory role for China: Hong Kong 'will be vested with executive, legislative and independent judicial power, including that of final adjudication'.[7] However, these legal guarantees of autonomy have, in their transformation into

[4] See Cora Chan, 'Subnational constitutionalism: Hong Kong' in David S Law (ed), *Constitutionalism in context* Cambridge University Press, forthcoming 2020.
[5] Chan, 'Subnational constitutionalism: Hong Kong', 146.
[6] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (signed 19 December 1984, entered into force 27 May 1985) 1399 UNTS 33, para 3(2).
[7] Joint Declaration, para 3(3).

constitutional law provisions, become discretionary grants of power by China: the Basic Law repeatedly uses the formula 'the [National People's Congress] NPC authorises Hong Kong to exercise…' to stipulate Hong Kong's powers of autonomy. The phrase 'a high degree of autonomy' is 'no longer juxtaposed' to 'except in foreign and defence affairs', suggesting that there may be matters other than foreign and defence affairs that are outside of Hong Kong's autonomy.[8] Open-ended formulations of China and Hong Kong's respective competences,[9] such as 'foreign affairs and defence as well as other matters outside the limits of the autonomy of the Region as specified by this Law', did not bode well for autonomy. The Basic Law also institutes important supervisory roles for China over Hong Kong, including the National People's Congress Standing Committee (NPCSC)'s ultimate power of interpreting the Basic Law (BL 158), the Chinese Government's powers of appointing top officials in Hong Kong (BL 45, 68) and of controlling the pace and substance of democratic reform (BL Annexes I & II).[10]

The tone of the Basic Law echoes that in the Chinese Government's latest published policy on Hong Kong (see e.g. the controversial White Paper issued by China in 2014[11]), which emphasises that China has 'comprehensive jurisdiction' over Hong Kong and that Hong Kong's autonomy is 'not an inherent power, but derives solely from the authorisation by the central leadership', the implication being that all exercises of power are subject to central supervision.[12] In response to criticisms that these constitute new policies for Hong Kong, the Chinese Government asserted that these positions simply reiterated the policy in the Basic Law. Ghai's analysis demonstrates that this is indeed the case: the fundamental change in the nature of the China-Hong Kong relationship has already occurred in the process of concretising the international treaty's promises into domestic constitutional law.

A second point he exposes in relation to the theme of autonomy is its secondary role in Hong Kong's constitutional order. Contrary to common perception, the central theme in the Basic Law is not autonomy, but continuity of previous systems. The primary goal of the Basic Law was to preserve a *particular* kind of capitalism for Hong Kong: the colonial system that favours a free economy, strong executive, governance by co-option of business elites rather than democracy. Autonomy is important but only to the extent that it serves this larger goal: it is 'secondary, and is contingent on the other, larger aim'.[13]

While preservation of the special kind of capitalism may coincide with the imperatives of autonomy – and it probably did during the drafting process of the Basic Law, in that most people desired preservation of the status quo – the overlap is contingent rather than inherent.[14] The Basic Law is not designed primarily to give effect to the will of Hong Kong people. Political institutions 'are drawn from the logic of the special kind of capitalism prescribed for the

[8] Ghai, *Hong Kong's new constitutional order*, 146.
[9] Ghai, *Hong Kong's new constitutional order*, 204.
[10] This paragraph is drawn from Chan, 'Subnational constitutionalism: Hong Kong'.
[11] *The practice of the 'One country, two systems' policy in the Hong Kong Special Administrative Region*, Information Office of the State Council, People's Republic of China, 10 June 2014.
[12] *The practice of the 'One country, two systems' policy*, Ch V, section 1. See also Chan, 'Subnational constitutionalism: Hong Kong'.
[13] Ghai, *Hong Kong's new constitutional order*, 139, 140 and 184. This paragraph is drawn from Chan, 'Subnational constitutionalism: Hong Kong'.
[14] This paragraph is drawn from Chan, 'Subnational constitutionalism: Hong Kong'.

HKSAR – or what is assumed to be its logic (which works against democracy and favours a powerful executive), rather than from the logic of general autonomy or self-realization'.[15] The Basic Law institutes a strong head of the executive – the eventual democratisation of which is subject to Beijing's approval – and a weak legislature – the eventual democratisation of which does not, in theory, have to be endorsed by Beijing.

> Political values and institutions, [such as democracy] which might elsewhere be regarded as essential or important to capitalism are seen as antithetical to the prosperity and stability of Hong Kong, and are to be avoided in favour of an outdated colonial political order under the cover of 'current systems'. There is thus a curious but deliberate imbalance in One Country Two Systems: a dying socialist economic system clothed with a strong communist political apparatus and a vibrant capitalism clad in a restrictive political order.[16]

The potential tension between autonomy and continuity also arises from the fact that the Basic Law entrenches current systems in considerable detail:

> A government required to preserve capitalism would enjoy great flexibility in deciding social, economic, and political policies and the institutions to adopt and execute them; in brief it would be bestowed with a high degree of autonomy. But the Basic Law goes on to prescribe many of the details of the capitalist system that Hong Kong must preserve; and thus erodes the autonomy that the HKSAR might otherwise have enjoyed.[17]

For instance, the Basic Law stipulates numerous features of the economic system: Hong Kong shall take the low tax system as reference, strive to achieve a fiscal balance, and shall have a freely convertible currency backed by 100% reserve fund.[18] The Basic Law seeks to freeze certain features of the colonial systems for 50 years, with the result that even if the general public would like to deviate from them (say, by pursuing a high tax policy and turning Hong Kong into a welfare city) their hands would be tied. The tension has materialised in numerous respects. For example, the general public does not seem supportive of protecting the rights of 'indigenous inhabitants' of the New Territories, but such rights are entrenched in the Basic Law. Certain sections of the public seem also to support granting more powers to the legislature, the relatively more democratic branch of the government, but the Basic Law entrenches the colonial system of government that gives extensive powers to the Chief Executive and systemically handicaps the legislature.

Moreover, it is worth noting that while the courts have used provisions entrenching the status quo to expand the scope of constitutional protection beyond what was provided in the colonial era (e.g. in *Kong Yunming*,[19] the Court of Final Appeal interpreted the right to social welfare as guaranteeing, at a minimum, social welfare benefits that stood as at 30 June 1997), such provisions have at times functioned as a cap on constitutional entitlements (e.g. the court held, in

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[15] Ghai, *Hong Kong's new constitutional order,* 139-140. This paragraph is drawn partly from Chan, 'Subnational constitutionalism: Hong Kong'.
[16] Ghai, *Hong Kong's new constitutional order,* 139-140. 141.
[17] Ghai, *Hong Kong's new constitutional order,* 139-140. 139.
[18] See BL ch V.
[19] *Kong Yunming v The Director of Social Welfare* [2013] HKCFA 107; (2013) 16 HKCFAR 950; [2014] 1 HKC 518.

Kong Yunming,[20] that administrative measures count as 'law' and in *Chan Yu Nam*,[21] that corporate voting was constitutional, in both cases partly because the measure under challenge existed prior to the handover) or as a limit on Hong Kong's autonomy vis-à-vis China (e.g. the Court of Appeal in *Ma Wai Kwan*[22] held that post-handover Hong Kong's courts have no jurisdiction to question the acts of the National People's Congress (NPC) or its Standing Committee because pre-handover courts had no jurisdiction to question acts of the British Crown or Parliament).

Third, Ghai highlights the implications of the economic basis of Hong Kong's autonomy for the sustainability of the autonomy arrangements. Such arrangements were put in place to assure businessmen in Hong Kong that the territory's economy will continue to prosper, to prevent a brain drain, and to ensure that Hong Kong will be useful to China's opening up of its economy. 'Autonomy is an imperative of the economic system – in that sense the basis of HKSAR's autonomy is different from many other examples where it is founded in the accommodation of social, cultural or ethnic diversity.'[23] Ghai rightly forewarns that when the imperative of autonomy is economic, its normative basis is weaker,[24] and it is less safe, 'especially as the economic paradigms of the two parts of China converge increasingly.'[25]

When the Basic Law was being drafted in the 1980s, China's economy was just beginning to open up; Hong Kong, in contrast, was a thriving capitalist economy. Autonomy and separation of systems were the means to ensure economic prosperity then. Three decades on, however, China has emerged as one of the most lucrative markets in the world. The way to ensure economic prosperity in Hong Kong, it seems, is no longer autonomy or separation of systems, but placation of China and integration of systems. This highlights a dilemma that emerged for Hong Kong people as China's economic power grows.[26] Before the handover, the imperatives for economic prosperity and self-governance coincided; Hong Kong people can comfortably prioritise the former without sacrificing the latter. But as the imperatives of the two goals are beginning to part, the people of Hong Kong need to seriously consider their priorities. Are they willing to accept less autonomy for more immediate economic growth? A key question that Hong Kong people would have to consider *if* and *when* they have an opportunity to participate in constitution rebuilding for 2047 is this: is autonomy important for self-realisation or only as a means to guarantee economic prosperity? Depending on what the answer is, the constitutional arrangements that ensue might look very different. Ghai might be prophetic in observing that autonomy has become a transitional arrangement to full integration.[27] By the end of 50 years

[20] *Kong Yunming* at [25].
[21] *Chan Yu Nam v The Secretary for Justice* [2010] HKCA 364; [2012] 3 HKC 38, at [81]-[108].
[22] *HKSAR v Ma Wai Kwan David and others* [1997] HKCA 652; [1997] HKLRD 761; [1997] 2 HKC 315 at [57]
[23] Ghai, *Hong Kong's new constitutional order*, 140.
[24] Ghai, *Hong Kong's new constitutional order,* 139-140. 184-185.
[25] Ghai, *Hong Kong's new constitutional order,* 185; see also Yash Ghai, 'Hong Kong's autonomy: Dialects of powers and institutions' in Yash Ghai and Sophia Woodman (eds), *Practising self-government: A comparative study of autonomous regions,* Cambridge University Press, New York, 2013, 326.
[26] Cora Chan, 'Thirty years from Tiananmen: China, Hong Kong, and ongoing experiment to preserve liberal values in an authoritarian state' (2019) *International Journal of Constitutional Law*, 439, at 449.
[27] Ghai, *Hong Kong's new constitutional order*, 326.

(which amount to five ten-year plans), China and Hong Kong's economies might be completely integrated, in which case there would no longer be any need for autonomy or segregation.[28]

Finally, Ghai saw the increasingly divergent expectations of 'One country, two systems' between the Chinese Government on the one hand and certain sections of the public in Hong Kong on the other.[29] To the Chinese Government, maintenance of sovereignty and territorial integrity take priority over segregation of systems. If the latter threatens the former, the latter should give way. To certain sectors in Hong Kong, the two imperatives are at least on a par with each other. 'One country, two systems' is a single concept; its components cannot be discussed separately. To the Chinese Government, the basis for having separate systems is economic. But to certain sectors of Hong Kong, the basis is 'more than economic; it is also different political and cultural values, and indeed on a distinctive Hong Kong identity'[30] – an identity that is becoming stronger. To these people, autonomy is important for the territory's self-realisation. To the Chinese Government, the promise for Hong Kong has been economic autonomy, not political autonomy. To certain sectors of Hong Kong, there is no meaningful autonomy without political autonomy.[31]

These divergent expectations have led to major political clashes in the territory. They were played out, for instance, in the rift over democratic reform and, in its aftermath, the controversies over how the rise of pro-independence forces in Hong Kong should be handled. The Chinese Government insists on absolute control over who can be the political leader of Hong Kong, lest the region goes out of hand and becomes a base for subversion. Hence in a decision issued in 2014,[32] it sought to control who could run for the election via a pro-China nomination committee. In contrast, the pan-democrats insist on universal suffrage that guarantees the free expression of the will of Hong Kong people. The 79-day illegal occupation of roads known as 'Umbrella movement' or 'Occupy Central' was a protest against China's refusal to grant genuine universal suffrage. The slow pace of democratic reform has generated voices calling for Hong Kong to be given the right to determine its constitutional future, including the option of becoming an independent state. China has been adamant on suppressing pro- self-determination forces, witnessed by the fact that it issued a fifth interpretation of the Basic Law,[33] apparently to stop affiliated individuals from becoming legislators. Ghai was far-sighted in predicting that the 'pervasiveness of "Chineseness"' weakens the argument that Hong Kong people have a distinct identity: 'it will be increasingly hard to advance it [the argument] when there is such an emphasis on "compatriotism" (with its ambiguities), and the distrust in Beijing of regional differences.'[34]

Going forward, peaceful co-existence of these two camps (holding opposing views and expectations) is only possible if a common understanding is forged on the nature of the

[28] Chan, 'Thirty years from Tiananmen', 449.
[29] See e.g. Ghai, *Hong Kong's new constitutional order,* 185.
[30] Ghai, *Hong Kong's new constitutional order,* 185. See also Chan, 'Subnational constitutionalism: Hong Kong'.
[31] Cf Ghai, 'Hong Kong's autonomy' 325.
[32] Decision of the NPCSC on Issues Relating to the Selection of the Chief Executive of Hong Kong by Universal Suffrage and on the Method for Forming the Legislative Council in Hong Kong in the Year 2016 (adopted at the Tenth Session of the Standing Committee of the Twelfth National People's Congress on 31 August 2014).
[33] Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress (Adopted by the Standing Committee of the Twelfth National People's Congress at its Twenty-fourth Session on 7 November 2016).
[34] Ghai, *Hong Kong's new constitutional order*, 185.

relationship between mainland China and Hong Kong. For 'One country, two systems' to serve as a meaningful governing framework and not just as rhetoric, the major challenge would be to build consensus over its meaning.[35]

II. Interpretation of the Basic Law

Ghai rightly points out that while Hong Kong is granted extensive powers of self-governance, the institutional guarantees of its autonomy are weak: 'Indeed we note a curious paradox here: HKSAR has more powers than any autonomous region or federal unit, but their exercise will be subject to closer scrutiny and supervision than powers elsewhere.'[36] The most important supervisory power is the NPCSC's ultimate power of interpreting the Basic Law.

The Basic Law is both the constitution of a common law legal system and a piece of legislation of a socialist[37] legal system.[38] The power of interpreting the Basic Law is divided between these two systems: courts in Hong Kong have powers of interpreting the Basic Law in the course of adjudication (BL 158(2) and (3)), subject to a duty to refer provisions relating to China's prerogatives to the NPCSC for interpretation (BL 158(3)), and an overall plenary power of interpretation by the NPCSC (BL 158(1)). Dividing the power of interpretation of a constitution between two institutions is not so much of a problem if the two institutions share similar legal traditions, but it is a problem here, because the NPCSC and Hong Kong courts adopt highly contrasting methods of interpretation.[39] Hong Kong courts ascertain the meaning of the text in light of its purpose and context. They do not give words a meaning that they cannot bear. There is, at least in principle, a clear distinction between interpretation and rewriting legislation. In contrast, the NPCSC has no principled and coherent approach to interpretation. In practice, legislative interpretations may clarify or supplement legislation.[40] Ghai observes that these different interpretative methods reflect 'more profound social and political differences, and of perceptions of the nature and purpose of law'.[41] In the common law tradition, the purpose of the law is to guide human conduct. Legal certainty is important. Courts may not change the meaning of the law retrospectively in the name of interpretation. In contrast, in a socialist regime, law is, amongst other things, a tool to serve the party's political agenda. Legal certainty is less important than flexibility to suit political demands.[42]

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[35] Cf Chan, 'Subnational constitutionalism: Hong Kong'.
[36] Chan, 'Subnational constitutionalism: Hong Kong'.
[37] It is more common for the Chinese legal system to be described as a socialist legal system than communist legal system. The PRC officially states that China is in the 'preliminary stage of socialism' and 'communism' is only to be achieved at the indefinite point in time in the future.
[38] Chan, 'Subnational constitutionalism: Hong Kong'.
[39] Yash Ghai, 'Litigating the Basic Law: Jurisdiction, interpretation and procedure' in Johannes MM Chan, HL Fu, Yash Ghai, (eds) *Hong Kong's constitutional debates: Conflict over interpretation* Hong Kong University Press, Hong Kong, 2000, 36.
[40] Cf Lin Feng, 'The duty of Hong Kong courts to follow the NPCSC's interpretation of the Basic Law: Are there any limits?' (2018) 48(1) *Hong Kong Law Journal* 167.
[41] Ghai, *Hong Kong's new constitutional order*, 213.
[42] See Cora Chan, 'The legal limits on Beijing's powers of interpreting the Basic Law', HKU Legal Scholarship Blog, 3 November 2016, available at www.researchblog.law.hku.hk/2016/11/cora-chan-on-legal-limits-of-beijings.html; Chan, 'Thirty years from Tiananmen', 443; Chan, 'Subnational constitutionalism: Hong Kong'.

The Basic Law is torn between these two legal traditions. Since what the law means depends on whether an NPCSC interpretation is issued, the Basic Law suffers from a 'novel element of unpredictability'.[43] Ghai argues that 'it is clearly necessary for the coherence of the Basic Law that some uniform and fundamental principles of and approaches to interpretation be adopted.'[44] 'It is important to avoid a situation when the two systems are locked (or are seen to be locked) in a struggle for the soul of Hong Kong; instead the struggle must be towards coherence.'[45] Whilst there are signs that Hong Kong courts are increasingly disposed to rule in harmony with Chinese decisions,[46] it may be doubted whether coherence would be in the interest of preserving the integrity of Hong Kong's legal system, in light of the divergence between the Chinese and common law approaches to law. Given that Chinese interpretative methods are unlikely to be susceptible of common law influences, the only way to achieve coherence seems to be for common law reasoning to accommodate Chinese approaches. Nevertheless, even though common law reasoning is flexible, there are limits to how far it can be stretched. Asking courts to accommodate Chinese interpretative approaches may amount to asking them to compromise principled reasoning, tainting Hong Kong's legal methods with Socialist praxis. It is argued that the way to enable the two contrasting legal systems to co-exist may instead be for institutions in each to insist on their own methods.[47] The Court of Final Appeal's adoption of common law methods to construe an NPCSC interpretation in *Chong Fung Yuen* is an example of such insistence. Such insistence will lead to tension, yes, but such tension is precisely the beauty of "One Country, Two Systems". The legal unpredictability that results from such tension is the inherent price for adopting a governing framework whose essence is tension, not harmony.[48]

Ghai discerns why the NPCSC reserved to itself the ultimate power of interpreting the Basic Law. Knowing that patently political solutions are not available in Hong Kong, where there is a strong rule of law tradition, China maintains supervision by controlling what the highest law in the territory means.[49] The irony, then, as Ghai suggests, is that the Chinese Communist Party, which normally prefers the flexibility of politics over law, has resorted to legalisation of politics in Hong Kong.[50] The double irony, though, is that as a result, in Hong Kong, a jurisdiction which boasts itself of the rule of law, politicisation of the law is destined. The law that lies at the

[43] Anthony Mason, 'The role of the Common Law in Hong Kong', in Jessica Young and Rebecca Lee (eds), *The Common Law Lecture Series 2005* Faculty of Law, University of Hong Kong, 2006, 1.
[44] Ghai, *Hong Kong's new constitutional order,* 191.
[45] Ghai, *Hong Kong's new constitutional order,* 212.
[46] See e.g. *Chief Executive of Hong Kong Special Administrative Region v The President of The Legislative Council* [2016] HKCA 573, at [55]-[58]; [2017] HKCFA 54, at [35]-[36]; *Leung Chung Hang, Sixtus v President of Legislative Counsel and Secretary for Justice* [2018] HKCFI 2657, [53]-[76]; *Chan Ho Tin v Lo Ying-Ki Alan and others* [2018] HKCFI 345, at [46]-[49]. Cf *Kwok Wing Hang and others v Chief Executive in Council and another* [2019] HKCFI 2820, CACV 541/2019 (see n 148 below). See also Chan, 'Thirty years from Tiananmen', 447-448.
[47] Cora Chan, 'How Hong Kong's courts interpret Beijing's interpretation of the Basic Law may yet surprise', *South China Morning Post*, 9 November 2016, available at http://www.scmp.com/comment/insight-opinion/article/2044385/how-hong-kongs-courts-interpret-beijings-interpretation.
[48] Chan, 'How Hong Kong's courts interpret Beijing's interpretation of the Basic Law may yet surprise'.
[49] Cora Chan, 'Legalizing politics: An evaluation of Hong Kong's recent attempt at democratization' (2017) 16(2) *Election Law Journal* 296, 298; Yash Ghai, 'The intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of technique or politics?' (2007) 37 *Hong Kong Law Journal* 363, 404.
[50] Ghai, 'Hong Kong's autonomy: Dialects of powers and institutions' 341, 348; Ghai, 'The intersection of Chinese Law and the Common Law' 363, 403-404; Ghai, 'Litigating the Basic Law', 8.

foundation of its legal system may not bear a meaning free from politics; rather, its meaning is subject to the will of a political body.

According to Ghai, the NPCSC's plenary power of interpretation is the 'Achilles heel' of Hong Kong's autonomy.[51] It is the loophole that renders the Basic Law a 'device for control' rather than 'an instrument for the empowerment of the people of Hong Kong'.[52] He predicted that if the powers of interpretation were used to the full, there would be no basis for autonomy, and it is not difficult to see why. First, key guarantees on autonomy could be nullified by interpretations. Second, since local laws could be invalidated if they contravene the Basic Law, it would be possible for China to determine the content of the former by issuing an interpretation of the latter.[53] Third, Hong Kong courts' power of final adjudication is more limited than that in other common law jurisdictions in that it does not include the final power of interpreting the highest law. Where adjudication hinges on an interpretation of the Basic Law, it would be possible for the NPCSC to dictate the outcome of the case by issuing such interpretation.[54] The NPCSC could also extinguish the precedential effect of a court ruling by issuing an interpretation.[55] Hence, as one of us has argued elsewhere, 'whereas in most other jurisdictions, the stipulation of guarantees in a constitution can entrench them against political vagaries; in the case of Hong Kong, it exposes them to that of the Chinese Government.'[56]

The concerns that the NPCSC's interpretative powers would nullify autonomy have partly materialised. By giving the NPCSC an additional power of controlling when democratic reform could be kick-started, the NPCSC's second interpretation of the Basic Law has restricted Hong Kong's say over the pace of democratisation.[57] The NPCSC's fifth interpretation has effectively elevated certain content of the local law on oath-taking to constitutional status, restricting the local legislature's power to amend such law by ordinary legislative process.[58] The NPCSC's first interpretation, issued in the aftermath of the Court of Final Appeal's ruling in *Ng Ka Ling*, extinguished the precedential effect of such ruling.[59] All three interpretations were issued pursuant to the NPCSC's plenary power of interpretation.

III. A theory of Hong Kong's constitutional law

[51] Yash Ghai, 'Autonomy and the Court of Final Appeal: The constitutional framework' in Simon NM Young and Yash Ghai (eds), *Hong Kong's Court of Final Appeal: The development of the law in China's Hong Kong*, Cambridge University Press, 2014, 58.
[52] Ghai, *Hong Kong's new constitutional order,* 496.
[53] Chan, 'Subnational constitutionalism: Hong Kong'.
[54] Chan, 'Subnational constitutionalism: Hong Kong'; Chan, 'The legal limits on Beijing's powers of interpreting the Basic Law'.
[55] Chan, 'The legal limits on Beijing's powers of interpreting the Basic Law'.
[56] Chan, 'Subnational constitutionalism: Hong Kong'.
[57] Interpretation by the NPCSC of Article 7 of Annex I and Article III of Annex II to the Basic Law (adopted at the Eighth Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004). See the discussion in section IV(3) below.
[58] See the discussion in section IV(2) below.
[59] The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Tenth Session of the Standing Committee of the Ninth National People's Congress on 26 June 1999).

Ghai not only discerns the potential issues in the nature of Hong Kong's constitutional order; he propounds a theory that ought to guide the resolution of those issues as well. He argued that to understand the essence of the Basic Law, one must go back to the 'twin foundations' of the Basic Law:[60] 1) the Sino-British Joint Declaration and 2) Article 31 of the PRC Constitution, which states that the NPC may, when necessary, set up regions that practise different systems, and pursuant to which the NPC set up the Hong Kong Special Administrative Region. The spirit of the latter, Ghai argues, is clearly to free certain regions of China from the 'shackles and restraints' of systems in the Mainland.[61] Hence,

> [i]t is from the logic of these [Hong Kong's] systems that the precise scope of powers of the HKSAR and its relationship with the Central Authorities when the Basic Law provisions are unclear should be drawn… It is thus not simple considerations of autonomy but the complex logic of systems that we must turn.[62]

The scope of Hong Kong's powers should therefore be determined by the imperatives of it being able to function as a separate economic and social entity. Various provisions in the Basic Law also confirm that the Basic Law has a special status within the Chinese legal order. The NPC has unlimited powers of amending ordinary Chinese laws, but its ability to amend the Basic Law is circumscribed both in procedure and in substance (no amendment shall contravene China's basic policies towards Hong Kong) (BL 159).

Once the nature of Hong Kong's constitutional order is conceived in that way, the answers to certain unresolved issues in the Basic Law seem clear. One such issue, for instance, is whether Hong Kong enjoys 'residual powers', i.e. powers that are not expressly granted to it by the Basic law. While many scholars approach the issue as one of whether Hong Kong is a part of a federal system (and hence possesses residual powers) or a unitary system (and hence does not), Ghai believes that the scope of Hong Kong's powers should not be distilled through the concept of residual powers:

> [T]he conceptualization of the powers of the HKSAR is to be derived from the integrity of the 'Hong Kong' system in which capitalism plays a key but not exclusive role. Many powers which are not expressly granted to the HKSAR are ancillary to the operation of the market economic system (for example the stock exchange) or the administration of Hong Kong (like a water or power supply system). These clearly must be deemed to be vested in the HKSAR... Since the recognition of Hong Kong's separate systems is itself an exercise of Chinese sovereignty, the logic of those systems must also prescribe operational limitations on that sovereignty. The powers necessary for the operation of Hong Kong's systems are thus a mirror image of the limitations on Chinese sovereignty. In this conceptualization, there is little scope for the notion of 'residual powers'.[63]

His theory also provides an answer to an issue that was left deliberately open in the drafting of the Basic Law: that of the relationship between such Law and the PRC Constitution. The NPC passed a resolution on the same day that it enacted the Basic Law to affirm that the Basic Law was consistent with the PRC Constitution. However, the question remains as to which provisions

[60] Ghai, 'Litigating the Basic Law', 46.
[61] Ghai, *Hong Kong's new constitutional order*, 222.
[62] Ghai, *Hong Kong's new constitutional order*, 223.
[63] Ghai, *Hong Kong's new constitutional order*, 150-151.

of the PRC Constitution are applicable to Hong Kong and whether other laws enacted by the NPC could override the Basic Law. This question has been the subject of debate recently.[64] Ghai argues that for guarantees of autonomy in the Basic Law to be safe, and for its provisions giving it special status to make sense, such Law has to be as 'self-contained' as possible.[65] Provisions in PRC law, including provisions of the PRC Constitution, should not be applicable to Hong Kong unless there is a basis for their application in the Basic Law itself.[66] The NPCSC's power of interpreting the Basic Law, for example, should be viewed as deriving solely from BL 158, and not from Article 67 of the PRC Constitution,[67] the implications being that the scope of that interpretative power should be consistent with the other provisions of the Basic Law as well.[68]

Ghai emphasises that Hong Kong's constitutional order is constantly shaped by the dialectics between law and politics. He is fully aware of the influence that China's overwhelming political power has on Hong Kong: he argues that the Chinese legal system has 'triumphed' over the common law, not because of the former's superior techniques, but because of its 'predominant political power'.[69] Nevertheless, his *descriptive* account of the reality is not to be confused with his vision on how the Chinese-Hong Kong relationship *ought* to be developed. He firmly believes that Hong Kong's constitutional order should be developed in a direction that gives law a greater role. Currently, the fragility of such order lies in the fact that the highest decision-maker is not, as a matter of domestic law and political reality, subject to any legal limits.[70] There seem to be no substantive constraints on the NPCSC's final powers of interpretation. Ghai believes that this is not an ideal state of affairs. For autonomy to be secure, the Basic Law ought to be treated as '"hard law" in the common law tradition'.[71] It ought to deliver what it promises. The NPCSC should not wield unlimited power.[72] 'Interpretation' by the NPCSC under BL 158 should mean interpretation understood in the common law sense, and should not be used to 'limit or extend legal provisions', as might be allowed under the Chinese system.[73] Otherwise, the integrity of the Basic Law would be tarnished, and China may amend the Basic Law in the name of interpretation, rendering the special provisions for amendment under BL 159 nugatory.[74] 'Given the likely pressures from the Mainland on the autonomy of Hong Kong, the Basic Law is largely meaningless without the shield of legality – few legal instruments seem so desperately in need of it.'[75]

[64] See e.g. recent remarks by Wang Zhenmin, Head of the Legal Division of the China Liaison Office in Hong Kong: 'Chinese constitution applies to HK: Wang Zhenmin' *RTHK news* (14 July 2018), available at http://news.rthk.hk/rthk/en/component/k2/1406989-20180714.htm.
[65] Ghai, *Hong Kong's new constitutional order*, 218; Ghai, 'Litigating the Basic Law', 46.
[66] Chan, 'Subnational constitutionalism: Hong Kong'.
[67] Chan, 'Subnational constitutionalism: Hong Kong'.
[68] Ghai, 'The intersection of Chinese Law and the Common Law' 392-393.
[69] Ghai, 'The intersection of Chinese Law and the Common Law' 403-405.
[70] Chan, 'The legal limits on Beijing's powers of interpreting the Basic Law'.
[71] Ghai, *Hong Kong's new constitutional order*, 220.
[72] Ghai, *Hong Kong's new constitutional order*, 495.
[73] Ghai, *Hong Kong's new constitutional order*, 201, 220.
[74] Ghai, *Hong Kong's new constitutional order*, 201, 210, 211, 220.
[75] Ghai, *Hong Kong's new constitutional order*, 498.

Ghai is not clear on how such 'shield of legality' can be enforced against China.[76] He seems to support the view that Hong Kong courts should police the Basic Law even as against the NPC or NPCSC, striking down acts by these organs that contravene such Law.[77] Such jurisdiction was boldly asserted by the Court of Final Appeal in *Ng Ka Ling*, but has never been exercised. The Court of Final Appeal subsequently held in *Lau Kong Yung* that courts are bound by interpretations issued by the NPCSC. The relationship between these two rulings is unresolved: does *Lau Kong Yung* imply that the Court of Final Appeal may not question NPCSC interpretations that in the court's view contravene the Basic Law?

Whether there are substantive limits on an NPCSC's interpretation, and whether courts can enforce those limits, have been a focus of the *Leung and Yau* oath-taking litigation.[78] The applicant argued that the NPCSC's fifth interpretation has added new content to BL 104 – the provision being interpreted, and was as such an amendment rather than interpretation of the Basic Law. The argument goes that since the procedure for amendment under BL 159 was not followed, the court should refuse to enforce the fifth interpretation. The Court of Appeal rejected this argument, and leave to Court of Final Appeal was refused. In a subsequent case, in face of a decision issued by the NPCSC that is apparently outside the Basic Law's framework, the Court of First Instance even implied that the NPCSC could act outside the Basic Law, that the courts could not challenge it, and that the decision in question ought to be given significant weight.[79] These judgments seem to foreclose, at least for the moment, the possibility of Hong Kong courts imposing substantive limits on the NPCSC's supervisory powers over Hong Kong.

IV. Constitutional developments in the HKSAR since 1999

The second edition of Ghai's book on *Hong Kong's new constitutional order* was published in 1999. To enable readers of that book to have a quick update and to read the book with the benefit of hindsight, we provide in this section of the chapter a brief review of major constitutional developments in the HKSAR since 1999.

(1) *The attempt to implement Article 23 of the Basic Law ("BL23")*

BL 23 requires the HKSAR to 'enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government'. It also addresses the protection of state secrets and the activities of foreign political organisations in Hong Kong. Many of the

[76] Indeed, he recognises that it will 'require very considerable change of philosophy and habits on the part of the Central Authorities to accept the Basic Law as 'hard law' with the capacity to govern relationships that are widely perceived by them as between a sovereign entity and a local administration.' (Ghai, *Hong Kong's new constitutional order*, 186-187).

[77] See e.g. Ghai, *Hong Kong's new constitutional order*, 179-180; Ghai, 'The intersection of Chinese Law and the Common Law' 376.

[78] *Chief Executive of the Hong Kong Special Administrative Region Secretary for Justice v The President of the Legislative Council, Sixtus Leung Chung Hang and Yau Wai Ching* [2016] HKCA 573; [2017] 1 HKLRD 460; [2016] 6 HKC 541. *Chief Executive of the Hong Kong Special Administrative Region Secretary for Justice v The President of the Legislative Council, Sixtus Leung Chung Hang and Yau Wai Ching* [2017] HKCFA 55; (2017) 20 HKCFAR 390.

[79] *Leung Chung Hang, Sixtus v President of Legislative Council and Secretary for Justice* [2018] HKCFI 2657, [53]-[76]. Chan, 'Thirty years from Tiananmen' 447-448. See n. 153 below.

issues raised by BL 23 are considered politically sensitive. Ever since the Basic Law was enacted in 1990 and brought into effect in July 1997, there have been anxieties over the implementation of BL 23.

The publication on 24 September 2002 of the government's Consultation Document on *Proposals to implement Article 23 of the Basic Law* opened a three-month consultation exercise on the legislative proposal. On 28 January 2003, the government published the results of the consultation, and announced nine sets of clarifications or modifications of the original legislative proposal. This was followed by the publication of the National Security (Legislative Provisions) Bill on 13 February 2003 and its first reading in the Legislative Council on 26 February 2003. During the Bills Committee's deliberations on the bill, the government agreed to some amendments. However, critics said that these amendments were insufficient,[80] and in any event the government's timetable for passing the bill in the Legislative Council's week-long meeting beginning on 9 July did not allow sufficient time for deliberation.

On 1 July 2003, a hot summer day that was also a public holiday marking the anniversary of Hong Kong's return to China, an estimated half a million Hong Kong residents took to the streets to demonstrate against the BL 23 legislative exercise and to express other grievances against the Tung Chee-hwa administration. The demonstration had the effect of tilting the balance in the Legislative Council between legislators who supported the bill and those who opposed it: the Liberal Party, which had hitherto supported the bill, now advocated its postponement and opposed the Tung administration's decision on 5 July to adhere to the original 9 July deadline for its passage. Not having enough votes in the legislature to pass the bill, the government decided to postpone it.[81]On 17 July 2003, Tung announced that the government would re-open public consultations on the bill. However, in an about-turn on 5 September 2003, he announced that the bill was to be withdrawn. Since then, the implementation of BL 23 has been shelved indefinitely. However, in view of the development of a pro-independence discourse in Hong Kong after the failure of the 'Occupy Central Movement' to achieve its immediate goals of democratisation, it is likely the BL 23 issue will return to the government's legislative agenda some time in the future.

(2) *Interpretations of the Basic Law by the NPCSC*

As explained above, the NPCSC possesses final powers of interpreting the Basic Law. In the last two decades, a total of five interpretations have been issued. The first interpretation was issued in 1999, which was well covered in the second edition of Ghai's book. After 1999, the NPCSC has exercised the power of Basic Law interpretation on four other occasions.

In 2004, acting on its own initiative (instead of at the request of the Chief Executive of the HKSAR), the NPCSC issued an interpretation of the Basic Law provisions relating to electoral

[80] Hualing Fu, Carole J Petersen and Simon NM Young, (eds), *National security and fundamental freedoms: Hong Kong's Article 23 under scrutiny,* Hong Kong University Press, Hong Kong, 2005. For a collection on the future of Article 23 legislation, see Cora Chan and Fiona de Londras (eds), *China's national security: Endangering Hong Kong's rule of law?* Hart Publishing, 2020.

[81] Albert Chen, 'A defining moment in Hong Kong's history,' *South China Morning Post*, 4 July 2003; 'How the Liberals stopped a constitutional crisis,' *South China Morning Post*, 8 July 2003.

reform.[82] In 2005, upon the request of the Acting Chief Executive of the HKSAR, the NPCSC issued an interpretation to clarify the term of office of a Chief Executive who succeeds one who resigns before completing his term of office.[83] In 2011, the Court of Final Appeal in the *Congo* case[84] used for the first time the reference procedure in Article 158(3) of the Basic Law to refer certain Basic Law provisions relating to foreign affairs and 'acts of state' to the NPCSC for interpretation.[85] This *Congo* case concerned whether the applicable law of foreign sovereign immunity in the HKSAR was the same as that in the Mainland.

In November 2016, the NPCSC, acting on its own initiative, issued an interpretation of article 104 of the Basic Law, which relates to the oath-taking requirements applicable to officials, judges, and members of the Legislative and Executive Councils. This interpretation was particularly controversial, as it was issued three days after Hong Kong's High Court heard a case on oath-taking and before the court delivered judgment. In this case,[86] the government argued that two pro- 'Hong Kong independence' Legislative Councillors had been disqualified by reason of their failure to comply with the oath-taking requirements stipulated in Article 104 of the Basic Law and other Hong Kong legislation.

(3) *The pace of democratisation*

The Basic Law provides for the development of the political system of the HKSAR in the longer term. It declares that the 'ultimate aim'[87] of the political evolution of the HKSAR is the election of both the CE and all members of LegCo by universal suffrage. Such political evolution would depend on 'the actual situation in the [HKSAR]' and should be 'in accordance with the principle of gradual and orderly progress'. The Basic Law does not provide any timetable for the eventual realisation of universal suffrage. But Annexes I and II to the Basic Law expressly provide that the methods for electing the CE and LegCo may change after 2007. They also expressly provide for the procedure for such constitutional change, which involves the support of a two-thirds majority in LegCo, the CE's consent, and the approval of (in the case of a change in the electoral method for the CE) or 'reporting for the record' to (in the case of a change in the electoral method for LegCo) the NPCSC.

In the second half of 2003, after the failure of the Hong Kong government's attempt to enact a national security law for the purpose of the implementing Article 23 of the Basic Law, the 'pan-democrats', who led the movement against the bill, launched a movement to demand the speedy

[82] Albert HY Chen, 'The constitutional controversy of spring 2004' (2004) 34 *Hong Kong Law Journal* 215.
[83] Albert HY Chen, 'The NPCSC's interpretation in spring 2005' (2005) 35 *Hong Kong Law Journal* 255.
[84] (2011) 14 HKCFAR 95, 395.
[85] Albert HY Chen, 'The *Congo* Case' (2011) 41 *Hong Kong Law Journal* 369.
[86] *Chief Executive of the HKSAR v President of the Legislative Council and Leung Chung Hang Sixtus*, HCAL 185/2016 (Court of First Instance, 15 November 2016), [2017] 1 HKLRD 460 (Court of Appeal), (2017) 20 HKCFAR 390 (CFA). The two Legislative Councillors were disqualified. For other cases relating to the NPCSC interpretation of 2016, see *Nathan Law Kwun Chung* [2017] 4 HKLRD 115 (disqualification of 4 other LegCo members); *Chan Ho Tin* [2018] HKCFI 345 (disqualification of a candidate in the LegCo election of 2016 on the ground that he advocated Hong Kong's independence: see generally Hong Kong newspapers of 3 August 2016, e.g. 'Protests shut down electoral commission briefing as Hong Kong indigenous' Edward Leung disqualified from Legco elections', 'Hong Kong's returning officers' power to dismiss potential LegCo candidates called into question', both published in *South China Morning Post* (on-line edition), 2 August 2016.
[87] Articles 45, 68, Basic Law.

democratisation of the HKSAR.[88] In early 2004, Beijing decided to respond to the democracy movement in Hong Kong. On 6 April 2004, the NPCSC issued an Interpretation of the Basic Law.[89] It elaborates upon Annexes I and II to the Basic Law by stipulating a procedure for initiating changes to the relevant electoral methods. The procedure requires the CE to submit a report to the NPCSC on whether there is a need to introduce electoral reform, whereupon the NPCSC will decide the matter in accordance with Articles 45 and 68 of the Basic Law.

Since April 2004, three reports on electoral reforms have been submitted to the NPCSC by CEs in Hong Kong, in 2004, 2007 and 2014 respectively. In response to the 2007 report, NPCSC decided that 'the election of the fifth CE of the HKSAR in the year 2017 may be implemented by the method of universal suffrage; that after the CE is selected by universal suffrage, the election of the LegCo of the HKSAR may be implemented by the method of electing all the members by universal suffrage.'[90]

In 2013, activists proposed the idea of an 'Occupy Central' campaign to put pressure on Beijing and the Hong Kong government to introduce a model for universal suffrage in 2017 that is consistent with international standards of democratic elections.[91] On 15 July 2014, Chief Executive CY Leung initiated the procedure for electoral reform, and submitted a report to the NPCSC. On 31 August 2014, the NPCSC rendered its Decision on political reform in the HKSAR.[92] It stated that the 'broadly representative nominating committee' that would nominate candidates for election of the CE by universal suffrage in accordance with Article 45 of the Basic Law should be modelled on the existing Election Committee.[93] 'The nominating committee shall nominate two to three candidates... Each candidate must have the endorsement of more than half of all the members of the nominating committee.' The Decision explained as follows:

> [T]he principle that the Chief Executive has to be a person who loves the country and loves Hong Kong must be upheld. This is a basic requirement of the policy of 'one country, two systems'. It … is called for by the actual need to maintain long-term prosperity and stability of Hong Kong and uphold the sovereignty, security and development interests of the country. The method for selecting the Chief Executive by universal suffrage must provide corresponding institutional safeguards for this purpose.

The Decision of the NPCSC was met by strong protests from pro-democracy forces in Hong Kong, which condemned the electoral model as 'fake universal suffrage' because it was perceived that only pro-China political figures and no pan-democrats would be able to gain

[88] See Ming Sing, 'Public support for democracy in Hong Kong' (2005) 12 *Democratization* 244; Lynn T. White III, *Democratization in Hong Kong – and China?* Lynne Rienner, Boulder, 2016.
[89] See Chen, 'The NPCSC's interpretation in spring 2005' 255.
[90] See Albert HY Chen, 'A new era in Hong Kong's constitutional history' (2008) 38 *Hong Kong Law Journal* 1.
[91] See generally Alvin Y Cheung, 'Road to nowhere: Hong Kong's democratization and China's obligations under public international law' (2014) 40 *Brooklyn Journal of International Law* 465, 494-98; Michael C Davis, 'The Basic Law, universal suffrage and rule of law in Hong Kong' (2015) 38 *Hastings International and Comparative Law Review* 275, 289.
[92] Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016.
[93] See Article 45, Basic Law. Article 45 refers to 'the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures'.

majority support from the nominating committee so as to become candidates in the election of the CE by universal suffrage. Students and other democracy activists launched the 'Umbrella Movement' or 'Occupy Central Movement' that started in late September and continued until mid-December 2014.[94] The bill to introduce universal suffrage for the election of the CE was eventually rejected by LegCo on 18 June 2015; with the pan-democrats voting against the proposal, it failed to secure the requisite two-thirds majority for amendment of Annex I to the Basic Law. The veto meant that the existing system of the election of the CE by a 1200-member Election Committee would continue.[95]

(4) *The jurisprudence of the Basic Law*

Although the NPCSC on 23 February 1997 in its Decision on the Treatment of the Laws Previously in Force in Hong Kong[96] declared the non-adoption, inter alia, of three interpretative provisions in the Hong Kong Bill of Rights Ordinance,[97] the operative force of the Hong Kong Bill of Rights and the Hong Kong courts' power of judicial review of legislation on human rights grounds and related principles of proportionality have survived the handover. This is clear from the case law of the post-1997 era, particularly the Court of Final Appeal's decisions in *Ng Kung Siu*[98] and *Leung Kwok Hung*.[99] The Hong Kong courts' post-1997 approach to human rights protection is that the courts may review whether any legislative or executive action violates rights guaranteed by the Basic Law or by the Hong Kong Bill of Rights (which gives effect to the applicable provisions of the ICCPR, which in turn is given effect to by Article 39 of the Basic Law). The courts have interpreted Article 39 to mean that the relevant provisions of the ICCPR as incorporated into the Hong Kong Bill of Rights have the same constitutional force as the Basic Law itself, thus overriding laws that are inconsistent with these provisions.

The net effect of the coming into force of the Basic Law in July 1997 and the HKSAR courts' interpretation of their judicial review power and of Article 39 is that the grounds on which legislative and executive actions may be challenged by way of judicial review have been broadened compared to the pre-1997 era. After 1991 but before 1997, it was possible to launch such a challenge on the basis of the provisions of the Hong Kong Bill of Rights, which are identical to those provisions of the ICCPR that are applicable to Hong Kong. After 1997, a challenge may still be launched on this basis, but in addition a challenge may also be based on other provisions of the Basic Law, particularly those which confer rights that are not expressly or adequately provided for in the ICCPR.

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[94] See generally Yongshun Cai, *The Occupy Movement in Hong Kong,* Routledge 2017; Ngok Ma and Edmund W Cheng (eds), *The Umbrella Movement* Amsterdam U Press, 2019.

[95] See generally Albert HY Chen, 'The law and politics of the struggle for universal suffrage in Hong Kong, 2013-15' (2016) 3 *Asian Journal of Law and Society* 189; Cora Chan, 'Legalizing politics: An evaluation of Hong Kong's recent attempt at democratization' (2017) 16 *Election Law Journal* 296.

[96] For an English translation of this Decision, see (1997) 27 *Hong Kong Law Journal* 419.

[97] The interpretative provisions concerned were sections 2(3), 3 and 4 of the Ordinance. The invalidation of the interpretative provisions was apparently on the ground that they purported to give the Ordinance a superior status overriding other Hong Kong laws, which was said to be inconsistent with the principle that only the Hong Kong Basic Law is superior to other Hong Kong laws.

[98] (1999) 2 HKCFAR 442.

[99] (2005) 8 HKCFAR 229. See PJ Yap, 'Constitutional review under the Basic Law' (2007) 37 *Hong Kong Law Journal* 449.

The Court of Final Appeal decisions in *Ng Kung Siu*[100] and *Leung Kwok Hung*[101] provide illustrations of constitutional judicial review, employing proportionality analysis, of Hong Kong laws restricting human rights. The two cases concerned freedom of expression and freedom of assembly and procession respectively. Whereas the impugned flag desecration law was upheld as a proportionate restriction on freedom of expression for the protection of *ordre public* in *Ng Kung Siu*, one provision in the existing Public Order Ordinance was struck down in *Leung Kwok Hung*. In the latter case, the Court of Final Appeal reiterated the proportionality test for the constitutional review of laws restricting constitutional rights (other than absolute rights such as the right not to be tortured), which involves a three-stage analysis: Is the statutory restriction of the relevant right for the purpose of achieving a legitimate aim? Is the restriction 'rationally connected with one or more of the legitimate purposes'? Is the restriction 'no more than is necessary to accomplish the legitimate purpose in question' (or is the restriction so designed as to involve minimum impairment of the relevant right)? In the subsequent case of *Hysan Development*, the Court of Final Appeal, following English and European jurisprudence, added a fourth step (proportionality *stricto sensu*) to the test, which is to consider whether a 'reasonable balance' has been struck between the interests of the individual or group concerned and the 'societal benefits' flowing from the restriction on the relevant constitutional right of the individual or group, 'asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual'.[102]

The proportionality test has been applied by the Hong Kong courts not only to human rights guaranteed by the ICCPR and the Hong Kong Bill of Rights, but also to other rights guaranteed by the Basic Law, such as the right to travel,[103] and even to adjudicate on the constitutionality of a restriction on appeals from a lower court to the Court of Final Appeal.[104] In the context of the right to equality and non-discrimination, proportionality analysis has been undertaken under the 'justification test', which is structurally similar to the proportionality test. In considering a constitutional challenge on the basis of equality and non-discrimination on the ground of sexual orientation, the CFA decided in *Yau Yuk Lung*[105] that where persons in 'comparable situations' are subject to differential treatment by law, the Government must justify such differential treatment by showing that:- the differential treatment pursues 'a legitimate aim', in the sense that there is 'a genuine need for such difference'; 'the difference in treatment' is 'rationally connected to the legitimate aim'; and 'the difference in treatment' is 'no more than is necessary to accomplish the legitimate aim'. After *Hysan Development*, a fourth step has also been added to the justification test.[106]

In cases concerning socio-economic policies such as the right to social welfare and the provision of social services, the courts have adopted a less rigorous version of the proportionality or justification test by modifying the third limb of the test ('no more than necessary to accomplish the legitimate

[100] (2005) 8 HKCFAR 229.
[101] (2005) 8 HKCFAR 229.
[102] *Hysan Development v Town Planning Board* (2016) 19 HKCFAR 372, particularly paras.73, 76, 78, 135.
[103] See e.g. *Gurung Kesh Bahadur v Director of Immigration* [2002] 2 HKLRD 775; *Director of Immigration v Lau Fong* [2004] 2 HKLRD 204.
[104] *A Solicitor v Law Society of Hong Kong* (2003) 6 HKCFAR 570.
[105] (2007) 10 HKCFAR 335.
[106] See *Director of Immigration v QT* [2018] HKCFA 28; [2018] 4 HKC 403; FACV 1/2018 (4 July 2018) at [86].

aim', which may be called the standard of 'necessity') to become a standard of 'reasonableness' (or 'manifestly without reasonable foundation'). The modified test was first enunciated by the Court of Final Appeal in *Fok Chun Wa v Hospital Authority*,[107] a case concerning differential charges for obstetric services in public hospitals based on whether the woman giving birth was resident in Hong Kong. The Court of Final Appeal noted that this case concerned a matter of 'socio-economic policies'[108] and 'allocation of public funds' under conditions of 'limited financial resources'.[109] Furthermore, the differential treatment that was challenged in this case was based on residence, rather than 'core values relating to personal characteristics'[110] and involving 'the respect and dignity that society accords to a human being', such as 'race, colour, gender, sexual orientation, religion, politics, or social origin'.[111] In this domain, the court considered it appropriate that a greater 'margin of appreciation'[112] or degree of 'deference'[113] be accorded to the government. Hence in applying the third limb of the 'justification test', the court would only strike down the differential treatment if it is 'manifestly beyond the spectrum of reasonableness' or 'manifestly without reasonable foundation'.[114] Applying this test, the court upheld the differential hospital fees in this case. Subsequently, this modified version of the proportionality test was also applied by the Court of Final Appeal in *Kong Yunming v Director of Social Welfare*,[115] but with the outcome of the impugned restriction (also based on residence) of the right to social welfare being struck down in that case. In *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs*,[116] the application of the proportionality test was relaxed by the CFA on the ground that the constitutional issues raised by the impugned legislation involved a political question or a political judgment.

The operation of the HKSAR's political system has generated a body of case law in which the courts have recognised that there exists a separation of powers within this system.[117] For example, as regards the CE's power under the Basic Law to issue 'executive orders',[118] it has been held that the Public Service (Administration) Order issued by the CE for the purpose of the regulation of the civil service was valid,[119] but the Law Enforcement (Covert Surveillance Procedure) Order 2005 was unconstitutional as fundamental rights guaranteed by the Basic Law may only be restricted by law and not by executive order.[120] As the Basic Law vests the judicial power of the SAR in the courts, it has been held that legislation that conferred power on the CE to determine the length of sentence of under-aged offenders convicted for murder was unconstitutional.[121] Drawing upon

[107] (2012) 13 HKCFAR 409.
[108] *Fok Chun Wa v Hospital Authority,* para. 61, 65.
[109] *Fok Chun Wa v Hospital Authority,* para. 70.
[110] *Fok Chun Wa v Hospital Authority,* para. 78.
[111] *Fok Chun Wa v Hospital Authority,* para. 77.
[112] *Fok Chun Wa v Hospital Authority,* para. 61.
[113] *Fok Chun Wa v Hospital Authority,* para. 62.
[114] *Fok Chun Wa v Hospital Authority,* para. 76.
[115] (2013) 16 HKCFAR 950.
[116] (2017) 20 HKCFAR 353.
[117] See generally PY Lo and Albert HY Chen, 'The judicial perspective of "separation of powers" in the Hong Kong Special Administrative Region of the People's Republic of China' (2018) 5(2) *Journal of International and Comparative Law* 337-362.
[118] Article 48(4).
[119] *Association of Expatriate Civil Servants of Hong Kong v Chief Executive* [1998] 1 HKLRD 615.
[120] *Leung Kwok Hung v Chief Executive*, CACV 73/2006 (CA, 10 May 2006); *Koo Sze Yiu v Chief Executive* (2006) 9 HKCFAR 441.
[121] *Yau Kwong Man v Secretary for Security*, HCAL 1595/2001 (CFI, 9 Sep 2002).

jurisprudence in other common law jurisdictions on judicial non-intervention in the internal operation of Parliament (due to considerations of separation of powers and the need to enable the legislature to perform its constitutional functions effectively), the HKSAR court decided in one case not to intervene in an inquiry conducted by a LegCo committee,[122] and in another case not to intervene in the decision of the President of LegCo to put a stop to filibuster.[123] Referring to rules in Hong Kong's colonial LegCo and in the British Parliamentary system that limit the right of legislators to propose an increase in public spending, the Hong Kong court has upheld a provision in LegCo's Rules of Procedure to limit a legislator's right to propose an amendment to a bill if the amendment has a charging effect on public revenue.[124] The doctrine of separation of powers was also directly relevant to the controversy over the constitutionality of the Emergency Regulations Ordinance which confers law-making powers on the Chief Executive in Council during occasions of emergency or public danger.[125]

(5) *The attempt to introduce an extradition bill*[126]

On 9 June 2019, Hong Kong became the focus of international attention as hundreds of thousands of demonstrators marched to oppose the imminent enactment of a legislative bill (the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, hereafter referred to as 'the Extradition Bill').[127] The Extradition Bill would introduce a rendition arrangement as between Hong Kong and other parts of China (including mainland China, Taiwan and Macau), as well as new extradition arrangements as between the HKSAR and over 170 States with which the HKSAR has not yet entered into extradition treaties.[128] This Bill not only led to the largest protests in Hong Kong's history, it also brought about the most serious crisis of governance in the HKSAR.

The saga began with a murder suspected to have been committed by a Hongkonger in Taiwan. In March 2018, Chan Tong-kai, a 20-year old Hong Kong permanent resident travelling with his girlfriend to Taiwan on holiday, was suspected of having murdered his girlfriend and then fleeing to Hong Kong. He was subsequently arrested in Hong Kong and prosecuted for money laundering. Taiwan authorities requested Chan's extradition to Taiwan. In any event, under the existing law, Hong Kong courts have no jurisdiction to try a murder case where the murder has

[122] *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555.
[123] *Leung Kwok Hung v President of the Legislative Council* (2014) 17 HKCFAR 841.
[124] *Leung Kwok Hung v President of the Legislative Council* [2007] 1 HKLRD 387.
[125] See *Kwok Wing Hang and others v Chief Executive in Council and another* [2019] HKCFI 2820, CACV 541/2019, note 147 below and the accompanying text.
[126] This section of this article draws on Albert HY Chen, 'A perfect storm: How the proposed law on Hong Kong-Mainland China rendition was aborted', *VerfBlog,* 19 June 2019, https://verfassungsblog.de/a-perfect-storm/. See also Cora Chan, 'Demise of "One country, two systems"?: Reflections on the Hong Kong rendition saga', *VerfBlog,* 28 June 2019, https://verfassungsblog.de/demise-of-one-country-two-systems/. See also the revised versions of these articles in (2019) 49 *Hong Kong Law Journal* 419-430, 447-458.
[127] https://www.legco.gov.hk/yr18-19/english/bills/b201903291.pdf (last accessed 28 December 2019)..
[128] See generally Albert Chen, 'A commentary on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019', http://researchblog.law.hku.hk/search?q=commentary+fugitive+offenders (first published on 3 May 2019).

been committed outside Hong Kong.[129] It seemed therefore, that justice would require Chan's extradition to Taiwan for trial.

Hong Kong's law of extradition was contained in the Fugitive Offenders Ordinance ('FOO') enacted in April 1997. This Ordinance enabled extradition to be practised as between Hong Kong and foreign States with which the HKSAR has entered into extradition treaties. Since 1997, the HKSAR has entered into extradition treaties with 20 countries;[130] more than 100 persons – largely foreign nationals – have been surrendered by Hong Kong pursuant to these treaties, with the USA being the destination of the largest number of surrenders.[131] However, it was expressly provided in the FOO that it is not applicable to 'any other part of the PRC' (including mainland China, Taiwan and Macau). Apparently, at the time of enactment of the Ordinance, it was considered that given the vast differences between Hong Kong's common-law based legal system and the socialist legal system in mainland China, Hong Kong was not yet ready to enter into rendition arrangements with the mainland.

Given the exclusion of other parts of China from the application of the FOO, the Hong Kong government found that there was no legal basis for Chan Tong-kai's extradition to Taiwan. Chief Executive Carrie Lam henceforth decided to embark on a legislative exercise to introduce into the FOO a mechanism of making ad-hoc extradition arrangements on a case-by-case basis (in the absence of extradition treaties) with any foreign jurisdiction – including more than 170 states with which Hong Kong has not entered into any extradition treaty, as well as mainland China, Taiwan and Macau. The original version of the proposal was first published on 13 February 2019 and discussed in the Legislative Council's Panel on Security on 15 February 2019.[132] After some consultation and taking into account the concerns of the business community regarding rendition to the Mainland for business-related offences which they may have committed in the past, the proposal was refined; the Bill was gazetted on 29 March 2019 and introduced into the Legislative Council (LegCo) on 3 April 2019.[133]

Hong Kong politicians and civil society became highly polarised since the introduction of the Bill, with the 'pro-China camp' (the 'pro-Establishment' camp) supporting the Bill and the 'pro-democracy camp' (the 'pan-Democrats') strongly opposed to the Bill. The momentum of protests

[129] Under Hong Kong's existing law, the courts have extraterritorial jurisdiction over a number of criminal offences, but they do not include murder: See *Archbold Hong Kong 2019* (Sweet and Maxwell), sections 2-111 – 2-155F. The provisions on homicide in Hong Kong's Offences against the Person Ordinance were largely modelled on the provisions on homicide in the Offences against the Person Act 1861 (UK), particularly sections 1 (murder), 4 (conspiring or soliciting to commit murder), 5 (manslaughter), 6 (indictment for murder or manslaughter), 7 (excusable homicide) and 10 (provision for the trial of murder and manslaughter where the death or cause of death only happens in England or Ireland). However, section 9 (on the extraterritorial jurisdiction of the British courts over murder or manslaughter committed abroad by a British subject) of the 1861 Act does not have any counterpart in the Hong Kong Ordinance. I am indebted to Dr PY Lo for his drawing my attention to this point.

[130] See www.doj.gov.hk/eng/laws/table4ti.html . (last accessed 28 December 2019)

[131] See generally Glenville Cross, 'Fugitive surrender: Rights and responsibilities', *China Daily*, 12 June 2019, https://www.chinadailyhk.com/articles/186/73/64/1560307116859.html .

[132] See https://www.legco.gov.hk/yr18-19/english/panels/se/papers/se20190215cb2-767-3-e.pdf . (last accessed 28 December 2019)

[133] See the government's press release of 26 March 2019: https://www.info.gov.hk/gia/general/201903/26/P2019032600708.htm . For the Legislative Council Brief, see https://www.legco.gov.hk/yr18-19/english/bills/brief/b201903291_brf.pdf . (last accessed 28 December 2019)

against the Bill built up gradually, with the first demonstration against it on 31 March 2019, followed by another demonstration of a larger size on 28 April (with 130,000 participants as estimated by the organisers and 22,800 estimated by the police).

Many politicians and members of the legal community[134] opposed the Bill on the ground that it would put innocent people in Hong Kong at risk of being extradited to face trial in the Mainland. The legal system in the Mainland was not trusted by many Hong Kong people, who doubt whether it would provide a fair trial for the accused. There were also concerns that once the rendition process is initiated in a case by the Chief Executive at the request of Beijing, there is little which the Hong Kong courts can do to reject the request. This is because the existing law on extradition only requires the requesting state to provide written evidence that would constitute a prima facie case against the accused, and the accused cannot adduce evidence or call witnesses to prove his or her innocence. Furthermore, some people who opposed the Bill did not fully understand the scope of its application. Some were fearful that they could be extradited to mainland China even if the alleged crimes were committed in Hong Kong rather than in mainland China.[135] Others worried that they might be framed and falsely accused for the purpose of extradition to mainland China.

The LegCo formed a Bills Committee to study the Bill which met for the first time on 17 April 2019.[136] However, the Committee failed to operate because the pan-Democrats filibustered at its first two meetings leading to its failure to elect a Chairman, and the pro-China legislators then convened further meetings of the Committee whose legality and validity were contested by the pan-Democrats.[137] On 20 May 2019, the government decided to by-pass the Bills Committee and to commence the final stage of the legislative process on 12 June. In an attempt to compensate for the lack of deliberations on the Bill in the Bills Committee, the LegCo Panel on Security was

[134] For the views of the legal community, see, e.g. 'Observations of the Hong Kong Bar Association on the Fugitive Offenders and Mutual legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019', 2 April 2019, available at https://www.hkba.org/events-publication/submission-position-papers; Law Society of Hong Kong, 'Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, Submission', 5 June 2019, available at http://video3.mingpao.com/typeset/stb/inews/20190605/20190605law.pdf ; 'Withdraw the Fugitive Offenders Bill', joint statement of all members of the Election Committee Subsector Election (Legal), 8 April 2019, https://www.change.org/p/%E5%85%A8%E9%AB%94%E6%B3%95%E5%BE%8B%E7%95%8C%E9%81%B8%E5%A7%94-%E6%92%A4%E5%9B%9E%E9%80%83%E7%8A%AF%E6%A2%9D%E4%BE%8B%E8%8D%89%E6%A1%88-withdraw-the-fugitive-offenders-bill . On 6 June 2019, more than a thousand lawyers joined a 'silent march' against the Bill; this was the fifth march of its kind since 1997: see '"Record 3,000" Hong Kong lawyers in silent march against controversial extradition bill', *South China Morning Post*, 6 June 2019, https://www.scmp.com/news/hong-kong/politics/article/3013461/thousands-hong-kong-lawyers-launch-silent-march-against .

[135] An article published in the left-wing Wen Wei Po on 23 May 2019, quoting from an 'authoritative source', seems to suggest that rendition to the mainland may be applicable to certain crimes committed by people outside mainland China: see 'An authoritative source explains the spirit of Mr Han Zheng's speech' (權威人士解讀韓正講話精神), Wen Wei Po, 23 May 2019.

[136] See https://www.legco.gov.hk/yr18-19/english/rescindedbc/b201903291/general/b201903291.htm (last accessed 28 December 2019).

[137] After the first two meetings of the Bills Committee, the 'pro-China' camp of legislators secured a direction from LegCo's House Committee to replace the (temporary) chairman of the Bills Committee (who belonged to the pan-Democrat camp) by a LegCo member from the pro-China camp. Then both the pan-Democrats and the pro-China camp purported to convene their own Bills Committee meetings twice.

convened to discuss the Bill on 31 May-5 June.[138] A slightly revised package had been announced by the government on 30 May 2019 to narrow down the offences covered by the proposed extradition arrangement and to try to improve the safeguards for the rights of the accused.[139]

The social movement against the Bill culminated in a march of hundreds of thousands of people on 9 June 2019 (with 1.03 million participants as estimated by the organisers and 240,000 estimated by the police).[140] Despite the fact that the demonstration on 9 June 2019 was the largest of its kind since the demonstration against the national security bill in 2003, Chief Executive ('CE') Carrie Lam decided to press ahead with the final stage of the legislative process that was scheduled to begin with the commencement of the Legislative Council debate on the Bill on 12 June.[141] On the morning of that day, Hong Kong's downtown area and streets surrounding the Legislative Council building were occupied by tens of thousands of demonstrators. In the afternoon, the protest escalated into what the Hong Kong police called a 'riot' (a label which opponents of the Bill strongly contested),[142] to which the police responded with large volumes of tear gas, pepper balls, baton rounds and even rubber bullet shots and bean bag shots. The President of the Legislative Council decided that the circumstances were such that it was impossible for the Council to begin the series of meetings on the Bill that were originally scheduled for 12-20 June, which would consist of several days of debates on the Bill and the Bill being put to a vote on 20 June. Then, on 15 June, CE Carrie Lam announced that the legislative process on the Bill would be immediately suspended.[143]

Even after the suspension of the Bill, an even larger protest occurred on 16 June (with close to two million participants as estimated by the organisers and 338,000 estimated by the police) to demand complete withdrawal of the Bill and to protest against police use of excessive force against demonstrators on 12 June. In response CE Lam publicly apologised on 18 June for

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[138] See https://www.legco.gov.hk/yr18-19/english/rescindedbc/b201903291/papers/b201903291_ppr.htm (last accessed 28 December 2019).

[139] See the press releases dated 30 May 2019: https://www.info.gov.hk/gia/general/201905/30/P2019053000811.htm (Secretary for Security's speech in Chinese); https://www.info.gov.hk/gia/general/201905/30/P2019053000960.htm (replies to questions in English). These webpages and those cited below were last visited on 16 January 2020.

[140] The number of people who participated in this march and subsequent marches is difficult to estimate and has been a contested issue in Hong Kong. As regards the number of participants in the 9 June march, the estimated numbers include 1.03 million (estimate by the organisers of the march – the Civil Human Rights Front (CHRF)), between 810,000 and 1.08 million (by Prof. HUI Shu Yuen Ron), 240,000 (by the police), and 199,000 (by Prof. Francis T Lui). The estimated numbers in the 16 June march are 2 million (CHRF), 1.5 million (Prof. Hui), 400,000 (Prof. Lui) and 338,000 (the police). For comparative purpose, the estimated numbers at the annual 1 July march in 2019 may be noted: 550,000 (CHRF), 265,000 (Prof. Paul SF Yip and Prof. Edwin T Chow), 215,000 (Prof. Lui) and 190,000 (the police). The figures here appear in Ming Pao and other Hong Kong newspapers on the relevant dates.

[141] See the Chief Executive's speech at her press conference on 10 June 2019: https://www.info.gov.hk/gia/general/201906/10/P2019061000615.htm .

[142] Subsequently, the Commissioner of Police at a press conference on 17 June 2019 clarified that the use of the term 'riot' only referred to the behaviour of some violent protesters and not to all or most of the participants in the protest on 12 June 2019: see https://www.news.gov.hk/eng/2019/06/20190617/20190617_224726_031.html.

[143] For the full text of the CE's statement, see https://www.info.gov.hk/gia/general/201906/15/P2019061500707.htm. The government subsequently explained that all work on the Bill had been stopped, and stated that it would accept that the Bill would lapse upon the expiration of the current term of the Legislative Council in summer 2020. However, opponents were not satisfied and insisted that the Bill must be 'withdrawn'.

'deficiencies in the work of the HKSAR government' on the legislative amendment exercise, which 'has led to controversies, disputes and anxieties in society'.[144] However, as the CE did not accede to the principal demands of the protestors (including the withdrawal of the Bill, the lifting of the label of 'riot' from the 12 June protest, non-prosecution of protestors, and the establishment of an independent commission of inquiry to investigate the incident), civil unrest and sporadic rioting has continued in Hong Kong even after legislative proceedings on the Bill had been shelved. For example, crowds of protestors laid siege to the Police Headquarters in Wanchai on 21 and 26 June 2019. On 1 July 2019 they stormed the Legislative Council building and damaged its facilities to an extent that the legislature would not be able to meet in the venue for the next few months. On 21 July 2019 the building of the Liaison Office of the Central Government was besieged, and the national emblem on the building was defaced. Public outcry followed massive assaults on the same evening by suspected triad society members on protestors and other commuters at the Yuen Long subway station with suspected acquiescence or even collusion by the police.

On 4 September 2019, the CE announced the formal withdrawal of the Extradition Bill and the establishment of an 'investigative platform to look into the fundamental causes of the social unrest and suggest solution'[145] However, this still fell short of what the protestors demanded at that point of time. Three months from the first community-wide protests, the movement had evolved into one for, amongst other things, universal suffrage for the elections of the CE and all members of the legislature, and independent investigation into the police's use of force against protestors. Between September and November 2019, the use of force on the part of both radical protestors and the police escalated, culminating in violent clashes on the campuses of the Chinese University of Hong Kong[146] and the Hong Kong Polytechnic University[147] in November. Meanwhile, on 4 October 2019, the CE and Council relied on the Emergency Regulations Ordinance (Cap 241) to issue the Prohibition on Face Covering Regulation (Cap 241K), which was purportedly aimed at facilitating police investigation and deterring violent acts by masked protestors. On 18 November 2019, the Hong Kong Court of First Instance found parts of the Ordinance and Regulation unconstitutional.[148] This judgment provoked rebuke from a spokesman of the Legislative Affairs Commission of the NPCSC, who stated that the NPCSC

[144] Government of HKSAR Press Releases, 'Opening remarks by the Chief Executive, Mrs Carrie Lam, at a media session this afternoon (June 18 [2019])' https://www.info.gov.hk/gia/general/201906/18/P2019061800812.htm; and Government of HKSAR Press Releases, 'Transcript of remarks by the Chief Executive, Mrs Carrie Lam, at a media session this afternoon (June 18 [2019])' https://www.info.gov.hk/gia/general/201906/18/P2019061800950.htm.

[145] SCMP reporters, 'Hong Kong leader Carrie Lam announces formal withdrawal of the extradition bill and sets up a platform to look into key causes of protest crisis' *South China Morning Post* 4 September 2019 https://www.scmp.com/news/hong-kong/politics/article/3025641/hong-kong-leader-carrie-lam-announce-formal-withdrawal. The bill was formally withdrawn from LegCo on 23 Oct 2019.

[146] Kris Cheng & Holmes Chanm, 'CUHK turns into battleground between protesters and police as clashes rage on across Hong Kong universities' *Hong Kong Free Press* 12 November 2019 https://www.hongkongfp.com/2019/11/12/cuhk-turns-battleground-protesters-police-clashes-rage-across-hong-kong-universities/.

[147] Chris Lau and Kinling Lo, 'Hong Kong protests: police to send negotiators and psychologists to PolyU to convince holdouts to come out' *South China Morning Post* 25 Nov 2019 https://www.scmp.com/news/hong-kong/politics/article/3039293/hong-kong-protests-polyu-wants-peaceful-humane-end-campus.

[148] *Kwok Wing Hang and others v Chief Executive in Council and another* [2019] HKCFI 2820. The court's decision has been appealed to the Court of Appeal (CACV 541/2019), which at the time of writing has not yet rendered its judgment.

was the only body that could decide whether a Hong Kong law complied with the Basic Law,[149] a position that was at odds with the long-standing practice of constitutional review by post-handover Hong Kong courts. At the time of writing, the judgment is on appeal before the Hong Kong Court of Appeal.

The landslide victory of the pan-democrats in the Hong Kong District Council elections on 24 November 2019,[150] coupled with the US enactment of the Hong Kong Human Rights and Democracy Act which many protestors in the anti-extradition movement had lobbied the Congress to pass,[151] seemed to have relieved the tension in society,[152] although at the time of finalising this chapter there are still small-scale violent demonstrations and larger-scale peaceful ones from time to time. The HKSAR government experienced a most severe crisis of governance.

V. Concluding Reflections

Although Ghai's treatise on the Hong Kong Basic Law was published more than two decades ago, the conceptual framework developed by him to study and analyse the constitutional operation of 'One country, two systems' is still basically valid and highly relevant today. Ghai's work demonstrates that the principal challenge for 'One country, two systems' is how to maintain in the HKSAR a legal system that is based on English common law and that seeks to protect civil liberties according to the norms of international human rights law, while mainland China continues to practise an authoritarian mode of rule that is incompatible with some of the basic values and aspirations of Hong Kong people. As this chapter shows, the possible contradictions and tensions between the 'two systems' that Ghai identifies in his scholarship on Hong Kong constitutional law have actually become more apparent and intensified in the last two decades.

Since the publication in 1999 of the last edition of Ghai's book *Hong Kong's new constitutional order*, the tensions and conflicts arising from the co-existence and interaction of the 'two systems' have been evidenced in the promulgation of four more interpretations of the Basic Law by the NPCSC, the failed attempts to legislate on national security and on rendition of fugitive offenders as between Hong Kong and the Mainland, the continuing struggles for Hong Kong's democratisation culminating in 'Occupy Central', and the increasing polarisation of the community, particularly during 'Occupy Central' and the social movement against the extradition bill. Legal controversies in recent years also testify to the difficulty of mutual accommodation as between the two systems. For example, the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Colocation) Ordinance 2018, which allows Chinese immigration and

[149] https://www.scmp.com/news/hong-kong/politics/article/3038325/hong-kong-judges-slammed-chinas-top-legislative-body.

[150] Under the influence of the social movement against the extradition bill, the pan-democrats secured an unprecedented victory in the District Council election on 24 Nov 2019, in which they won 57% of the popular votes and 85% of the seats (see Ming Pao (newspaper in Chinese), 26 Nov 2019).

[151] The Act (S. 1838, Pub.L. 116-76) was passed by both Houses of Congress in November 2019 and was signed into law by President Trump on 27 Nov 2019.

[152] Jeffie Lam, Sum Lok-kei, Ng Kang-chung, 'Hong Kong elections: pro-democracy camp wins 17 out of 18 districts while city leader says she will reflect on the result' *South China Morning Post* 25 Nov 2019 https://www.scmp.com/news/hong-kong/politics/article/3039151/hong-kong-elections-tsunami-disaffection-washes-over-city.

customs officers to be stationed in a port area in the West Kowloon express rail station, was criticised as being inconsistent with the Basic Law provision on the non-application of mainland laws in Hong Kong.[153] The Court of Final Appeal's judgment[154] on the lenient sentencing of some Occupy Central activists was criticised by opponents of the civil disobedience movement. Other Occupy Central activists have been convicted by the District Court but the cases are being appealed.[155] In the meantime, pro-independence activists barred from running in Legislative Council elections since 2016 litigated to challenge the decisions of returning officers.[156] And prosecutions of protestors in the anti-extradition bill movement are being heard in the courts.

The 2019 extradition controversy revealed the difficulties of preserving Hong Kong's autonomy and liberal values within China's one-party regime. The lack of a fully democratic political system in Hong Kong, for example, in part accounts for why the extradition dispute arose and for the inability of the Hong Kong government to resolve the crisis.[157] The extradition saga marks an important chapter in the ongoing constitutional experiment of 'One country, two systems': it shows that the approaches that have hitherto been adopted by Beijing and the people and institutions of Hong Kong as well as the institutional arrangements governing the relationship between the two jurisdictions are probably in need of major overhaul. Yet what those reforms should be and how they could be achieved are far from clear. In navigating these and other complex questions in the unprecedented journey of 'One country, two systems', we will continue to derive guidance and draw inspiration from Ghai's exemplary work.

[153] The Hong Kong Bar Association criticised the scheme as unconstitutional, but the Court of First Instance upheld the scheme in *Leung Chung Hang v President of Legislative Council* [2018] HKCFI 2657. As of January 2020, the case is on appeal before the Court of Appeal. The possible presence of mainland law enforcement officers in Hong Kong engaged in 'cross-border enforcement of mainland law' has been politically sensitive. In early 2016, the 'Lee Po incident' touched a nerve in the Hong Kong community. Mr Lee Po of the bookstore Causeway Bay Books, which was believed to have published books considered objectionable by the mainland authorities, disappeared from Hong Kong in late 2015, fuelling speculation that he had been abducted by Mainland policemen. His subsequent re-appearance in Hong Kong and claim that he had voluntarily gone to Mainland did not remove lingering doubts. For the aftermath, see 'Beijing and Hong Kong sign deal on notification procedures when residents are detained', *South China Morning Post*, https://www.scmp.com/news/hong-kong/politics/article/2124316/beijing-and-hong-kong-sign-deal-notification-procedures-when (first published 14 December 2017).

[154] *Secretary for Justice v Wong Chi Fung* [2018] HKCFA 4 (6 Feb 2018).

[155] *HKSAR v Tai Yiu Ting* [2019] HKDC 450.

[156] See *Chan Ho Tin* [2018] HKCFI 345; *Chow Ting v Teng Yu Yan* [2019] HKCFI 2135 (2 Sept 2019); *Au Nok Hin v Teng Yu Yan Anne (the Returning Officer of the Hong Kong Constituency) and another* [2019] HKCFA 50, FAMV 307/2019 (20 Dec 2019); *Lau Wing Hong v Chan Yuen Man* [2019] HKCFI 2287 (13 Sept 2019).

[157] Chan, 'Demise of "One country, two systems"?' (n 126 above).