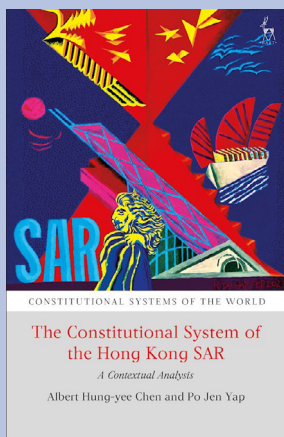


THE CONSTITUTIONAL SYSTEM OF THE HONG KONG SAR: A CONTEXTUAL ANALYSIS

BY ALBERT HUNG-YEE CHEN AND PO JEN YAP

MICHAEL PALMER

SOAS & IALS; HKU & CUHK



Albert Hung-yee Chen and Po Jen Yap (2023) *The Constitutional System of the Hong Kong SAR: A Contextual Analysis* published by Hart, Oxford ISBN 9781509956296¹

This book provides a comprehensive and thoughtful analysis of Hong Kong's constitutional development, offering valuable insight into its governance, political challenges and the delicate balance between autonomy and central authority after colonial rule ended, and China resumed sovereignty, in 1997. In particular, the study considers the manner in which the constitutional framework of the Hong Kong Special Administrative Region (HKSAR) operates under the “one country, two systems” (OCTS) principle, a foundational dimension of the HKSAR's distinctive constitutional system. It seeks to explain the challenges facing that framework, and the implications of Hong Kong's constitutional system for the rule of law, separation of powers, constitutional review and more generally local political life, and how the framework is fraught with tensions, particularly between Hong Kong's aspirations for liberal democracy and the central Chinese Government's authoritarian culture and system of governance. The authors examine the evolving constitutional relationship

¹ The intriguing book cover by artist Putachad is intended as a pictorial expression of Hong Kong's “One Country, Two Systems” structure. Two red pyramids reflect this duality, featuring elements such as China's national symbols, Hong Kong's iconic skyscrapers and Hong Kong's colonial past.

between the mainland and Hong Kong, the concept of autonomy and its importance in the HKSAR's Basic Law, and the judiciary's difficult role in maintaining a delicate balance between autonomy and central authority while also safeguarding rights.

The book is organized into eight chapters, each exploring key aspects of Hong Kong's constitutional framework and its evolution. After a brief scene-setting Preface, chapter 1 offers a concise overview of Hong Kong's constitutional history, especially the transition from colonial governance to the HKSAR under Chinese sovereignty, through to 2022, which commemorated 25 years of Hong Kong's status as a Special Administrative Region (SAR) of the People's Republic of China (PRC). It thus considers Hong Kong's colonial past, the Sino-British Joint Declaration, and the Basic Law drafting. This chapter lays the groundwork for the discussions in subsequent chapters, which examine various dimensions of Hong Kong's constitutional system and its complex relationship with the central authorities in Beijing. Thus, chapter 2 examines the nature of the Hong Kong SAR as an autonomous region within the PRC. It focuses on the division of powers between the central authorities and the Hong Kong SAR Government and examines key events, including the enactment of the National Security Law in 2020—one of the most significant interventions by Beijing since the Basic Law came into effect in 1997—and their implications for autonomy. The passage of the National Security Law in 2020 and the 2021 electoral reforms in Hong Kong, initiated unilaterally by China's central authorities, significantly altered the constitutional order established by the Basic Law. Originally, the Basic Law intended for Hong Kong to legislate its own national security laws. These changes, which have been framed as necessary responses to national security concerns raised during the 2019 protests, have led to a notable transformation in Hong Kong's governance within the OCTS framework. Chapter 3 shifts focus to Hong Kong's internal political structure, pointing out that the political institutions established by the Basic Law were largely modelled on the pre-existing colonial system, and analysing the office of the Chief Executive, the executive branch and the legislature. It examines the executive-led government structure, and polarizing political forces within Hong Kong. Hong Kong has never been governed by democratically elected politicians. The political system of the HKSAR primarily consists of bureaucrats leading the executive branch, aiming to cooperate with a legislature made up of elected representatives. But since 1997, the legislature's capacity to initiate and implement public policies, as well as its effectiveness in overseeing and evaluating the administration, have been diminished. This examination transitions into chapter 4, which further

explores Hong Kong's political system. It covers the electoral framework, electoral reforms, the dynamics of political polarization, and the ongoing tensions between the "pro-democracy" and "pro-China" factions. More specifically, this chapter examines constitutional reforms and political crises over the last 25 years, including the anti-extradition Bill protests in 2019 and Beijing's sweeping overhaul of Hong Kong's electoral system in 2021. As the authors emphasize, a distinctive aspect of the OCTS policy for the HKSAR lies in the presence of an authoritarian party-state, led by the Chinese Communist Party (CCP) at the national level. However, the CCP does not directly or publicly participate in the electoral system or public affairs within the HKSAR. Instead, applying the principle of "patriots ruling Hong Kong (爱国者治港, *aiguo zhe zhi gang*)", the Chinese central authorities, through their Liaison Office in the HKSAR, coordinate with and support pro-China political forces. This ensures they secure a majority in both the Legislative Council (LegCo) and Hong Kong's Election Committee (EC) (page 100).

Chapter 5 turns to the judiciary's role within the HKSAR. It provides an overview of the judicial structure and addresses significant issues concerning constitutional jurisdiction and the judiciary's relationship with Beijing's central authorities. The chapter also evaluates the interplay between the judiciary and other branches of Hong Kong's government, particularly through the lens of the "separation of powers" principle and Beijing's narrative of an "executive-led government". The judiciary's critical role in constitutional interpretation, protection of rights and maintaining judicial independence amidst pressures from Beijing are analysed. The authors conclude that the judiciary in Hong Kong to a significant degree engages in a form of constitutional dialogue with the other branches of government, collaborating on the interpretation of rights. This governance model embraces the concept of "judicial penultimacy", where courts actively participate in an ongoing exchange not only with political institutions but also society at large. Through this dynamic process, constitutional meanings evolve through conversation rather than being unilaterally defined or finalized (pages 141-142).

Chapter 6, the longest chapter in the book, explores the protection of constitutional rights in Hong Kong, emphasizing the safeguarding of fundamental rights and civil liberties as a cornerstone of constitutional governance. It discusses the protection of civil liberties and fundamental rights under the Basic Law and the challenges posed by political and legal changes. The chapter highlights the distinctive features of Hong Kong's rights protection system and examines its application during the tenures of successive Chief Justices. The authors point to the difficult

position of Hong Kong's Court of Final Appeal (CFA)—if it chooses to be oblivious to the political repercussions of its decisions, Interpretations by the mainland's National People's Congress Standing Committee are likely to become a routine mechanism for censuring the Court and curtailing its authority. As the branch of government most inherently aligned with protecting the autonomy of the HKSAR, the CFA can only effectively uphold the legal traditions it has inherited by adapting to the new political framework within which it now operates (page 186).

Chapter 7 focuses on the enforcement of constitutional rights through legal remedies. The chapter emphasizes the necessity of effective judicial mechanisms to uphold rights, arguing that declarations of rights are meaningless without the ability to grant practical and enforceable remedies. It reviews the mechanisms for enforcing constitutional rights in the HKSAR. It also highlights the innovative approaches, within constraints, adopted by Hong Kong's judiciary in this area. The authors take the view that, while active exercise of remedial discretion may present constitutional challenges for some legal scholars, if governance is framed as a "field of partnership" between the judiciary and the legislature, the innovative remedial strategies employed by the HKSAR courts—blending governance and adjudication—have the potential to enhance democratic deliberation and elevate governmental performance.

Finally, Chapter 8 offers concluding reflections on the constitutional experiment of OCTS as practised in the HKSAR. It also reflects on the global implications of Hong Kong's constitutional struggles for federalism, autonomy and democracy. Overall, this book provides a thorough and nuanced exploration of Hong Kong's constitutional framework, examining its historical evolution, political dynamics and legal structures. It situates Hong Kong's system within broader global discussions on devolution, federalism and the expanding influence of courts in political affairs. The analysis gains particular relevance through its examination of urgent contemporary issues, including an in-depth look at the National Security Law and recent electoral reforms, balancing academic rigour with sensitivity to these critical topics. A central concern is the judiciary's evolving role in safeguarding rights, documenting how courts have striven to protect individual liberties amid increasing institutional constraints. By highlighting the judiciary's efforts to navigate the delicate balance between rights protection and external pressures, the book offers valuable insights into the practical functioning of Hong Kong's constitutional system during a transformative period.

While presenting a thorough legal examination of Hong Kong's constitutional framework, and of course focusing on legal aspects of the issues involved, the book arguably would have benefited from a more contextualized exploration of the social and cultural forces that have shaped constitutional evolution. The analysis of movements such as Occupy Central and the anti-extradition protests could perhaps have been enriched by examining the underlying cultural and societal factors that drive public sentiment, particularly generational divisions, collective identity formation and local attitudes towards governance and autonomy. The book's treatment of Hong Kong's distinctive position as a post-colonial region, navigating between Chinese sovereignty and local autonomy, might be enhanced by exploring the manner in which cultural identity and historical narratives influence legal and political developments. Although the book effectively covers judicial and constitutional processes, it could further explore the manner in which societal values and cultural interpretations affect both the application and public perception of law, including constitutional norms, in Hong Kong.

This book is a valuable resource for scholars and practitioners interested in constitutional law, autonomy arrangements and the interplay between democracy and authoritarian governance. It provides a rigorous overview of the HKSAR's constitutional framework and the challenges of balancing autonomy with central oversight under the OCTS model through to 2020. This study represents a meaningful and significant contribution to the field of comparative constitutional studies, both in its achievements and its future potential. The Hong Kong case as explicated in this book by Professors Chen and Yap offers several rich avenues for comparative legal analysis. Its findings, for example, will likely have relevance for autonomous regions like Quebec or Catalonia, particularly regarding their handling of cultural and constitutional intersections. The HKSAR's ideas of liberal democracy and traditions of the common law and the PRC's authoritarian political-legal culture and adherence to the civil law tradition together inform its distinctive constitutional framework,² creating a complex arrangement that can be analysed in terms of various issues in comparative legal studies including, legal pluralism, mixed jurisdictions and legal transplants and hybridization,

² In their Preface, the authors point out that OCTS was initially envisioned by Chinese authorities as a constitutional framework that would enable the coexistence of "socialism" in mainland China and "capitalism" in Hong Kong. However, the political instability and periodic crises that have unfolded in Hong Kong since the 1997 handover cannot be attributed to an inherent conflict between these economic systems. Instead, they stem from the tension between China's authoritarian governance culture and practice and the widespread aspirations for liberal democracy among the majority of Hong Kong's population. The authors further point out that at the time of writing (February 2023) "the project of OCTS is facing more challenges than ever before" (page ix).

transitional justice and constitutional transformation (especially post-colonial constitutional transitions and how established legal institutions adapt when sovereignty shifts), constitutional design, interpretation of constitutional documents, comparative rights protection, especially by the courts (and including judicial review), and the intersection of international and constitutional law.

The very impressive study by Chen and Yap makes a significant contribution to our understanding of Hong Kong's distinctive constitutional arrangement and its broader implications for comparative constitutional law. While this reviewer suggests that the analysis might have benefited from deeper exploration of sociocultural dynamics, the book succeeds admirably in its core mission of explicating Hong Kong's complex constitutional framework under OCTS. Through its careful examination of the interplay between common law traditions and the PRC's political-legal culture, judicial independence and central authority, and autonomy and sovereignty, the work offers valuable insights not only for scholars of Hong Kong law but also for those studying comparative law more generally. The authors' thorough treatment of recent developments makes this an especially timely and valuable contribution to the field. These changes include the National Security Law introduced in June 2020, establishing new criminal offences including secession, subversion, terrorism and collusion with foreign forces, while creating special enforcement and prosecution mechanisms (that operate alongside Hong Kong's existing legal system). The authors have also analysed the major electoral reforms in 2021 that restructured the Legislative Council and introduced a new vetting system for candidates, substantially changing Hong Kong's electoral framework. The principle of "patriots administering Hong Kong" has become a central feature of governance, affecting political participation and representation. The courts have faced new challenges in balancing traditional common law principles with national security considerations, while the autonomy guaranteed under OCTS has in reality been redefined.

About the author

Professor Michael Palmer was seconded from the Department of Law at SOAS (University of London) to serve in the Hong Kong Attorney-General's Chambers in the early nineties, a time of uncertainty and heightened tension on the mainland, advising mainly on cross-border and resumption of sovereignty issues as between Hong Kong and the mainland PRC. He has held teaching appointments at both leading universities in Hong Kong, and is currently Cheng Yu Tung Visiting Professor in the Faculty of Law in the University of Hong Kong and Senior Research Fellow in the China

Law Programme, HKIAPS, Chinese University of Hong Kong. In 1999 he advised the UN High Commissioner for Human Rights on the legal reforms necessary for China's ratification of the International Covenant on Civil and Political Rights. Between 2012 and 2018 he was a serving member of the Social Sciences and Humanities Panel of the Hong Kong Research Grants Council. He was also (very likely) the first "western" Dean since 1949 of a mainland PRC Law School (Shantou University, 2011-2016). See also his current profile [page](#).

Emails: michael.palmer@sas.ac.uk; mp@soas.ac.uk; and mpalmer@serlecourt.co.uk.

Legislation, Regulations and Rules

Basic Law 1997

National Security Law 2020