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HONG KONG
CONSTITUTION

THIRD EDITION

GENERAL EDITORS

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and

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SWEET & MAXWELL

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the Government's motions. The DP leadership and its supporters justified acceptance of the Government's modified Reform Package by highlighting the progress in terms of democracy it achieved—10 more seats would be added to LegCo in 2012, with 5 elected by universal suffrage and the other 5 elected by “quasi-universal suffrage”, with all voters having two votes (instead of the existing system of 200,000 voters having two votes and three million having only one). They also argued that the passage of the modified Reform Package would pave the way for, and would in any event not be detrimental to, the eventual election of the CE and all legislators by universal suffrage. They pointed out that although the five newly created “functional constituency” seats would be filled by elected District Councillors nominated by fellow District Councillors, their direct election by the people of Hong Kong would mean that they would be accountable to the people of Hong Kong instead of to narrow social sectors represented by existing functional constituencies. Opponents of the Government's modified Reform Package argued that it did nothing to pave the way for the abolition of functional constituencies, and could not be considered progressive. They questioned whether acceptance of the package would only weaken the popular movement to strive for full democratisation in Hong Kong. They also pointed out that questions of the road map to and electoral models for eventual universal suffrage remain unresolved. Some of them even accused the DP of betraying the cause of democracy.

8.077 The history of the failed political reform in 2005 and the successful reform in 2010 thus illustrates the nature and operation of the constitutional dynamics of democratisation in the HKSAR. Under the Basic Law and the NPCSC's interpretation of it in 2004, any electoral reform in Hong Kong can only be initiated with the consent of the NPCSC, and the basic features of the reform—which have to be proposed by the HKSAR Government—must win the support of a two-thirds majority in the LegCo before the reform can go ahead. Thus whether a particular reform will materialise depends on the collective will of the Central Government, the HKSAR Government and the Hong Kong LegCo. In the LegCo, the pan-democrats (who, in past elections since 1991, on the average secured approximately 55–60 per cent of the popular votes for the LegCo seats that were elected by universal suffrage) have always secured more than one-third of the seats in LegCo, thus they have the power of veto on any political reform. In 2005, they vetoed the political reform package proposed by the government on the ground that it was not democratic enough. In 2010, the government's proposal would have been vetoed—again on the ground that it was not democratic enough—but for a last-minute major amendment of the proposal.

8.078 Thus the paradox of the constitutional dynamics of Hong Kong's democratisation is that the pan-democrats have the voting power to defeat any government proposal for democratisation which they consider to be not democratic enough and thus unsatisfactory, even though the pan-democrats do not themselves have the power to initiate any democratic reform or to secure its passage in LegCo. Given the provisions on democratisation in the Basic Law and the demands for democratisation from civil society in Hong Kong, the Central Government and the Hong Kong Government have been willing to introduce moderate measures in the direction of democratisation. The pan-democrats, in reliance on their power of veto, may seek to bargain for a better deal. However, whether they succeed or not depends on whether there is a sufficient incentive and will on the part of the Central Government and the Hong Kong Government to make a deal and to move Hong Kong forward on the path of democratisation. In case the bargaining fails and no deal is reached, there would be no forward movement at all and the status quo of the political system would be maintained. In this case, both the pan-democrats and the government would be losers, assuming that the interests of both the pan-democrats and the government would be served by a movement towards democratisation.

(d) The controversy over universal suffrage in 2017

To the pan-democrats, the political reform of 2010 was only of limited significance, since Hong Kong's political system was still far away from achieving the goals of what they called “double universal suffrage”—the election of the CE and of all members of LegCo by universal suffrage. As mentioned above, the NPCSC had in December 2007 set the timetable for the realisation of these goals: the CE may be elected by universal suffrage in 2017, and thereafter the whole of the LegCo may also be so elected. 8.079

As the NPCSC had set the target date for the implementation of universal suffrage for the election of the CE at 2017, a third exercise in political reform (following the first two exercises in 2005 and 2010 respectively) was conducted in 2013–15 to work out the precise model for such election.¹⁶² On 17 October 2013, Mr CY Leung, the CE, announced the establishment of a three-person “Task Force on Constitutional Development”, led by Chief Secretary Mrs Carrie Lam, which would launch a public consultation exercise on the electoral reforms for the LegCo and the CE to be elected in 2016 and 2017 respectively. The exercise formally commenced on 4 December 2013 with the publication of the Consultation Document on “Let's talk and achieve universal suffrage” initiating a five-month consultation period which ended on 3 May 2014. During the consultation period, many political parties and civil society groups, including those which are “pro-China” and those which are “pro-democracy”, put forward their proposed models for the nomination and election of the CE in 2017.¹⁶³ On 15 July 2014, the government released its report on the outcomes of the consultation exercise. On the same day, the CE, Mr CY Leung, submitted to the NPCSC his “Report on whether there is a need to amend the methods for selecting the Chief Executive of the HKSAR in 2017 and for forming the Legislative Council of the HKSAR on 2016”,¹⁶⁴ recommending the introduction of universal suffrage for the election of the CE in 2017, and recommending no constitutional change regarding the electoral arrangements for the LegCo in 2016. 8.080

Since March 2013, the Central Government, through various widely publicised speeches of its senior officials and of legal scholars close to the government, made known its stance on and baseline for this exercise in political reform in Hong Kong.¹⁶⁵ It was repeatedly said that any model for the election of the CE must be based on and consistent with the provisions of the Basic Law and the relevant decisions of the NPCSC. In this regard, doubt was cast on whether the mode of “civic nominations” of candidates for the CE election proposed by the pan-democrats, the Alliance for True Democracy (formed in March 2013) and the Occupy Central Movement (which developed in early 2013) was consistent with the provision on nominations by the nominating committee (NC) in art.45 of the Basic Law. 8.081

Central Government officials and mainland legal scholars, beginning with Qiao Xiaoyang making an important speech to “pro-Establishment” Hong Kong legislators in Shenzhen on 24 March 2013 and continuing with Li Fei's visit to Hong Kong in November 2013, also pointed out that nominations by the NC are “institutional 8.082

¹⁶² For relevant developments since early 2013, including the “Occupy Central” movement, see Chapter 7 of this book.
¹⁶³ For information on various models that were proposed, see the government's report on the consultation exercise published on 15 July 2014, entitled the Report on the Public Consultation on the Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016 (see www.2017.gov.hk, last visited 14 June 2015).
¹⁶⁴ See www.2017.gov.hk.
¹⁶⁵ The following discussion is based on reports of such speeches in Hong Kong newspapers (particularly newspapers in Chinese) and on the website of the Liaison Office of the Central People's Government in the HKSAR. www.locpg.gov.cn.

nominations" (i.e. nominations by the NC as an institution) expressing the "collective will" of the committee, which are different in nature from the procedure (in Annex I to the Basic Law) of joint nominations by individuals used by the existing Election Committee for the election of the CE. It was stressed that the CE must be a "patriot" who "loves the nation and loves Hong Kong", and the Central Government will not appoint as CE someone who is "confrontational" towards the Central Government and attempts to change the socialist political system in mainland China. In March 2014, Mr Zhang Dejiang, Chairman of the NPCSC, said that the design of the model for universal suffrage for the CE of the HKSAR is a matter that concerns the "sovereignty, security and developmental interests" of the PRC, and that the context for the universal suffrage to be practiced in the HKSAR is that of a local election and not a national election—hence the models for national elections in other countries are not necessarily appropriate for Hong Kong. Subsequently, it was elaborated that if someone who is not a "patriot" becomes the CE of the HKSAR, the security interests of the PRC might be prejudiced.

8.083

The Central Government's position on universal suffrage in the HKSAR was further elaborated when senior officials met with Hong Kong legislators (including some of the pan-democrats) in Shanghai in April 2014, and when they met with Hong Kong legislators, Hong Kong deputies to the NPC, Hong Kong members of the Chinese People's Political Consultative Conference (CPPCC) and other representatives of Hong Kong society in Shenzhen in August 2014 after the Hong Kong Government published its report on the consultation exercise in July and before the NPCSC met to consider the report. It was explained that the provision in the Basic Law that candidates for election of the CE by universal suffrage should be nominated by a "broadly representative nominating committee" was well-designed for the purpose of minimising three kinds of "risks" associated with such election: the risk of "political confrontation", that of "constitutional crisis" and that of "populism". "Political confrontation" refers to confrontation between the "two social systems" within "One Country, Two Systems" between Hong Kong and the Central Government, or within Hong Kong society. The nominating committee would ensure that candidates are acceptable to various factions and thus minimise the risk of confrontational politics. As regards "constitutional crisis", this refers to the scenario of a candidate being elected by universal suffrage who is not considered appointable by Beijing, and Beijing refuses to appoint him or her as CE. Finally, as regards "populism", this refers to failure to ensure that the interests of all social classes (including those of business or capital) are taken care of. The risk of "populism" is said to be minimised as the composition of the nominating committee is based on the principle of balanced representation of various social classes.

8.084

Chinese officials also pointed out that the debate on the model for electing the CE by universal suffrage not only involved a question of the design of rules and institutions, but also a political question of whether the principle of "patriots ruling Hong Kong" should be given effect to. It was pointed out that some people in Hong Kong would like Hong Kong to become an "independent political entity" and do not accept the Central Government's "plenary power to govern" Hong Kong (*quanmian guanzhi quan 全面管治權*);¹⁶⁶ they use "one system" against the central authority, or even attempt to change

¹⁶⁶ See generally the White Paper published by the Information Office of the State Council of the PRC on 10 June 2015 on *The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region*, http://english.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm (last visited 22 June 2015).

the political system in the Chinese mainland. Such people should not be allowed to become the CE of the HKSAR.¹⁶⁷

On 31 August 2014, the NPCSC finally rendered its decision on political reform in the HKSAR.¹⁶⁸ It accepted the CE's recommendation that no constitutional change regarding the election of the LegCo was called for in 2016. On the question of the election of the CE by universal suffrage, the following points in the decision are particularly noteworthy:

8.085

- (1) "Since the long-term prosperity and stability of Hong Kong and the sovereignty, security and development interests of the country are at stake, there is a need to proceed in a prudent and steady manner."
- (2) "The formulation of the method for selecting the Chief Executive by universal suffrage must strictly comply with the relevant provisions of the Hong Kong Basic Law, accord with the principle of 'one country, two systems', and befit the legal status of the HKSAR. It must meet the interests of different sectors of the society, achieve balanced participation, be conducive to the development of the capitalist economy, and make gradual and orderly progress in developing a democratic system that suits the actual situation in Hong Kong."
- (3) "Since the Chief Executive of the HKSAR shall be accountable to both the HKSAR and the Central People's Government in accordance with the provisions of the Hong Kong Basic Law, the principle that the Chief Executive has to be a person who loves the country and loves Hong Kong must be upheld. This is a basic requirement of the policy of 'one country, two systems'. It is determined by the legal status as well as important functions and duties of the Chief Executive, and is called for by the actual need to maintain long-term prosperity and stability of Hong Kong and uphold the sovereignty, security and development interests of the country. The method for selecting the Chief Executive by universal suffrage must provide corresponding institutional safeguards for this purpose."
- (4) The CE of the HKSAR may be elected by universal suffrage "starting from 2017".
- (5) As regards the "number of members, composition and formation method" of the "broadly representative nominating committee" that nominates candidates for the CE, provisions "shall be made in accordance with the number of members, composition and formation method of the Election Committee for the Fourth Chief Executive."

¹⁶⁷ At an important meeting between senior Chinese officials in charge of Hong Kong affairs and Hong Kong Legislative Councillors (including some of the pan-democrats) in Shenzhen on 31 May 2015, Wang Guangya, Director of the Hong Kong and Macau Affairs Office of the State Council, said that there are two kinds of "pan-democrats". Whereas one group among the two supports the policy of One Country Two Systems and China's political system as prescribed by its Constitution, even though their views on democracy and its implementation in Hong Kong may be different from those of Beijing's, the other group—whom Wang called "the diehards" (死硬派, 頑固派)—use "democracy" as a cloak, regard Hong Kong as an independent political entity, deliberately distort the Basic Law, obstruct the governance of Hong Kong by its government, resist the Central authority in a diehard manner, or even conspire with foreign forces, advocate and support secessionist forces such as 'Hong Kong independence', and attempt to subvert the ruling status of the Chinese Communist Party and the socialist system that are prescribed by China's Constitution". He pointed out that the proposed system for electing the Chief Executive by universal suffrage was so designed as to prevent the latter group from becoming candidates in the election, and even if one among this group were elected, the Central Government would definitely not appoint this person as Chief Executive of the HKSAR. See Hong Kong newspapers of 1 June 2015. The full text of Wang's speech was published in some newspapers. See, e.g., *Ming Pao*, 1 June 2015, A29 (in Chinese).

¹⁶⁸ The decision of the Standing Committee of the NPC on issues relating to the selection of the Chief Executive of the HKSAR by universal suffrage and on the method for forming the Legislative Council of the HKSAR in the year 2016 (31 August 2014). See http://www.china.org.cn/china/2014-08/31/content_33390388.htm.

- (6) "The nominating committee shall nominate two to three candidate for the office of the Chief Executive in accordance with democratic procedures. Each candidate must have the endorsement of more than half of all the members of the nominating committee."

8.086

On 1 September 2014—the day following the NPCSC decision—senior Chinese officials visited Hong Kong and made important speeches to explain the decision to members of the public and to Hong Kong Government officials. They reiterated many of the points previously made as set out above. It was further pointed out that the model for universal suffrage prescribed by the decision provides the institutional guarantee that the CE elected by universal suffrage in future would be someone who is both trusted by the Central Government and supported by the people of Hong Kong, and that non-patriots or those confrontational towards the Central Government could not become the CE. It was also said that the question of the model for universal suffrage in Hong Kong involves "a struggle for the power to govern the HKSAR". Some people in Hong Kong are:

"unwilling to accept the fact that the PRC has resumed the exercise of sovereignty over Hong Kong, and are unwilling to accept the governing power of the central authority over Hong Kong; they adopt an 'alternative interpretation' of 'One Country, Two Systems' and the provisions of the Basic Law; they make use of foreign forces, continuously stir up political disputes, pointing their fingers at the Central Government, and attempt to turn Hong Kong into an independent political entity. On the issue of universal suffrage, their views and demands may be summarised in one sentence: let their representative become the Chief Executive. This, of course, cannot be permitted. If they are allowed to become the Chief Executive, this would necessarily prejudice the Central Government's governing power over the HKSAR, prejudice our country's sovereignty, security and developmental interests, and damage the stability and prosperity of Hong Kong ... If we understand the political nature of the question of universal suffrage, we can see that the question involves matters of fundamental principles on which there can be no compromise. ... Those who insist on being confrontational towards the Central Government cannot be the Chief Executive, whether in the past, present or future."¹⁶⁹

8.087

The decision of the NPCSC was met by strong protest from pro-democracy forces in Hong Kong, which launched the "Umbrella Movement" (also known as the "Occupy Central Movement") that started in late September and continued until mid-December 2014, resulting in the occupation by demonstrators of central business and government districts in Admiralty, Causeway Bay and Mongkok. After the occupation came to a peaceful end, the Government on 6 January 2015, in pursuance of a promise made at a televised meeting with student leaders during the occupation campaign, submitted to the Hong Kong and Macau Affairs Office of the State Council a "Report on the Recent Community and Political Situation in Hong Kong",¹⁷⁰ which was intended to reflect to Beijing the views of the Hong Kong community on the controversial issues of universal suffrage.

¹⁶⁹ My own translation from the Chinese original.

¹⁷⁰ See www.2017.gov.hk (last visited 14 June 2015). For an alternative report on community views by an NGO, see the report dated 17 February 2015 by the Civil Society Joint Action group, available at <https://www.facebook.com/events/300089920198104/> (last visited 14 June 2015).

On 7 January 2015, the Government launched the "second round consultation" on political reform by publishing the consultation document entitled "2017 Seize the Opportunity: Method for Selecting the Chief Executive by Universal Suffrage Consultation Document",¹⁷¹ for the purpose of consulting the public on the concrete model for electing the CE in 2017, which was to be formulated on the basis of the parameters set by the NPCSC decision. The pan-democrats boycotted the consultation exercise, stating that they would reject any electoral model that conformed to the parameters set by the NPCSC decision.

8.088

On 22 April 2015, the Government published a policy document entitled "2017 Make it happen! Method for Selecting the Chief Executive by Universal Suffrage: Consultation Report and Proposals",¹⁷² proposing a concrete model for nominating candidates for electing the CE in 2017, including proposed amendments to Annex I to the Basic Law (on the method for electing the CE). The model included some details that were not in the NPCSC decision itself. For example, there would be a "two-stage process" of nominating candidates for the CE election. In stage one, not less than 120 and not more than 240 members of the 1200-member Nominating Committee (NC) could jointly recommend potential candidates, who could then campaign and compete for support before stage two. In stage two, members of the NC would vote on whether they support each of the potential candidates. Each NC member would vote for at least two and at most "n" potential candidates ("n" being the total number of potential candidates who emerged in stage one). In this way two or three candidates for the CE election by universal suffrage would be produced, each having obtained the supporting votes of more than half of the NC members. The proposed model was subsequently introduced in the LegCo and put to a vote on 18 June 2015. With 28 (including 27 "pan-democrats") of the 70-member Council voting against the proposal, it failed to secure the requisite two-thirds majority for amendment of Annex I to the Basic Law.¹⁷³ The veto meant that the existing system of the election of the CE by a 1200-member Election Committee would continue in force in the foreseeable future.

8.089

(e) Comments and analysis

The key difference between Beijing's position on universal suffrage for Hong Kong's CE and that of the pan-democrats may be analysed as follows. Beijing would like to ensure that the candidates for election by universal suffrage to the office of the CE are all acceptable, trustworthy and appointable from Beijing's point of view, in the sense that they are not "confrontational" towards the Central Government or ideologically opposed to the "socialist political system" being practiced in mainland China. The system of nominations of candidates by a nominating committee as provided for in art.45 of the Basic Law enables this objective to be achieved if the majority of the members of the nominating committee are "pro-China" or "patriots", and if the nominations the committee makes are "institutional nominations" expressing the majority will of members of the committee. Thus the 2014

8.090

¹⁷¹ www.2017.gov.hk.

¹⁷² *Ibid.*

¹⁷³ Actually the Government's motion was rejected by a vote of 8 (for the motion) to 28 (against). Less than one minute before the voting took place, 31 pro-Government legislators walked out of the chamber en masse, intending to precipitate an insufficient quorum so that the voting could be delayed until one absent pro-Government legislator (Lau Wong Fat) could come back to vote with the others. Due to failure in coordination and communication, 9 pro-Government legislators did not join the walk-out, hence the quorum (half of the membership of LegCo) was still satisfied and the voting in the chamber was completed a few seconds after the walk-out. In the state of confusion, one of the 9 pro-Government legislators who stayed in the chamber failed to press the voting button in time, hence only 8 votes in support of the Government's motion were recorded. Jasper Tsang, President of LegCo, followed the convention of the President not voting. See the reports in Hong Kong newspapers of 19 June 2015, e.g., "Reform package fails, as does walkout", *South China Morning Post*, 19 June 2015.

decision of the NPCSC requires the size and composition of the nominating committee to follow closely that of the pre-existing election committee for the CE. The political reality has been that with the 4-sector composition of the election committee and its members being largely elected by functional constituencies, the majority of its members were indeed "pro-China" or "pro-Establishment", and those who were pan-democrats or sympathetic to them only constituted a minority (slightly more than one-eighth) in the election committee.

8.091

On the other hand, the pan-democrats were firmly opposed to any "screening" to be performed by the nominating committee for the purpose of preventing persons who have considerable public support among Hong Kong voters (such as leading members of the pan-democrats) but are not "patriots" in Beijing's eyes from becoming candidates for election by universal suffrage to the office of the CE. In their view, this would be "fake" universal suffrage and inconsistent with international standards of universal suffrage and democracy which prohibit unreasonable restrictions on the right to be a candidate in an election.¹⁷⁴ "Genuine" universal suffrage, in their view, requires a truly competitive election in which candidates with different platforms and political opinions may freely and fairly compete for votes. Given that the pan-democrats have always obtained a majority of the popular votes for the LegCo seats that were elected by universal suffrage, they believed that any nomination system for the election of the CE by universal suffrage which makes it impossible for their leaders to be nominated as candidates would not be genuine universal suffrage. Hence the pan-democrats and their supporters condemned the model for universal suffrage stipulated in the NPCSC decision, boycotted the government's "second round" of consultation regarding more detailed arrangements for universal suffrage, and ultimately voted in LegCo to veto the constitutional reform proposal.

(f) The "pan-democrats" and the "pro-China/ pro-Establishment" camp

8.092

The above-mentioned difference between Beijing and the pan-democrats in Hong Kong on the issue of universal suffrage can only be fully understood in the light of the history and orientation of the "pan-democrats" or "pro-democracy" politicians as a political force in Hong Kong, to which we now turn.

8.093

Since the 1980s and up to now, politicians and activists in Hong Kong have been divided into two camps—the pro-China camp (now commonly known as the "pro-establishment" camp) and the pro-democracy camp (now commonly known as the "pan-democrats").¹⁷⁵ The division has been intensified by the experience of various major political events, such as the Beijing student movement in 1989, the Patten political reform in the 1990s, the establishment of the Provisional Legislative Council, the "right of abode" saga leading to the first-ever interpretation of the Basic Law by the NPCSC, the art.23 saga leading to the abortion of the National Security Bill, the 2004 interventions by the NPCSC on political reform in Hong Kong, the 2005 Interpretation by the NPCSC on the term of office of the CE, the defeat of Donald Tsang's political reform proposal in December 2005, and the 2007 NPCSC Decision on political development in Hong Kong.

¹⁷⁴ See Chapters 7 and 28.

¹⁷⁵ See generally S.K. Lau and H.C. Kuan, "Partial Democratization, 'Foundation Moment' and Political Parties in Hong Kong" (2000) 163 *China Quarterly* 705; Lam, fn 67 above, Chapter 7; Ma, *Political Development* fn 76 above, Chapter 6.

8.094

In each of these events, the pro-democracy politicians opposed the Chinese Government's position. The pro-democracy camp has been labelled "the opposition camp" by some pro-China commentators in Hong Kong.¹⁷⁶ They are considered to have consistently opposed the policies of the Chinese Government towards Hong Kong (particularly with regard to the development of the political system in Hong Kong), the Tung Chee Hwa administration, the Donald Tsang administration, and most recently the CY Leung administration. Some of them are considered hostile towards the Chinese Communist Party-led political system in China. Some of them are leaders of the Hong Kong Alliance in Support of Patriotic Democratic Movements of China, which was founded in 1989 and has continued to operate in Hong Kong after 1997, organising annual vigils and protests demanding the rehabilitation of the Beijing student movement of 1989 and the end of one-party rule. Some of them attended the ceremony in Norway for the award to Liu Xiaobo—a leading dissident in China—of the Nobel Peace Prize in 2010, a ceremony which China urged all Governments friendly to it to boycott. Some of the pan-democrats were denied the issue of a "huixiang zheng" (回鄉証), a passport-like document which Hong Kong permanent residents who are Chinese nationals need to produce in order to enter mainland China. Some of them are also suspected of having close relationships with foreign Governments or foreign NGOs with political interests. And yet, ever since direct election was introduced in Hong Kong in 1991, they have consistently succeeded in capturing approximately 55 to 60 per cent of the popular votes for that portion of LegCo seats which were filled by elections by universal suffrage.¹⁷⁷ It is therefore feared that if unrestricted elections by universal suffrage were introduced in Hong Kong, the office of the CE and the majority of LegCo seats would be captured by members of the pro-democratic camp.

8.095

There are two main lines of cleavage among political parties and politicians in Hong Kong. One is the pro-democracy/pro-China cleavage. The other is the pro-grassroots/pro-business cleavage. Among these two lines of cleavage, the former has been the dominant one.¹⁷⁸ As discussed above, since the establishment of the HKSAR, the effectiveness of the "executive-led" government in Hong Kong¹⁷⁹ has depended on a loose coalition of pro-China political parties and independent legislators, which occupied the majority of seats in LegCo.¹⁸⁰ The coalition embraces the Democratic Alliance for the Betterment of Hong Kong (DAB),¹⁸¹ the main pro-China political party in Hong Kong, the Hong Kong Federation of Trade Unions, a pro-China and pro-grassroots civic organisation with a long history in

¹⁷⁶ The term "opposition camp" or "opposition faction" (反對派) was first used by Mr Donald Tsang to refer to the pro-democracy camp when the latter vetoed Tsang's political reform proposal in December 2005. The term was popularised among pro-China commentators after the publication of a lengthy article in the pro-China newspaper *Wen Wei Po*: "The Hong Kong 'Democracy Camp' is actually the Opposition Camp" (香港「民主派」實為反對派), *Wen Wei Po*, 29 December 2005, A8-A9.

¹⁷⁷ The pro-China camp has consistently captured 30–40% of these popular votes. See generally Lam, fn 67 above, Chapter 7, esp 129; Ma, *Political Development*, fn 76 above, 154, 223; Ma Ngok, "Pluralization amidst Polarization: The 2004 LegCo Election", in Chan and Harris (eds.), fn 134 above, Chapter 14. The pro-China forces usually performed better in elections to District Councils (DC) and captured the majority of DC seats. The DCs do not have lawmaking power and are only concerned with district affairs. However, under the influence of the social movement against the extradition bill in 2019, the pan-democrats and other opposition politicians secured an unprecedented victory in the DC election on 24 November 2019, in which they won 57% of the popular votes and 85% of the seats. See *Ming Pao* (Chinese newspaper), 26 November 2019.

¹⁷⁸ See generally Lam, fn 67 above, Chapter 7; Lau and Kuan, fn 175 above.

¹⁷⁹ On executive-led government in Hong Kong, see generally Lam, fn 67 above, Chapter 2; A. Chen, "'Executive-led Government', Strong and Weak Governments and 'Consensus Democracy'" in Chan and Harris (eds.), fn 134 above, Chapter 2; Joseph Chan (陳祖為), "Executive-led Government was Not the Original Intent behind the Basic Law" (in Chinese), *Ming Pao*, 28 June 2004, A34; Joseph Chan, "Separation of Powers in Hong Kong's Political System" (in Chinese), *Ming Pao*, 29 June 2007, A33.

¹⁸⁰ See the works cited in fn 100, 102 and 103 above.

¹⁸¹ In 2005 the DAB was re-named the Democratic Alliance for the Betterment and Progress of Hong Kong after its merger with the Hong Kong Progressive Alliance.

Hong Kong, the Liberal Party, the main pro-business political party, the New People's Party, and some independent legislators mainly based on the functional constituencies in the business sector. The pan-democrats in LegCo constituting the "opposition" include, among others, the DP (the oldest political party among the pro-democracy politicians) and the CP (formed in 2006 by some of the lawyers who played a prominent role in the struggle against the art.23 legislation in 2003).

8.096 The long-standing differences between the pro-democracy and pro-China sides of Hong Kong's political spectrum reveal a fundamental problem of "One Country Two Systems" insurmountable obstacle to full democratisation in Hong Kong. This fundamental problem consists of a fundamental difference in the understanding of "autonomy" and of the relationship between "autonomy" and "democracy" on the part of the Chinese Government on the one hand and the pro-democracy political parties, politicians and civil society in Hong Kong on the other hand. The pro-democracy camp's understanding of the autonomy of Hong Kong may be termed a Western liberal democratic and legalistic understanding of autonomy. It is believed that as in the case of, say, the people in a state of the United States who can freely elect their state legislature and state governor, the people of Hong Kong should also be able to freely elect by universal suffrage their CE and all members of their Legislature. In a liberal democratic federal state like the United States, the state legislature and state governor may on their own exercise all powers within their constitutional limits, and the federal government may not interfere with the exercise of such powers. In a similar vein, the democrats in Hong Kong believe that so long as the elected Government of Hong Kong stays within the scope of its power under the Basic Law, the Central Government should leave it alone and it is none of the Central Government's business to intervene or otherwise influence it. Thus there is no legitimate reason why Beijing should oppose full democratisation in Hong Kong. And the appointment of the CE by the Central Government after his or her being elected by the people of Hong Kong should be no more than a formality.

8.097 Beijing's understanding of autonomy is however not the same. It has always been stressed that the power of appointment of the CE is a substantive power and not merely formal or ceremonial. Since the 1990s, it has been stressed that Hong Kong's system of government is an "executive-led" system and must not be allowed to become a "legislative-led" one.¹⁸² The emphasis on executive-led government may be understood in the light of the fact that it is the Executive (including the CE and the principal officials), not the Legislature, that is appointed by Beijing and enjoys the confidence and trust of, and derives powers and authority from, Beijing. As is evident in Deng Xiaoping's speeches on "One Country, Two Systems" in Hong Kong (which were re-published¹⁸³ in 2004 during the campaign¹⁸⁴ to stress the idea of "patriots ruling Hong Kong") and the White Paper of 2014,¹⁸⁵ China's understanding of Hong Kong's autonomy is that of "Hong Kong people ruling Hong Kong", the majority of those Hong Kong people exercising the power to rule Hong Kong being patriots—people whom the Chinese Government and the Chinese Communist Party consider to be patriots and thus their political allies for the purpose of ruling Hong Kong. This kind of thinking should be understood in the context of the Chinese Communist

¹⁸² See the works cited in fn 179 above.

¹⁸³ Deng Xiaoping On "One Country, Two Systems" (Joint Publishing, 2004), which is the English translation of 《邓小平論「一國兩制」》 published by the same publisher. See particularly the speeches at 13, 23 and 67 of this English book.

¹⁸⁴ See Ming Pao Editorial Department (eds), *The Debate on Patriotism* (愛國論爭) (Ming Pao Press, 2004) (in Chinese).

¹⁸⁵ See fn 166 above.

Party's long tradition of "united front work",¹⁸⁶ in which friendly political relations are cultivated between the Communist Party and non-communists whom the Party considers to be trustworthy and reliable for the purpose of forming a political alliance to achieve a common goal. Such united front work has been actively undertaken in Hong Kong by the Chinese authorities both before and after the 1997 Handover.¹⁸⁷

8.098 It is noteworthy that Deng Xiaoping said in the context of "patriots ruling Hong Kong" that "direct elections" may not necessarily produce the right people for this purpose.¹⁸⁸ Thus democracy is not an ultimate value or goal in itself. It is only a means for the purpose of choosing the right people to rule Hong Kong. And the process of democratisation in Hong Kong is subject to the overriding principle of "patriots ruling Hong Kong". Thus the Chinese Government's perspective on autonomy, democracy and democratisation in Hong Kong may be understood as follows. Hong Kong already enjoys full autonomy in the sense of "Hong Kong people ruling Hong Kong"—not Communist cadres ruling Hong Kong, and the Central Government not interfering with the administration, policy-making and law-making of Hong Kong. As regards democracy, Hong Kong already enjoys a significant degree of democracy (including the rule of law, civil liberties, judicial independence, multiparty competition for and direct elections to the legislature, functional constituency elections, etc.). As regards Hong Kong's further democratisation, this must be subject to the condition that the CE must be a "patriot".

(g) Concluding reflections

8.099 In the struggle over the model of universal suffrage to be introduced in Hong Kong in 2017, the key players were the central government on the one hand and the pan-democrats and their supporters (including the Occupy Central Movement) on the other hand; the HKSAR government and the pro-China/ pro-Establishment political forces in Hong Kong largely followed the line taken by the central government. The single most crucial issue in the debate on the issue of universal suffrage for the election of the CE was whether the "nomination threshold" in the operation of the nominating committee would be low enough for at least one leader of the pan-democrats to be a candidate in the election.

8.100 In the existing system for election of the CE by the Election Committee under Annex I to the Basic Law, a candidate may be nominated jointly by at least one-eighth of the members of the Election Committee, followed by election by members of the Election Committee. In the CE elections of 2007 and 2012, persons supporting or sympathetic to the pan-democrats won more than one-eighth of the seats in the elections to the Election Committee, and thus Alan Leong (of the CP) and Albert Ho (of the DP) were nominated respectively as one of the two candidates in the 2007 election and one of the three candidates in the 2012 election.

8.101 During the debate in 2013–14 on the nomination system for election of the CE by universal suffrage in 2017, the principal demand of the pan-democrats was civic nomination, although there were proposals from pro-democracy scholars considered to be "moderate" (and also a proposal from Ronny Tong, a legislator who was also a member of the CP) that did not insist on civic nomination but advocated a relatively low threshold for nomination

¹⁸⁶ See generally Lyman P. Van Slyke, *Enemies and Friends: The United Front in Chinese Communist History* (Stanford University Press, 1967).

¹⁸⁷ See Ma, *Political Development*, fn 76 above, Chapter 3; Jamie Allen, *Seeing Red: China's Uncompromising Takeover of Hong Kong* (Butterworth-Heinemann Asia, 1997) Chapter 3.

¹⁸⁸ Deng Xiaoping On "One Country, Two Systems", fn 183 above, 75–76.

by a nomination committee (such as one-eighth of its members being able to nominate a candidate) which should be more democratically constituted than the existing Election Committee. The pan-democrats considered civic nomination to be more consistent with democracy and free election than nominations by a nominating committee that is not elected by universal suffrage, as civic nomination would allow everyone who has the requisite degree of popular support (say tens of thousands of eligible voters) to participate as a candidate in the election. Strategically, the demand for civic nomination was probably intended to counteract the idea of “institutional nomination” announced by Qiao Xiaoyang in March 2013: Relying on the difference in wording between (a) the relevant provision on joint nominations by individual members of the Election Committee in Annex I to the Basic Law and (b) the provision in art.45 of the Basic Law on the making of nominations by the nominating committee in accordance with democratic procedures, Qiao argued that the nominating committee collectively as an institution or organ should make the nominations, and “democratic procedures” imply that the minority should defer to the majority. Qiao’s idea of institutional nomination thus raised the prospect of a high nomination threshold in the operation of the nominating committee. Given this context, the pan-democrats seemed to believe that the idea of civic nomination might be used to bypass the “screening effect” of a high nomination threshold within the nominating committee.

8.102 Some observers believe that insistence on civic nomination was, for most though not all of the pan-democrats, only a high “asking price” in the bargaining process, and they would be willing to accept a final package that included a low nomination threshold (not higher than one-eighth of the members of the nominating committee) and a nominating committee with a voters’ base significantly larger than the existing Election Committee. In retrospect, some observers suggest that if the pan-democrats had not invested most of their efforts in civic nomination—which the Central Government considered to be clearly outside what is permissible under the Basic Law—and the threat of “Occupy Central”, the final decision of the NPCSC might have been more palatable to the pan-democrats. It is true that the pan-democrats’ actions were by no means conducive to the building of trust between themselves and the Central Government, and foreclosed any possibility of genuine dialogue regarding, for example, what compromise solution might be viable to ensure that persons considered unacceptable and not appointable by Beijing would not become candidates for or would not be appointed as CE. However, it is impossible and futile to speculate on what might have happened had the pan-democrats chosen to adopt a less “confrontational” or more conciliatory approach in dealing with the Central Government.

8.103 In both the text of the NPCSC decision of August 2014 and the speeches given by Chinese officials, it was pointed out that the model of universal suffrage prescribed by the decision provides the institutional guarantee to ensure that only a patriot would become the CE. At the same time, Chinese officials argued that the nomination system stipulated by the decision does not constitute any unreasonable restrictions on opportunities to become candidates in the election: persons from different political parties or groups can equally compete for the support of the majority of the members of the NC who are largely elected from the four major sectors of Hong Kong society. There is thus an apparent contradiction between the “patriot” requirement and the alleged principle of fair and equal competition. The answer would seem to lie in the historical and political reality that the manner in which the existing Election Committee is constituted (which, according to the NPCSC decision, is also the manner in which the NC would be constituted) has in practice secured a majority of “patriots” in the committee. Although there is nothing in the nature of a constitutional guarantee that there will always be such a majority of “patriots” in the future, Chinese

officials apparently believed that institutional nomination by a majority of the members of the Nominating Committee should be able to ensure that the candidates are “patriots”.

8.104 Pan-democrats condemned the NPCSC decision of August 2014 and accused Beijing of breaching its promise of universal suffrage for Hong Kong people under the Basic Law. Yet what the Basic Law promised was no more than a system of appointment of the CE by the Central People’s Government after an election by “universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures”. Thus some degree of control or pre-selection — or what the pan-democrats objected to as “screening” — of candidates by a nominating committee had been built into the Basic Law as enacted in 1990.

8.105 Given the failure of the electoral reform of 2015, the question for the future is whether the model of universal suffrage stipulated in the NPCSC decision of 2014 must still be followed in any future attempt to realise the goal stipulated in the Basic Law of the election of the CE by universal suffrage. In this regard, it is noteworthy that Li Fei, then Chairman of the Hong Kong Basic Law Committee of the NPC Standing Committee, said at a meeting on 31 May 2015 in Shenzhen with Hong Kong Legislative Councillors that “[t]here is no possibility for the top legislature [the NPCSC] to revise the decision [the NPCSC Decision of 31 August 2014] without even putting it into practice”.¹⁸⁹ Immediately following LegCo’s veto on the political reform proposal on 18 June 2015, a spokesman of the General Office of the NPCSC said to the media that “the orientation of the system of universal suffrage and the legal principles prescribed by the NPCSC Decision must continue to be followed in the process of promoting the election of the Chief Executive by universal suffrage; any future implementation of universal suffrage for the election of the Chief Executive in Hong Kong must still rely on this Decision as the constitutional basis for universal suffrage”.¹⁹⁰ These statements suggest that it is highly unlikely that the Central Authorities can be persuaded—in order to secure a two-thirds majority in LegCo in support of political reform at a future point in time—to relax the terms and conditions of the NPCSC decision of 2014, which still stands as a valid law (governing election of the CE of the HKSAR by universal suffrage at any future point in time) unless amended or repealed.

8.106 Political developments since 2015 culminating in the “anti-extradition bill” movement of 2019 and the NPC decision of 28 May 2020 “on establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security” (followed by the NPCSC’s enactment on 30 June 2020 of the Law of the PRC on Safeguarding National Security in the HKSAR) testify to increasing tensions and conflicts between pan-democrats (and other political forces opposed to the Central Authorities) and the Central Authorities, and increasing polarisation in Hong Kong society between “pro-Establishment” forces and the opposition. These trends only serve to dim the prospects of further democratisation of Hong Kong’s political system, because any major political reform in the HKSAR depends on the existence of a sufficient degree of consensus in the community so as to secure a two-thirds majority in LegCo voting in support of a political reform package proposed by the government.

¹⁸⁹ “NPCSC decision stays effective beyond 2017: Li Fei”, *China Daily* (Hong Kong edition), 1 June 2015, 1. Li’s speech was widely reported in Hong Kong newspapers on 1 June 2015.

¹⁹⁰ See Hong Kong newspapers of 19 June 2015; www.locpg.hk/jsdt/2015-06/19/c_127934136.htm (香港特區行政長官普選法案因少數議員阻撓未獲通過) (last visited 2 April 2020).

- 8.107 After the failure of political reform in 2015, the new generation of political activists who came on the scene¹⁹¹ distanced themselves from the traditional pan-democrats who have struggled to realise democracy in Hong Kong within the constitutional framework of "One Country, Two Systems". These younger activists are inclined to believe that the authoritarian PRC regime would not tolerate the existence in the HKSAR of a true democracy with genuine universal suffrage. Thus they went one step further to question the assumption that Hong Kong should remain part of the PRC. Political activists who hold such views are now known as the "localists". Some of the "localists" advocate self-determination or even independence for Hong Kong.¹⁹²
- 8.108 In the LegCo election of September 2016, some "localists" were barred from being candidates in the LegCo election,¹⁹³ on the ground that their political views were inconsistent with the declarations they had signed (as required by the electoral law) that they would uphold the Basic Law and owe allegiance to the HKSAR.¹⁹⁴ Despite this move, a total of six "localists" were elected into LegCo in this election, collectively capturing 19 per cent of the popular votes.¹⁹⁵ As far as LegCo was concerned, the success of the "localists" proved to be short-lived, as some of them were subsequently stripped of their LegCo seats by the court on the ground of their failure to comply with the oath-taking requirement in the Basic Law and local legislation.¹⁹⁶ These "disqualification" cases were particularly controversial as the NPCSC intervened in the course of the judicial proceedings in the first "disqualification" case by issuing an interpretation of art.104 of the Basic Law (which concerns the oath-taking requirement). In the by-elections held to fill the vacancies arising from the disqualification of these legislators, some "localists" were again barred from participation.¹⁹⁷
- 8.109 The pro-independence Hong Kong National Party, founded by Chan Ho Tin Andy, one of the "localists" barred from participating as a candidate in the 2016 LegCo election,¹⁹⁸ was banned by the Secretary for Security as an "unlawful society" under the Societies

Ordinance on 24 September 2018.¹⁹⁹ The National Party's appeal to the CE in Council was dismissed on 19 February 2019.²⁰⁰ On 26 February 2019, the Central People's Government issued an "official letter" (*gongghan*) to the CE expressing support for the decision to ban the National Party, affirming that it was the constitutional duty of the HKSAR to "safeguard national security in accordance with law", and requiring the CE to submit a report on the matter.²⁰¹

8.110 After its interpretation in November 2016 on the oath-taking requirement under the Basic Law, the NPCSC acted again with regard to the HKSAR in December 2017 in the midst of the legal controversy surrounding "co-location" of mainland and Hong Kong immigration and customs check-points at the Western Kowloon Express Rail station. The Guangzhou-Shenzhen-Hong Kong Express Rail Link (Colocation) Ordinance 2018, which allows Chinese immigration and customs officers to be stationed in a port control area in the new West Kowloon station and to enforce mainland Chinese law there, was criticised by opponents of the "co-location" scheme as being inconsistent with the Basic Law provision on the non-application of mainland laws in Hong Kong. The scheme was subsequently upheld by the Court of First Instance, relying to some extent on the NPCSC decision approving the scheme and confirming its constitutionality.²⁰²

8.111 The escalating tension between opposition politicians in Hong Kong and the Central Authorities reached a climax in 2019 during the social movement against a proposed extradition law, which gave rise to massive protests, riots, and half a year of civil unrest unprecedented in the history of the HKSAR. A murder committed in Taiwan by a Hong Kong resident prompted the HKSAR government to introduce in March 2019 the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill, which provided for *ad hoc* extradition between Hong Kong and any other jurisdiction on a case-by-case basis. The bill was considered necessary because although Hong Kong's existing law provided for extradition by treaties between Hong Kong and foreign states, it did not allow rendition between Hong Kong and another part of China, and Taiwan was regarded as part of China. Opponents of the bill perceived it as putting innocent Hongkongers at risk of being extradited to mainland China, where (it was feared that) they might not receive a fair trial. Massive protests resulted in the bill being shelved on 15 June and formally withdrawn on 23 October

¹⁹¹ See generally Sonny S.H. Lo, "Ideologies and Factionalism in Beijing-Hong Kong Relations" (2018) 58 *Asian Survey* 392; Chan Kin-man and Vitrierat Ng, "Localists, Militants and Cynics: Post-Umbrella Social Trends in Hong Kong" (本土、勇武與犬儒：傘後香港的社會趨勢)(2017) 60:1 *Mainland China Studies* (中國大陸研究) 19.

¹⁹² For the "localist" turn in Hong Kong politics since the 2012 LegCo election, see Ngok Ma, "The Rise of 'Anti-China' Sentiments in Hong Kong and the 2012 Legislative Council Elections" (2015) 15 *China Review* 39; Joseph Y.S. Cheng (ed.), *New Trends of Political Participation in Hong Kong* (City University of Hong Kong Press, 2014); lam-chong Ip, *Hong Kong's New Identity Politics* (Routledge, 2020).

¹⁹³ See Hong Kong newspapers of 3 August 2016, eg, "Protests shut down electoral commission briefing as 'Hong Kong Indigenous' Edward Leung disqualified from Legco elections", *South China Morning Post*, 2 Aug 2016; "Hong Kong's returning officers' power to dismiss potential Legco candidates called into question", *South China Morning Post*, 2 Aug 2016.

¹⁹⁴ Chan Ho Tin, one of the disqualified candidates, subsequently brought an election petition to challenge the returning officer's decision not to allow him to be a candidate, but failed before the Court of First Instance: *Chan Ho Tin v Lo Ying Ki Alan* [2018] 2 HKLRD 7. The case was not appealed to a higher court.

¹⁹⁵ "Localists and self-determination activists capture 6 seats, LegCo divided into 3 factions" and "Localist self-determination politicians capture 400,000 votes", *Ming Pao*, 6 September 2016 (in Chinese); C.K. Choy and J.M. Chan, "A preliminary analysis of the outcome of the LegCo election" (立法會選舉結果初步評析), *Ming Pao*, 6 September 2016.

¹⁹⁶ The first "disqualification" case related to Leung Chung Hang and Yau Wai Ching: *Chief Executive of the HKSAR v President of the Legislative Council* [2016] 6 HKC 417 (CFI); [2017] 1 HKLRD 460 (CA); *Yau Wai Ching v Chief Executive of HKSAR* (2017) 20 HKCFAR 390 (leave to appeal refused by CFA). Four other Legislative Councillors were subsequently also disqualified on the ground of failure to take their oaths properly: *Nathan Law Kwun Chung* [2017] 4 HKLRD 115 (CFI), *Leung Kwok Hung* [2019] HKCA 173 (CA). For an analysis, see Han Zhu and A.H.Y. Chen, "The Oath-taking Cases and the NPCSC Interpretation of 2016" (2019) 49 *HKLJ* 381.

¹⁹⁷ See, eg, *Chow Ting v Teng Yu Yan* [2019] 4 HKLRD 459 and *Au Nok Hin v Teng Yu Yan Anne* (2019) 22 HKCFAR 524 (candidates' disqualification successfully challenged on procedural grounds); *Lau Wing Hong v Chan Yuen Man Amy (Returning Officer) (No 2)* [2019] 5 HKLRD 1 (effect of such successful challenge on incumbent LegCo member).

¹⁹⁸ See *Chan Ho Tin v Lo Ying Ki Alan* [2018] 2 HKLRD 7.

¹⁹⁹ See Hong Kong newspapers of 25 September 2018.

²⁰⁰ "Hong Kong National Party ban upheld by panel which says it doesn't trust group not 'to resort to violence' in independence bid", *South China Morning Post*, 22 Feb 2019.

²⁰¹ "Beijing backs city government's ban on Hong Kong National Party, says leader Carrie Lam", *South China Morning Post*, 26 Feb 2019. For the full Chinese text of the "official letter", see www.gov.cn/zhengce/content/2019-02/26/content_5368672.htm (accessed 5 Apr 2020). The Chief Executive's report was submitted on 16 April 2019: see "Carrie Lam submits report on National Party", *Ming Pao*, 19 April 2019 (in Chinese). For the full Chinese text of the report, see gia.info.gov.hk/general/201904/18/P2019041800415_308614_1_1555572199159.pdf (accessed 5 Apr 2020).

²⁰² *Leung Chung Hang Sixtus v President of Legislative Council* [2019] 1 HKLRD 292. The possible presence of mainland law enforcement officers in Hong Kong engaged in "cross-border enforcement of mainland law" had been a politically sensitive issue. In early 2016, the "Lee Po incident" touched a nerve in Hong Kong. Mr Lee Po of the bookstore Causeway Bay Books, which was believed to have published books objectionable to mainland authorities, disappeared from Hong Kong in late 2015, fuelling speculations that he had been abducted by mainland police. His subsequent re-appearance in Hong Kong and claim that he had voluntarily gone to the Mainland did not remove lingering doubts. For the aftermath, see "Notification deal sets out detention timetable", *South China Morning Post*, 15 Dec 2017.

2019.²⁰³ Nonetheless, protests continued for several months after the bill was withdrawn, with protesters expressing dissatisfaction that the government had only accepted one of the “five principal demands” of the movement. The “five demands” had included withdrawal of the bill, independent investigation of alleged police brutalities during the social movement, official acknowledgement that the protest against the bill was not a “riot”, non-prosecution of protesters, and introduction of universal suffrage for the election of the CE and all legislators.²⁰⁴

8.112 The anti-extradition movement has revealed that many people in Hong Kong, particularly young people, are dissatisfied with the policy of “One Country, Two System” as practised in recent years, do not have trust in either the SAR government or the central government, identify themselves as Hongkongers rather than Chinese citizens, and even consider the PRC and mainland Chinese people to be an alien “Other”. The movement may be interpreted as the escalation and culmination of the contradictions between the “two systems” in “One Country, Two Systems”. The basic contradiction is apparently that between the aspirations for liberty and democracy on the part of many Hong Kong people, and the limits to the realisation of such aspirations imposed by the logic of “One Country”.

8.113 In retrospect, it may be observed that the anti-extradition movement, which had resorted to both peaceful and violent actions to fight for liberty, governmental accountability and democracy in Hong Kong,²⁰⁵ ultimately backfired, and only had the effect of prompting the central authorities to impose even tighter control on Hong Kong by means of the NPC decision of 28 May 2020 and the HKSAR National Security Law (NSL). The NSL may be regarded as stipulating, in the form of legal norms, the red line for the “one country” element in “One Country, Two Systems” (OCTS). The central authorities argue that the new legislative scheme of national security in Hong Kong would enable the OCTS policy to be more successfully practised in the future.²⁰⁶ On the other hand, critics of the scheme accuse Beijing of abandoning the “two systems” policy in OCTS, and now only “one country” remains.

8.114 Bolstered by the commitment to democracy as universal suffrage in the Basic Law, the “pro-democracy” camp would not give up its demand for democratic political reform until the constitutional promise of universal suffrage is realised. Thus a distinguishing feature of the case of Hong Kong as an autonomous regional entity is that its political system—which cannot be changed without the consent of the central government—is unstable and lacks sufficient legitimacy, and this is not only a political reality but also flows from the Basic Law itself. In affirming the ultimate goals of universal suffrage in the election of the CE and of all legislators in the HKSAR, the Basic Law legitimises the struggle for such universal suffrage and, in a sense, de-legitimises the existing political

²⁰³ Chief Executive Carrie Lam promised to withdraw the bill on 4 September. See generally Albert H.Y. Chen, “A Perfect Storm: Hong Kong-China rendition of fugitive offenders, 2019” (2019) 49 HKLJ 419.

²⁰⁴ See Albert H.Y. Chen, “Hong Kong’s Internal Contradiction of ‘One Country, Two Systems’”, *Economist*, 11 October 2019, <https://www.economist.com/open-future/2019/10/11/hong-kongs-internal-contradiction-of-one-country-two-systems> (accessed 5 Apr 2020).

²⁰⁵ See generally Z. Ibrahim and J. Lam (eds), *Rebel City: Hong Kong’s Year of Water and Fire* (Singapore: World Scientific, 2020).

²⁰⁶ See speech of Zhang Xiaoming (Deputy Director of the HKMAO) at a seminar to celebrate the 30th anniversary of the Basic Law of the HKSAR held on 8 June 2020: Zhang Xiaoming (張曉明), “The firmer the red line for national security, the greater the space for ‘One Country, Two Systems’” (國家安全底線愈牢, “一國兩制”空間愈大) <www.basiclaw.gov.hk/gb/anniversary30/pdf/speeches_file2.pdf>.

system which falls short of the ideal of universal suffrage. However, given that the Chinese government is unlikely to retreat from the “August 31 Decision” of 2014, and the pro-democracy politicians in Hong Kong are unlikely to drop their objection to that decision as “fake universal suffrage”, the impasse in Hong Kong’s political reform is doomed to continue indefinitely.

Annex 1

Composition of Legislative Council 1985–2016

	Geographical election	Functional constituencies	Election committee/ electoral college	Appointed non-government members	Government members
1985	nil	12	12	22	10
1988	nil	14	12	22	10
1991	18	21	nil	17	3
1995	20	30	10	nil	nil
1997	nil	nil	nil	60	nil
1998	20	30	10	nil	nil
2000	24	30	6	nil	nil
2004	30	30	nil	nil	nil
2008	30	30	nil	nil	nil
2012	35	35	nil	nil	nil
2016	35	35	nil	nil	nil

9.005

To meet the objective of the Sino-British Joint Declaration as stated above, LegCo must be able to function as an effective check and balance against the Hong Kong Special Administrative Region (HKSAR) Government, and must be able effectively to hold the Government to account. As shall be discussed below, the constitutional framework provides LegCo with great powers to hold the government accountable. Together with the parliamentary procedure and practice inherited from the colonial era, and the organisation structure and professional administrative support developed in the run-up to the handover, LegCo rivalled any established legislature in the world. How these powers and the great machinery are exercised in practice is a different question. In this regard, two factors are determinative. The first is the composition of LegCo which is only partially democratically elected. Article 68 provides that the “ultimate aim is the election of all members of the Legislative Council by universal suffrage.” But as progress towards this aim has been stalled, LegCo remains dominated by a pro-government majority inherently protected by an undemocratic system of election. The effect of Annex II as interpreted by the Standing Committee of the National People’s Congress (NPCSC) blights further progress by putting the initiative firmly in the hands of the Standing Committee in Beijing. The practical result is that a resolution sanctioning or coercing the government can only be passed with the agreement of the pro-government majority and the acquiescence of the central authorities. The second factor is the “split voting” system. Article 75(1) defines the quorum as “not less than half of all members”. The split-voting system under Annex II (II) requires a majority vote of members present in each of the directly elected group and the functional constituencies group of LegCo for a member’s motion to be carried. As a matter of record, nearly all members’ motions, including motions of members in opposition, were defeated under this system. The stalemate and futility thus ensued has undermined LegCo’s authority and status in the community. It will be argued that the lessons learned from the failure of LegCo in recent years to act as an effective check and balance is a strong reason to press for greater democratic development sooner, if the efficacy and credibility of the constitutional framework is not to be undermined.

9.006

Equally necessary for LegCo to discharge its function is its autonomy. LegCo’s autonomy and freedom from interference are inherent in the doctrine of separation of powers as well as underpinned by the Basic Law, most specifically in arts.75(2), 77 and 78, and upheld by the highest court under the “non-intervention principle”.⁶ However, as will be discussed below, the courts have also held that the non-intervention principle is subject to exceptions, given that LegCo is not supreme but under the Basic Law, and that under the Basic Law, the courts alone have the power to interpret the Basic Law in Hong Kong. Recent developments have shown how this can be used by the government against its opposition in LegCo, notably by seeking the disqualification of opposition candidates from standing for election, disqualification of elected legislators from holding office, and prosecuting legislators for their conduct in LegCo under purported criminal offences.⁷ It is submitted that the unchecked success of these methods will drive a coach and four horses through LegCo’s autonomy and immunities the purpose of which is to protect legislators from the retaliation of the government when they vigorously oppose the government. Further, when the constitutional check and balance fails, civic disturbances as the only

⁶ *Leung Kwok Hung v President of Legislative Council* (2014) 17 HKCFAR 689, [28].
⁷ See discussion in “Postscript” of this chapter.

alternative to express dissent and discontent will become inevitable, as predicted by this author elsewhere.⁸

The courts have an important role to play in adjudicating disputes on the extent of executive power and legislative oversight. So far, the scores are with the government. The latest challenge concerned the power of the Chief Executive in Council (CEIC) to make laws under the colonial Emergency Regulations Ordinance (Cap.241) (ERO). In October 2019, to counter escalating protests triggered off by the government’s extradition bill, the government invoked the ERO to make wide regulations prohibiting facial coverage. The constitutional challenge of the ERO and the regulations were challenged by 24 democrat LegCo members in judicial review. The Court of First Instance, in a rare two-judge divisional bench, noted the “marked contrast” between the pre-1997 provisions and the provisions concerning LegCo under the Basic Law. They held that under the Basic Law, LegCo alone has the power “to enact, amend and repeal laws”, and declared that the CEIC’s wide powers to make any regulations whatsoever desirable on an occasion she considers to be an occasion of public danger was unconstitutional and invalid.⁹ The government appealed. The Court of Appeal, in contrast to the Court of First Instance, emphasised the theme of continuity, and took the view that under the Basic Law, the government continued to be “very much an executive-led government” like the pre-1997 colonial government.¹⁰ In the Court of Appeal’s judgment, the scrutiny of the court in judicial review is sufficient check on the executive’s use of the wide law-making powers under the ERO without the consent of the LegCo. The matter is proceeding to the CFA in further appeal. It is submitted that, if this view prevails, it will render the function of the legislature envisaged in the Sino-British Joint Declaration so emaciated as to be illusory.

9.007

2. THE POWER TO LEGISLATE

9.008

As the elected representative of the people, the LegCo has an important constitutional role to hold the Government accountable on their behalf. This role is most directly and visibly performed by questioning officials and speaking in motion debates on Government policies during Council meetings, and this is what the public tends to focus on. No less attention should be given to LegCo’s primary function as “the legislature of the Region”, namely, its law-making powers, function and procedure.¹¹ Under the rule of law, we look to the law to protect the individual’s rights and freedoms and to provide a sound foundation for good government. A lack of critical interest and understanding in the business of legislation would lead to legislators themselves not giving it the meticulous attention it demands, and not developing the depth of skill and knowledge necessary to the task, especially in the unique circumstances of Hong Kong. The quality of our law and legal system would suffer and deteriorate over time.

⁸ See Margaret Ng, “The Legislature as a ‘Vetogate’”, in Cora Chan and Fiona de Londras (eds), *China’s National Security – Endangering Hong Kong’s Rule of Law?* (Hart Publishing, 2020), 173. The prediction came true in 2019 when the government’s proposed amendment to extradition law sparked off massive and prolonged protests.
⁹ *Leung Kwok Hung v Secretary for Justice* [2020] HKCA 192, [51], [89], [90]–[91], [193(1)].
¹⁰ *Ibid.*, [81], [92].
¹¹ Basic Law art.73.

- 9.009 The power to enact laws is an extremely powerful check and balance against the executive. It is important to ensure that laws which assist good governance are passed and to stop laws which undermine good governance and the rights and freedoms of its inhabitants from being passed.
- 9.010 Prior to 1997, LegCo members can introduce any bill, except a bill or amendment to a bill which has the effect of charging on the revenue. After 1997, under the Basic Law, members' power to introduce legislation is more restricted. Bills which affect public policy cannot be introduced without the written consent of the Chief Executive. Bills affecting the political structure are completely banned.¹² In the post-1997 LegCo, there have been only a handful of members' bills, which related to private charities, the universities and the merger of banks.
- 9.011 Another handicap was the "split voting" system which is imposed by Annex II of the Basic Law. This means any bill or amendment to a bill proposed by a member is passed only if it is approved by a majority of members in each of the two groups: namely, members returned by the geographical constituencies and the functional constituencies respectively. These restrictions had serious effects on LegCo's operation.
- 9.012 The rule of law takes as a starting point that individuals have rights with which no one can interfere except by their consent and according to law. No person or executive authority, however highly placed, can interfere with the rights and freedoms of another person, however humble, unless empowered by the law to do so, and only to the extent that the law empowers. Just getting LegCo to pass whatever laws the Government wants and force people to obey them is not the rule of law but rule by law: the law serving as a tool of the Government to rule the people. Rule by law is no different from tyranny. Indeed, it can be worse, because it is tyranny with a veneer of legitimacy. Just going through the formalities of law-making without regard to the underlying principles does not amount to due process. Due process is not just a matter of form but also of substance. The laws we pass must not curtail rights without consent for sufficient reasons, or give the executive arbitrary power without effective restraint. The legislative process is designed to apply these principles, not to circumvent them.

3. THE LEGISLATIVE PROCESS

- 9.013 The basic steps of the legislative procedure are set down in the Rules of Procedure of the Legislative Council (RoP) which the Council makes "on its own" under art.75(2) of the Basic Law. They are supplemented by a body of practices and conventions established through daily business transactions between the executive and the legislature. Because they are largely unwritten but maintained by the staff and members as LegCo's tradition, they are most vulnerable not least because rules without underlying principles are arbitrary.

¹² The question was raised as to whether the same restrictions applied also to members' amendment of a government bill. LegCo, on legal advice, held that they did not apply. The Government took the view that they did apply. LegCo prevailed and members were allowed to introduce such amendments under the Rules of Procedure: see *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387, 396. But the Government took the stance of opposing all amendments introduced by members. As a result, hardly any members' amendments were ever passed, although numerous were introduced.

(a) Pre-legislation consultation

9.014 The first formal or legal step of legislation is the introduction of a bill (i.e. the proposed legislation) into LegCo. But as a matter of practice and good sense, before this step can be taken, there has to be consultation between the Administration and LegCo. Before the Administration decides to introduce a law, it must first ascertain that such a law is necessary and has the support of the community, and it must consult LegCo as the people's elected representatives. To safeguard this, there is a LegCo practice whereby no bill can be introduced into LegCo without the matter having been first raised in the relevant LegCo panel. This is the opportunity for the Administration to explain their proposal and the reason for it, and for members to ask questions, voice concerns, and the Administration should take the opportunity to address them. Although the panel has no binding powers, a sensible Administration will not press ahead if the proposed policy measure receives little support or is found to be problematic or greatly opposed.

9.015 A great advantage of trying to get things right before going ahead with preparing a bill is that it is much easier to make changes at this stage. In contrast, a bill is intended to be a legal instrument and has to be drafted with great precision. It is often also highly structured. Amending it is a much more complex business because an amendment of one part may affect another part of the bill, and may even have implications for existing laws. If it is desirable to consult widely, retain maximum flexibility to respond to criticisms and suggestions, but at the same time show people the details and the actual legal effect of the legislation when it is passed, a draft bill (called a "white bill") can be published for the purpose of consultation.¹³

9.016 The purpose of going through the panel is for the Administration and LegCo to exchange preliminary views at an early stage. The Panel can also receive views directly from the public if desirable. If, having consulted the relevant panel, the Government decides to proceed with legislation, it will start the law drafting process with the Law Draftsman's team in the Department of Justice, eventually to produce the bill.¹⁴

¹³ It is called a "white bill" because, in contrast to the official version of the bill for introduction into LegCo, which is printed on blue paper and therefore called a "blue bill", it is printed on white paper. The white bill device was used by the Government on a number of occasions, including for the intended overhaul of the regulatory system for financial investment products by means of a Securities and Futures Bill consolidating 10 pieces of legislation. But the most well-known case concerned art.23 legislation which Chief Executive Tung Chee Hua wanted LegCo to pass in 2003. Since people were worried that the new offences of treason, subversion, secession, sedition and other offences against the State will take away their rights and freedoms, it was important for them to see how these offences were defined. The Hong Kong Bar Association and Law Society of Hong Kong urged the Government to publish a white bill for consultation but the request was refused on the pretext that it would be a waste of time because ordinary people would not be able to understand the bill anyway. This extremely unwise decision convinced the public that the conclusion was not genuine, and the frustration eventually led to the public protest march on 1 July 2003 and the withdrawal of the bill. Again, the case of art.23 is a signal lesson on what the Government should *not* do. The Government carried out a three-month consultation exercise. The community was deeply divided, and supporters and opponents each did their utmost to mobilise the public. In the end, a total of over 8,000 independent submissions were received representing a total of 369, 612 individuals who expressed their views. The Government report on the consultation covered up the results. After the Government announced its conclusions in LegCo on 6 February 2003 (just 20 days before the National Security (Legislative Provisions) Bill was gazetted), a team of academic researchers took up the task of going through the submissions collected and eventually reported their findings to LegCo on 17 June 2003 (CB(2)2450/02-03(02)). They showed that properly analysed, opposition to the Government's proposal far outweighed support. Had the Government been honest about the results of the consultation, it would have seen the red light blinking loud and clear, and refrained from going ahead, and the disaster that followed might have been averted.