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# Constitutional Additives in China's Hong Kong: Could central constitutional decision-making for a region under a hybrid regime ever be illegitimate?

Pui-yin Lo\* 

Faculty of Law, University of Hong Kong, Hong Kong  
Email: [pylohk@hku.hk](mailto:pylohk@hku.hk)

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## Abstract

This article examines the central-local relation between China's unitary and socialist state and its capitalist Special Administrative Region (SAR) of Hong Kong, and considers that, notwithstanding the centralised system underpinning the relationship, Chinese central decision-making in respect of Hong Kong could raise issues of legitimacy. This article focuses on the decision-making of China's National People's Congress and its Standing Committee between 2016 and 2021, purportedly pursuant to the *Chinese Constitution* and the *Hong Kong Basic Law* (the instruments providing for Hong Kong's different systems). Upon examination, this article argues that legitimacy-based inhibition, restriction, and resistance arises in relation to the legal control exercised by the Chinese central authorities over Hong Kong. This is made possible by the 'conditionality' of the Basic Law, framed as the implementation of China's policies for the return of Hong Kong on 1 July 1997, and by the nurturing of the perceived pluralistic premise of the policy of 'One Country, Two Systems' by Hong Kong's common law judges and lawyers in their interpretation and application of the 'imposed constitution' of the Basic Law.

## Introduction

Many debates over the legitimacy of constitutional decisions take place in the context of a sovereign state and that state's constitutional instruments. A sovereign state that adopts a multi-level form of governance pursuant to a constitution – be it through the establishment of a federal structure of government consisting of federal and state/provincial/subnational institutions, the enactment of an instrument of autonomy, or the devolution of governing power to a subnational unit<sup>1</sup> – may take decisions that impinge on the relationship between the established institutions of central/national and local/subnational power.

A critical moment for questioning legitimacy arises when an amendment or change made by a constitutionally authorised or politically enabled body of the state is not to the liking of those affected, has been adopted in deviation from established provisions or approaches, or contradicts

\*Barrister-at-law (England and Wales and Hong Kong). Visiting Fellow, Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong. An earlier draft was presented at the conference 'Constitutional Amendment and Legitimacy: When is a Constitutional Amendment Illegitimate?' (National University of Singapore, 25 May 2021). The author declares no competing interests.

<sup>1</sup>See Nicholas Aroney & Albert HY Chen, 'Multi-level Governance and Constitutions of "Plurality-in-Unity": "One Country, Two Systems" in the Hong Kong Special Administrative Region (1997–2019)' (Feb 2022) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4025796](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4025796)> accessed 23 Jan 2025.

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accepted norms or values of the relevant polity. In hybrid or authoritarian regimes, where political power is formally or substantively consolidated and exercised without much opposition or checking, it is likely that challenges to the legitimacy of such alterations will focus less on constitutional and legal reasoning and instead take the form of social movements and widespread public protest.

It seems heretical to suggest that the unitary, centralised, and socialist state of the People's Republic of China (PRC), led by the vanguard Chinese Communist Party (CCP), could allow for the legitimacy of decisions made by its central authorities, established under the *PRC Constitution*, to be challenged.<sup>2</sup> However, this article sketches the central-local relation between the PRC central authorities and Hong Kong, one of the two Special Administrative Regions (SARs) of the PRC, and suggests that, at least (or at most) theoretically, this relationship might allow for such challenges. These challenges stem from the unique conditions under which the PRC has established and maintained the Hong Kong SAR (HKSAR) and its systems, which require the central authorities to exercise a certain degree of restraint in their actions toward the HKSAR and its systems. Failure to do so could undermine the durability and efficacy of the PRC's resumption of sovereignty over Hong Kong, leading to discontent among its residents and others who value Hong Kong's distinct and special status as a capitalist and liberal enclave in China,<sup>3</sup> potentially leading to perceptions of China's exercise of sovereignty over Hong Kong as 'kosher but stinking'.<sup>4</sup>

This article examines five incidents of central decision-making on the HKSAR since 2016 to explore the implications and potential of this submission. None of these instances involved an amendment of the legislative text constitutive of the HKSAR in accordance with the pre-existing and relevant amendment rules, but each was framed as being consistent with the PRC Constitution and the central authorities' policy narrative regarding Hong Kong. The five incidents are:

- (1) an interpretation adopted by the Standing Committee of the National People's Congress (SCNPC) in November 2016 on the provision of the Hong Kong Basic Law on oaths of public officers (the 2016 SCNPC Oaths Interpretation);
- (2) a decision of the SCNPC in December 2017, approving an agreement between Guangdong Province and the HKSAR that led to the establishment of co-located checkpoints of Hong Kong and Mainland China in a high-speed rail terminal inside Hong Kong (the 2017 SCNPC Co-location Arrangement Decision);
- (3) the enactment by the SCNPC, pursuant to authorisation of the NPC, in June 2020 of the *Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* (HKNSL) and the SCNPC's decision to introduce the HKNSL into the HKSAR legal system;
- (4) the SCNPC's two decisions in 2020 regarding the Legislative Council of the HKSAR (the 2020 SCNPC LegCo Decisions); and
- (5) the SCNPC's amendments, authorised by the NPC, of the electoral methods for the Chief Executive and the Legislative Council of the HKSAR of March 2021 (the 2021 Electoral Methods Amendments).<sup>5</sup>

Following this introduction, I will outline the international, political, and constitutional background of the establishment and governance of the HKSAR as a subnational unit of the PRC

<sup>2</sup>See Ngoc Son Bui, 'China's Socialist constitutional identity' (2023) 1 *Comparative Constitutional Studies* 51, 54–59.

<sup>3</sup>See Cora Chan, 'Can Hong Kong Remain a liberal enclave within China? Analysis of the Hong Kong National Security Law' [2021] *Public Law* 271.

<sup>4</sup>Cf Yaniv Roznai, 'Clownstitutionalism: Making a Joke of the Constitution by Abuse of Constituent Power' (2024) 15 *Juridica Ibero* 51.

<sup>5</sup>The circumstances of the incidents and the contents of the Central decision-making are outlined in Albert HY Chen & Po Jen Yap, *The Constitutional System of the Hong Kong SAR: A Contextual Analysis* (Hart Publishing 2023) ch 2.

with a ‘high degree of autonomy’ pursuant to the *Basic Law of the HKSAR (HKBL)*,<sup>6</sup> which was enacted to implement the PRC’s policies for the resumption of exercise of sovereignty over Hong Kong on 1 July 1997 under the principle of ‘One Country, Two Systems’ (OCTS). Within this context, several critical issues emerge: the HKBL itself contains provisions often perceived as textual barriers; there is the continuity of the common law-based legal system administered by judges and lawyers trained in the English common law; and the Hong Kong legal elite actively sought to temper the HKBL and mitigate its role as an instrument imposed by the PRC’s central authorities.

The five sets of constitutional action are then analysed, particularly regarding the extent to which each of them differs from the original, textual, or ordinary conception of an amendment pursuant to the HKBL. The central authorities’ justifications for these actions are also examined. This leads to a discussion on the legitimacy challenges these constitutional actions may pose in the context of central-SAR relations, based on two contrasting premises: the HKBL as a self-restraining statute of the central authorities, or alternatively, as a constitutive instrument imposed on the HKSAR under specific conditions. From this framework, key factors for examining the legitimacy impact of these constitutional actions can be identified, including considerations grounded in textual interpretation, implied provisions, and underlying or intrinsic values or assumptions. The discussion also highlights problems for assessing the legitimacy challenges identified, with recent judgments by the HKSAR courts serving to illustrate such problems.

The article concludes in the frame of subnational constitutionalism by reflecting on the ‘competing’ bases of legitimacy underpinning constitutional actions originating from the centre and from the SAR.

### The PRC’s Ruling of Hong Kong under ‘One Country, Two Systems’ through the Hong Kong Basic Law

The PRC was founded in 1949 as a ‘people’s democratic state’ under the leadership of the CCP. At the time of the PRC’s founding, there were Chinese territories that had not yet come under PRC rule, including the territories of Hong Kong and Macau, which were under British and Portuguese colonial administration respectively, and Taiwan and its associated territories, which were governed by the relocated Government of the Republic of China of the Kuomintang. The PRC’s first constitution, adopted in 1954, introduced a state system of a unitary state with provision for regional autonomy for areas with a national minority population.<sup>7</sup>

Peaceful national reunification of Chinese territories was announced by the CCP in the 1980s, when the CCP adopted the programme of ‘reform and opening up’ and prepared for the drafting of the current PRC Constitution. The leaders of the Taiwan region were told that the CCP and the Kuomintang could achieve reunification on terms that the Taiwan region would have autonomy as a ‘Special Administrative Region’. In September 1982, Deng Xiaoping told Margaret Thatcher, the British Prime Minister at the time, that the PRC would recover the whole of Hong Kong from the UK in 1997 and apply policies to Hong Kong that would maintain the then ‘political and economic systems and even most of its laws’.<sup>8</sup> This approach to national reunification by the PRC became known as ‘One Country, Two Systems’.

On 4 December 1982, the current Constitution of the PRC was adopted.<sup>9</sup> Its preamble declares the PRC to be ‘a unitary multi-national state created jointly by the people of all its nationalities’.<sup>10</sup>

<sup>6</sup>The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (4 Apr 1990) (1990) 29 International Legal Materials 1511.

<sup>7</sup>Jie Cheng (程洁), 治道与治权：中国宪法的制度分析 (*Zhidào yǔ zhìquán: Zhōngguó xiànfǎ de zhìdù fēnxī*) [*State Craft and the State Power: An Institutional Analysis of Chinese Constitution*] (Law Press China 2015) 164–166.

<sup>8</sup>Xiaoping Deng, *Deng Xiaoping on the Question of Hong Kong* (New Horizon Press 1993) 3.

<sup>9</sup>The PRC Constitution was amended by the NPC subsequently in 1988, 1993, 1999, 2004, and 2018.

<sup>10</sup>PRC Constitution 2018, preamble.

State power is exercised through the people's congress system, with the NPC being the organ through which the people exercise state power at the national level; it is the 'supreme organ of state power', the apex of a pyramidal structure of people's congresses.<sup>11</sup> The NPC usually meets in session once a year when it is convened by the SCNPC, its 'permanent body'.<sup>12</sup>

The SCNPC is vested under the PRC Constitution with an array of functions and powers, including interpreting and supervising the implementation of the PRC Constitution; enacting, amending, and supplementing laws; interpreting laws; annulling regulations, decision, orders, and resolutions that are inconsistent with the PRC Constitution, laws, and administrative regulations of the Central People's Government (CPG); declaring national or local states of emergency; as well as other functions and powers delegated to it by the NPC.<sup>13</sup>

As the 'motherland' has yet to be reunified, the PRC Constitution provides that while, fundamentally, the socialist system is the basic system of the PRC and shall not be disrupted,<sup>14</sup> 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 [NPC] in the light of specific conditions'.<sup>15</sup>

Article 3 of the PRC Constitution requires the PRC's state institutions to practise 'the principle of democratic centralism'. This Leninist principle of state and party organisation underlies the relationship between the NPC and the bodies of government at the national level. The object of 'democratic centralism' is the centralisation of power; this is the starting point for resolving central-local and higher-lower relations.<sup>16</sup> Deng Xiaoping's discussion during the 'reform and opening up' era did not downplay the element of centralisation: '[Under] the system, personal interests must be subordinated to collective ones, the interests of the part to those of the whole, and immediate to long-term interests'.<sup>17</sup> The same principle of 'democratic centralism' operates, vertically, in the central-local relation or between the national authorities and subnational regions or entities of the PRC.<sup>18</sup> The practice of distributed powers under this principle 'does not assume that these powers are equal, independent from each other, and can check each other'.<sup>19</sup> The subsequent discussion here will show that this principle operates within the relationship and interaction of the PRC central authorities and the HKSAR, which was established on 1 July 1997.

As the negotiations between the PRC and the UK on the future of Hong Kong drew to a close, Deng Xiaoping expounded the OCTS policy in June 1984. Deng stated that upon the PRC's resumption of exercise of sovereignty over Hong Kong in 1997,

Hong Kong's current social and economic system will remain basically unchanged, its way of life and its status as a free port and an international trade and financial centre will remain

<sup>11</sup>The NPC's functions and powers under Article 62 of the PRC Constitution include the supervision and enforcement of the Constitution (art 62(2)), legislative powers over 'basic laws' (art 62(3)), the power to alter or annul inappropriate decisions of the SCNPC (art 62(12)), and the exercise of 'such other functions and powers as the highest organ of state power should exercise' (art 62(16)).

<sup>12</sup>PRC Constitution, arts 57, 61.

<sup>13</sup>ibid art 67(1), (2), (3), (4), (7), (8), (21), (22).

<sup>14</sup>ibid art 1. The Thirty-sixth Amendment to the PRC Constitution, adopted by the NPC on 11 March 2018, added to Article 1 the provision that the leadership of the CCP is the most basic characteristic of socialism with Chinese characteristics.

<sup>15</sup>PRC Constitution, art 31. Correspondingly, under Article 62(14) of the Constitution, the NPC has the function of 'deciding on the establishment of special administrative regions and the systems to be instituted there'.

<sup>16</sup>See Cheng, *State Craft and State Power* (n 7) 162–164. See also Sarah Biddulph, 'Democratic Centralism and Administration in China', in Hualing Fu, John Gillespie, Pip Nicholson & William Partlett (eds), *Socialist Law in Socialist East Asia* (Cambridge University Press 2018) 195.

<sup>17</sup>Xiaoping Deng, 'Emancipate the Mind, Seek Truth from Facts and Unite as One in Looking to the Future', in Xiaoping Deng, *Selected Works of Deng Xiaoping (1975–1982)* (Foreign Languages Press 1978) 151.

<sup>18</sup>See Han Zhai, *The Constitutional Identity of Contemporary China: The Unitary System and Its Internal Logic* (Brill Nijhoff 2020) 211–216.

<sup>19</sup>See Bui (n 2) 57.

unchanged and it can continue to maintain or establish economic relations with other countries and regions ... We are pursuing a policy of 'one country, two systems'. More specifically, this means that within the People's Republic of China, the mainland with its one billion people will maintain the socialist system, while Hong Kong and Taiwan continue under the capitalist system ... Our policy towards Hong Kong will remain unchanged for a long time to come, but this will not affect socialism on the mainland. The main part of China must maintain socialism, but a capitalist system will be allowed to exist in certain areas, such as Hong Kong and Taiwan.<sup>20</sup>

The Sino-British Joint Declaration on the Question of Hong Kong (SBJD) was signed in Beijing on 19 December 1984 and entered into force on 27 May 1985.<sup>21</sup> In this international agreement, which was concluded to implement the British handover of Hong Kong to the PRC and the PRC's resumption of exercise of sovereignty over Hong Kong on 1 July 1997,<sup>22</sup> the PRC declared its basic policies regarding Hong Kong in twelve points. The HKSAR, which would be established in accordance with Article 31 of the PRC Constitution, would be directly under the authority of the CPG and would enjoy a high degree of autonomy, except for foreign affairs and defence, which would be responsibilities of the CPG. The HKSAR would be vested with executive, legislative, and independent judicial power, including that of final adjudication. Its government would be composed of locals. Its current laws would remain basically unchanged, as would its current social and economic systems and way of life. Rights and freedoms would be ensured by law in the HKSAR. Private property, ownership of enterprises, and legitimate right of inheritance and foreign investment would be protected by law. The maintenance of public order in the HKSAR would be the responsibility of the HKSAR Government.<sup>23</sup> All these basic policies and their elaboration<sup>24</sup> would be stipulated in a Basic Law by the NPC and would remain unchanged for fifty years.<sup>25</sup>

The HKBL was drafted between 1985 and 1990 by a drafting committee consisting of a majority of Mainland Chinese members and Hong Kong members selected from various sectors of the Hong Kong community. The expertise in central-local relations and institutional design rested with the Mainland Chinese members, who were scholars of constitutional, state, and international law, supported by a secretariat of Mainland Chinese officers. There were only a handful of lawyers among the Hong Kong members, and none of them had had the experience and training to formulate an instrument of regional autonomy.<sup>26</sup>

The NPC enacted the HKBL on 4 April 1990, specifying that it would come into operation on 1 July 1997, the date of the establishment of the HKSAR. The NPC, on the same date, adopted a decision to resolve the question of the compatibility of the HKBL with the PRC Constitution.<sup>27</sup> This was

<sup>20</sup>See Deng, *On the Question of Hong Kong* (n 8) 6–11. The statements also included this: 'patriots [shall] form the main body of administrators, that is, of the future government of the [HKSAR].'

<sup>21</sup>See the Joint Declaration of the Government of United Kingdom of Great Britain and the Government of the People's Republic of China on the Question of Hong Kong (19 Dec 1984) 1399 United Nations Treaty Series 33, (1984) 23 International Legal Materials 1366. For an examination of the SBJD, see CL Lim, *Treaty for a Lost City: The Sino-British Joint Declaration* (Cambridge University Press 2022).

<sup>22</sup>SBJD, arts 1, 2.

<sup>23</sup>ibid art 3(1)–(11).

<sup>24</sup>ibid Annex I.

<sup>25</sup>ibid art 3(12).

<sup>26</sup>For accounts of the drafting of the HKBL, including consultations between the British and the PRC Governments at the legal expert level, see Albert HY Chen, 'The History of the Drafting and Implementation of the Basic Law of the Hong Kong Special Administrative Region', in Ngoc Son Bui, Stuart Hargreaves & Ryan Mitchell (eds), *Routledge Handbook of Constitutional Law in Greater China* (Routledge 2022) 34; and Pui-yin Lo, 'The Making of the Hong Kong Basic Law', in Ngoc Son Bui & Mara Malagodi (eds), *Asian Comparative Constitutional Law, Volume 1: Constitution-Making* (Hart Publishing 2023) 99.

<sup>27</sup>National People's Congress, Decision on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (4 Apr 1990) <<https://www.elegislation.gov.hk/hk/A104>> accessed 23 Jan 2025.

considered to be necessary because the HKBL would establish for the HKSAR a system different from the basic socialist system of the country, including a political system that envisaged as the ultimate goal universal suffrage of the Chief Executive (CE) (who is the head of the SAR) and all members of the Legislative Council (LegCo), a legal system based on the common law (where national laws enacted by the NPC or the SCNPC are generally not to apply to the SAR), a self-contained judicial system with power of final adjudication exercised by a Court of Final Appeal in Hong Kong (HKCFA), provisions that regulate the activities of Mainland Chinese units of government in Hong Kong and obliging Mainland Chinese officers to obey the laws of the HKSAR while in Hong Kong, and stipulations that appear to insulate the HKSAR from the practice of the socialist system and policies.<sup>28</sup> The NPC held that the HKBL was constitutional ‘as it is enacted in accordance with the Constitution of the [PRC] and the specific conditions of Hong Kong. The systems, policies, and laws to be instituted after the establishment of the [HKSAR] shall be based on the [HKBL].’

The HKBL reflects a blend of integration and autonomy. On the one hand, the HKSAR is well integrated into the governmental structure provided under the PRC Constitution. This can be seen in the provisions of the HKBL: the HKSAR, an inalienable part of the PRC, is a local administrative region of the PRC directly under the CPG.<sup>29</sup> The CPG shall appoint the CE and the principal officials.<sup>30</sup> The SCNPC has the power to review laws enacted by the HKSAR legislature on the ground of conformity with certain provisions of the HKBL.<sup>31</sup> The SCNPC has the power to introduce national laws ‘relating to defence and foreign affairs as well as other matters outside the limits of autonomy’ for application in the HKSAR.<sup>32</sup> The SCNPC has the power to declare a state of emergency in Hong Kong.<sup>33</sup> The CE shall be accountable to the CPG and the HKSAR.<sup>34</sup> The CE must implement directives issued by the CPG in respect of relevant matters provided for in the HKBL.<sup>35</sup> The power of interpretation of the HKBL is vested with the SCNPC,<sup>36</sup> while the power of amendment of the HKBL is vested with the NPC.<sup>37</sup>

On the other hand, the courts of the HKSAR also have the power of interpretation of the provisions of the HKBL.<sup>38</sup> The courts are to continue to apply the existing common law and refer to future common law precedents.<sup>39</sup> And the NPC’s power of amendment of the HKBL may be constrained by express provisions that prescribe the procedure for the exercise of this power<sup>40</sup> and require that the amendment does not contravene the PRC’s established basic policies regarding Hong Kong.<sup>41</sup>

<sup>28</sup>See Yash Ghai, *Hong Kong’s New Constitutional Order* (2nd edn, Hong Kong University Press 1999) 61–62, 178; and Hualing Fu, ‘Supremacy of a Different Kind: The Constitution, the NPC, and the Hong Kong SAR’, in Johannes MM Chan, Hualing Fu & Yash Ghai (eds), *Hong Kong’s Constitutional Debate: Conflict over interpretation* (Hong Kong University Press 2000) 97–111.

<sup>29</sup>HKBL, arts 1, 12.

<sup>30</sup>ibid art 15.

<sup>31</sup>ibid art 17.

<sup>32</sup>ibid art 18(3).

<sup>33</sup>ibid art 18(4).

<sup>34</sup>ibid art 43(2).

<sup>35</sup>ibid art 48(8).

<sup>36</sup>ibid art 158(1).

<sup>37</sup>ibid art 159(1).

<sup>38</sup>ibid art 158(2). This is subject to the obligation under Article 158(3) to refer specified provisions of the HKBL to the SCNPC for interpretation before final adjudication.

<sup>39</sup>ibid arts 8, 18, 84.

<sup>40</sup>ibid art 159(2) and (3). These provisions restrict the institutional actors that can propose bills of amendment to the HKBL. Additionally, before any bill of amendment can be placed before the NPC, Article 159(2) and (3) mandate that it must first undergo review by the Committee for the Basic Law of the HKSAR (HKBL Committee) under the SCNPC.

<sup>41</sup>ibid art 159(4).



The cross-referencing between the PRC Constitution and the HKBL above indicates that while the PRC has chosen to allow Hong Kong to practise systems and policies (including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative, and judicial systems, and the relevant policies, based on the provisions of the HKBL,<sup>42</sup> the apex law of the HKSAR's legal system),<sup>43</sup> the PRC has embedded, in the same HKBL, various means of control, supervision, and subordination by the central authorities over the governance of the HKSAR, replicating the constitutional powers of the central authorities over the local administrative regions of the PRC.<sup>44</sup> The HKBL's positioning of the HKSAR as a local administrative region of the PRC under the CPG's 'direct governance' determines fundamentally the limitation of the HKSAR's autonomy within the PRC's unitary system.<sup>45</sup> The only restraint built into the HKBL is that of amending itself, as the relevant provision potentially entrenches a 'core' of OCTS policies and stipulates a specific procedure for initiating, deliberating, and completing an amendment. An implication of this restraint, at least by way of parsing the HKBL's text, would be the limited interpretative power of the SCNPC.

Judges of the HKSAR had not considered the HKBL and the relationship between the central authorities and the HKSAR with such sophistication in the early days. Judicial recognition of the HKBL as a constitutional instrument begot judicial review. On 29 January 1999, the HKCFA asserted the 'constitutional jurisdiction' of the courts in its first substantial case involving the HKBL, reviewing not only legislation and administrative decision of the authorities of the HKSAR, but also a 'legislative act' of the NPC or the SCNPC, on the basis of consistency with the HKBL. The HKCFA justified this *Marbury v Madison* approach to judicial review as part and parcel of the HKSAR courts' jurisdiction to enforce and interpret the HKBL.<sup>46</sup> On 26 February 1999, in the face of objections, including from Mainland Chinese legal experts who had drafted the HKBL, that the judicial assertion of jurisdiction to check the supreme authority of the State was a usurpation (or, implicitly, a violation of democratic centralism),<sup>47</sup> the HKCFA released an 'unanimous judgment' acknowledging that its jurisdiction to enforce and interpret the HKBL 'is derived from and is subject to the provisions of the [HKBL]' and expressing its acceptance that

[it] cannot question [the authority of the NPCSC to make an interpretation under Article 158 of the HKBL that would have to be followed by the courts of the HKSAR] ... the Court accepts that it cannot question the authority of the [NPC] or the [SCNPC] to do any act which is in accordance with the provisions of the [HKBL] and the procedure therein.<sup>48</sup>

The use of this statement, which arguably clarified nothing,<sup>49</sup> is shown below.

<sup>42</sup>ibid art 11(1).

<sup>43</sup>ibid art 11(2), stipulating that laws made by the HKSAR's legislature must not contravene the HKBL.

<sup>44</sup>Yash Ghai noted that legal guarantees of Hong Kong's autonomy articulated by the PRC in the SBJD have become grants of power by the Central Authorities, which have supervisory roles on the affairs of the HKSAR; see Ghai (n 28) 146, 204.

<sup>45</sup>See Zhai (n 18) 70.

<sup>46</sup>*Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, 26. For justifications that are better than that of *nec regibus infinita aut libera poestas*, see Pui-yin Lo, *The Judicial Construction of Hong Kong's Basic Law: Courts, Politics and Society after 1997* (Hong Kong University Press 2014) 215–237; and Eric C Ip, 'The Logical Foundations of Judicial Review of Legislation in the Hong Kong Special Administrative Region' (2020) 50 Hong Kong Law Journal 19.

<sup>47</sup>See Weiyun Xiao et al, 'Why the Court of Final Appeal Was Wrong: Comments of the Mainland Scholars on the Judgment of the Court of Final Appeal', in Johannes MM Chan, Hualing Fu & Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over interpretation* (Hong Kong University Press 2000) 53–60.

<sup>48</sup>*Ng Ka Ling & Ors v Director of Immigration (No 2)* (1999) 2 HKCFAR 141.

<sup>49</sup>See Johannes MM Chan, *Paths of Justice* (Hong Kong University Press 2018) 30–34.

Notwithstanding the above setback on ‘constitutional jurisdiction’, the HKCFA resisted a subsequent assertion from the SCNPC on ‘original intention’ over a provision of the HKBL,<sup>50</sup> adopted a common law approach to the interpretation of the HKBL,<sup>51</sup> and, over the next two decades, developed a constitutional jurisprudence protective of fundamental rights and congruent with the methodology and reach of international and comparative human rights jurisprudence.<sup>52</sup> Examples include declarations of unconstitutionality against the legislative discretion authorising interception of telecommunications,<sup>53</sup> the criminalisation of homosexual buggery,<sup>54</sup> the disenfranchisement of prisoners,<sup>55</sup> the exclusion of post-operative transsexuals from marrying a person of the opposite gender,<sup>56</sup> and the policy of amending the gender marker on identity cards for transsexuals.<sup>57</sup> During these years, the Hong Kong public expressed a high level of satisfaction and confidence in the courts of the HKSAR, which uphold the rule of law in the SAR.<sup>58</sup> Further, reputable international agencies had continuously considered the territory’s rule of law to be amongst the highest ranked both regionally and globally.<sup>59</sup>

### The PRC Central Authorities’ Actions between 2016 and 2021

This section explains the five sets of constitutional action taken by the central authorities of the PRC. Each of these actions will be examined with reference to the text of the decision adopted, along with the explanations and opinions given during the deliberations of the relevant NPC or SCNPC Session.<sup>60</sup> The constitutional actions reflect the central authorities’ position on the OCTS policy as outlined in a policy paper in 2014.<sup>61</sup> This ‘White Paper’ stresses, among other things, that the central authorities have ‘overall jurisdiction’ over the SAR pursuant to a SAR system prescribed in the PRC Constitution and the HKBL: that the fundamental objectives for the continued practice of the OCTS policy in Hong Kong are to safeguard the sovereignty, security, and development interests of the PRC and to maintain the long-term stability and prosperity of Hong Kong; and that implementing the OCTS policy requires the combination of upholding the ‘one country’ principle with respecting the differences between the ‘two systems’. This preserves the power of the central authorities while ensuring the HKSAR’s high degree of autonomy, and allows the Mainland to play its role as a strong supporter of the HKSAR by improving Hong Kong’s competitiveness. It also underlines that the ‘two systems’ are ‘subordinate to and derived from’ ‘one country’ and that Hong Kong must be governed by ‘patriots as the mainstay’. Despite the number of words used, this narrative of the central authorities cannot be said to be new or

<sup>50</sup>*Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211.

<sup>51</sup>*ibid* 223–225.

<sup>52</sup>See Lo, *The Judicial Construction of Hong Kong’s Basic Law* (n 46) 69–172; and Chen & Yap (n 5) chs 5, 6.

<sup>53</sup>*Koo Sze Yiu & Anor v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441.

<sup>54</sup>*Leung v Secretary for Justice* [2006] 4 HKLRD 211; *Secretary for Justice v Yau Yuk Lung Zigo* (2007) 10 HKCFAR 335.

<sup>55</sup>*Chan Kin Sum Simon v Secretary for Justice* [2009] 2 HKLRD 166.

<sup>56</sup>*W v Registrar of Marriages* (2013) 16 HKCFAR 112.

<sup>57</sup>*Q v Commissioner of Registration* (2023) 26 HKCFAR 25.

<sup>58</sup>See Julius Yam, ‘Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts’ (2021) 46 *Law and Social Inquiry* 153, 160–161.

<sup>59</sup>See, eg, World Justice Project (WJP), ‘Hong Kong SAR, China’, in WJP, ‘Rule of Law Index 2015’ <<https://worldjusticeproject.org/rule-of-law-index/country/2015/Hong%20Kong%20SAR%2C%20China/>> accessed 23 Jan 2025; and World Bank Group (WBG), ‘Hong Kong SAR, China’, in WBG, ‘Worldwide Governance Indicators’ (2013, 2018, 2023) <<https://www.worldbank.org/en/publication/worldwide-governance-indicators/interactive-data-access>> accessed 23 Jan 2025.

<sup>60</sup>The text, explanations, and opinions related to each decision are published subsequently in the Gazette of the SCNPC, which is available online (in Chinese): <<http://www.npc.gov.cn/wxzlhg/>> accessed 23 Jan 2025.

<sup>61</sup>See PRC State Council Information Office, *The Practice of the ‘One Country, Two Systems’ Policy in the Hong Kong Special Administrative Region* (10 Jun 2014) <[http://english.www.gov.cn/archive/white\\_paper/2014/08/23/content\\_281474982986578.htm](http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm)> accessed 23 Jan 2025.



surprising; its precepts have their roots in Deng Xiaoping's original vision for the OCTS policy, which has been recalled above.

### *The 2016 SCNPC Oaths Interpretation*

On 7 November 2016, the SCNPC adopted an interpretation of Article 104 of the HKBL which provided that specified classes of officers of the HKSAR 'must, in accordance with law, swear to uphold the [HKBL] and swear allegiance to the [HKSAR]' when assuming office. The 2016 SCNPC Oaths Interpretation was the fifth interpretation adopted by the SCNPC since it first utilised its power of interpretation of the HKBL in 1999. A controversy brewed every time the SCNPC exercised this constitutional power, which was said to be 'plenary', 'unqualified', and could be exercised 'at any time'. The HKSAR courts had acknowledged that where the SCNPC interprets a provision of the HKBL, the SCNPC interpretation controls the meaning of that provision from day one and the courts are bound to follow the interpretation, notwithstanding that the HKCFA may have earlier interpreted the same provision of the HKBL differently.<sup>62</sup> Also, the courts have noted that the SCNPC, when exercising its power of interpretation, may go beyond stating the meaning of the text and 'supplement' it.<sup>63</sup> Hence, it has been said that Hong Kong's rule of law is qualified by the SCNPC's authority of adopting interpretations, and the frequency and contents of them.<sup>64</sup>

The 2016 SCNPC Oaths Interpretation was more remarkable than its predecessors in the depth of intervention. The interpretation was introduced by the SCNPC on its own motion while a case lodged by the HKSAR Government was pending before the Court of First Instance in Hong Kong to deal with the probably dire consequences, under local law, of the improper oaths taken by two 'nativist' legislators at the time of assumption of office.<sup>65</sup> Critics learned in the common law had argued that the interpretation was not necessary and purported to interfere with judicial independence of the HKSAR. The interpretation did not specify its temporal effect. It stated also that the text of the oath stipulated in Article 104 of the HKBL – requiring officials 'to uphold the [HKBL] ...' and bear 'allegiance to the [HKSAR]' – was 'not only the legal content which must be included in the oath prescribed by the Article, *but also the legal requirements and preconditions for standing for election in respect of or taking up the public office specified in the Article*' (emphasis added), thereby adding an extra layer of meaning unrelated to the context of Article 104. It further laid out a slew of requirements and consequences in relation to the obligation to take the prescribed oath when assuming office under Article 104.<sup>66</sup> The interpretation thus appears to have gone beyond explaining the provision, and actually provided the *law* to the phrase 'in accordance with law' in the provision, thereby supplanting local laws regulating oath taking and disqualification of members of the LegCo.<sup>67</sup>

<sup>62</sup>*Lau Kong Yung & Ors v Director of Immigration* (1999) 2 HKCFAR 300. See also Chan, Fu & Ghai (n 28) 478–480.

<sup>63</sup>See *Director of Immigration v Chong Fung Yuen* (n 50) 221.

<sup>64</sup>See Anthony Mason, 'The Rule of Law in the Shadow of the Giant: The Hong Kong Experience' (2011) 33(4) Sydney Law Review 623.

<sup>65</sup>The responsible officer presenting the draft SCNPC interpretation referred to the disputes in Hong Kong, including that between the LegCo and the HKSAR Government, over the validity of the oaths taken and whether the legislators could retake the oaths, and indicated that the draft SCNPC interpretation was introduced to effectively crush and prevent 'Hong Kong independence' activities, safeguard national sovereignty and territorial integrity, and protect the fundamental interests of Hong Kong residents and the stability and prosperity of the HKSAR. See Standing Committee of the National People's Congress, 'Explanation on the Draft Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China' (5 Nov 2016) (2016.6) Gazette of the SCNPC 1058.

<sup>66</sup>See the Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress (7 Nov 2016) <<https://www.elegislation.gov.hk/hk/A115>> accessed 23 Jan 2025.

<sup>67</sup>For commentaries, see Pui-yin Lo, 'Enforcing an Unfortunate, Unnecessary and "Unquestionably Binding" NPCSC Interpretation: The Hong Kong Judiciary's Deconstruction of Its Construction of the Basic Law' (2018) 48 Hong Kong

### *The 2017 SCNPC Co-location Arrangement Decision*

On 27 December 2017, the SCNPC adopted a decision approving a co-operation arrangement between Guangdong province and the HKSAR for the establishment of co-located Mainland and Hong Kong checkpoints at a high-speed rail terminal located in the middle of Hong Kong.<sup>68</sup> The SCNPC Session indicated in lengthy preambular passages to the decision that the co-operation arrangement was consistent with the OCTS principle, the PRC Constitution, and the HKBL. They then proceeded to say that the construction of the high-speed rail link between Guangdong province and Hong Kong had great benefits, that the co-location arrangement at the Hong Kong terminal for clearance of passengers and their baggage was necessary, that it was within the high degree of autonomy of the HKSAR under the HKBL to make and implement the co-location arrangement, and that establishing the Mainland Chinese checkpoint at the Hong Kong terminal within Hong Kong did not alter the HKSAR's boundaries, did not affect the HKSAR's high degree of autonomy, and did not undermine the rights and freedoms enjoyed by HKSAR residents in accordance with law.<sup>69</sup> Based on these considerations, the SCNPC declared the decision to be in accordance with the PRC Constitution *and* the HKBL. It approved the co-operation arrangement, directed the State Council to approve the establishment and specific location of the Mainland Chinese checkpoint, and stipulated that the Mainland would exercise jurisdiction over the Mainland Chinese checkpoint in accordance with Mainland laws and the co-operation arrangement from the relevant commencement date. Officers of the relevant authorities would be stationed at the checkpoint to enforce the laws.

The 2017 SCNPC Co-location Arrangement Decision was followed by the enactment of legislation in Hong Kong declaring that the specified area of the Mainland Chinese checkpoint 'is to be regarded as an area lying outside of Hong Kong but lying within the Mainland for the purposes of (a) the application of the laws of the Mainland, and of the laws of Hong Kong, [within this area]; and (b) the delineation of jurisdiction (including the jurisdiction of the courts) over [the area]'.<sup>70</sup>

While it appears clear that the 2017 SCNPC Co-location Arrangement Decision was made with the intention of ensuring the commencement of the major and much-desired cross-border infrastructure project of the high-speed rail link between Guangdong province and Hong Kong through a decision at the highest level of governance of the PRC, the precise *legal* basis for the SCNPC Session's decision-making has remained unclear or unstated, as the decision merely references the titles of the PRC Constitution and the HKBL without further elaboration. The SCNPC Session's refutations of questions over the co-location arrangement's consistency with the HKBL in the preambular passages read like conclusory adjudicative texts answering questions rather

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Law Journal 399; and Han Zhu & Albert HY Chen, 'The Oath-Taking Cases and the NPCSC Interpretation of 2016: The Interface of Common Law and Chinese Law' (2019) 49 Hong Kong Law Journal 381.

<sup>68</sup>See Standing Committee of the National People's Congress, Decision 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 (27 Dec 2017) <<https://www.elegislation.gov.hk/hk/A214>> accessed 23 Jan 2025.

<sup>69</sup>The responsible officer of the CPG presenting the draft SCNPC decision specially indicated that having the SCNPC to approve the co-operation arrangement and to confirm that it was consistent with the OCTS policy, the PRC Constitution and the HKBL would provide a further constitutional legal basis for establishing the co-located checkpoints, as well as the legal basis for the CPG to allow the Mainland authorities to establish the Mainland side of the co-located checkpoints and station authorities there to perform duties. He went on to address various issues of concern to the Hong Kong community about the relation between the co-operation arrangement and provisions of the HKBL. One such issue, raised under Article 18 of the HKBL, related to the stationing of Mainland authorities at the Mainland side of the co-located checkpoints in the Hong Kong terminal, which performed their duties and functions in accordance with Mainland law. See Standing Committee of the National People's Congress, 'Explanation on the Draft Decision 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' (22 Dec 2017) (2018.1) Gazette of the SCNPC 53.

<sup>70</sup>Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Chapter 632, Laws of Hong Kong), s 6(1).

than expounding the meaning of the relevant provisions of the HKBL. As the decisional paragraphs of the decision and the sections of the HKSAR implementing legislation show, the co-location arrangement, implemented in the prescribed manner, effectively ousts in a part of the HKSAR the jurisdiction of the HKSAR authorities, including courts, to administer the laws of the HKSAR and protect the rights of Hong Kong residents there.<sup>71</sup> More broadly, this decision marked the first occasion where the SCNPC expressly invoked the PRC Constitution to rule on or support the validity of an act between the HKSAR and another local administrative region of the PRC, as well as to direct subsequent actions by subordinate authorities at state and local levels.<sup>72</sup>

### *The HKNSL*

The NPC Session adopted on 28 May 2020, following deliberations on a motion submitted by the SCNPC, a decision to take ‘necessary measures to establish and improve the legal system and enforcement mechanisms for the HKSAR to safeguard national security, as well as to prevent, stop and punish in accordance with the law acts and activities endangering national security’.<sup>73</sup> To this end, the NPC Session also entrusted the SCNPC ‘to formulate relevant laws on establishing and improving the legal system and enforcement for the HKSAR to safeguard national security’ and to make a decision for the implementation by the HKSAR locally of such laws.

A month later, on 30 June 2020, the SCNPC adopted the HKNSL. On the same day, the SCNPC decided to add the HKNSL to Annex III of the HKBL, thereby making it a law to be enforced by all authorities of the HKSAR.<sup>74</sup> The HKNSL is a ‘national law’ that overrides any ‘local’ law that is inconsistent with its provisions.<sup>75</sup> It was drafted partly in the lexicon of law-making in the Mainland.<sup>76</sup> It serves the following functions:

- (1) Establishing general principles and duties for the HKSAR and its residents in relation to safeguarding national security;
- (2) Establishing institutions of the HKSAR for safeguarding national security, particularly the Committee for Safeguarding National Security (CSNS);<sup>77</sup>
- (3) Establishing the Office of the Central People’s Government in the HKSAR for the safeguarding of national security (CPGNSO);<sup>78</sup>

<sup>71</sup>See Stephen Thomson, ‘The New Constitutional Disorder: The Unlawful Application of Mainland Chinese Law to Hong Kong’ (2018) 54 *Texas International Law Journal* 115.

<sup>72</sup>For discussion, see Feng Lin, ‘Constitutionality of the Co-location Arrangement at the West Kowloon High-Speed Rail Terminus’ (2017) *Hong Kong Law Journal* 699; and Po Jen Yap & Zixin Jiang, ‘Co-location is Constitutional’ (2018) 48 *Hong Kong Law Journal* 37.

<sup>73</sup>National People’s Congress, Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security (28 May 2020) <<https://www.elegislation.gov.hk/hk/A301>> accessed 23 Jan 2025.

<sup>74</sup>An English translation of the text of the HKNSL was published at <<https://www.gld.gov.hk/egazette/pdf/20202448/egn2020244872.pdf>> accessed 23 Jan 2025.

<sup>75</sup>HKNSL, art 62.

<sup>76</sup>Article 64 of the HKNSL is a glossary provision which translates some of the penal terms used in the HKNSL to specified terms used in the criminal law and criminal procedure legislation of the HKSAR.

<sup>77</sup>HKNSL, ch II. The CSNS is chaired by the Chief Executive and has a National Security Adviser designated by the CPG. For safeguarding national security, it assesses the situation of Hong Kong, makes plans and policies, ‘[advances] the development of the [HKSAR’s] legal system and enforcement mechanisms’, and coordinates ‘major work and significant operations’ in Hong Kong. Information relating to the CSNS’s work is not subject to disclosure. Its decisions are not subject to judicial review (art 14). The CSNS was said by the SCNPC in an interpretation to Article 14 adopted on 30 December 2022 to also have the power ‘to make judgments and decisions on whether or not national security issues are involved’, though Ling Bing has cautioned against reading this interpretation expansively. See Bing Ling, ‘The Constitutional Impact of the National Security Law Interpretation: A Preliminary Analysis’ (2023) 53 *Hong Kong Law Journal* 355.

<sup>78</sup>HKNSL, ch V. The CPGNSO is staffed with officers of the PRC Public Security Ministry and State Security Ministry. It is tasked with analysing and assessing Hong Kong’s national security situation, providing related opinions and proposals, and playing a supervisory and supportive role. Its responsibilities include overseeing, guiding, coordinating with, and providing

- (4) Prescribing the criminal offences of secession,<sup>79</sup> subversion,<sup>80</sup> and terrorism,<sup>81</sup> as well as collusion with a foreign country or external elements to endanger national security,<sup>82</sup> and
- (5) Prescribing the framework for the investigation, prosecution, and punishment of those offences in the HKSAR, as well as the circumstances and framework for the CPGNSO to exercise jurisdiction in the HKSAR, and, upon the exercise of such jurisdiction, the prosecution and adjudication of the relevant case by the PRC procuratorate and court respectively.<sup>83</sup>

Article 3 of the HKNSL instructs the executive authorities, the legislature, and the judiciary of the HKSAR to ‘effectively prevent, suppress and impose punishment for any act or activity endangering national security’ in accordance with applicable laws. Article 8 of the HKNSL further requires the law enforcement and judicial authorities of the HKSAR to ‘fully enforce’ the HKNSL and other applicable laws. Article 6 of the HKNSL imposes a duty on all persons in the HKSAR to abide by the HKNSL and the laws of the HKSAR that safeguard national security. Enforcement of the HKNSL in Hong Kong is primarily vested with the police force, whose new powers under the HKNSL will be exercised under the supervision of the CSNS.<sup>84</sup> Prosecutions of offences endangering national security are to be performed by officers of a specialised division of the Department of Justice, who are appointed by the Secretary for Justice with the approval of the CSNS.<sup>85</sup> Court proceedings under the HKNSL are to be handled by judges and magistrates designated by the CE, who may consult the CSNS and the Chief Justice of the HKCFA before making the designation.<sup>86</sup>

The HKNSL was part of the response of the CCP and the PRC central authorities to the civil unrest in Hong Kong in 2019<sup>87</sup> and the HKSAR’s failure to enact national security legislation comporting with the SAR’s legal system to prohibit specified categories of acts that endanger national security.<sup>88</sup> Rather than leaving the matter to the HKSAR, the PRC’s leadership decided to cause the SCNPC to submit a motion to the NPC Session to request the NPC to act pursuant to four expressly stated provisions of the PRC Constitution,<sup>89</sup> as well as ‘the relevant provisions of the [HKBL]’, in order to ‘safeguard national sovereignty, security and development interests, uphold and improve the “one country, two systems” regime, safeguard the long-term prosperity and stability of Hong Kong, and safeguard

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support to the HKSAR in safeguarding national security, national security intelligence gathering, and ‘handling cases concerning offence endangering national security in accordance with the law’ (art 49).

<sup>79</sup>HKNSL, arts 20–21.

<sup>80</sup>ibid arts 22–23.

<sup>81</sup>ibid arts 24–28.

<sup>82</sup>ibid arts 29–30.

<sup>83</sup>ibid arts 55–57.

<sup>84</sup>ibid arts 16, 43.

<sup>85</sup>ibid art 18.

<sup>86</sup>ibid art 44. The designation is for a duration of one year and a designated judge is to be removed from the designation list if he or she ‘makes any statement or behaves in any manner endangering national security’ during his or her term of office.

<sup>87</sup>The violent protests included the storming of the Legislative Council chamber on 1 July 2019 and the besieging of the Liaison Office of the CPG in the HKSAR on 21 July 2019, during which the national emblem displayed on the façade of the building was defaced. The NPC Decision of 28 May 2020 (n 73) included the NPC Session’s consideration that ‘national sovereignty, unity and territorial integrity’ had been seriously jeopardised and that there had been flagrant interference in Hong Kong affairs by ‘foreign or external forces’. A post-HKNSL analysis suggests that leaders of the CCP met in late July 2019 to discuss the situation in Hong Kong and proceeded to move the Fourth Plenum of the Central Committee of the CCP to endorse a decision setting out a strategy to address the Hong Kong situation, which included ‘establishing and completing the legal system and enforcement mechanism to safeguard national security in the [SAR]’. See Minxin Pei, ‘A Death Long Feared: How China Decided to Impose its National Security Law in Hong Kong’ (China Leadership Monitor, issue 65, Sep 2020).

<sup>88</sup>The authority to enact such national security ‘on its own’ was provided under Article 23 of the HKBL.

<sup>89</sup>The NPC Decision of 28 May 2020 (n 73) referred to Articles 31, 62(2), 62(14), and 62(16) of the PRC Constitution. They refer comprehensively to the functions and powers of the NPC to supervise the implementation of the PRC Constitution, to establish and determine the systems of the SARs, and to perform such functions and powers that should be performed by the highest organ of state power.

the legitimate rights and interests of Hong Kong residents'. The NPC's decision entrusted the SCNPC to formulate the relevant law to establish and improve the institutions and enforcement mechanisms in the HKSAR for safeguarding national security, specifically against secession, subversion, terrorism, and activities of foreign or external forces interfering in the affairs of the HKSAR.<sup>90</sup> It also sought to make use of a mechanism in the HKBL for applying 'national laws' in the HKSAR to implement the formulated law in Hong Kong.<sup>91</sup> Article 1 of the HKNSL states that it was enacted in accordance with the PRC Constitution, the HKBL, and the NPC Decision of 28 May 2020.

Reading the constitutional process involved, it appears that the central authorities had followed the ample and general language of the provisions cited in the relevant decisions.<sup>92</sup> While many have agreed that the safeguarding of national security is a responsibility of the central authorities, and the HKNSL itself highlighted the 'overarching responsibility' of the CPG for national security affairs relating to the HKSAR,<sup>93</sup> there is more than a little disquiet about the central authorities' imposition of a comprehensive and separately formulated system of safeguarding national security in the HKSAR, apparently outside the framework or objective intent of the HKBL,<sup>94</sup> it may be formally legal, but its mode of adoption is 'exceptional'<sup>95</sup> and 'revolutionary', with the NPC enabling itself to enact 'laws of national interest for Hong Kong as circumstances demand'.<sup>96</sup>

Enforcement of the HKNSL's penal provisions, which appear to be vaguely worded and criminalise some forms of advocacy,<sup>97</sup> has been CSNS-led, prevention and punishment-driven, strictly confidential, and subject to little or no external checks.<sup>98</sup> The HKSAR courts are exhorted thrice by the HKNSL to fully enforce this law.<sup>99</sup> Although the HKNSL refers to and envisages the application of HKSAR laws on criminal procedure in prosecutions brought under it for adjudication in Hong Kong, and the Explanations of the draft HKNSL presented to the NPCSC Session spoke of 'working principles' that included 'accommodating the differences between Mainland China and the HKSAR, and striving to address the convergence, compatibility and complementarity between [the HKNSL] and the relevant national laws and local laws of the HKSAR',<sup>100</sup> the extent of the application of

<sup>90</sup>Article 67(22) of the PRC Constitution enables the SCNPC to exercise such functions and powers entrusted to it by the NPC.

<sup>91</sup>The NPC Decision of 28 May 2020 (n 73) instructed the SCNPC to include the law it enacted in Annex III to the HKBL for promulgation and implementation in the HKSAR.

<sup>92</sup>Whether the PRC Central Authorities had observed the particular intent, context, and substance of having the HKBL stipulating the systems and policies practised in the HKSAR is quite a different matter. See Johannes MM Chan, 'Five Reasons to Question the Legality of a National Security Law for Hong Kong' (Verfassungsblog, 1 Jun 2020) <<https://verfassungsblog.de/five-reasons-to-question-the-legality-of-a-national-security-law-for-hong-kong/>> accessed 23 Jan 2025.

<sup>93</sup>HKNSL, art 3.

<sup>94</sup>See Johannes MM Chan, 'National Security Law 2020 in Hong Kong: One Year On' (2022) 30 *Academia Sinica Law Journal* 39; and Cora Chan, 'Can Hong Kong Remain a liberal enclave within China?' (n 3).

<sup>95</sup>See Tom Ginsburg, 'The BRI, Non-Interference, and Democracy' (2021) 62 *Harvard International Law Journal* 40, 57–62.

<sup>96</sup>See Hualing Fu & Michael Hor, 'Introduction', in Hualing Fu & Michael Hor (eds), *The National Security Law of Hong Kong: Restoration and Transformation* (Hong Kong University Press 2022) 7.

<sup>97</sup>See Carole Petersen, 'The Disappearing Firewall: International Consequences of Beijing's Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong' (2020) 50 *Hong Kong Law Journal* 633; and Michael C Davis, *Making Hong Kong China: The Rollback of Human Rights and the Rule of Law* (Association of Asian Studies 2020). Cf Siu-kai Lau, 'The National Security Law: political and social effects on the governance of the Hong Kong Special Administrative Region' (2021) 24(3) *Public Administration and Policy* 234.

<sup>98</sup>See HKNSL, arts 3, 14, 42, 43, 46, 47, 63, as well as the Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (7 Jul 2020) <<https://www.elegislation.gov.hk/hk/A303>> accessed 23 Jan 2025.

<sup>99</sup>See HKNSL, arts 3, 8, 42.

<sup>100</sup>Standing Committee of the National People's Congress, 'Explanation on the Draft Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region' (18 Jun 2020) (2020.3) *Gazette of the SCNPC* 600.



HKSAR laws is subject to the relevant provisions of the HKNSL.<sup>101</sup> These parameters of the HKNSL have made it unclear how the principle of respect and protection of human rights and the principle of the rule of law in criminal proceedings stated in the HKNSL, a law drafted in the socialist legal system, would be put into effect in the HKSAR's common law-based criminal justice system.<sup>102</sup> Last but not least, as the HKNSL is a 'national law' made by the SCNPC pursuant to the authority of the NPC, the HKBL – a law enacted by the NPC in session and arguably more 'basic' than the HKNSL – does not necessarily have normative primacy over the HKNSL.<sup>103</sup> The NPC's deliberate direction to the SCNPC for implementing the HKNSL as a 'national law' in the HKSAR by promulgation could be read as suggesting that the HKNSL is not subordinate to the HKBL.<sup>104</sup> Pending any resolution of this debate by the SCNPC, scholars have concluded that the HKNSL has introduced institutions and mechanisms additional to the political and legal systems of the HKSAR, clarified particular provisions of the HKBL, supplemented 'silences' of the HKBL, redefined the relationship between the central authorities and the HKSAR as well as the inter-relationships between the CE, the executive authorities, the legislature, and the judiciary of the HKSAR, and perhaps even integrated the HKSAR into the national security system of the PRC.<sup>105</sup>

### The 2020 SCNPC LegCo Decisions

The SCNPC made two decisions in relation to the HKSAR legislature in 2020. On 11 August 2020, responding to the decision of the CE to postpone the general election of the legislature by one year and the likely consequence that the HKSAR would be deprived of a functioning legislature during the interregnum, the SCNPC decided that the Sixth Term LegCo would 'continue to discharge duties' beyond its term for 'not less than one year' until the Seventh Term LegCo is formed and begins its term of office.<sup>106</sup> Then, in November 2020, at the request of the CE, the SCNPC decided on the qualification of members of the LegCo by prescribing that those members who had conducted themselves to endanger national security in certain specific ways would be disqualified from membership after ascertainment according to law.<sup>107</sup> The HKSAR Government announced on the same day that four members of the continuing LegCo were disqualified from membership

<sup>101</sup>See HKNSL, art 41.

<sup>102</sup>See HKNSL arts 4, 5. Daniel Pascoe has concluded that HKNSL is, 'on balance, socialist'. See Daniel Pascoe, 'Hong Kong's National Security Law: A Socialist Legal Transplant?' (2022) 10 Chinese Journal of Comparative Law 28. Cheng Jie noted that the HKNSL is 'semi-constitutional' in character. See Jie Cheng, 'Hong Kong's Constitutional Order after the National Security Law', in Hualing Fu & Michael Hor (eds), *The National Security Law of Hong Kong: Restoration and Transformation* (Hong Kong University Press 2022) 95.

<sup>103</sup>Fu Hualing has contended that the HKNSL, as legislation enacted by SCNPC and introduced into Annex III to the HKBL, falls within the structure of the HKBL and is subject to its control. This must be so as to not imperil the integrity of the HKBL, which stipulates the systems and policies of the HKSAR. See Hualing Fu, 'National Security', in Johannes MM Chan & CL Lim (eds), *Law of the Hong Kong Constitution* (3rd edn, Sweet & Maxwell 2021) 202.

<sup>104</sup>The Explanation presented to the SCNPC Session in the afternoon of 30 June 2020 noted that, following the adoption of the HKNSL during the SCNPC Session earlier that day, the Secretariat of the SCNPC consulted both the HKBL Committee and the HKSAR Government, and both confirmed that adding the HKNSL to Annex III to the HKBL complied with the NPC Decision of 28 May 2020 (n 73) and the HKBL, and deemed the addition both necessary and appropriate. See Standing Committee of the National People's Congress, 'Explanation on the Draft Decision of the Standing Committee of the National People's Congress on Adding to the National Laws Listed in Annex III to the Basic Law of the Hong Kong Special Administrative Region' (30 Jun 2020) (2020.3) Gazette of the SCNPC 609.

<sup>105</sup>See Fu & Hor (n 96) 12; Cheng, 'Hong Kong's Constitutional Order after the National Security Law' (n 102) 114–118; and Feng Lin & Mengtian Fei, 'A Paradigm Shift for Hong Kong's National Security Constitution – A Comparative Study of the Impact of Its National Security Law' (2023) 17 Vienna Journal on International Constitutional Law 135.

<sup>106</sup>Standing Committee of the National People's Congress, Decision on the Continuing Discharge of Duties by the Sixth Term Legislative Council of the Hong Kong Special Administrative Region (11 Aug 2020) <<https://www.elegislation.gov.hk/hk/A216>> accessed 23 Jan 2025.

<sup>107</sup>Standing Committee of the National People's Congress, Decision on Issues Relating to the Qualification of the Members of the Legislative Council of the Hong Kong Special Administrative Region (11 Nov 2020) <[https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext\\_doc29.pdf](https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext_doc29.pdf)> accessed 23 Jan 2025.



because their nominations had been found invalid in July 2020 for the purpose of their candidature in the now terminated general election (on grounds similar to those prescribed in the SCNPC decision).<sup>108</sup>

The SCNPC's responses in support of the CE were extraordinary. The August decision to sanction the extension of the term of the Sixth Term LegCo by at least one year, said to be pursuant to 'the relevant provisions of the [PRC Constitution and the HKBL]', overrides or disregards Article 69 of the HKBL, which stipulates that the term of office of the LegCo 'shall be four years'.<sup>109</sup> The November decision deals with the qualification of LegCo members through prescribing explicit instructions for the implementation of its 2016 SCNPC Oaths Interpretation for the purpose of loyalty testing and sanctioning. It invokes not only Article 67(1) of the PRC Constitution,<sup>110</sup> the 'relevant provisions' of the HKBL, the NPC Decision of 28 May 2020, the HKNSL, the 2016 SCNPC Oaths Interpretation, and the August decision, but also the provisions of the PRC Constitution regarding the duties of PRC citizens to safeguard the unification of the country, the unity of the PRC's nationalities, and the security, honour, and interest of the motherland.<sup>111</sup>

### *The 2021 Electoral Methods Amendments*

The PRC central authorities acted in March 2021 to replace the method of electing the CE and the method of forming the LegCo in order to address what they described as 'clear loopholes and deficiencies' in the HKSAR's electoral system that had created risks for 'anti-China, destabilising elements' to exploit for the purpose of seizing 'power of governance of [the SAR]'.<sup>112</sup> The NPC Session, after considering a motion that the SCNPC submitted presumably at the behest of the PRC's leadership, adopted a decision on 11 March 2021 to improve the HKSAR's electoral system.<sup>113</sup> This decision first sets out principles for improving the HKSAR's electoral system, particularly the precept that the governance of Hong Kong shall be by 'patriots' among the Hong Kong people as the main body. The decision then prescribes the parameters of the 'improvements', with their principal features being the reconstitution of the Election Committee to function as

<sup>108</sup> Announcement pursuant to the Decision of the Standing Committee of the National People's Congress on Issues Relating to the Qualification of the Members of the Legislative Council of the Hong Kong Special Administrative Region (11 Nov 2020) <<https://www.elegislation.gov.hk/hk/A217A>> accessed 23 Jan 2025.

<sup>109</sup> In explaining the draft Decision to the SCNPC Session in August, the CPG's responsible officer referred to Article 69 of the HKBL before stating that the vacuum in the legislature needed to be resolved at the constitutional dimension, that the SCNPC had both the power and the responsibility to resolve appropriately constitutional issues arising in the implementation of the HKBL, and that the SCNPC's decision would serve as the solid legal basis for the Sixth Term LegCo to continue functioning. See Standing Committee of the National People's Congress, 'Explanation on the Proposal of the State Council on Requesting the Standing Committee of the National People's Congress to Make Decision on the Continuing Operation of the Sixth Term Legislative Council of the Hong Kong Special Administrative Region' (8 Aug 2020) (2020.4) Gazette of the SCNPC 635. The Constitution and Law Committee of the NPC issued a concurring opinion on the same day.

<sup>110</sup> Article 67(1) provides for the SCNPC's function of 'interpreting the Constitution and overseeing its enforcement'.

<sup>111</sup> PRC Constitution, arts 52, 54. No explanation of the CPG's proposal was published. However, the Constitution and Law Committee of the NPC did indicate that it was necessary and appropriate to apply the rule of disqualification to those members of the Sixth Term LegCo whose candidature had been disqualified in the nomination phase of the originally scheduled elections for the Seventh Term LegCo by SCNPC decision. See Constitution and Law Committee of the National People's Congress, 'Deliberation Opinion on the Draft Decision of the Standing Committee of the National People's Congress on Issues Relating to the Qualification of the Members of the Legislative Council of the Hong Kong Special Administrative Region' (10 Nov 2020) (2021.1) Gazette of the SCNPC 44.

<sup>112</sup> See Standing Committee of the National People's Congress, 'Explanation on the Draft Decision of the National People's Congress on Improving the Electoral System of the Hong Kong Special Administrative Region' (5 Mar 2021) (2021.3) Gazette of the SCNPC 407. An English translation is available online at <[https://www.basiclew.gov.hk/filemanager/content/en/files/basiclewtext/basiclewtext\\_doc30.pdf](https://www.basiclew.gov.hk/filemanager/content/en/files/basiclewtext/basiclewtext_doc30.pdf)> accessed 23 Jan 2025.

<sup>113</sup> National People's Congress, Decision on Improving the Electoral System of the Hong Kong Special Administrative Region (11 Mar 2021) <[https://www.basiclew.gov.hk/filemanager/content/en/files/basiclewtext/basiclewtext\\_doc31.pdf](https://www.basiclew.gov.hk/filemanager/content/en/files/basiclewtext/basiclewtext_doc31.pdf)> accessed 23 Jan 2025.

the centrepiece of the new electoral methods. It would not only nominate and elect the CE, but also a portion of the LegCo's membership. The introduction of candidate eligibility review would serve to ensure that candidates in elections have loyalty qualifications in conformity with the HKBL, the HKNSL, the 2016 SCNPC Oaths Interpretation, and the 2020 SCNPC Decision on Legislative Council Members, as well as relevant local laws of the HKSAR. The composition of the LegCo was altered to include a proportion of members returned by the Election Committee, at the expense of the proportion of members that were previously elected by the over four million registered electors in Hong Kong in geographical constituency-based elections. Finally, the NPC Session entrusted the SCNPC to flesh out the details by amending Annex I and Annex II of the HKBL in accordance with this decision.

Following consultations with selected Hong Kong residents,<sup>114</sup> the SCNPC deliberated on draft amendments to Annex I and Annex II of the HKBL and adopted an amendment to Annex I of the HKBL and an amendment to Annex II of the HKBL on 30 March 2021.<sup>115</sup> The responsible official explained to the SCNPC Session the day before that the basis for the two amendments was the NPC decision of 11 March 2021. Upon promulgation, the two amendments would replace the original two Annexes and any previous amendments to them made in accordance with amendment procedures outlined in each annex. The two amendments also vest in the SCNPC the power of amendment of the two methods in Annex I and Annex II, subject to the requirement that, before the SCNPC exercises this power of amendment, the opinions of various sectors of the Hong Kong community would be consulted in appropriate ways.<sup>116</sup>

Hong Kong's political landscape was overhauled. Electoral legislation of the HKSAR was amended in accordance with the NPC decision and the amended Annex I and Annex II to the HKBL,<sup>117</sup> and the HKSAR Government organised and conducted elections for subsectors of the Election Committee, the LegCo, and the CE between September 2021 and May 2022. In the event, the central authorities had set aside the developments between 2004 and 2014 in the HKSAR's political system, in accordance with Articles 45 and 68 of the HKBL, towards 'universal suffrage' by 'gradual and orderly progress'. Astonishingly, this was achieved not by amending any provisions on the political system in Chapter IV of the HKBL, but by amending, pursuant to the NPC decision, the two annexes to the HKBL that set out the two electoral methods. This approach sidestepped the amendment procedure prescribed in Article 159 of the HKBL, even though the procedural and substantive requirements of Article 159 could likely have been met without serious constitutional questioning.<sup>118</sup> The amendment provisions in the two annexes

<sup>114</sup>State officials were in Hong Kong from 15 to 17 Mar 2021 to hold sixty consultation sessions with about 1,000 selected residents; see Jeffie Lam & Natalie Wong, 'Hong Kong elections reform: debate emerges over number of directly elected lawmakers as senior Beijing official opens talks' (South China Morning Post, 15 Mar 2021) <<https://www.scmp.com/news/hong-kong/politics/article/3125435/hong-kong-elections-reform-senior-beijing-official-opens>> accessed 23 Jan 2025.

<sup>115</sup>English translations of the 2021 Electoral Methods Amendments are available online at <<https://www.basiclaw.gov.hk/en/basiclaw/annex1.html>> (Annex I) and <<https://www.basiclaw.gov.hk/en/basiclaw/annex2.html>> (Annex II) accessed 23 Jan 2025.

<sup>116</sup>See Standing Committee of the National People's Congress, 'Explanation on the Draft Amendment of the Method of Selection of the Chief Executive of the Hong Kong Special Administrative Region in Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China' (29 Mar 2021) (2021.4) Gazette of the SCNPC 656; and Standing Committee of the National People's Congress, 'Explanation on the Draft Amendment of the Method of Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures in Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China' (29 Mar 2021) (2021.4) Gazette of the SCNPC 666. The Explanations referred to a meeting of the HKBL Committee held on 13 March 2021 to discuss matters relating to the amendment of Annex I and Annex II, and the opinion of the Committee was published for the first time. See (2021.4) Gazette of the SCNPC 662.

<sup>117</sup>Te, through the *Improving Electoral System (Consolidated Amendments) Ordinance* 2021 (14 of 2021), which commenced on 31 May 2021.

<sup>118</sup>This is because the SBJD declares the PRC's policy for the CE to be appointed by the CPG 'on the basis of the results of elections or consultations to be held locally' (art 3(4)) and for the legislature to be constituted by 'elections' (Annex I, s 1).

themselves, which specify a procedure for a process of amendment to be initiated by the HKSAR and completed by the SCNPC for the purpose of developing the political system, did not appear to present a serious obstacle that would preclude the NPC, the highest organ of state power, from applying Article 159.

### Characterising the Constitutional Actions

The above accounts of the five sets of PRC constitutional action reveal a trend: the central authorities are taking decisive, expansive, and determinative action in relation to situations in the HKSAR perceived as less than manageable by its CE and her HKSAR Government, in order to safeguard national sovereignty, security, and development interests, and relying, increasingly, on provisions of the PRC Constitution as the starting point, basis, and justification for the action. It has also become increasingly common for the HKBL to be referred to in the instrument of constitutional action, but only to have it named either as part of the bundle of provisions relied on (without citing particular provisions and the reasoning associated with any consideration of them<sup>119</sup>) or in a conclusory manner of ‘consistency’. This has revived scholarly debate about the extent to which the PRC Constitution applies to the HKSAR, as it is now no longer sufficient to simply state that the PRC Constitution applies, through the HKBL, to the HKSAR.<sup>120</sup> Last but not least, the changes to the HKBL, both *de facto* and *de jure*, were effected not through the mechanism of amendment installed in the HKBL, which has procedural and substantive safeguards. This allegation of ‘bypassing’ the HKBL and its amendment-checking barriers presses on a particular, and palpably the original, vision of the HKBL as a constitutional or constitutive statute adopted by the NPC to implement the OCTS policy as a guarantee to Hong Kong, its inhabitants, and others who appreciate the stability and prosperity of the territory, by prescribing the HKSAR’s systems in a self-containing HKBL.<sup>121</sup> The legitimacy of the constitutional actions will next be examined through various lenses premising on the HKBL.

### Constitutional Additions upon Hong Kong’s Imposed Constitution: Impairing ‘One Country, Two Systems’ and the HKSAR’s Courts?

Yaniv Roznai has questioned whether the HKBL is a ‘sophisticated form, rather unique, of imposed constitution’, as it was formulated based on the PRC’s basic policies towards Hong Kong as set out in the SBJD.<sup>122</sup> Apart from the consultations in Hong Kong, the drafting and enactment of the HKBL were organised and completed in the Chinese Mainland, utilising the PRC central authorities’ resources. The purpose of the deliberations was to implement the PRC’s basic policies towards Hong Kong. The enactment process was pursuant to the PRC’s constitutional framework. The enacted law established the HKSAR under the PRC’s governance arrangements. All these suggest congruence with the notion of ‘imposed constitution’, not only in terms of the presence of an ‘external’ element from the perspective of those among the Hong Kong population who had been

<sup>119</sup>The 2016 SCNPC Oaths Interpretation and the 2017 SCNPC Co-location Arrangement Decision, however, did deal with specific provisions of the HKBL in a more specific manner, and with reasoning.

<sup>120</sup>See Han Zhu, ‘The Hong Kong National Security Law: The Shifted Grundnorm of Hong Kong’s Legal Order and its Implications’, in Hualing Fu & Michael Hor (eds), *The National Security Law of Hong Kong: Restoration and Transformation* (Hong Kong University Press 2022) 54–56; Cheng, ‘Hong Kong’s Constitutional Order after the National Security Law’ (n 102) 111; and Fu (n 103) 201.

<sup>121</sup>See Pengfei Ji, ‘Explanations on The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft) and Its Related Documents’ (28 Mar 1990) <[https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext\\_doc6.pdf](https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext_doc6.pdf)> accessed 23 Jan 2025.

<sup>122</sup>See Yaniv Roznai, ‘Internally imposed constitutions’, in Richard Albert, Xenophon Contiades & Alkmene Fotiadou (eds), *The Law and Legitimacy of Imposed Constitutions* (Routledge 2019) 63.

politically active outside the CCP United Front,<sup>123</sup> but also through the ‘internal’ imposition of the main body of the country on a minority of the country.<sup>124</sup>

Yet, the imposition of the HKBL may have been acceptable to the UK and the Hong Kong inhabitants because of the condition of a ‘restrained’ imposition by the PRC upon its resumption of exercise of sovereignty over Hong Kong through those announced basic policies that were intended to preserve, at least, the capitalist economy and way of life in Hong Kong. This condition to maintain, distinguish, and pluralise the HKSAR’s systems appears to be underlined in four provisions of the HKBL:

- (1) Article 4 obliges the HKSAR to safeguard the rights and freedoms of HKSAR residents and other persons in the SAR in accordance with law.
- (2) Article 5 states that the ‘socialist system and policies shall not be practised in the [HKSAR], and the previous capitalist system and way of life shall remain unchanged for 50 years’.
- (3) Article 11 provides that the systems and policies practised in the HKSAR ‘shall be based on the provisions of this Law’.
- (4) Article 159 prohibits amendments to the HKBL that contravene ‘the established basic policies of the [PRC] regarding Hong Kong’.

This conditionality could have been reinforced by the NPC’s 1990 decision on the constitutionality of the HKBL, which resolved the relationship between the PRC Constitution and the HKBL by endorsing the self-containment of the systems, policies, and laws to be instituted in the HKSAR under the HKBL.

Similarly, Yash Ghai has underlined that for Hong Kong’s autonomy to be secure, the HKBL should be a limiting statute on the central authorities. The SCNPC’s power of interpretation should be limited to expounding the meaning of the text of the provision in question, in accordance with the common law understanding of the exercise. The power of amendment under the HKBL, which is subject to specific limitations, should not be rendered nugatory, with consequences on the integrity of the HKBL itself. A ‘shield of legality’ is needed for the HKBL from the ‘predominant political power’ of the central authorities.<sup>125</sup>

The five constitutional actions above are at least internal impositions of the majoritarian kind.<sup>126</sup> And considering the limited consultations in Hong Kong before the actions were taken<sup>127</sup> – coupled with the widely held view, both among the public and scholars, that Hong Kong was an enclave with its own identified status and values<sup>128</sup> – one could argue that these actions reflected an account of a classic external imposition. They have shuddered the integrity of the HKBL.

<sup>123</sup>The United Front is the approach by which the CCP co-opts supporters and persuades the population in a locality towards its agenda. See Christine Loh, *Underground Front: The Chinese Communist Party in Hong Kong* (2nd edn, Hong Kong University Press 2018).

<sup>124</sup>See Roznai (n 122) 64 (referring to Mark Janis’ definition of ‘imposed constitutionalism’).

<sup>125</sup>Ghai (n 28) 201, 210, 211, 220, 498; and Yash Ghai, ‘The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of technique or politics?’ (2007) 37 *Hong Kong Law Journal* 363, 403–405.

<sup>126</sup>An associated question involves identifying the constituent power relating to constitutional change for Hong Kong. From a national-subnational diode setting, that would have to be the NPC.

<sup>127</sup>The NPC and the SCNPC’s agenda on Hong Kong matters and the draft of the proposed decision, among other documents, had been kept confidential before adoption. Of the five acts, only the 2017 SCNPC Co-location Arrangement Decision had been well anticipated, although its terms still took many by surprise. This stemmed from the HKSAR Government’s earlier messaging, which had suggested that the SCNPC would grant additional power(s) to the HKSAR under the HKBL, rather than what ultimately transpired.

<sup>128</sup>See Bruce Gilley, ‘Democratic enclaves in authoritarian regimes’ (2010) 17 *Democratization* 389; Cora 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.

The conditionality asserted above, the substantive barrier in Article 159 of the HKBL, and the SCNPC's claims that its acts of change were done 'in accordance with the Basic Law' all contributed to the scholarly exploration and advocacy of a judicial role for challenging the legitimacy of the five constitutional actions based on 'implied limitations' and 'basic structure or features' of the constitutional framework established to implement the OCTS policy in Hong Kong.<sup>129</sup>

Admittedly, this is a siren that the HKSAR courts will not heed. What the HKCFA had stated about the SCNPC in 1999 seemed to have solidified into canon, and nowadays, the courts here believe that they are bound to enforce any interpretation adopted by the SCNPC,<sup>130</sup> and deny that they could have jurisdiction to challenge the validity of a decision of the SCNPC.<sup>131</sup> They have also rejected arguments that provisions of the PRC Constitution are 'necessarily irrelevant or should be ignored by the courts when adjudicating cases'.<sup>132</sup> Significantly, the HKCFA defanged itself in the first case it heard on the HKNSL. Having considered that the legislative acts of the NPC and the SCNPC which led to the promulgation of the HKNSL in the HKSAR were done in accordance with the provisions of the HKBL and the procedure therein,<sup>133</sup> the HKCFA felt obliged to accept that it could not question the HKNSL and its provisions on grounds of incompatibility with the HKBL and the provisions of the *International Covenant on Civil and Political Rights* as applied to Hong Kong, and the fundamental rights guaranteed therein.<sup>134</sup>

The above judicial decisions suggest that the HKSAR courts are piqued by problems over their competence to rule on the legitimacy of acts of the NPC and the SCNPC.<sup>135</sup> The experience of being accused of usurpation against the PRC could have hatched an approach to prevent a repeat of such an episode. Such concern affects the judicial capacity to define its own competence (ie, *kompetenz-kompetenz*), particularly where the act concerned invokes the PRC Constitution, the fundamental constitutional instrument that the HKSAR courts are not expressly authorised to interpret and apply. Since the HKSAR courts are established pursuant to the HKBL, which was enacted pursuant to the PRC Constitution,<sup>136</sup> it seems unsurprising for them to think in the terms of subordination (as opposed to plurality). What the HKCFA has said about accepting the authority of the NPC and the SCNPC to act 'in accordance with the provisions of the [HKBL] and the procedure therein' has

<sup>129</sup>See Bing Ling (凌兵), '人大国安立法 符基本法第159条否? (Rèndà guó'ān lǐfǎ fú jīběnfǎ dì 159 tiáo fǒu?) [Does NPC's National Security Legislation Conform with Article 159 of the Basic Law?]' (Ming Pao Daily, 26 May 2020) B09; Surya Deva, 'Threats to Hong Kong's Autonomy from the NPC's Standing Committee: The Role of Courts and the Basic Structure Doctrine' (2020) 50 Hong Kong Law Journal 901; Cheng, 'Hong Kong's Constitutional Order after the National Security Law' (n 102) 116; and Zhu, 'The Hong Kong National Security Law' (n 120) 55.

<sup>130</sup>See *Chief Executive of the HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460; *Secretary for Justice v Leung Kwok Hung* [2019] HKCA 173.

<sup>131</sup>See *Yau Wai Ching v Chief Executive of the HKSAR* (2017) 20 HKCFAR 390.

<sup>132</sup>See *Leung Chung Hang Sixtus & Ors v President of Legislative Council* [2019] 1 HKLRD 292. This was also the only case to date in which an applicant had sought to impugn HKSAR legislation (ie, the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (n 70)) on the ground that it was 'incompatible with the basic and unamendable features' of the HKBL. The Court of First Instance rejected the submission off-hand, believing that it added nothing of substance to the other grounds that alleged inconsistency with specified provisions of the HKBL ([77]).

<sup>133</sup>See *Ng Ka Ling & Ors v Director of Immigration (No 2)* (n 48).

<sup>134</sup>See *HKSAR v Lai Chee Ying* [2021] HKCFA 3. See also Chan, 'National Security Law 2020 in Hong Kong' (n 94) and Cora Chan, 'From Legal Pluralism to Dual State: Evolution of the Relationship between the Chinese and Hong Kong Legal Orders' (2022) 16 Law & Ethics of Human Rights 99, 117 (which suggests that HKCFA might not have precluded, by its statement, all forms of review, such as *vires* review).

<sup>135</sup>The HKSAR courts are sensitive to politically charged issues; see Po Jen Yap, 'Interpreting the Basic Law and the Adjudication of Politically Sensitive Questions' (2007) 6 Chinese Journal of International Law 543; Po Jen Yap & Julius Yam, 'Legalism and Strategic Judicial Decision-making in Hong Kong' (2023) 53 Hong Kong Law Journal 207.

<sup>136</sup>See *Kwok Cheuk Kin v Secretary for Justice* [2021] HKCA 871, where the Court of Appeal held that the 2017 SCNPC Co-location Arrangement Decision was 'highly persuasive' and could even be determinative in its adjudication, as the Decision was, 'as a matter of Mainland law', final on the question of conformity with the HKBL, and it was thought that the SCNPC would give the same answer on the occasion of a subsequent reference by the HKCFA for interpretation of one or more provisions of the HKBL.



been regarded less as a criterion for substantive assessment than as a formalist concession. In other words, the courts labour under problems over their ‘competing’ legitimac(ies) to say what the law is and to ensure that no one is above the law.<sup>137</sup>

### Concluding Observations: Subnational Constitutionalism, Competing Legitimacies, or Merely ‘It’s the vibe of it’?<sup>138</sup>

Hong Kong exemplifies more the challenges than the benefits of subnational constitutionalism.<sup>139</sup> The HKBL is an instrument that authorises the HKSAR’s autonomy, delineates powers and functions concerning the HKSAR exercised exclusively by the PRC central authorities, and embeds mechanisms that allow the central authorities to exert control over the HKSAR institutions they have established. The PRC Constitution has provided the constitutional space, authority, and means for the central authorities to tackle the HKSAR’s issues of governance at the national level. The OCTS policy, initially proposed to resolve the Hong Kong question, has evolved in its application: when it was first advanced, it aimed ‘to realize and uphold national unity’; however, following Hong Kong’s return to the PRC, the policy has shifted to prioritise ‘firmly uphold[ing] China’s sovereignty, security and development interests’. This evolution emphasises the need to conduct affairs with ‘a strong sense of “One Country”’ and observance of the ‘principle of “One Country”’, so as to handle the relationship between the HKSAR and the CPG ‘correctly’.<sup>140</sup> This dynamic underscores the asymmetry in Hong Kong’s received constitutionalism.

The central authorities’ subjugation of the common law courts in the HKSAR through the invocation of the PRC’s Marxist-Leninist-Stalinist features of interpretation of laws, as embodied in the SCNPC and its system of Soviet-style centralised supervision,<sup>141</sup> testifies not only to the potency of democratic centralism as a unified, absolute, undefined, and unrestrained ‘reservoir’ of power, but also to the unwillingness and inability (if not ignorance) of the HKSAR courts to counter-act the SCNPC’s use of ‘legal tools’ to exert control, expand influence, and limit the autonomy of the HKSAR’s systems.<sup>142</sup> Recognition of the involvement of a plurality of ‘law regimes’ in the practice of the OCTS principle in the HKSAR<sup>143</sup> should have prompted the HKSAR courts to uphold the separate and different systems envisioned by the HKBL. This would at least further the objectives

<sup>137</sup>The courts’ responses have been labelled as amounting to a ‘weak form of “abusive judicial review”’. See Johannes MM Chan, ‘Taking Rights Seriously – The Judiciary at a Challenging Time’ (2022) 52 Hong Kong Law Journal 937.

<sup>138</sup>Referring to the Australian movie *The Castle* (Rob Sitch, 1997).

<sup>139</sup>See Cora Chan, ‘Subnational Constitutionalism: Hong Kong’, in David S Law (ed), *Constitutionalism in Context* (Cambridge University Press 2022) ch 17.

<sup>140</sup>See Jinping Xi, ‘Address at the Meeting Celebrating the 20th Anniversary of Hong Kong’s Return to the Motherland and the Inaugural Ceremony of the Fifth Term Government of the Hong Kong Special Administrative Region’ (Xinhuanet, 1 Jul 2017) <[http://www.xinhuanet.com/english/2017-07/01/c\\_136409940.htm](http://www.xinhuanet.com/english/2017-07/01/c_136409940.htm)> accessed 23 Jan 2025.

<sup>141</sup>See Yash Ghai, ‘The Political Economy of Interpretation’, in Hualing Fu, Lison Harris & Simon Young (eds), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007) 115; and Sophia Woodman, ‘Legislative Interpretation by China’s National People’s Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law’, in Hualing Fu, Lison Harris & Simon Young (eds), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007) 229.

<sup>142</sup>Senior judges and lawyers in Hong Kong have continued to address the PRC system as ‘Mainland civil law system’. See *Secretary for Justice v Leung Kwok Hung* (n 130) and *Tong Ying Kit v HKSAR* [2020] HKCFI 2133. They said so notwithstanding a legion of scholastic defence. See Cora Chan, ‘The Legal Limits on Beijing’s Powers to Interpret Hong Kong’s Basic Law’ (Hong Kong University Legal Scholarship Blog, 3 Nov 2016) <<http://researchblog.law.hku.hk/2016/11/cora-chan-on-legal-limits-of-beijings.html>> accessed 23 Jan 2025; Hualing Fu, ‘Guide to Legislative Interpretation in China’ (Hong Kong University Legal Scholarship Blog, 19 Jul 2017) <<http://researchblog.law.hku.hk/2017/07/guide-to-legislative-interpretation-in.html>> accessed 23 Jan 2025; Eric C Ip, ‘Interpreting Interpretations: A Methodology for the Judicial Enforcement of Legislative Interpretations of the Hong Kong Basic Law’ [2017] Public Law 552; and Feng Lin, ‘The Duty of Hong Kong Courts to Follow the NPCSC’s Interpretation of the Basic Law: Are there Any Limits?’ (2018) 48 Hong Kong Law Journal 167.

<sup>143</sup>See Ghai (n 28) 211–212.



of ensuring that socialist systems and policies are not practised in the HKSAR, nurturing the HKSAR's high degree of autonomy, and protecting the rights and freedoms of HKSAR residents.<sup>144</sup> A more ambitious project would be to construct a political, constitutional, and legal identity of the HKSAR that is distinct from that of the rest of the PRC.<sup>145</sup> This would bolster claims of the HKSAR's judicial independence and autonomy and position the HKSAR as the suitable and sustainable centre for resolving legal disputes among businesses in the Asia-Pacific region and along the Belt and Road Initiative, including cases involving a Mainland Chinese entity.<sup>146</sup>

Further, the 'shortcomings' of the HKBL and its implementation in Hong Kong seem to have been exposed by the central authorities' recourse to their constitutional 'reservoir' of powers, rather than the specific provisions of the HKBL, to address 'shortcomings' in the governance of the HKSAR, particularly in restraining radical politicians taking oaths disloyally, safeguarding national security, and ensuring that 'patriots' govern Hong Kong. The repeated remedy of exercising constitutional powers of supervision and system-specification testifies the central authorities' preference for direct and powerful measures to resolve perceived governance challenges in the HKSAR that will bypass any difficulties, existing or potential, in implementation or enforcement. If this reliance on overarching constitutional authority passes over the established and self-contained systems established under the HKBL, it possibly eclipses the legitimacy of the HKBL. This issue seems to have been acutely exposed in the 2016 SCNPC Oaths Interpretation, the HKNSL, and the 2021 electoral methods overhaul. However, in prioritising effective governance measures, the central authorities seem to place little importance on such concerns over legitimacy.

There is a paradox in the fact that the power of formal amendment under the HKBL has not been resorted to in the five sets of constitutional action discussed here, notwithstanding that the procedural provisions under the HKBL allow the central authorities to readily propose bills of amendment before an NPC Session. The annual meeting frequency of the NPC is not an issue, since two of the five sets of constitutional action were authorised by an NPC Session. The oft-cited claim that the Basic Law Drafting Committee wished that 'in order to maintain Hong Kong's stability and prosperity, the Basic Law shall not be easily amended'<sup>147</sup> makes less sense when an express term limit or context stipulated under the HKBL was effaced by an interpretation or decision of the SCNPC.<sup>148</sup> It might therefore be suggested that the central authorities somehow allowed the formal amendment power to lapse through desuetude,<sup>149</sup> or that they paid respect to the restriction of the formal powers of amendment and scrutiny through sidestepping them by creating another route of constitutional operation.<sup>150</sup> Given that the HKBL was designed to grant the HKSAR a high degree of autonomy, it would seem that the central authorities needed to resort

<sup>144</sup>The summation of HKBL, arts 4, 5, 11.

<sup>145</sup>See, generally, Johannes MM Chan, 'Behind the Text of the Basic Law: Some Constitutional Fundamentals', in Rosalind Dixon & Adrienne Stone (eds), *The Invisible Constitution in Comparative Perspective* (Cambridge University Press 2018) 193.

<sup>146</sup>See, eg, Teresa Cheng, 'Speech by the Secretary for Justice at the Panel Session on "The Belt and Road Initiative and International Dispute Settlement" at the Forum on the Belt and Road Legal Cooperation' (2 Jul 2018) <[https://www.doj.gov.hk/en/community\\_engagement/speeches/20180702\\_sj1.html](https://www.doj.gov.hk/en/community_engagement/speeches/20180702_sj1.html)> accessed 23 Jan 2025.

<sup>147</sup>See Priscilla MF Leung, *The Hong Kong Basic Law: Hybrid of Common Law and Chinese Law* (Rev edn, LexisNexis 2007) 87.

<sup>148</sup>The alleged urgency of the situation might provide a rationale for the SCNPC in the two cases of the 2016 SCNPC Oaths Interpretation and the first of the two 2020 SCNPC LegCo Decisions. However, neither of them was subsequently ratified by formal amendment of the HKBL. It might be argued that the inclusion of an account of the SCNPC's relevant action in the SCNPC's annual working report to the NPC Session, and the study and adoption of this work report by a resolution of the NPC Session, constitutes endorsement by the NPC Session.

<sup>149</sup>See Richard Albert, 'Constitutional Amendment by Constitutional Desuetude' (2014) 62 *American Journal of Comparative Law* 641.

<sup>150</sup>What had been sidestepped might have also included the PRC's own Law on Legislation. This consideration could in turn be a justification for the 'NPC Decision + SCNPC legislation' technique. See Cheng, 'Hong Kong's Constitutional Order after the National Security Law' (n 102) 97–98.

to the source powers in the PRC Constitution to unlock and re-calibrate or re-design Hong Kong's constitutional framework.<sup>151</sup>

The considerations above lead to a somewhat surprising observation: the more the central authorities take constitutional action towards Hong Kong, the more challenged the HKBL will be on the one hand, and the more enhanced the PRC's rule-based governance under the PRC Constitution will become on the other hand.<sup>152</sup> What Hong Kong may lose in constitutionalism may well be what the PRC gains in constitutionalism, albeit that the language of 'constitutionalism' is not necessarily the same in the two jurisdictions. The grievous flaw for Hong Kong's constitutionalists in respect of the OCTS principle and the HKBL is likely to be that they have hitherto been focusing too much on the separate systems under the HKBL, as if they were 'separated' systems, without paying much attention to the unitary and centralised state system of 'One Country'.<sup>153</sup> What would probably be the common ground between Hong Kong's waning 'liberal' and 'subsidiarity' constitutionalism and the PRC's 'socialist' and 'centralised' constitutionalism is an adherence to the text of the constitutional instrument. From this starting point, it would be necessary to parse the new instruments, and their official explanations, cautiously, with alertness to 'ideological reinterpretation'.<sup>154</sup> The objective of such an exercise might well be what Yash Ghai had urged two decades ago, a struggle towards 'coherence' in 'a special and distinctive approach to jurisprudence of the Basic Law'. However, that goal might look elusive now, as his concern that the two systems would become locked in 'a struggle for the soul of Hong Kong' has probably come true.<sup>155</sup>

The tension regarding Hong Kong's constitutional identity and autonomy may now have reached a critical juncture or even a resolution. Whilst the centripetal force has been 'liberated' to press on the implementation of the OCTS policy,<sup>156</sup> President Xi Jinping emphasised in 2022 that the country will not only be committed to this 'good policy ... in the long run', but also to the policy's logic of '[maintaining] Hong Kong's distinctive status and advantages', one of which was Hong Kong's maintaining of the common law.<sup>157</sup> Afterwards, in a mindful move, the HKCFA asserted during its adjudication of a HKNSL case in August 2023 that the HKSAR courts would apply the 'common law approach' to interpret the HKNSL, and further explained that the 'convergence' called for under the 'working principle' referred to aligning the HKNSL with 'national law on safeguarding national security', and not 'convergence' of the HKSAR's legal system with Mainland Chinese law that uses language similar to that employed in the original Chinese text of the HKNSL, given the SCNPC's recognition and 'highlighting' of the 'separateness of the two legal systems'.<sup>158</sup> By 2024, however, the final piece needed by the central authorities for safeguarding national security in the HKSAR was put in place, notably by the HKSAR itself: the *Safeguarding National Security Ordinance*. This ordinance enshrines the safeguarding of 'national sovereignty, security and development interests' as the 'highest principle' of the OCTS policy, adopts the Mainland legal definitions of 'national security' and 'state secrets', requires all HKSAR legislation to be interpreted with 'the best regard'

<sup>151</sup>This might explain the invocation of Article 31 of the PRC Constitution, through the NPC's function of supervising the implementation of the Constitution and the SCNPC's function of supervising the implementation of laws, to reconfigure the systems of the HKSAR.

<sup>152</sup>See Taisu Zhang & Tom Ginsburg, 'China's Turn Toward Law' (2019) 59 *Virginia Journal of International Law* 306.

<sup>153</sup>The PRC Central Authorities, on the other hand, sponsored studies of the OCTS principle and the HKBL as a branch of state law. See Lo (n 46) 179 fn 1. See also Han Zhu, 'Beijing's "Rule of Law" Strategy for Governing Hong Kong: Legalization without Democratization' [2019] *China Perspectives* 23.

<sup>154</sup>See Denis Chang, 'The Basic Law of the Hong Kong Special Administrative Region: Economics and Norms of Credibility' (1988) 2 *Journal of Chinese Law* 21, 22.

<sup>155</sup>See Ghai (n 28) 212.

<sup>156</sup>Cora Chan, 'Subnational Constitutionalism: Hong Kong' (n 139) 380, 399.

<sup>157</sup>See Jinping Xi, 'Address at the meeting celebrating the 25th anniversary of Hong Kong's return to the motherland and the inaugural ceremony of the sixth-term government of the Hong Kong Special Administrative Region' (*Xinhuanet*, 2 Jul 2022) <<https://english.news.cn/20220702/84161c1f78fc4cd3ad239d059e1b400f/c.html>> accessed 23 Jan 2025.

<sup>158</sup>See *HKSAR v Lui Sai Yu* [2023] HKCFA 26.

to the ordinance's object and purposes of 'safeguarding national security', puts the 'safeguarding national security' as 'most important factor' in all decision-making in accordance with HKSAR legislation, and mandates respect and implementation in accordance with the law of the CSNS's 'judgements and decisions' by all persons exercising a statutory power.<sup>159</sup> In essence, amidst the continued acknowledgments of Hong Kong's special status and common law system, the overriding priority of national security under the OCTS policy has settled into Hong Kong's common law-based legal system. In other words, 'the vibe' remains.

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<sup>159</sup>See the Safeguarding of National Security Ordinance, ss 2(a), 4, 8, 29, 112. The Ordinance commenced on 23 March 2024. <<https://www.elegislation.gov.hk/hk/A305>> accessed 23 Jan 2025. For an illustration of how the Ordinance has clamped statutory decision-making, see *Ma Chun Man v Commissioner of Correctional Services* [2024] HKCFI 3531.

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