

China's National Security

Endangering Hong Kong's Rule of Law?

Edited by
Cora Chan
and
Fiona de Londras

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LIST OF CONTRIBUTORS

Paulo Cardinal is a guest teacher at the Faculty of Law of the University of Macau and former Chief Legal Adviser at the Macau Legislative Assembly.

Cora Chan is an Associate Professor at the Faculty of Law of the University of Hong Kong.

Johannes Chan is Chair Professor at the Faculty of Law of the University of Hong Kong and an honorary Senior Counsel in Hong Kong.

Albert HY Chen is Cheng Chan Lan Yue Professor in Constitutional Law at the Faculty of Law of the University of Hong Kong.

Surabhi Chopra is an Associate Professor at the Faculty of Law of Chinese University of Hong Kong.

Michael C Davis is Professor of Law and International Affairs at OP Jindal Global University and Senior Residential Fellow at Woodrow Wilson International Center for Scholars, Washington, DC.

Fiona de Londras is Professor of Global Legal Studies at Birmingham Law School of University of Birmingham.

Hualing Fu is Warren Chan Professor in Human Rights and Responsibilities and Interim Dean at the Faculty of Law of the University of Hong Kong.

Jill Cottrell Ghai is a founder and board member of Katiba Institute in Kenya.

Yash Ghai is an Emeritus Professor at the Faculty of Law of the University of Hong Kong and a founder and board member of Katiba Institute in Kenya.

Danny Gittings is an Associate Professor at the College of Humanities and Law, School of Professional and Continuing Education at the University of Hong Kong.

Swati Jhaveri is an Assistant Professor at the Faculty of Law of National University of Singapore.

Wai-Man Lam is Honorary Associate Fellow at the Centre for Civil Society and Governance of the Faculty of Social Sciences at the University of Hong Kong and Associate Professor at the School of Arts and Social Sciences of Open University of Hong Kong.

Lin Feng is Professor and Associate Dean and Director of the Centre for Judicial Education and Research at the School of Law of City University of Hong Kong.

Pui-Yin Lo is a barrister-at-law (England and Wales, Hong Kong) and Visiting Fellow at the Centre for Comparative and Public Law of the Faculty of Law of the University of Hong Kong.

Margaret Ng is a barrister-at-law (Hong Kong) and a former member of the Hong Kong Legislative Council.

Carole J Petersen is a Professor at the William S Richardson School of Law and Graduate Chair of Matsunaga Institute for Peace at the University of Hawai'i at Mānoa.

Simon NM Young is Professor and Associate Dean (Research) at the Faculty of Law of the University of Hong Kong and barrister-at-law (Hong Kong).

LIST OF ABBREVIATIONS

BRI	Belt and Road Initiative
CA	Hong Kong Court of Appeal
CCP	Communist Party of China
CFA	Hong Kong Court of Final Appeal
CFI	Hong Kong Court of First Instance
ECtHR	European Court of Human Rights
HKBA	Hong Kong Bar Association
HKLRC	Hong Kong Law Reform Commission
HKNP	Hong Kong National Party
HKSAR	Hong Kong Special Administrative Region
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
JORC	Judicial Officers Recommendation Commission of Hong Kong
LegCo	Hong Kong Legislative Council
LSHK	Law Society of Hong Kong
NGO	Non-governmental organisation
NPC	National People's Congress
NPCSC	Standing Committee of the National People's Congress
NPJ	Non-Permanent Judge of the Hong Kong Court of Final Appeal
NSC	National Security Commission of China
POAS	Principal Officials Accountability System
PRC	People's Republic of China
SAR	Special Administrative Region

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SCO	Shanghai Cooperation Organisation
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UPR	Universal Periodic Review
US	United States of America

1

Introduction: China's National Security in Hong Kong

A Challenge for Constitutionalism, Autonomy and the Rule of Law

CORA CHAN AND FIONA DE LONDRAS

For 30 years now, the Hong Kong people have persevered in holding an annual candlelight vigil on 4 June to commemorate the 1989 Tiananmen Square Massacre, urging the Chinese Government to admit it was wrong to perpetrate the massacre and to end one-party rule. Hong Kong is the only jurisdiction in China in which such a demonstration could openly take place. A former British colony and now a Special Administrative Region (SAR) of the People's Republic of China (PRC or China), since its return to Chinese sovereignty in 1997 Hong Kong has been governed under the framework of 'one country, two systems', which allows it to practice separate economic, legal and political systems from those on the mainland. The framework's aim is to preserve Hong Kong's distinctiveness vis-à-vis China, including its liberal rule of law tradition, which remains strong after more than two decades of Chinese rule. Yet, given China's intensifying national security advances and rising economic stature, real questions arise about how much longer, and by what means, this tradition can persist.

In this book we aim to explore those questions, understanding them through the prism of the query suggested by its title – *Does China's national security endanger Hong Kong's rule of law?* – by investigating whether, and if so how, China's national security can be protected without jeopardising the rule of law in Hong Kong. From the perspective of both China and Hong Kong this is a vitally important question, not least because it goes to the heart of whether 'one country, two systems' is a viable model for governing the constitutional relationship between them in the long run. Although the opening up of China's economy has rendered the economic differences between China and Hong Kong much less apparent than when that governing model was first conceived, their legal traditions remain highly divergent. For many Hong Kong people the biggest challenge

in implementing 'one country, two systems' has been maintaining Hong Kong's vibrant common law system, with its respect for human rights and the separation of powers, within the envelope of China's Leninist legal system. A solution to that challenge would resolve the broader question of how to make this constitutional model work. This is of wider significance for China: from its perspective what is at stake is not just the ability to govern Hong Kong and continue utilising the territory to facilitate its market reforms, but also the prospect of reunification with Taiwan, for which the 'one country, two systems' model was originally designed.¹ What is at stake for the seven million inhabitants of Hong Kong is not just the ability to maintain a separate legal system, but the very identity of Hong Kong, which has long defined itself by being what China is not.² For Hong Kong people, without the rule of law, the territory seems destined to become 'just another Chinese city'.³

When it comes to security, the relationship between China and Hong Kong, and the functioning of 'one country, two systems' are especially challenging; on the one hand, China fears that security risks to the overall state may foment and find operational space in Hong Kong and thus insists that the Hong Kong Government introduce what it considers 'appropriate' security-related laws; on the other, people in Hong Kong fear the imposition of such laws in a way that undermines their civil liberties, including liberties on the basis of which Beijing can be challenged, organised against and subjected to public criticism. Both concerns have purchase; both point towards the very real difficulties of reconciling two fundamentally different dispositions towards law and legality within one overall national legal system.

I. Relevance Beyond Hong Kong

The questions that are considered in this collection are obviously of relevance to Hong Kong and China, but their significance goes beyond the immediate context in which they arise. Hong Kong is the only contemporary example of a truly liberal region within an authoritarian state. Although there is an extensive body of literature on how national security can be reconciled with the rule of law, the question of how a liberal subnational unit's rule of law can be reconciled with an illiberal national unit's conceptions of national security remains underexplored. Thus,

¹ This was recently reiterated in Xi Jinping's speech commemorating the 40th anniversary of Beijing's 'Message to Compatriots in Taiwan'. See J Xi, 'Working Together to Realize Rejuvenation of the Chinese Nation and Advance China's Peaceful Reunification' (2 January 2019), available at www.gov.cn/xinwen/2019-01/02/content_5354209.htm.

² See the contribution of Hualing Fu in this collection.

³ 'Hong Kong is just another Chinese city: Carrie Lam's reaction to US report proves it' *South China Morning Post*, 20 November 2018, available at www.scmp.com/comment/letters/article/2173991/hong-kong-just-another-chinese-city-carrie-lams-reaction-us-report. On the role of the rule of law as a distinguishing feature of Hong Kong vis-a-vis China see, eg, CAG Jones, *Lost in China? Law, Culture and Identity in Post-1997 Hong Kong* (Cambridge, Cambridge University Press, 2015).

the contributions to this book shed light on the prospects for establishing liberal subunits in illiberal states more generally.

Whilst the book will have direct implications for the building of the rule of law in other Chinese regions (including Macau, the only other SAR of China), they also speak indirectly to other asymmetrical political and economic relationships within which the same kinds of pressures are being applied. These relationships need not be formally constituted in terms of unified statehood. Rather, historical and contemporary political and economic ties between, for example, the Russian Federation and some of its neighbour states, and some of the former states of the former USSR, may result in transnational relationships in which the security concerns of the dominant nation are translated into formal or informal demands and pressures on the other state(s) to introduce 'appropriate' security laws. China's national security strategy explicitly acknowledges that 'sovereignty, security and development interests'⁴ are intertwined so that the now well-established practice of China investing and lending money, including in very large volumes to support major infrastructure projects in Africa and South Asia, must be understood as being at least in part an instantiation of its broader security agenda.⁵ The 'Belt and Road' agenda is spreading; early in 2019 Italy indicated its intention to sign up to it, thus extending China's influence very substantially into the European political space, seemingly in clear tension with the European Union (itself also a security actor). This programme of economic investment does not, of course, create formal constitutional relationships through which security-related demands can be made. In that sense it is clearly not comparable to the Hong Kong–China relationship. However, that relationship and its working out in and beyond the security space remain apposite for our understanding of China's integrated approach to pursuing security alongside and by means of economic activity. That this is so is clear from some states' resistance to banning Huawei, for example, in spite of requests from the United States of America based apparently on security-related concerns due, it appears, to the economic influence that China can exert.

The questions that are raised in this book and, indeed, the reflections offered on China's approach to security and its pursuit generally are also of international and transnational importance. China is an important and emerging actor in the international security field, including transnational counter-terrorism. Of course, its place as one of the permanent members of the United Nations (UN) Security Council already established that, but increasingly China is acting on transnational scales further to develop and to spread its approach to security across other states. Russia and China are, together, engaged in a process that seems to seek to formalise such relationships by their continued leadership

⁴ See, eg, Xi Jinping's Report at the 19th National Congress of the CCP: J Xi, 'Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era' (18 October 2017), available at www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf.

⁵ See the contribution of Yash Ghai and Jill Cottrell Ghai in this collection.

and expansion of the Shanghai Cooperation Organisation (SCO); an organisation devoted almost entirely to security, defined almost exclusively by reference to the interests and definitional preferences of Russia and China, and based on a principle of mutuality in which what is a crime in one Member State is expected to be a crime in all of the others. At the time of writing, the SCO was, geographically, the largest regional organisation in the world; its Member States are China, Russia, Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan, India and Pakistan. Afghanistan, Belarus, Iran and Mongolia are observer states, and the status of 'dialogue partner' is held by Armenia, Azerbaijan, Cambodia, Nepal, Sri Lanka and Turkey. It is also an acknowledged 'key' partner of international organisations such as the UN Committee on Counter-Terrorism and its Executive Directorate, and appears to have strong relationships with ASEAN, the UN and the Commonwealth of International States, all of which attend its meetings. Through initiatives such as the SCO, China appears to seek not only to exert its influence in the formal institutional settings of the UN but also to develop forums in which it can dominate, its view of security and its demands can become embedded, and gradually the norms and practices that China's conceptualisation of security demand may spread across states and into other international and transnational spaces.⁶

Seen thus, it becomes abundantly clear that China's engagement with Hong Kong, and Hong Kong's response and ability (if eventually demonstrated) to retain the rule of law and its core propositions – including protection of human rights – matter not only for the people of Hong Kong and the other actual and putative SARs of China, but for all of us.

II. Complexity of the Issues

Reconciling China's national security with Hong Kong's rule of law has been and will continue to be difficult. This is not least because the two jurisdictions have legal systems that are rooted in opposing ideologies: Leninist authoritarianism, and liberal constitutionalism. National security and the rule of law thus take on very different meanings in the two jurisdictions, reconciliation of which is extremely difficult. China conceives of national security in very broad terms to encompass its 'sovereignty, security, and development interests',⁷ political control over its territory, the Communist Party of China's (CCP) monopoly on power, and the country's economic interests. Security threats can thus take a variety of forms – many of which would not be viewed through a 'security' lens in other political contexts – and, however small, they must be stamped out immediately. This sweeping conception of national security is reconcilable with China's socialist rule

⁶ See further F de Londras, 'Transnational Counter-Terrorism: A Problematique' (2019) *Current Legal Problems* (forthcoming).

⁷ See, eg, Xi Jinping's Report at the 19th National Congress of the CCP (2017).

of law, according to which rights are state-granted. However, it clashes with Hong Kong's legal tradition under which the protection of national security is subject to international human rights standards and constitutional and common law principles enforceable by an independent judiciary. Hence, unlike the debate on security and the rule of law in the typical liberal democratic context, where reference to a common set of democratic values to resolve the tension is possible, in the China–Hong Kong context there is no such common frame of reference to appeal to.

At the same time, unlike in the typical authoritarian context where normatively appealing solutions may be found in the liberalisation of or secession from the ruling regime, in the China–Hong Kong context there are strong *prima facie* normative grounds for retaining the 'one country, two systems' framework. That framework expressly mandates that Hong Kong remain liberal (in fact, it envisages Hong Kong becoming even more liberal-democratic under Chinese rule, ie maturing from a partial to full democracy) without altering the Chinese regime's authoritarian nature and sovereign status.⁸ If the framework is to be retained – and this book assumes that it should be – then it is necessary to find ways of preserving the differences between socialist and liberal ideologies within one nation; an arrangement that has no precedent. Any solution to the conflict between national security and the rule of law in the 'one country, two systems' context is therefore likely to be autochthonous.

The complexity of the conflict is aggravated by its constitutional dimension. Hong Kong's post-handover constitutional document, the Basic Law, institutionalises the ideological differences between the two jurisdictions and promises to preserve them for at least 50 years, ie the duration of Hong Kong autonomy to which China committed under the Sino–British Joint Declaration, the international treaty underpinning the handover of sovereignty. However, the Basic Law does not fully specify how such vast differences can be sustained without disintegration or assimilation.⁹ On the one hand, the document grants Hong Kong extensive autonomous powers, including the final power of adjudication, and the maintenance of its pre-handover systems. In line with liberal constitutionalism, the Basic Law also guarantees an extensive list of individual rights, entrenches the International Covenant on Civil and Political Rights in domestic law, institutes checks and balances including judicial review by an independent judiciary, and promises eventual universal suffrage for Hong Kong's legislature and Chief Executive. On the other hand, in line with the socialist ethos of control, it vests China with important supervisory powers, including the final power to interpret the Basic Law. In addition, Article 23 of the Basic Law – to which a great many of our contributors refer – requires Hong Kong to enact legislation to prevent

⁸C Chan, 'Thirty years from Tiananmen: China, Hong Kong, and the ongoing experiment to preserve liberal values in an authoritarian state' (2019) 17 *International Journal of Constitutional Law* 439, 442.

⁹This and the following two paragraphs are adapted from Chan, 'Thirty years from Tiananmen' (ibid) 442–43, 444–45.

treason, subversion, secession, sedition, the theft of state secrets and ties with foreign organisations opposed to the Chinese Government. Through these and other provisions, the Basic Law seeks to maintain China's conception of its sovereign prerogatives alongside Hong Kong's liberal values, but it is not at all clear on how these tensions can be resolved.

The potential for such ideological differences to result in constitutional conflict is not academic. This can be illustrated by reference to just two such conflicts. The first, in 2003, revolved around the Hong Kong Government's first, and so far only, attempt to introduce legislation to implement Article 23 of the Basic Law.¹⁰ The attempt failed because of widespread public opposition, much of which considered the Bill overly repressive by reference to international rights standards. A 500,000-person demonstration on 1 July 2003 ultimately forced the Government to shelve the Bill, even though the Basic Law arguably required (and continues to require) the introduction of such a law. The second, in 2014, arose out of disputes over what form 'universal suffrage' would take for the 2017 Chief Executive election.¹¹ Hong Kong's pan-democratic camp insisted on free and fair elections, but Beijing decided to grant only hegemonic elections¹² in which everyone could vote, but only for a select list of candidates approved by a pro-Beijing committee.¹³ This decision sparked the 79-day illegal occupation of roads that became known internationally as the Umbrella Movement. China refused to yield, and the prevailing election methods have thus remained unchanged.

The ideological tension between the two sides has also manifested institutionally. The Basic Law divides the power for interpreting it between the Standing Committee of the National People's Congress (NPCSC) and the Hong Kong courts. Whilst the former enjoys the final, plenary power of interpretation, the latter have authority to interpret the Basic Law in the course of adjudication, subject to a duty to refer provisions on Chinese prerogatives to the NPCSC.¹⁴ The two organs are poles apart in interpretative methods. The text plays a central role in Hong Kong's interpretative tradition, whilst the NPCSC's interpretations may in practice amend legislation. These differences reflect opposing conceptions of the law. In the liberal tradition, the purposes that the law serves are predicated upon the law's ability

¹⁰ National Security (Legislative Provisions) Bill 2003. See generally, HKSAR Government, 'Proposals to implement Article 23 of the BASIC LAW', available at www.basiclaw23.gov.hk/english.

¹¹ In 2007, the NPCSC determined that universal suffrage for the Chief Executive election could be introduced in 2017.

¹² See, eg, L Diamond, 'Thinking about Hybrid Regimes' (2002) 13 *Journal of Democracy* 21; S Levitsky and LA Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (Cambridge, Cambridge University Press, 2010) 7.

¹³ NPCSC, 'Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of Hong Kong by Universal Suffrage and on the Method for Forming the Legislative Council in Hong Kong in the Year 2016' (adopted at the Tenth Session of the Standing Committee of the Twelfth National People's Congress, 31 August 2014).

¹⁴ This arrangement is inspired by the European Union's preliminary reference procedure. See C Chan, 'Implementing China and Hong Kong's Preliminary Reference System: Transposability of Article 267 TFEU Principles' [2014] *Public Law* 642.

to guide. Legal certainty is important. The courts cannot change the meaning of a law retrospectively in the name of interpretation. However, notwithstanding its recent emphasis on 'law-based governance',¹⁵ for Beijing the law remains chiefly a political tool. Legal certainty is less important than the flexibility required to adapt to political exigencies,¹⁶ illustrating a clear difference between the NPCSC and Hong Kong courts, which has played out in clashes on questions such as the binding scope of an NPCSC interpretation and what material ought to be admissible as an interpretative aid.¹⁷

III. Developments Since 2003

The question of how China's national security can be reconciled with Hong Kong's rule of law has already been explored in depth in the context of evaluating the 2003 Article 23 Bill.¹⁸ Yet there have been important developments since 2003 that call for a revisiting of the question beyond the Article 23 context. As explained below, these developments suggest that China's imperatives for regulating national security in Hong Kong have increased, whilst Hong Kong's ability to maintain its rule of law has decreased. More generally, we are now almost mid-way through China's 50-year commitment to Hong Kong's autonomy under the Joint Declaration. At the end of the 50-year period in 2047, China is arguably free to depart from its basic policy on segregation of systems, stated as unamendable in the Basic Law. If that policy is to persist beyond 2047 – and it is widely considered to be in the best interests of both jurisdictions that it do so – now would be a timely juncture for reflecting on what constitutional design, institutions, practices and socioeconomic conditions are needed to ensure its long-term viability.¹⁹

IV. China's Increased Imperatives for Controlling Hong Kong

There are at least three reasons for China's tightened policy over Hong Kong in recent years. First, it is likely part and parcel of Xi Jinping's overall plan to securitise the state, manifested in, for example, the enactment of the PRC National

¹⁵ See, eg, Xi Jinping's Report at the 19th National Congress of the CCP (n 4).

¹⁶ See Y Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, 2nd edn (Hong Kong, Hong Kong University Press, 1999) 212–13; C Chan, 'The Legal Limits on Beijing's Powers of Interpreting the Basic Law' (HKU Legal Scholarship blog, 3 November 2016), available at www.researchblog.law.hku.hk/2016/11/cora-chan-on-legal-limits-of-beijings.html.

¹⁷ See *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211.

¹⁸ H Fu, CJ Petersen and SNM Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong, Hong Kong University Press, 2005).

¹⁹ This paragraph is adapted from Chan, 'Thirty years from Tiananmen' (2019) 450–51.

Security Law, the CCP's latest 'retraining' policy for the Uighurs in Xinjiang, the country's ongoing persecution of human rights advocates and lawyers since 2015, and its bold use of technology as a tool for control. Second, recent developments in Hong Kong seem to have convinced Beijing that the territory now poses real security threats that warrant a heavier hand. The large-scale demonstration that led to the failed attempt to enact Article 23 legislation in 2003²⁰ indicated to Beijing that Hong Kong might spiral out of (its) control if granted genuine democracy. Hence, shortly thereafter, the NPCSC issued an interpretation granting itself additional power to control the pace of democratic reform in Hong Kong.²¹ In 2014, civil society engaged in heated debate over the launch of a large-scale Occupy Central movement should Beijing refuse to grant genuine democracy. Amongst Beijing's responses to this debate was a white paper pronouncing that it had 'comprehensive jurisdiction' over Hong Kong, a position that apparently contradicts the Joint Declaration's promise of a high degree of autonomy,²² and the aforementioned imposition of hegemonic elections. The moves were indicative of China's strong resolve to prevent any possibility of Hong Kong becoming a base for subversion.

Occupy Central did indeed take place, but the failure of the movement to achieve democratisation prompted calls for Hong Kong's disconnection from China, self-determination and even secession.²³ Although these calls have never been widespread, and none of the activities associated with them thus far constitutes a genuine threat to national security or comes close to being a public emergency by international human rights standards, China considers them a threat and has responded resolutely. In 2016, through an interpretation of the Basic Law (the 'oath-taking interpretation'),²⁴ the NPCSC transformed a provision whose original formulation simply required major officers to swear an oath of allegiance to the Basic Law before assuming office into a formal political screening mechanism: individuals who wish to run for or assume office must be 'sincere' in upholding the Basic Law, including its stipulation of Chinese sovereignty. Anyone who has advocated, or even displayed mild sympathy for, secession or self-determination cannot be sincere, and is thus disqualified. At the time of writing, 13 elected or would-be legislators have been disqualified on this ground.

Furthermore, in 2018, in an unprecedented move the Hong Kong Government used local law to ban a pro-independence political party. It publicised a letter from the Chinese Government expressing support for its decision to ban the party and subsequently submitted a report to the latter on the ban. At the same

²⁰ J Cheng, 'The Story of a New Policy' (Fall 2009) 15 *Hong Kong Journal*.

²¹ NPCSC, 'The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law' (Adopted at the Eighth Session of the Standing Committee of the Tenth National People's Congress, 6 April 2004). See also Chan (n 8) 445.

²² Information Office of the State Council of the PRC, 'The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region' (10 June 2014).

²³ This paragraph is adapted from Chan (n 8) 445.

²⁴ NPCSC, 'Interpretation by the Standing Committee of the National People's Congress of Article 104 of the Basic Law' (Adopted by the Standing Committee of the Twelfth National People's Congress at its Twenty-fourth Session, 7 November 2016).

time, the push for secession has prompted renewed calls from pro-China sections of society for the Hong Kong Government to reintroduce legislation to implement Article 23. All of these events clearly demonstrate Beijing's will to stamp out pro-self-determination or pro-independence moves in Hong Kong, however unpromising they may be. Any Article 23 law introduced in this context is likely to be draconian, and more repressive towards rights than the 2003 Bill was, targeting not just acts that pose a genuine threat to territorial integrity or are likely to incite imminent violence, but also the mere advocacy of anything Beijing perceives to be a threat.

Third, increasing economic, social and cultural integration between China and Hong Kong, coupled with the widening power imbalance between the two jurisdictions, has given China new incentives (and weakened disincentives) to assimilate the two legal systems.²⁵ A good illustration of these dynamics at work is the controversy over China's 'co-location arrangement' for a train station in Hong Kong that links the territory to China's high-speed railway network. Under the arrangement, both Chinese and Hong Kong checkpoints are located in Hong Kong, leading to the application of Chinese law and jurisdiction (including criminal jurisdiction) to a part of Hong Kong. However, the Basic Law's mechanism for such application was bypassed; instead, Beijing sought to legitimise the arrangement through a mere 'decision' issued outside the Basic Law framework.²⁶ Despite the far-reaching constitutional implications of the arrangement, many in Hong Kong seem to have accepted it as a necessary, and not particularly significant, trade-off for securing the vast potential economic benefits of integration with the national railway network and the placation of Beijing. In the end, the arrangement was approved by the Legislative Council.

This controversy reveals that, first, economic integration can drive legal integration and, second, as China's economic power grows, the incentives to retain (and disincentives to dismantle) Hong Kong's distinctiveness are dwindling. Three decades ago when the 'one country, two systems' model was first conceived, China's economy was just beginning to open up, whereas Hong Kong was already a thriving capitalist economy. The means to economic prosperity for both was thus segregated systems. Three decades on, however, China has become the world's second largest economy and is projected to become the largest by 2032.²⁷ The country no longer needs a distinct Hong Kong in the way that it used to and, for Hong Kong, the means to achieve continued prosperity may no longer be segregation but rather integration with the Chinese economy and the securing of Beijing's

²⁵This and the following paragraph is adapted from Chan (n 8) 449–50.

²⁶NPCSC, 'Decision of the Standing Committee of the National People's Congress on Approving the Co-Operation Arrangement Between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port At the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link For Implementing Co-Location Arrangement' (Adopted at the Thirty-first Session of the Standing Committee of the Twelfth National People's Congress, 27 December 2017).

²⁷Centre for Economics and Business Research, *World Economic League Table 2019* (2018), available at cebr.com/welt-2019.

patronage. The economic incentives for assimilation have seemed to embolden an ever more interventionist China. Those imperatives will only be reinforced, and the choice between economic prosperity and the rule of law that Hong Kong faces starker, as the two economies integrate further as part of the Greater Bay Area project and as China trundles towards becoming ‘a global leader in terms of composite national strength and international influence’ by its centenary in 2049.²⁸

All of this suggests that the scene is set for a Hong Kong debate on national security. Certainly, such a debate seems timelier and more likely now than it was in 2003 when the Hong Kong Government first attempted to pass an Article 23 law. While the prospect of an Article 23 law being introduced is very real, the evolving understanding of security in China and the developing political situation in Hong Kong point towards the relevance of far more contexts than ‘merely’ Article 23 for questions relating to security and the rule of law. The NPCSC’s oath-taking interpretation demonstrates that China can export its security concepts by issuing an interpretation of the Basic Law. The co-location controversy illustrates that the NPCSC may even be able to achieve the effects of such interpretation without following the Basic Law’s procedure for issuing one.²⁹ Beijing seems able to enforce its desired security measures through the Hong Kong Government, as shown by the latter’s active disqualification of legislators and candidates and, most recently, the attempt (met with substantial civil resistance) to introduce legislative amendments that would allow for surrender of fugitives in Hong Kong to mainland China.³⁰ Finally, if it is true that (as some suspect) the Chinese Government abducted the owners of Causeway Bay Books in 2016, took them to mainland China, and coerced them to admit their guilt, then it seems that Beijing is ready to quench its national security concerns even extra-constitutionally. Hence, whilst Article 23 continues to be a core focus of scholarly and political debate about national security and the rule of law in Hong Kong, it is by no means the only issue that requires urgent attention.

V. Democratic Backsliding in Hong Kong³¹

Just as China’s imperatives to regulate national security in Hong Kong are intensifying, the institutions and culture needed to maintain Hong Kong’s rule of law are waning. Some of the means used to erode those institutions and culture are similar to those adopted by popularly elected rulers in other jurisdictions experiencing

²⁸ See, eg, Xi Jinping’s Report at the 19th National Congress of the CCP (n 4).

²⁹ Chan (n 8) 445.

³⁰ Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019. On 15 June 2019, in response to widespread opposition, the Hong Kong Government announced that legislative proceedings on the Bill would be suspended.

³¹ This section is adapted from Chan (n 8) 443–49.

democratic backsliding.³² As a polity with a strong rule of law tradition within an authoritarian state, Hong Kong has seen sophisticated uses of the law by both Beijing and the Hong Kong Government that tend towards eroding its liberal foundations.³³

First, the Basic Law has been weakened as a framework for guaranteeing the rule of law in Hong Kong. Although it is not clear from the Basic Law's wording that the NPCSC can issue an interpretation on any provision on its own volition, or that it can use an interpretation to change the prevalent understanding of the Basic Law, the NPCSC has since 2003 used its interpretative powers in these ways. The way in which Beijing pushed through the co-location arrangement suggests that it may even be able to circumvent the formal procedure for issuing an interpretation altogether. The result is that the Basic Law's guarantees – extensive though they may seem – can be delivered only at China's grace,³⁴ calling into question the constitutional character of the document in respect of individuals' and society's relationship with China, and arguably also with the Hong Kong Government.

Second, the courts have become less muscular in checking Chinese actions that may intrude upon Hong Kong's autonomy and the freedoms of its population. Back in 1999, the Hong Kong courts were bold enough to assert jurisdiction to strike down Chinese acts that did not comply with the Basic Law³⁵ and, in 1999–2001, to use the common law distinction between *obiter* and *ratio* to render non-binding a certain part of an NPCSC interpretation.³⁶ Recently, however, they have become much less ready to challenge Chinese decisions. In a 2017 case, for example, the courts refused to examine whether the NPCSC's oath-taking interpretation added so much content that it exceeded the boundaries of an interpretation allowed by the Basic Law.³⁷ In 2018, when faced with a decision issued by the NPCSC outside the Basic Law's framework, the Court of First Instance (CFI) held that the NPCSC could act outside the Basic Law, that the courts had no power to challenge such an act, and that the NPCSC decision at stake attracted conclusive weight.³⁸ In another case, the CFI refused to use common law methods to read down an NPCSC interpretation.³⁹

³² See eg MA Graber, S Levinson and M Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford, Oxford University Press, 2018); D Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189; OO Varol, 'Stealth Authoritarianism' (2015) 100 *Iowa Law Review* 1673.

³³ See, eg, A Cheung, "For My Enemies, The Law": Abusive Legalism' (2018 International Society of Public Law Conference, University of Hong Kong, 2018).

³⁴ Chan, 'The Legal Limits on Beijing's Powers' (2016).

³⁵ *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 26A–B.

³⁶ *Chong Fung Yuen v Director of Immigration* [2000] 1 HKC 359 (CFI) 382E–83D; [2000] 3 HKLRD 661 (CA) 675D–E, 679D–F, 680C–F, 686E–F; (2001) 4 HKCFAR 211 (CFA) section 6.2.

³⁷ *Chief Executive of HKSAR v President of The Legislative Council* [2017] 1 HKLRD 460 (CA) [55]–[58]; sub nom *Yau Wai Ching v Chief Executive of HKSAR* (2017) 20 HKCFAR 390 (CFA) [35]–[36].

³⁸ *Leung Chung Hang, Sixtus v President of Legislative Council and Secretary for Justice* [2019] 1 HKLRD 292 [53]–[76].

³⁹ *Chan Ho Tin v Lo Ying-Ki Alan and others* [2018] 2 HKLRD 7 [46]–[49].

The cumulative effect of these recent cases is that the courts are giving Chinese actions full force in Hong Kong, regardless of whether they comply with the substantive or procedural requirements of the Basic Law. The courts' changing attitudes did not arise from formal changes in the structure or competences of the courts or from direct political pressure. There have been no attempts to pack the courts in Hong Kong or to oust their jurisdiction, and nor is there any evidence of direct threats to judges. Rather, the pressure seems more subtle, indicating perhaps that, as Ghai has put it, the Chinese legal system has 'triumphed' over common law in Hong Kong because of its 'predominant political power'.⁴⁰

Third, the legislature's role in curbing abuses of power has also waned. The Government's disqualification of candidates and legislators (2016) and changes in procedural rules (2017), and the increasing success of pro-China candidates in direct elections since the handover have diminished the legislature's ability to check repressive laws. The passing of the co-location bill in 2018 is a case in point, illustrating its compliant attitude even in the face of proposals that blatantly violate the Basic Law.

Although China's increased intervention and the Hong Kong Government's full cooperation in implementing China's will (and at times even exceeding it) have sparked social movements that have strengthened civil society in Hong Kong, they have also served to undermine civil society. To name but a few examples of local government measures to restrict civil society action, the Government criticised a university publication for advocating Hong Kong independence; denied an international journalist who had hosted a talk by the leader of a pro-independence political party entry to Hong Kong as well as subsequently banning that party; and disqualified a pro-self-determination candidate from standing in village elections, which fall outside the scope of the NPCSC oath-taking interpretation. These measures, amongst others, have directly impaired, or exerted chilling effects upon, political rights and freedoms of speech, association and the press, handicapping civil society's capacity to mobilise against repressive measures. Most recently, the Hong Kong Government proposed a law that criminalises expressions of disrespect for the national anthem⁴¹ and legislative amendments that would lift the restriction on surrender of fugitives to China,⁴² both of which, if passed, would have serious chilling effects on civil liberties. At the time of finalising this Introduction (June 2019), the Hong Kong Government has suspended the legislative proceedings on the latter due to widespread opposition,⁴³ but it is not yet clear

⁴⁰ See Y Ghai, 'The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?' (2007) 37 *Hong Kong Law Journal* 363, 403–05.

⁴¹ National Anthem Bill.

⁴² Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019. On 15 June 2019, the Hong Kong Government announced that legislative proceedings on the Bill would be suspended, in response to widespread opposition thereto.

⁴³ As it happened: Carrie Lam backs down and "suspends" Hong Kong extradition bill, sets no new time frame', *South China Morning Post*, 15 June 2019, available at www.scmp.com/news/hong-kong/politics/article/3014638/hong-kong-extradition-bill-carrie-lam-hit-pause-button. See also text to n 49 below.

whether and in what form it will be reintroduced. There are numerous signs of self-censorship by the media.⁴⁴ Indeed, the latest survey by the Public Opinion Programme of the University of Hong Kong shows that ‘the freedoms of “academic research”, “speech”, “press”, “publication” and “association” have dropped to their record lows since the questions were first asked in August 1997’.⁴⁵

Finally, China’s formidable economic power poses a key obstacle to the mobilisation of civil society to resist China’s authoritarian advances. A substantial portion of the Hong Kong population has become willing to succumb to Chinese pressure in return for economic patronage, as reflected in the relatively muted response to China’s co-location arrangement. The ability of the territory to remain liberal ultimately depends on a general desire to safeguard Hong Kong’s liberal character, as without such a desire even ‘the best institutional and constitutional design in the world will likely be for naught’.⁴⁶ At the time of finalising this Introduction (June 2019), large-scale protests forced the Hong Kong Government to suspend its proposed legislative amendments that would allow Hong Kong to surrender fugitives to China. These protests are the largest that Hong Kong has seen since the 2003 demonstration against the National Security Bill and the 2014 occupy movement on democratic reform. According to the organisers, the protest on 9 June 2019 drew over a million people; the one on 16 June 2019 nearly two million.⁴⁷ This turn of events suggests that a significant portion of the general public in Hong Kong are still willing to stand up to guard Hong Kong’s rule of law. However, the point being made here remains true: that the rising economic stature of China is an incentive for many in Hong Kong to forego liberal values. The power imbalance between the two jurisdictions will remain the key impediment to safeguarding liberal values in Hong Kong.

VI. Organisation of the Book

These developments do not bode well for Hong Kong’s rule of law. Indeed, the first two parts of this book do not appear to counsel optimism. The chapters in Part I suggest that a clash is inevitable. Chen explains why legislating for national security in Hong Kong is one of the most difficult challenges facing the China–Hong Kong

⁴⁴ See eg Hong Kong Journalists Association, 2018 Annual Report, ‘Candle in the wind: national security law looms over diminishing freedoms’, available at www.hkja.org.hk/ebook/e_Annual_report_2018/files/downloads/HKJA%20Annual%20Report%202018.pdf, ch 3.

⁴⁵ Public Opinion Programme of the University of Hong Kong, ‘HKU POP releases its final round of social indicators’ (21 May 2019), available at www.hkupop.hku.hk/english/release/release1588.html.

⁴⁶ T Ginsburg and AZ Huq, *How to Save a Constitutional Democracy* (Chicago, The University of Chicago Press, 2018) 245.

⁴⁷ ‘Hong Kong protest: ‘Nearly two million’ join demonstration’ BBC News (17 June 2019), available at www.bbc.com/news/world-asia-china-48656471; ‘Hong Kong extradition protests leave city in shock’ BBC News (13 June 2019), available at www.bbc.com/news/world-asia-china-48618484; ‘Violent clashes mar protest after “more than a million” Hongkongers of all ages and backgrounds march against controversial extradition bill’ *South China Morning Post*, 10 June 2019, available at www.scmp.com/news/hong-kong/politics/article/3013757/violent-clashes-mar-protest-after-more-million-hongkongers.

relationship. That explanation is followed by Fu's chapter, which elaborates China's approach to national security and the role that Hong Kong plays in China's security order. Lam then analyses the relationship between the rule of law and such concepts as national identity and highlights the implications of her findings for the introduction of national security measures in Hong Kong. Cardinal, offering a comparative perspective from Macau, which passed the equivalent of Article 23 legislation in 2009, suggests that Hong Kong is now converging with Macau in terms of its (lack of) resilience against Chinese pressure. In his critical reflection on these chapters, Lin argues that at a fundamental level the existence not only of two systems but of two *national security* systems within what is one country explains the difficulties posed by and to the passage of an Article 23 law in Hong Kong. In doing so he develops his argument that in the absence of Article 23 legislation in Hong Kong the likelihood is that the Central Government will take action either by applying national security law from mainland China to Hong Kong or by issuing an interpretation of the Basic Law and that, in either case, such a development may effectively dismantle the commitment to two systems. This highlights what might be said to be Hong Kong's Article 23 predicament: if Hong Kong law on Article 23 is undesirable from a rule of law perspective but nevertheless preferable to law developed by China, what should be done and, if Article 23 law is to be passed, is there any way in which to bolster the rule of law in Hong Kong regardless?

Part II of the book then explores what sources of resilience Hong Kong has for resisting encroachments on the rule of law that come in the guise of national security. At first reading, these chapters suggest that these sources are either waning or insignificant. Jhaveri suggests that the Hong Kong courts have some space in administrative law to safeguard rights. That space is described as modest, however, because the NPCSC can ultimately restrict it via an interpretation of the Basic Law. The following chapters then analyse the weakening of various institutions' ability to defend the rule of law: the judiciary and legal profession (Lo), the legislature (Ng) and civil society (Davis). A closer reading, however, reveals that these authors all believe that there is much that the people and institutions of Hong Kong can still do to strengthen their resilience. A common message is that Hong Kong is well-endowed with constitutional arrangements (extensive autonomous powers and guarantees of eventual universal suffrage), institutions (impartial courts, a clean election system), traditions (a fine judiciary and legal profession, vibrant judicial review), culture (strong civil society, high esteem for the rule of law) and geo-political status (an international financial centre that attracts international attention) that could help to sustain the rule of law if properly utilised. In her commentary on Part II Chopra offers a sobering analysis of the limitations of the Basic Law as a source of resilience in the face of national security logics and legislation. She subtly but powerfully questions whether reliance on the Basic Law – especially without further institutional strengthening and innovation, and without a continued commitment to Hong Kong's openness and transnationalism – is sufficient, or whether Hong Kong people committed to the rule of law need better to 'transcend liberal blind spots', as she puts it, through a 'critical, creative, heterodox engagement with the law'.

The message that it is possible to strengthen Hong Kong's resilience becomes even clearer in Part III of the book, the contributors to which propose ways of strengthening Hong Kong's sources of resilience. The chapters therein suggest that much lies in the hands of the territory's people and institutions at all three key stages of the security law's lifecycle: drafting, enforcement and adjudication. Young sketches the principles that Hong Kong law-makers should follow in drafting any Article 23 legislation to ensure respect for the rule of law. Petersen proposes a role for international law and institutions in monitoring Hong Kong's liberal status. Johannes Chan then demonstrates how the proper application of common law principles could limit the undue import of expansive national security concepts into Hong Kong's legal system, how the independence of the judiciary could be enhanced, and how best to maintain open justice while respecting the need for secrecy in national security cases. This chapter is followed by Cora Chan and de Londras's chapter proposing new arrangements for monitoring the excesses of national security measures, including the establishment of an Independent Reviewer, the enactment of an access to information law and archives law, and the use of sunset clauses. Hitting a pragmatic and realistic tone, however, Gittings concludes Part III with a critical reflection that considers the costs and likely success of the proposals in the preceding chapters, showing keenly the ways in which local, national and geopolitical realities may well conspire to limit the possible impact and feasibility of the other authors' proposals.

Expanding our lens somewhat to place the China–Hong Kong relationship into broader perspective, Yash Ghai and Jill Cottrell Ghai conclude the book by highlighting the increasing influence that China has over security, economy and politics in other parts of the world, particularly through the Belt and Road Initiative. For Ghai and Cottrell Ghai the implications of this for Hong Kong are significant, not least because China's growing economic influence may well lead to a decline in solidarity from other states on which Hong Kong may find itself reliant to sustain its autonomy in the longer term.

The answer this book offers to the question of whether China's national security endangers Hong Kong's rule of law is, thus, 'not necessarily'. China's conceptions of national security are inherently incompatible with Hong Kong's conception of the rule of law. However, the timely, wise and creative use of sources of resilience by the people and institutions of Hong Kong could ensure that the territory's rule of law continues to flourish in China's authoritarian shadow. As one of us has argued elsewhere:

[S]uch tension [between the two systems] is precisely the beauty of 'one country, two systems'. The crux of this governing framework is tension, not harmony. It is through the solemn ping-ponging between institutions in the two systems that such divergent systems continue to survive side by side.⁴⁸

⁴⁸ C Chan, 'How Hong Kong's courts interpret Beijing's interpretation of the Basic Law may yet surprise' *South China Morning Post*, 9 November 2016, available at www.scmp.com/comment/insight-opinion/article/2044385/how-hong-kongs-courts-interpret-beijings-interpretation.