

CHINA'S SOCIALIST UNITARY STATE AND ITS CAPITALIST SPECIAL ADMINISTRATIVE REGIONS: "ONE COUNTRY, TWO SYSTEMS" AND ITS DEVELOPMENTAL IMPLEMENTATION

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The People's Republic of China is, according to its Constitution, "a unitary multi-national state" based on the socialist system. The Constitution also allows the state to establish "special administrative regions" in light of "specific conditions." This provision backs the principle of "One Country, Two Systems" that China applies to achieve territorial reunification, through allowing the relevant territories to continue with their capitalist system and way of life. This principle was operationalised in the cases of Hong Kong and Macau, resulting in the establishment of two Special Administrative Regions, each of which governed by a "Basic Law" prescribing the systems of the relevant region, when China resumed the exercise of sovereignty over them on 1 July 1997 and 20 December 1999 respectively. This article considers the two decades of constitutional and legal interactions between the Chinese "Central Authorities" and these sub-national Special Administrative Regions, so as to highlight the socialist mechanisms of central control that have been applied constitutionally, politically, economically and socially in Hong Kong and Macau to ensure that "One Country, Two Systems" with not be "distorted," that national sovereignty, security and development interests are safeguarded, and that these regions will play a positive role in national economic development. It is clear from this study that the implementation of "One Country, Two Systems" in the two regions has been "developmental," with the law serving the interests of the "Centre" under the leadership of the Communist Party of China.

Keywords: People's Republic of China; Hong Kong; socialist state; unitary state; Special Administrative Region; "One Country, Two Systems"; central-local relations; mechanisms of central control.



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Introduction

China has advanced the principle of "One Country, Two Systems" (OCTS principle) for the peaceful reunification of territories with the motherland since the 1980s. In 1997 and 1999, the OCTS principle was put into practice by the establishment of the Special Administrative Regions (SARs) of Hong Kong and Macau following the return of those territories from British and Portuguese administration respectively.

Unlike the socialist approach dealing with the question of "nationalities" hitherto, the OCTS principle is innovative as a political, institutional and constitutional initiative, whereby a socialist state led by the communist party vanguard, allows a territory to be administered by its local inhabitants with a "high degree of autonomy" and remaining in the meantime "capitalist" both in the economy and the way of life. And, to ensure peaceful transition of the resumption of exercise of sovereignty and assure the local inhabitants, the policies following the OCTS principle were set out in declaratory writing, together with a commitment that they would be stipulated in a "Basic Law" and remain unchanged for 50 years.¹

¹ See the Joint Declaration of the Government of United Kingdom of Great Britain and the Government of the People's Republic of China on the Question of Hong Kong (19 December 1984), 1399 U.N.T.S. 33; 23 I.L.M. 1366 (1984); and the Joint Declaration of the Government of the Republic of Portugal and the Government of the People's Republic of China on the Question of Macao (26 March 1987), 1498 U.N.T.S. 195; 5 *Asian Ybk. of Intl. L.* 567 (1995).



The commencement of the Basic Laws in respect of the Hong Kong Special Administrative Region (HKSAR) in 1997 and in respect of the Macau Special Administrative Region (MSAR) in 1999 respectively began two decades of constitutional and legal interactions,² if not struggle, between “the Central Authorities” and the SARs principally through the medium of the sub-national Basic Laws, and at some critical junctures by the intervening reliance of the national Constitution.³

This article seeks to highlight the socialist thinking and mechanisms of central control that have been applied constitutionally, politically, economically and socially in Hong Kong and Macau to ensure –


- that the “One Country, Two Systems” policy would not be “distorted”;
- that the “intentions” underlying the Basic Law would be observed;
- that national sovereignty, national security and national development interests would be safeguarded; and
- that the Special Administrative Regions would play a positive role in national economic development.

The Centre-initiated mechanisms have thus far included –

- the enlivening and timely application of the power of interpretation of the Basic Law by the Standing Committee of the National People’s Congress (NPCSC) (the standing body of the highest organ of state power, the National People’s Congress (NPC));
- the establishment of a liaison office of the Central People’s Government (CPG) in the SAR of cadres deployed there to monitor, liaise and co-ordinate political, social and cultural factions and units in the SAR through United Front and other works;
- the support and promotion of a form of “Chief Executive-led” government in the SAR to the exclusion of the practice of other governmental approaches such as a parliamentary system or a separation of powers/check and balance system;
- the inclusion of the SARs into the five-year programmatic national economic planning system, and the social and way of life integration of the SARs with their neighbouring cities (like the “Greater Bay Area” concept and outline development plan) and of the residents of the SARs with their Chinese Mainland compatriots (like the introduction of a resident card for those residents living in the Chinese Mainland to enable them to enjoy state benefits); and
- the enactment, for the HKSAR, of a national law to safeguard national security there.

² The Basic Law of the HKSAR and the Basic Law of the MSAR are structurally identical but have differences in drafting, including in relation to provisions protective of rights and freedoms of residents. For a comparison of the two Basic Laws, see Albert H.Y. Chen & Pui Yin Lo, *The Constitutional Orders of “One Country, Two Systems”: A Comparative Study of the Visible and Invisible Bases of Constitutional Review and Proportionality Analysis in the Chinese Special Administrative Regions of Hong Kong and Macau in The Invisible Constitution in Comparative Perspective* 230 (Rosalind Dixon & Adrienne Stone eds., 2018).

³ For comparisons of the legal systems of the HKSAR and the MSAR in the English language, see Ignazio Castellucci, *Legal Hybridity in Hong Kong and Macau*, 57(4) McGill L.J. 665 (2011); and Eric C. Ip, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (2019).



Reactions in the two SARs to interventions of the Central Authorities have differed. Legal elites and pro-democracy politicians in the HKSAR have reacted strongly against the Centre's interventions and sought to enlist the courts of the HKSAR to produce jurisprudence protective of the "two systems" element of the "One Country, Two Systems" principle and resisted the introduction, maintenance and propagation of socialist approaches that are seen as "corrosive" of Hong Kong's common law-based and internationalist legal and judicial systems.⁴ The response of the ruling elite in the MSAR, by contrast, has been patriotically supportive.⁵ Hence this article will primarily look into the moves and exchanges between the Central Authorities, the HKSAR's Chief Executive and the Government he or she leads, and the HKSAR's civil society in relation to central control to illustrate the extent that the socialist legacy in matters of legality have continued in China in the four decades since the adoption by the Communist Party of China of the policy of "reform and opening up."

1. The People's Republic of China as a Socialist Unitary State

The People's Republic of China (PRC) was founded in 1949 as a "people's democratic state" that implements "people's democratic dictatorship" under the leadership of the working class, opposing imperialism, feudalism and bureaucratic capitalism, in struggle for the independence, democracy, peace, unification, strength and prosperity of China.⁶

At the time of foundation, the PRC had not reunited all Chinese territories. The island of Hainan was liberated in May 1950. The "Seventeen Points Agreement," which paved the way for the peaceful liberation of Tibet, was signed and sealed in May 1951. By the time the first Constitution of the People's Republic of China (PRC Constitution)

⁴ See, generally, Pui Yin Lo, *An Internationalist, Consequentialist and Non-progressive Court: Constitutional Adjudication in Hong Kong (1997–2009)*, 2 City U. H.K. L. Rev. 215 (2010).

⁵ The MSAR has fulfilled in 2009 its "obligation" to enact locally legislation safeguarding national security; see Section 3.5 below. The Government of the MSAR has also maintained a conservative policy of not admitting into Macau politically active or controversial Hong Kong residents as well as journalists based in Hong Kong or of particular news organizations, on the ground that their presence there may jeopardise the public security of this SAR; see Johannes M.M. Chan, *Paths of Justice* 212–217 (2018); and Hong Kong Journalists Denied Entry to Macau, Committee to Protect Journalists, 28 August 2017 (Mar. 5, 2021), available at <https://cpj.org/2017/08/hong-kong-journalists-denied-entry-to-macau/>. Moves have been made to orient the systems of the MSAR from Portuguese influence, including the dismissal of two Portuguese legal advisers to the MSAR's legislature in 2018 and the enactment of legislation also in 2018 to ensure that only judges who are Chinese nationals may hear and determine cases with a national security dimension; see Farah Master, *In Macau, Portuguese Elites Feel Squeezed Out by Chinese Influence*, Reuters, 5 October 2018 (Mar. 5, 2021), available at <https://www.reuters.com/article/us-macau-china-law/in-macau-portuguese-elites-feel-squeezed-out-by-chinese-influence-idUSKCN1MF00Q>.

⁶ Common Programme of the Chinese People's Political Consultative Conference, adopted by the First Plenary Session of the CPPCC on 29 September 1949, Art. 1. The Common Programme can be regarded as a provisional constitutional instrument of the PRC. An English translation is available at <http://www.lawinfochina.com/display.aspx?id=13212&lib=law>.



was adopted on 20 September 1954 by the First Session of the First NPC,⁷ the territory of Inner Mongolia was already a regional ethnic autonomous region,⁸ with Xinjiang and Tibet gradually following suit in the next decade.⁹ Yet, at the time, the Government of the Republic of China of the Kuomintang that the Chinese People's Liberation Army of the CPC defeated in the Civil War of 1945–1949 had relocated to the island of Taiwan and its associated territories of Penghu, Kinmen and Matsu. And Hong Kong and Macau remained under the colonial rule of Britain and Portugal respectively. Nevertheless, in the course of the founding of the People's Republic and the drafting of its constitutional documents, the question of whether the new State should adopt a form of a federalist structure similar to that the Soviet Union of constituent republics was debated. Having referred to the writings of Marx, Engels, Lenin and Stalin and considering the formation of the Soviet Union as a case of the fragmentation of Russian state after multiple revolutions, the decision was made to adopt the system of a unitary state under which regional autonomy would be implemented in areas with a particular national minority population.¹⁰

Reunification of the Motherland was firmly in the agenda of the CPC in the drafting of the current PRC Constitution in the early 1980s. Ye Jianying, the Chairman of the NPCSC, made a public statement in 1981 calling for a repeat in the co-operations between the CPC and the Kuomintang, commencement of exchanges between the Chinese Mainland and the Taiwan region, and reunification on terms that the Taiwan region would have a degree of autonomy as a "Special Administrative Region," retain

⁷ Constitution of the People's Republic of China (1954), which, in its Preamble, stated that it was based on the Common Programme, and in Article 3, stated that the PRC "is a single multi-national state," with "regional autonomy" being applicable to areas of "compact communities" of "national minorities." An English translation is available at <http://en.pkulaw.cn/display.aspx?cgid=52993&lib=law>.

⁸ The CPC's approach to regional ethnic autonomy approximated with that practised by Stalin in the Soviet Union than the resolution to the problem of "nationalities" advocated by Lenin in his "Last Testament: Letters to the Congress – The Question of Nationalities or Autonomisation"; see Beryl Williams, *Lenin and the Problem of Nationalities*, 15(4-6) Hist. Eur. Ideas 611 (1992); and Joseph Lian, *How Lenin Considered the Problem of "Nationalities" Back Then*, Hong Kong Econ. J., 16 July 2009 (in Chinese) (Mar. 5, 2021), available at http://hktext.blogspot.com/2009/07/blog-post_8235.html. Shiyuan Hao considered that the Soviet Union made "premature judgments about the development course for socialist construction" and handled the problem of nationalities "in a radical and simplistic manner," and then promoted CPC's leadership work under the praxis of "human development" by way of "socialism with Chinese characteristics" through implementing regional national autonomy in areas with concentrations of minority nationalities, quoting Mao Zedong's words for continuing "to study Stalin diligently wherever he is right," while making sure that the study "is linked with the Chinese reality"; see Shiyuan Hao, *How the Communist Party of China Manages the Issue of Nationality: An Evolving Topic* 1 (2016).

⁹ See in the case of Xinjiang, State Council Information Office, Cultural Protection and Development in Xinjiang (November 2018) (Mar. 5, 2021), available at http://english.www.gov.cn/archive/white_paper/2018/11/15/content_281476391524846.htm. See, in the case of Tibet, State Council Information Office, Democratic Reform in Tibet – Sixty Years On (March 2019) (Mar. 5, 2021), available at http://english.www.gov.cn/archive/white_paper/2019/03/28/content_281476583712704.htm.

¹⁰ Jie Cheng, *The Way of Governance and the Power of Governance: A Systemic Analysis of China's Constitution* 164–166 (2015) (in Chinese).



its own military, maintain unchanged its existing social, economic systems, way of life, and economic and cultural relations with foreign countries, and that there be no interference with private property, ownership of enterprises, legitimate right of inheritance and foreign investment there.¹¹ On 24 September 1982, Deng Xiaoping told Margaret Thatcher, the visiting British Prime Minister, that China would recover the whole of Hong Kong from Britain in 1997 and apply policies on Hong Kong that would keep in force the then “political and economic systems and even most of its laws.”¹² The OCTS principle was then being shaped by the leaders of the CPC, who intended to apply it to reunite Taiwan and Hong Kong.¹³

The current Constitution of the People’s Republic of China, adopted by the NPC on 4 December 1982,¹⁴ thus charted in the Preamble the transition of the Chinese people of all nationalities in transforming China into a socialist society under the leadership of the CPC and declared the PRC as “a unitary multi-national state created jointly by the people of all its nationalities.”¹⁵ Acknowledging that the “motherland” has yet to be reunified,¹⁶ the Constitution provides that while fundamentally, the socialist system is the basic system of the PRC and shall not be disrupted,¹⁷ the state “may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of specific conditions.”¹⁸

¹¹ The full text of Chairman Ye see in Ye Jianying on Taiwan’s Return to Motherland and Peaceful Reunification (Mar. 5, 2021), available at <http://www.china.org.cn/english/7945.htm>. See also State Council Information Office and State Council Taiwan Affairs Office, The Taiwan Question and Reunification of China (August 1993) (Mar. 5, 2021), available at <http://www.china.org.cn/e-white/taiwan/index.htm>; and State Council Information Office, The One-China Principle and the Taiwan Issue (February 2000) (Mar. 5, 2021), available at <http://www.lawinfochina.com/display.aspx?lib=dbref&id=21&EncodingName=big5>.

¹² See Deng Xiaoping on the Question of Hong Kong 3 (1993).

¹³ Yash Ghai summarized this promise of autonomy in Yash Ghai, *Litigating the Basic Law: Jurisdiction, Interpretation and Procedure in Hong Kong’s Constitutional Debate: Conflict over Interpretation* 3, 29–31 (Johannes M.M. Chan et al. eds., 2000). The motivations are more than political, since Hong Kong had been China’s largest source of foreign direct investment since the beginning of the policy of “reform and opening up”; see Kui Yin Cheung & Chengze Simon Fan, *Hong Kong Investment in China and Income Distribution of Hong Kong*, 16(4) J. Econ. Integr. 526 (2001); and Michael J. Enright, *Developing China: The Remarkable Impact of Foreign Direct Investment* (2017).


¹⁴ The PRC Constitution was amended by the NPC in 1988, 1993, 1999, 2004 and 2018.

¹⁵ PRC Constitution, Preamble.

¹⁶ The Preamble of the PRC Constitution refers to “the inviolable duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.”

¹⁷ PRC Constitution, Art. 1. The Thirty-sixth Amendment to the PRC Constitution, adopted by the NPC on 11 March 2018, added to Article 1 the provision that the leadership of the CPC is the most basic characteristic of socialism with Chinese characteristics.

¹⁸ PRC Constitution, Art. 31.



Albert H.Y. Chen discussed the PRC Constitution in terms of its nature, and the form of the state and the political system it establishes. As to nature, the PRC Constitution is the “mother-law” from which other laws derived and has the status as the “fundamental law of the state” and has “supreme legal authority.”¹⁹ The form of state, on which the form of the political system depends, is considered to be the “people’s democratic dictatorship” under the leadership of the CPC.²⁰ The form of the political system for the exercise of state power is the people’s congress system, with the NPC being the organ through which the people exercise state power at the national level; it is the “supreme organ of state power,” the apex of a pyramidal structure of people’s congresses. Each of the people’s congresses in the hierarchy exercises the power of the people in socialist unification of deliberation and execution; it is the people’s congress that deliberates and makes the decision and one of the organs directly under it that carries out the decision, reports on the carrying out of the decision, and accepts supervision on the same.²¹

The provisions of the PRC Constitution on the relationship of the NPC to the bodies of government at the national level, and the provisions of the Constitution on the relationship of the local people’s congresses to the bodies of government of the local level implicate the practice of the principle of “democratic centralism,” a Leninist principle of state and party organization that has all along been broadly applied to the CPC’s governance at state and local levels.²² Mao Zedong had expressed figuratively his understanding that “democratic centralism” involves four “subordinations”: the individual be subordinated to the organization; the minority be subordinated to the majority; the lower-level organ be subordinated to the high level organ; and the local authority be subordinated to the higher level organ. As Jie Cheng has underscored, centralization of power is the object of “democratic centralism,” the starting point for resolving central-local relationships and higher-lower tier relationships. This principle, as Zhou Enlai explained, required all works to be carried out under unified policy and unified plan, while giving some authority to the local agent to take account of local circumstances and further the motivations of local cadres.²³ Even the subsequent discussion by Deng Xiaoping in the “reform and opening up” era had not played down the element of centralization:

¹⁹ PRC Constitution, Preamble and Art. 5.

²⁰ PRC Constitution, Art. 1. CPC General Secretary Xi Jinping has recently reaffirmed the leadership of the CPC in the governance of the PRC according to law, and in the construction of China into a “socialist country ruled by law” pursuant to Article 5 of the PRC Constitution; see Jinping Xi, *Strengthening the Leadership of the Party on Comprehensive Law-based Governance of the Country*, 4 Qiu Shi (2019) (in Chinese) (Mar. 5, 2021), available at http://www.qstheory.cn/dukan/qs/2019-02/15/c_1124114454.htm.

²¹ Albert H.Y. Chen, *An Introduction to the Chinese Legal System* 57–60 (5th ed., LexisNexis, 2019). See also Pitman Potter, *China’s Legal System* 7–48 (2013); and Qianfan Zhang, *The Constitution of China: A Contextual Analysis* 75–148 (2012).

²² William Partlett & Eric C. Ip, *Is Socialist Law Really Dead?*, 48(2) N.Y.U. J. Int’l L. & Politics 463, 471 (2016).

²³ Cheng 2015, at 162–164. See also Sarah Biddulph, *Democratic Centralism and Administration in China in Socialist Law in Socialist East Asia* 195 (Hualing Fu et al. eds., 2018).



[Under] the system, personal interests must be subordinated to collective ones, the interests of the part to those of the whole, and immediate to long-term interests.²⁴

The basics of the governance of China under the leadership of the CPC have been sketched: The PRC is a unitary state of the people exercising power through organs of power under the leadership of the CPC in a centralized manner. This article shall seek to illustrate in the succeeding sections that the features of the PRC state summarized here are very much present in the interactions between the Central Authorities and the SARs, notwithstanding that there is a law enacted by the NPC that has established the systems of the SARs for the exercise of autonomy by the local inhabitants of each of them.

2. The “One Country, Two Systems” Policy and its Implementation

Constitutional provisions give constitutional and legal backing for the state policy of “One Country, Two Systems,” where the Chinese state, when it achieves reunification with Taiwan, Hong Kong and Macau, would allow these territories to continue under the “capitalist” system with the current social and economic systems remaining unchanged, their legal systems remaining “basically” unchanged, and their ways of life and various statuses remaining unchanged, and to continue to maintain or establish economic relations with other countries and regions. Specific terms of this policy, as they were to apply to Hong Kong and Macau upon the resumption of exercise of sovereignty by the PRC over each of them for a stated period of 50 years, were set out in the Sino-British Joint Declaration on the Question of Hong Kong 1984²⁵ and the Sino-Portuguese Joint Declaration of Macau 1987 respectively.²⁶ These specific terms were stated to be enacted into law in the two Joint Declarations.

Cross-referencing the specific terms of the PRC’s policies towards Hong Kong and Macau enacted into law with the PRC’s constitutional provisions and legislation (which was enacted in 1984), for regulation of regional autonomy of minority nationalities, as Yash Ghai, Jason Buhi and Joseph Lian had done, illustrate the distinction of the SARs set up under the former from the national autonomous regions regulated under the latter. Particularly, the national autonomous regions and their institutions are governed by the PRC’s political system of the people’s congresses, and the systems

²⁴ Xiaoping Deng, *Emancipate the Mind, Seek Truth from Facts and Unite as One in Looking to the Future in Selected Works of Deng Xiaoping (1975–1982)* 151 (1978).

²⁵ Sino-British Joint Declaration, *supra* note 1, Arts. 1, 3; Annex I.

²⁶ Sino-Portuguese Joint Declaration, *supra* note 1, Arts. 1, 2; Annex I.



of supervision for the people's courts, people's procuratorates and the supervision commissions, pursuant to the principle of democratic centralism.²⁷

The Basic Law of the HKSAR was drafted between 1985 and 1990. One question, which emerged in the course of the drafting process, required eventually a specific decision of the NPC to resolve. This was over the compatibility of the Basic Law with the PRC Constitution, bearing in mind that the systems to be established pursuant to the Basic Law would be different from, if not diametrically opposed to, the socialist basic system of the country, including a political system that promised, as the ultimate goal, universal suffrage of the Chief Executive (the head of the SAR) and all members of the Legislative Council, a legal system based on the common law (where national laws made by the NPC or its Standing Committee are not to be applicable to the HKSAR unless the NPCSC decides that specific conditions are met), provisions that regulate the activities of Mainland Chinese units of government in Hong Kong and obliging Mainland Chinese officers to obey the laws of the SAR while in Hong Kong, and provisions that appear to insulate the HKSAR from the practice of the socialist system and policies.²⁸ The NPC held that the Basic Law of the HKSAR was constitutional "as it is enacted in accordance with the Constitution of the People's Republic of China and the specific conditions of Hong Kong. The systems, policies and laws to be instituted after the establishment of the [HKSAR] shall be based on the Basic Law of the [HKSAR]."²⁹

The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China was adopted by the NPC on 4 April 1990, to be put into effect on 1 July 1997, when the resumption of exercise of Chinese sovereignty over Hong Kong and the establishment of the HKSAR would take place.³⁰ The Basic Law of the Macao

²⁷ See Yash Ghai, *Hong Kong's New Constitutional Order* 115–117 (2nd ed. 1999); Jason Buhi, *Constitutional Asymmetry in the People's Republic of China: Struggles of Autonomy Under a One-Party State* in *Constitutional Asymmetry in Multinational Federalism: Managing Multinationalism in Multi-Tiered Systems* 105 (Patricia Popelier & Maja Shadzic eds., 2019); Joseph Lian, *What Is the Autonomy in the Mainland's Law on Autonomy*, *Hong Kong Econ. J.* (2009) (Mar. 5, 2021), available at https://hktext.blogspot.com/2009/07/blog-post_9409.html. See also Cheng 2015, at 164–166.

²⁸ Yash Ghai characterized the provisions in the draft Basic Law as being "inconsistent" with the PRC Constitution and noted that there was a proposal in the course of the drafting process calling for the PRC Constitution to be amended to address the issue; see Ghai 1999, at 61–62, 178. Hualing Fu referred to this matter "as a particularly ambiguous point in the Basic Law" which had in fact been raised during the consultation process of the drafts of the Basic Law; see Hualing Fu, *Supremacy of a Different Kind: The Constitution, the NPC, and the Hong Kong SAR* in *Hong Kong's Constitutional Debate*, *supra* note 13, at 97–111.

²⁹ Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990. A similar decision was made by the NPC in respect of the Basic Law of the MSAR on 31 March 1993.

³⁰ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990; promulgated by the President of the People's Republic of China on 4 April 1990, 29 I.L.M. 1511 (1990).



Special Administrative Region of the People's Republic of China were enacted by the NPC on 31 March 1993, to be put into effect on 20 December 1999, when the resumption of exercise of Chinese sovereignty over Macau and the establishment of the MSAR would take place.³¹

The establishment of the SARs under Article 31 of the PRC Constitution and the enactment of the Basic Laws pursuant to Article 31 produce a paradox over the implementation of the PRC Constitution in the SARs themselves. There had been disquiet in the Hong Kong legal sector since 1 July 1997 on the Department of Justice's act of including the PRC Constitution as a "constitutional instrument" in the department's compilation of the Laws of the HKSAR. A more relevant perspective has been the HKSAR courts' treatment of the PRC Constitution, which will be discussed below.

The approach of the Central Authorities to this paradox of implementation at first was to refer to the relevant Basic Law only in its official pronouncements on the SARs. Since June 2014, after the publication by the State Council Information Office of a White Paper on the Practice of OCTS in the HKSAR,³² the Central Authorities have referred to the constitutional basis of the SARs to be the PRC Constitution and the relevant Basic Law. An important milestone in the development of this approach was the speech by President Xi Jinping in Hong Kong on 1 July 2017 at the meeting marking the 20th Anniversary of Hong Kong's Return to the Motherland and the Inaugural Ceremony of the Fifth Term Government of the HKSAR. The President explained in the speech the constitutional basis of the HKSAR is the Constitution and the Basic Law and underlined the exercise of jurisdiction over Hong Kong by the Central Government in accordance with the Constitution and the Basic Law.³³ The HKSAR Government had since obliged by issuing booklets of both the Constitution and the Basic Law.³⁴ These recent official assertions and exertions to underline the Constitution as the "mother law" basis do not resolve the paradox satisfactorily. Questions have continued to be asked in Hong Kong over the extent in which the Constitution, a socialist instrument, is "applicable," "effective" or "implemented" in the SAR, notwithstanding that it is the Basic Law that prescribes the systems and

³¹ The Basic Law of the Macao Special Administrative Region of the People's Republic of China, adopted at the First Session of the Eighth National People's Congress on 31 March 1993; promulgated by the President of the People's Republic of China on 31 March 1993. An English translation is available at <http://www.wipo.int/edocs/lexdocs/laws/en/mo/mo019en.pdf>.

³² State Council Information Office, *The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region*, 10 June 2014 (Mar. 5, 2021), available at <http://www.scio.gov.cn/zfbps/ndhf/2014/Document/1373163/1373163.htm>.

³³ Jinping Xi, *Speech at the Meeting Celebrating the 20th Anniversary of Hong Kong's Return to the Motherland and the Inaugural Ceremony of the Fifth Term Government of the Hong Kong Special Administrative Region*, *China Daily*, 1 July 2017 (Mar. 5, 2021), available at http://www.chinadaily.com.cn/china/hk20threturn/2017-07/01/content_29959860.htm.

³⁴ The booklet is accessible from the HKSAR Government's Basic Law website (Mar. 5, 2021), available at http://www.basiclaw.gov.hk/tc/basiclawtext/images/basiclaw_full_text_tc.pdf.



policies of the SAR, including the provision that socialist system and policies shall not be practised in the SAR.³⁵ It was through the Basic Law and its interpretation and implementation locally in the SAR that the HKSAR, particularly its courts, constructs its political, constitutional and legal identity distinct from that of the rest of the PRC,³⁶ and makes the claim that the Hong Kong jurisdiction enjoys judicial independence and autonomy and is the suitable and sustainable centre for resolving legal disputes for businesses in the Asia-Pacific region and the Belt and Road Initiative, including cases involving a Mainland Chinese entity.³⁷

3. The Special Administrative Regions and the Basic Laws

The SAR's administration of the relevant Basic Law was in beginning of the establishment of the SARs left largely a matter of "Two Systems" and to the SAR's established authorities. In the HKSAR, the Basic Law of the HKSAR has been regarded as a constitutional instrument, whose understanding and application had been informed by principles and values of constitutionalism.³⁸ As Johannes M.M. Chan has demonstrated, certain principles or objectives, including those of preservation of the integrity of the common law system and its protective concern of freedoms and liberties enjoyed by the individual, maintenance and continuity of the previous systems and arrangements, and the separation of powers, have been underlined by the HKSAR courts. Continuing from the previous common law based system and the practice of law in Hong Kong, the Hong Kong Court of Final Appeal (HKCFA) was able to lay down the judicial authority in the interpretation of the Basic Law in the HKSAR and the courts' general approach of interpretation of the Basic Law, including the adoption of a purposive approach towards interpretation in keeping with the nature of the Basic Law as a constitutional instrument, requiring the HKSAR Government to justify a restriction of the rights and freedoms enjoyed by residents in the HKSAR, and referring extensively to international and comparative materials,

³⁵ For a reiteration of the question, see Jasper Yok-sing Tsang, *The Constitution's Implementation*, 14 March 2019 (in Chinese) (Mar. 5, 2021), available at <http://www.master-insight.com/憲法實施/>. Tsang, a former President of the Legislative Council of the HKSAR, called for an authoritative, rigorous and comprehensive account on the question.

³⁶ See, generally, Pui Yin Lo, *The Judicial Construction of Hong Kong's Basic Law* (2014); and Johannes M.M. Chan, *Behind the Text of the Basic Law: Some Constitutional Fundamentals in The Invisible Constitution in Comparative Perspective*, *supra* note 2, at 193.

³⁷ See, e.g., Teresa Cheng, *Speech of the Secretary for Justice in the "The Belt and Road Initiative and International Dispute Settlement" Panel Session at the Form on the Belt and Road Legal Cooperation*, 2 July 2018 (Mar. 5, 2021), available at http://www.doj.gov.hk/en/community_engagement/speeches/pdf/sj20180702e1.pdf.

³⁸ The final court of appeal of the MSAR (Tribunal de Ultima Instancia) has embarked on a similar trajectory, at least where the matters in question were the judicial review of legislation and the application of proportionality as a standard of review; see Chen & Lo 2018.



particularly in adjudications on protected fundamental rights and determining the appropriate judicial remedies.³⁹

The running of the SARs by their respective institutions in their own ways had been left unhindered largely by the Central Authorities unless an issue of substantive or vital importance arose. Whether an issue is of substantive or vital importance to the Central Authorities is a function of socialist political ideology. As the resolution of such matters have turned out, the Central Authorities have chosen the tools of socialist legality to address controversies and they have proved effective against the recalcitrant institutions of the HKSAR, which happened to be the courts and the legal profession, both of which were and are bound to an ethos of the “Rule of Law,” even though the means that have been used to procure their submission have had more to do with ruling by the Centre “in accordance with law” than any principles or values of constitutionalism that they wished to maintain and propagate in Hong Kong.

3.1. The Powers of the Central Authorities “in Accordance with” the Basic Laws

The first constitutional controversy in Hong Kong came from the HKCFA’s judgment in the right of abode litigation in 1999. In this *Ng Ka Ling* judgment of 29 January 1999, the HKCFA declined the request made on behalf of the HKSAR Government to refer provision(s) of the Basic Law of the HKSAR considered necessary for the adjudication to the NPCSC for interpretation and proceeded to interpret all the provisions concerned and then rejected the Government’s case.⁴⁰

The HKSAR Government’s request was made pursuant to the provision of the Basic Law of the HKSAR on its interpretation, which first provides for the authority of the NPCSC to interpret the Basic Law and then provides that, in adjudicating cases, the HKSAR courts are authorised by the NPCSC to interpret the provisions of the Basic Law on their own, except that the HKCFA is required to make a reference, before final adjudication, to the NPCSC regarding the interpretation of a Basic Law provision which is concerned with an affair that is the responsibility of the Central People’s Government or concerned with the relationship between the Central Authorities and the HKSAR, and whose interpretation is necessary for such final adjudication.⁴¹

³⁹ Chan, *Behind the Text of the Basic Law*. The HKSAR courts are enabled by the self-contained judicial system of the HKSAR, which includes its own power of final adjudication, the delegated authority to interpret on its own provisions of the Basic Law that are within the autonomy of the HKSAR, the authority to refer to precedents of other common law jurisdictions, and the authority on the part of the Hong Kong Court of Final Appeal to invite judges from other common law jurisdictions to sit on the Court as non-permanent judges: Basic Law of the HKSAR, Arts. 2, 19, 82, 84 & 85. For detailed discussions of the courts of the Hong Kong SAR, see Pui Yin Lo, *Hong Kong: Common Law Courts in China in Asian Courts in Context* 183 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2014); Albert H.Y. Chen & Pui Yin Lo, *Hong Kong’s Judiciary Under ‘One Country, Two Systems’ in Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* 131 (Hoong P. Lee & Marilyn Pittard eds., 2018).

⁴⁰ See Chan, *Behind the Text of the Basic Law*, at 200–202.

⁴¹ Basic Law of the HKSAR, Art. 158.



The HKCFA probably transgressed the rule for making a reference to the NPCSC for final interpretation before final adjudication, since one of the necessary provisions involved in the adjudication was arguably a provision concerned with the Central Authorities and the HKSAR. This could have been left to rest on the basis of respecting autonomy, had not the HKCFA asserted in the same judgment the “constitutional jurisdiction” to review whether an act of the NPC or the NPCSC is inconsistent with the Basic Law as part and parcel of the HKSAR courts’ jurisdiction to enforce and interpret the Basic Law.⁴² Officers of the Central Authorities, including those Soviet-educated legal scholars responsible for the drafting of the Basic Law,⁴³ would have none of this sort of usurping checking of the supreme authority of the State, a clear violation of the precept of democratic centralism. The assertion was duly purged with the co-option of the Secretary for Justice of the HKSAR Government, who applied to the HKCFA for a “clarification” of its judgment, and of the HKCFA, which duly issued on 26 February 1999 a “unanimous judgment” acknowledging that its jurisdiction to enforce and interpret the Basic Law “is derived from and is subject to the provisions of the Basic Law” and expressed its acceptance that “[it] cannot question [the authority of the NPCSC to make an interpretation under Art. 158 which would have to be followed by the courts of the Region] ... the Court accepts that it cannot question, the authority of the [NPC] or the [NPCSC] to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.”⁴⁴

Although the HKCFA’s clarification clarified nothing,⁴⁵ it was soon realized that the NPCSC would issue an interpretation at the request of the State Council in light of a report from the Chief Executive of HKSAR expressing “difficulties” in implementing the HKCFA’s judgment of 29 January 1999.⁴⁶ The NPCSC Interpretation of 26 June 1999, which cited Article 67(4) of the PRC Constitution and Article 158(1) of the Basic Law of the HKSAR, considered not only that the HKCFA had not sought an interpretation from the NPCSC before final adjudication when it should have but also that the HKCFA’s interpretation “is not consistent with the legislative intent.” The NPCSC then issued its interpretation of the relevant provisions of the Basic Law to nullify and supersede the HKCFA’s interpretation of those provisions.⁴⁷ Subsequently, the HKCFA announced in a judgment on 3 December 1999 that it accepted as binding

⁴² *Ng Ka Ling & Ors v. Director of Immigration* (1999) 2 H.K.C.F.A.R. 4, 26 (C.F.A.).

⁴³ The former drafters of the Basic Law who were upset by the HKCFA’s assertions included Wu Jianfan and Xiao Weiyun, both of whom received legal education in the Soviet Union in the early 1950s. They and two other drafters, Shao Tianren and Xu Chongde, made known of their displeasure to the Chinese official press; see *Hong Kong’s Constitutional Debate*, *supra* note 13, at 53–60.

⁴⁴ *Ng Ka Ling & Ors v. Director of Immigration* (1999) 2 H.K.C.F.A.R. 141 (C.F.A.).

⁴⁵ See also Chan, *Paths of Justice*, at 30–34.

⁴⁶ See *Hong Kong’s Constitutional Debate*, *supra* note 13, at 474–477.

⁴⁷ See *Id.* at 478–480.



on the HKSAR courts the NPCSC Interpretation of 26 June 1999, suggesting that it stated what the Basic Law provisions concerned meant on the date of coming into operation of the Basic Law.⁴⁸

The HKCFA judgments above have solidified into canon in the next 20 years, so much that nowadays, the HKSAR courts believe that they are bound to enforce any interpretation adopted by the NPCSC⁴⁹ and deny they could have jurisdiction to challenge the validity of a decision of the NPCSC.⁵⁰ The HKSAR courts have also resolved the ambiguity over the applicability of the PRC Constitution to adjudications in the HKSAR by rejecting arguments that provisions of the PRC Constitution are “necessary irrelevant or should be ignored by the Hong Kong courts when adjudicating cases.”⁵¹

In the same period of time, the NPCSC had produced four more interpretations and seven more decisions, extending the reach of its powers from purporting to elucidate “legislative intention” of a provision of the Basic Law of the HKSAR,⁵² to establishing the procedure and parameters for development of the political system of the HKSAR,⁵³ the authorization of the HKSAR to exercise jurisdiction outside SAR territory on leased land in Mainland China,⁵⁴ the assertion of Central positions against the social movement for “Hong Kong independence” in political life in Hong Kong,⁵⁵ and the purported approval, in exercise of the PRC Constitution’s power of supervising its implementation and of the Basic Law’s implied power of supervising its implementation, of a co-operation arrangement between Mainland and the HKSAR on the establishment of a Mainland port at the West Kowloon Station of the high speed

⁴⁸ *Lau Kong Yung & Ors v. Director of Immigration* (1999) 2 H.K.C.F.A.R. 300 (C.F.A.).

⁴⁹ See *Chief Executive of the HKSAR v. President of the Legislative Council* [2017] 1 H.K.L.R.D. 460 (C.A.); *Secretary for Justice v. Leung Kwok Hung* [2019] H.K.C.A. 173 (15 February 2019) (C.A.).

⁵⁰ See *Yau Wai Ching v. Chief Executive of the HKSAR* (2017) 20 H.K.C.F.A.R. 390 (C.F.A.); *Secretary for Justice v. Leung Kwok Hung*, *supra* note 49; *Leung Chung Hang Sixtus & Ors v. President of Legislative Council* [2019] 1 H.K.L.R.D. 292 (C.F.I.).


⁵¹ See *Leung Chung Hang Sixtus & Ors v. President of Legislative Council*, *supra* note 50.

⁵² See the NPCSC Interpretation of 27 April 2005 (on Article 53 of the Basic Law) and the NPCSC Interpretation of 26 August 2011 (on Articles 13 and 19 of the Basic Law).

⁵³ See the NPCSC Interpretation of 6 April 2004 and decisions purported to be made under this interpretation and the decision(s) made under this interpretation, including the NPCSC Decision of 31 August 2014, which set out restrictive terms under which the election of the candidate for appointment of the office of Chief Executive by universal suffrage may be held.

⁵⁴ See the NPCSC Decision of 31 October 2006 on Empowering the HKSAR to Exercise Jurisdiction over the Shenzhen Bay Port Hong Kong Port Area.

⁵⁵ See the NPCSC Interpretation of 7 November 2016 of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, which not only was adopted in the course of legal proceedings in Hong Kong to apply relevant legislation to disqualify the relevant elected members of the Legislative Council on the ground that their oath-taking antics meant that they neglected to take the oath of office when called upon to do so, but also was produced to include a stipulation that would stymie any other persons who are adjudged to be unable to uphold the Basic Law and to swear allegiance to the HKSAR of the PRC from standing in elections.



rail link to Mainland China in the middle of Hong Kong exercising exclusive Mainland laws and jurisdiction therein.⁵⁶ That the Central Authorities have subdued the common law courts of the HKSAR by invoking the Marxist-Leninist-Stalinist features of the PRC State of interpretation of laws by the NPCSC⁵⁷ and of the Soviet-statist institution of centralized supervision⁵⁸ testifies not only to the potency of democratic centralism as a unified, absolute, undefined and unrestrained “reservoir” of power but also to the unwillingness and inability (if not ignorance) on the part of the HKSAR courts to counter-act the NPCSC’s use of “legal tools” to control and rein in the systems of the HKSAR, and to mitigate their effects on them.⁵⁹ The countervailing approach should have been to maintain the separate systems provided for the HKSAR pursuant to the Basic Law, at least in furthering the objects that socialist system and policies shall not be practised in the HKSAR, there be a high degree of autonomy in the HKSAR, and the rights and freedoms of all persons in the HKSAR be safeguarded.⁶⁰

The power of interpretation of the NPCSC to interpret provisions of the Basic Law of the HKSAR at any time and with or without any request from the HKSAR courts has qualified the Rule of Law of the HKSAR.⁶¹ Yet, what has not been well

⁵⁶ See the NPCSC Decision of 27 December 2017 on Approving the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement.

⁵⁷ Hong Kong scholars had sought to discuss the supremacy of the NPCSC’s power of interpretation through the prism of constitutionalism in the wake of the controversy of the NPCSC Interpretation of 26 June 1999; see, generally, *Hong Kong’s Constitutional Debate*, *supra* note 13. Hong Kong scholars began to underline the socialist and Soviet-statist roots of the power of NPCSC interpretation in 2007; see Yash Ghai, *The Political Economy of Interpretation in Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* 115 (Hualing Fu et al. eds., 2007); and Sophia Woodman, *Legislative Interpretation by China’s National People’s Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law in Id.* at 229.

⁵⁸ Partlett & Ip 2016, at 482, 496–497, 509.

⁵⁹ Senior judges and lawyers in Hong Kong have continued to address the PRC constitutional system as “Mainland civil law system”; see *Secretary for Justice v. Leung Kwok Hung* [2019] H.K.C.A. 173 (15 February 2019) (C.A.); *Chief Executive of the HKSAR v. President of the Legislative Council* [2017] 1 H.K.L.R.D. 460 (C.A.). They said so notwithstanding a legion of scholastic discussion; see Cora Chan, *The Legal Limits on Beijing’s Powers to Interpret Hong Kong’s Basic Law*, HKU Legal Scholarship Blog, 3 November 2016 (Mar. 5, 2021), available at <http://researchblog.law.hku.hk/2016/11/cora-chan-o%20n-legal-limits-of-beijings.html>; Hualing Fu, *Guide to Legislative Interpretation in China*, HKU Legal Scholarship Blog, 19 July 2017 (Mar. 5, 2021), available at <http://researchblog.law.hku.hk/2017/07/guide-to-legislative-interpretation-in.html>; Jonathan Lam, *Re-thinking the NPCSC’s Power to Interpret the Basic Law*, 47 Hong Kong L.J. 825 (2017); Eric C. Ip, *Interpreting Interpretations: A Methodology for the Judicial Enforcement of Legislative Interpretations of the Hong Kong Basic Law*, 2017 Pub. L. 552 (2017); Feng Lin, *The Duty of Hong Kong Courts to Follow the NPCSC’s Interpretation of the Basic Law: Are There Any Limits?*, 48 Hong Kong L.J. 167 (2018); and Pui Yin Lo, *Enforcing an Unfortunate, Unnecessary and ‘Unquestionably Binding’ NPCSC Interpretation: The Hong Kong Judiciary’s Deconstruction of its Construction of the Basic Law*, 48 Hong Kong L.J. 399 (2018).

⁶⁰ The summation of Basic Law of the HKSAR, Arts. 4, 5, 11.

⁶¹ See Anthony Mason, *The Rule of Law in the Shadow of the Giant: The Hong Kong Experience*, 33(4) Syd. L. Rev. 623 (2011).



appreciated in Hong Kong by its legal elite is the fact that the Basic Law itself is replete with provisions designating, positioning and subordinating the HKSAR in the system of statist administration and supervision of the PRC. Article 12 of the Basic Law designates the HKSAR, in terms of administrative division, as “a local administrative region” of the PRC, coming directly under the CPG. Article 15 provides for the CPG’s power of appointment of the Chief Executive and the principal officials of the HKSAR Government, which implicates the concomitant power of dismissal. Article 17 provides for the NPCSC’s power to scrutinize legislations enacted by the HKSAR in terms of conformity with provisions of the Basic Law concerning affairs within the responsibilities of the Central Authorities or regarding the relationship between the Central Authorities and the HKSAR and to return any such legislation considered to be non-conforming in these respects, thereby invalidating it immediately. Although Article 18 provides for the general non-application of national laws for the purpose of ensuring the self-containing nature of the HKSAR’s legal system, it enables the NPCSC to add national laws “relating to defence and foreign affairs as well as other matters *outside the limits of the autonomy of the Region as specified by this Law*,” and to decide on the existence of a state of emergency in the HKSAR so as to enable relevant national laws to be applied in the HKSAR. Article 43 provides that the Chief Executive of the HKSAR, the head of the HKSAR and the head of its Government, shall be accountable to the CPG and the HKSAR in accordance with the Basic Law. Budgets and final accounts of the HKSAR must be reported to the CPG for the record. The CPG is empowered under Article 48(8) to issue directives to the Chief Executive in respect of relevant matters provided for in the Basic Law and it is an incumbent function of the Chief Executive to implement such a directive. Last but not least, pursuant to Article 90, senior judicial appointments and removals in the HKSAR must be reported to the NPCSC for the record. Writing in 2002, Zhenmin Wang summarized most of the above powers in terms of the powers for the “organization” of the SARs and further discussed the resolution of the issue of “residual power” as between the Central Authorities and the SARs in terms of Article 2 of the Basic Laws stipulating that the high degree of autonomy enjoyed by the SARs being powers “delegated” by the Central Authorities, Article 12 signifying the SAR as being directly administered by the CPG, and of Article 20 empowering the SARs to “accept” additional powers from the Central Authorities, thus indicating that the Central Authorities retain the “residual powers.”⁶²

If a study of the list of Central Authorities’ power above has not enlightened the Hong Kong legal community of the PRC’s coding of centralization of powers in the Basic Law, the 2014 State Council’s White Paper on the *Practice of the “One Country, Two Systems” Policy in the Hong Kong Special Administrative Region* should have.⁶³

⁶² Zhenmin Wang, *Relationship Between the Chinese Central Authorities and Regional Governments of Hong Kong and Macao: A Legal Perspective* 143–175 (2019).

⁶³ I.e. State Council Information Office, *supra* note 32.



The White Paper introduced the narrative of the Central Government exercising “overall jurisdiction” (*quanmian guanzhi quan* 全面管治權) over an SAR pursuant to the system of the SAR prescribed in the PRC Constitution and the Basic Law, with the Central Government having powers it would directly exercise, such as the powers of establishing the SAR and forming its organs of power, the functions of supporting and guiding the administration of the Chief Executive and the Government of the SAR in accordance with law, the responsibility for foreign affairs relating to the SAR, the responsibility for the defence of the SAR, the NPCSC’s powers regarding the SAR, and the Central Military Commission’s leadership of the garrison in the SAR; and the SAR being delegated with powers by the Central Government to enable it to exercise a high degree of autonomy in accordance with the law, subject to the Central Government’s power of oversight over the exercise of a high degree of autonomy in the SAR.

Also, the White Paper made clear that the OCTS is predicated upon the PRC’s form and nature of its socialist state as well as its fundamental interests. It explained “One Country” in the following terms:

The “one country” means that within the PRC, the HKSAR is an inseparable part and a local administrative region directly under China’s CPG. As a unitary state, China’s central government has comprehensive jurisdiction over all local administrative regions, including the HKSAR. The high degree of autonomy of HKSAR is not an inherent power, but one that comes solely from the authorization by the central leadership. The high degree of autonomy of the HKSAR is not full autonomy, nor a decentralized power. It is the power to run local affairs as authorized by the central leadership. The high degree of autonomy of HKSAR is subject to the level of the central leadership’s authorization. There is no such thing called “residual power.” With China’s Constitution stipulating in clear-cut terms that the country follows a fundamental system of socialism, the basic system, core leadership and guiding thought of the “one country” have been explicitly provided for. The most important thing to do in upholding the “one country” principle is to maintain China’s sovereignty, security and development interests, and respect the country’s fundamental system and other systems and principles.

It then explained “Two Systems” in “One Country” as follows:

The “two systems” means that, within the “one country” the main body of the country practices socialism, while Hong Kong and some other regions practise capitalism. The “one country” is the premise and basis of the “two systems,” and the “two systems” is subordinate to and derived from “one country.” But the “two systems” under the “one country” are not on a par with each other. The fact that the mainland, the main body of the country,



embraces socialism will not change. With that as the premise, and taking into account the history of Hong Kong and some other regions, capitalism is allowed to stay on a long-term basis. Therefore, a socialist system by the mainland is the prerequisite and guarantee for Hong Kong's practising capitalism and maintaining its stability and prosperity. For Hong Kong to retain its capitalist system and enjoy a high degree of autonomy with "Hong Kong people governing Hong Kong" according to the Basic Law, it must fully respect the socialist system practised on the mainland in keeping with the "one country" principle and, in particular, the political system and other systems and principles in practice. The mainland should respect and tolerate the capitalism embraced by Hong Kong while upholding its socialist system, and draw on the successful experience of Hong Kong in economic development and social management. Only by respecting and learning from each other can the "two systems" in the "one country" coexist harmoniously and achieve common development.

OCTS being implemented by the Basic Law, enacted pursuant to the PRC Constitution, the White Paper next called for "a full understanding of the provisions of the Basic Law," which –

are not isolated from but interrelated with each other. Each of these provisions must be understood in the context of the Basic Law and the HKSAR system as a whole. The implementation of the Basic Law shows that if we comprehend individual provisions of the Basic Law in an isolated way without taking into account the Basic Law as a whole, stressing one aspect while ignoring others, ambiguity or even contentious interpretation will occur, which will severely hamper the implementation of the Basic Law. Only by comprehensively understanding all the provisions of the Basic Law can we find that the HKSAR system, along with all its components, is an integrated whole complementary to each other and that this system plays the role of protecting the fundamental rights and freedoms of Hong Kong residents, and ensures the prosperity and stability of Hong Kong.

Interpretations of the NPCSC shall be followed and the fact that the NPCSC exercises the power of interpretation of the Basic Law in accordance with law "is aimed at maintaining the rule of law in Hong Kong, as it oversees HKSAR's implementation of the Basic Law and protects the high degree of autonomy of the Region."

Finally, the White Paper indicated that the systems and mechanisms in the implementation of the Basic Law would have to be further improved:

It is necessary to, with an eye to the lasting peace and order in Hong Kong, exercise well the power invested in the central government as prescribed in the



Basic Law and see to it that the relationship between the central government and HKSAR is indeed brought onto a legal and institutionalized orbit.

The Basic Law has thus been explained as the instrument of the unitary socialist state of the PRC exercising overall and comprehensive jurisdiction over the SAR it establishes: Each and every act of governance by the Central Authorities has been done “in accordance with law.”

3.2. The Liaison Office of the Central People's Government and the Management of the United Front

The CPG's resident organ in the HKSAR is the Liaison Office. It evolved from the PRC's representative institution in Hong Kong during the time of the British colonial administration, which operated in the guise of the Xinhua News Agency Hong Kong Branch. By a notification to the HKSAR Government in 1999, the CPG stated that the Liaison Office's functions include: (1) liaising with the Office of the Commissioner of the Ministry of Foreign Affairs in the HKSAR and with the Hong Kong Garrison of the Chinese People's Liberation Army; (2) contacting and assisting the relevant departments of Mainland China in the administration of PRC-funded institutions in Hong Kong; (3) promoting exchanges and cooperation in economic, education, science, culture, sports and other fields between Hong Kong and Mainland China; (4) liaising with people of all sectors of the Hong Kong community, enhancing exchanges between Mainland China and Hong Kong and reflecting the opinions of Hong Kong residents about Mainland China; (5) handling Taiwan-related affairs;⁶⁴ and (6) undertaking other tasks assigned by the CPG.⁶⁵ The organization chart of the Liaison Office not only takes care of all these functions but also include specific divisions for propaganda and culture, communications with Hong Kong societies, communications on police matters, youth work, legal issues, and works based on the geographical divisions of Hong Kong Island, Kowloon and New Territories.

The Liaison Office, like its predecessor, is also the base of the CPC's operating unit in Hong Kong, namely the Hong Kong Work Committee. This work committee works under the direction and supervision of a coordination panel on Hong Kong and Macao Work of the Central Committee of the CPC.⁶⁶ Although the CPC does not

⁶⁴ The authorities in Taiwan are wary of the Liaison Office's Taiwan-related functions, raising concerns that officials from Taiwan visiting the premises of the Liaison Office might signal acceptance of the PRC's application of the OCTS model for reunification of Taiwan; see Han's Visit to Beijing Offices “Politically Sensitive”: MAC, Focus Taiwan, 27 March 2019 (Mar. 5, 2021), available at <http://focustaiwan.tw/news/acs/201903270012.aspx>.

⁶⁵ Wang 2019, at 241–242.

⁶⁶ The first panel on Hong Kong and Macao work was established by the Central Committee of the CPC in 1978; see CPC Central Decides to Establish Hong Kong and Macao Panel on 12 August 1978 (in Chinese) (Mar. 5, 2021), available at <http://www.todayonhistory.com/8/12/ZhongYangJueDingChengLiGangAoXiaoZu.html>. The Central Committee's panel is customarily chaired by a member of the Politburo and the



operate openly in Hong Kong, it is clear that officers of the Liaison Office are part of a “second governance team,”⁶⁷ functioning in an equal (if not higher) profile with the HKSAR Government, discharging tasks of coordination that the HKSAR Government might feel constrained from performing due to its imperative of maintaining an appearance of political neutrality in the watch of the various political factions in Hong Kong and of the international diplomatic corps and press stationed in Hong Kong. These efforts have reportedly included collecting views from individuals of various sectors of the community and offering patronage to selected “patriots” in various roles including appointments to political consultative conferences at the national and regional levels and electoral prospects to the Hong Kong delegation to the NPC,⁶⁸ coordinating the “pro-Establishment” political factions in Hong Kong to attain the maximum number of seats in open elections in Hong Kong, mobilizing the considerable manpower and other resources associated with the many PRC-funded corporations and businesses in Hong Kong⁶⁹ and the social organizations affiliated with the Hong Kong patriotic front in elections and the public debate of social and political issues, furthering the propaganda work undertaken by mass media outlets,

present head is Han Zheng, the first Vice-Premier; see Kimmy Chung, *Chinese Vice-Premier Han Zheng the “Right” Man in Charge of Hong Kong Affairs as City Shuns Political Gridlock for Economic Growth*, South China Morning Post, 28 June 2018 (Mar. 5, 2021), available at <https://www.scmp.com/news/hong-kong/politics/article/2152765/chinese-vice-premier-han-zheng-right-man-charge-hong-kong>. For a history of the activities of the CPC in Hong Kong, see Christine Loh, *Underground Front: The Chinese Communist Party in Hong Kong* (2nd ed. 2018).

⁶⁷ The notion of the “second governance team” consisting of Mainland Chinese cadres was first mentioned by Cao Erbao, the then head of research division of the Liaison Office, in a news article in 2008; see Loh 2018, at 3. An English translation is available at http://www.civicparty.hk/cp/media/pdf/090506_cao_eng.pdf. Jie Cheng wrote subsequently to confirm the raising of this notion as an indicium of a change in policy of the CPC towards Hong Kong; see Jie Cheng, *The Story of a New Policy*, Hong Kong J. (2009) (Mar. 5, 2021), available at <http://www.hkbasiclaw.com/Hong%20Kong%20Journal/Cheng%20Jie%20article.htm>.

⁶⁸ This is the long hand for the traditional labour intensive “United Front” work of co-optation and persuasion; see Loh 2018, at 27–41. An achievement of the “United Front” efforts in the legal sector was the co-optation of a serving Chairman of the Hong Kong Bar Association to serve in the Guangdong Committee of the Chinese People’s Political Consultative Conference; see Chairman Appointed Guangdong Political Consultative Conference Member, Hong Kong Bar Association “Fallen,” Apple Daily, 16 January 2008 (in Chinese) (Mar. 5, 2021), available at s.nextmedia.com/apple/a.php?i=20080116&sec_id=4104&s=0&a=10649375.

⁶⁹ Joseph Lian has pointed out that party organizations are established not only in the PRC’s state-owned enterprises and state-funded corporations, but also in non-state firms (including foreign companies), creating a party-corporate complex in the Chinese economy: Yi-Zheng Lian, *China, the Party-Corporate Complex*, New York Times, 12 February 2017 (Mar. 5, 2021), available at <https://www.nytimes.com/2017/02/12/opinion/china-the-party-corporate-complex.html>. Lian also pointed to the activities of state owned enterprises in Hong Kong of pressuring their employees to vote for certain candidates in elections and of Mainland Chinese money serving to restrict civil society and communal movements in Hong Kong, suggesting that the purchase of local assets by foreign and Mainland capital should be regulated by law; see Yi-Zheng Lian, *Red Capital in Hong Kong*, New York Times, 1 June 2017 (Mar. 5, 2021), available at www.nytimes.com/2017/06/01/opinion/red-capital-in-hong-kong-china-investment.html.



publishing houses, and bookstores (some of which are in fact owned indirectly by the Liaison Office),⁷⁰ and supporting counter-groups organized to oppose civil society organizations or mass movements in Hong Kong.⁷¹

A more recent trend from the CPC and the CPG's station in Hong Kong involves the Liaison Office's Director or spokesperson making speeches and issuing statements on matters of public concern in Hong Kong.⁷² From the perspective of democratic centralism, this has to be regarded as an assertion of leadership and ideological tutelage over the official governmental institutions of the HKSAR. While the CPC has not "come out" in Hong Kong yet, it is clear that it is a pervasive presence in Hong Kong, with its policies to be learned by all concerned with the administration of the HKSAR.⁷³

3.3. The "Chief Executive-led" Government as the Accountable Proxy

The CPC and the Central Authorities' consistent rhetoric has been to express support the Chief Executive of the HKSAR in his or her law-based governance of Hong Kong and fulfillment of the constitutional responsibility of safeguarding "China's sovereignty, security and development interests."⁷⁴ This is well understood in relation to the Chief Executive's status and wide-ranging functions under the Basic Law and HKSAR legislation, which include recommending individuals for appointment as principal officials, appointing judges, specifying the dates of general elections of the Legislation Council and convening its sessions, and introducing Bills and budgets

⁷⁰ See Blake Schmidt, *The Publishing Empire Helping China Silence Dissent in Hong Kong*, Bloomberg, 18 August 2020 (Mar. 5, 2021), available at <https://www.bloomberg.com/news/features/2020-08-17/the-publishing-empire-helping-china-silence-dissent-in-hong-kong>.

⁷¹ Loh 2018, at 202–244.

⁷² See, e.g., Speech of Luo Huining on the Event of the 2020 National Security Education Day for All in Hong Kong, 15 April 2020 (in Chinese) (Mar. 5, 2021), available at http://www.locpg.gov.cn/jsdt/2020-04/15/c_1210558684.htm; LOC Spokesman: We Support the Establishment and Improvement of an Education System Compatible with "One Country, Two Systems" in the HKSAR, 12 June 2020 (in Chinese) (Mar. 5, 2021), available at http://www.locpg.gov.cn/jsdt/2020-06/12/c_1210657773.htm; LOC Spokesman: The Disqualification by Returning Officers in Accordance with Law of Some Candidates for the Legislative Council Election Deserves to be Resolutely Supported, 30 July 2020 (in Chinese) (Mar. 5, 2021), available at http://www.locpg.gov.cn/jsdt/2020-07/30/c_1210727946.htm; and Let Patriotism Flourish in Hong Kong: Remarks by Luo Huining, Director of the Liaison Office of the Central People's Government in the Hong Kong Special Administrative Region, at the Gala in Celebration of the 71st Anniversary of the Founding of the People's Republic of China, 30 September 2020 (Mar. 5, 2021), available at http://www.locpg.gov.cn/jsdt/2020-10/01/c_1210825856.htm.

⁷³ The CPC Central Committee dispatched a "publicity" delegation in 2017 to Hong Kong to explain the report of General Secretary Xi Jinping to the 19th National Congress of the CPC to the HKSAR Government; see Government Holds Seminar on 19th National Congress, Press Release of the Government of the Hong Kong Special Administrative Region, 23 November 2017 (Mar. 5, 2021), available at www.info.gov.hk/gia/general/201711/23/P2017112300748.htm.

⁷⁴ See State Council Information Office, *supra* note 32; Jinping Xi, *supra* note 33; and Jinping Xi, *Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era* (18 October 2017) 67 (2018).



into the Legislative Council and signing the enacted legislation and approved budget into effect, as well as his or her constitutional responsibility for the implementation of the Basic Law and CPG's directives in Hong Kong, and his or her constitutional accountability to the CPG, both under the Basic Law and in respect of his or her appointment by the CPG.⁷⁵ Hence there is in place a system for the Chief Executive to make verbal and written reports to the CPG on work, which had been used for different purposes to connect the SAR with the Central Authorities, including petitioning the Central Authorities for an interpretation of a provision of the Basic Law or a decision on the next step in the development of the political system,⁷⁶ and signifying openly Central support of a decision made by the Chief Executive.⁷⁷

Political support of the Chief Executive is coupled with theoretical insistence on the core position of the Chief Executive in the SAR system based on OCTS. Deng Xiaoping stated in 1987 in a meeting with members of the Basic Law Drafting Committee that "it would not be appropriate for [Hong Kong's system] to copy those of Britain and the United States with, for example, separation of the three powers" (*sanquan fenli* 三權分立).⁷⁸ Since then, mainland officials and scholars have taken care not to use the term 'separation of the three powers' to characterise the political system established by the Basic Law. On completion of the drafting process of the Basic Law, Ji Pengfei, Chairman of the Basic Law Drafting Committee, explained the draft Basic Law to the NPC session that enacted the Basic Law in April 1990: "The executive authorities and the legislature should regulate each other as well as co-ordinate their activities." The Chief Executive, as the head of the SAR and its Government who is accountable to the CPG and the SAR, "must have real power which, at the same time, should be subject to some restrictions."⁷⁹

⁷⁵ Article 73(9) of the Basic Law provides for the impeachment of the Chief Executive by the Legislative Council but a Chief Executive so impeached is not removed by operation of law; the impeachment must be reported to the CPG for decision. On the other hand, Article 52(2) and (3) requires the Chief Executive to resign to resolve an impasse between him or her and the Legislative Council, one that continues to persist in spite of dissolution and fresh elections of the latter.

⁷⁶ Two NPCSC interpretations, adopted in 1999 and in 2005 respectively, were initiated by a report from the Chief Executive/Acting Chief Executive. NPCSC decisions on further development of the HKSAR's political system in 2004, 2007 and 2014 were adopted after the submission of a report of the Chief Executive pursuant to a procedure prescribed under the NPCSC Interpretation of 6 April 2004.

⁷⁷ The CPG issued a state letter (*Guo Kan*) to the Chief Executive on 26 February 2019 in light of the Chief Executive in Council dismissing the appeal by the Hong Kong National Party against the decision of the Secretary for Security to prohibit its operation under HKSAR laws; see Jeffie Lam et al., *Beijing Backs City Government's Ban on Hong Kong National Party, Leader Carrie Lam Says*, South China Morning Post, 26 February 2019 (Mar. 5, 2021), available at <http://www.scmp.com/news/hong-kong/politics/article/2187744/beijing-backs-city-governments-ban-hong-kong-national-party>.

⁷⁸ *Deng Xiaoping on the Question of Hong Kong*, *supra* note 12, at 55.

⁷⁹ Pengfei Ji, *Explanations on "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)" and its Related Documents*, Third Session of the Seventh National People's Congress, China, 28 March 1990 (Mar. 5, 2021), available at https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc10.pdf.



However, as enacted, the Basic Law's provisions do reflect, to lawyers and scholars schooled in the common law tradition, an institutional and functional separation of powers. HKSAR judges have in fact interpreted the Basic Law as incorporating a doctrine of separation of powers and applied it as a feature of Hong Kong's Rule of Law in the adjudication of cases concerning the balance of powers between the HKSAR's coordinate branches of government and how prepared the judicial authority is to check or supervise them.⁸⁰

That had not appealed to Mainland Chinese legal scholars and members of the former Basic Law Drafting Committee, who advocated that the key term that would correctly characterise the political system of the HKSAR is "executive-led government" (*xingzheng zhudao* 行政主導, also translated as "executive dominance").⁸¹ Hong Kong academics had publicly challenged this notion in response.⁸² Official support of the Mainland characterization came in 2007, when Wu Bangguo, the then Chairman of the NPCSC, expressed the view that a key characteristic of the political system of the Hong Kong SAR is "executive-led government" with the Chief Executive as the core (*yi xingzheng zhangguan wei hexin de xingzheng zhudao* 以行政長官為核心的行政主導).⁸³ In July 2010, Qiao Xiaoyang, the then Deputy Secretary-General of the NPCSC, noted in a speech in Macau that while there exists a kind of division of power within the political system prescribed by the Basic Law of Hong Kong and the Basic Law of Macau, it would be wrong to act on the basis of the concept of "separation of the three powers" instead of the actual provisions of the Basic Law, which ought to be read as "a socialist document" with a political system of "executive-led government."⁸⁴

General Secretary and President Xi Jinping, in the Report to the 19th National Congress of the CPC on 18 October 2017, referred to the OCTS policy as an integral component of "Xi Jinping's Thought on Chinese-style Socialism for the New Age." Xi reiterated that the Chief Executive of the SAR occupies the core of its political system.⁸⁵ The imprint of this matter as part of the paramount guiding ideology of the PRC has concluded the discussion.

⁸⁰ See Pui Yin Lo & Albert H.Y. Chen, *The Judicial Perspective of "Separation of Powers" in the Hong Kong Special Administrative Region of the People's Republic of China*, 5(2) J. Int'l Comp. L. 337 (2018).

⁸¹ *Introduction to the Basic Law of the Hong Kong Special Administrative Region* 345–350 (Shu-wen Wang ed., 2nd ed. 2009); Weiyun Xiao, *On the Hong Kong Basic Law* 640–644 (2003); and Albert Chen, "Executive-Led Government", *Strong and Weak Governments and "Consensus Democracy"* in *Hong Kong's Constitutional Debate*, *supra* note 13, at 9.

⁸² See Lo 2014, at 42–46.

⁸³ Bangguo Wu, *Enforce the Basic Law of the Hong Kong Special Administrative Region in Depth, Push Forward the Grand Implementation of 'One Country, Two Systems'*, National People's Congress, 6 June 2007 (in Chinese) (Mar. 5, 2021), available at http://www.gov.cn/jdhd/2007-06/06/content_639111.htm.

⁸⁴ Qiao Xiaoyang, *Studying the Basic Law, Upgrading the Quality of Civil Servants: A Speech at the Graduation Ceremony of the "Advanced Course of the Basic Law of MSAR,"* 6 Acad. J. of One Country, Two Systems 1, 4 (2010).

⁸⁵ Jinping Xi, *supra* note 74.



3.4. National Economic and Social Development Planning and the Greater Bay Area

The CPC has been the vanguard of national economic and social development; this has been achieved through its proposal and steering of periodic national economic and social development plans. State planning, or macro-regulation and control, is plainly a principal feature of the socialist market economy practised in China, with the state-owned economy being the leading force and the state being responsible for its consolidation and growth.⁸⁶ Every five years, the NPC adopts a national economic and social development plan for the PRC.⁸⁷

Since the 12th Five Year Plan for Economic and Social Development of the People's Republic of China (2010–2015), the HKSAR and the MSAR have been included as part of the plan with their separate chapter. Although one part of the chapter repeats the basic premises of OCTS, the Basic Law and support of the SAR Government, the remainder of the chapter describes the SARs as having positions and roles in the PRC's economic development and opening up, outlines the economic strengths and designations of the HKSAR and MSAR and the economic sectors and initiatives that are to be developed in each of the SARs, plus an emphasis in deepening cooperation between the Chinese Mainland (particularly the neighbouring Guangdong Province) and the SARs.⁸⁸

While the SARs had since 2003 been having strengthened trade and investment cooperation under the framework of bilateral Closer Economic Partnership Arrangements, they were adopted in the form of free trade agreements between customs territories and members of the World Trade Organization as voluntary agreements for trade facilitation.⁸⁹ Inclusion of the SARs in national economic and social development planning is another matter, bearing in mind that what the NPC has gone beyond the economic and financial cooperation and facilitation between the Chinese Mainland and the SARs and into matters of cooperation on social development, living standards, culture, education, environmental protection, and other areas, as well as promotion of a quality living area in the Greater Pearl River Delta region and advancing the development of the Guangdong-Hong Kong-Macao Greater Bay Area.

⁸⁶ PRC Constitution, Arts. 6, 7, 15.

⁸⁷ As to the recent state planning process by the five-year plans, see Sebastian Heilmann, *Red Swan: How Unorthodox Policy Making Facilitated China's Rise* 155–158, 173–194 (2018).

⁸⁸ The 12th Five Year Plan for Economic and Social Development of the People's Republic of China (2010–2015), Ch. 57; and the 13th Five Year Plan for Economic and Social Development of the People's Republic of China (2016–2020), Ch. 54 (Mar. 5, 2021), available at http://en.ndrc.gov.cn/policyrelease_8233/201612/P020191101482242850325.pdf.

⁸⁹ See Wenwei Guan, *China's Free Trade from SEZs to CEPA and FTZs: The Beijing Consensus in Global Convergence and Divergence in Chinese Legal Reform and the Global Legal Order: Adoption and Adaptation* 104 (Yun Zhao & Michael Ng eds., 2018).



The Greater Bay Area project of developing nine areas of Guangdong Province, Hong Kong and Macao into a regional grouping rivaling regions such as the Silicon Valley is an ambitious national strategy personally conceived, deployed and advanced by President Xi.⁹⁰ It involves not only infrastructure projects like the Hong Kong-Zhuhai-Macao Bridge and the Guangdong-Shenzhen-Hong Kong Express Rail Link, but, more importantly, harmonization for the purpose of removing barriers in the movement of people, capital and information,⁹¹ objectives that might go beyond the commonplace regional planning efforts.⁹² The Outline Development Plan for this Greater Bay Area, unveiled on 18 February 2019, is all encompassing, covering innovation and technology, infrastructural connectivity, modern manufacturing and service provision, ecological conservation, education and talents, culture and leisure, employment and entrepreneurship, health, social security and social governance, and servicing the Belt and Road Initiative and global competitiveness. As to how all these developments are to be implemented, a central leading group for the development of this Greater Bay Area has been established, “relevant central ministries” would formulate “concrete policies and measures,” keep track of progress in implementation, conduct evaluation and assessments and put forward proposals for refinement, timely reports on major issues would be made to the CPC Central Committee and the State Council, and there is recognized in the Outline Development Plan that there have to be “breakthroughs in systems and mechanisms.”⁹³ If the centralized coordination experienced in regional planning and the “crisis mode” leadership approach of President Xi are to serve as references, economic development in Hong Kong would henceforth be subject to guidance at the national level, with the HKSAR Government producing initiatives and implementations that would serve the macro-regulatory imperatives; it is up to the HKSAR Government to recognize leeway for experiment and innovation, albeit under the purview of the leading group.⁹⁴ This is somewhat a contradiction, for innovation and global competitiveness to be planned and implemented from top-down.

A greater contradiction in these Centre-planned economic and social developments for Hong Kong lies in their imposition of the national socialist system on

⁹⁰ See Jinping Xi, *supra* note 74, at 68; and Office of the Leading Group for Development of the Guangdong-Hong Kong-Macao Greater Bay Area: Building International First Class Bay Area, Advance Livelihood Benefits, People's Daily, 19 February 2019 (in Chinese) (Mar. 5, 2021), available at <http://cpc.people.com.cn/BIG5/n1/2019/0219/c64387-30804195.html>.

⁹¹ See Ben Bland, *Greater Bay Area: Xi Jinping's Other Grand Plan*, Financial Times, 3 September 2018 (Mar. 5, 2021), available at www.ft.com/content/fe5976d8-ab81-11e8-94bd-cba20d67390c.

⁹² See Heilmann 2018, at 159–164.

⁹³ See Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area, 18 February 2019 (English translation) (Mar. 5, 2021), available at https://www.bayarea.gov.hk/filemanager/en/share/pdf/Outline_Development_Plan.pdf.

⁹⁴ See Heilmann 2018, at 188–189, 200–211.



a regional economy and society that is guaranteed by its foundational law to be capitalist with its own way of life.⁹⁵ But that is a contradiction that will be celebrated and not condemned in Hong Kong, so long as tangible benefits could be yielded in the result to some, and hopefully the better, quarters of the Hong Kong community.⁹⁶ In any event, Hong Kong has become increasingly dependent on the PRC's economy and economic and financial policies,⁹⁷ and the servicing of the PRC's needs in the global economy.⁹⁸ A pure and principled approach in the implementation of the Basic Law is not to be a hinderance to "development" and "progress" preferred by the Central leadership and adopted by the SAR's governmental elites.

3.5. The Hong Kong National Security Law

Both the Basic Law of the HKSAR and the Basic Law of the MSAR provides that the SAR "shall" enact, "on its own," legislation to prohibit specified categories of acts endangering national security.⁹⁹ However, while the MSAR has discharged this "constitutional duty" to enact national security legislation in 2009,¹⁰⁰ and has established a Commission on the Defence of National Security since 2018,¹⁰¹ the HKSAR has not been able to enact national security legislation since its establishment in 1997.

As it is well known, Hong Kong was in civil unrest in the latter half of 2019 due to the escalated the "anti-extradition law" protests. In the midst of the confrontations, Hong Kong police used multiple types non-lethal and chemical ammunition. Protestors responded with bricks, slingshots, high-powered laser pointers, sharpened objects and petrol bombs. In addition, on 1 July 2019, protestors stormed into the chamber of the HKSAR's Legislative Council and caused significant damage to the building and facilities there. And, on 21 July 2019, protestors besieged the building of the Liaison Office and, in the course of the event, defaced the national emblem.

⁹⁵ Basic Law of the HKSAR, Art. 5.

⁹⁶ Some quarters in the Hong Kong community will lament over the loss of Hong Kong identity and distinctiveness in the development and consequential subsuming of Hong Kong into the Greater Bay Area; see Agnes Ku, *Identity as Politics: Contesting the Local, the National and the Global* in *Routledge Handbook of Contemporary Hong Kong* 451 (Tai-lok Lui et al. eds., 2019).

⁹⁷ See Yun-wing Sung, *Becoming Part of One National Economy: Maintaining Two Systems in the Midst of the Rise of China* in *Routledge Handbook of Contemporary Hong Kong*, *supra* note 96, at 66.

⁹⁸ See David Meyer, *Hong Kong: China's Global City* in *Routledge Handbook of Contemporary Hong Kong*, *supra* note 96, at 414; and Ho-fung Hung, *Chinese State Capitalism in Hong Kong* in *Id.* at 430.

⁹⁹ Basic Law of the HKSAR, Art. 23 and Basic Law of the MSAR, Art. 23.

¹⁰⁰ See *Lei relativa à defesa da segurança do Estado* (Lei No 2/2009) (Mar. 5, 2021), available at <http://images.io.gov.mo/bo/i/2009/09/lei-2-2009.pdf>. English translation of Lei No 2/2009 is available at <http://www.cecc.gov/resources/legal-provisions/macau-special-administrative-region-national-security-law-chinese-and->.

¹⁰¹ See National Security Defence Commission Holds This Year's 2nd Session, Macaonews, 25 September 2020 (Mar. 5, 2021), available at <http://macaonews.org/national-security-defence-commission-holds-this-years-2nd-session/>.



On a weekly basis between July and November 2019, hundreds and thousands of Hong Kong residents participated in strikes, vandalism, street battles, obstruction of vital infrastructure including the Hong Kong International Airport, the metro system, and the cross-harbour tunnel, and occupation of university campuses. The protests divided Hong Kong society; there were occasions of lynching of individuals and damaging and looting of shop premises.¹⁰²

The CPC decided to act. On 31 October 2019, the fourth plenary session of the 19th Central Committee of the CPC adopted the Decision of the Central Committee Plenary Session on several important questions on upholding and improving the Socialist System with Chinese Characteristics and advancing the modernization of the national governance system and governance ability. Section 12 of the Decision concerned the system of “One Country, Two Systems.” It elaborated on the matter of improving the system for the Central Authorities to exercise comprehensive jurisdiction over the SARs in accordance with the Constitution and the Basic Law for the purposes of staunchly safeguarding national sovereignty, security and development interests and safeguarding the long-term prosperity and stability of the SARs, and ensuring no tolerance of any act that challenges the bottom line of “One Country, Two Systems” or undermining national unification. It stated that such improvements would involve, among others, establishing and improving the legal system and enforcement mechanism of the SARs for safeguarding national security; supporting the strengthening of the power of law enforcement of the SARs, strengthening education on the Constitution, the Basic Law, the national condition, Chinese history and Chinese culture in Hong Kong society (particularly in relation to public servants and young people) so that the national awareness and patriotism of Hong Kong compatriots would be enhanced; and resolutely preventing and restraining external forces from interfering in Hong Kong affairs and conducting separatist, subversive, infiltrating and sabotage activities, so that Hong Kong would have long term governance and order.¹⁰³

The 2020 NPC Session, which was delayed by the COVID-19 pandemic, adopted a decision on 28 May 2020 to instruct the HKSAR to complete the national security

¹⁰² For chronologies of the 2019 Hong Kong Protests prepared by news media and NGOs, see, e.g., New York Times (Mar. 5, 2021), available at <http://www.nytimes.com/interactive/2019/world/asia/hong-kong-protests-arc.html>; and Human Rights in China (Mar. 5, 2021), available at <http://www.hrichina.org/en/2019-hong-kong-protests-timeline>. The HKCFA has also summarized “the degeneration of law and order in Hong Kong and the ever-increasing violence and lawlessness” in Hong Kong between June and November 2019 in its judgment in *Kwok Wing Hang & Ors v. Chief Executive in Council & Anor* [2020] H.K.C.F.A. 42 (21 December 2020) [87]–[97].

¹⁰³ See The Decision of the Central Committee of the Communist Party of China on Several Important Questions on Upholding and Improving the Socialist System with Chinese Characteristics and Advancing the Modernization of the National Governance System and Governance Ability, adopted by the Fourth Plenary Session of the Nineteenth Central Committee of the Communist Party of China on 31 October 2019, Xinhuanet, 5 November 2019 (in Chinese) (Mar. 5, 2021), available at http://www.xinhuanet.com/politics/2019-11/05/c_1125195786.htm.



legislation stipulated in the Basic Law of the HKSAR at an earlier date, require the HKSAR's administrative, legislative and judicial organs to effectively prevent, stop and punish acts and activities endangering national security in accordance with relevant laws and regulations, direct the HKSAR to strengthen the enforcement forces for safeguarding national security and step up enforcement to safeguard national security, and entrust the NPCSC with the formulation of laws for the HKSAR for the purpose of effectively preventing, stopping and punishing acts that seriously endanger national security and activities of foreign or external forces interfering in the affairs of the Hong Kong SAR.¹⁰⁴ The NPCSC did so on 30 June 2020 by enacting the *Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* (HKNSL) and then decided to apply the HKNSL to the HKSAR by adding it to Annex III to the Basic Law of HKSAR. The Chief Executive of the HKSAR promulgated the HKNSL by notice on the same day for the HKNSL to apply to Hong Kong.¹⁰⁵

The HKNSL, drafted in the lexicon of law-making in Mainland China,¹⁰⁶ serves to: (1) Establish general principles and duties in relation to safeguarding national security for the Hong Kong SAR and its residents;¹⁰⁷ (2) Establish institutions of the Hong Kong SAR for safeguarding national security, including the pivot government body of the Committee for Safeguarding National Security (CSNS) chaired by the Chief Executive of the HKSAR and advised by a National Security Adviser;¹⁰⁸ (3) Establish the Office of the Central People's Government in the Hong Kong SAR for safeguarding national security (CPGNSO);¹⁰⁹ (4) Prescribe criminal offences of

¹⁰⁴ See Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security, adopted at the Third Session of the Thirteenth National People's Congress on 28 May 2020 (Mar. 5, 2021), available at <http://www.elegislation.gov.hk/hk/A215>.

¹⁰⁵ See Promulgation of National Law 2020 (Mar. 5, 2021), available at <https://www.elegislation.gov.hk/hk/A406>. For an unofficial English translation of the HKNSL, see Gazette of the Hong Kong Special Administrative Region (GN (E) 72 of 2020) (Mar. 5, 2021), available at <http://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf>.

¹⁰⁶ Article 64 of the HKNSL is a glossary provision that translates some of the penal terms used in the HKNSL to refer to specified terms used in the criminal law and criminal procedure legislation of the HKSAR.

¹⁰⁷ HKNSL, Ch. I.

¹⁰⁸ HKNSL, Ch. II. The CSNS performs these functions: (1) analyzing and assessing the situation of Hong Kong, making work plans and formulating policies, in relation to safeguarding national security; (2) advancing the development of the legal system and enforcement mechanisms of the HKSAR for safeguarding national security; and (3) coordinating major work and significant operations for safeguarding national security in the HKSAR. The current National Security Adviser is Luo Huining, the Director of the Liaison Office, who is also a Deputy Director of the State Council Hong Kong and Macao Affairs Office and a member of the Central Committee of the CPC.

¹⁰⁹ HKNSL, Ch. V. The CPGNSO is staffed with officers of the Chinese Public Security Ministry and State Security Ministry and performs the functions of analysis and assessment of the Hong Kong situation



secession, subversion, terrorism, and collusion with a foreign country or external elements to endanger national security;¹¹⁰ and (5) Prescribe the framework for the investigation, prosecution and punishment of those offences in the Hong Kong SAR, as well as the circumstances and framework for the CPGNSO to exercise jurisdiction in the Hong Kong SAR and the subsequent prosecution and adjudicate of the relevant case by the Chinese procuratorate and court.¹¹¹

The HKNSL is a striking piece of national law enacted for implementation in the HKSAR. It expressly and directly establishes government bodies of the HKSAR, and also a CPG body in the HKSAR, for safeguarding national security, and stipulates that these bodies are answerable to the CPG and not subject to any form of check, scrutiny and accountability under the systems of the Basic Law of the HKSAR. The HKNSL also provides for a self-contained penal code for safeguarding national security that the HKSAR and Mainland Chinese authorities specified under it, including the courts of the HKSAR, would apply according to its language and the particular context for effective and full enforcement so as to prevent, suppress and punish any act or activity endangering national security in Hong Kong.¹¹² To ensure that every individual and organization in Hong Kong recognizes the importance of national security and complies with the HKNSL, Article 6 of the HKNSL imposes on everyone in the HKSAR the duty to abide by the HKNSL and the laws of HKSAR that safeguard national security and requires a resident of the Hong Kong SAR who stands for election or assumes public office to confirm in writing or take an oath to uphold the Basic Law of the HKSAR and swear allegiance to the HKSAR in accordance with the law. And to make sure that even the judges and lawyers of the HKSAR understand, Article 2 of the HKNSL interprets the Basic Law of the HKSAR to indicate that those Basic Law provisions on the legal status of the HKSAR as an inalienable part of China and a local administrative region coming directly under the CPG are “fundamental provisions” of the Basic Law and that no institution, organization or individual in the HKSAR shall contravene these provisions in exercising their rights and freedoms.¹¹³

for providing opinions and making proposals on strategy and policy for safeguarding national security in the HKSAR, overseeing, guiding, coordination and supporting the HKSAR in performing its duties for safeguarding national security, collecting and analyzing intelligence and information concerning national security, and handling cases concerning an offence endangering national security upon the approval of the CPG.

¹¹⁰ HKNSL, Ch. III.

¹¹¹ HKNSL, Chs. IV & V.

¹¹² Article 62 of the HKNSL establishes the “prevailing” status of the HKNSL over provisions of the local laws of the HKSAR that are inconsistent with it.

¹¹³ This provision may control the proper understanding and application of Article 4 of the HKNSL (which provides that human rights shall be respected and protected in safeguarding national security in the HKSAR); and Article 5 of the HKNSL (which provides that the principle of the rule of law shall be adhered to in preventing, suppressing and punishing crimes of endangering national security, and highlights several principles of criminal justice, including the principle that a person is presumed innocent until convicted by a judicial body).



Whilst the HKNSL, as described above, has a profound effect on the existing political, legal and judicial systems of the HKSAR provided under the Basic Law of the HKSAR, this is because the HKNSL adds a layer of governmental responsibilities and powers to the HKSAR. More importantly, the Central Authorities entrusts, through the HKNSL, the primary operational duties with the CSNS, the Chief Executive of the HKSAR and the investigatory and prosecutorial bodies of the HKSAR, with the CPGNSO serving as the support and in particularly rare circumstances, the substitute enforcement body on the ground. The courts of the HKSAR, too, must adjudicate cases of endangering national security in accordance with the applicable law. Hong Kong people continues to rule Hong Kong, albeit with a bigger stick. From this perspective, it is strange to find foreign governments condemning the HKNSL as diminishing the HKSAR's "high degree of autonomy."¹¹⁴

Conclusion

Communism prospered on Chinese soil possibly, in part, due to the attraction of some of its sloganized propositions, such as equality (均) and commonness (公), to the intelligentsia educated in the Confucian tradition.¹¹⁵ The CPC captured the hearts and minds of the educated class longing for a force of change to save China from domestic turmoil and foreign aggression.¹¹⁶ The CPC went on to defeat all opposition and achieve governance of the land mass of China. The CPC has adopted the twin goals of realizing Communism and the rejuvenation of the Chinese nation, to be achieved through establishing *socialism* as China's basic system and advancing socialist construction, a great project in a great struggle to realize a great dream.¹¹⁷

Commentators are now beginning to consider China a "civilizational state," in the sense of the Chinese State's ability to apply China's cultural self-sufficiency to further the agenda of internal governance and external influence, to the extent of at least constructing an alternative discourse competing with and even excepting or departing from internationally recognized or universal norms or values.¹¹⁸ Before

¹¹⁴ See, e.g., UK Foreign, Commonwealth and Development Office, The Six-Monthly Report on Hong Kong 1 January to 30 June 2020, 23 November 2020 (Mar. 5, 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/937162/Hong_Kong_Six_Monthly_Report_January_-_June_2020.pdf.

¹¹⁵ See Ying-shih Yu, *The Memoirs of Yu Ying-Shih* 49–53 (2018) (in Chinese).

¹¹⁶ Another contributing factor was personality and idealism surrounding Mao Zedong; see Julia Lovell, *Maoism: A Global History* (2019).

¹¹⁷ See Jinping Xi, *supra* note 74, at 16–19; and Jinping Xi, *On Several Questions Concerning the Insistence and Development of Socialism with Chinese Characteristics*, 7 Qiu Shi (2019) (in Chinese) (Mar. 5, 2021), available at www.qstheory.cn/dukan/qs/2019-03/31/c_1124302776.htm.

¹¹⁸ See Weiwei Zhang, *The China Wave: Rise of a Civilizational State* (2012); Weiwei Zhang, *The China Horizon: Glory and Dream of a Civilizational State* (2016); Christopher Coker, *The Rise of the Civilizational State*



them, Partlett and Ip recognized the congruence of traditional Chinese bureaucratic and historical approach to law and Leninist principles of governance in relation to centralized governance by law.¹¹⁹

The discussion above can show sufficiently that Hong Kong and Macau continue to play their roles in the national rejuvenation project of the Chinese nation, not separately, but in ways coordinated under the leadership of the CPC and implemented through its legal and non-legal nodes and connections with the SARs and their economies and communities. In this connection, the law, Leninist encoded, has served the interests of the CPC and the Central Authorities under its leadership in the governing of Hong Kong.

The United States has cancelled the preferential treatment it once accorded to Hong Kong in distinction to that accorded to the PRC.¹²⁰ Any talk of the Sino-British Joint Declaration 1984 providing international redress is hollow since the PRC, a party to the treaty and the sovereign of Hong Kong, made it known in 2017 that it regards the treaty as “spent.”¹²¹ Hong Kong residents’ perception of OCTS has plunged to all time low net rating of minus 40 percentage points.¹²² Twenty-three years since the reunification with the Motherland, the legal elite of Hong Kong cannot possibly rest on the reputational laurels of the common law and liberal constitutionalism, they have to face the realities of the “One Country” they live under, including the presence of the Central Authorities’ view of legality.

References

Biddulph S. *Democratic Centralism and Administration in China in Socialist Law in Socialist East Asia* 195 (Hualing Fu et al. eds., 2018). <https://doi.org/10.1017/9781108347822.008>

Castellucci I. *Legal Hybridity in Hong Kong and Macau*, 57(4) McGill L.J. 665 (2011).

Chan J.M.M. *Behind the Text of the Basic Law: Some Constitutional Fundamentals in The Invisible Constitution in Comparative Perspective* 193 (Rosalind Dixon & Adrienne Stone eds., 2018). <https://doi.org/10.1017/9781108277914.007>

(2019); Gideon Rachman, *China, India and the Rise of the “Civilization State,”* Financial Times, 4 March 2019 (Mar. 5, 2021), available at www.ft.com/content/b6bc9ac2-3e5b-11e9-9bee-efab61506f44.

¹¹⁹ Partlett & Ip 2016, at 475.

¹²⁰ See The President’s Executive Order on Hong Kong Normalization, Executive Order 13936, 14 July 2020 (Mar. 5, 2021), available at <https://www.federalregister.gov/documents/2020/07/17/2020-15646/the-presidents-executive-order-on-hong-kong-normalization>.

¹²¹ See Joyce Ng, *Sino-British Joint Declaration on Hong Kong ‘No Longer Has Any Realistic Meaning,’ Chinese Foreign Ministry Says*, South China Morning Post, 30 June 2017 (Mar. 5, 2021), available at <https://www.scmp.com/news/hong-kong/politics/article/2100779/sino-british-joint-declaration-hong-kong-no-longer-has-any>.

¹²² For the relevant surveys done by the Hong Kong Public Opinion Research Institute on Hong Kong’s public confidence in OCTS (Mar. 5, 2021), available at <http://www.pori.hk/pop-poll/cross-strait-relation/k006>.



Chan J.M.M. *Paths of Justice* (2018).

Chen A.H.Y. & Lo P.Y. *Hong Kong's Judiciary Under 'One Country, Two Systems'* in *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* 131 (Hoong P. Lee & Marilyn Pittard eds., 2018). <https://doi.org/10.1017/9781316480946.009>

Chen A.H.Y. *An Introduction to the Chinese Legal System* (5th ed., LexisNexis, 2019).

Cheng J. *The Way of Governance and the Power of Governance: A Systemic Analysis of China's Constitution* (2015).

Cheung K.Y. & Fan C.S. *Hong Kong Investment in China and Income Distribution of Hong Kong*, 16(4) *J. Econ. Integr.* 526 (2001).

Enright M.J. *Developing China: The Remarkable Impact of Foreign Direct Investment* (2017). <https://doi.org/10.4324/9781315393346>

Hong Kong's Constitutional Debate: Conflict over Interpretation (Johannes M.M. Chan et al. eds., 2000).

Hung H. *Chinese State Capitalism in Hong Kong* in *Routledge Handbook of Contemporary Hong Kong* 430 (Tai-lok Lui et al. eds., 2019). <https://doi.org/10.4324/9781315660530>

Introduction to the Basic Law of the Hong Kong Special Administrative Region (Shu-wen Wang ed., 2nd ed. 2009).

Ip E.C. *Interpreting Interpretations: A Methodology for the Judicial Enforcement of Legislative Interpretations of the Hong Kong Basic Law*, 2017 *Pub. L.* 552 (2017).

Ku A. *Identity as Politics: Contesting the Local, the National and the Global* in *Routledge Handbook of Contemporary Hong Kong* 451 (Tai-lok Lui et al. eds., 2019). <https://doi.org/10.4324/9781315660530>

Lam J. *Re-thinking the NPCSC's Power to Interpret the Basic Law*, 47 *Hong Kong L.J.* 825 (2017).

Lin F. *The Duty of Hong Kong Courts to Follow the NPCSC's Interpretation of the Basic Law: Are There Any Limits?*, 48 *Hong Kong L.J.* 167 (2018).

Lo P.Y. & Chen A.H.Y. *The Judicial Perspective of "Separation of Powers" in the Hong Kong Special Administrative Region of the People's Republic of China*, 5(2) *J. Int'l Comp. L.* 337 (2018).

Lo P.Y. *An Internationalist, Consequentialist and Non-progressive Court: Constitutional Adjudication in Hong Kong (1997–2009)*, 2 *City U. H.K. L. Rev.* 215 (2010).

Lo P.Y. *Enforcing an Unfortunate, Unnecessary and 'Unquestionably Binding' NPCSC Interpretation: The Hong Kong Judiciary's Deconstruction of its Construction of the Basic Law*, 48 *Hong Kong L.J.* 399 (2018).

Lo P.Y. *Hong Kong: Common Law Courts in China* in *Asian Courts in Context* 183 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2014). <https://doi.org/10.1017/CBO9781107588813.006>

Lo P.Y. *The Judicial Construction of Hong Kong's Basic Law* (2014).

Lovell J. *Maoism: A Global History* (2019).

Partlett W. & Ip E.C. *Is Socialist Law Really Dead?*, 48(2) *N.Y.U. J. Int'l L. & Politics* 463 (2016).



Potter P. *China's Legal System* (2013).

Qiao X. *Studying the Basic Law, Upgrading the Quality of Civil Servants: A Speech at the Graduation Ceremony of the "Advanced Course of the Basic Law of MSAR,"* 6 Acad. J. of One Country, Two Systems 1 (2010).

Sung Y. *Becoming Part of One National Economy: Maintaining Two Systems in the Midst of the Rise of China* in *Routledge Handbook of Contemporary Hong Kong* 66 (Tai-lok Lui et al. eds., 2019). <https://doi.org/10.4324/9781315660530>

Wang Z. *Relationship Between the Chinese Central Authorities and Regional Governments of Hong Kong and Macao: A Legal Perspective* (2019). <https://doi.org/10.1007/978-981-13-2322-5>

Williams B. *Lenin and the Problem of Nationalities*, 15(4-6) Hist. Eur. Ideas 611 (1992). [https://doi.org/10.1016/0191-6599\(92\)90070-5](https://doi.org/10.1016/0191-6599(92)90070-5)

Woodman S. *Legislative Interpretation by China's National People's Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law in Interpreting Hong Kong's Basic Law: The Struggle for Coherence* 229 (Hualing Fu et al. eds., 2007). <https://doi.org/10.1057/9780230610361>

Xiao W. *On the Hong Kong Basic Law* (2003).

Yu Y. *The Memoirs of Yu Ying-Shih* (2018).

Zhang Q. *The Constitution of China: A Contextual Analysis* (2012).

Zhang W. *The China Horizon: Glory and Dream of a Civilizational State* (2016).

Zhang W. *The China Wave: Rise of a Civilizational State* (2012).

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