Università
Ca'Foscari
Venezia

Master's Degree in
Languages, Economics
and Institutions of Asia
and North Africa

Final Thesis

One country, one system?
The evolving controversial relations between Beijing and Hong Kong

Supervisor
Ch. Prof. Renzo Riccardo Cavalieri

Assistant supervisor
Ch. Prof. Sara D'Attoma

Graduand
Alessia Caparra

Matricolation number:
874766

Academic Year
2019 / 2020

Table of contents

前言

本论文的目的是评论中央人民政府与香港特别行政区政府之间的关系以及相互作用的机构。于 1997 年 7 月 1 日中国政府对香港地区恢复行使主权；然后根据宪法的第三十一条，中国政府决定在香港建立一个直辖于中央人民政府的特别行政区。香港有自己的基本法（中华人民共和国香港特别行政区基本法），根据这份文件香港享有高度自治权，并享有行政权、立法权、独立的司法权和终审权。另外，香港 1997 年以前的资本主义制度以及生活方式 50 年不变。

从 1997 年起《一国两制》方针政策调控中央人民政府于香港特别行政区的政治关系。《一国》表示在中华人民共和国内香港特别行政区是不可分开的部分，并且香港直辖于中央人民政府，而《两制》的意思是保持香港原有上述特点。然而，多年来这个方针政策的不同解释造成了某些争论。事实上，从中央人民政府的角度来看《一国两制》是为实现国家和平统一的基本工具。另外，这个方针有利于维护国家主权、安全和发展利益，对保持香港特别行政区长期繁荣稳定很重要。反而从香港居民的角度来看《一国两制》主要表示保障言论、出版、集会、结社、旅行、迁徙、宗教信仰的自由。

通过这本文论我来分析《一国两制》的平衡如何变化，中央人民政府与香港特别行政区政府的相互作用如何变化。为了实现这个目的我的分析分为三个部分。第一个部分与香港的独特历史有关；作为英国的殖民地,它的历史与中华人民共和国的历史有差异，香港居民的生活方式、习惯、文化和理想与大陆的不一样。中华人民共和国香港特别行政区基本法体现香港的独特情况，实际上它具有两面性：一方面它是国家主权的基础，另一方面它表现地方自治。通过香港基本法的

分析，第一个部分定义中央政府于香港政府的关系。在香港基本法的条中，第一百五十八条对这两个政府的关系的重要性非常大， 它于基本法的解释有关；尤其是，根据第一百五十八条全国人民代表大会常务委员会享有解释权。从 1999 年起，全国人民代表大会常务委员会发表了五个解释，每个解释有自己的特点，并帮助了解北京于香港关系的发展。

本文论的第二个部分关于 2019 年逃犯及刑事事宜相互法律协助法例条例草案的修订。通过该文件香港政府尝试修订《逃犯条例》，是为了使香港于大陆和其他国家安排引渡程序。为了更了解这种问题，第二个部分先包括中华人民共和国的引渡方式以及香港特别行政区的引渡方式的分析。通过该分析，我们会发现香港于北京之间没有引渡协议；这主要是因为中华人民共和国的法系是民法的， 而香港特别行政区的是普通法，差异很大。关于这个题目有一些专家认为香港的立法机关故意地决定于北京不府签订引渡的协议，是为了维护香港的法治和司法独立。反而，其他一些专家认为引渡协议的缺失表示香港于北京的政治关系有非常严重的问题。除了这个分析以外，第二个部分还包括 2019 年的事件的报告。2019 年逃犯及刑事事宜相互法律协助法例条例草案的修订对《一国两制》方针政策的影响非常有意思；实际上，它在香港产生舆论哗然，香港人开始害怕失去他们的自由和基本权利。

本文论的第三个部分于另一个对香港于北京的关系有很大影响的最近事件有关，也就是说 2020 年六月全国人民代表大会决定发布中华人民共和国香港特别行政区维护国家安全法。北京政府表明它在 2019 年的动荡的基础上决定发布上述文件，并且根据中华人民共和国香港特别行政区基本法的二十三条，香港特别行政区应该自行立法维护自己的安全和稳定。由于香港政府从来没有发布这种法律，所以

全国人民代表大会常务委员会决定发布于香港的安全有关的法律。从北京政府的角度来看，这种法律的目标不仅是维护香港安全，而且还是实施《一国两制》方针政策，让这个地区保持稳定性，并不断地发展。而，从香港人的角度来看，该新法律对他们的权利和利益不有利；这主要是因为它的规定不清楚，所以更容易有不同的解释。另外，根据最近安全法，不遵守本法律的香港人和其他国家的人犯会在大陆受审。

所有上述的事件对北京于香港关系的发展有重要性，他们有不同的特点，但是他们都有两面性：一方面北京政府使用全国人民代表大会的权力来影响香港内务，另一方面香港人害怕北京干预会影响港岛的政治制度、生活方式以及居民的权力、利益和自由。根据国际惯例，如果两个国家的政府有同样的政治制度，它们更容易地合作，而要是它们的政治制度之间的差异大，合作的发展更难。在所有上述的情况下，北京于香港政治制度之间的差异很夏然；因而，必须重新考虑《一国两制》的方针政策，还必须考虑北京于香港的关系是否均衡的关系；中华人民共和国政府正在尝试建立《一国一制》的架构还是它的目的是维护香港特别行政区的高度自治权？

Introduction

The aim of this thesis is analyzing the relations and mechanisms of interaction existing between the Central People's Government of the PRC and the government of the Hong Kong Special Administrative Region. On July 1, 1997 the mainland government started to exert its sovereignty over Hong Kong and, afterwards, complying with Article 31 of the Chinese Constitution, it decided to establish the Hong Kong Special Administrative Region (HKSAR). This region has its own mini constitution, the Basic Law, which provides that Hong Kong enjoys a high degree of autonomy and executive, legislative and independent judicial power, including that of final adjudication. Furthermore, it provides that, after 1997, the previous capitalist system and way of life would remain unchanged for 50 years.

Starting from 1997 onwards, the mechanisms of interaction between Beijing and Hong Kong have been based on the "one country, two systems" principle. On the one hand, "one country" means that the HKSAR is considered an "inalienable part of the People's Republic of China" and that it is under the jurisdiction of the Central Government; on the other hand, the meaning of "two systems" is maintaining the previously mentioned peculiarities of the special administrative region. However, the differing interpretations of this formula, which have emerged across time, have led to many debates. Indeed, from the point of view of the Central Government, the "one country, two systems" principle represents an instrument used to attain a national peaceful reunification; additionally, it is fundamental in order to safeguard the region's national sovereignty, security and development interests, and to maintain a long-term flourishing stability. On the contrary, from Hong Kong residents' point of view, the principle at issue mainly means to

guarantee freedom of speech, press, assembly, association, travel, migration and religious belief.

Through this dissertation I will analyze how the balance of the "one country, two systems" principle has shifted and how the mechanisms of interaction between the Central Government and the Hong Kong government have evolved. The first chapter deals with the unique history of the HKSAR: being a British colony, its history differs from the PRC one and Hong Kong people's way of life, habits, culture and way of thinking are not the same as in the mainland. The Hong Kong Basic Law reflects the peculiar status of the region; as matter of fact, the mini constitution has a dual nature: on the one hand, it represents the prerequisite for national sovereignty, and, on the other hand, it is the expression of local autonomy. By analyzing the Basic Law, this chapter aims to define the relations existing between the mainland and the region. Among the articles of the Basic Law, Article 158, which deals with the interpretation issue, plays a fundamental role in the development of such relations; in particular, according to Article 158 the National People's Congress Standing Committee (NPCSC) is vested with the interpretation power of the Basic Law itself. Starting from 1999 until now, this body has issued five interpretations and each one of them may help in understanding the way in which the relations between Beijing and Hong Kong have evolved.

The second chapter of this thesis is devoted to a case study on the 2019 attempt to amend Hong Kong extradition law. The aim of such amendment would be to establish an agreement on extradition both between Hong Kong and the mainland and between Hong Kong and other countries with which Hong Kong has never signed an agreement on this issue. In order to have a full understanding of this incident, this chapter firstly include a description of the extradition systems and procedures in the mainland and in the HKSAR;

the aim of this part is explaining the reason why there is no extradition agreement between the two parties, which seems to be the enormous difference existing between mainland's civil law system and Hong Kong's common law system. Concerning this matter, many experts believe that Hong Kong legislature has intentionally not signed an agreement with the mainland in order to safeguard its rule of law and judicial independence. On the contrary, other experts argue that the lack of an extradition agreement represents a loophole in the relations between the two governments. This second chapter also provides a report on the incidents which were caused by the 2019 amendment; it has had a significant influence on the "one country, two systems" formula and has caused public unrest in the region; such unrest was mainly due to the fact that people started to worry about the likelihood to lose their freedoms and fundamental rights.

The final chapter concerns another important incident which has affected the development of the interaction between the Central Government and the region's government: the decision taken by the National People's Congress in June 2020 to issue a National Security Law for the region. The Central Government has clearly stated that, following the unrest of the previous year, it was necessary to issue the above-mentioned law; additionally it also argued that, according to Article 23 of the Basic Law the special administrative region would have issued a law independently in order to safeguard its own security and stability. Considering that this has never happened, the NPC decided to take on the responsibility to act in this sense. From the point of view of the Central Government, the security law not only aims to safeguard national security, it is also fundamental in order to implement the "one country, two systems" principle, and to allow the region to maintain stability and continuously develop. In contrast, Hong Kong people strongly believe that the new law highly affects their rights and interests, considering that its provisions are not so clear and leave space for differing interpretations. Additionally,

it provides that both Hong Kong people and people based in other countries who act against the law may be tried in the mainland.

Each one of the above-mentioned incidents are meaningful for the purpose of this dissertation; they all have different features, but, at the same time, they all have a dual nature: on the one hand, in all these cases, the Central Government has exploited the power of the NPC to exert its influence in Hong Kong internal affairs; on the other hand, Hong Kong people have shown their concern about Beijing's intervention in the region and its potential influence on the political system and way of life of Hong Kong, and on the rights, interests and freedoms of its residents. According to the international practice, if two governments share the same political system, they are more likely to cooperate, while if they have substantially different political systems, it may be more difficult to find a common ground. In all the cases analyzed, the difference existing between the two governments at issue is evident, as a consequence, it is necessary to reconsider the concept of "one country, two systems" and try to understand whether there is balance between Beijing and Hong Kong's power. Is the Central Government trying to establish a path towards a "one country, one system" or is it acting in order to safeguard the high degree of autonomy of the special administrative region?

Chapter I: Hong Kong, Beijing and the interpretation issue

Part I: Hong Kong and its relations with the Central People's Government

In the first part of this thesis I will provide an analysis of the development of Hong Kong's strong sense of identity and of the evolving relations between the region and the mainland, which have affected the "one country, two systems" principle. Additionally, an analysis of the provisions contained both in the Sino-British Joint Declaration and in the Basic Law will be reported in order define the formal mechanisms of interaction between the two governments.

1. Hong Kong's identity through history

In 1841, during the first Opium War, the British naval party invaded the Hong Kong island and took control of it in the name of the British power. The following year, the Treaty of Nanking[1] officially set the Chinese handover of Hong Kong Island under the British control in perpetuity[2]. The colony was further expanded twice; the first transfer took place in 1860, during the Second Opium War[3], when Britain obtained the lower Kowloon Peninsula in perpetuity, under the Convention of Peking; and the second transfer took place in 1898, when the British obtained the control and a 99-year lease of the so-called New Territories[4]; the end of this lease would culminate in the return of all Hong Kong to China in 1997[5]. At that time, the real intention of Britain was establishing

[1] On the Treaty of Nanking see: Steve TSANG, *A modern history of Hong Kong*, Bloomsbury Academic, 2007, p.14
[2] John M. CARROLL, *A Concise History of Hong Kong*, The University of Hong Kong, 2007, p.1
[3] On Opium Wars see: Jack Patrick HAYES, *The Opium Wars in China*, Asia Pacific Foundation of Canada, https://asiapacificcurriculum.ca/learning-module/opium-wars-china
[4] The New Territories correspond to an area which includes approximately 230 outlying islands.
[5] Richard C. BRUSH, *Hong Kong in the shadow of China*, Brookings Institution Press, 2016, pp. 6-7

an imperial outpost in order to improve its trade and economic exchanges with the Chinese Empire. British efforts represented a significant driving force for the economic development of the region, and they enabled Hong Kong to become a centre for international trade[6]. As a matter of fact, Hong Kong entered its modern era, transforming itself from a group of fishing villages into a British imperial outpost, a naval station and a free port[7].

Despite being a British colony, Hong Kong was closely integrated to China both socially and economically, and this was mainly due to the fact that, in this first phase, there were no formal borders among the mainland and the region, which allowed mainland Chinese to move freely. In particular, Chinese people from the mainland decided to move to Hong Kong because, on the one hand, they saw the area as a refuge from wars and rebellions[8] that were taking place in their territories, and, on the other hand, they were interested in the opportunities for trade and employment provided by the colony. However, these migrants tended to return to the mainland when the local situation improved or when they were satisfied with their business; this is the reason why they felt Chinese and, at this stage, Hong Kong was considered only a place of transit[9].

However, the real economic success of Hong Kong started in the decades following World War II and the Cold War. This period was characterized by another Chinese migration wave towards Hong Kong, which was mainly due to the beginning of the civil war between the Chinese Communist Party (CCP) and the Nationalist Party, whose outcome was the CCP's victory and the establishment of the People's Republic of China

[6] Steve TSANG, *A modern history of Hong Kong*, Bloomsbury Academic, 2007, p.57
[7] Steve TSANG, *Modern Hong Kong*, Oxford Research Encyclopedia of Asian History, 2017, p.3
[8] On Chinese wars and rebellions that led to migrations in the mid-late 19th century see: Jack Patrick HAYES, *Leaving home: Chinese Migrations in the Mid-Late 19th century*, Asia Pacific Foundation of Canada, https://asiapacificcurriculum.ca/learning-module/chinese-migrations-mid-late-19th-century
[9] Alvin Y. SO, *"One country, two systems" and Hong Kong-China National Integration: A Crisis-Transformation Perspective*, Journal of Contemporary Asia, 2011, p.101

(PRC) in 1949[10]. Thanks to some favorable circumstances, including a stable colonial government, access to British capital and cheap labor from China, Hong Kong experimented its economic boom. Under such conditions, there were clear differences between life in Hong Kong and life in the PRC and these discrepancies were due to the fact that the PRC had to face many difficulties caused by Mao's Great Leap Forward (1958-1962)[11] and Great Proletarian Cultural Revolution (1966-1976)[12].

Being a British colony, Hong Kong represented a refuge also for revolutionaries and critics of the Chinese government. But the colonial government never allowed these critics to use Hong Kong in order to subvert the Chinese administration. However, after 1949, the CCP tried to maintain control over the area through a secret party branch under the public guise of the New China News Agency[13], which was recognized and tolerated by the colonial government[14].

Additionally, after the Communist Revolution in 1949, the Hong Kong-China relation significantly changed in comparison with their relation in the XIX century. Indeed, all the "refugees" that entered Hong Kong in this period could not go back to China, because of formal borders created by the government in order to stop the entrance of people from the mainland. The Chinese government, on its part, decided to close borders because it was afraid of the capitalist contamination which came from the region[15]. Furthermore, from an economic point of view, the colonial state decided to gain more control over Hong

[10] On the civil war see: Guido SAMARANI, La Cina del Novecento: Dalla Fine dell'Impero ad Oggi, Einaudi, Torino, 2004
[11] On the Great Leap Forward see: Hsiung-Shen JUNG, Jui-Lung CHEN, *Causes, Consequences and Impact of the Great Leap Forward in China*, Canadian Center of Science and Education, 2019
[12] On the Great Proletarian Cultural Revolution see: Thomas HEBERER, *The "Great Proletarian Cultural Revolution": China's modern trauma*, Modern Chinese History, 2009
[13] On Chinese Representatives in Hong Kong in the colonial period see: Peter WESLEY-SMITH, *Chinese Consular Representation in British Hong Kong, Pacific Affairs, University of British Columbia,* 1998
[14] Steve TSANG, *Modern Hong Kong*, Oxford Research Encyclopedia of Asian History, 2017, p.5
[15] Alvin Y. SO, *"One country, two systems" and Hong Kong-China National Integration: A Crisis-Transformation Perspective*, Journal of Contemporary Asia, 2011, pp.101-102

Kong transforming it from a commercial hub orientated toward China to a commercial hub orientated toward the global market. In this phase, Hong Kong was not only separated from mainland China from an economic point of view, but it was separated from a political, social and cultural point of view as well; as a matter of fact, the colonial government suppressed communist operations in Hong Kong and, on the education front, English was considered the language for instruction[16]. The closing of borders deepened the differences between Maoist China and capitalist Hong Kong and the success of the colonial system gave rise to a sort of ideological challenge to Beijing[17]. As a consequence of these factors, starting from 1950 Hong Kong experimented the rise of a national identity, which was based on a blend of traditional Chinese culture and culture imported from overseas[18].

A further step in the development of the relation between mainland China and Hong Kong took place in 1971, when the PRC became a UN member state and its ambassador to the UN, Huang Hua, expressed strong opposition to the classification of Hong Kong and Macau as colonies towards the General Assembly's Special Committee on Colonialism. In particular, the following year Huang Hua underlined in a letter that "Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities" and that "the settlement of the questions of Hong Kong and Macao is entirely within China's sovereign right and does not fall under the ordinary category of colonial territories"; in response, the chairman of the UN committee agreed to China's demand[19].

[16] Alvin Y. SO, *"One country, two systems" and Hong Kong-China National Integration: A Crisis-Transformation Perspective*, Journal of Contemporary Asia, 2011, pp.101-102
[17] Richard C. BRUSH, *Hong Kong in the shadow of China*, Brookings Institution Press, 2016, p.9
[18] Steve TSANG, *Modern Hong Kong*, Oxford Research Encyclopedia of Asian History, 2017, p.14
[19] Hungdah CHIU, *Hong Kong's transition to 1997: background, problems and prospects (with documents)*, *Maryland Series in Contemporary Asian Studies*: Vol. 1993: No. 5, Article 1, p.4

The year 1979 was a crucial one for Hong Kong's future, because it sanctioned the beginning of a process of formal negotiations between Britain and the PRC. In this phase, the Chinese party aimed to improve Sino-Hong Kong relations and to increase Hong Kong's contribution to the programme of "four modernizations"[20]. In 1982, Margaret Thatcher, the British prime minister, raised the question of Hong Kong with both Premier Zhao Ziyang and Chairman of the Military Affairs Commission Deng Xiaoping emphasizing that, in order to preserve Hong Kong's stability as commercial and financial centre, it was fundamental to maintain its link with the United Kingdom[21]. Under such circumstances, Deng Xiaoping defined the Chinese government's position showing rigidity on the issue of sovereignty: China would accept an agreement for cooperation with Britain in order to safeguard Hong Kong's prosperity and stability, but it would not make any concession over sovereignty[22]. The outcome of these Sino-British negotiations took place in 1984: the leaders of the two countries signed the Sino-British Joint Declaration (*Zhongying Lianhe Shengming* 中英联合声明) setting forth the British handover of Hong Kong to China which would take place in 1997, when Hong Kong would become a Special Administrative Region (SAR) with a high degree of autonomy. Moreover, according to this agreement, Hong Kong social and economic systems would remain unchanged for 50 years. In this way, the British would manage to maintain a capitalist economy and residents would continue to enjoy those rights which were granted

[20] Steve TSANG, *A modern history of Hong Kong*, Bloomsbury Academic, 2007, p.212
Four modernizations were put at the top of the country's agenda by Deng Xiaoping in order to strengthen the fields of agriculture, industry, defence, science and technology; on the "four modernizations" programme see: Thomas S. MACINTYRE, *Impact of the Sino-British agreement on Hong Kong's economic future*, Journal of Comparative Business and Capital Market Law 7, 1985, p.199
[21] Hungdah CHIU*, Hong Kong's transition to 1997: background, problems and prospects (with documents)*, *Maryland Series in Contemporary Asian Studies*: Vol. 1993: No. 5, Article 1, p.5
[22] On Sino-British negotiations which took place from 1982 to 1983 see: Steve TSANG, *A modern history of Hong Kong*, Bloomsbury Academic, 2007, p.218

in the colonial period until 2047, including rights to speech, press, assembly, strike and religious belief[23].

In 1985 the Chinese government started the drafting phase of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (*Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa* 中华人民共和国香港特别行政区基本法), which was promulgated by the Chinese National People's Congress (NPC) in 1990. It is the current mini constitution of the Hong Kong Special Administrative Region, which translates the general principles of the Joint Declaration into greater detail. In the next paragraphs we will try to analyze the importance of the Basic Law and its role in defining the dynamics of interaction between the Central People's Government (CPG) and the Hong Kong Special Administrative Region. In this phase, both the British and Hong Kong governments, tried to prepare Hong Kong politically for this new era as part of China, but they were not always successful in persuading those residents who asked for a more open political system and democratization[24]. As a matter of fact, the political integration process between Hong Kong and the mainland before the entry into force of the Basic Law faced some difficulties. A symbolic event in this sense is represented by 1989 Tiananmen protests which made Hong Kong people worry about the possibility that the Communist Party would not respect the provisions contained in the Joint Declaration and in the Basic Law; and, as a consequence, this would undermine the high degree of autonomy of the region. The concern linked to Tiananmen events led to a series of protests also in Hong Kong

[23] Hungdah CHIU*, Hong Kong's transition to 1997: background, problems and prospects (with documents)*, *Maryland Series in Contemporary Asian Studies*: Vol. 1993: No. 5, Article 1, p.6
[24] Richard C. BRUSH, *Hong Kong in the shadow of China*, Brookings Institution Press, 2016, p. 14

against the Chinese Communist Party (CCP), but also to an emigration process from Hong Kong to other areas of the world and to the establishment of a resistance movement[25].

On July 1, 1997, the British government officially handed Hong Kong over to the PRC and Hong Kong formally became a SAR. In its early phases as a SAR, Hong Kong seemed not to be affected by Beijing's intervention in domestic affairs and enjoyed a high degree of autonomy; however, soon it was clear that it would be difficult to find a framework that would allow the Chinese government and the Hong Kong government not to cross each other's bottom lines[26].

In particular, after 1997, a conflict over constitutional reform began between mainland China and Hong Kong and it was due to the fact that, on the one hand, the Hong Kong public did not accept the rule of the Communist party, and, on the other hand, it demonstrated cultural similarities with the Chinese from mainland[27]. The co-existence of two systems that are different in values and ideology – a common law system based on individualism and separation of power on one side, and a socialist system on the other side – has given rise to inevitable conflicts; these conflicts have been further exacerbated by a blurred demarcation of jurisdiction and the absence of a mechanism aimed to resolute disputes between the two systems[28].

[25] Alvin Y. SO, *"One country, two systems" and Hong Kong-China National Integration: A Crisis-Transformation Perspective*, Journal of Contemporary Asia, 2011, pp. 106-107
[26] Steve TSANG, *Modern Hong Kong*, Oxford Research Encyclopedia of Asian History, 2017, p.15
[27] Anthony Y.H. FUNG, Chi Kit CHAN, *Post-handover identity: contested cultural bonding between China and Hong Kong*, Chinese Journal of Communication, 2017, p.1
[28] Johannes CHAN, *Hong Kong's Constitutional Journey, 1997-2011*, University of Hong Kong, Faculty of Law, 2014, p.2

2. The three phases of Hong Kong's system of government

As already mentioned before, in 1984 Britain and China signed the Sino-British Joint Declaration defining new features for the government of the special administrative region. In this paragraph we will try to analyze major changes of Hong Kong's system of government before and after 1984 and the way in which such changes have affected the relations existing between the region's government and the mainland government.

2.1 Before 1984

For what concerns British rule over Hong Kong before 1984, the constitutional order was established exactly like other British colonies and it was based on two main principles of subordination: the legislature was subordinate to the executive and the colonial government was subordinate to the imperial government[29]. The institutions, including legislature, executive government and courts, were modeled on those of the British empire, with some modifications which reflected the imperial control[30]. In particular, Hong Kong's system of government before 1984 was characterized by an "executive-led" nature: the Governor represented the British power over the territory and the political structure was designed not to give people an acting role, but to enable Britain to exercise its control over the colony; therefore, the colony was not a democracy, it was an autocracy[31]. The government was composed of a Governor, whose wide-ranging powers were conferred by Letters Patent, and major leaders that were appointed or approved by

[29] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.84
[30] Peter WESLEY-SMITH, *Law in Hong Kong and China: The Meshing of Systems*, Sage Publications, 1996, p.106
[31] Christine LOH, *Government and Business Alliance: Hong Kong's Functional Constituencies*, Civic Exchange, 2004, p.5

the Crown; in turn, these leaders appointed the members of the two colonial councils which assisted the Governor in his activities[32]: the Legislative Council (LegCo) and the Executive Council (ExCo) [33], whose composition, powers and procedures were established by the Royal Instructions[34]. When executing his power, the Governor had the legal obligation to ask for the advice of the ExCo, although he could decide to act contrary to this advice if he considered it appropriate. In addition, before 1984, considering that all the seats of the LegCo were appointed by the Governor, the LegCo was not considered a legislature or representative organ; it simply occupied a subordinate position and its main activities were elaborating and adopting legislation, and examining the budget of the government[35]. Despite the fact that almost total authority over the colony was in the hands of the Crown, the British government adopted a non-interference policy, making Hong Kong be largely autonomous and able to deal with day-to-day administration[36].

Before 1984 Hong Kong's legal system imitated the English one: English common law[37] underlay Hong Kong's legal system and the British tradition of the Rule of Law and judicial independence[38] were handed over to Hong Kong[39]; in particular, from 1846 to

[32] Governor's main activities were: implementing decisions made by the British government, following the advice and consent of the Legislative Council (LegCo) in order to make laws for stability and good governance of the Region, appointing judges and other officers of the government according to the Colonial Regulations, etc.
[33] Thomas S. MACINTYRE, *Impact of the Sino-British agreement on Hong Kong's economic future*, Journal of Comparative Business and Capital Market Law 7, 1985, p.201
[34] Nancy C. JACKSON, *The Legal Regime of Hong Kong After 1997: An Examination of the Joint Declaration of the United Kingdom and the People's Republic of China*, International Tax & Business Lawyer, Vol. 5:377, 1987, p.384
[35] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, pp.84-85
[36] Nancy C. JACKSON, *The Legal Regime of Hong Kong After 1997: An Examination of the Joint Declaration of the United Kingdom and the People's Republic of China*, International Tax & Business Lawyer, Vol. 5:377, 1987, p. 385
[37] On common law see: Peter WESLEY-SMITH, *The Sources of Hong Kong Law*, Hong Kong University Press, 1994, Part I
[38] See: paragraph 3
[39] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3 p.628; see also paragraph 4.3

1966 Hong Kong received the law of England as it existed on April 1843 for what concerns the application to Hong Kong of Acts of Parliament; while English common law continued to apply to Hong Kong regardless it had developed before or after 1843[40]. In addition, final adjudication was reserved to Judicial Committee of the Privy Council of Great Britain (JCPC) [41]; its decisions and the decisions of the House of Lords regarding English common law were considered binding on the courts in Hong Kong[42].

Another important feature of the Hong Kong system before 1984 is that even if the Hong Kong form of government was a non-democratic one, in the 1970s it established a consultative system in order to improve communications between the government and people. In addition, advisory boards were developed in order to enlarge public participation in the policy-making process[43].

2.2. Transitional period and the Sino-British Joint Declaration

Hong Kong's political, constitutional and legal system experimented a real transformation between 1985 and 1997, after the entry into force of the Sino-British Joint Declaration in 1984 by the hand of Margaret Thatcher, the former British prime minister, and the Chinese leader Zhao Ziyang. In Article 4 of the Joint Declaration the government of the United Kingdom and the government of the PRC declared that during this

[40] Peter WESLEY-SMITH, *The Common Law of England in the Special Administrative Region* in Raymond Wacks, *Hong Kong, China and 1997, Essays in Legal Theory*, Hong Kong University Press, 1993, p.5; on following simplification of this procedure see: Peter WESLEY-SMITH, *The Sources of Hong Kong Law*, Hong Kong University Press, 1994, Part II

[41] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p. 85

[42] Peter WESLEY-SMITH, *The Common Law of England in the Special Administrative Region* in Raymond Wacks, *Hong Kong, China and 1997, Essays in Legal Theory*, Hong Kong University Press, 1993, p.5; also see: Peter WESLEY-SMITH, *The effect of "de Lasala" in Hong Kong*, Malaya Law Review, Vol.28 No.1, National University of Singapore (faculty of law), 1986

[43] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.86

transitional period, the British government would be "responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability" and that the government of the PRC would collaborate to achieve such goal[44]. In other words, this meant that Britain could reform the legislature of Hong Kong, but only in a way which could be accepted by the mainland government[45]. As a matter of fact, although legal authority would not shift to Beijing until 1997, the PRC did not lose time in gaining some control over Hong Kong local affairs; in particular, it made the Xinhua, the official agent of Beijing, become active in the region, setting up ten departments to coordinate different sectors in Hong Kong, such as administration, foreign affairs, economics, culture, etc.[46].

From the point of view of the Chinese government, the main purpose of this transitional period was to prepare Hong Kong to rejoin the mainland. In particular, the Chinese government showed flexibility when taking decisions in the drafting phase in order to gain Britain's cooperation and, as a consequence, in order to achieve a successful takeover. In order to reach such goal, Beijing also needed the cooperation of Hong Kong people who were worried about the possibility that their freedom and way of life could be threatened by the interference of the mainland government. On the other hand, from the point of view of Britain, this transitional period and the signing of the Sino-British Joint Declaration would safeguard British interests and give the possibility to the colonial government to withdraw from Hong Kong with honour[47].

[44] *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Questions of Hong Kong with annexes*, Art.4
[45] Steve TSANG, *A modern history of Hong Kong*, Bloomsbury Academic, 2007, p.228
[46] Parris H. CHANG, *China's Relations with Hong Kong and Taiwan*, Sage Publications, 1992, p.130
[47] Steve TSANG, *A modern history of Hong Kong*, Bloomsbury Academic, 2007, p.229

Despite the efforts made by the Chinese government in order to gain Hong Kong people's cooperation, the Sino-British negotiations clearly displayed people's impotence in the decision-making process, giving rise to their desire to have a say over their future[48]. This period was characterized by an attempt of creating a democratization path and introducing a set of political reforms aimed to establish a more representative government. Specifically, the democracy path started in 1984, when Hong Kong government issued a Green Paper[49], whose main aim was to transform the government of Hong Kong in a form of parliamentary democracy with the executive chosen by and accountable to the legislature; however, this reform did not take effect because of the Chinese government's opposition, which stated that it was not in line with provisions of the Joint Declaration and of the still-undrafted Basic Law[50]. The democracy process was further developed in 1992 by the last British Governor of Hong Kong, Christopher Patten, who promoted some political and legal reforms in order to safeguard Hong Kong's identity[51]. In particular, his aim was "exploring how to develop Hong Kong representative institutions to the maximum extent within the terms of the Joint Declaration and the Basic Law"[52]. On its part, the Chinese government opposed Patten's policy stating that it was not consistent with the Sino-British Joint Declaration, with principles contained in the Basic Law and with existing mutual understandings between China and Britain[53]. All these issues

[48] Steve TSANG, *A modern history of Hong Kong*, Bloomsbury Academic, 2007, p. 230
[49] See Green Paper: *The Further Development of Representative Government in Hong Kong*, Internet Archive: https://archive.org/details/greenpaperfurthe00hong/page/n1/mode/2up, University of Toronto Libraries
[50] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, pp.89-90
[51] *Ibid*, p.87
[52] *Ibid*, p.91. On Patten's reform see: Hungdah CHIU, H*ong Kong's transition to 1997: background, problems and prospects (with documents)*, Occasional Papers/Reprints Series in Contemporary Asian Studies, Number 5, School of Law University of Maryland, 1993, p.17;
[53] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.92

contributed to the development of significant tensions between the two governments during the transition period.

Formally speaking the body of the of this treaty has eight articles and three annexes, which are all as equally binding as the main document: Annex I is devoted to the elaboration by the government of the PRC of its basic policies regarding Hong Kong, Annex II is related to the establishment of a Sino-British Joint Liaison Group[54] in order to ensure a smooth transfer of government in 1997, and Annex III deals with some provisions regarding land leases with effect from the entry into force of the Joint Declaration itself[55]. In wider terms, this declaration defines three important aspects related to the HKSAR: the first one is that Hong Kong will have its own executive, legislative and judicial power, including that of final adjudication; the second one is that the government of Hong Kong should be composed of local inhabitants and the legislature of the region is established by elections; the third one is that executive authorities shall be accountable to the legislature[56].

Considering that the main objective of this dissertation is understanding the dynamics existing behind the relations between the CPG and the HKSAR, an analysis of Article 3 of the declaration may prove to be useful in this sense. As a matter of fact, in Article 3 the Government of the PRC lists PRC's basic policies regarding Hong Kong. In particular, the PRC underlines its will to establish the HKSAR always "upholding national unity and

[54] The Sino-British Joint Liaison Group was formed only for liaison purposes and had no power; it dealt with issues related to the international status of Hong Kong (e.g.: membership in the General Agreement on Tariffs and Trade). It was composed of delegations representing the position of the British government and of the Chinese government, while Hong Kong residents were not represented, see: Parris H. CHANG, *China's Relations with Hong Kong and Taiwan*, Sage Publications, 1992, p. 130

[55] *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Questions of Hong Kong with annexes*

[56] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.97

territorial integrity". In addition, "the HKSAR will be directly under the authority of the CPG of the PRC" and it "will enjoy a high degree of autonomy, except in foreign and defence affairs which are responsibilities of the CPG"; the region will also enjoy executive, legislative and independent judicial power, including that of final adjudication. The HKSAR has a Chief Executive who will be appointed by the CPG on the basis of local elections or consultations, while principal officials will be nominated by the Chief Executive of the region and appointed by the CPG. At the end of article 3 it is also provided that the above-mentioned basic policies will be stipulated in a Basic Law of the HKSAR of the PRC, by the National People's Congress of the PRC and that they will remain unchanged for 50 years[57].

Annex I of the Joint Declaration as well defines the relations between the HKSAR and the mainland in different fields. As far as the legislature is concerned, it provides that the HKSAR may enact laws autonomously, but always complying with the provisions of the Basic Law and legal procedures, and it has to report them to the National People's Congress Standing Committee for the record. Regarding the judicial power, according to the principle of judicial independence which will be analyzed in the next paragraphs, the courts of the HKSAR "shall exercise judicial power independently and free from any interference"; furthermore, judges of the HKSAR courts are appointed or removed by the Chief Executive and every decision shall be reported once again to the NPCSC for the record. The Court of Final Appeal (CFA) is in charge of the power of final judgment of the HKSAR[58].

[57] *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Questions of Hong Kong with annexes,* Art.3
[58] *Ibid,* Annexes I.II - I.III; on the relations between the CPG and the HKSAR government in the economic field see: Steve TSANG, *A modern history of Hong Kong,* Bloomsbury Academic, 2007, p.226; *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the*

The Joint Declaration also mentions some elements of continuity with respect to the legal system of the region before 1984. In particular, the laws which were in force at that time (i.e. common law, rules of equity, ordinances, subordinate legislation and customary law), would remain unchanged, with the exception of those laws that contravened the Basic Law; the same decision for continuity was chosen for what concerned the already existing social and economic system and the lifestyle. These provisions would guarantee people rights and freedoms "including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief"; furthermore, private property, ownership of enterprises, legitimate right of inheritance and foreign investment would all be ensured by law[59]. As far as continuity in the judicial system is concerned, as already said before, the Joint Declaration provided that, after the establishment of the HKSAR, it would remain unchanged "except for those changes consequent upon the vesting in the courts of the HKSAR of the power of final adjudication[60]".

In conclusion, it is possible to state that the Sino-British Joint Declaration represented the basis for a post-1997 Hong Kong, for the future of its people and for its relations with the CPG. However, the implementation of the Chinese promises depended on the promulgation and enforcement of a PRC law, which was considered a domestic affair by Beijing government[61].

Government of the People's Republic of China on the Questions of Hong Kong with annexes, Annexes I.V, I.VI, I.VIII, I.IX

[59] *Ibid*, Art. 3 and Annex I.II

[60] *Ibid*, Annex I.III

[61] Steve TSANG, *A modern history of Hong Kong*, Bloomsbury Academic, 2007, p.227

2.3 1997 and the Hong Kong Basic Law

The third phase of the Hong Kong's system of government started in 1997, when the Hong Kong Basic Law came into effect defining a new constitutional order in the HKSAR based on the "one country two systems" (*yiguo-liangzhi* 一国两制) formula[62], which was mentioned by Deng Xiaoping in the 80s as a scheme for the reunification under Chinese sovereignty of Hong Kong[63]. According to the Joint Declaration, the main goal of the Basic Law was to stipulate what was contained in its Annex I in an appropriate legal form, but, in reality, the PRC leaders decided to consider the Basic Law a subsidiary of their own constitution instead of a subsidiary of the Joint Declaration[64].

In the 1980s PRC's leaders realized that they needed to persuade Hong Kong people to believe in their commitment to maintain the main features of the previous system; this is the reason why they opted for a long-lasting drafting phase[65]. As a matter of fact, every single article of this mini-constitution was approved by two-thirds of the members of the newly appointed Basic Law Drafting Committee (BLDC); moreover, Hong Kong people were involved in the drafting process thanks to a Basic Law Consultative Committee (BLCC)[66], which sought the opinion of local residents; the aim of this procedure was making sure that the Law was well received by Hong Kong people[67]. The BLDC was divided into five task groups and the two most important were the one which dealt with the political system and the one which worked on relations between the central

[62] See paragraph 4
[63] Ignazio CASTELLUCCI, Rule of Law and Legal Complexity in the People's Republic of China, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p. 152
[64] Steve TSANG, *A modern history of Hong Kong*, Bloomsbury Academic, 2007, p.238
[65] *Ibid*
[66] On BLDC and BLCC see: Nancy C. JACKSON, *The Legal Regime of Hong Kong After 1997: An Examination of the Joint Declaration of the United Kingdom and the People's Republic of China*, International Tax & Business Lawyer, Vol. 5:377, 1987, p. 382
[67] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, pp.81-82

government and the SAR and, as a consequence, on the definition of the extent of autonomy of the region; the other three groups were responsible for the rights of the SAR's residents; economic and financial matters; and education, science, technology, culture, sports and religion[68].

In particular, the Drafting Committee of the Hong Kong Basic Law explained that the political design of the HKSAR was based on the idea of maintaining Hong Kong's stability and prosperity in order to facilitate the development of a capitalist economy. As a consequence, some existing political features of pre-1997 governance were maintained in the Basic Law, while a more democratic system was gradually introduced[69].

Generally speaking, the Basic Law has a dual purpose: the first one is providing a mini constitution for the HKSAR and the second one is establishing a SAR system within the constitutional order of the PRC. In the same way, it has a dual nature: on the one hand Chinese authorities consider it a political instrument for guaranteeing sovereignty to the CPG; and, on the other hand, Hong Kong authorities see it as a symbol of the high degree of autonomy of the region and a way to preserve the previous way of life and capitalist system for 50 years. From a formal point of view, the body of the Hong Kong Basic Law, which is enacted and adopted by the NPC in accordance with Article 31 of the Chinese

[68] Steve TSANG, *A modern history of Hong Kong*, Bloomsbury Academic, 2007, p.242

[69] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, pp.98-119; As for the Sino-British Joint Declaration, the Basic Law may be considered another important tool for understanding the kind of relations existing between the Central Authorities and the HKSAR. An important evidence of the existence of these relations and of the impact exerted by the central government in the region is contained in the explanations on the Basic Law submitted by Ji Pengfei, the Chairman of the Drafting Committee, to the NPC in 1990; indeed, these explanations provide that the power exercised by the NPCSC of the CPG "is indispensable to maintaining the state sovereignty, see: Explanations on "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft) and Its Related Documents, *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*

Constitution[70], consists of a full text divided into 9 chapters, which include a total of 160 articles, and III Annexes[71]. Apparently, this mini constitution as a whole, appears to guarantee the "high degree" of autonomy for the region in the post-1997 period, but a more detailed analysis of the provisions contained in it, may show that the PRC maintains a certain degree of intervention in Hong Kong affairs, especially in those matters that are related to the autonomy of the HKSAR's political system[72]. In this regard, Article 20 clearly states that "The Hong Kong Special Administrative Region may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government"[73], meaning that the residual powers which are not delegated to the region's government are reserved for the PRC government[74].

One of the most significant chapters of the Basic Law linked to the purpose of this thesis is Chapter II, which is devoted to the description of the fundamental traits of the relations existing between the CPG and the Hong Kong government. First of all, it is underlined once again that Hong Kong is a local and highly autonomous administrative region of the PRC, but it comes directly under the CPG[75]. Despite HKSAR's high degree

[70] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.119; Article 31 of the Chinese Constitution provides that: "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 the specific conditions", see: *The Constitution law of People's Republic of China*, Art. 31

[71] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*

[72] Hungdah CHIU, H*ong Kong's transition to 1997: background, problems and prospects (with documents)*, Occasional Papers/Reprints Series in Contemporary Asian Studies, Number 5, School of Law University of Maryland, 1993, p.10

[73] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.20

[74] Hungdah CHIU, H*ong Kong's transition to 1997: background, problems and prospects (with documents)*, Occasional Papers/Reprints Series in Contemporary Asian Studies, Number 5, School of Law University of Maryland, 1993, p.10

[75] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China,* Art. 12

of autonomy, the CPG is responsible for its foreign affairs[76] and for its defence[77]. Additionally, its Chief Executive and principal officials of the executive authorities are appointed by the CPG[78]. As far as the legislature and the judiciary are concerned, this section of the Basic Law vests HKSAR with autonomous executive power[79] and with legislative power but it is specified that the laws enacted by HKSAR's legislature[80] must be recorded by the NPCSC, and if the NPCSC considers that any law is not in conformity with the provisions of the Basic Law related to affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, it may return the law in question but shall not amend it; in addition, any law returned by the NPCSC shall immediately be invalidated[81]. Moreover, according to Article 18 of the Basic Law, "National laws shall not be applied in the HKSAR except for those listed in Annex III to this Law[82] [..]. The NPCSC may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the HKSAR and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits

[76] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.13; it was subject to interpretation in 2012
[77] *Ibid*, Art.14
[78] *Ibid*, Art.15
[79] *Ibid*, Art.16
[80] On the LegCo see: *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Chapter IV – Section 3; Michael F. MARTIN, *Hong Kong: Ten Years After the Handover*, Congressional Research Service prepared for Members and Committees of Congress, 2007; Christine LOH, *Government and Business Alliance: Hong Kong's Functional Constituencies*, Civic Exchange, 2004; Hungdah CHIU, H*ong Kong's transition to 1997: background, problems and prospects (with documents)*, Occasional Papers/Reprints Series in Contemporary Asian Studies, Number 5, School of Law University of Maryland, 1993
[81] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.17
[82] Annex III lists the following National Laws to be applied in the HKSAR: 1) resolution on the capital, calendar, national anthem and national flag of the PRC; 2) resolution on the national day of the PRC; 3) order on the national emblem of the PRC proclaimed by the CPG; 4) declaration of the government of the PTC on the territorial sea; 5) nationality law of the PRC; 6) regulations of the people's republic of china concerning diplomatic privileges and immunities

of the autonomy of the Region as specified by this Law"[83]. As a consequence, this article of the Basic Law makes it clear that in addition to foreign affairs and defence, there are other matters that are related to the interest of the whole nation and they should be managed by the central government[84].

Article 19 vests the HKSAR with independent judicial power, including that of final adjudication, but HSKAR's courts have no jurisdiction over defence and foreign affairs, which are under the control of the CPG[85]. For what concerns the judiciary system and its relations with the central government, the Basic Law states that the CE, when appointing or removing judges of the Court of Final Appeal and the Chief Judge of the High Court of the HKSAR, shall obtain the endorsement of the LegCo and shall report any decision to the NPCSC for the record[86]. In addition, the HKSAR, when making arrangement with foreign states for reciprocal juridical assistance, shall obtain the assistance or authorization of the CPG[87].

In conclusion, Article 22 leaves space for the region's independence providing that "No department of the CPG and no province, autonomous region, or municipality directly under the CPG may interfere in the affairs which HKSAR administers on its own in accordance with this Law"[88].

The promulgation of the Basic Law concretized the accountability of the government to the legislature, which was already provided by the Joint Declaration, and created a

[83] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.18
[84] On the relations between the CPG and the HKSAR government in the economic field see: *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Chapter V; on the relations between the CPG and the HKSAR government in external affairs see: : *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Chapter VII
[85] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.19; it was subject to interpretation in 2012
[86] *Ibid*, Art.90
[87] *Ibid*, Art.96
[88] *Ibid*, Art.22

system of mutual checking between the executive and the legislature; therefore, under conditions provided by the law, the CE has the possibility to dissolve legislature and the LegCo has the power to ask the CE to resign[89].

Chapter IV as well is useful in defining the dynamics of interaction between the two governments at issue; it deals with the political structure of the HKSAR, which is always in line with the principle of "one country, two systems", meaning that it is always based on the idea of maintaining previous political features which proved to be effective and, at the same time, introducing a democratic system in a gradual way in order to support Hong Kong's reality and identity[90]. An important evidence of the unique relations existing between the region's government and the CPG contained in this section is linked to the role of the Chief Executive of the region. The CE is described as the head of the HKSAR and, as we already know, he is accountable both to the CPG and HKSAR[91]. This dual accountability is argued to be a tool for strengthening the unified leadership of administrative work, raising the effectiveness of government administration and improving relations between the Central Authority and the HKSAR[92]. The CE presides over the Executive Council[93], his or her term of office shall be five years and he or she may not serve for more than two consecutive terms[94]. Furthermore, Article 45 specifies

[89] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, pp.101-102
[90] Explanations on "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft) and Its Related Documents, *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*
[91] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.43
[92] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.100
[93] On the ExCo see: *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Chapter IV – Section 2
[94] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art. 46

that the CE is selected by local elections or consultations and he is appointed by the CPG[95]. Article 48 of the Basic additionally lists his or her powers and functions; three of the most significative functions, which are useful in order to define the interaction between the two governments at issue, include:

- "to nominate and to report to the CPG for appointment the following principal officials: Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration and Commissioner of Customs and Excise; and to recommend to the CPG the removal of the abovementioned officials";
- "to implement directives issued by the CPG in respect of the relevant matters provided for in this Law";
- "to conduct, on behalf of the Government of the HKSAR, external affairs and other affairs authorized by the Central Authorities".

Other important tasks of the CE are implementing the Basic Law and other laws in the HKSAR, signing bills passed by the LegCo, deciding on government policies and issuing executive orders, appointing or removing judges of the courts at all levels, etc.[96] What is singular is that the accountability of the Chief Executive to the CPG has not formal procedure; for example, for what concerns the function of the CE of implementing the directives issued by the CPG in respect of the relevant matters provided for in the Basic Law, the general public does not have any additional information on how directives from the CPG are received and carried out by the Chief Executive[97].

[95] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.45
[96] *Ibid*, Art. 48
[97] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.111

Another mechanism of interaction between the CPG and the Hong Kong government is eventually described in Chapter VIII of the Basic Law, which deals with interpretation and amendment of the constitution itself. In particular, the interpretation of the Basic Law may be considered one of the most important tools used by the mainland government in order to exercise control over HKSAR's decision making process and, according to Article 158 of the Basic law, it is exerted by the NPCSC. The NPCSC shall authorize Hong Kong's courts to interpret on their own the provisions of the Basic Law which are within the limits of the autonomy of the region; but as far as affairs which are under the responsibility of the CPG or the relationship between the Central Authorities and the region are concerned, the courts of the region shall seek the interpretation of the NPCSC through the CFA[98]. Additionally, for what concerns amendments of the Basic Law, Article 159 provides that the NPC retains the power of amendment[99]. Therefore, the NPC and its permanent body retain the authority of setting the boundary between the sovereignty of the CPG and the HKSAR[100]. Since 1997 the Standing Committee has interpreted five times the Basic Law and we will look more into detail this important issue, which is closely linked to the mechanisms of interaction between Hong Kong and Beijing, in the second part of this chapter.

To conclude, through an analysis of the Basic Law, it is possible to identify both elements of continuity and significant changes in comparison with the colonial period. As far as the legal system is concerned, Article 8 of the Hong Kong Basic Law provides that all the laws in force in the region during the colonial period, including common law, shall

[98] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art. 158
[99] *Ibid*, Art. 159
[100] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.117

be maintained[101]. Nevertheless, this attempt towards continuity in Hong Kong's law and legal system has been affected by the above-mentioned Article 158 and by Article 160, which provides the adoption of existing laws, except for those which the NPCSC declares to be in contravention to the Basic Law[102]. Concerning the judiciary, the Basic Law maintains the system existing before 1997, including the appointment and removal of members of the judiciary other than judges, but with the exception of those changes consequent upon the establishment of the Court of Final Appeal (CFA), which is vested with the power of final adjudication, taking JCPC's place[103].

The concept of the "executive-led" government (*xinzheng zhudao* 行政主导) is also relevant when analyzing Hong Kong's political system before and after 1997; this concept, which can be considered a legacy of the British power, implies that the Chief Executive is the head of administration and has a leading role in formulating policies and initiating bills in the LegCo. Such concept represented an important issue for the Drafting Committee of the Hong Kong Basic Law and it is still mentioned in recent debates by many Chinese officials or senior figures of the NPCSC in order to prove that this type of government, which was part also of the previous political structure, is effective and should be maintained; as a consequence, according to this logic, the legislature should be given a subsidiary role. Chinese officials strongly sustain this kind of political system stating that if there is a strong executive branch, this might be good for economic development and social control; moreover, an executive-led government is closely related to the

[101] Peter WESLEY-SMITH, *The Common Law of England in the Special Administrative Region* in Raymond Wacks, *Hong Kong, China and 1997, Essays in Legal Theory*, Hong Kong University Press, 1993, p.5
[102] Raymond WACKS, *One Country, Two Grundnormen? The Basic Law and the Basic Norm*, in Raymond Wacks, *Hong Kong, China and 1997, Essays in Legal Theory,* Hong Kong University Press, 1993, p.170
[103] Berry F.C. HSU, *Judicial Independence Under the Basic Law*, Hong Kong Law Journal, 2004, Vol. 34 Part 2, p.289

accountability of the Chief Executive to the CPG and may help affirming the Central Authorities' power over Hong Kong[104].

3. Rule of Law and judicial independence

The HKSAR differs from the PRC in the existence of the Rule of Law and of an independent judiciary, which are considered the most important legacy of the British power[105]. As the historian Steve Tsang explains, HKSAR's possibility to maintain its own system and way of life described in the Sino-British Joint Declaration and confirmed in the Basic Law depends on the survival of these two important issues after 1997[106].

As far as the Rule of Law is concerned, it is based on the idea that there is an institution or an authority higher than the local government which provides a redress to abuses[107]; as a consequence, it had an important role in determining the structure and the procedures of the legal system in nineteenth century Hong Kong, preventing some governors from approving policies harmful to the community and guaranteeing the acquittal of those wrongly accused[108]. It may be described as a set of principles of law that regulates the way in which power is exercised in this region. The main aim of the Rule of Law is guaranteeing that the power of the government and of its servants derives from law as expressed in legislation and that judicial decisions are made by independent courts.

---

[104] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems",* The London School of Economics and Political Science, 2011, p.103

[105] Steve TSANG, *Judicial Independence and the Rule of Law in Hong Kong*, Hong Kong University Press, 2001, p.1

[106] *Ibid*, p.2; for further information on how the Chinese government exerted pressure on the rule of law see: Ignazio CASTELLUCCI, Rule of Law and Legal Complexity in the People's Republic of China, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p. 172

[107] *Ibid*, p.12

[108] Steve TSANG, *A modern history of Hong Kong*, Bloomsbury Academic, 2007, p.55

Therefore, it requires that the courts are independent of the executive in order to guarantee impartial ruling when they are required to decide on the legality of acts of government[109].

In the colonial period this was possible thanks to the supervision of London's democratic government. On the contrary, in this new era, the authority which plays this role is represented by the Basic Law; it is not only the mini constitution which confirms the principles provided by the Joint Declaration, but it is also a constitutional instrument which is used in order to solve any dispute between the executive, legislative and judicial powers in Hong Kong[110].

Regarding judicial independence, after the establishment of the HKSAR in 1997, the courts of Hong Kong had to face the challenges caused by the new constitutional order based on the "one country, two systems" formula. At this stage, courts had to deal with the contradiction existing between the Communist Party-led legal system in mainland China and the principle of judicial independence; at the same time Hong Kong's courts had to tackle the problem of guaranteeing both individual's rights and public interest and to solve internal tensions which were caused by conflicting demands among different social classes[111].

The Hong Kong Basic Law has proved to have a fundamental role also in sustaining the principle of judicial independence, which is defined by Professor Hsu of the University of Hong Kong as something which is strictly linked to the separation of powers[112] and to the idea that each branch of government should have a degree of

[109] On the Rule of Law see: Department of Justice, The Government of the Hong Kong Special Administrative Region, *Legal system in Hong Kong*, https://www.doj.gov.hk/eng/legal/index.html
[110] Steve TSANG, *Judicial Independence and the Rule of Law in Hong Kong*, Hong Kong University Press, 2001, p.13
[111] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3 p.629
[112] See: P.Y. 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*, Journal of International and Comparative Law, 2018, Vol.5(2)

independence from the others[113]. As a matter of fact, the Basic Law does not contain any provision that empowers the executive branch or the LegCo to exercise powers that go beyond those provided in it; therefore, judicial power can be exercised exclusively by the judiciary. In the same way, the mini constitution provides that the powers and functions of the courts must be restricted to the judicial power of the HKSAR and their jurisdiction is applicable to all cases within the HKSAR[114].

As said before, the Basic Law vests the HKSAR with independent judicial power, including that of final adjudication[115] and it guarantees the independence of the judiciary stating that the courts of the HKSAR shall exercise their power free from any interference[116]. However, as it emerged first in the Sino-British Joint Declaration and later in the Hong Kong Basic Law, the judicial system may be not considered completely free from the interference of the PRC[117]; indeed, according to Article 88 of the Basic Law, judges of the HKSAR are appointed by the CE who is in turn appointed by the PRC on the basis of local elections or consultations. Although judges' appointments are based on the recommendation of an independent commission, the ultimate authority is in the hands of the CE[118]. Additionally, in the case of appointment or removal of judges of the CFA and the Chief Judge of the High Court of the HKSAR, the CE shall report it to the NPCSC for the record.[119]

---

[113] Berry F.C. HSU, *Judicial Independence Under the Basic Law*, Hong Kong Law Journal, 2004, Vol. 34 Part 2, p.281
[114] *Ibid*, p.284
[115] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.2
[116] *Ibid*, Art. 85
[117] Nancy C. JACKSON, *The Legal Regime of Hong Kong After 1997: An Examination of the Joint Declaration of the United Kingdom and the People's Republic of China*, International Tax & Business Lawyer, Vol. 5:377, 1987, p. 395
[118] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.88
[119] *Ibid*, Art.90

The implementation of the judicial independence does not depend only on the Basic Law, but it depends also on the judges themselves, who should be independent[120], and on the way this principle is interpreted by the judiciary: considering that the Basic Law provides the HKSAR with a high degree of autonomy, the judiciary's crucial goals are protecting constitutional rights of HKSAR residents, preserving "one country, two systems" policy and ensuring fair elections[121].

4. The "one country, two systems" policy and related challenges

During the 1982-84 period of negotiations between Britain and China regarding the Hong Kong region, Beijing presented the principle of "one country, two systems" in order to explain the way it would rule Hong Kong after the handover of British sovereignty to China. The key features of this policy provide that: Hong Kong keeps the already existing capitalist system, which is separated from the communist system of the mainland (two systems); Hong Kong enjoys a high degree of autonomy in its economic, cultural and political spheres; the Hong Kong government will be elected by Hong Kong people and it will be managed by Hong Kong people; and the "one country, two systems" will remain unchanged for 50 years after 1997[122].

[120] Berry F.C. HSU, *Judicial Independence Under the Basic Law*, Hong Kong Law Journal, 2004, Vol. 34 Part 2, p.282
[121] *Ibid*, p.302
[122] Alvin Y. SO, *"One country, two systems" and Hong Kong-China National Integration: A Crisis-Transformation Perspective*, Journal of Contemporary Asia, 2011, p.104

In order to sustain the principle at issue, the Chinese government inserted the already mentioned Article 31 into the Chinese Constitution, which provides the legal basis to establish the HKSAR, Macao and Taiwan[123].

The explanations on the Basic Law clarify that the "one country, two systems" policy is considered fundamental for bringing about the country's reunification and that all the principles and policies regarding Hong Kong which had been formulated by the Chinese Government were in line with this policy. In addition, the concept of "one country, two systems" is presented both as a guarantee for the resumption of China's sovereignty over Hong Kong, maintaining its stability, and as something which meets the interests of the Chinese people, in particular Hong Kong people's interests[124].

Hong Kong under the "one country, two systems" principle enjoys a high degree of autonomy, which may be considered greater than the one enjoyed by states of federal countries, but if we focus our attention on the legal security of this autonomy, some issues may arise. As a matter of fact, the Constitution of the PRC does not entrench the division of power between the central government and the SAR, it is only provided in the Basic Law, which is amendable by the NPCSC. This is the reason why mainland Chinese scholars prefer to talk about "delegation of power" by the central government to the SAR rather than "division of power". Additionally, according to the "one country, two systems" policy, there is no Supreme Court that deals with jurisdictional disputes between the two governments; instead, the authority which deals with the interpretation of the Basic Law and the division of power included in it is once again the NPCSC[125]. Therefore, many

[123] Alvin Y. SO, *"One country, two systems" and Hong Kong-China National Integration: A Crisis-Transformation Perspective*, Journal of Contemporary Asia, 2011, p.104
[124] Explanations on "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft) and Its Related Documents, *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*
[125] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3 p.631

controversies arose in post-1997 Hong Kong regarding the legitimacy of this parliamentary institution in performing the task of interpretation[126].

Over the past three decades, the "one country, two systems" policy has moved both toward the direction of "one country" and toward the direction of "two systems" according to different socio-political dynamics which have come in succession; in particular, Hong Kong leaders pushed towards the "two system" direction, while Beijing pushed towards the "one country" direction[127].

The already mentioned Tiananmen protests were the first important event that undermined the balance between "one country" and "two systems", and they made Hong Kong citizens feel worried about the possibility that the authoritarian rule could be imposed in their territory. Under such circumstance, a strong democratic and anti-Beijing line was adopted in the 1990s by a new-born Democratic Party. In order to respond to this trend and make its control over the HKSAR tighter, the Chinese government decided to introduce a last minute new clause in the Basic Law; this new clause was Article 23,[128] stating: "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies"[129].

[126] See Part II
[127] Alvin Y. SO, *"One country, two systems" and Hong Kong-China National Integration: A Crisis-Transformation Perspective*, Journal of Contemporary Asia, 2011, p.112
[128] *Ibid*, pp.107-108
[129] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.23; on the issue of national security also see: Chapter 3

Despite the fact that in the initial post-handover period Beijing opted for a noninterventionist approach in Hong Kong, in 2003 Beijing embarked on a "new Hong Kong policy" (*xin dui Xiang zhengce* 新对港政策) in order to exert a greater control over the political, economic and ideological arenas of the region[130]. As a matter of fact, another event which moved the pendulum from "two systems" to "one country" took place in that year, and it was a consequence of the enactment of Article 23 by the Hong Kong government. As this Article of the Basic Law covers a wide range of issues, the Hong Kong government's move was considered a threat for civil liberties by Hong Kong people, who organized the largest protest in Hong Kong since 1997. Since the central government considered the HKSAR incapable of managing this crisis, it decided to take the lead in starting an integration process of Hong Kong with the mainland, which implied the ratification of some formal agreements between the two governments. In particular they signed the "Individual Traveller's Scheme", according to which residents in nine Chinese provinces could visit Hong Kong and Macao on a personal basis, while, before the agreement, they could visit these places only on official tours and they had to go through a number of different procedures. The second agreement, which aimed to integrate HKSAR with mainland China, is the Closer Economic Participation Agreement (CEPA)[131]. The first CEPA was signed in 2003 and its purpose was to allow Hong Kong manufactured products to enter the mainland market; while CEPA II was signed in 2005 and it allowed also services, like law, accountancy, medical, banking, insurance, transportation, tourism, education and social welfare, to enter the mainland market. Both the Individual Traveller's Scheme and CEPA, showed Beijing's intention of having an

[130] Brian C.H. FONG, *One Country, Two Nationalism: Center-Periphery Relations between Mainland China and Hong Kong, 1997-2016*, Sage Publications, 2017, p.527
[131] On CEPA see: Ignazio CASTELLUCCI, Rule of Law and Legal Complexity in the People's Republic of China, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p. 181

impact on the HKSAR government and shifting once again the focus from the "two system" direction to the "one country" one[132].

In general, as Alvin So of the Hong University of Science and Technology states in his publication, the ratification of institutional agreements between the HKSAR government and Beijing government led to a new phase of "symmetrical integration", which is based on three key features; the first one is that these agreements allowed a two-way interaction, while previously everything seemed to move from Hong Kong towards the mainland; the second feature is linked to a more comprehensive interaction which included not only the manufacturing sector, but also services, real estate and the retail sector; the third one is that this kind of integration benefited not only the capitalists but also other social classes like middle class professionals. As a consequence, after the signing of the CEPA in 2003, the Democrat Party's criticism of the Beijing government wore out[133].

Over the past years Beijing's leaders developed a new political narrative to defend the powers of the Central Authorities under the "one country, two systems" policy and one example is represented by the White Paper "The practice of the "One Country Two Systems" Policy in the Hong Kong Special Administrative Region" (*""Yiguo-liangzhi" zai Xianggang Tebie Xingzhengqu de Shijian"* "《"一国两制"在香港特别行政区的实践"》) issued in June 2014 by the State Council Information Office[134]. As the title suggests, the aim of this paper is clarifying once again the principle of "one country, two systems" that governs the HKSAR's relationship with Beijing. Such principle is here defined as a "basic policy the Chinese government has adopted to realize the peaceful

[132] Alvin Y. SO, *"One country, Two Systems" and Hong Kong-China National Integration: A Crisis-Transformation Perspective*, The Hong Kong University of Science and Technology, 2011, pp.109-110
[133] *Ibid*, pp.110.111
[134] Brian C.H. FONG, *One Country, Two Nationalism: Center-Periphery Relations between Mainland China and Hong Kong, 1997-2016*, Sage Publications, 2017, p.529

reunification of the country" and a tool which was used by the Chinese government to make Hong Kong return "to the embrace of the motherland" and "embark on the broad road of common development with the mainland, as they complemented each other's advantages". A third definition of this formula provided in this paper cites: "a new domain in which we constantly explore new possibilities and make new progress in pioneering spirit"[135]; these words may be interpreted as a way used by the Central Chinese government for leaving room for a broader control over the HKSAR.

Section II provides that "the central government exercises overall jurisdiction (*quanmian guanzhi quan* 全面管治权) over the HKSAR"; furthermore, it is specified that, according to the Basic Law and the Constitution of the PRC, "the organs of power by which the central leadership directly exercises jurisdiction over the HKSAR are the NPCSC, the president of the state, the Central People's Government and the Central Military Commission" and these organ's duties and powers are then listed one by one. In addition, this section clearly identifies which are the spheres of intervention of the central leadership on the HKSAR in accordance with law: forming the power organs of the HKSAR; supporting and guiding the administration of the Chief Executive and the government of the HKSAR in accordance with the law; being responsible for foreign affairs involving the HKSAR; being responsible for the defence of the HKSAR; exercising power granted to the NPCSC by the Constitution of the PRC and the Basic Law of the HKSAR[136].

[135] *Zhonghua Renmin Gongheguo Guowuyuan Xinwen Bangongshi* 中华人民共和国国务院新闻办公室 Information Office of the State, *""yiguo-liangzhi" zai Xianggang Tebie Xingzhengqu de Shijian"* ""一国两制"在香港特别行政区的实践" *The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region*, 2014, 前言 Foreword, http://www.chinaembassy.org.sa/chn/xwdt/2014yaowen/P020140611516113858993.pdf

[136] Information Office of the State Council – The People's Republic of China, *The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region*, 2014, Section II, http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm

As far as the second duty is concerned it is important to underline that two important organs are mentioned in this section; the first one is the Hong Kong and Macau Affairs Office of the State Council, whose aim is to implement the "one country, two systems" principle and to communicate with the government of the HSKAR; and the second one is the Liaison Office of the Central People's Government in the HKSAR, which is a resident organ of the CPG in Hong Kong and one of its main duties is promoting exchanges and cooperation between Hong Kong and the mainland.[137]

Another meaningful section of this White Paper is represented by section V, which aims to provide a full understanding of the meaning of the "one country, two systems" policy and to implement it. In particular, it is claimed that some people are still "confused or lopsided" in their understanding of this policy (*dui "yiguo-liangzhi" fangzhen zhengce he jibenfa you mohu renshi he pianmian lijie* 对 "一国两制"方针政策和基本法有模糊认识和片面理解) and what is important is to uphold the principle of "one country" and respecting the differences existing among the "two systems", which means maintaining the power of the central government and ensuring the high degree of autonomy of the HKSAR at the same time[138]. However, a further clarification is offered about the HKSAR's autonomy: considering that China is a unitary state, China's central government has "comprehensive jurisdiction over all local administrative regions, including the HKSAR", and the HKSAR autonomy is not considered an inherent power, it exists just because the central leadership has authorized it; this autonomy corresponds

[137] Information Office of the State Council – The People's Republic of China, *The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region*, 2014, Section II, http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm

[138] *Zhonghua Renmin Gongheguo Guowuyuan Xinwen Bangongshi* 中华人民共和国国务院新闻办公室 Information Office of the State, *"yiguo-liangzhi" zai Xianggang Tebie Xingzhengqu de Shijian* "一国两制"在香港特别行政区的实践 *The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region*", 2014, 第五段 Section 5, http://www.chinaembassy.org.sa/chn/xwdt/2014yaowen/P020140611516113858993.pdf

to the power to run local affairs as authorized by the central leadership", as a consequence it is not considered a full autonomy or a decentralized power. Moreover, the "one country" concept is defined as the basis of the "two systems" concept and the latter is subordinate to the first one. Therefore, the socialist system of the mainland is considered a prerequisite for Hong Kong's capitalism and for maintaining its stability and prosperity. In order to achieve this goal, it is also stressed that those people who govern Hong Kong, including the Chief Executive, principal officials, members of the ExCo and LegCo, judges of the courts and other judicial personnel, should be patriotic[139].

In the conclusion of this White Paper it is once again underlined that the "one country, two systems" principle is "the best solution to the Hong Kong question left over from the history but also the best institutional arrangement for the long-term prosperity and stability of Hong Kong after its return to the motherland"[140].

The unprecedent publication of this White Paper and the timing it was released showed that Beijing was determined to have a significant influence on Hong Kong's political development; indeed, it was released ten days before Occupy Central activists decided to hold an unofficial referendum on options for the 2017 election of the Chief Executive[141].

Considering the accountability of the CE to the central government, the already mentioned concept of "executive-led government" is also relevant in sustaining the political connection of the CPG with the SAR and its relation to the principle at issue; indeed in the Report to the 19th National Congress of the Communist Party of China in 2017, General Secretary Xi Jinping defined the "one country, two systems" policy the

[139] Information Office of the State Council – The People's Republic of China, *The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region*, 2014, Section V, http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm
[140] *Ibid*, Conclusion
[141] *Beijing emphasizes its total control over Hong Kong in white paper*, South China Morning Post, 2014, https://www.scmp.com/news/hong-kong/article/1529300/beijing-reasserts-its-total-control-over-hong-kong-white-paper

guiding ideology of the PRC, adding that the CE of the HKSAR occupies the core of the region's political system and guaranteeing continuing support to the CE for the fulfillment of his or her tasks[142].

To conclude, it is possible to state that the political design of the "one country, two systems" policy was not an outcome which had the same meaning for all the parties involved. As a matter of fact, Beijing decided to accommodate a capitalist Hong Kong under its socialist system just to maintain social, economic and political stability and to make it contribute to the project of Four Modernizations. On the opposite side, Hong Kong interpreted the "one country, two systems" policy as a way for maintaining its socio-economic system and its autonomy unchanged[143]. This is the reason why, on the one hand, starting from 2003 onwards, Beijing has tried to adopt an assimilationist approach in order to exert its control over the HKSAR, using the "one country, two systems" policy only as a transitional tool; on the other hand, in response to Beijing attempts, Hong Kong people have tried to strengthen their identity and have interpreted this policy as a potential permanent arrangement[144].

[142] P.Y. 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*, Journal of International and Comparative Law, 2018, Vol.5(2), p.359
[143] Tai-Iok LUI, *A missing page in the grand plan of "one country, two systems": regional integration and its challenges to post-1997 Hong Kong*, Inter-Asia Cultural Studies, 2015, p.397
[144] Brian C.H. FONG, *One Country, Two Nationalism: Center-Periphery Relations between Mainland China and Hong Kong, 1997-2016*, Sage Publications, 2017, p.549

Part II: Interpretation and interaction between the Central Government and the HKSAR

In the second part of this dissertation I will analyze in depth one of the most important tools which have affected the mechanisms of interaction between the mainland and Hong Kong and have led critics to reassess the balance between "one country" and "two systems": the interpretation issue (*jieshi* 解释). After a description of the meaning of interpretation both in mainland and in the HKSAR, I will provide an overview of the five cases in which the NPCSC exerted its power of interpretation over the Basic Law. Through this analysis, it is possible to understand how the mechanisms of interaction between Beijing and Hong Kong have changed across time.

1. Interpretation in mainland China

The 1954 first Constitution of the PRC established that the NPC was the supreme organ of state power and it was given the power to interpret laws and to enact decrees. The third Constitution of 1978 reaffirmed such powers and added that the NPCSC was vested also with the possibility to interpret the Constitution itself[145]; finally, the 1982 Constitution, which is still in force today, establishes once again that the NPCSC is vested with the power of interpretation of the Constitution itself and it is responsible for annulling lower-level legislation that is not in line with the Constitution[146]. The importance of the NPCSC is mainly given by the fact that all power in the PRC belongs

[145] Albert H.Y. CHEN, *The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives*, Hong Kong Law Journal, 2000, p.23

[146] Keith HAND, *Resolving Constitutional Disputes in Contemporary China*, East Asia Law Review, 2012, p.7; on functions and powers of the NPCSC also see: *The Constitution law of People's Republic of China*, Art.67

to the people, and the organ through which the people exercise their power is the NPCSC[147].

A Resolution adopted by the NPCSC in 1981 played a fundamental role in helping to distinguish among four different types of interpretation in China: legislative interpretation, through which the NPCSC interprets provisions in laws that need a clarification or a supplementation; judicial interpretation, which allows the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP)[148] to interpret law during their adjudicative and procuratorial work; executive or administrative interpretation, according to which the State Council and its departments may interpret points of law in areas different from the adjudicative or procuratorial areas; and the last type of interpretation is in the hands of the standing committee of a local people's congress, which may interpret provisions in local regulations which need clarification or supplementation, and of the local people's government, which may interpret points of law that arise from the application of local regulations[149].

When talking about interpretation in China, experts mainly refer to legislative interpretation, which is considered a tool for maintaining the integrity of the legal system and for ensuring that laws are applied correctly[150]. The Chinese meaning of interpretation differs from the Western conception; indeed, Western law is based on the idea that if the

[147] Hongshi WEN, *Interpretation of Law by the Standing Committee of the National People's Congress*, in in Johannes M.M. CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, 2000, p.188; on the importance of the NPCSC also see: Guobin ZHU, *Constitutional Review in China: An Unaccomplished Project or a Mirage?*, Suffolk University Law Review, 2010, Vol. XLIII, p.626

[148] On functions of the SPC and SPP see: Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, pp.31-34

[149] Albert H.Y. CHEN, *The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives*, Hong Kong Law Journal, 2000, p.23

[150] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.176

legislation enacted reveals itself to be unclear or ambiguous, it can be interpreted by lawyers and judges to find the applicable meaning; as a consequence, it may happen that the outcome of the interpretation is unexpected in relation to the legislator's original legal text or it may even be contrary to general interests or to the interests of the government. On the contrary, in a socialist context, like the Chinese one, rules are meant to represent the will of the people; therefore, when the meaning of law is unexpressed or unclear, there is no possibility to extract a meaning from the written text which opposes to what has been considered appropriate by the legislator, by the state and by the Party during the enactment process[151].

Legislative interpretation is mentioned both in the Legislation Law of the PRC and in the Chinese Constitution. In particular, according to Article 45 of the Legislation Law of the PRC (*Zhonghua Renmin Gongheguo Lifafa* 中华人民共和国立法法) the NPCSC is vested with the power to interpret the national law in two specific circumstances: when it is necessary to get a clarification of the provision's meaning, and when after the enactment of a law a new situation arises requiring a clarification for its application[152]. Furthermore, Article 46 specifies that the request for legislative interpretation shall be filed by "the State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuratorate, the various special committees of the Standing Committee, and the Standing Committee of the People's Congress of various provinces, autonomous regions and municipality directly under the central government"[153]. After the promulgation of the interpretation by the Standing Committee through public

[151] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.27
[152] *Legislation Law of the PRC* (*Zhonghua Renmin Gongheguo Lifafa* 中华人民共和国立法法), Section 4, Art.45, https://www.szse.cn/lawrules/rules/law/P020180328464054561811.pdf
[153] *Ibid*, Art.46

announcement, the interpretation acquires the same force as national law[154], therefore it must be obeyed by all administrative bodies and social organizations, and it must also be followed by courts when deciding on specific cases[155]. Concerning the interpretation function in the Chinese Constitution, Article 67 vests the NPCSC with the power to interpret the constitution itself and to supervise its enforcement; additionally, this body holds the power of interpretation of statutes[156].

The 1982 Constitution provides that the NPCSC, together with the NPC, not only is vested with the interpretation power, but also with the legislative power of the state[157]; the legislative procedure followed by the permanent organ of the NPC has been formalized in section three of the Legislation Law[158]. In particular, a draft bill has to go through three reads before it becomes law: 1) the organization responsible for the drafting phase must introduce the bill to the whole session of the NPCSC describing reasons and framework of it; 2) members of the NPCSC review the draft and the Law Committee also reports to the NPCSC on the revision of the draft; 3) the Law Committee reports to the NPCSC of its final deliberation on the draft at a plenary meeting and the revised draft is deliberated on at group meetings, before the final vote[159]. This procedure appears more complex compared to the procedure of legal interpretation, which develops as follow: after the request made by the above-mentioned bodies, the office of operation of the

[154] *Legislation Law of the PRC* (*Zhonghua Renmin Gongheguo Lifafa* 中华人民共和国立法法), Section 4, Art.50

[155] Zhenmin WANG, *Constitutional Conflict and the Role of The National People's Congress*, The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, 2008, p.5

[156] *The Constitution law of People's Republic of China*, Art.67

[157] *Ibid*, Art.58, and *Legislation Law of the PRC* (*Zhonghua Renmin Gongheguo Lifafa* 中华人民共和国立法法), Section 1: Scope of Legislative Authority, Art.7

[158] See: *Legislation Law of the PRC* (*Zhonghua Renmin Gongheguo Lifafa* 中华人民共和国立法法), Section 3

[159] Tom GINSBURG, *Constitutional Interpretation in Law-Making: China's Invisible Constitutional Enforcement Mechanism*, The American Journal of Comparative Law, 2015, p.4; see also: *Legislation Law of the PRC* (*Zhonghua Renmin Gongheguo Lifafa* 中华人民共和国立法法), Section 3, Art.29

NPCSC shall research and prepare a draft legislative interpretation and put it on the agenda of the upcoming session of the NPCSC; after deliberation by this session, the draft shall be deliberated and amended by the Legislative Committee, which shall submit a voting version of the draft legislative interpretation; finally, the voting version of the draft shall be adopted only if it is approved by more than half of NPCSC's members and it shall be promulgated by the NPCSC using a public announcement[160]. What is relevant is that, regardless the difference in complexity between the two procedures, as we already know, legal interpretations issued by the NPCSC have the same effect as the laws enacted by it; this is the reason why the NPCSC's interpretations may be considered a reasonable extension of its legislative power[161].

For what concerns interpretation in China, there are two issues untouched in the Legislation Law. The first one is linked to the nature of judicial interpretation by the SPC, which is not linked to any clear provision and recognition[162]. The 1955 Resolution of the NPCSC on interpretation of law was the first resolution that authorized the SPC to exert the power of interpretation of law and it was adopted to facilitate law enforcement after the CCP's victory over the Nationalist Party[163]. Additionally, the resolution stated that if additional definitions or stipulations about laws and decrees needed to be issued, the NPCSC should provide interpretations or make stipulations by means of decrees[164]. Nevertheless, this Resolution had no real effect after its adoption, because China faced a

[160] *Legislation Law of the PRC* (*Zhonghua Renmin Gongheguo Lifafa* 中华人民共和国立法法), Section 4

[161] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, pp.180-182; also see: *Legislation Law of the PRC* (*Zhonghua Renmin Gonheguo Lifafa* 中华人民共和国立法法), Section 4, Artt.47-48-49

[162] *Ibid*, p.184

[163] Li WEI, *Judicial interpretation in China*, Willamette Journal of International Law and Dispute Resolution Vol.5 No.1, Willamette University College of Law, 1997, p.89

[164] Hongshi WEN, *Interpretation of Law by the Standing Committee of the National People's Congress*, in in Johannes M.M. CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, 2000, p.184

radical change imposed by Mao, who decided to end the process of drafting and adopting new statutes other than constitutions; consequently, judicial interpretation became just an explanation of the CCP's policies[165]. At a later time, the already mentioned 1981 Resolution, which is still in force today, was adopted in order to restore the legal system which was dismantled in the Maoist era, to make the adopted statutes applicable and to make sure that the courts across the country would apply them in a proper way[166]. This resolution, always concerning the strengthening of interpretation work of the NPCSC, has had more success than the previous one and it provides that the interpretation power is conferred not only to the SPC but also to the SPP and that their power is considered inferior to that of the NPCSC in terms of legal effect. Furthermore, the resolution provides that, if the interpretations issued by the SPC and SPP are not in line with each other, both of them must be submitted to the NPCSC for a final decision[167]. Although according to this system the SPC's power of interpreting is generally limited and its judicial interpretation cannot function as legislation, its power of interpretation within the judicial system is absolute: the SPC has never delegated its authority to any courts and, under the Organic Law of the People's Court, it is authorized to provide legal guidance to lower courts; as a consequence, all lower courts in China are required to apply the SPC's binding interpretations; even if it has proven to be practically impossible because of local interests, which led local courts implementing their own understanding of national statutes[168]. In addition, from a practical point of view, the SPC did not limit itself to use the

[165] Li WEI, *Judicial interpretation in China*, Willamette Journal of International Law and Dispute Resolution Vol.5 No.1, Willamette University College of Law, 1997, p.89
[166] *Ibid*, p.90
[167] *Ibid*, p.9; on the content of the 1981 Resolution also see: Hongshi WEN, *Interpretation of Law by the Standing Committee of the National People's Congress*, in in Johannes M.M. CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, 2000, p.184
[168] *Ibid*, pp.93-109

interpretation power to answer questions raised in court trials concerning statutes' application, as provided by the 1981 Resolution, but it also issued explanations of statutory provisions, it expanded, supplemented or limited existing statutes, amended statutes and, in other cases, created new statutory provisions[169]. Nevertheless, the Party has never really formalized this SPC's expanded authority to interpret the law, as a result, the nature of judicial interpretation in China is still uncertain[170].

Although the SPC is authorized by the NPCSC to interpret laws, this authorization is based on some conditions. As a matter of fact, under circumstances described in the already mentioned Article 45 of the Legislation Law, the SPC shall submit the provisions at issue to the NPCSC for a final interpretation before the courts make a final ruling. This procedure shows that the NPCSC interpretation and the ordinary court system are closely connected to each other[171]. As the law professor Ignazio Castellucci explains, the obligation to refer the case to the NPCSC is linked to the French principle of *référé législatif*, according to which the courts are la *bouche de la loi*[172].

Nevertheless, in the socialist legal tradition of China the interpretation function is different from the adjudication one, with the latter being the application of the law[173]; in particular the power of final interpretation and the power of final adjudication are not held by the same body: the former, as we already know, is in the hand of the NPCSC, while

[169] Li WEI, *Judicial interpretation in China*, Willamette Journal of International Law and Dispute Resolution Vol.5 No.1, Willamette University College of Law, 1997, p.100
[170] *Ibid*, p.108
[171] Zhenmin WANG, *Constitutional Conflict and the Role of The National People's Congress*, The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, 2008, p.5
[172] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.158
[173] *Ibid*

the latter is the hand of the SPC[174]. Therefore, in the Chinese tradition the interpretation function belongs to the lawmaker and, as a consequence, has a law-making nature[175].

The second untouched issue in the Legislation Law is linked to the constitutional interpretation, which has never been exercised, at least formally, by the NPCSC, even if it is listed among its functions in the Chinese Constitution of 1982[176]. In reality, Chinese scholars have identified several interpretations issued by the NPCSC during the legislative process that have constitutional significance; however, they are not officially rendered constitutional interpretations[177]. These constitutional interpretations have been mainly used in three different ways: to redistribute governmental power, to define citizens' rights and to adjust the economic structure[178]. In particular, the director of the Constitutional Affairs Section of the Legislative Affairs Commission of the NPC, Chen Sixi, conducted a research on the NPCSC's power of interpretation, showing that this legislative body had made constitutional and legal interpretation many times and some of them were requested by the SPC or the SPP; furthermore, among these interpretations some concerned the Hong Kong Basic Law, and they will be further analysed in the next paragraphs[179].

As the international law Professor of the University of Chicago, Tom Ginsburg explains, during the process of constitutional interpretation the NPC and its Standing

[174] Zhenmin WANG, *Constitutional Conflict and the Role of The National People's Congress*, The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, 2008, p.6
[175] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.158
[176] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.184
[177] Tom GINSBURG, *Constitutional Interpretation in Law-Making: China's Invisible Constitutional Enforcement Mechanism*, The American Journal of Comparative Law, 2015, p.2
[178] On examples of constitutional interpretations in these fields see: *Ibid*, p.5
[179] Zhenmin WANG, *Constitutional Conflict and the Role of The National People's Congress*, The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, 2008, p.7

Committee have played three different roles: first of all they have been followers of the document at issue, adhering to the rules and principles provided in it; secondly, they have been creators of new constitutional norms and order, when the existing rules proved to be outdated or a need for constitutional changes was necessary; thirdly, they have also been arbiters issuing interpretations when conflicts on constitutional rights or on jurisdictional boundaries between organizations arose[180]. Additionally, the law Professor also clarifies that interpretative approaches adopted by the NPC and the NPCSC in different arenas have been various: using a constitutional clause to legitimate a new legislative arrangement; borrowing a constitutional principle in order to allow an institutional innovation; invoking a constitutional principle to reject a controversial legislative proposal, which could undermine the status quo; intentionally being vague to avoid constitutional disputes[181].

In general, the NPCSC's legislative interpretation power has always been source of debate, above all after the publication of the 1981 Resolution, which made a distinction between different types of interpretation; as a consequence, the allocation of competences among different bodies became more difficult to be defined[182].

Other debates arose also around the ambiguity of Article 50 of the Legislation Law, which provides that legislative interpretations issued by the NPCSC have the same effect as laws, but it does not contain any explicit provision concerning the retrospective effect of such interpretations. These debates gave rise to different points of view: on the one hand, the legislative interpretation may be considered a piece of legislation and, therefore,

[180] Tom GINSBURG, *Constitutional Interpretation in Law-Making: China's Invisible Constitutional Enforcement Mechanism*, The American Journal of Comparative Law, 2015, p.19
[181] *Ibid*
[182] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.186

it should exert its effect since the date of its promulgation, without having a retrospective effect. On the other hand, the interpretation may be seen as a legislative act linked to the relevant law at issue, which clarifies the original meaning of the provisions; therefore, the interpretation, which is not an ordinary law enacted by the NPCSC or the NPC, has retrospective effect and its effect dates back to the date when the relevant law was enacted. An additional point of view on the retrospective effect of interpretations in mainland China is based on the idea that it depends on the circumstances: if the interpretation just clarifies the meaning of the relevant provision, it may have a retrospective effect which dates back to the time of promulgation of such provision; while if the interpretation supplements the law creating new rules, it should not have retrospective effect[183].

2. Interpretation in Hong Kong

As already said before, the Basic Law has a dual nature: it is both a piece of legislation used by national legislature to establish a framework for governing the HKSAR and a mini constitution that lists and guarantees the rights of Hong Kong people; it is based both on national sovereignty and on local autonomy depending upon the reader's perspective. This is the reason why the CPG and the HKSAR government have disagreed more than once on the meaning and interpretation of this mini constitution[184].

Since 1997, the Hong Kong judiciary has had in the same way a dual task: on the one hand, it has safeguarded the fundamental liberties in the Region, on the other hand, it has

[183] Han ZHU, Albert H.Y. CHEN, *The Oath-taking Cases and the NPCSC Interpretation of 2016: Interface and Common Law and Chinese Law*, Hong Kong Law Journal 49(1), 2019, pp.22-25
[184] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.2

dealt with the political sensitivities of the CPG[185]. As a consequence, the issue of interpretation of the Basic Law has been a reason for conflict between local judiciary, the HKSAR government, the NPC and its Standing Committee in China. This conflict has not been caused by the need to define how to interpret the Basic Law, instead by the need to decide who were the rightful interpreters of this mini constitution[186].

For all these reasons, the "one country, two systems" policy, which describes the relations between Beijing and Hong Kong, is reflected also in the interpretation issue. Both mainland and Hong Kong institutions play a role in interpreting the Basic Law, but they have divergent interests: on the one hand, national authorities want to preserve the "one country" aspect in order to safeguard national and regional stability; on the other hand, Hong Kong authorities' will is to preserve the "two systems" aspect in order to safeguard political and civil liberties provided by the Basic Law. These competing interests have represented another obstacle to the development of a harmonious interpretation mechanism[187].

The approach used by the PRC, which is based on a combination of legislation and interpretation in a single institution, the NPCSC, seems hard to be accepted in Hong Kong, which is characterized by a common law system[188]. This system has had some friction with the PRC's tradition, which is based both on the socialist system and on the civil law system; indeed, whereas in a civil law system the legislature is vested with the power to

[185] Po Jen YAP, *10 years of the Basic Law: the rise, retreat and resurgence of judicial power in Hong Kong*, Common Law World Review, 2007, p.1
[186] Po Jen YAP, *Interpreting the Basic Law and the adjudication of politically sensitive questions*, Chinese Journal of International Law, Oxford University Press, 2007, p.543
[187] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.5
[188] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.188

interpret the law, in a common law system this power is in the hands of the judiciary[189]. A common law system is generally based on Western liberalism and the principle of separation of powers, and the judiciary is considered the guardian of human rights and the rule of law; instead, in the Chinese socialist tradition there is a rejection of the principle of separation of powers, therefore, all powers - legislative, executive and judicial - are in the hands of the NPC[190]. Consequently, the mainland government insists that the Chinese stability depends on the power of the NPCSC to exert ultimate authority to interpret the Basic Law, while Hong Kong government believe that each NPCSC's interpretation may erode judicial independence and the rule of law of the region[191].

However, the Basic Law incorporates some elements of the Chinese civil law system based on the legislative supremacy[192]; indeed, as we already know, Article 158 of the Hong Kong Basic Law provides that the ultimate authority for interpreting the Basic Law itself is in the hand of the NPCSC, which is considered a political institution rather than a legal institution by Hong Kong legal community[193]. Although under the "one country, two systems" principle Hong Kong judiciaries are authorized by the NPCSC to interpret the mini constitution in the judicial process, this authorization is conditional, as it happens for the SPC in mainland China[194]. More specifically, the NPCSC and Article 158 authorize the courts of the HKSAR to interpret the provision of the mini constitution, but

[189] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.3
[190] Johannes CHAN SC, *Basic Law and Constitutional Review: The First Decade*, Hong Kong Law Journal, 2007, Vol.37 Part 2, p.407
[191] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.3
[192] *Ibid*, p.23; on examples of legislative supremacy also see: Artt.17-18-20 of *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*
[193] Johannes CHAN SC, *Basic Law and Constitutional Review: The First Decade*, Hong Kong Law Journal, 2007, Vol.37 Part 2, p.415
[194] Zhenmin WANG, *Constitutional Conflict and the Role of The National People's Congress*, The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, 2008, p.5

only in adjudicating cases within the limits of the autonomy conferred upon the region. If the courts need to interpret provisions which are related to affairs under the responsibility of the CPG or to the relationship between the central government and the region's government – called by the CFA "excluded provisions" - they shall seek the interpretation of the NPCSC through the CFA, before making their final judgements. The other condition that may determine a reference to the NPCSC is that the interpretation of the provision at issue will affect the judgement on the case[195].

Before making an interpretation of the provisions at issue, the Standing Committee shall consult its Committee for the Basic Law of the HKSAR; additionally, when the NPCSC issues an interpretation, the courts of the region shall follow it when they apply those provisions[196]. The NPCSC's interpretations of the Basic Law have the same force as legislation after they are issued, but they cannot overturn any court judgement related to the rights and interest of people that are involved in the litigation[197].

This may be considered a dual system of judicial or constitutional review which is based, on the one hand, on the idea of sovereignty of the central government over Hong Kong, and on the other hand, on the idea that Hong Kong represents an exception. As a consequence, the NPCSC plays a stronger role in Hong Kong's constitutional review compared to the role of Hong Kong courts in terms of the implementation of the Basic Law[198].

---

[195] Yash GHAI, *Litigating the Basic Law: Jurisdiction, Interpretation and Procedure*, in Johannes M.M. CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, 2000, p.33

[196] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* Art.158

[197] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3, p.651

[198] Shucheng WANG, *Reconciling Hong Kong's Final Authority on Judicial Review with the Central Authorities in China: A Perspective from "One Country, Two systems"*, Public Law Review, Vol.27, No2, 2016, p.9

Focusing more on Article 158, it is closely related to the debate on sovereignty, which characterized negotiation between China and Britain concerning the future of Hong Kong. In particular, during the drafting process of the Basic Law, the Hong Kong legal community asked for judicial independence and final interpretation over the mini constitution; the British government suggested a constitutional court to deal with problems linked to the relationship between the PRC and the region; on its part the Chinese government insisted in vesting the NPCSC with the primary power of interpretation of the constitution[199]. Consequently, the interpretation of the Basic Law is linked to the governance of China over this SAR and represents one of the most significant tools used by the central authority to exert its influence[200].

However, as the Assistant Professor of Law at the University of Hong Kong, Cora Chan, explains, there are some ambiguities in the Basic Law in general and more specifically in Article 158 over the arrangements for interpreting the mini constitution; in particular, it is not clear whether the NPCSC's power of interpretation of the Basic Law is free-standing, meaning that from a procedural point of view this power can be exercised without judicial reference from Hong Kong courts and from a substantial point of view it can be exercised in relation to all provisions included in the Basic Law including those provisions that are within the scope of autonomy of the HKSAR. The second unclear arrangement is related to the way in which Hong Kong courts shall seek a preliminary ruling from the NPCSC in practice[201].

[199] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.191
[200] *Ibid*, p.192
[201] Cora CHAN, *Reconceptualising the Relationship between the Mainland Chinese Legal System and the Hong Kong Legal system*, Asian Journal of Comparative Law: Vol. 6: Iss.1, Article 1, 2011, p.6

As it happens in mainland China, the power of final adjudication and the power of interpretation are not exercised by the same body: the former is exercised by the CFA, while the latter by the NPCSC. However, the CFA is subject to the constitutional and legal interpretations issued by the NPCSC. The CFA, besides exercising its power of final adjudication, is also one of the three bodies empowered to potentially ask for the NPCSC's interpretations; the other two are the NPCSC on its own initiative and the State Council[202].

The NPCSC interprets the Basic Law on its own initiative under different circumstances: when the courts refer a matter to it under Article 158; when laws enacted by the HKSAR are invalidated because they are considered not in conformity with the provisions of the Basic Law regarding the responsibility of the Central Authorities or the relationship between the central government and the region's government (Article 17); when the NPCSC adds PRC laws to the list of laws that are applicable in the region, but only if they relate to defence and foreign affairs or other matters which are not within the limits of autonomy of the region; and when the NPCSC declares a law previously in force in the region to be in contravention of the Basic Law (Article 160)[203].

In the following paragraphs we will analyse the five circumstances in which the NPCSC exerted its power of interpretation in the HKSAR and the relevant features.

[202] Zhenmin WANG, *Constitutional Conflict and the Role of The National People's Congress*, The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, 2008, p.6

[203] Peter WESLEY-SMITH, *Law in Hong Kong and China: The Meshing of Systems*, Sage Publications, 1996, p.111

3. Five cases of interpretation by the NPCSC in the HKSAR

3.1 Right of abode

The first opportunity for the mainland government to disclose its actual view of its constitutional authority under Article 158 took place in 1999, with a controversy on the right of abode (*juliuquan* 居留权), known as the *Ng Ka Ling* case[204].

The Basic Law stipulates that Hong Kong residents of Chinese descent are eligible for the right of abode in Hong Kong if, at the time of birth, at least one parent was a citizen enjoying the right-of-abode status[205]. However, after the handover in 1997, the LegCo passed an emergency amendment to the Immigration Ordinance, whose aim was to require any mainland person who claimed to have the right of abode in the region to produce a certificate of entitlement, which could only be applied for outside Hong Kong; this certificate could be issued only if the applicants first secured an exit approval from the Security Bureau of the PRC. A problem arose around the constitutionality of this amendment, which was challenged for being contrary to Article 24 of the Basic Law, which defines permanent residents and their right of abode[206]; however, the Director of Immigration gave legitimacy to it mentioning Article 22, which provided that people from other parts of China must apply for approval in order to enter the region[207].

In particular, the suit at issue was filed in Hong Kong courts on behalf of children who were born in the mainland and had at least one parent eligible for permanent resident status in the region. The suit claimed that those children, under the third category of Article 24, enjoyed the right of abode and could reside in Hong Kong. Nevertheless, the

[204] Thomas E. KELLOGG, *Excessive Deference or Strategic Retreat? The Impact of Basic Law Article 158*, Hong Kong Journal, No. 9, 2008, p.2
[205] John M. CARROLL, *A Concise History of Hong Kong*, The University of Hong Kong, 2007, p.222
[206] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* Art.24
[207] Johannes CHAN, *Hong Kong's Constitutional Journey: 1997-2011*, The University of Hong Kong, Faculty of Law, 2014, p.4

Hong Kong government stated that, according to Article 22, these children must obtain the approval of the CPG[208].

In such circumstance the Hong Kong government asked the NPCSC for an interpretation of Article 22 Clause 4 and Article 24 Clause 2 of the HKSAR Basic Law, which reversed a previous judicial decision issued by the CFA[209].

As already said before, article 24 defines who is considered a permanent resident of Hong Kong and has the right of abode in the region. This category includes 1) Chinese citizens born in the HKSAR before or after the handover; 2) Chinese citizens who have resided in the region for seven continuous years either before or after the handover and 3) "persons of Chinese nationality born outside Hong Kong of those residents listed in the previous two categories"; additionally, this article guarantees all these permanent residents the right of abode in the HKSAR and the qualification to obtain permanent identity cards which state their right of abode[210]. The ambiguous matter is the type of interpretation that could be given to this provision; if we adopt a narrow interpretation, the right of abode is enjoyed by a child of at least one parent who was a Hong Kong permanent resident before his/her birth; if we adopt a broad interpretation this right is enjoyed by a child whose parents were not permanent residents at the time of birth, but at least one of them subsequently became a permanent resident of the region[211].

Concerning Article 22, it provides that people coming from other parts of China who want to enter the HKSAR must apply for approval and that the number of people who enter the region for settlement shall be determined by the competent authorities of the

[208] Michael F. MARTIN, *Hong Kong: Ten Years After the Handover*, Congressional Research Service prepared for Members and Committees of Congress, 2007, p.11
[209] Thomas E. KELLOGG, *Excessive Deference or Strategic Retreat? The Impact of Basic Law Article 158*, Hong Kong Journal, No. 9, 2008, p.2
[210] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.24
[211] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3 p.640

CPG after consulting the HKSAR government[212]. Also in Article 22 it is possible to opt for a narrow interpretation, according to which only mainland residents who have no right of abode under Article 24 shall apply for approval, or a broad interpretation, according to which also mainland residents who enjoy the right of abode under Article 24 shall apply for approval[213].

When the case was appealed to the CFA, it argued that the duty to make reference to the NPCSC under Article 158 was based on the two abovementioned conditions: the classification condition, which arises if the provisions at issue concern affairs under the responsibility of the CPG or the relationship between central authorities and the region; and the necessity condition, according to which the CFA needs to interpret the provisions at issue as the interpretation will affect the judgement on the case. Furthermore, the Court explained that, in order to decide if the classification condition was satisfied, first it must identify the predominant provision[214] that needed to be interpreted. It declared that the predominant provision was Article 24, which concerned permanent residency in Hong Kong and was not linked to the relationship between mainland authorities and the region's authorities; therefore, it was not necessary to make reference to the NPCSC[215]. In the end, the Court opted for a broad interpretation of article 24 and a narrow interpretation of Article 22[216].

---

[212] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.22

[213] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3 p.640

[214] On predominant provision in the right of abode case see: Yash GHAI, *Litigating the Basic Law: Jurisdiction, Interpretation and Procedure*, in Johannes M.M. CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, 2000, p.34

[215] Po Jen YAP, *10 years of the Basic Law: the rise, retreat and resurgence of judicial power in Hong Kong*, Common Law World Review, 2007, p.5

[216] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3 p.640

The decision of the CFA followed common law standards, clarifying that among its powers there was the possibility to decide on the necessity to request an interpretation of the Basic Law to the NPCSC according to Article 158 and it found it was not the case in this specific circumstance[217]. The CFA behaved as the constitutional guardian of the Basic Law, of Hong Kong's autonomy and Hong Kong people's rights[218] and it asserted to have jurisdiction to strike down laws that were not consistent with the mini constitution; the court also added that this power to examine the consistency with the Basic Law of legislative acts of the NPC or of its Standing Committee and to declare them invalid if found inconsistent was justified by the fact that this jurisdiction of constitutional review is derived from Article 31 of the PRC Constitution and the Basic Law is considered a national law. These assertions were somehow controversial, considering that even the SPC does not have the jurisdiction to declare the legislative acts of the NPC or an act of the CPG invalid[219]. This is the reason why this episode provoked some criticism from the mainland[220] and gave rise to a political and constitutional debate over the independence of Hong Kong courts[221].

Some weeks after the ruling, the CFA issued a clarification[222] which was the result of political pressure exerted by Beijing and whose aim was to underline that the NPCSC had

[217] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.159
[218] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3 p.634
[219] Johannes CHAN SC, *Basic Law and Constitutional Review: The First Decade*, Hong Kong Law Journal, 2007, Vol.37 Part 2, p.413
[220] On comments of mainland scholars on the judgement of the CFA see: Xiao WEIYUN and others, W*hy the Court of Final Appeal Was Wrong: Comments of the Mainland Scholars on the Judgment of the Court of Final Appeal*, in Johannes M.M. CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, 2000, p.53
[221] Ignazio CASTELLUCCI, Rule of Law and Legal Complexity in the People's Republic of China, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.159
[222] On the content of the clarification see: Johannes M.M. CHAN, *What the Court of Final Appeal Has Not Clarified in Its Clarification: Jurisdiction and Amicus Intervention*, in Johannes M.M. CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, 2000

full power to interpret the Hong Kong Basic Law, not only when it was requested by the CFA, but also on a voluntary basis[223]; it also clarified that the power of Hong Kong courts to interpret the Basic Law derived from the NPCSC under Article 158 and this power is subject to any interpretation issued by the NPCSC, which is binding on other Hong Kong courts[224]. Soon after the publication of this clarification, the government of the region announced it would ask for the intervention of the NPCSC and justified its decisions explaining that the Basic Law is a national law and under the mainland system the ultimate authority to interpret statutes is in the hands of the NPCSC; therefore, given that the NPC enacts statutes, its Standing Committee would certainly be the most authoritative body able to interpret the law and understand what is the true legislative intent[225]. This revealed to be controversial, because under Article 158 of the Basic Law the NPCSC is vested with the power of interpretation, but this power is supposed to be exerted on the basis of a request from the courts of the region and not from the SAR government[226]. Furthermore, the referral to the NPCSC was considered as a self-inflicted threat to Hong Kong's autonomy, judicial authority, rule of law and individual rights[227].

Additionally, according to a study by Hong Kong government, issued in order to overturn the CFA's decision, the consequence of the implementation of articles 24 and 22 as interpreted by the CFA would cause that the number of children in China that would be eligible to immigrate into Hong Kong was around 1.6 million residents in the next ten

[223] Ignazio CASTELLUCCI, Rule of Law and Legal Complexity in the People's Republic of China, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.160
[224] Johannes CHAN SC, *Basic Law and Constitutional Review: The First Decade*, Hong Kong Law Journal, 2007, Vol.37 Part 2, p.414
[225] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.160
[226] Steve TSANG, *Judicial Independence and the Rule of Law in Hong Kong*, Hong Kong University Press, 2001, p.6
[227] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3 p.642

years[228]. Furthermore, it estimated that $710 billion would be necessary to absorb them and additional lands and premises would be required; however, no benefits related to employment opportunities and to the arrival of young migrants in an ageing population were taken into consideration[229]. According to the government of the region, the migration wave would overburden schools, housing and other services in the region. Consequently, the desire was to obtain a rule against a broad definition of enjoying the permanent resident status; this is the reason why the then CE, Tung, sought the NPCSC's interpretation, which was far more restrictive than the CFA's[230].

According to Steve Tsang, there is no evidence to prove that the CE acted because of pressures from Beijing; instead, he took the decision on his own or following the advice of law officers. Nevertheless, what is significant is that the Justice Department based its advice on a particular consideration which was presented by the Deputy Law Officer R. Allcock to the South China Morning Post. He explained that under the common law, the ultimate power to interpret the law is vested in the judiciary; however, the HKSAR is part of the PRC, which is a civil law system, and under this kind of system the ultimate power of interpretation is in the hands of the NPCSC. This comment raised some questions on the rights enjoyed by the HKSAR, in particular on Article 8 of the Basic Law, which provides that the common law system shall remain unchanged after the handover[231].

The interpretation of the NPCSC was based on the legislative intent and context of the provisions on the right of abode of the Basic Law, a mechanism which is typical of the

[228] Albert H.Y. CHEN, P.Y. LO, *Hong Kong's Judiciary Under "One Country, Two systems",* University of Hong Kong - Faculty of Law, Research Paper No. 2017/022, 2017, p.7
[229] Yash GHAI, *The NPC Interpretation and Its Consequences*, in Johannes M.M. CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, 2000, p.201
[230] Michael F. MARTIN, *Hong Kong: Ten Years After the Handover*, Congressional Research Service prepared for Members and Committees of Congress, 2007, p.11
[231] Steve TSANG, *Judicial Independence and the Rule of Law in Hong Kong*, Hong Kong University Press, 2001, p.7

Chinese statutory interpretation tradition and not contemplated by the common law tradition[232]. As far as Article 22 is concerned, the interpretation of the NPCSC provided that those people who must apply for approval in order to enter the HKSAR are "people from all provinces, autonomous regions, or municipalities directly under the Central Government, including those persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents, who wish to enter the HKSAR for whatever reason […]"[233]. Concerning interpretation of Article 24, the NPCSC provided that the third category of those considered permanent residents of the region imply that "both parents of such persons, whether born before or after the establishment of the HKSAR, or either of such parents must have fulfilled the condition prescribed by category 1) or 2) of Article 24 of the Basic Law of the HKSAR of the PRC at the time of their birth[234].

The NPCSC justified its interpretation claiming that both these provisions concerned affairs that are under the responsibility of the CPG and were related to the relationship existing between the Central Authorities and the HKSAR. Additionally, it underlined that, before making its own judgement, the CFA did not seek an interpretation of the NPCSC, following what was required in Article 158 of the Basic Law and that the CFA's interpretation was not consistent with the legislative intent of the provisions at issue[235].

From a theoretical point of view, instead of making reference to the NPCSC the Hong Kong government could have proposed to Beijing an amendment to the Basic Law in order to solve the problems of migration generated by the decision of the CFA. However,

[232] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.163
[233] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Instrument 17 - The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China
[234] *Ibid*
[235] *Ibid*

considering that under the Basic Law the power to amend the mini constitution is only in the hand of the NPC, which only meets once a year in a spring session, the earliest amendment would be enacted in spring 2000; therefore, this option was not taken into consideration because before this time a flood of new migrants would have moved to Hong Kong[236].

This interpretation also had an additional meaning beyond the issue of the right of abode; indeed, the fact that the NPCSC issued an interpretation without the formal request from the CFA created a precedent affirming that the interpretative authority of this body is a free-standing authority and its only procedural limit consists in consulting with the Basic Law Committee[237].Thus, through referral, the CE set a precedent for interference by the NPCSC in other matters of the region[238].

This first interpretation was not exempt from controversies; some commentators claimed that decisions of the NPCSC could be considered a reinterpretation of the Basic Law rather than an interpretation; furthermore, it gave rise to periodic protests in Hong Kong on behalf of mainland children who were kept out of Hong Kong subsequently to this restrictive interpretation[239]. Additionally, Hong Kong scholars argued that, since Article 158 authorized the courts of Hong Kong to interpret on their own provisions within the high degree of autonomy of the region, the NPCSC should limit itself from exercising its interpretative power. The decision of the NPCSC was also considered harmful with regard to the independence of the judiciary and the power of final adjudication in the hands of the HKSAR. On the opposite side, mainland scholars and the

[236] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3 p.642
[237] Thomas E. KELLOGG, *Excessive Deference or Strategic Retreat? The Impact of Basic Law Article 158*, Hong Kong Journal, No. 9, 2008, p.4
[238] Lorenz LANGER, *The elusive aim of universal suffrage: Constitutional developments in Hong Kong*, International Journal of Constitutional Law, Volume 5, Issue 3, 2007, p.443
[239] Michael F. MARTIN, *Hong Kong: Ten Years After the Handover*, Congressional Research Service prepared for Members and Committees of Congress, 2007, p.11

HKSAR government itself claimed that the NPCSC's interpretation was "necessary and totally appropriate" to make the legislative intent of the article of the Basic Law at issue clear and to guarantee the correct enforcement of the mini constitution[240].

In the following right of abode case, known as *Lau Kong Yung* case, the CFA recognized the binding force of the NPCSC and determined the effect of its interpretation[241]. In this circumstance, the seekers of the right of abode claimed that the interpretation was not issued upon request by the CFA under Article 158, therefore it should not be taken into consideration. The Court rejected this point of view and declared the binding force of the interpretation on the Hong Kong courts. In particular, the Court justified its decision explaining that the power of interpretation of the NPCSC was a free-standing power, therefore it can be exercised at any time and without a reference by the Court itself. Additionally, the Court established that the interpretation had a retroactive effect[242].

The restoration of the self-confidence of the Hong Kong courts after the 1999 interpretation is represented by the *Chong Fung Yuen* case. In particular, the key issue of this case was whether, under Article 24 of the Basic Law, the right of abode in Hong Kong vests in children born in Hong Kong to Chinese parents who are not Hong Kong residents visiting Hong Kong temporarily or illegally staying in Hong Kong. If a literal interpretation of Article 24 is adopted, such children are considered Hong Kong permanent residents and enjoy the right of abode[243]. Under such circumstances, the CFA decided that the Hong Kong courts should adopt the common law approach when dealing

[240] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.168
[241] Albert H.Y. CHEN, P.Y. LO, *Hong Kong's Judiciary Under "One Country, Two systems",* University of Hong Kong - Faculty of Law, Research Paper No. 2017/022, 2017, p.8
[242] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3 p.644
[243] *Ibid*, p.647

with the interpretation; this meant that the court must avoid a literal, technical, narrow and rigid approach, and the common law system should give effect to the legislative intent as expressed in the language. The outcome of the adoption of a common law approach was that the CFA argued the only answer to the case at issue was that the child involved enjoyed the right of abode in the region. The CFA felt free to apply its own interpretation instead of the 1999 one because it argued that the latter concerned only Article 22(4) and 24(2)(3) of the Basic Law, while the *Chong Fung Yuen* case was linked to Article 24(2)(1)[244]. In particular, Article 24(2)(1) deals only with the right of abode in Hong Kong of persons of Chinese nationality born in Hong Kong and does not contain any provision on whether the parents of such persons are Hong Kong, China or other countries' residents. This is the reason why the CFA believed that this provision concerned neither the relationship between the HKSAR and the Central Authorities nor affairs which are under the responsibility of the CPG and, as a consequence, there was no need to refer Article 24(2)(1) to the NPCSC for interpretation. In acting in this way, the CFA mainly relied on a common law strategy used by courts: if the text is ambiguous the court can solve this problem in an appropriate way, while if the legislature has clarified the ambiguity of the text, the court must apply the legislative text; considering that the 1999 interpretation did not clarified that it was valid also for Article 24(2)(1) and that under Article 158 the courts of the region are only bound by official interpretations, the CFA had the possibility not to follow the 1999 interpretation[245].

On its part, Beijing decided to express its opinion on the decision of the CFA, but with a non-invasive approach; indeed, Legislative Affairs Commission of the NPCSC issued a press statement explaining that such decision was not consistent with the NPCSC's

[244] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3, p.648
[245] *Ibid*, p.649

interpretation, but there was no further action from Beijing. By doing so, the NPCSC demonstrated that it did not approve the CFA's interpretation and that its own interpretation probably would be different from the CFA's one[246].

In conclusion, the *Chong Fung Yuen* case set forth the jurisprudential liberation of the constitutional role of the CFA, which regained its importance in being the guardian of fundamental rights in the region[247]. In that occasion the Court showed its judicial astuteness because it must have known that there was no risk the Director of Immigration would stop its decision; indeed, unlike the *Ng Ka Ling* case, such decision would not give rise to a huge and immediate influx of mainland people towards the region: only 555 children per annum would enjoy the right of abode. Therefore, that was the opportune time for the court to claim its autonomy and defend the right of abode of those asking for it[248].

3.2 Selection of the Chief Executive and formation of the Legislative Council and its voting procedures

In 2004, the CE of the Hong Kong government set up a task force on constitutional development, which issued a report[249] based on the idea that the process of constitutional development of the region was closely connected to the relationship between the region and the CPG and to the systems used to implement the "one country two systems"

[246] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3, p.649
[247] Johannes CHAN SC, *Basic Law and Constitutional Review: The First Decade*, Hong Kong Law Journal, 2007, Vol.37 Part 2, p.422
[248] Po Jen YAP, *10 years of the Basic Law: the rise, retreat and resurgence of judicial power in Hong Kong*, Common Law World Review, 2007, p.12
[249] See: Constitutional Development Task Force, The First Report of the Constitutional Development Task Force: Issues of Legislative Process in the Basic Law Relating to Constitutional Development, 2004, https://www.legco.gov.hk/yr03-04/english/panels/ca/papers/ca0331cb2-report-e.pdf

principle and the Basic Law; as a consequence, according to the task force, the CPG should take part in such process. Additionally, the task force set out the competence in order to start amendments to Annex I and Annex II of the Hong Kong Basic Law when necessary; however, it did not give any particular guideline concerning who could decide whether or when amendments would be considered necessary. Such a lacuna led the NPCSC to issue its second interpretation in the same year[250].

This second interpretation of the Hong Kong Basic Law, based on Article 158 of the mini constitution and on Article 67 of the Chinese constitution, was part of a constitutional reform process[251]. While the first interpretation was closely linked to the power of judicial review, this second interpretation dealt with the structure of the region's government[252].

In particular, the 2004 interpretation concerned Article 7 of Annex I, dealing with the method for the selection of the Chief Executive of the HKSAR for the terms subsequent to the year 2007 and on Article III of Annex II dealing with the method for the formation of the Legislative Council and its voting procedures subsequent to the year 2007[253]. After the demonstrations in 2003 over the already mentioned Article 23 of the Basic Law, the desire of Hong Kong people to move towards a more democratic system strengthened; as a consequence, the meaning of both Annex I and Annex II is fundamental in order to understand the road of constitutional reform in Hong Kong[254].

---

[250] Lorenz LANGER, *The elusive aim of universal suffrage: Constitutional developments in Hong Kong*, International Journal of Constitutional Law, Volume 5, Issue 3, 2007, p.443

[251] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.164

[252] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.7

[253] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*

[254] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.169

Generally speaking, the body of the Basic Law provides vague instruction about the process for the selection of the CE and for the election process of all the members of the legislature. In both cases, it is specified that the ultimate aim was the attainment of universal suffrage; in this way, the body of the mini constitution establishes long-term democratic goals, but it does not set forth any specific timetable to reach them. This imprecision reflects the ambivalence of the CPG about its will to provide a high degree of autonomy of the region on the one hand, and to control the political progress and development of Hong Kong on the other hand. By contrast, the Annexes of the Basic Law lay out more details about these provisions[255].

In particular, as far as the selection of the Chief Executive is concerned, Annex I provides that the election shall be based on limited functional, politically controlled constituencies; additionally, it suggests that the system can be reformed after the elections of 2007. Similar provisions related to the LegCo elections are contained in Annex II[256]. Additionally, the two annexes provide that if there is the need to amend these methods the NPCSC shall play an important role: for the selection of members of the LegCo changes must be reported to the NPC for the record, while changes in the process for the selection of the CE must be reported to the NPC for approval[257]. Both the annexes also specify that they are not amendable for a certain period of time[258].

Considering the provisions contained in the Basic Law, the general Hong Kong public expected universal suffrage to become the method for the selection of the CE and for the

[255] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.8-14
[256] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.164
[257] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Annex I.7 and Annex II.III
[258] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.9

LegCo after 2007. However, against a growing support for democratic reform, in 2004 the NPCSC disclosed its intention to issue an interpretation of the provisions at issue[259]. The interpretation of the NPCSC affected the expectations regarding a democratic path, clarifying that the two processes shall be controlled by the CPG's authorities and that the principle of "gradual and orderly progress" used for the selection of the CE (Article 45) and for the formation of the LegCo (Article 68) shall prevail over the requests for universal suffrage[260]. Additionally, the interpretation provided that the block on amendments of the annexes extended through the year 2007 and that Hong Kong authorities shall submit a report not only upon proposing specific changes to the annexes, but also before beginning the process of amendment[261]. Afterwards, the NPCSC, in accordance with the provisions contained in Article 45 and 68 of the Basic Law, shall take a decision "in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress". Finally, the NPCSC specified that until the Basic Law is amended, the CE and the members of the LegCo will continue to be selected according to the already existing procedures[262].

This interpretation has established a sort of constitutional convention, which can be called a "five step procedure" for the amendment of the methods of election for the CE and the LegCo; these five steps include: 1) a report by the HKSAR government to the NPCSC on whether there is the need to amend the methods; 2) a decision by the NPCSC upon the region's request; 3) if the request is accepted, the HKSAR government proposes

[259] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.9
[260] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.165
[261] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.9
[262] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, The Interpretation by the NPCSC of Article 7 of Annex I and Article III of Annex II of the HKSAR of the PRC

a bill to the LegCo and achieves a two-thirds vote from the LegCo; 4) the CE signs on the relevant bills and 5) reports to the NPCSC for approval or recording[263].

Although the interpretation also specifies that the annexes may be amended or not amended, according to some commentators it represented the intention of the CCP to give rise to a political reform process in the region. The evidence of this intention is that in the process of amendment of both Annexes, the CE has to ask for Beijing's approval before and after the beginning of the process, while the members of the LegCo are not vested with the power of proposing an amendment. As we already know, while the LegCo consists of democratically elected members who may sustain democratic reforms, the CE is more loyal to Beijing and vesting him or her with the power to initiate reforms, gives Beijing the guarantee that the discussion at issue will be in line with a timetable suitable to mainland authorities[264].

On the opposite side, Beijing tried to make clear that the interpretation was undertaken only to ensure Hong Kong's benefit, promoting economic prosperity and avoiding political instability, and to provide a correct understanding and implementation of the mini constitution of the region[265].

This interpretation marked the first effort by the CPG to interpret the meaning of the Basic Law without consulting the HKSAR government; this meant that the mainland claimed the authority on its own, without any procedural limitation imposed by Hong Kong[266]. Whilst in the right of abode controversy, the Hong Kong government asked for the interpretation of the NPCSC, in the case of Annex I and II the NPCSC announced its

[263] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.173
[264] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.10-12
[265] *Ibid*, p.10
[266] *Ibid*, p.2

decision without consultation of or solicitation by HKSAR authorities, thus expanding its authority over the law[267]. Another troubling issue raised by this interpretation in comparison with the right of abode interpretation is that the former involved a matter of local concern, while the latter was linked to the national context; as a consequence, the interpretation of annexes directly affected the political autonomy of the HKSAR government[268].

In the explanation of this interpretation the Deputy Secretary General of the NPCSC, Li Fei, underlined that the "need to amend" is under the responsibility of the Central Authorities, who shall give their approval. This view is also sustained by the status of Hong Kong under the "one country, two systems" principle. The methods for selecting the CE and the members of the LegCo are part of the constitutional development of the region, which is closely linked to the relations between the Central authorities and the Hong Kong government and, as a consequence, does not fall under the high degree of autonomy of the region[269].

One of the reasons that led the NPCSC to issue such interpretation has to do with the mainland's preoccupation with the transfer of sovereignty over the region from Britain to China and its will to defend the sovereignty from any threat. Additional explanations to the interpretation of the annexes are linked to the skepticism of the PRC towards Hong Kong's political liberalization and to the political situation in Hong Kong: a strong dissatisfaction with the HKSAR administration caused protests against the HKSAR administration and, even within the region, a part of the community, above all the business

[267] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.12
[268] *Ibid*, p.13
[269] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.171

community, tended to sustain pro-Beijing policies, claiming that Hong Kong was not ready for universal suffrage; this instability, which seemed to weaken the support for democracy, was used by Beijing in order to reinforce less democratic governance structures in the region[270]. Also the domestic political climate of the mainland played an important role in the decision of interpreting the annexes: the activities which are carried out in the HKSAR inevitably extend to the mainland and a liberalization in Hong Kong would both affect the ability of the PRC to monitor the effect of this change and would generate similar demands for democracy in the mainland[271].

In 2004, the then CE Tung was also asked to submit a report on this matter, through which he acknowledged the need for amendment. In such report, he listed a series of principles any amendment must comply with. In particular, the report specifies that the region, when meditating on a constitutional change, has to take into consideration the opinion of the Central Authorities; furthermore, any amendment must follow the aim of consolidating the executive-led government of the region. Therefore, the CE report was focused on favoring the executive branch, preserving the functional constituencies and create suspicion concerning direct elections. Such report, together with the interpretation, narrowed the range of constitutional changes and led to the promulgation of a decision by the NPCSC in the same year[272]. According to this decision the conditions for the selection of the CE by universal suffrage and for the election of all LegCo members by universal suffrage did not exist, mainly because, at that time, according to the NPCSC, "different sectors of the Hong Kong society still have considerable differences on how to determine the methods for selecting the CE and for forming the LegCo after year 2007

[270] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.13
[271] *Ibid*, p.16
[272] Lorenz LANGER, *The elusive aim of universal suffrage: Constitutional developments in Hong Kong*, International Journal of Constitutional Law, Volume 5, Issue 3, 2007, p.443

and have not come to a broad consensus"; additionally, the number of members elected by functional constituencies and the number of members elected by direct elections remained the same. Consequently, any significant change happened for the CE election in 2007 and for the LegCo formation in 2008[273].

The 2004 decision was followed by other decisions issued by the NPCSC; the first one was adopted at the thirty first session of the Standing Committee of the Tenth NPC in 2007 and concerned the potential need to amend the methods for the selection of the CE and for the formation of the LegCo in 2012 expressed in a report submitted by the then CE Tsang Yam-kuen. Following the relevant provisions of the Basic Law and the interpretation of Annex I and II, the NPCSC stated that in 2012 the election of the fourth CE and of the fifth term LegCo of the region should not be implemented using the method of universal suffrage. Additionally, the presence in the LegCo of half members returned by functional constituencies and half members returned by geographical constituencies through direct elections should remain unchanged; the same decision was taken for what concerned the LegCo's voting procedures on bills and motions[274].

The following decision was adopted in 2014, when the then CE Leung Chun-ying issued a report expressing the potential need to amend the methods for the selection of the CE in 2017 and the formation of the LegCo in 2016. In such decision the session of the NPCSC established that the election of the fifth CE of the region in the year 2017 should be implemented using the method of universal suffrage, but always after the CE makes a report to the NPCSC regarding the amendment of the provisions at issue. In the

[273] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Decision of the NPCSC Relating to the Methods for Selecting the Chief Executive of the HKSAR in the Year 2007 and for Forming the Legislative Council of the HKSAR in the Year 2008

[274] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Decision of the NPCSC on Issues Relating to the Methods for Selecting the CE of the HKSAR and for Forming the LegCo of the HKSAR in the Year 2012 and on Issues Relating to Universal Suffrage; on consequences of the 2007 decision see: Keith HAND, *Resolving Constitutional Disputes in Contemporary China*, East Asia Law Review, 2011, p.51

decision the NPCSC also explained that implementing universal suffrage for the selection of the CE represented a "historic progress in Hong Kong's democratic development and a significant change in the political structure of the HKSAR". According to the NPCSC, the method of universal suffrage should be formulated following the relevant provision of the Basic Law, the principle of "one country, two systems" and the legal status of the region; furthermore, "it must meet the interests of different sectors of the society, achieve balanced participation, be conducive to the development of the capitalist economy and make gradual and orderly progress in developing a democratic system that suits the actual situation in Hong Kong". The decision of the NPCSC also specified that the CE shall be a person who loves the country and Hong Kong, in order to maintain a long-term stability in the region. The amendment on universal suffrage should obtain two-thirds majority of all members of the LegCo and the consent of the CE, before being submitted to the NPCSC for approval, otherwise the method used for the preceding term should continue to apply[275].

As far as the formation of the LegCo and its voting procedures are concerned, the decision stated that the provisions contained in Annex II would continue to apply also in 2016, following the principle of gradual and orderly progress; at an appropriate time before the election of the LegCo by universal suffrage, the CE should submit a report concerning the possibility to amend the method for the formation of the legislative body and the NPCSC should subsequently make a determination[276].

[275] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Decision of the NPCSC on Issues Relating to the Selection of the Chief Executive of the HKSAR by Universal Suffrage and on the Method for Forming the Legislative Council of the HKSAR in the Year 2016
[276] *Ibid*; on the point of view of the NPCSC also see: *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Explanations on the Draft Decision of the NPCSC on Issues Relating to the Selection of the CE of the HKSAR by Universal Suffrage and on the Method for Forming the LegCo of the HKSAR in the Year 2016

3.3 Vacancy of the Chief Executive

The third interpretation issued by the NPCSC is linked to paragraph 2 of Article 53 of the Hong Kong mini constitution, which provides that "in the event that the office of Chief Executive becomes vacant (*xingzhengzhangguan quewei* 行政长官缺位), a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of this Law. During the period of vacancy, his or her duties shall be assumed according to the provision of the preceding paragraph"; such preceding paragraph states that in the event that the CE is not able to discharge his or her duties for a short period of time, the Administrative Secretary, Financial Secretary or Secretary of Justice in this order of precedence shall temporarily be responsible for discharging them[277].

This third interpretation was requested to the NPCSC in 2005, when the then Chief Executive, Tung Chee Hwa, decided to resign two years before the natural end of his mandate; this decision was officially due to health problems, but many commentators argued that it was caused by his falling into disgrace with central authorities[278]. The main aim of this interpretation was to clarify what is not specified in the Basic Law, that is whether the new CE would serve a new full five-year term, as provided by Article 46 of the Basic Law, or he would serve just the remaining term of his predecessor until 2007; in the end the latter option prevailed[279]. However, the CE elected in 2005 enjoying a short-term office, was re-elected in 2007; he was the already mentioned Tung's Chief Secretary for Administration, Donald Tsang Yam-kuen.

[277] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Article 53
[278] For further information see: John M. CARROLL, *A Concise History of Hong Kong*, The University of Hong Kong, 2007, p.233
[279] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.166

Under such circumstances, the interpretation was required by the CE, who believed that the intervention of the NPCSC would be the best solution to have a full understanding of the provision at issue[280]; furthermore, he opted for the interpretation of the NPCSC because he believed that a legal review issued by Hong Kong independent judiciary would take a long time. This decision caused many objections by Hong Kong pro-democracy parties and the Hong Kong Bar Association, which argued that it would undermine Hong Kong's high degree of autonomy[281].

The decision of the NPCSC was based on a specific interpretation of Article 46, according to which, prior to the year 2007, each individual elected officer shall not necessarily enjoy a fixed duration of the term of office; instead, a fixed term of five years may include consecutive elected officers in case of early resignation of the person in office, as it happened in the case at issue. In addition, if the method for selecting the CE is amended after 2007, the term of office in case of vacancy is defined by the amended method. This decision was further supported by the fact that in Annex I of the Basic Law, it is provided that the elections of the CE shall be held in 2007[282].

Furthermore, in the official interpretation of the NPCSC it is possible to find different provisions that are mentioned to make it clear that, prior to the year 2007, in the event that the CE elected by the Election Committee with a five-year term of office resigns, the term of office of the new CE shall be the remainder of the previous one, thus justifying the interpretation of the NPCSC itself; the first provision is represented by Clause 1 of Annex I, which provides that the CE is elected by a broadly representative Election

[280] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.174
[281] Michael F. MARTIN, *Hong Kong: Ten Years After the Handover*, Congressional Research Service prepared for Members and Committees of Congress, 2007, p.6
[282] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.167

Committee and he or she is appointed by the CPG; the second one is Clause 2 of Annex I, which stipulates that the term of office of the Election Committee is five years; and the third one is Clause 7 of Annex I, according to which "if there is a need to amend the method for the selection of the CE for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-third majority of all the members of the LegCo and the consent of the CE and they shall be reported to the NPCSC for approval"[283].

Both the 2005 and 2004 interpretations were controversial and were criticized by the legal community, which argued that they were not based on jurisprudential reasons, but on political reasons; additionally, they were accused of introducing additional content into the mini constitution, which means amendments that did not follow the procedure for amendments described in Article 159, more than interpretations[284].

3.4 Foreign affairs and defence: diplomatic immunity

Since the establishment of the "one country, two systems" policy in Hong Kong, the judicial autonomy of the region has always been characterized by many controversies; in particular, these controversies were linked to the definition of "act of state" (*guonei xingwei* 国内行为) and "foreign affairs" (*waijiaoshiwu* 外交事务), which are both excluded from the jurisdiction of the region's courts. These issues have been at the core

[283] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Interpretation of Paragraph 2, Article 53 of the Basic Law of the HKSAR of the PRC by the NPCSC
[284] Albert H.Y. CHEN, *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, 2006, Vol.15 No.3 p.647

of a controversy that arose in 2008 and ended with the fourth interpretation issued by the NPCSC in 2011[285].

In particular, the 2011 interpretation involved Paragraph 1 of Article 13, which provides that the CPG shall be responsible for the foreign affairs relating to the HKSAR, and Paragraph 3 of Article 19, according to which the courts of the region have no jurisdiction over acts of state, such as defence and foreign affairs[286].

Such interpretation was the first interpretation activated by the CFA of the region according to Article 158 of the mini constitution and it received large coverage in Hong Kong media, which referred to it as the *Congo case*. This name is due to the fact that this controversy involved an American investment fund, which tried to enforce two ICC arbitral awards against the Democratic Republic of Congo, and it obtained the leave of the Hong Kong High Court to do so in the region. In particular, the American fund asked the Hong Kong Court to have a PRC Chinese State-owned enterprise pay the fees it owed to the African government within the Chinese government's project of economic cooperation with developing countries[287]. In response, the government of Congo referred to the state immunity and argued that, being a sovereign government, it was immune from civil suit in Hong Kong[288]. Therefore, it decided to apply to the Court of First Instance (CFI) of the region to set aside the leave granted to the US investment fund. In particular, the African government referred to Article 19 of the Basic Law arguing that these "acts of state" were not under the jurisdiction of Hong Kong courts[289].

---

[285] Cora CHAN, *State Immunity: Reassessing the Boundaries of Judicial Autonomy in Hong Kong*, University of Hong Kong Faculty of Law, 2011, Research Paper No.2012/27, p.1

[286] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Artt.13-19

[287] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.169

[288] Johannes CHAN, *Hong Kong's Constitutional Journey, 1997-2011*, University of Hong Kong, Faculty of Law, 2014, p.7

[289] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.169

As far as the position of the Chinese government is concerned, it found it advantageous to sustain the concept of absolute state immunity and to keep its economic cooperation activities with developing countries not subject to the jurisdiction of Hong Kong courts; furthermore, it argued that, being part of China, Hong Kong had to follow the same principle[290]. Hong Kong supported mainland government's point of view too. On the opposite side, the US fund supported a narrower concept of "act of State", which would not immunise the resources at issue from jurisdiction[291].

In 2008 the CFI decided to set aside the leave to enforce the awards in the region, but in 2010 the Court of Appeal (CA) reversed this decision, rejecting the idea of absolute immunity and holding that under the common law, the state immunity was not applicable if it was linked to a purely commercial act[292]. However, the CA granted the possibility to appeal to the CFA. When the case reached the CFA, it was solicited by Hong Kong government to require an interpretation of the NPCSC according to Article 158 of the Basic Law, in order to gain a clarification of the scope of "act of state" mentioned in Article 19. The CFA took a decision by majority of three members against two arguing that the term "act of state" could not be linked to two different meanings in two different areas of the same country[293]. It explained that the concept of state immunity was included in the "acts of state such as defence and foreign affairs", and, as a consequence, it could be interpreted by the NPCSC under Article 158 of the Basic Law[294]. Furthermore, it revoked the order to freeze the Chinese payments in favour of the African government

[290] Johannes CHAN, *Hong Kong's Constitutional Journey, 1997-2011*, University of Hong Kong, Faculty of Law, 2014, p.7
[291] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.169
[292] Johannes CHAN, *Hong Kong's Constitutional Journey, 1997-2011*, University of Hong Kong, Faculty of Law, 2014, p.7
[293] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.170
[294] Johannes CHAN, *Hong Kong's Constitutional Journey, 1997-2011*, University of Hong Kong, Faculty of Law, 2014, p.7

and supported the idea that the Chinese concept of "act of state" was applicable also to Hong Kong and, as a consequence, the state immunity was an act of state outside the jurisdiction of the region's courts[295].

Since this was the first referral from the CFA towards the NPCSC, the Court decided to design some procedures to follow in such circumstances: first of all the Court hears submission from the parties and decides whether to make a referral; it considers a potential submission of the CPG through the Secretary of Justice; it defines the question to be analysed for interpretation by the NPCSC; and it finally gives its own opinion on the case at hand, in this way the NPCSC knows the judgement of the highest court of the region, which is certainly closer to a common law vision[296].

In the end, the NPCSC issued an interpretation in 2011 confirming that the Chinese concept of "act of state" was applicable also in Hong Kong courts[297]. Therefore, any time during a judicial adjudication the issue of immunity from jurisdiction and immunity from execution arises, the courts of Hong Kong must apply the rules or policies established by the CPG, which holds the control of foreign affairs and defence of the region[298]. In the interpretation it is also specified that the laws previously in force in Hong Kong concerning the rules on state immunity may continue to be applied after 1 July 1997, but only if they are consistent with the rules or policies on state immunity established by the

[295] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.171
[296] Johannes CHAN, *Hong Kong's Constitutional Journey, 1997-2011*, University of Hong Kong, Faculty of Law, 2014, p.8
[297] Ignazio CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012, p.171
[298] Johannes CHAN, *Hong Kong's Constitutional Journey, 1997-2011*, University of Hong Kong, Faculty of Law, 2014, p.8; also see: *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the HKSAR of the PRC by the NPCSC

CPG, otherwise they must be subject to modifications, adaptation, limitations or exceptions[299].

3.5 Oath taking of LegCo members

The most recent interpretation issued by the Standing Committee of the National People's Congress dates back to 2016 and it concerns Article 104 of the Hong Kong Basic Law, according to which "when assuming office, the Chief Executive, principal officials and members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the HKSAR must, in accordance with law, swear to uphold (*xuanshi yonghu* 宣誓拥护) the Basic Law of the HKSAR of the PRC and swear allegiance (*xiaozhong* 效忠) to the HKSAR of the PRC"[300]. This interpretation gave rise to controversies and debates linked to the "one country, two systems" policy, like the interaction between the central government and the region's government, judicial independence, rule of law, separation of powers, etc. Furthermore, the oath-taking cases, which led to the publication of the interpretation, clearly showed the tension existing since the 1997 handover between mainland law, characterized by the supreme authority by the NPC, and the semi-democratic and common law system of Hong Kong[301].

The issue arose when two pro-independence activists, Leung Chung-hang and Yau Wai-ching were elected in September 2016 as LegCo members in their respective

[299] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the HKSAR of the PRC by the NPCSC
[300] *Ibid*, Art.104
[301] Han ZHU, Albert H.Y. CHEN, *The Oath-taking Cases and the NPCSC Interpretation of 2016: Interface and Common Law and Chinese Law*, Hong Kong Law Journal 49(1), 2019, p.2

geographical constituencies[302], but they faced some problems due to their oath of office that was judged to be offensive to the Chinese People and to the PRC; in particular, they argued that "Hong Kong is not China" and used the words "Hong Kong nation" during their oath. Consequently, their oaths were considered invalid by the administrator of oath; however, in October the LegCo president gave them the possibility to retake their oaths. On the other side, the CE and the Secretary for Justice opted for a judicial review in front of the Court of the First Instance of the High Court, which resulted in the disqualification of Leung Chung-hang and Yau Wai-ching as LegCo members. In November, the NPCSC issued its 2016 interpretation, trying to clarify which were the requirements to take a valid oath of office[303].

The government of the region later decided to initiate judicial review proceedings also against four other pan-democratic LegCo members, Nathan Law Kwung Chung, Leung Kwok Hung, Lau Siu Lai and Yiu Chung Yim; they were accused not to have taken their oath in a proper way; in particular, they did not alter the substance of the oath, but they read it at a slow pace or adding some messages before and after the oath. However, their oaths were accepted by the administrator of oaths; therefore, they were allowed to assume office as members of the LegCo. In December, the government started the judicial proceeding against these LegCo members and in July of the following year the CFI provided that they had been disqualified because they failed to take their oaths in a proper way. This disqualification had a relevant political impact because the pro-democracy bloc of the LegCo was curtailed[304].

[302] Po Jen YAP, Eric CHAN, *Legislative Oaths and Judicial Intervention in Hong Kong*, Hong Kong Law Journal 1-15, 2017, p.2
[303] Han ZHU, Albert H.Y. CHEN, *The Oath-taking Cases and the NPCSC Interpretation of 2016: Interface and Common Law and Chinese Law*, Hong Kong Law Journal 49(1), 2019, pp.1-3
[304] *Ibid*, p.4

In both cases of judicial review, the courts opted for a deferential attitude towards the interpretation issued by the NPCSC in 2016, according to which the legal requirements and preconditions for standing for the election in respect of or taking up the public office specified in Article 104 are "to uphold the Basic Law of the HKSAR of the PRC" and to bear "allegiance to the HKSAR of the PRC"; these issues shall also be part of the legal content of the oath. Additionally, the interpretation specifies that if someone fails to lawfully and validly take the oath or declines to take the oath, he or she cannot assume public office and cannot exercise corresponding powers and functions. The oath taker must take the oath sincerely and solemnly and must accurately, completely and solemnly read out the oath prescribed by law. Furthermore, if the oath taker declines to take the oath, he is disqualified forthwith from assuming the public office; if the oath taker reads out words that are not in line with the wording of the oath provided by the law or takes the oath in a manner which is not sincere or solemn, he or she is treated as declining to take the oath and he or she is disqualified forthwith from assuming office. The validity of the oath and its compliance with the interpretation and the law of the HKSAR is judged by the person administering the oath; if this person determines that it is not valid, no arrangement is possible to retake the oath. At the end of the interpretation it is also specified that the oath taking is a legal pledge and it is legally binding[305].

Leung and Yau sustained the invalidity of this interpretation, as it amended the Basic Law going beyond the power of interpretation of the NPCSC. On the opposite side, the CFI explained that it would take the same decision regardless of the content of the 2016 interpretation, because also the region's domestic law [306] would provide for the disqualification of the two candidates. However, the court also ruled that, even if the

[305] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China,* Interpretation of Article 104 of the Basic Law of the HKSAR of the PRC by the NPCSC
[306] Oaths and Declarations Ordinance (ODO)

interpretation was not issued after a reference of the CFA according to Article 158 of the Basic Law, the interpretation was binding on Hong Kong courts and the courts cannot review the validity of the interpretation[307].

As far as the case of the four LegCo members is concerned, one of the main controversies concerned the retrospective effect of the 2016 interpretation, which would make the interpretation govern acts and events that took place before the NPCSC issued the interpretation. In particular, both the CFI and the CA confirmed the retrospective effect of the interpretation, a point of view which was not consistent with the principle of the rule of law, according to which the law should be predictable and citizens should know in advance the legal consequences of their behaviour. The latter is the argument raised by the four LegCo members in order to defend themselves, but it was rejected by the court, which underlined that it was the final arbiter of the validity of the oaths[308].

In general, this interpretation caused debates and controversies. Critics argued that it was an example of a clash between mainland's interference and the region's judicial independence and autonomy; consequently, the "one country, two systems" principle was once again challenged. In particular, the two most important issues raised were linked to the validity and binding force of the interpretation under Article 158 and its already mentioned retroactive effect[309].

As far as the validity and binding force of the interpretation are concerned, critics argued that according to Article 67 of the Chinese Constitution and under Article 159 of the Basic Law the sole body which has the power to amend the Basic Law is the NPC, while the NPCSC can only interpret it; since the NPCSC's interpretation supplemented

[307] Han ZHU, Albert H.Y. CHEN, *The Oath-taking Cases and the NPCSC Interpretation of 2016: Interface and Common Law and Chinese Law*, Hong Kong Law Journal 49(1), 2019, p.7
[308] *Ibid*, p.8
[309] *Ibid*, p.17

and amended Article 104, critics believed that the interpretation was not valid and had no binding force on the courts of the HKSAR. Furthermore, they also claimed that the interpretation had not only revised and supplemented the Basic Law, but also other relevant legal provisions of the region, like the ODO. However, the courts rejected this point of view and declared the interpretation valid and binding[310].

As far as the retrospective effect of the interpretation is concerned, the LegCo members who were involved in the oath-taking cases argued that an interpretation should be applied to acts or conduct that took place before the NPCSC issued it, unless it is explicitly provided by the interpretation itself; they also contended that the 2016 interpretation in particular should not have retrospective affect because it did not interpret Article 104, instead it supplemented it[311]. However, on the other side, the CA believed that the interpretation established the true and proper meaning of Article 104 from the entry into force of such article[312]; therefore, the court rejected the opinions of the LegCo members and established that the effect of the 2016 interpretation would exert its effect since the entry into effect of the Basic Law, on 1 July 1997[313]. According to Yap and Chan, the implicit assumption in the decision of the CA is that the interpretations issued by the NPCSC operate in the same way as common law decisions; considering that in the common law tradition when a new judicial proposition is announced, the law is not changed, but just revealed, the NPCSC interpretation, in the same way, acts as a judge who clarifies the original meaning of the provision at issue; as a consequence, the

[310] Han ZHU, Albert H.Y. CHEN, *The Oath-taking Cases and the NPCSC Interpretation of 2016: Interface and Common Law and Chinese Law*, Hong Kong Law Journal 49(1), 2019, pp.17-19
[311] *Ibid*, p.21
[312] Po Jen YAP, Eric CHAN, *Legislative Oaths and Judicial Intervention in Hong Kong*, Hong Kong Law Journal 1-15, 2017, p.9
[313] Han ZHU, Albert H.Y. CHEN, *The Oath-taking Cases and the NPCSC Interpretation of 2016: Interface and Common Law and Chinese Law*, Hong Kong Law Journal 49(1), 2019, p.21

interpretation shall apply retrospectively as it happens for common law judgements. This kind of approach is the same used in the first case of interpretation on the right of abode[314].

After the promulgation of the interpretation, in November 2016, the Hong Kong Bar Association issued a statement in order to express its opinion on this matter; in particular, the Bar expressed regrets for the interpretation, underlining that it was unnecessary and inappropriate and that it gave the impression that the NPCSC had legislated for Hong Kong, affecting on the one hand the "one country, two systems" principle and the high degree of autonomy of the region, and on the other hand the perception of the international community regarding the authority and the independence of the judiciary and the confidence in the rule of law[315].

According to some critics, these oath-taking cases and their related interpretation also have had more implicit implication; since the interpretation describes the proper way to take the oath and also the beliefs required of candidates during the election phase, it has also raised issues concerning the extent of power of the law and the courts to exclude people holding certain political beliefs from being candidates as LegCo members. As a consequence, the legislators of the region elected in future may be more likely to comply with the formal requirements of oath-taking, so that there will not be any case of disqualification in front of the courts; the government may also try to bar people believing in Hong Kong's independence from taking part in LegCo elections[316].

[314] Po Jen YAP, Eric CHAN, *Legislative Oaths and Judicial Intervention in Hong Kong*, Hong Kong Law Journal 1-15, 2017, p.9
[315] Hong Kong Bar Association, *The Hong Kong Bar Association's statement concerning the interpretation made by National People's Congress Standing Committee of Article 104 of the Basic Law*, 2016, https://www.hkba.org/sites/default/files/20161107%20-%20Statement%20re%20NPCSC%20interpretration%20BL104%20%28Eng%20Version-web%29.pdf
[316] Po Jen YAP, Eric CHAN, *Legislative Oaths and Judicial Intervention in Hong Kong*, Hong Kong Law Journal 1-15, 2017, p.33

Chapter II - Case study: Extradition between Mainland China and the HKSAR

Another recent event which has affected the high degree of autonomy of the HKSAR and which is useful to describe the controversial relations existing between Beijing and Hong Kong took place in 2019, when the HKSAR government proposed to amend its laws on extradition and on mutual legal assistance with foreign countries.

This chapter is aimed to describe the dynamics of extradition as a general issue and, more specifically, to define the dynamics of extradition existing in mainland China and in the HKSAR. The relations between the two areas concerning extradition will be analyzed through an explanation of the provisions contained in the proposed 2019 amendment, which led to significant protest movements in the special administrative region.

1. What is extradition?

The international extradition process consists in the formal surrender of an individual by one country (the requested state) to another country (the requesting state) for prosecution, to serve a sentence or for criminal investigation[317]. In other words, it may be defined as the process which enacts the delivery of an accused or convicted person to the state where he or she is accused of or convicted of a crime, by the state in which he or she is resident at the time[318]. Furthermore, as defined by the Department of International

[317] Ronald J. HEDGES, *International Extradition: A Guide for Judges*, Federal Judicial Center, 2014, p.1, https://www.fjc.gov/sites/default/files/2014/International-Extradition-Guide-Hedges-FJC-2014.pdf
[318] Untalimile Crystal MOKOENA and Emma Charlene LUBAALE, *Extradition in the absence of state agreements: Provisions in international treaties on extradition*, South Africa Crime Quarterly, 2019, p.32, http://dx.doi.org/10.17159/2413-3108/2019/v0n67a4927

Protection of the United Nations High Commissioner for Refugees (UNHCR), extradition is a formal process through which states offer each other mutual judicial assistance in criminal matters, complying with bilateral or multilateral treaties or on an *ad hoc* basis[319].

Generally speaking, the international law leaves space for each state to exert control on issues concerning its own territory, including extradition; this vision is closely connected to the concept of sovereignty of states, which may be defined as the state's legal independence from other states. In case of absence of an extradition treaty among the states at issue, according to the principle of sovereignty, the requested state is not obliged to surrender an alleged criminal. On the contrary, a state that signs an extradition treaty may be implicitly viewed as ceding a part of its sovereignty[320].

On the opposite side, despite the principle of sovereignty of states, according to the principle of *aut dedere aut judicare* - literally meaning "either surrender (or deliver) or try (or judge)" - states may not harbour criminals in their own territories[321]. As a matter of fact, there are some international instruments that oblige the requested state to extradite or prosecute the wanted person in its own courts if the surrender is refused[322]; if they fail

[319] Sybille KAPFERER, *Legal and Protection Policy Research Series: The Interface between Extradition and Asylum*, United National High Commissioner for Refugees – Department of International Protection, Geneva, 2003, Introduction, https://www.unhcr.org/protection/globalconsult/3fe84fad4/5-interface-extradition-asylum-sibylle-kapferer.html

[320] Untalimile Crystal MOKOENA and Emma Charlene LUBAALE, *Extradition in the absence of state agreements: Provisions in international treaties on extradition*, South Africa Crime Quarterly, 2019, p.32, http://dx.doi.org/10.17159/2413-3108/2019/v0n67a4927; In addition to extradition treaties, other options used to create obligations in order to surrender offenders are: agreements on the enactment of reciprocal legislation by groups of like-minded states and statute based on less formal undertaking of reciprocity by the requesting state in order to make the surrender possible, see. Janice M. BRABYN, *Extradition and the Hong Kong Special Administrative Region*, Case Western Reserve Journal of International Law, Case Western Reserve University – School of Law, 1988, Volume 20, Issue 1, p.169

[321] *Ibid*

[322] Sybille KAPFERER, *Legal and Protection Policy Research Series: The Interface between Extradition and Asylum*, United National High Commissioner for Refugees – Department of International Protection, Geneva, 2003, p.VI, https://www.unhcr.org/protection/globalconsult/3fe84fad4/5-interface-extradition-asylum-sibylle-kapferer.html

to do so, this gives rise to an internationally wrongful act[323]. The principle of *aut dedere aut judicare* is implemented mainly when dealing with certain types of transnational crime, such as terrorism[324]. To this purpose, such principle is also present in multilateral treaties, whose aim is promoting international cooperation in law enforcement and suppressing certain criminal acts[325].

In the past, extradition decisions were taken by nations following the principles of international comity; however, nowadays, extradition proceedings are based on bilateral or multilateral treaties among states[326]. Furthermore, extradition was considered a state practice, while in more recent times it has become a concept in law; consequently, it is governed by a number of rules which are included in relevant treaties. Such rules have changed across time in response to new types of crime and the development of new security concerns[327].

In case of absence of agreements among states, international criminal, humanitarian and human rights law represents the guide for extradition related to certain crimes. At the same time, such law has also changed the conception of the individual in the procedure of extradition, strengthening his or her position and barring his or her surrender if this would imply an exposition to human rights violations, such as torture, cruel, inhuman or

[323] Untalimile Crystal MOKOENA and Emma Charlene LUBAALE, *Extradition in the absence of state agreements: Provisions in international treaties on extradition*, South Africa Crime Quarterly, 2019, p.33, http://dx.doi.org/10.17159/2413-3108/2019/v0n67a4927
[324] Sybille KAPFERER, *Legal and Protection Policy Research Series: The Interface between Extradition and Asylum*, United National High Commissioner for Refugees – Department of International Protection, Geneva, 2003, p.V, https://www.unhcr.org/protection/globalconsult/3fe84fad4/5-interface-extradition-asylum-sibylle-kapferer.html
[325] Untalimile Crystal MOKOENA and Emma Charlene LUBAALE, *Extradition in the absence of state agreements: Provisions in international treaties on extradition*, South Africa Crime Quarterly, 2019, p.34, http://dx.doi.org/10.17159/2413-3108/2019/v0n67a4927
[326] Ronald J. HEDGES, *International Extradition: A Guide for Judges*, Federal Judicial Center, 2014, p.1, https://www.fjc.gov/sites/default/files/2014/International-Extradition-Guide-Hedges-FJC-2014.pdf
[327] Sybille KAPFERER, *Legal and Protection Policy Research Series: The Interface between Extradition and Asylum*, United National High Commissioner for Refugees – Department of International Protection, Geneva, 2003, Introduction, https://www.unhcr.org/protection/globalconsult/3fe84fad4/5-interface-extradition-asylum-sibylle-kapferer.html

degrading treatment or punishment, capital punishment and unfair trial in the requesting state[328]. Consequently, when extradition is prohibited, there may be a conflict of obligations for the requested state and such conflict should be solved following the applicable principles and standards of international law; in particular, if human rights and/or refugee law bar the extradition, this provision prevails over any obligation to start the process of extradition defined in the agreement between the two states involved[329]. As far as the position of the individual in the extradition process is concerned, it varies from one country to another: under some circumstances, he or she may oppose his or her surrender challenging the legality of arrest and detention, however, this option depends on the availability of avenues of appeal against decisions taken during the extradition process; in some other occasions the possibility of the wanted person to oppose are restricted[330].

States are left significant latitude to establish their own national rules for extradition by international law, this is the reason why conditions for the proceeding may vary from one country to another one. However, there are some general principles that are common to different national extradition law: firstly, the requesting state must present a formal extradition request, identifying the wanted person and the offence he or she is accused of, and such request may be preceded by a provisional arrest warrant; secondly, the extradition process is possible only if the offence at issue is an extraditable offence

[328] Sybille KAPFERER, *Legal and Protection Policy Research Series: The Interface between Extradition and Asylum*, United National High Commissioner for Refugees – Department of International Protection, Geneva, 2003, Introduction - p.VIII; The extradition is also characterized by the application of the principle of *non-refoulement* according to which: "No contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life of freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"; see: UNHCR, *Text of the 1951 Convention Relating to the Status of Refugees*, https://www.unhcr.org/3b66c2aa10

[329] *Ibid*, p.VI

[330] *Ibid*, p.IX

according to the relevant extradition agreement or legislation; furthermore, according to the principle of double criminality, the extradition is possible only if the offence at issue is a criminal offence under the jurisdiction of both the requesting and the requested state[331]. A further general principle is represented by the rule of speciality, which has been recognized by laws of nations and by the international law[332]; according to such rule, the requesting state can ask for the extradition of a person only for the offences listed in its request, unless the requested state consents; and, at the same time, the requesting state may not decide to re-extradite the person to a third state, without the consent of the requested state[333]. Also the Model Treaty on Extradition[334], adopted by the United Nations in 1990, makes reference to the rule of speciality, providing that "a person extradited under the present Treaty shall not be proceeded against, sentenced, detained, re-extradited to a third State, or subject to any other restriction of personal liberty in the territory of the requesting State for any offence committed before surrender other than: (a) an offence for which extradition is granted; (b) any other offence in respect of which the requested state consents[335].

As far as extradition treaties are concerned, they usually include also provisions for refusing the extradition request, such as the political offence exemption, whose purpose is to protect human rights and to prevent political oppression against those people that

[331]Sybille KAPFERER, *Legal and Protection Policy Research Series: The Interface between Extradition and Asylum*, United National High Commissioner for Refugees – Department of International Protection, Geneva, 2003, Introduction, p.VI

[332] Research and Library Services Division (RLSD) of the Legislative Council Secretariat, *Information Note: Research Study on the Agreement between Hong Kong and the Mainland Concerning Surrender of Fugitive Offenders: The Issue of Re-extradition*, 2001, p.4

[333] Sybille KAPFERER, *Legal and Protection Policy Research Series: The Interface between Extradition and Asylum*, United National High Commissioner for Refugees – Department of International Protection, Geneva, 2003, Introduction, https://www.unhcr.org/protection/globalconsult/3fe84fad4/5-interface-extradition-asylum-sibylle-kapferer.html

[334] The Model Treaty on Extradition, together with the Model Treaty on Mutual Assistance in Criminal Matters are used as a basis for international co-operation and national action against organized crime and terrorist crime; see: *Ibid*

[335] United Nations, *Model Treaty on Extradition*, Article 14, https://www.unodc.org/pdf/model_treaty_extradition.pdf

hold different political opinions[336]; as a matter of fact, such exemption allows the requested state to refuse extradition if the request is based on political reasons, giving the possibility to maintain friendly relations among states. Another possible reason that is used to justify the refusal of extradition is the "discrimination clause", which allows the requested state to refuse extradition if the request is based on a persecutory and/or discriminatory intent[337].

As far as the extradition procedure is concerned, since it is connected both to the protection of the legal status and litigation rights of the person sought and to the applicability of norms of international cooperation and domestic laws, many modern countries usually establish that both judicial authorities and administrative authorities take part in the decision making process concerning extradition and regulate the process following authorizations and procedures[338]. As a matter of fact, even though extradition agreements do not contain any provision on procedure, in most countries there are three stages to follow in order to examine the request: 1) an administrative phase, in which the admissibility of the extradition request is evaluated; 2) a judicial phase, in which a judge examines if the extradition request complies with the conditions provided by the relevant national legislation and/or applicable extradition agreement; 3) an executive phase in which the extradition is granted or refused[339].

---

[336] Pak-kwan CHAU, Stephen LAM, *Research study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*, Research and Library Services Division and Legal Service Division – Legislative Council Secretariat, Hong Kong, 2001, p.15

[337] On other examples of grounds for refusing extradition requests see: Sybille KAPFERER, *Legal and Protection Policy Research Series: The Interface between Extradition and Asylum*, United National High Commissioner for Refugees – Department of International Protection, Geneva, 2003, p.VII, https://www.unhcr.org/protection/globalconsult/3fe84fad4/5-interface-extradition-asylum-sibylle-kapferer.html

[338] Huang FENG, *The establishment and characteristics of China's extradition system*, Frontiers of Law in China, vol.1, no. 4, HeinOnline, 2006, p.600

[339] Sometimes, extradition agreements provide simplified procedures in order to accelerate the process and to reduce the costs; as a consequence, it may happen that states opt for irregular methods of surrendering alleged fugitives or for obtaining jurisdiction over them, see: Sybille KAPFERER, *Legal and Protection*

2. Extradition in Mainland China

This paragraph is aimed to describe the extradition system in mainland China. Such analysis is important in order to understand the differences and similarities existing between mainland China and the HKSAR regarding the extradition issue and the extradition procedure; and consequently, it allows to understand the reason why the two areas have never signed an extradition arrangement to provide each other mutual legal assistance in this matter.

The extradition system in China started to develop at the beginning of the 90s and the first Chinese bilateral extradition treaty was signed in 1993 with Thailand; since then, China has signed bilateral extradition treaties with 37 countries[340], mainly in developing countries in Asia and Africa, but also in European countries. Such treaties, according to the Constitution and the Procedural Law on Conclusion of Treaties, should be ratified by the NPCSC and, after the ratification, they will acquire legal force[341]. Generally speaking, they follow the principles of extradition treaties that are recognized internationally, such as the principle of double criminality, the principle of speciality[342], the principle of non-

Policy Research Series: The Interface between Extradition and Asylum, United National High Commissioner for Refugees – Department of International Protection, Geneva, 2003, p.IX, https://www.unhcr.org/protection/globalconsult/3fe84fad4/5-interface-extradition-asylum-sibylle-kapferer.html

[340] The list of all the countries with which China has entered into a treaty on extradition can be found at http://treaty.mfa.gov.cn/Treaty/web/list.jsp?nPageIndex_=1&keywords=%E5%BC%95%E6%B8%A1&chnltype_c=all

[341] Huang FENG, *The establishment and characteristics of China's extradition system*, Frontiers of Law in China, vol.1, no. 4, HeinOnline, 2006, pp.595-596

[342] In mainland China, the rule of speciality is recognized both by legislation and by bilateral treaties China is part of. As a matter of fact, Article 14 of the Extradition Law of the PRC provides that, when requesting the extradition, the requesting state shall assure that "no criminal responsibility shall be investigated against the person in respect of the offences committed before his surrender except for which extradition is granted, nor shall that person be re-extradited to a third state, unless consented to by the People's Republic of China, or unless that person has not left the requesting state within 30 days from the date of the proceedings in respect of the offence for which extradition is requested are terminated, or the person completes his sentence or is released before the sentence expires, or after leaving the country the person has returned of his own free will". Such rule of speciality is contained in all bilateral treaties China stipulated with other countries, but it is expressed in different ways; see: Research and Library Services Division (RLSD) of the Legislative Council Secretariat, *Information Note: Research Study on the Agreement between Hong Kong and the Mainland Concerning Surrender of Fugitive Offenders: The Issue of Re-extradition*, 2001, pp.5-6; People's

extradition for political offences, the principle of non-extradition of nationals and the principle of either extradition or prosecution[343]. As far as contents are concerned, such treaties contain provisions concerning the obligation to extradite, extraditable offences, the circumstances under which extradition should or may be refused, the applicable law used to deal with extradition requests and the dispute resolution[344].

Another important step towards the development of the extradition system in the country took place on December 28, 2000, when China promulgated its first Extradition Law[345]; prior to such date, the country's regulatory framework for extradition was based on internal regulations and international treaties[346]. Additionally, in 1992, the Ministry of Foreign Affairs, the SPC, the SPP, the Ministry of Public Security and the Ministry of Justice issued the *Provisions on Several Issues concerning the Handling of Extradition Cases*, in order to establish some norms for the extradition process in Mainland China[347].

The Extradition Law contains rules, conditions and procedures in order to cooperate with other countries concerning the extradition issue[348]. In particular, it is divided into four chapters; the first chapter deals with general provisions, the second one is devoted

---

Republic of China, *Extradition Law of the People's Republic of China*, Article 14, http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf;

[343] On the meaning see: Pak-kwan CHAU, Stephen LAM, *Research study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*, Research and Library Services Division and Legal Service Division – Legislative Council Secretariat, Hong Kong, 2001, p.8

[344] Pak-kwan CHAU, Stephen LAM, *Research study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*, Research and Library Services Division and Legal Service Division – Legislative Council Secretariat, Hong Kong, 2001, Executive Summary

[345] For Extradition Law of the PRC text see: http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf

[346] On example of international treaties China acceded to, see: Pak-kwan CHAU, Stephen LAM, *Research study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*, Research and Library Services Division and Legal Service Division – Legislative Council Secretariat, Hong Kong, 2001, p.5

[347] Pak-kwan CHAU, Stephen LAM, *Research study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*, Research and Library Services Division and Legal Service Division – Legislative Council Secretariat, Hong Kong, 2001, p.2

[348] Huang FENG, *The establishment and characteristics of China's extradition system*, Frontiers of Law in China, vol.1, no. 4, HeinOnline, 2006, p.595

to the procedures for requesting extradition to the PRC, the third chapter contains provisions for requesting extradition to foreign states; and the last one provides supplementary provisions[349].

The Extradition Law clearly states that "no cooperation in extradition may impair the sovereignty (*zhuquan* 主权), security (*anquan* 安全) and public interests (*shehui gonggong liyi* 社会公共利益) of the People's Republic of China"[350] and such provision may be used in order to refuse an extradition request submitted by another state[351]. Additionally, the law also provides that "The People's Republic of China cooperates with foreign states in extradition on the basis of equality and reciprocity (*zai pingdeng huhui de jichu shang* 在平等互惠的基础上) "[352]; this means that the requesting state shall give the same extradition cooperation when the requested state makes the extradition request in similar circumstances. This reasoning is valid both for already existing or precedent cooperation and for future practice of those countries which are willing to cooperate with China on the basis of equality and reciprocity[353].

In China, there are three standards that the requesting state may follow in order to submit the documents and materials to the requested state: 1) according to the first standard, known as "*prima facie* evidence" or "rational grounds" or "major suspect" standard, if evidences provided by the requesting state are uncontroverted, they represent a sufficient base to put the person sought on trial by the court; 2) the second standard

[349] *Extradition Law of the People's Republic of China* (2000), Contents, http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf
[350] *Ibid*, Art.3 Paragraph 2
[351] Huang FENG, *The establishment and characteristics of China's extradition system*, Frontiers of Law in China, vol.1, no. 4, HeinOnline, 2006, p.605
[352] *Extradition Law of the People's Republic of China* (2000), Art. 3 Paragraph 1, http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf
[353] Huang FENG, *The establishment and characteristics of China's extradition system*, Frontiers of Law in China, vol.1, no. 4, HeinOnline, 2006, p.606

provides that it is necessary to provide "an abstract of existing evidences and an explanation that these evidences, in accordance with laws of the requesting state, will be sufficient to prosecute the person sought"; 3) the last standard, known as "no evidence standard", states that the requesting state shall provide the warrant of arrest and relevant case summary[354].

In the past, extradition requests were examined by governmental administrative authorities, however subsequent documents provided that also the SPC, the SPP and the Ministry of Justice should be considered competent authorities for extradition cases. However, since the promulgation of the Extradition Law in 2000 a double examination of the request of extradition has been adopted: judicial organs are responsible for judicial examination, while administrative organs deal with administrative examination and the decision for extradition is taken only after its passing these two steps; both of such organs, enjoy the right to veto an extradition request and their veto is binding[355]. In particular, the double examination adopted by China develops as follow: the first step is represented by administrative examination, through which administrative authorities examine the request and determine if there are circumstances which do not comply with extradition cooperation; if there is no interference of such circumstances, the request is submitted to judicial authorities, which have to decide on the permissibility of the request; and in the end the request is sent back once again to the administrative authorities. The authority designated as the communicating authority for extradition is the Ministry of Foreign Affairs of the PRC; in particular he makes a preliminary administrative examination of the request received by the requesting state, assessing if the letter of request and the

[354] Huang FENG, *The establishment and characteristics of China's extradition system*, Frontiers of Law in China, vol.1, no. 4, HeinOnline, 2006, p.697
[355] Ibid, p.600

relevant documents and material comply with the provisions contained in the Extradition Law and in the extradition treaties[356].

As far as the judicial examination is concerned, in China the extradition law vests the people's court with the power to make decisions, while public security organs do not directly take part in judicial examination, as it happens in ordinary criminal procedures; they are only vested with the power of searching for the person sought, executing compulsory measures and surrendering the person sought. The organ designated by the SPC to execute the judicial examination is the Higher People's Court, but its decisions on extradition, before entering into force, must be approved by the SPC[357]. If the Higher People's Court decides that the request of extradition meets all the conditions necessary to extradite, such decision is not binding on administrative organs; as a matter of fact, the State Council, which is the final decision-making organ, may decide not to adopt the decision at issue and it may make a contrary and binding decision for non-extradition. On the contrary, if the Higher People's Court, according to the veto right, upon the approval of the CPC, decides that no extradition shall be granted because the request does not comply with the conditions for extradition, such decision immediately enters into force and effect; furthermore, such decision is binding on administrative organs, which cannot change or overrule it. The Ministry of Foreign Affairs will then notify the requesting state of the decision[358].

[356] Huang FENG, *The establishment and characteristics of China's extradition system*, Frontiers of Law in China, vol.1, no. 4, HeinOnline, 2006, p.601; for further details on the examination of the request for extradition in the PRC see: *Extradition Law of the People's Republic of China* (2000), Chapter II, Section 3; also see: *Extradition Law of the People's Republic of China* (2000), Section II, http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf

[357] Huang FENG, *The establishment and characteristics of China's extradition system*, Frontiers of Law in China, vol.1, no. 4, HeinOnline, 2006, p.602

[358] *Ibid*, p.603; also see: *Extradition Law of the People's Republic of China* (2000), Section III, http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf

The above-mentioned political offense (*zhengzhi fanzui* 政治犯罪) exception is an extradition principle recognized by the international community and it represents one of the most common reasons for rejecting an extradition request based on the bilateral extradition treaties that China signed with other countries. Nevertheless, under the pressure of the international society's will to crack down transnational crimes, the political offence exception has been taken into consideration less frequently. This is the reason why many countries, including China, are paying attention not to let this wording become a justification for criminals and to depoliticize their crimes in order to avoid the application of the exception of political offense[359]; however, a commonly accepted definition of "political offence" is not present in the international community, therefore, every country could make its own judgement on this principle according to its own legal system[360]. Other reasons for rejecting an extradition request in China may be linked to the protection of human rights of the person sought; this is the reason why the Extradition Law contains some provisions against persecution, discrimination and torture of the person at issue[361].

As far as request of extradition made by the PRC to foreign states is concerned, Chapter 3 of the Extradition Law provides that the organs responsible for dealing with the case concerned in a province, autonomous region, and municipality directly under the CPG shall submit opinions, relevant documents and material to the SPC, the SPP, Ministry of Public Security, the Ministry of State Security and the Ministry of Justice.

[359] Huang FENG, *The establishment and characteristics of China's extradition system*, Frontiers of Law in China, vol.1, no. 4, HeinOnline, 2006, p.608

[360] Pak-kwan CHAU, Stephen LAM, *Research study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*, Research and Library Services Division and Legal Service Division – Legislative Council Secretariat, Hong Kong, 2001, p.15

[361] For the complete list of reasons for rejecting an extradition request by a foreign state in the PRC see: *Extradition Law of the People's Republic of China* (2000), Artt.8-9, http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf

The latter, together with the Ministry of the Foreign Affairs, shall review the material and approve to make the request; after their approval, the request shall be submitted to the foreign state at issue through the Ministry of Foreign Affairs[362]. Article 50 of the Extradition Law further specifies that if the requested state approves extradition with strings attached, the Ministry of Foreign Affairs may make sure that the sovereignty, national interests and public interests of the PRC are not affected or impaired[363]. Lastly, the public security organs are vested with the power of taking over the person whose extradition is granted by the foreign state[364].

3. Extradition in Hong Kong and the path towards the 2019 amendment

Before 1997, the extradition of persons from Hong Kong by all powers was based on statutes passed by the British Parliament and on a series of orders in council made pursuant to such statutes by the British Crown. At that time, as far as extradition relations were concerned, the British colony did not have any legal power to enter into treaties or other arrangements with other governments or multinational organizations on its own; instead, it was the British Crown which was vested with the power of developing Hong Kong's extradition relations with other states[365].

Before the handover of Hong Kong, the extradition relations of the colony were based on three main systems: the first one dealt with extradition to and from members states of the Commonwealth, their dependent territories and colonies; the second system was based

[362] *Extradition Law of the People's Republic of China* (2000), Art. 47, http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf
[363] *Ibid*, Art.50
[364] *Ibid*, Art. 51
[365] Janice M. BRABYN, *Extradition and the Hong Kong Special Administrative Region*, Case Western Reserve Journal of International Law, Case Western Reserve University – School of Law, 1988, Volume 20, Issue 1, p.172

on reciprocal treaties for extradition to and from foreign countries; and the last system was linked to extradition to the PRC[366].

As far as the first system was concerned, the Fugitive Offenders Act 1967 of the United Kingdom was extended to Hong Kong through the Fugitive Offenders (Hong Kong) Order 1967. Such act provided that offenders from Hong Kong would return to the United Kingdom, the Commonwealth countries, the United Kingdom dependencies and the Republic of Ireland[367]. Concerning the second system, in 1877, also the Extradition Act of 1870 of the United Kingdom was extended to Hong Kong through an order in Council; such Act dealt with the extradition of offenders to foreign states, other than Commonwealth countries, United Kingdom dependencies or the Republic of Ireland[368]. However, the Extradition Act of 1870 had very little effect; indeed, before taking into consideration an extradition request, the Act must be applied by the requesting states through an order in council, and such order could be made only when the foreign country at issue had already entered into an arrangement with the British Government; additionally each order should be laid before both Houses of the British Parliament[369].

Lastly, the system concerning extradition to the PRC was based on the Supplementary Treaty of 1843, which contained provisions on the surrender to China of Chinese who

[366] Janice M. BRABYN, *Extradition and the Hong Kong Special Administrative Region*, Case Western Reserve Journal of International Law, Case Western Reserve University – School of Law, 1988, Volume 20, Issue 1, p.176
[367] See: Alec SAMUELS, *The English Fugitive Offenders Act, 1967*, 1968, University of Toronto Press, The University of Toronto Law Journal, Vol. 18 No. 2, https://www.jstor.org/stable/pdf/825264.pdf
[368] Pak-kwan CHAU, Stephen LAM, *Research study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*, Research and Library Services Division and Legal Service Division – Legislative Council Secretariat, Hong Kong, 2001, p.24
[369] Janice M. BRABYN, *Extradition and the Hong Kong Special Administrative Region*, Case Western Reserve Journal of International Law, Case Western Reserve University – School of Law, 1988, Volume 20, Issue 1, p.180; also see: United Kingdom Government *A review of the United Kingdom's extradition arrangements (Following Written Ministerial Statement by the Secretary of State for the Home Department of 8 September 2010)*, 2011, p.32, https://www.gov.uk/government/publications/independent-review-of-the-united-kingdoms-extradition-arrangements

were found within Hong Kong or on board of British ships and whose return was sought by the Chinese authorities in order to make him or her face criminal charges; it also contained provisions on the surrender of British subjects found on Chinese territory and whose surrender was sought by the British Crown for the same reason[370].

After the handover in 1997, the establishment of the HKSAR and the "one country, two systems" principle changed the framework through which jurisdiction was managed in the PRC unitary state; as a matter of fact, starting from 1997, there were two different legal sovereignties under the single political sovereignty of the PRC, which were both independent of each other and had their own legal system, their own political economy and their own legal culture[371].

The Basic Law provided that, after the handover, the HKSAR would be authorized by the Central Government to conclude agreements on the surrender of fugitive offenders with foreign countries and to cooperate with other jurisdictions on mutual legal assistance. Consequently, the special administrative region has so far signed extradition agreements with 20 countries[372], and such agreements are considered part of Hong Kong laws[373]. Additionally, since 1997, the Hong Kong government has actively promoted cooperation with 32 jurisdictions on mutual legal assistance in criminal matters. At present, the law which governs the surrender of fugitive offenders in the HKSAR is the Fugitive Offenders

[370] Janice M. BRABYN, *Extradition and the Hong Kong Special Administrative Region*, Case Western Reserve Journal of International Law, Case Western Reserve University – School of Law, 1988, Volume 20, Issue 1, p.184

[371] Huanling FU, *Yiguo-Liangzhi: Xianggang Yu Zhongguo Dalu Nengfou Jiu Yijiao Zuifan Wenti Dacheng Xieyi 一国两制: 香港与中国大陆能否就移交罪犯问题达成协议?* (*One Country and Two systems: Will Hong Kong and the Mainland Reach an Agreement on Rendition?*), University of Hong Kong – Faculty of Law, 1999, Vol. Jan. No. 2, p. 54

[372] For the list of extraditions treaties the HKSAR has entered with foreign countries see: https://www.doj.gov.hk/eng/laws/table4ti.html

[373] Pak-kwan CHAU, Stephen LAM, *Research study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*, Research and Library Services Division and Legal Service Division – Legislative Council Secretariat, Hong Kong, 2001, Executive Summary

Ordinance (FOO) (*di 503 zhang "taofan tiaoli"*, 第 503 章 "逃犯条例", Cap.503 of the Laws of Hong Kong); while the legal basis for cooperation between Hong Kong and other places on mutual legal assistance in criminal matters is the Mutual Legal Assistance in Criminal Matters Ordinance (MLAO) (*di 525 zhang "xingshi shiyi xianghu falu xiezhu tiaoli*,第 525 章 "刑事事宜相互法律协助条例", Cap.525 of the Laws of Hong Kong). Both the ordinances allow Hong Kong and other places to cooperate in order to fight against serious crimes, pursuing judicial justice in criminal cases and avoid the evasion of justice by criminals[374]. However, such ordinances are not applicable to other parts of China, including mainland China, Taiwan and Macau; this happens apparently because, at the time of their enactment, the vast differences existing between the Hong Kong legal system, based on common law, and the socialist legal system, have played an important role. More specifically, Hong Kong was not considered ready to enter into an extradition arrangement with China[375]. In this regard, international practice has shown that when two different systems share the same political tradition and have confidence in each other, they tend to co-operate freely; on the contrary, the wider is the difference between their political system, the less confidence one system has in the other and the more difficult is to develop a co-operation between the two; therefore, a rendition agreement between Hong Kong and the PRC turned out to be almost impossible[376]. In a debate on extradition arrangements with the mainland the then Secretary for Security itself declared that this

[374] Legislative Council Panel on Security, *Cooperation between Hong Kong and other places on juridical assistance in criminal matters*, 2019, p.1

[375] Albert H.Y. CHEN, *A perfect storm: Hong Kong-China Rendition of Fugitive Offenders*, University of Hong Kong - Faculty of Law, Research Paper No. 2019/108, 2019, p.422

[376] Huanling FU, Yiguo-Liangzhi: Xianggang Yu Zhongguo Dalu Nengfou Jiu Yijiao Zuifan Wenti Dacheng Xieyi *一国两制: 香港与中国大陆能否就移交罪犯问题达成协议? (One Country and Two systems: Will Hong Kong and the Mainland Reach an Agreement on Rendition?*), University of Hong Kong – Faculty of Law, 1999, Vol. Jan. No. 2, p. 54

was a difficult issue and that, before taking any decision on it and concluding any rendition arrangement, the government would consult the community[377].

Another reason for which there is lack of rendition arrangement between the HKSAR and the mainland is linked to two cases that took place short after the change of sovereignty. The first one was a dispute over the surrender of Cheung Tze Keung, a Hongkonger who was accused of committing harmed robbery and kidnapping in the region; he was arrested and tried in the mainland and he was then convicted and executed; the second one deals with the history of Li Yuhui, a mainlander who was convicted and executed in the mainland for a murder offence committed in Hong Kong. Both these cases gave rise to a vibrant discussion on rendition arrangement between the two parties at issue, which led the government itself to admit that there were many difficulties in making a rendition[378]. The debate developed also within the region itself, between lawyers and the government; in particular, the former argued that the autonomy of the criminal justice system of the region was eroded by the latter when it did not act in order to seek the return of the suspects to Hong Kong for trial and it accepted to apply the Criminal Law of the PRC to mainland residents and their conduct in Hong Kong[379].

Both MLAO and FOO have been in force in the HKSAR for many years, during which many crimes were recorded, and many culprits tried to elude justice in other jurisdictions. One relevant case, which showed the limitations of MLAO and FOO, took place in 2018, when a Hong Kong resident suspected of murdering another Hong Kong resident in Taiwan returned to Hong Kong; in such case, it was not possible to send him back to

[377] Johannes CHAN, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.2
[378] *Ibid*, p.3
[379] P.Y. LO, *The Unprosecuted Taiwan Homicide, the Unaccepted Extradition Law Amendment Bill and the Underestimated Common Law*, The University of Hong Kong, 2020, p.27

Taiwan because MLAO and FOO are not applicable to any other parts of the PRC. As a consequence, the suspect was accused only of money laundering offences committed in Hong Kong and this gave rise to a widespread public concern related to the loopholes existing in a legislative scheme that enables the offenders of serious crimes to seek refuge in the region[380]. In the opinion of the Hong Kong Bar Association, there is no loophole in such system; instead, it was a deliberate decision by the legislature when enacting the FOO in 1997 not to make the FOO applicable to the rest of the PRC; this was mainly due to the reasons mentioned above, according to which the two criminal justice systems at issue, the mainland one and the HKSAR one, are fundamentally different; and, additionally, the track record on the protection of fundamental rights in the mainland is not so clear[381]. The opinion that the lack of an extradition arrangement between the two areas is not accidental was sustained also in the past by Sir Malcolm Rifkind, the then British Foreign Secretary between 1995 and 1997; he claimed that both the FOO and the MLAO did not contain any loophole, rather they build a firewall in order not to affect the judicial independence of the special administrative region[382].

As a consequence, without an extradition arrangement, the authorities of the HKSAR can ask for repatriation cum rendition from mainland to Hong Kong of Hong Kong residents wanted in Hong Kong for having committed offences there, through law enforcement agencies; in the same way, mainland's authorities, through such agencies, can ask for removal cum rendition from Hong Kong to mainland of mainland residents

[380] Legislative Council Panel on Security, *Cooperation between Hong Kong and other places on juridical assistance in criminal matters*, 2019, p.2
[381] Hong Kong Bar Association, *Observations of the Hong Kong Bar Association ("HKBA") on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, 2019, p.2
[382] P.Y. LO, *The Unprosecuted Taiwan Homicide, the Unaccepted Extradition Law Amendment Bill and the Underestimated Common Law*, The University of Hong Kong, 2020, p.16

wanted in mainland China for having committed a crime there[383]. The reciprocal notification mechanism between the mainland and the HKSAR entered into force in 2001 and allowed the relevant authorities of the mainland and the HKSAR government to notify each other of the criminal prosecution initiated against the residents of the other side, of the criminal compulsory measures imposed on alleged criminal of the other side or of the unnatural deaths of residents of the other side in their respective territories[384]. In 2016, the government of the special administrative region proposed the Hong Kong and Macao Affairs Office of the State Council (HKMAO) to initiate a review of the procedure of reciprocal notification with the mainland in order to attain more transparency and optimize the time needed for it. Therefore, in the following year, the Security Bureau of the region and Ministry of Public Security of the mainland signed the "*Arrangements on the Reciprocal Notification Mechanism between the Mainland and the Hong Kong Special Administrative Region Relating to Situations Including the Imposition of Criminal Compulsory Measures or the Institution of Criminal Prosecution*", which entered into force in 2018. These new arrangements provided that, when imposing criminal compulsory measures on Hong Kong residents, the agencies[385] of the mainland are required to notify the HKSAR government of such imposition; in the same way, the government of the region should send a notification to the mainland when the Hong Kong Police Force, the Customs and Excise Department, the Immigration Department and the newly-added Independent Commission Against Corruption decide to institute a criminal prosecution against mainland residents. Furthermore, the arrangements established some

[383] P.Y. LO, *The Unprosecuted Taiwan Homicide, the Unaccepted Extradition Law Amendment Bill and the Underestimated Common Law*, The University of Hong Kong, 2020, p.17
[384] Legislative Council Panel on Security, *New Arrangements on the Reciprocal Notification Mechanism between the Mainland and the Hong Kong Special Administrative Region*, 2018, p.1
[385] Mainland's agencies are: public security authorities, the state security authorities, the customs and anti-smuggling departments and the prosecution authorities

measures in order to improve the process of notification. Such measures include the time frame of notification, which varies according to the type of crime at issue and which also provides that both sides are free to make an enquiry if there is something that has not been notified or if there is any doubt; the requested party should reply within 30 working days after receiving the enquiry. The other measures deal with the content of notification, which will be standardized for both parties and the channels of notification[386].

As far as cooperation with other countries other than the mainland is concerned, according to the original ordinances, requests for MLA and SFO can be processed in two different ways: 1) by adopting a long-term arrangement, in order to build a more comprehensive cooperation network and a long-term partnership between the parties; or 2) by providing assistance on a one-off case-based approach[387]. Therefore, in areas where long-term agreements have not been reached, the Hong Kong government is allowed to provide case-based arrangements, but the application to China (including also Macao and Taiwan) is not included[388]. The first approach was frequently used in the past, and the persons involved in the process were protected by safeguards listed in the two ordinances, including safeguards on human rights and procedural safeguards[389].

However, the case that pushed the Hong Kong government to propose an amendment of such extradition law and its system was the abovementioned murder which took place in Taiwan in 2018, also known as "the murder of Poon Hiu-wing"; in this case, Chan Tong-kai, a 19-year-old Hong Kong resident killed his 19-year-old girlfriend during a trip

[386] Legislative Council Panel on Security, *New Arrangements on the Reciprocal Notification Mechanism between the Mainland and the Hong Kong Special Administrative Region*, 2018, p.2
[387] Legislative Council Panel on Security, *Cooperation between Hong Kong and other places on juridical assistance in criminal matters*, 2019, p.3
[388] Yu-Han CHEN, *The Controversy of the Amendment of Anti-Extradition in Hong Kong – Threat to the people of Hong Kong*, HOLISTICA – Journal of Business and Public Administration 10(3):133-142, 2019, p.135
[389] See: Legislative Council Panel on Security, *Cooperation between Hong Kong and other places on juridical assistance in criminal matters*, 2019, p.3

in Taiwan, and after the murder, he flew back to Hong Kong, where he used Poon Hiu-wing's ATM card. In order to solve the case, Taiwan Shilin District Prosecutors Office requested the Hong Kong government to extradite the man to Taiwan for three times. In particular, under the existing law, the courts of the region had no jurisdiction to judge a murder case if the murder had been committed outside Hong Kong, therefore an extradition to Taiwan for trial would be necessary; however, considering that there was no mutual legal assistance agreement between Hong Kong and Taiwan, the Hong Kong government claimed that it could not satisfy Taiwan's request and that there was no legal basis for the extradition of Chan[390].

Consequently, the Security Bureau of the Hong Kong government claimed that it would amend the FOO and the MLAO in order to remove the restrictions which impeded their application to other parts of China outside Hong Kong and in order to allow Hong Kong to deal with extradition requests on a case-by-case basis with any foreign jurisdiction with which Hong Kong had never entered into an extradition treaty before[391]. Additionally, the amendment also included the proposal to remove the exclusion of "other parts of China" from the application of the MLAO. Such amendment was formally known as the *"2019 nian Taofan Ji Xingshi Shiyi Xianghu Falu Xiezhu Fali (Xiuding) Tiaoli Cao'an"* "2019 年逃犯及刑事事宜相互法律协助法例（修订）条例草案" "Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019" and the first proposal was published and discussed in the LegCo's Panel on Security in February 2019. However, in February, the chairwoman of

[390] Albert H.Y. CHEN, *A perfect storm: Hong Kong-China Rendition of Fugitive Offenders*, University of Hong Kong - Faculty of Law, Research Paper No. 2019/108, 2019, p.422
[391] Yu-Han CHEN, *The Controversy of the Amendment of Anti-Extradition in Hong Kong – Threat to the people of Hong Kong*, HOLISTICA – Journal of Business and Public Administration 10(3):133-142, 2019, p.134

the Business and Professionals Alliance, Priscilla Leung Meifun, said that the business community of the region was concerned about the rendition to China for offences of business nature; therefore, in response to the business community, the proposal was refined, excluding nine white-collar offences; the Bill was then gazette in March and introduced into the LegCo the following month[392].

3.1 The FOO and MLAO and their proposed amendment

After the handover of sovereignty in 1997, the bilateral and multilateral treaties for the surrender of fugitive offenders that the United Kingdom had extended to Hong Kong expired; however, the Hong Kong government negotiated some bilateral agreements for the surrender of fugitive offenders in the Joint Liaison Group and such agreements would remain in force after 1997. Against this background, in April 1997 the FOO was enacted in order to provide a mechanism to implement the above-mentioned new bilateral and multilateral agreements and in order to establish the procedures to define the surrender of fugitives and their treatment after the surrender[393]. The provisions contained in such ordinance are based on the British extradition law and they include many principles that were part of the United Nations Model Treaty on Extradition and the London Scheme on Extradition within the Commonwealth, such as the already mentioned issues of no extradition based on political offences, no extradition based on prosecution of a political

[392] Albert H.Y. CHEN, *A perfect storm: Hong Kong-China Rendition of Fugitive Offenders*, University of Hong Kong - Faculty of Law, Research Paper No. 2019/108, 2019, p.423; also see: Ethan MEICK, Hong Kong's Proposed Extradition Bill Could Extend Beijing's Coercive Reach: Risks for the United States, 2019, U.S.-China Economic and Security Review Commission, p.3

[393] Pak-kwan CHAU, Stephen LAM, *Research study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*, Research and Library Services Division and Legal Service Division – Legislative Council Secretariat, Hong Kong, 2001, p.25

opinion, religion, race, nationality and no extradition when a fair trial of the person at issue is not guaranteed[394].

The Fugitive Offenders Ordinance, as already said before, establishes the process through which the HKSAR government handles extradition requests coming from other countries, including those countries with which the region has entered into extradition agreements. Furthermore, it also lists the types of crimes that are eligible for extradition[395].

In particular, the Fugitive Offenders Ordinance is divided into four parts. Part one is a preliminary dealing with the interpretation (*shiyi* 释义) of the Ordinance itself and of the terms contained in it; this part provides that that the arrangements for the fugitive offenders mentioned in the Ordinance itself are applicable to "the government and the government of a place outside Hong Kong (other than the CPG or the government of any other part of China)" and to "Hong Kong and a place outside Hong Kong (other than any other part of the PRC)". The preliminary also identifies that persons liable to be surrendered and arrested under the FOO are those persons that are "wanted in a prescribed place (*ding ming difang* 订明地方) for prosecution, or for the imposition or enforcement of a sentence, in respect of a relevant offence against the law of that place". Furthermore, part one also lists a number of general restrictions on surrender, such as prohibiting the

[394] Albert H.Y. CHEN, *A perfect storm: Hong Kong-China Rendition of Fugitive Offenders*, University of Hong Kong - Faculty of Law, Research Paper No. 2019/108, 2019, p.421. The rule of speciality is recognized by Hong Kong law and agreements the region entered with other countries; in particular section 5 of the Hong Kong Fugitive Offenders Ordinance lists general restrictions on surrender: "a person shall not be surrendered to a prescribed place or committed, to or kept in custody for the purposes of such surrender, unless provision is made by the law of the place, or by the prescribed arrangements concerned, for securing that he will not […] be dealt with in that place for or in respect of any offence committed before his surrender to it", see: *Fugitive Offenders Ordinance (Cap.503)*, Section 5, https://www.elegislation.gov.hk/hk/cap503!en.pdf

[395] Congressional Research Service, Hong Kong's Proposed Extradition Law Amendments, 2019, https://fas.org/sgp/crs/row/IF11248.pdf; also see: *Fugitive Offenders Ordinance (FOO) (Cap.503)*, Schedule 1 – Description of Offences

extradition of a person for a political offence, prohibiting the extradition of people who were convicted in absentia or where the sentence could be the death penalty[396].

As far as the second part of the FOO is concerned, it deals with the procedure of surrender. In particular, when receiving a request for surrender, the CE shall evaluate if the request complies with the provisions of the ordinance; is such request is lawfully made, the CE may issue an authority in order to proceed. The arrest of a person may be issued by a magistrate on the receipt of an authority to proceed (*shouquan jinxingshu* 授权进行书), or without such an authority when the magistrate is satisfied by information about the person given on oath (e.g. the person is or is believed to be in or on his way to Hong Kong, or the person is wanted in a prescribed place in respect of a relevant offence)[397]. The magistrate also has to verify that the extradition request is in line with the requirements of the FOO, including that: there is a *prima facie* case that the person sought committed an extraditable offence in the requesting state; the offence shall be part of extraditable offences listed in the FOO and shall not be a political offence; according to the mutuality requirement, the offence shall be considered an offence also under the Hong Kong law; the extradition shall not be based nor on political reasons neither on race, nationality, religion or political issues; death penalty shall not be contemplated; and there is no possibility to re-extradite the accused person to a third country without giving him or her the opportunity to leave the requesting state[398]. When the magistrate issues a provisional warrant (*linshi shouling* 临时手令), he or she shall give notice to the CE; if the CE decides not to issue an authority to proceed or if the person sought has not consented to his surrender, the CE shall cancel by order the warrant and discharge the

[396] *Fugitive Offenders Ordinance (FOO) (Cap.503)*, Part 1 - Preliminary
[397] *Ibid*, Part 2 - Procedure
[398] Johannes CHAN, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.5

person from custody, if the person was arrested[399]. However, while, under the FOO, the CE may refuse to proceed with the surrender of the fugitive offender in the case of a request coming from a foreign state, the scenario is different in the case of a request coming from the CPG; indeed, according to the Basic Law and the FOO, the CE has to comply with instruction given by the CPG when taking an action that may affect the interests of the PRC in matters of defence and foreign affairs[400]. This second part goes on describing also the process of search and seizure carried out by an authorized officer (*huo shouquan renyuan* 获授权人员), the proceedings for committal, the statement of the case at issue by court of committal, the application for *habeas corpus*, the order for surrender, the discharge in case of delay, the surrender of the person liable to serve sentences of imprisonment and its custody in relation to the order for surrender[401].

The third part of the FOO is devoted to the treatment of persons surrendered from prescribed places, while the last part is linked to miscellaneous issues, such as the escape from custody, the form of orders, etc.[402].

The MLAO, which came into force in the same year of the FOO, is divided into VII part: part I is a preliminary which contains an interpretation of the terms used in the ordinance itself, provisions for the application of the ordinance, provisions linked to the refusal of assistance and general provisions dealing with the request for assistance to and by Hong Kong; part II is devoted to the issue of assistance in relation to taking of evidence and production of things; part III deals with assistance in relation to search and seizure;

[399] *Fugitive Offenders Ordinance (FOO) (Cap.503)*, Part 2 - Procedure
[400] P.Y. LO, *The Unprosecuted Taiwan Homicide, the Unaccepted Extradition Law Amendment Bill and the Underestimated Common Law*, The University of Hong Kong, 2020, p.16; also see: Johannes CHAN, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.5
[401] *Fugitive Offenders Ordinance (FOO) (Cap.503)*, Part 2 - Procedure
[402] *Ibid*, Part 3 and Part 4 – Treatment of Persons Surrendered from Prescribed Place and Miscellaneous

part IV is based on assistance in relation to production, etc. of material; part V deals with provisions about the transfer of persons to give assistance in relation to criminal matters; part VI contains provisions on assistance in relation to confiscation, etc. of proceeds of crime; and part VII is devoted to miscellaneous issues[403]. As the FOO, also the MLAO stipulates that it is not applicable to any other parts of the PRC.

Under the FOO, the layers of protection are limited because the CE has a lot of power in its hands. Firstly, he or she may refuse to start the extradition process upon an extradition request. Secondly, if there is no extradition agreement between the region and the requesting state, the CE may opt for an ad hoc agreement for extradition complying with the FOO, which must go through the negative vetting of the LegCo. However, according to the ordinance, this type of process is not applicable to a request that comes from "any other part of China"[404]. Thirdly, the current FOO provides a low standard of scrutiny by the court of committal (magistrate) of the case presented by the requesting jurisdiction of a *prima facie* case on the statement that the fugitive would be subject to a fair trial, would have the right to challenge evidence, to get legal representation and to get fair hearing before an independent court. Additionally, it may be difficult to assess if the request for surrender is made for purposes that generally restrict surrender, such as persecution of race, religion, nationality or political opinion. Another aspect that affects the safeguard of the human rights of the surrender is that, according to Hong Kong jurisprudence, the compliance by the requesting state with provisions of the Hong Kong Bill of Rights is not taken into consideration in the decision-making process of the court

[403] *Mutual Legal Assistance in Criminal Matters Ordinance (MLAO) (Cap.525)*, http://www.oecd.org/site/adboecdanti-corruptioninitiative/39837934.pdf
[404] Johannes CHAN, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.4

of committal[405], which means that when the committal magistrate considers whether to commit a fugitive upon an extradition request, he or she has no jurisdiction to rely on the Bill of Rights; this is due to the fact that in the FOO there is no express requirement that the magistrate has to assess if the committal is line with the Bill of Rights. From the point of view of the government, the lack of such requirement is given by the fact that it needs flexibility during the negotiation phase with other countries in ad hoc arrangements. Under these circumstances, the fugitive still has the right to challenge the CE's decision by judicial review or *habeas corpus*; however, it is not clear how the court may review an ad hoc arrangement into which the government has entered with the requesting state and how the court may decide to refuse an extradition request coming from the requesting country on the grounds of an assessment of the relevant legal system and human rights records. This aspect is particularly true when the judiciary of the region has to do with the mainland; as a matter of fact, according to the CPG the Hong Kong courts have no jurisdiction to challenge the decisions taken by the NPCSC[406] and, under the "one country, two systems" principle, judges of the courts must be patriotic, swear to uphold the Basic Law, ensuring the safeguard of country's sovereignty, security and development interests and swear allegiance to the HKSAR of the PRC[407].

As already said before, in April 2019, the Hong Kong government decided to introduce the extradition bill before the LegCo of the region. Such bill would amend both the FOO

[405] P.Y. LO, *The Unprosecuted Taiwan Homicide, the Unaccepted Extradition Law Amendment Bill and the Underestimated Common Law*, The University of Hong Kong, 2020, p.20
[406] Johannes CHAN, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.7
[407] *Zhonghua Renmin Gongheguo Guowuyuan Xinwen Bangongshi* 中华人民共和国国务院新闻办公室 Information Office of the State, *""yiguo-liangzhi" zai Xianggang Tebie Xingzhengqu de Shijian"* ""一国两制"在香港特别行政区的实践" *The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region*, 2014, 第五段 Section V, http://www.chinaembassy.org.sa/chn/xwdt/2014yaowen/P020140611516113858993.pdf

and the MLAO[408]. In particular the main issue of the amendment was to introduce a rendition arrangement between Hong Kong and other parts of China, including mainland China, Taiwan and Macau[409]; this would abolish the regulation of the exclusion, meaning that, if a person is in Hong Kong and the central government believes that he or she is guilty of a crime, the government would be allowed to extradite that person to mainland China for trial in a case-based arrangement, regardless of the fact that he or she is a Hong Kong citizen, a foreigner living in the region or a person transiting in the territory[410]. In this way, the amendment would abolish the bar against extradition to China, which is a ban used as a firewall in order to keep the Hong Kong's common law system separate from China's socialist legal system[411]. Similarly, the goal of the amendment was to introduce new extradition arrangements also between Hong Kong and over 170 states with which the region had not yet signed extradition treaties[412]; afterwards, cooperation under the one-off case-based approach would be superseded by a long-term arrangement once the latter would be in place in the future[413].

Another important provision included in the amendment is linked to the assessment of whether to extradite an offender. In particular, case-based arrangements would not be subject to legislative scrutiny anymore; it would be the CE of the region who would have the power to accept or refuse the request of extradition, which would be examined by the

[408] Ethan MEICK, *Hong Kong's Proposed Extradition Bill Could Extend Beijing's Coercive Reach: Risks for the United States*, 2019, U.S.-China Economic and Security Review Commission, p.1
[409] Albert H.Y. CHEN, *A perfect storm: Hong Kong-China Rendition of Fugitive Offenders*, University of Hong Kong - Faculty of Law, Research Paper No. 2019/108, 2019, p. 419
[410] Yu-Han CHEN, *The Controversy of the Amendment of Anti-Extradition in Hong Kong – Threat to the people of Hong Kong*, HOLISTICA – Journal of Business and Public Administration 10(3):133-142, 2019, p.134
[411] Cora CHAN, *Demise of "One Country, Two systems"? Reflections on the Hong Kong Rendition Saga*, Hong Kong Law Journal 447, 2019
[412] Albert H.Y. CHEN, *A perfect storm: Hong Kong-China Rendition of Fugitive Offenders*, University of Hong Kong - Faculty of Law, Research Paper No. 2019/108, 2019, p.419
[413] Legislative Council Panel on Security, *Cooperation between Hong Kong and other places on juridical assistance in criminal matters*, 2019, p.9

Department of Justice in advance, in order to understand if it meets the conditions to proceed with extradition. After the assessment of the CE the request would go through the judicial process; afterwards, the Magistrates' Court would hear the submission of evidence by the requesting state and the relevant reply of the person requested, in order to understand if conditions to commit a person to custody are met. The judge would decide whether to issue an arrest warrant, and the last phase of the procedure involves the CE once again, who would have to take the final decision issuing or refusing to issue the extradition order[414].

Hong Kong government's point of view concerning the removal of the legislative scrutiny was that the legislative process would be lengthy, its public nature would alert the offender and it would undermine the committal procedure[415]. However, having a say both at the initial stage of activating the extradition proceedings and the last stage of surrendering, the CE might undermine the guarantees contained in the FOO when the requesting state is the mainland; as a matter of fact, being accountable to the CPG, he or she would find it difficult to refuse the surrender of a fugitive offender after a committal requested by the mainland government[416].

As already explained before, the amendment had also the purpose of removing nine commercial offences from the list of extraditable offences, following the previously mentioned concerns which arose in the business sector; such nine offences included those

[414] Yu-Han CHEN, *The Controversy of the Amendment of Anti-Extradition in Hong Kong – Threat to the people of Hong Kong*, HOLISTICA – Journal of Business and Public Administration 10(3):133-142, 2019, p.135; also see: Ethan MEICK, *Hong Kong's Proposed Extradition Bill Could Extend Beijing's Coercive Reach: Risks for the United States*, 2019, U.S.-China Economic and Security Review Commission, p.2
[415] Johannes CHAN, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.5; also see: Legislative Council Panel on Security, *Cooperation between Hong Kong and other places on juridical assistance in criminal matters*, 2019, p.6
[416] Johannes CHAN, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.6

linked to the following fields: bankruptcy, corporate law, securities and future trading, intellectual property, environmental pollution or protection of public health, imports and exports or international transfer of funds, use of computers, taxes and duties, and trade descriptions[417]. However, from the point of view of the Chair Professor of Law of the Faculty Law at the University of Hong Kong there was no rational reason for excluding such nine offences, because the real concern of the business sector was the same concern related to any other type of concern, which is the possibility for the accused person to obtain a fair hearing in the mainland. Additionally, the Law Professor pointed out that the removal of these offences would not exempt people of the business sector from concerns, because they could be easily accused of other types of offences[418]. At the same time, according to the Hong Kong Bar Association, this change might represent a step backwards from the point of view of international cooperation in criminal justice, as it would make it impossible for any jurisdiction which did not have a long-term arrangement with the HKSAR to request the surrender of a person for these types of offences[419]. Additionally, according to the first proposal of the amendment, the remaining 37 offences must be punishable by at least 3 years in prison, while in its final version, it provided that such offences must be punishable by at least seven years in prison (see Table I).

[417] Ethan MEICK, *Hong Kong's Proposed Extradition Bill Could Extend Beijing's Coercive Reach: Risks for the United States*, 2019, U.S.-China Economic and Security Review Commission, p.4

[418]Johannes CHAN, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.5; also see: Hong Kong Bar Association, *Observations of the Hong Kong Bar Association ("HKBA") on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, 2019, p.9

[419] Hong Kong Bar Association, *Observations of the Hong Kong Bar Association ("HKBA") on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, 2019, p.9

Table 1. Extradition Provisions of Hong Kong's Fugitive Offenders Ordinance (FOO)
Existing FOO compared to proposed amendments, as submitted on April 3, 2019

	Existing FOO		Amended FOO	
Coverage	Governments with which the HKSAR has an extradition agreement	Any other governments (***excluding*** Mainland China, Macau, and Taiwan)	Governments with which the HKSAR has an extradition agreement	Any other governments (***including*** Mainland China, Macau, and Taiwan)
Crimes Subject to Extradition	46 types of violent and commercial crimes with possible sentence of 1 year or more	46 types of violent and commercial crimes with possible sentence of 1 year or more	46 types of violent and commercial crimes with possible sentence of 1 year or more	37 types of violent and commercial crimes with possible sentence of 3 years or more (see **Note**)
Role of Legco	None	Pass legislation to permit HKSAR to enter into a special extradition arrangement	None	None

Source: CRS analysis.

Congressional Research Service, *Hong Kong's Proposed Extradition Law Amendments*, 2019, https://fas.org/sgp/crs/row/IF11248.pdf

As far as the MLAO is concerned, it provides that a request may be made to Hong Kong in order to make a prisoner or other person in Hong Kong travel to a place outside Hong Kong to give assistance in criminal matters (*xingshi shiyi* 刑事事宜); under such circumstance, the Secretary for Justice in vested with the power to decide if the requesting country has adequately proven that 1) the person at issue will not be imperiled for any external offence that he or she may have committed before his or her departure from Hong Kong; that 2) he or she will be returned to the region according to the arrangement agreed by the Secretary for Justice; and that 3) the person at issue has been given a copy of such undertakings and has consented to give assistance in the requesting country[420]. On this basis, according to the 2019 Amendment Bill the Secretary for Justice, who is HKSAR's official appointed by the CPG according to the Basic Law, would be in charge of making sure that the undertakings given by mainland China when asking for the removal of a prisoner or other person in Hong Kong to mainland to assist in a criminal matter there, would be adequate; moreover, he would be also responsible for making sure that the

[420] P.Y. LO, *The Unprosecuted Taiwan Homicide, the Unaccepted Extradition Law Amendment Bill and the Underestimated Common Law*, The University of Hong Kong, 2020, p.25; also see: *Mutual Legal Assistance in Criminal Matters Ordinance (MLAO) (Cap.525)*

person at issue would be informed concerning such undertakings and that he or she would give his or her consent to the travelling to the mainland[421].

3.2 Protests and criticism

Against this background the first protests against the Bill started in March 2019 and developed up to 9 June 2019, when thousands of demonstrators marched in the HKSAR in order to oppose the enactment of the amendment[422], making the region become the focus of international attention[423]. Such demonstration was the largest in the history of the region after the handover and since the demonstration against the national security bill, which took place in 2003, and the pro-democracy "Occupy Central" or Umbrella movement, which took place in 2014 in order to protest against the refusal to grant universal suffrage[424]. The extradition protests also represent the way in which Hong Kong society has changed since 2014 Umbrella Movement; indeed, the general public has become more involved in protest action, the civil society has made use of social media and other means in order to mobilize as much people as possible and to gain international attention, the preservation of Hong Kong identity has become a priority and many people are more willing to make personal sacrifices in order to safeguard their freedoms[425].

Since the introduction of the Bill in March 2019, politicians and civil society lined up with two different groups: the "pro-China camp, which was in favor of the Bill; and the

[421] P.Y. LO, *The Unprosecuted Taiwan Homicide, the Unaccepted Extradition Law Amendment Bill and the Underestimated Common Law*, The University of Hong Kong, 2020, p.25
[422] On dynamics of protests see: Tin-yuet TING, *From "be water" to "be fire": nascent smart mob and networked protests in Hong Kong*, Social Movement Studies, 2020, The Hong Kong Polytechnic University
[423] Albert H.Y. CHEN, *A perfect storm: Hong Kong-China Rendition of Fugitive Offenders*, University of Hong Kong - Faculty of Law, Research Paper No. 2019/108, 2019, p.419
[424] Cora CHAN, *Demise of "One Country, Two systems"? Reflections on the Hong Kong Rendition Saga*, Hong Kong Law Journal 447, 2019
[425] *Ibid*

"pro-democracy camp", which opposed the Bill and believed that it would put people of Hong Kong at risk of being extradited to face an unfair trial in China[426]. The other concern of the opponents was that Hong Kong courts had no power to reject the request of extradition once the rendition process was started by the CE following the request of the central government; as a matter of fact, the existing law on extradition was based on the already mentioned principle of *prima facie*, therefore, the requesting state just had to provide written evidence while the accused could not do it and had no possibility to call witnesses to prove his or her innocence[427].

The Hong Kong Bar Association too showed once again its opposition to such amendment, claiming that it would reduce personal safety and personal freedom; this would happen, firstly, because there is no balance between the central government and the Hong Kong government; therefore, the latter might find it difficult to reject future requests of extradition coming from mainland China; indeed, Article 24 of the Extradition Law Amendment provides that the CE should follow the instructions given by the CPG. Secondly, according to the Bar Association's analysis, the Magistrate's Court has no power to examine if the person accused of offence is actually guilty and if he or she will enjoy justice after being extradited; therefore, if the request of extradition comes from jurisdictions which do not guarantee the respect of basic human rights for prisoners, the legal protection which should be given to individuals may be undermined.[428]

A further concern regarding the amendment is linked to the fact that, as already explained in the previous chapter of this dissertation, the NPCSC holds the final power

[426] Albert H.Y. CHEN, *A perfect storm: Hong Kong-China Rendition of Fugitive Offenders*, University of Hong Kong - Faculty of Law, Research Paper No. 2019/108, 2019, p.420
[427] *Ibid*, p.425
[428] Yu-Han CHEN, *The Controversy of the Amendment of Anti-Extradition in Hong Kong – Threat to the people of Hong Kong*, HOLISTICA – Journal of Business and Public Administration 10(3):133-142, 2019, p.136

of interpretation of the Basic Law, and such organ might undermine the jurisdiction of Hong Kong courts issuing an interpretation of the provisions of the law at issue[429].

As far as other governments' reactions to the amendment are concerned, on the one hand, many foreign countries and their governments, including United States of America, Canada, Britain, Germany, Australia and the EU in general, showed their concern for all the reasons listed above; on the other hand, the CPG highly supported it, accusing foreign countries of interfering in China's domestic affairs[430].

Despite the large demonstration, the government of the region decided to go on with the final stage of the legislative process, which consisted in the debate of the LegCo on the Bill on 12 June. However, on the same day, the streets near the LegCo building were full of demonstrators and the situation gave rise to what the police of the HKSAR called "riot", leading the police to respond with tear gas, pepper balls, baton rounds, rubber bullet shots and bean bag shots. Consequently, the President of the LegCo assessed that there were not the conditions for the Council to begin the meetings it had programmed to discuss the Bill and vote it on 20 June; and on 15 June, the CE of the region, Carrie Lam, declared that the legislative process on the Bill would be suspended[431]. On its part, Taiwan authorities stated that if the surrender would be based on the Bill, according to which Taiwan is considered part of the PRC, they would not cooperate and, even if the Bill were to be passed, they would never ask for Chan's surrender[432]. Additionally, it stated that it would not accept to negotiate with the Hong Kong government on this bill which would

[429] Cora CHAN, *Demise of "One Country, Two systems"? Reflections on the Hong Kong Rendition Saga*, Hong Kong Law Journal 447, 2019
[430] Albert H.Y. CHEN, *A perfect storm: Hong Kong-China Rendition of Fugitive Offenders*, University of Hong Kong - Faculty of Law, Research Paper No. 2019/108, 2019, p.420
[431] *Ibid*
[432] *Ibid*, p.424

be based on political motivations and on the violation of human rights[433]. However, Taiwan's statements were not enough to affect the Hong Kong government's decision[434].

What distinguishes this controversy from previous controversies, like the 2003 one, is that, in 2003, pro-China legislators changed their stance after peaceful protests, while in the extradition case, the Chief Executive decided to meet one of the five demands of protesters halting the Bill, only after some violent clashes between the police and protesters and only after having obtained the approval by Beijing. Such five demands included: 1) the removal of the extradition law amendment (the sole demand met by the Hong Kong government); 2) an independent public inquiry in order to investigate the brutality used by the police force on 12 June; 3) the withdrawal of the term "riotous" to define the demonstrators of 12 June; 4) the amnesty for arrested protesters; and 5) dual universal suffrage, for both the LegCo and the CE[435].

According to the Associate Professor of Law at the University of Hong Kong, Cora Chan, also the way in which the Bill was aborted is an example of the great influence of Beijing in the region's affairs; in particular, the government of the region "suspended" rather than "withdraw" the Bill[436]. However, as the Law Professor points out, considering that the expiration of the bill corresponded to the term of the LegCo in twelve months'

[433] Human rights may be violated because the courts have no power to assess whether extradition complies with the International Covenant on Civil and Political Rights and other similar provisions; additionally the person at issue may be subject to unfair trial in the mainland, on this issue see: Cora CHAN, *Demise of "One Country, Two systems"? Reflections on the Hong Kong Rendition Saga*, Hong Kong Law Journal 447, 2019, p.2; on the International Covenant on Civil and Political Rights see: United Nations Human Rights – Office of the High Commissioner, *International Covenant on Civil and Political Rights* (1966), https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[434] Yu-Han CHEN, *The Controversy of the Amendment of Anti-Extradition in Hong Kong – Threat to the people of Hong Kong*, HOLISTICA – Journal of Business and Public Administration 10(3):133-142, 2019, p.135

[435] Johannes CHAN, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.11

[436] Cora CHAN, *Demise of "One Country, Two systems"? Reflections on the Hong Kong Rendition Saga*, Hong Kong Law Journal 447, 2019

time, the suspension of the Bill was actually its withdrawal, even if the CE Carrie Lam refused to use the word "withdrawal"[437].

What is relevant in the case at issue is that there is a fundamental difference between the introduction in Hong Kong of a case-by-case extradition arrangement with other countries and the introduction of the same type of arrangement with the PRC. Indeed, in the first situation the Hong Kong government has the discretion to refuse the request of extradition even if it meets all the criteria contained in the FOO and the proposed amendment; this discretion is due to the fact that, according to public international law, in absence an extradition treaties between the states at issue, the requested state has no duty to deal with the request. On the contrary, the second situation which involves the PRC appears different: the relations between the region's government and the CPG are not based on public international law, but on the Basic Law, according to which, the former government is appointed by and constitutionally subordinated to the latter, as already described in chapter one of this dissertation. As a consequence, it is difficult for the HKSAR government to reject an extradition request coming from Beijing[438].

The incident at issue clearly represents the double nature of the HKSAR, a region in which there is a semi-democratic political system characterized by flourishing civil liberties and civil society, but, at the same time, a region in which the executive branch of the government is not democratically elected and the CE is accountable both to the HKSAR government and to the CPG[439].

[437] Johannes CHAN, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.9
[438]Albert H.Y. CHEN, *A perfect storm: Hong Kong-China Rendition of Fugitive Offenders*, University of Hong Kong - Faculty of Law, Research Paper No. 2019/108, 2019, p.426
[439] *Ibid*, p.429

The CE made a series of public apologies for the 2019's events, however, she has always refused to take into consideration the other above-mentioned four demands made by pan-democrats[440]. As far as the public inquiry is concerned, the Hong Kong government argued that a mechanism to manage complaints against police already existed and its name was Complaint Against Police Office (CAPO), which is monitored by the Independent Police Complaints Office (IPCC). However, CAPO has never convinced the public opinion of its impartiality and the IPCC, considering that it has no power to conduct its own investigations, has limited power; therefore, if CAPO and ICCP do not reach an agreement, the dispute is solved by the CE. Additionally, both CAPO and IPCC deal with police's abuse of power in individual cases, not in wider policy matters or social causes like the protest at issue. As far as the third request is concerned, it was probably based on the vivid memory of the characterization of Tiananmen protests on 4 June 1989 as a riot by Li Peng, the then Premier of the PRC; however, the Secretary for Justice argued that the characterization of the protests had not impact on decisions of criminal prosecution, only what the law considered a riot would be prosecuted[441]. Concerning the fourth demand, the government of the region refused to grant a general amnesty arguing that it is contrary to the rule of law, that the CE has no such power and that such power could be exercised only in accordance with some procedures after the completion of the judicial process[442].

To conclude we may say that the CE found herself in a very complex situation, between the differing interests of the pro-democracy camp on the one hand and of the

[440] Johannes CHAN, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.11
[441] *Ibid*
[442] See: Johannes CHAN, *The Power of the Chief Executive to grant Amnesty: A possible Solution to the Extradition Bill Controversies*, University of Hong Kong – Faculty of Law, 2019, Hong Kong Law Journal, p.2

pro-establishment camp on the other hand: if she met the demands of the former, she would lose the support of the latter[443].

[443] Johannes CHAN, *Ten Days that shocked the World: The Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.12

Chapter III: Recent developments and concluding remarks

1. Recent developments: the National Security Law

The last relevant incident which caused unrest in the HKSAR took place on May 22, 2020, when China announced that the NPC would enact an anti-subversion law for Hong Kong, formally known as *Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Weihu Guojia Anquan Fa* 中华人民共和国香港特别行政区维护国家安全法 (*The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative* or National Security Law or NSL), which was then approved by Beijing on June 30 and promulgated by the CE of the region later the same day[444].

Even though Article 23 of the Hong Kong Basic Law provides that "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organization or bodies", the first attempt to introduce this kind of legislation was made only in 2003[445]; however, such attempt was abandoned after the development of an estimated 500.000-person peaceful protest and the

[444] The International Institute for Strategic Studies, *Strategic Comments: Hong Kong's security law*, 2020, Volume 26, Comment 13, p.1, https://www.iiss.org/~/publication/82d6b9d1-5a55-4336-bdb5-2daa2ef45157/hong-kongs-security-law.pdf; also see: Susan V. LAWRENCE, Michael F. MARTIN for Congressional Research Service, *China's National Security Law for Hong Kong: Issues for Congress*, 2020, https://fas.org/sgp/crs/row/R46473.pdf

[445] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.23; on Article 23 see: H.L. FU and Richard CULLEN, National Security Law in Hong Kong: Quo Vadis a Study of Article 23 of the Basic Law of Hong Kong, 19 UCLA Pacific Basin Law Journal, 2002; on 2003 National Security Bill see: *Legislative Council Brief: National Security (Legislative Provisions) Bill*, 2003, SBCR 2/1162/97, https://www.legco.gov.hk/yr02-03/english/bills/brief/b34_brf.pdf; also see: Hong Kong Bar Association, Hong Kong Bar Association's Views on the National Security (Legislative Provisions) Bill 2003, 2003, Submission No.53, http://www.law.hku.hk/ccpl/wp-content/uploads/2018/03/updated/14062003b-hkba.pdf.pdf

subsequent resignation of then-Hong Kong Secretary of Security and now LegCo member Regina Ip Lau Suk-yee.

After the tensions concerning the Amendment on extradition, which were deeply analyzed in the previous chapter of this dissertation, the idea of introducing an anti-subversion law became prominent once again; indeed, the newly elected director of the Liaison Office of the CPG in Hong Kong, Luo Huining, declared that, following the social unrest about the extradition issue, an anti-subversion legislation was necessary. However, considering that the action of the region's LegCo was affected by pro-democracy legislators, the only way to proceed with the approval of the law was an act of force by China[446]. The NPC Vice Chairman Wang Chen as well, in an explanation of the NPCSC on the decision to formulate a new national security law, argued that, since the outbreak of 2019 protests, there were growing risks to national security in the region: in particular he asserted that "anti-China" forces were bringing chaos, calling for the independence of Hong Kong from China, for self-determination and for a referendum in order to change Hong Kong's future[447]. In practice, the path that led to promulgation of the NSL started in October 2019 during the Fourth Plenum of the 19th Central Committee, where the committee members expressed the need to modernize China's governance system and

[446] The International Institute for Strategic Studies, *Strategic Comments: Hong Kong's security law*, 2020, Volume 26, Comment 13, p.1, https://www.iiss.org/~/publication/82d6b9d1-5a55-4336-bdb5-2daa2ef45157/hong-kongs-security-law.pdf

[447] Congressional Research Service, *China's National Security Law for Hong Kong: Issues for Congress*, p.4, 2020, https://fas.org/sgp/crs/row/R46473.pdf. On reasons for the NPC action also see: (*lianghui shouquan fabu) Wang Chen zuo guanyu "Quanguo Renmin Daibiao Dahui guanyu jianli jianquan Xianggaang Tebie Xingzhengqu weihu guojia anquan de falu zhidu he zhixing jizhi de jueding (cao'an)" de shuoming*（*两会受权发布）王晨作关于《全国人民代表大会关于建立健全香港特别行政区维护国家安全的法律制度和执行机制的决定（草案）》的说明, ("(Authorized for Release) Wang Chen Gives Explanation on 'Draft' Decision of NPC on Establishment of Sound Legal System, Implementation Mechanism for Safeguarding of National Security in Hong Kong Special Administrative Region")*, Xinhua, 2020, http://www.xinhuanet.com/politics/2020-05/22/c_1126019468.htm; Michael F. MARTIN, Susan V. LAWRENCE, *China moves to impose National Security Law on Hong Kong*, Congressional Research Service, 2020, https://fas.org/sgp/crs/row/IF11562.pdf; also see: Global Times, *National Security Law to protect HK democracy, freedom: Global Times editorial*, 2020, https://www.globaltimes.cn/content/1193131.shtml

governance capacity and to improve the mechanisms for maintaining national security in the region[448]. As declared by Shen Chunyao, the Director of the Legislative Affairs Commission of the NPCSC, during the plenum, China did not opt for writing the new NSL; instead the options at stake were an amendment or a fresh interpretation of the Basic Law issued by the NPC or the NPCSC or a directive issued by the central government. Nevertheless, in the following months, the State Council of China secretly drafted a report[449] sustaining the combination of a NPC's decision and a new national law; the existence of such State Council was not disclosed until May 22, 2020[450]. On May 21 the government disclosed the agenda[451] for the annual full session of the NPC and it included a NPCSC decision based on the establishment of a legal system and mechanisms for the safeguard of national security in Hong Kong. On May 28, the NPC's decision was eventually passed[452].

Immediately after the NPCSC passed the law on June 30, Xi Jinping signed a presidential order to promulgate the law in China; additionally, the NPCSC listed it in

[448] See: *(shouquan fabu) zhonggong zhongyang guanyu jianchi he wanshan Zhongguo tese shehuizhuyi zhidu tuijin guojia zhili tixi he zhili nengli xiandaihua ruogan zhongda wenti de jueding (受权发布）中共中央关于坚持和完善中国特色社会主义制度推进国家治理体系和治理能力现代化若干重大 问题的决定, (Authorized for Release) Decision of the CPC Central Committee on Major Issues Concerning Upholding and Improving the System of Socialism with Chinese Characteristics and Advancing the Modernization of China's System and Capacity for Governance*, Xinhua, 2019, http://www.xinhuanet.com/politics/2019-11/05/c_1125195786.htm

[449] The title of the report was: "Report on Maintenance of National Stability in the Hong Kong Special Administrative Region"

[450] Congressional Research Service, *China's National Security Law for Hong Kong: Issues for Congress*, p.7, 2020, https://fas.org/sgp/crs/row/R46473.pdf

[451] *(Lianghui shuoquan fabu) di shisan jie Quanguo Renmin Daibiao Dahui di san ci huiyi yicheng (两会受权发布）第十三届全国人民代表大会第三次会议议程*, (Two Meetings Authorized for Release), Agenda for the 3rd Session of the 13th National People's Congress, Xinhua, 2020, http://www.xinhuanet.com/politics/2020-05/21/c_1126016350.htm

[452] Congressional Research Service, *China's National Security Law for Hong Kong: Issues for Congress*, 2020, p.7, https://fas.org/sgp/crs/row/R46473.pdf; see: Hong Kong government, *"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,"* unofficial English translation, 2020, https://www.elegislation.gov.hk/hk/A215.

Annex III of the Basic Law, in order to make it applicable to Hong Kong. Afterwards, the CE, Carrie Lam, promulgated the law according to Article 18 of the mini constitution[453].

As far as the content of legislation is concerned, it was released only on June 30 and it includes six chapters and sixty-six articles. In particular, chapter I deals with some general principles; chapter II is devoted to the explanation of duties and of the government bodies of the HKSAR for safeguarding national security; chapter III lists and describes offences and penalties; chapter IV concerns the issues of jurisdiction, applicable law and procedure; chapter V has to do with the Office for Safeguarding National Security of the CPG in the HKSAR; and Chapter VI contains supplementary provisions.

The new national security law deals with the issue of "preventing, suppressing and imposing punishment for the offences of secession (*fenlie guojia zui* 分裂国家罪), subversion (*dianfu guojia zhengquan zui* 颠覆国家政权罪), organization and perpetration of terrorist activities (*kongbu huodong zui* 恐怖活动罪) and collusion with a foreign country or external elements to endanger national security (*guojie waiguo huozhe jingwai shili weihai guojia anquan* 勾结外国或者境外势力危害国家安全罪) in relation to the Hong Kong Special Administrative Region". The other purposes listed in the text of the law are: ensuring the faithful implementation of the "one country, two systems" policy, safeguarding national security, maintaining prosperity and stability in the region and protecting the rights and interests of its residents[454]. Additionally, under the new

[453] Congressional Research Service, *China's National Security Law for Hong Kong: Issues for Congress*, 2020, p.8, https://fas.org/sgp/crs/row/R46473.pdf; also see: *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Art.18: "[…] In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region."

[454] *Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Weihu Guojia Anquan Fa 中华人民共和国香港特别行政区维护国家安全法, The Law of the People's Republic of China on Safeguarding*

legislation, the central government is authorized to establish a national security office in Hong Kong, through which it may decide to exert its jurisdiction over alleged violations of the law and to prosecute and adjudicate the cases in mainland China[455]; it applies to offences committed against the region by any person who is placed anywhere in the world, including persons who are not permanent residents of the region[456]. In particular, the latter, according to Article 34 of the NSL, may be subject to deportation if they commit and offence under the new legislation or if they contravene the provisions of the new legislation[457].

This decision was widely considered by critics as a breach of the 1984 Sino-British Joint Declaration and, consequently, a step towards further erosion of the high degree of autonomy of the HKSAR[458]. The critics also argued that this legislation would undermine the human rights of Hong Kong residents, as well as the status of the region as a global financial and trading hub. In other words, the enactment of the NSL represented a step closer to the end of the "one country, two systems" framework[459].

National Security in the Hong Kong Special Administrative, di yi zhang: zongzi, 第一章: 总则, Chapter I: General Principles, http://www.npc.gov.cn/npc/c30834/202007/3ae94fae8aec4468868b32f8cf8e02ad.shtml

[455] Susan V. LAWRENCE, Michael F. MARTIN for Congressional Research Service, *China's National Security Law for Hong Kong: Issues for Congress*, 2020, https://fas.org/sgp/crs/row/R46473.pdf

[456] See: *Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Weihu Guojia Anquan Fa 中华人民共和国香港特别行政区维护国家安全法, The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative, di san zhang: zuixing he chufa, di liu jie: xiaoli fanwei* 第三章: 罪行和处罚, 第六节效力范围, Chapter III: Offences and Penalties, Part 6: Scope of Application

[457] *Ibid, di san zhang: zuixing he chufa, di wu jie: qita chufa guiding, di sanshisi tiao*, 第三章: 罪行和处罚, 第五节: 其他处罚规定, 第三十四条, Chapter III Offences and Penalties, Part 5: Other Provisions on Penalty, Art.34

[458] The International Institute for Strategic Studies, *Strategic Comments: Hong Kong's security law*, 2020, Volume 26, Comment 13, p.1, https://www.iiss.org/~/publication/82d6b9d1-5a55-4336-bdb5-2daa2ef45157/hong-kongs-security-law.pdf; also see: Susan V. LAWRENCE, Michael F. MARTIN for Congressional Research Service, *China's National Security Law for Hong Kong: Issues for Congress*, 2020, https://fas.org/sgp/crs/row/R46473.pdf

[459] Congressional Research Service, *China's National Security Law for Hong Kong: Issues for Congress*, 2020, p.1, https://fas.org/sgp/crs/row/R46473.pdf. On criticism before the enactment of the National Security Law also see: Michael F. MARTIN, Susan V. LAWRENCE, *China moves to impose National Security Law on Hong Kong*, Congressional Research Service, 2020,

At the same time, according to a report of the Congressional Research Service, there are several possible motivations for which PRC decided to pass the NSL: to interrupt the rise of pro-democracy movement and protests; to commemorate the 99th anniversary of the founding of the CCP and the 23rd anniversary of Hong Kong handover to China on July 1, when the law at issue came into force; to underline that president Xi Jinping has reached the target to strengthen his control over the special administrative region; to avoid the protests that every year take place in Hong Kong on July 1; and for preventing members of the pro-democracy camp from running in upcoming LegCo elections[460]. However, after the meeting on June 3, 2020 with Chinese Vice Premier Han Zheng, the Hong Kong CE Lam explained that the new legislation would apply only on a small minority of criminals in the region; additionally, on May 28, she also stated that the NSL would not affect the legitimate rights and freedoms enjoyed by the residents of the HKSAR and that the decision was due to the fact that, according to Article 23 of the Basic Law, the region had the legal responsibility to enact the legislation to safeguard national security[461].

What is relevant for the purpose of this thesis is that the approval and implementation of the NSL are strictly connected to present and future dynamics of interaction existing

https://fas.org/sgp/crs/row/IF11562.pdf; Hong Kong Bar Association, *Statement of Hong Kong Bar Association on proposal of National People's Congress to enact National Security Law in Hong Kong*, 2020,https://www.hkba.org/sites/default/files/20200525%20-%20Proposal%20of%20National%20People%27s%20Congress%20to%20enact%20National%20Security%20Law%20in%20Hong%20Kong%20%28E%29.pdf; Hong Kong Bar Association, *Statement of Hong Kong Bar Association on NPSC's deliberation of the proposed national security law and reported details*, 2020, https://www.hkba.org/sites/default/files/20200619%20-%20HKBA%20Statement%20of%20HKBA%20on%20reported%20details%20of%20proposed%20NSL%20%28E%29.pdf

[460] Congressional Research Service, *China's National Security Law for Hong Kong: Issues for Congress*, 2020, p.5, https://fas.org/sgp/crs/row/R46473.pdf. According to Article 35 of the NSL a person who is convicted of an offence against national security shall be disqualified from standing as a candidate in the LegCo elections and district councils of the HKSAR, holding public office and being a member of the Election Committee for the election of the CE.

[461] Michael F. MARTIN, Susan V. LAWRENCE, *China moves to impose National Security Law on Hong Kong*, Congressional Research Service, 2020, https://fas.org/sgp/crs/row/IF11562.pdf

between Mainland China and the HKSAR. In particular, in the new legislation the accountability of the CE to the CPG for affairs related to the national security is reaffirmed, adding that he or she shall submit an annual report on the performance of duties of the region concerning the safeguard of national security; additionally, if requested by the CPG, the CE shall also submit a report on specific matters concerning the national security issue[462]. Article 12 of the new law also provides that the government of the region shall establish the Committee for Safeguarding National Security in the HKSAR (*Xianggang Tebie Xingzhengqu Weihu Guojia Anquan Weiyuanhui* 香港特别行政区维护国家安全委员会), which is responsible for affairs relating to national security. As the CE, such Committee is accountable to the CPG and accepts its supervision; furthermore, no institution is allowed to interfere with its work, information relating to its work shall not be disclosed and, above all, its decisions are not amenable to judicial review[463]. It is responsible for affairs relating to national security and it assumes primary responsibility for this issue; its duties and functions include: making plans and formulating policies in order safeguard national security, work on the development of the legal system used to safeguard national security and coordinating significant operations for the same reason[464]. Additionally, under the Committee there is a secretariat headed by a Secretary-General, who is appointed by the CPG upon nomination by the CE[465]. The Committee shall also have a National Security Adviser, who is designated by the CPG

[462] *Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Weihu Guojia Anquan Fa 中华人民共和国香港特别行政区维护国家安全法, The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative, di er zhang: Xianggang Tebie Xingzhengqu weihu guojia anquan de zhize he jigou, di yi jie: zhize, di shiyi tiao* 第二章: 香港特别行政区维护国家安全的职责和机构, 第一节: 职责, 第十一条, Chapter II: The Duties and the Government Bodies of the Hong Kong Special Administrative Region for Safeguarding National Security, Part 1: Duties, Art. 11

[463] *Ibid, di er jie: jigou, di shier tiao, dishisi tiao* 第二节: 机构, 第十二条、第十四条, Part 2: Government Bodies, Artt.12, 14

[464] *Ibid*

[465] *Ibid, di shisan tiao* 第十三条, Art.13

and provides advice on matters linked to the duties and functions of the Committee itself[466].

Another body established by the NSL, which has relevance in shaping the relations between the two governments concerning national security matters, is the Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region (*Zhongyang Renmin Zhengfu Zhu Xianggang Tebie Xingzhengqu Weihu Guojia Anquan Gongshu* 中央人民政府住香港特别行政区维护国家安全公署). In particular, according to Article 55, upon the approval by the CPG of a request made by the government of the region or by the office itself, this office shall exercise jurisdiction over a case endangering the national security; this is possible when 1) the case at issue is particularly complex because it involves a foreign country or external matters; 2) the government of the region is not able to effectively enforce the law in a serious situation; 3) an imminent threat to national security is taking place[467]. When the office exercises jurisdiction over a case concerning the national security, it initiates an investigation; afterwards, the SPP designates a prosecuting body and the SPC designates a court to adjudicate[468]. What is even more relevant on this issue is that, in respect of cases over which jurisdiction is exercised following the provisions contained in Article 55, the Criminal Procedure Law of the People's Republic of China[469] and other related national laws shall be applied; such laws include also those related to criminal

[466] *Ibid, di shiwu tiao* 第十五条, Art.15

[467] *Ibid, di wu zhang: Zhonghua Renmin Zhengfu zhu Xianggang Tebie Xingzhengqu weihu guojia anquan jigou, di wushiwu tiao,* 第五章: 中央人民政府驻香港特别行政区维护国家安全机构, 第五十五条, Chapter V: Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region, Art.55

[468] *Ibid,* di wushiliu tiao 第五十六条, Art, 56

[469] On Criminal Procedure Law of the PRC see: Wang ZHENHUI, *The Development and Main Reform of Criminal Procedure Law in China*, *Chinese Studies,* 4, 20-24, 2015, http://dx.doi.org/10.4236/chnstd.2015.41004; also see: *Criminal Procedure Law of the People's Republic of China -1996*, https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814279.pdf

investigation, examination and prosecution, trial, and execution of penalty[470]. Eventually, all the acts performed by the Office at issue and its staff pursuant to the NSL are not subject to the jurisdiction of the HKSAR[471].

Concerning the issue of interpretation, which has been deeply analyzed in Chapter one of this thesis, the power of interpretation of the NSL is vested in the NPCSC, as it happens for the Basic Law[472]. This provision may undercut the independence of judicial power which is exercised by the Courts of the Region under Articles 80 and 85 of the mini constitution[473]. According to the Hong Kong Bar Association (HKBA), the independence of the judiciary has been undermined also by the fact that, under Article 44 of the NSL, the CE has the power to designate a list of approved judges for national security cases on a yearly basis; additionally, these judges can be removed from this list if their behavior has a negative impact on national security[474].

---

[470] *Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Weihu Guojia Anquan Fa 中华人民共和国香港特别行政区维护国家安全法, The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative, di wu zhang: Zhonghua Renmin Zhengfu zhu Xianggang Tebie Xingzhengqu weihu guojia anquan jigou, di wushiqi tiao* 第五章:中央人民政府驻香港特别行政区维护国家安全机构, 第五十七条, Chapter V: Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region, Art.57

[471] *Ibid, di liushi tiao,* 第六十条, Art.60

[472] *Ibid, di liu zhang: fuze, di liushiwu tiao* 第六章: 附则, 第六十五条, Chapter VI: Supplementary Provisions, Art.65

[473] Hong Kong Bar Association, *The Law of the People's Republic of China ("PRC") on Safeguarding National Security in the Hong Kong Special Administrative Region ("HKSAR"): Statement of the Hong Kong Bar Association*, 2020, p.3, https://www.hkba.org/sites/default/files/20200701%20HKBA%20statement%20on%20Safeguarding%20National%20%20Security%20in%20HKSAR.pdf. Article 80 provides that the courts of the HKSAR at all levels exercise the judicial power of the region; Article 85 provides that the judicial power of the courts shall be independent and free from any interference.

[474] Hong Kong Bar Association, *The Law of the People's Republic of China ("PRC") on Safeguarding National Security in the Hong Kong Special Administrative Region ("HKSAR"): Statement of the Hong Kong Bar Association*, 2020, p.3; also see *Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Weihu Guojia Anquan Fa 中华人民共和国香港特别行政区维护国家安全法, The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative, di si zhang: anjian guanxia, falu shiyong he chengxu, di sishier tia,* 第四章: 案件管辖、法律适用和程序, 第四十二条, Chapter IV: Jurisdiction, Applicable Law and Procedure, Art.42

Many other criticisms and concerns were raised regarding the approval of this new legislation. For example, the HKBA argued that the four groups of criminal offences described in the NSL lack a clear and comprehensive list of guidelines and safeguards concerning legal certainty and fair treatment, therefore affecting fundamental rights, such as freedom of conscience, expression and assembly. In particular, under Article 20, secession can be committed with or without violence, meaning that mere speech or peaceful advocacy may be at risk. Under Article 22, subversion is described as any threat or use or force or "other unlawful means" (*qita feifa shouduan* 其他非法手段) which interfere with the authority of the HKSAR and imply an attack towards government facilities; according to the HKBA it is not clear if it includes also media criticism or picketing. As far as terrorist acts are concerned, the support of terrorist activities (including providing materials, labour services, transport, etc.) mentioned in Article 26 is vaguely described and it is not certain if prosecution will happen also when the accused person does not know that the person supported is a terrorist. Concerning collusion with foreign forces, Article 29 is vague as well, because it refers to directly or indirectly accepting the support from foreign organizations in order to act against the HKSAR; the main concern in this case is that the existing activities of some academics, NGOs and media organizations may become outlawed under the new legislation because they may be accused of provoking hatred among Hong Kong residents towards the Hong Kong government or the central government[475].

[475] Hong Kong Bar Association, *The Law of the People's Republic of China ("PRC") on Safeguarding National Security in the Hong Kong Special Administrative Region ("HKSAR"): Statement of the Hong Kong Bar Association*, 2020, p. 4; also see: International Association of Lawyers, *Hong Kong National Security Law Threatens the Rule of Law*, 2020, https://www.uianet.org/en/news/hong-kong-national-security-law-threatens-rule-law

Another relevant concern raised by the HKBA is that, according to the NSL, if central authorities decide to exercise their jurisdiction in a case, the alleged criminal can be removed to face trial in mainland China, where the guarantees of fair trial provided in the special administrative region are no longer applicable. However, this has nothing to do with the procedures and judicial controls typical of the extradition process, which instead takes place when the person is sent to face trial for an offence committed in the receiving jurisdiction; and, under such circumstances, mainland China will apply mainland criminal procedures. This is the reason why the HKBA and many other critics expressed their concern on whether the rights of the person at issue to fair trial would be adequately respected[476].

Following the approval of the NSL, also the International Association of Lawyers showed its concern arguing that it was a serious threat to the Rule of Law and, considering that it was imposed on Hong Kong without any consultation with or approval by the LegCo or people of the region, it was a threat also to Hong Kong's democratic institutions and principles contained in the Basic Law[477]. A part from sharing all the above mentioned concerns expressed by the HKBA, the International Association of Lawyers also underlined its concern on the fact that the NSL applies also to offences committed outside the region by non-permanent residents; this means that anyone in the world who criticizes the law at issue and the way in which it is enforced, may be judged under the law itself[478].

[476] Hong Kong Bar Association, *The Law of the People's Republic of China ("PRC") on Safeguarding National Security in the Hong Kong Special Administrative Region ("HKSAR"): Statement of the Hong Kong Bar Association*, 2020, p.2; also see: International Association of Lawyers, *Hong Kong National Security Law Threatens the Rule of Law*, 2020, https://www.uianet.org/en/news/hong-kong-national-security-law-threatens-rule-law

[477] International Association of Lawyers, *Hong Kong National Security Law Threatens the Rule of Law*, 2020, https://www.uianet.org/en/news/hong-kong-national-security-law-threatens-rule-law

[478] International Association of Lawyers, *Hong Kong National Security Law Threatens the Rule of Law*, 2020, https://www.uianet.org/en/news/hong-kong-national-security-law-threatens-rule-law

The international reaction to the new legislation was particularly strong. For example, the United Kingdom, being signatory to the Joint Declaration should have the responsibility to guarantee that the high degree of autonomy of the region is not affected; nevertheless, its range of action is limited and the most significant step it has made has been to announce that it would alter its immigration policy in order to allow three million Hong Kong residents born before 1997 to apply for British National passports, giving them the possibility to move to the UK and, afterwards, obtain the citizenship. Also the US reaction was particularly important for the future of the region; in particular, US President, Donald Trump, declared that the HKSAR would no longer have a special relationship with the US and this would have an impact on a number of agreements existing between the two governments, such as the extradition treaty. Therefore, the Hong Kong Policy Act, passed in the US in 1992, which recognized Hong Kong as a separate customs territory, was declared null and void[479]. Similarly, other countries like Canada, Australia, New Zealand, Germany and France, but also Britain itself, decided to suspend their extradition treaties with the HKSAR[480].

[479] The International Institute for Strategic Studies, *Strategic Comments: Hong Kong's security law*, 2020, Volume 26, Comment 13, p.2, https://www.iiss.org/~/publication/82d6b9d1-5a55-4336-bdb5-2daa2ef45157/hong-kongs-security-law.pdf; also see: U.S. Department of State - Bureau of East Asian and Pacific Affairs, *2020 Hong Kong Policy Act report*, 2020, https://www.state.gov/2020-hong-kong-policy-act-report/#:~:text=On%20May%2022%2C%202020%2C%20the,One%20Country%2C%20Two%20Systems%20framework.

[480] Praveen MENON, *New Zealand suspends extradition treaty with Hong Kong*, Reuters, 2020, https://www.reuters.com/article/us-hongkong-security-newzealand-idUSKCN24S2U1; David LJUNGGREN, *Canada suspends its extradition treaty with Hong Kong, eyes immigration boost*, Reuters, 2020, https://www.reuters.com/article/us-hongkong-protests-canada/canada-suspends-its-extradition-treaty-with-hong-kong-eyes-immigration-boost-idUSKBN24420I?il=0; Kirsty NEEDHAM, *Angering China, Australia suspends extradition treaty with Hong Kong, extends visas*, Reuters, 2020, https://www.reuters.com/article/us-hongkong-protests-australia/angering-china-australia-suspends-extradition-treaty-with-hong-kong-extends-visas-idUSKBN24A0E8; Reuters Staff, *France says it will not ratify extradition treaty with Hong Kong*, Reuters, 2020, https://www.reuters.com/article/us-france-hong-kong/france-says-it-will-not-ratify-extradition-treaty-with-hong-kong-idUSKCN24Z26L?il=0; Reuters Staff, *China embassy criticises Germany's suspension of extradition treaty with Hong Kong*, Reuters, 2020, https://www.reuters.com/article/us-hongkong-security-germany/china-embassy-criticises-germanys-suspension-of-extradition-treaty-with-hong-kong-idUSKCN24W2JA; William JAMES, Andy BRUCE, *UK suspends Hong Kong extradition treaty, stoking China tensions*, Reuters, 2020,

On its part, mainland China forces and voices kept on defending this new national security law explaining that it has nothing to do with the suppression of democracy and freedom of speech, assembly and association in Hong Kong. Furthermore, there is no intention to cancel the "one country two systems" principle; on the contrary, such law is thought as a powerful instrument to safeguard this principle and to prevent the region from becoming a turbulent place[481].

2. Concluding remarks

The purpose of this thesis is outlining the evolving controversial relations existing between the Central People's Government and the Hong Kong government, from the British handover of the region to the mainland up to the present day. In particular, these relations have been shaped over the years by different mechanisms of interaction that inevitably affected the "one country, two systems" principle. The question which is posed in this analysis is whether - starting from the interpretation of the Basic Law by the NPCSC, going through the attempt to implement an extradition law in the region and ending with the implementation of the National Security Law - the mainland government is gradually eroding the high degree of independence that the special administrative region has enjoyed since 1997, heading towards a "one country, one system" framework.

---

https://www.reuters.com/article/us-britain-china-diplomacy/britain-to-suspend-hong-kong-extradition-treaty-newspapers-idUSKCN24K0BA

[481] Global Times, *National Security Law to protect HK democracy, freedom: Global Times editorial*, 2020, https://www.globaltimes.cn/content/1193131.shtml; on the Chinese point of view on the NSL also see: Global Times, *Implementing rules further detail enforcement of national security law for HK*, 2020, https://www.globaltimes.cn/content/1193711.shtml; South China Morning Post - SCMP Reporters, *National security law: tough new reality for Hong Kong as offenders face maximum sentence of life in jail*, 2020, https://www.scmp.com/news/hong-kong/politics/article/3091241/national-security-law-chinese-president-xi-jinping-signs; The International Institute for Strategic Studies, *Strategic Comments: Hong Kong's security law*, 2020, Volume 26, Comment 13, https://www.iiss.org/~/publication/82d6b9d1-5a55-4336-bdb5-2daa2ef45157/hong-kongs-security-law.pdf

The interpretation issue is the first mechanism of interaction this thesis deals with, in order to pursue its objective. Interpretation is based on Article 158 of the Basic Law itself, which provides that the NPCSC is vested with the power of interpreting the mini constitution of the region. This is the reason why an overview of the interpretations issued by this party-controlled legislature has been made: the 1999 right of abode interpretation was issued without a formal request from the CFA, sanctioning the free-standing autonomy of the NPCSC in interpreting the Basic Law[482]; the 2004 interpretation on the selection of the CE and on the formation of the LegCo represented the first effort by the CPG to interpret the meaning of the Basic Law without a consultation with the HKSAR government[483]; the 2005 interpretation concerning the vacancy of the CE was required by the CE itself, who believed that the intervention of the NPCSC would led to a full understanding of the provision of the Basic Law at issue[484]; the 2011 interpretation regarding diplomatic immunity was the first one activated by the CFA of the region towards the NPCSC according to Article 158 and led the court to design some procedures to follow in such circumstances[485]; the 2016 interpretation, dealing with the oath taking of LegCo members, eventually caused debates on the "one country, two systems" framework due to its validity and its retroactive effect[486].

The second mechanism of interaction between the two governments has been analyzed through a case study on the attempt to implement an extradition bill in the HKSAR aimed

[482] Thomas E. KELLOGG, *Excessive Deference or Strategic Retreat? The Impact of Basic Law Article 158*, Hong Kong Journal, No. 9, 2008, p.4
[483] Mark R. CONRAD, *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005, p.2
[484] Guoming LI, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011, p.174
[485] Johannes CHAN, *Hong Kong's Constitutional Journey, 1997-2011*, University of Hong Kong, Faculty of Law, 2014, p.8
[486] Han ZHU, Albert H.Y. CHEN, *The Oath-taking Cases and the NPCSC Interpretation of 2016: Interface and Common Law and Chinese Law*, Hong Kong Law Journal 49(1), 2019, p.8

at establishing a rendition arrangement between Hong Kong and other parts of China and between Hong Kong and other 170 states. This decision was taken by the Hong Kong government itself in 2019 and would have allowed cooperation on extradition through a case-based approach. More importantly, such arrangements would have not been subject to the legislative scrutiny anymore; instead, the CE would have played a fundamental role in activating the extradition proceedings and in the last phase of surrendering[487]. What is relevant to the purpose of this thesis is that this attempt to introduce the bill is linked to the relation of subordination existing between the mainland government and the HKSAR government based on the Basic Law; as a matter of fact, if the amendment had been approved, it would have been difficult for the latter to refuse an extradition request coming from the former[488].

The last mechanism of interaction describing the evolving relations between the two governments is related to the newly introduced National Security Law. Firstly, the way in which it was imposed on Hong Kong without any consultation with or approval by the LegCo or people of the region represented a significant message coming from the mainland government. Secondly, all the provisions contained in the new legislation, may be considered a further step closer to the erosion of the high degree of autonomy of the Hong Kong Special Administrative Region and, according to critics, a breach of the principles contained in both the Basic Law and the Sino-British Joint Declaration[489]. Thus, this new legislation undermines the "one country, two systems" framework, making the

[487] Johannes CHAN, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal, p.6
[488] Albert H.Y. CHEN, *A perfect storm: Hong Kong-China Rendition of Fugitive Offenders*, University of Hong Kong - Faculty of Law, Research Paper No. 2019/108, 2019, p.426
[489] Hong Kong Bar Association, *The Law of the People's Republic of China ("PRC") on Safeguarding National Security in the Hong Kong Special Administrative Region ("HKSAR"): Statement of the Hong Kong Bar Association*, 2020, p.5, https://www.hkba.org/sites/default/files/20200701%20HKBA%20statement%20on%20Safeguarding%20National%20%20Security%20in%20HKSAR.pdf

independent judiciary, the enjoyment of fundamental rights and liberties and the vesting of legislative and executive power in local institutions far less likely to be achieved, and leading the relation between the two governments closer to a “one country, one system” scenario.

To conclude, this thesis exhorts the readers to reflect on the incidents that have made the relations existing between mainland China and the HKSAR evolve across time. For each one of such incidents there is a dual stance: on the one hand, the intention of the mainland government to use any instrument available in order to guarantee the stability and prosperity of Hong Kong; and on the other hand, the strong desire of Hong Kong residents to oppose any attempt of the central government to exert its influence on the region’s affairs. What is necessary to think about is whether, under such circumstances, there is balance between the two parties at issue and whether the compliance with the “one country, two systems” principle is still feasible.

Bibliography

(Lianghui shouquan fabu) di shisan jie quanguo renmin daibiao dahui da san ci huiyi yicheng,（两会受权发布）第十三届全国人民代表大会第三次会议议程, (Two Meetings Authorized for Release), Agenda for the 3rd Session of the 13th National People's Congress, Xinhua, 2020, http://www.xinhuanet.com/politics/2020-05/21/c_1126016350.htm, (last consulted on 20th September 2020)

(Liǎnghuì shòuquán fābù) Wang Chen zuo guanyu "quanguo renmin daibiao dahui guanyu jianli jianquan xianggang tebie xingzhengqu weihu guojia anquan de falu zhidu he zhixing jizhi de jueding (cao'an)" de shuoming（两会受权发布）王晨作关于《全国人民代表大会关于建立健全香港特别行政区维护国家安全的法律制度和执行机制的决定（草案）的说明, (Authorized for Release) Wang Chen Gives Explanation on "Draft Decision of NPC on Establishment of Sound Legal System, Implementation Mechanism for Safeguarding of National Security in Hong Kong Special Administrative Region", Xinhua, 2020, http://www.xinhuanet.com/politics/2020-05/22/c_1126019468.htm, (last consulted on 20th September 2020)

(Shouquan fabu) zhonggong zhongyang guanyu jianchi he wanshan zhongguo tese shehui zhuyi zhidu tuijin guojia zhili tixi he zhili nengli xiandaihua ruogan zhongda wenti de jueding, (受权发布）中共中央关于坚持和完善中国特色社会主义制度推进国家治理体系和治理能力现代化若干重大 问题的决定, (Authorized for Release) Decision of the CPC Central Committee on Major Issues Concerning Upholding and Improving the System of Socialism with Chinese Characteristics and Advancing the Modernization of China's System and Capacity for Governance), Xinhua, 2019, http://www.xinhuanet.com/politics/2019-11/05/c_1125195786.htm, (last consulted on 20th September 2020)

BRABYN Janice M., *Extradition and the Hong Kong Special Administrative Region*, Case Western Reserve Journal of International Law, Case Western Reserve University – School of Law, 1988, Volume 20, Issue 1

BRUSH Richard C., *China's Decision on Universal Suffrage in Hong Kong*, Brookings Institution Press, 2014, https://www.brookings.edu/blog/up-front/2014/09/02/chinas-decision-on-universal-suffrage-in-hong-kong/, (last consulted on 18th July 2020)

BRUSH Richard C., *Hong Kong in the shadow of China*, Washington D.C., Brookings Institution Press, 2016

CARROLL John M., *A Concise History of Hong Kong*, Hong Kong, The University of Hong Kong, 2007

CASTELLUCCI Ignazio, Rule of Law and Legal Complexity in the People's Republic of China, Università degli studi di Trento, Dipartimento di Scienze Giuridiche, 2012

CHAN Cora, *Demise of "One Country, Two systems"? Reflections on the Hong Kong Rendition Saga,* Hong Kong Law Journal 447, 2019

CHAN Cora, *Reconceptualising the Relationship between the Mainland Chinese Legal System and the Hong Kong Legal system*, Asian Journal of Comparative Law: Vol. 6: Iss.1, Article 1, 2011

CHAN Cora, *State Immunity: Reassessing the Boundaries of Judicial Autonomy in Hong Kong*, University of Hong Kong Faculty of Law, 2011, Research Paper No.2012/27

CHAN Johannes M.M., *What the Court of Final Appeal Has Not Clarified in Its Clarification: Jurisdiction and Amicus Intervention*, in Johannes M.M. CHAN, H.L. FU,

CHAN Johannes SC, *Basic Law and Constitutional Review: The First Decade*, Hong Kong Law Journal, 2007, Vol.37 Part 2

CHAN Johannes, *Hong Kong's Constitutional Journey, 1997-2011*, University of Hong Kong, Faculty of Law, 2014
CHAN Johannes, *Ten Days that shocked the World: the Rendition Proposal in Hong Kong*, University of Hong Kong - Faculty of Law, 2019, Hong Kong Law Journal

CHAN Johannes, *The Power of the Chief Executive to grant Amnesty: A possible Solution to the Extradition Bill Controversies*, University of Hong Kong – Faculty of Law, 2019, Hong Kong Law Journal

CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, Hong Kong, 2000

CHANG Parris H., *China's Relations with Hong Kong and Taiwan*, Sage Publications, 1992

CHAU Pak-kwan, LAM Stephen, *Research study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*, Research and Library Services Division and Legal Service Division – Legislative Council Secretariat, Hong Kong, 2001

CHEN Albert H.Y., *A perfect storm: Hong Kong-China Rendition of Fugitive Offenders*, University of Hong Kong - Faculty of Law, Research Paper No. 2019/108, 2019

CHEN Albert H.Y., *Constitutional adjudication in post-1997 Hong Kong*, Pacific Rim Law & Policy Journal Association, Vol.15 No.3, 2006

CHEN Albert H.Y., LO P.Y., *Hong Kong's Judiciary Under "One Country, Two systems",* University of Hong Kong - Faculty of Law, Research Paper No. 2017/022, 2017

CHEN Albert H.Y., *The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives*, Hong Kong Law Journal, 2000

CHEN Yu-Han, *The Controversy of the Amendment of Anti-Extradition in Hong Kong – Threat to the people of Hong Kong*, HOLISTICA – Journal of Business and Public Administration 10(3):133-142, 2019

CHIU Hungdah, *Hong Kong's transition to 1997: background, problems and prospects (with documents), Maryland Series in Contemporary Asian Studies*: Vol. 1993: No. 5, 1993

Congressional Research Service, *China's National Security Law for Hong Kong: Issues for Congress*, p.4, 2020, https://fas.org/sgp/crs/row/R46473.pdf, (last consulted on 15th September 2020)

Congressional Research Service, *Hong Kong's Proposed Extradition Law Amendments*, 2019, https://fas.org/sgp/crs/row/IF11248.pdf, (last consulted on 15th September 2020)

CONRAD Mark R., *Interpreting Hong Kong's Basic Law: a case for cases*, Pacific Basin Law Journal, 23(1), 2005

Constitutional Development Task Force, *The First Report of the Constitutional Development Task Force: Issues of Legislative Process in the Basic Law Relating to Constitutional Development*, 2004, https://www.legco.gov.hk/yr03-04/english/panels/ca/papers/ca0331cb2-report-e.pdf, (last consulted on 16th September 2020)

Criminal Procedure Law of the People's Republic of China -1996, https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814279.pdf, (last consulted on 28th August 2020)

Department of Justice, The Government of the Hong Kong Special Administrative Region, *Legal system in Hong Kong*, https://www.doj.gov.hk/eng/legal/index.html, (last consulted on 28th May 2020)

Di 503 zhang "taofan tiaoli" 第 503 章 《逃犯条例》, *Cap. 503 Fugitive Offenders Ordinance*, https://www.elegislation.gov.hk/hk/cap503!en-sc, (last consulted on 14th September 2020)

Di 525 zhang "xingshi shiyi xianghu falu xiezhu tiaoli", 第 525 章 《刑事事宜相互法律协助条例》, Cap. 525 Mutual Legal Assistance in Criminal Matters Ordinance, https://www.elegislation.gov.hk/hk/cap525!en-sc?INDEX_CS=N&pmc=0&m=0&pm=1, (last consulted on 14th September 2020)

Explanations on "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft) and Its Related Documents, *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China,* https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf (last consulted on 16th June 2020)

Explanations on the Draft Decision of the NPCSC on Issues Relating to the Selection of the CE of the HKSAR by Universal Suffrage and on the Method for Forming the LegCo of the HKSAR in the Year 2016, *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China,* https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf (last consulted on 17th June 2020)

Extradition Law of the People's Republic of China (2000), http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf, (last consulted on 4th September 2020)

FENG Huang, *The establishment and characteristics of China's extradition system*, Frontiers of Law in China, vol.1, no. 4, HeinOnline, 2006

FONG Brian C.H., *One Country, Two Nationalism: Center-Periphery Relations between Mainland China and Hong Kong, 1997-2016*, Sage Publications, 2017

FU H.L. and CULLEN Richard, National Security Law in Hong Kong: Quo Vadis a Study of Article 23 of the Basic Law of Hong Kong, 19 UCLA Pacific Basin Law Journal, 2002

FU Huanling, *Yiguo-Liangzhi: Xianggang Yu Zhongguo Dalu Nengfou Jiu Yijiao Zuifan Wenti Dacheng Xieyi*, 一国两制：香港与中国大陆能否就移交罪犯问题达成协议? (*One Country and Two systems: Will Hong Kong and the Mainland Reach an Agreement on Rendition?*), University of Hong Kong – Faculty of Law, 1999, Vol. Jan. No. 2

Fugitive Offenders Ordinance (Cap.503), https://www.elegislation.gov.hk/hk/cap503!en.pdf

FUNG Anthony Y.H., CHAN Chi Kit, *Post-handover identity: contested cultural bonding between China and Hong Kong*, Chinese Journal of Communication, 2017

GHAI Yash, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, Hong Kong, 2000

GHAI Yash, *Litigating the Basic Law: Jurisdiction, Interpretation and Procedure* in Johannes M.M. CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, Hong Kong, 2000

GHAI Yash, *The NPC Interpretation and Its Consequences*, in Johannes M.M. CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, Hong Kong, 2000

GINSBURG Tom, *Constitutional Interpretation in Law-Making: China's Invisible Constitutional Enforcement Mechanism*, The American Journal of Comparative Law, 2015

Green Paper: *The Further Development of Representative Government in Hong Kong* (1984), Internet Archive: https://archive.org/details/greenpaperfurthe00hong/page/n1/mode/2up, University of Toronto Libraries, (last consulted on 6th June 2020)

HAND Keith, *Resolving Constitutional Disputes in Contemporary China*, East Asia Law Review, 2011

HAYES Jack Patrick, *Leaving home: Chinese Migrations in the Mid-Late 19th century*, Asia Pacific Foundation of Canada, https://asiapacificcurriculum.ca/learning-module/chinese-migrations-mid-late-19th-century, (last consulted on 27th April 2020)

HAYES Jack Patrick, *The Opium Wars in China*, Asia Pacific Foundation of Canada, https://asiapacificcurriculum.ca/learning-module/opium-wars-china, (last consulted on 27th April 2020)

HEBERER Thomas, *The "Great Proletarian Cultural Revolution": China's modern trauma*, Modern Chinese History, 2009

HEDGES Ronald J., *International Extradition: A Guide for Judges*, Federal Judicial Center, 2014, https://www.fjc.gov/sites/default/files/2014/International-Extradition-Guide-Hedges-FJC-2014.pdf, (last consulted on 2nd July 2020)

Hong Kong Bar Association, *Hong Kong Bar Association's Views on the National Security (Legislative Provisions) Bill 2003*, 2003, Submission No.53, http://www.law.hku.hk/ccpl/wp-content/uploads/2018/03/updated/14062003b-hkba.pdf.pdf, (last consulted on 7th September 2020)

Hong Kong Bar Association, *Observations of the Hong Kong Bar Association ("HKBA") on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, 2019

Hong Kong Bar Association, *Statement of Hong Kong Bar Association on proposal of National People's Congress to enact National Security Law in Hong Kong*, 2020, https://www.hkba.org/sites/default/files/20200525%20-%20Proposal%20of%20National%20People%27s%20Congress%20to%20enact%20National%20Security%20Law%20in%20Hong%20Kong%20%28E%29.pdf, (last consulted on 5th September 2020)

Hong Kong Bar Association, *Statement of Hong Kong Bar Association on NPSC's deliberation of the proposed national security law and reported details*, 2020, https://www.hkba.org/sites/default/files/20200619%20-%20HKBA%20Statement%20of%20HKBA%20on%20reported%20details%20of%20proposed%20NSL%20%28E%29.pdf, (last consulted on 5th September 2020)

Hong Kong Bar Association, *The Hong Kong Bar Association's statement concerning the interpretation made by National People's Congress Standing Committee of Article 104 of the Basic Law*, 2016, https://www.hkba.org/sites/default/files/20161107%20-%20Statement%20re%20NPCSC%20interpretration%20BL104%20%28Eng%20Version-web%29.pdf, (last consulted on 6th May 2020)

Hong Kong Bar Association, *The Law of the People's Republic of China ("PRC") on Safeguarding National Security in the Hong Kong Special Administrative Region ("HKSAR"): Statement of the Hong Kong Bar Association*, 2020, p.3, https://www.hkba.org/sites/default/files/20200701%20HKBA%20statement%20on%20Safeguarding%20National%20%20Security%20in%20HKSAR.pdf, (last consulted on 8th September 2020)

Hong Kong government, *"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,"* unofficial English translation, 2020, https://www.elegislation.gov.hk/hk/A215, (last consulted on 8th September 2020)

HSU Berry F.C., *Judicial Independence Under the Basic Law*, Hong Kong Law Journal, Vol. 34, 2004

Information Office of the State Council – The People's Republic of China, *The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region*, 2014, Section II, http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm, (last consulted on 29th September 2020)

International Association of Lawyers, *Hong Kong National Security Law Threatens the Rule of Law*, 2020, https://www.uianet.org/en/news/hong-kong-national-security-law-threatens-rule-law, (last consulted on 19th September 2020)

JACKSON Nancy C., *The Legal Regime of Hong Kong After 1997: An Examination of the Joint Declaration of the United Kingdom and the People's Republic of China*, International Tax & Business Lawyer, Vol. 5:377, 1987

JAMES William, BRUCE Andy, *UK suspends Hong Kong extradition treaty, stoking China tensions*, Reuters, 2020, https://www.reuters.com/article/us-britain-china-diplomacy/britain-to-suspend-hong-kong-extradition-treaty-newspapers-idUSKCN24K0BA, (last consulted on 17th September 2020)

Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Questions of Hong Kong with annexes (1984), https://www.cmab.gov.hk/en/issues/jd2.htm

JUNG Hsiung-Shen, CHEN Jui-Lung, *Causes, Consequences and Impact of the Great Leap Forward in China*, Canadian Center of Science and Education, 2019

KAPFERER Sybille, *Legal and Protection Policy Research Series: The Interface between Extradition and Asylum, United National High Commissioner for Refugees* – Department of International Protection, Geneva, 2003, https://www.unhcr.org/protection/globalconsult/3fe84fad4/5-interface-extradition-asylum-sibylle-kapferer.html, (last consulted on 29th August 2020)

KELLOGG Thomas E., *Excessive Deference or Strategic Retreat? The Impact of Basic Law Article 158*, Hong Kong Journal, No. 9, 2008

LANGER Lorenz, *The elusive aim of universal suffrage: Constitutional developments in Hong Kong*, International Journal of Constitutional Law, Volume 5, Issue 3, 2007

LAWRENCE Susan V., MARTIN Michael F. for Congressional Research Service, *China's National Security Law for Hong Kong: Issues for Congress*, 2020, https://fas.org/sgp/crs/row/R46473.pdf, (last consulted on 15th September 2020)

Legislative Council Brief: National Security (Legislative Provisions) Bill, 2003, SBCR 2/1162/97, https://www.legco.gov.hk/yr02-03/english/bills/brief/b34_brf.pdf, (last consulted on 4th September 2020)

Legislative Council Panel on Security, *Cooperation between Hong Kong and other places on juridical assistance in criminal matters*, 2019

Legislative Council Panel on Security, *New Arrangements on the Reciprocal Notification Mechanism between the Mainland and the Hong Kong Special Administrative Region*, 2018

LI Guoming, *The Constitutional Relationship between China and Hong Kong: A study of the Status of Hong Kong in China's System of Government under the Principle of "One Country, Two Systems"*, The London School of Economics and Political Science, 2011

LJUNGGREN David, *Canada suspends its extradition treaty with Hong Kong, eyes immigration boost*, Reuters, 2020, https://www.reuters.com/article/us-hongkong-protests-canada/canada-suspends-its-extradition-treaty-with-hong-kong-eyes-immigration-boost-idUSKBN24420I?il=0, (last consulted on 18th September 2020)

LO P.Y., CHEN Albert H.Y., *The Judicial perspective of "separation of powers" in the Hong Kong Special Administrative Region of the People's Republic of China*, Journal of International and Comparative Law, 2018, Vol.5(2)

LO P.Y., *The Unprosecuted Taiwan Homicide, the Unaccepted Extradition Law Amendment Bill and the Underestimated Common Law*, The University of Hong Kong, 2020

LOH Christine, *Government and Business Alliance: Hong Kong's Functional Constituencies*, Civic Exchange, 2004

LUI Tai-Iok, *A missing page in the grand plan of "one country, two systems": regional integration and its challenges to post-1997 Hong Kong*, Inter-Asia Cultural Studies, 2015

MACINTYRE Thomas S., *Impact of the Sino-British agreement on Hong Kong's economic future*, Journal of Comparative Business and Capital Market Law 7, 1985

MARTIN Michael F., *Hong Kong: Ten Years After the Handover*, Congressional Research Service prepared for Members and Committees of Congress, 2007

MARTIN Michael F., LAWRENCE Susan V., *China moves to impose National Security Law on Hong Kong*, Congressional Research Service, 2020, https://fas.org/sgp/crs/row/IF11562.pdf, (last consulted on 17th September 2020)

MEICK Ethan, *Hong Kong's Proposed Extradition Bill Could Extend Beijing's Coercive Reach: Risks for the United States*, 2019, U.S.-China Economic and Security Review Commission

MENON Praveen, *New Zealand suspends extradition treaty with Hong Kong*, Reuters, 2020, https://www.reuters.com/article/us-hongkong-security-newzealand-idUSKCN24S2U1, (last consulted on 18th September 2020)

MOKOENA Untalimile Crystal, LUBAALE Emma Charlene, *Extradition in the absence of state agreements: Provisions in international treaties on extradition*, South Africa

Crime Quarterly, 2019, http://dx.doi.org/10.17159/2413-3108/2019/v0n67a4927, (last consulted on 26th August 2020)

Mutual Legal Assistance in Criminal Matters Ordinance (MLAO) (Cap.525), http://www.oecd.org/site/adboecdanti-corruptioninitiative/39837934.pdf

NEEDHAM Kirsty, *Angering China, Australia suspends extradition treaty with Hong Kong, extends visas*, Reuters, 2020, https://www.reuters.com/article/us-hongkong-protests-australia/angering-china-australia-suspends-extradition-treaty-with-hong-kong-extends-visas-idUSKBN24A0E8, (last consulted on 18th September 2020)

People's Republic of China, *Extradition Law of the People's Republic of China*, http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf

Research and Library Services Division (RLSD) of the Legislative Council Secretariat, *Information Note: Research Study on the Agreement between Hong Kong and the Mainland Concerning Surrender of Fugitive Offenders: The Issue of Re-extradition*, 2001

Reuters Staff, *China embassy criticises Germany's suspension of extradition treaty with Hong Kong*, Reuters, 2020, https://www.reuters.com/article/us-hongkong-security-germany/china-embassy-criticises-germanys-suspension-of-extradition-treaty-with-hong-kong-idUSKCN24W2JA, (last consulted on 18th September 2020)

Reuters Staff, *France says it will not ratify extradition treaty with Hong Kong*, Reuters, 2020, https://www.reuters.com/article/us-france-hong-kong/france-says-it-will-not-ratify-extradition-treaty-with-hong-kong-idUSKCN24Z26L?il=0, (last consulted on 18th September 2020)

SAMARANI Guido, La Cina del Novecento: Dalla Fine dell'Impero ad Oggi, Einaudi, Torino, 2004

SAMUELS Alec, *The English Fugitive Offenders Act, 1967*, 1968, University of Toronto Press, The University of Toronto Law Journal, Vol. 18 No. 2, https://www.jstor.org/stable/pdf/825264.pdf

SCOTT Ian, *One country, two systems: the end of a legitimating ideology?,* Asia Pacific Journal of Public Administration, 2017

SO Alvin Y., *"One country, two systems" and Hong Kong-China National Integration: A Crisis-Transformation Perspective*, Journal of Contemporary Asia, 2011

South China Morning Post *Beijing emphasizes its total control over Hong Kong in white paper*, , 2014, https://www.scmp.com/news/hong-kong/article/1529300/beijing-reasserts-its-total-control-over-hong-kong-white-paper, (last consulted on 16th July 2020)

The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990), https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf

The Constitution law of People's Republic of China (1982) https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn147en.pdf

The Government of the Hong Kong Special Administrative Region – Department of Justice, *List of Surrender of Fugitive Offenders Agreements*, https://www.doj.gov.hk/eng/laws/table4ti.html, (last consulted on 26th August 2020)

The Government of the United Kingdom*, A review of the United Kingdom's extradition arrangements (Following Written Ministerial Statement by the Secretary of State for the Home Department of 8 September 2010)*, 2011, https://www.gov.uk/government/publications/independent-review-of-the-united-kingdoms-extradition-arrangements, (last consulted on 20th September 2020)

The International Institute for Strategic Studies, *Strategic Comments: Hong Kong's security law*, 2020, Volume 26, Comment 13, https://www.iiss.org/~/publication/82d6b9d1-5a55-4336-bdb5-2daa2ef45157/hong-kongs-security-law.pdf

TING Tin-yuet, *From "be water" to "be fire": nascent smart mob and networked protests in Hong Kong*, *Social Movement Studies*, 2020, The Hong Kong Polytechnic University

TSANG Steve, *A modern history of Hong Kong*, Bloomsbury Academic, London, 2007

TSANG Steve, *Judicial Independence and the Rule of Law in Hong Kong*, Hong Kong University Press, Hong Kong, 2001

TSANG Steve, *Modern Hong Kong*, Oxford Research Encyclopedia of Asian History, 2017

U.S. Department of State - Bureau of East Asian and Pacific Affairs, *2020 Hong Kong Policy Act report*, 2020, https://www.state.gov/2020-hong-kong-policy-act-report/#:~:text=On%20May%2022%2C%202020%2C%20the,One%20Country%2C%20Two%20Systems%20framework, (last consulted on 21st September 2020)

UNHCR, *Text of the 1951 Convention Relating to the Status of Refugees*, https://www.unhcr.org/3b66c2aa10, (last consulted on 27th August 2020)

United Nations, Model Treaty on Extradition, https://www.unodc.org/pdf/model_treaty_extradition.pdf

WACKS Raymond, *One Country, Two Grundnormen? The Basic Law and the Basic Norm,* in Raymond Wacks, *Hong Kong, China and 1997, Essays in Legal Theory*, Hong Kong University Press, 1993

WANG Shucheng, *Reconciling Hong Kong's Final Authority on Judicial Review with the Central Authorities in China: A Perspective from "One Country, Two systems"*, Public Law Review, Vol.27, No2, 2016

WANG Zhenmin, *Constitutional Conflict and the Role of The National People's Congress*, The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, 2008

WEI Li, *Judicial interpretation in China*, Willamette Journal of International Law and Dispute Resolution Vol.5 No.1, Willamette University College of Law, 1997

WEIYUN Xiao and others, *Why the Court of Final Appeal Was Wrong: Comments of the Mainland Scholars on the Judgment of the Court of Final Appeal*, in Johannes M.M. CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, Hong Kong, 2000

WEN Hongshi, *Interpretation of Law by the Standing Committee of the National People's Congress*, in in Johannes M.M. CHAN, H.L. FU, Yash GHAI, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong University Press, Hong Kong, 2000

WESLEY-SMITH Peter, *Chinese Consular Representation in British Hong Kong, Pacific Affairs*, University of British Columbia, 1998

WESLEY-SMITH Peter, *Law in Hong Kong and China: The Meshing of Systems*, Sage Publications, 1996

WESLEY-SMITH Peter, *The Common Law of England in the Special Administrative Region* in Raymond Wacks, *Hong Kong, China and 1997, Essays in Legal Theory*, Hong Kong University Press, 1993

WESLEY-SMITH Peter, *The effect of "de Lasala" in Hong Kong*, Malaya Law Review, Vol.28 No.1, National University of Singapore (faculty of law), 1986

WESLEY-SMITH Peter, *The Sources of Hong Kong Law*, Hong Kong University Press, 1994

YAP Po Jen, *10 years of the Basic Law: the rise, retreat and resurgence of judicial power in Hong Kong*, Common Law World Review, 2007

YAP Po Jen, CHAN Eric, *Legislative Oaths and Judicial Intervention in Hong Kong*, Hong Kong Law Journal 1-15, 2017

YAP Po Jen, *Interpreting the Basic Law and the adjudication of politically sensitive questions*, Chinese Journal of International Law, Oxford University Press, 2007

ZHENHUI Wang, *The Development and Main Reform of Criminal Procedure Law in China*, Chinese Studies, 4, 20-24, 2015, http://dx.doi.org/10.4236/chnstd.2015.41004; also see: Criminal Procedure Law of the People's Republic of China -1996, https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814279.pdf

Zhonghua Renmin Gongheguo Guowuyuan Xinwen Bangongshi 中华人民共和国国务院新闻办公室 Information Office of the State, *"Yiguo-liangzhi" Zai Xianggang Tebie Xingzhengqu de Shijian*, "一国两制"在香港特别行政区的实践, *The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region*, 2014,
http://www.chinaembassy.org.sa/chn/xwdt/2014yaowen/P020140611516113858993.pdf

Zhonghua Renmin Gongheguo Xianfa, 中华人民共和国宪法, *The Constitution law of People's Republic of China* (1982), http://www.gov.cn/guoqing/2018-03/22/content_5276318.htm, (last consulted on 1st October 2020)

Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu weihu guojia anquan fa 中华人民共和国香港特别行政区维护国家安全法, *The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*, http://www.npc.gov.cn/npc/c30834/202007/3ae94fae8aec4468868b32f8cf8e02ad.shtml, (last consulted on 3rd October 2020)

Zhonghua Renmin Gongheguo Yindufa, 中华人民共和国引渡法, *Extradition Law of the People's Republic of China* (2000), http://www.npc.gov.cn/wxzl/gongbao/2001-03/05/content_5123887.htm, (last consulted on 28th August 2020)

Zhonghua Renmin Gongheguo 中华人民共和国 (PRC), *Tiaoyue shujuku* 条约数据库 (Database of treaties), http://treaty.mfa.gov.cn/Treaty/web/list.jsp?nPageIndex_=1&keywords=%E5%BC%95%E6%B8%A1&chnltype_c=all, (last consulted on 27th August 2020)

Zhonghua Renmin Gongheguo Lifafa, 中华人民共和国立法法, *Legislation Law of the PRC* (2015), https://www.szse.cn/lawrules/rules/law/P020180328464054561811.pdf

Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa 中华人民共和国香港特别行政区基本法, *The Basic Law of the Hong Kong Special Administrative Region* (1990), https://www.basiclaw.gov.hk/tc/basiclawtext/images/basiclaw_full_text_tc.pdf

Zhongying Lianhe Shengming, 中英联合声明, *The Sino-British Joint Declaration* (1984), https://www.cmab.gov.hk/gb/issues/jd3.htm, (last consulted on 17th August 2020)

ZHU Guobin, *Constitutional Review in China: An Unaccomplished Project or a Mirage?*, Suffolk University Law Review, 2010, Vol. XLIII

ZHU Han, CHEN Albert H.Y., *The Oath-taking Cases and the NPCSC Interpretation of 2016: Interface and Common Law and Chinese Law*, Hong Kong Law Journal 49(1), 2019

2019 nian taofan ji xingshi shiyi xianghu falu xiezhu falu (xiuding) tiaoli cao'an, 2019《2019 年逃犯及刑事事宜相互法律协助法例（修订）条例草案》, Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, https://www.legco.gov.hk/yr18-19/chinese/bills/b201903291.pdf