

## The Rule of Law, The Rule of Conflict? Hong Kong and Democracy—Past and Present Revisited

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### Article abstract

“The rule of law is essential to Hong Kong’s future” — declared the last governor of Hong Kong, Christopher Patten, a few years before the city’s handover to China. The rule of law, obviously, is essential to the future of any legal entity. However, one has to ask what happens if the law that rules is imperfect. It then inevitably leads to conflicts. The purpose of this paper is to investigate how efficiently has the rule of law ‘ruled’ in Hong Kong since the transition, with a special focus on the situations when law itself led to conflicts. In his analysis the author concentrates on the post-colonial influences of the past, People’s Republic of China’s influences of the present, and outlines possible scenarios for the future of the Chinese Special Administrative Region, while highlighting the question of democracy. The article is divided into two main parts—theoretical, composed of one chapter, and analytical, composed of two chapters. In the first part of the article the author reviews various understandings of the notions of the rule of law and of conflict, introducing the theoretical framework for further investigations. The second chapter of the article is devoted to the question of the rule of law in the semi-autonomous city. The author first explains why its explicit conceptualisation was revolutionary in Hong Kong at this particular moment, and then shows how it has been eroding ever since 1997. In the third chapter of the paper, the author focuses on the situations in Hong Kong when law itself has provoked conflicts — notably the recent oath-swearing dispute — and analyses them. The fourth, concluding part of the paper the author ventures to make predictions on the future of the legal systems, democracy, and thus the lives of the citizens of the Frangrant Harbour.

# THE RULE OF LAW, THE RULE OF CONFLICT? HONG KONG AND DEMOCRACY—PAST AND PRESENT REVISITED<sup>1</sup>

*Miroslaw M. Sadowski\**

“The rule of law is essential to Hong Kong’s future” — declared the last governor of Hong Kong, Christopher Patten, a few years before the city’s handover to China. The rule of law, obviously, is essential to the future of any legal entity. However, one has to ask what happens if the law that rules is imperfect. It then inevitably leads to conflicts. The purpose of this paper is to investigate how efficiently has the rule of law ‘ruled’ in Hong Kong since the transition, with a special focus on the situations when law itself led to conflicts. In his analysis the author concentrates on the post-colonial influences of the past, People’s Republic of China’s influences of the present, and outlines possible scenarios for the future of the Chinese Special Administrative Region, while highlighting the question of democracy. The article is divided into two main parts—theoretical, composed of one chapter, and analytical, composed of two chapters. In the first part of the article the author reviews various understandings of the notions of the rule of law and of conflict, introducing the theoretical framework for further investigations. The second chapter of the article is devoted to the question of the rule of law in the semi-autonomous city. The author first explains why its explicit conceptualisation was revolutionary in Hong Kong at this particular moment, and then shows how it has been eroding ever since 1997. In the third chapter of the paper, the author focuses on the situations in Hong Kong when law itself has provoked conflicts — notably the recent oath-swearing dispute — and analyses them. The fourth, concluding part of the paper the author ventures to make predictions on the future of the legal systems, democracy, and thus the lives of the citizens of the Frangrant Harbour.

« L’état de droit est essentiel pour l’avenir de Hong Kong », a déclaré Christopher Patten, le dernier gouverneur de Hong Kong, quelques années avant le transfert de la ville à la Chine. L’état de droit est évidemment essentiel pour l’avenir de toute entité juridique. Cependant, il convient de se demander ce qu’il se passe si la loi qui régit est imparfaite. Cela mène inévitablement à des conflits. L’objet de ce document est d’examiner l’efficacité de l’état de droit à Hong Kong depuis la transition, en mettant l’accent sur les situations où le droit a lui-même entraîné des conflits. Dans son analyse, l’auteur se concentre sur les influences postcoloniales du passé, les influences actuelles de la République populaire de Chine et décrit les scénarios possibles pour l’avenir de la région administrative spéciale chinoise, tout en soulignant la question de la démocratie. L’article est divisé en deux parties principales : théorique, composée d’un chapitre ; et analytique, composée de deux chapitres. Dans la première partie de l’article, l’auteur passe en revue diverses interprétations des notions d’État de droit et de conflit, en présentant le cadre théorique pour des recherches ultérieures. Le deuxième chapitre de l’article est consacré à la question de la prééminence du droit dans la ville semi-autonome. L’auteur explique d’abord pourquoi sa conceptualisation explicite était révolutionnaire à Hong Kong à ce moment précis, puis montre son érosion depuis 1997. Dans le troisième chapitre de l’article, l’auteur se concentre sur les situations à Hong Kong où le droit lui-même a provoqué des conflits — notamment le récent différend sur l’assermentation — et les analyse. Dans la quatrième partie, l’auteur entreprend la formulation de prédictions sur l’avenir des systèmes juridiques, de la démocratie et, partant, de la vie des citoyens de « Frangrant Harbour ».

“El estado de derecho es esencial para el futuro de Hong Kong”, declaró el último gobernador de Hong Kong, Christopher Patten, unos años antes del traspaso de la ciudad a China. El estado de derecho, obviamente, es

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<sup>1</sup> This first version of the article was written in 2017; it was accepted for publication in the following year. Hong Kong’s political situation was quite different back in the day, hence some parts of the paper at first glance may seem not as up-to-date as I would like them to be. However, the events taking place in Hong Kong in 2019 confirm my main thesis: from a variety of reasons analysed, conflicts are bound to take place in Hong Kong; as the November elections show, there is no going around the differences — Beijing will ultimately have to find a way to live with the reality of ‘one country, two systems’.

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esencial para el futuro de cualquier entidad jurídica. Sin embargo, es importante preguntarse qué sucede si la ley que gobierna es imperfecta. Esto conduce inevitablemente a conflictos. El propósito de este artículo es investigar qué tan eficientemente ha “gobernado” el estado de derecho en Hong Kong desde la transición, con un énfasis particular en aquellas situaciones en las que la ley es el origen de los conflictos. El autor concentra su análisis en las influencias poscoloniales del pasado, las influencias del presente de la República Popular China, y describe posibles escenarios para el futuro de la Región Administrativa Especial, destacando en ellos la cuestión de la democracia. El artículo se divide en dos partes principales: una teórica, compuesta de un capítulo, y una analítica, compuesta de dos capítulos. En la primera parte, el autor revisa varias interpretaciones de las nociones de estado de derecho y de conflicto, presentando el marco teórico para futuras investigaciones. El segundo capítulo del artículo está dedicado a la cuestión del estado de derecho en la ciudad semiautónoma. El autor primero explica por qué su conceptualización explícita fue revolucionaria en Hong Kong en ese momento y, después, demuestra cómo esta se ha ido erosionando desde 1997. En el tercer capítulo del artículo, el autor detalla las situaciones en las que la ley ha provocado conflictos en Hong Kong – especialmente la reciente disputa sobre el juramento – y las analiza. En la cuarta parte final del documento, el autor se aventura a hacer predicciones sobre el futuro del sistema legal, de la democracia y, por lo tanto, de la vida de los ciudadanos del Puerto del perfume.

The transition of Hong Kong to China in 1997 was a big step not only from the perspective of the city itself, but also from the perspective of People's Republic of China. The future of the newly established Special Administrative Region (SAR) was supposed to be guaranteed by a potent, yet elusive legal term—by the rule of law. As Christopher Patten, the last British governor of Hong Kong put it, “the rule of law is essential to Hong Kong’s future”<sup>2</sup>—what is left without it, he argued, is “the law of club and fang [...] a place for the Hobbesian brave.”<sup>3</sup>

China has had a chequered relationship with the rule of law. The first efforts towards modernisation of the legal system during the Qing era were stopped in the period of civil war, and ultimately the whole legal system suffered a major setback during the times of cultural revolution.<sup>4</sup> The turn-of-the century efforts towards the promotion of the concept of the rule of law, including a 1999 amendment to the *PRC's Constitution*<sup>5</sup>, were subsequently hindered in the first years of the twenty-first century.<sup>6</sup> While China has already “travelled a long way in the direction of the rule of law”<sup>7</sup>, the system in place still is “a socialist rule of law with Chinese characteristics”<sup>8</sup>, which prioritises protection of freedoms only in certain areas, such as civil law and socio-economic rights, disregarding (to an extent) political rights.<sup>9</sup> On the other hand, what was promised for Hong Kong was a ‘full’ rule of law. As Steve Tsang remarked, “what sets [Hong Kong] apart from the People’s Republic of China (PRC) is the existence of the rule of law and an independent judiciary. They are generally accepted in Hong Kong as the most important legacy of 156 years of British imperial rule.”<sup>10</sup>

In this article I will investigate how this difference in the understanding of the rule of law among Hong Kongers, and inherent problems regarding the SAR’s legal and political system, have led to conflicts over the rule of law and ultimately its erosion in the past twenty years. First, I will venture to answer the two fundamental questions for the later analysis: what is the rule of law and what is conflict? Then I will investigate the infringements of the rule of law in the city, and the legal conflicts connected to this question.

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<sup>2</sup> Christopher Patten, “1994 Policy Address” in “Official record of proceedings” at 32, online: Hong Kong Legislative Council <legco.gov.hk/yr94-95/english/lc\_sitg/hansard/h941005.pdf>.

<sup>3</sup> Christopher Patten cited in Edward A Gargan, “Hong Kong Worries Over Fate of Legal System Under Chinese Rule”, *The New York Times* (21 April 1995), online: The New York Times <nytimes.com/1995/04/21/world/hong-kong-worries-over-fate-of-legal-system-under-chinese-rule.html>.

<sup>4</sup> Randall Peerenboom, *China’s Long March Toward Rule of Law* (Cambridge: Cambridge University Press, 2002) at 1.

<sup>5</sup> *Ibid* at 1.

<sup>6</sup> Albert H Y Chen, “China’s Long March towards Rule of Law or China’s Turn against Law” (2016) 4:1 *The Chinese Journal of Comparative Law* 1 at 1.

<sup>7</sup> *Ibid* at 35.

<sup>8</sup> *Ibid* at 27.

<sup>9</sup> Hualing Fu, “Building Judicial Integrity in China” at 9, online: SSRN eLibrary <papers.ssrn.com/sol3/papers.cfm?abstract\_id=2684603&download=yes>.

<sup>10</sup> Steve Tsang, “Commitment to the Rule of Law and Judicial Independence” in Steve Tsang, ed, *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong: Hong Kong University Press, 2001) at 1.

## I. Rule of Law and Conflict – Theoretical Aspects

### A. Introduction to the notion of the rule of law

The notion of the rule of law is neither simple nor easily definable. The conundrum it presents for legal and political theorists, however, does not prevent politicians, journalists, or social media users to speak about it and pass judgment on whether or not the rule of law has been violated in a certain situation. As Brian Z. Tamanaha acutely remarks, the popularity of the rule of law as an idea is unparalleled in human history: from Vladimir Putin, to the Chinese authorities, to Robert Mugabe and certain leaders of Taliban, all politicians nowadays feel the need to assert, or at least aspire to the rule of law in their country.<sup>11</sup> It seems the West's idea that “the ‘rule of law’ is good for everyone”<sup>12</sup> has become widespread, at least on the level of semiotics.

Of course, while the notion of the rule of law has become “an accepted measure worldwide of government legitimacy”<sup>13</sup>, its understanding is different in every country. Researchers have distinguished three varying concepts of the rule of law on the basis of their provenance: the German ‘*Rechstaat*’; the French ‘*État de droit*’; and the Anglo-American ‘rule of law’.

The German idea of ‘*Rechstaat*’ rests on the “veritable symbiosis between the law and the state.”<sup>14</sup> As law becomes the single way of the channelling of the power of the state, ‘the rule of law’ becomes more of a ‘state rule through the law’.<sup>15</sup>

The French ‘*État de droit*’, while seemingly a direct translation of the German ‘*Rechstaat*’, actually means “‘constitutional state as legal guarantor of fundamental rights’ (against infringements stemming from law made by parliament)”<sup>16</sup>, rather than ‘state rule through the law’, which in French legal theory is closer to the ‘*État légal*’, understood as ‘the democratic state rule through law’.<sup>17</sup>

On the other hand, in the Anglo-American concept, the ‘rule of law’ means ‘a buffer’ between the interests of the citizens and the state, based on the social contract and civil society, to which individuals agree “in order to secure better coordination in the enforcement” of their rights.<sup>18</sup>

It is thus noticeable that historical factors play an important role in the understanding of the notion of the rule of law in various legal systems, *e.g.* the German positivist tradition, the French experience of constitutionalism, or the British idea of social contract.

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<sup>11</sup> Brian Z. Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge: Cambridge University Press, 2000) at 2–3.

<sup>12</sup> *Ibid* at 1.

<sup>13</sup> *Ibid* at 3.

<sup>14</sup> Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy* at 20, online: SSRN eLibrary <papers.ssrn.com/sol3/papers.cfm?abstract\_id=262350>.

<sup>15</sup> *Ibid* at 20.

<sup>16</sup> *Ibid* at 37.

<sup>17</sup> *Ibid* at 37–38.

<sup>18</sup> *Ibid* at 43.

Some general differences between the civil and common law systems approaches towards the rule of law may also be observed: as the common law system is more flexible than the civil law one, it is “better suited to deploy a coherent rule of law regime provided there is a high degree of consensus on core values and objectives, on a sense of fairness, and on an essential bundle of constitutional rights.”<sup>19</sup>

However, should the social consensus be broken, it is easier to maintain the rule of law in the civil law system, as it is “based on a more rigid conception of legality.”<sup>20</sup>

## B. The standard division of the rule of law conceptions

In general, both on domestic and international level, the concepts of the rule of law may be divided into formal and substantive, or ‘thin’ and ‘thick’, respectively.<sup>21</sup> The formal ones focus on the way in which the law was established, without analysing the content of the law itself. If the law was passed by a proper body, if the norm its clear, and if its temporal dimension was prospective, the formal precepts of the rule of law were met.<sup>22</sup>

The substantive conceptions of the rule of law seek to go beyond this While acknowledging the formal elements of the rule of law, they see it as the basis for certain substantive rights whose presence may indicate whether a law is ‘good’ or ‘bad’.<sup>23</sup>

Paul P. Craig argues it might be possible to distinguish ‘a middle way’ between the formal and substantive concepts of the rule of law<sup>24</sup>, based on the ideas of Joseph Raz and Jefferey Jowell. Raz argues for the ‘principled faithful application of the law’, with “an open, public administration of justice, with reasoned decisions by an independent judiciary, based on publicly promulgated, prospective, principled legislation”<sup>25</sup>, while Jowell “perceives the rule of law as a principle of institutional morality and as a constraint on the uninhibited exercise of government power and argues that it does possess a substantive aspect.”<sup>26</sup>

In the review of both historical and contemporary rule of law theories in the following two sections I will venture to classify them into, ‘thick’, ‘thin’, and ‘in-between’ ones.

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<sup>19</sup> *Ibid* at 65.

<sup>20</sup> *Ibid* at 65–66.

<sup>21</sup> Peerenboom, *supra* note 4 at 3.

<sup>22</sup> Paul P Craig, “Formal and substantive conceptions of the rule of law: An analytical framework” in Richard Bellamy, ed, *The Rule of Law and the Separation of Powers* (London: Routledge, 2017) at 95.

<sup>23</sup> *Ibid* at 1.

<sup>24</sup> *Ibid* at 11.

<sup>25</sup> Joseph Raz, *Ethics in the Public Domain. Essays on the Morality of Law and Politics* (Oxford: Clarendon Paperbacks, 1994) at 373–374.

<sup>26</sup> Craig, *supra* note 22 at 113.

### C. Historical theories of the rule of law

Various understandings of the idea of the rule of law stem from the long road towards its conceptualisation. The researchers point out towards Plato and Aristotle as the ‘grandfathers of the rule of law’. In his *The Laws*, Plato remarked that the rule of law gives stability and has a restraining effect, and that any government should be bound by the law<sup>27</sup>, because when the “law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.”<sup>28</sup>

Aristotle, as Brian Z. Tamanaha observes, somewhat prophetically enumerated all the main elements of the rule of law that would be part of the discussion on the notion for centuries to come: “self-rule in situations of political equality; government officials being subject to law; and the identification of law with reason, serving as protection against the potential for abuse inhering in the power to rule.”<sup>29</sup> In Aristotle’s own words:

the rule of law, it is argued, is preferable to that of any individual. [...] even if it would be better for certain individuals to govern, they should be made only guardians and ministers of the law... [...] he who bids the law rule may be deemed to bid God and Reason alone rule [...] The law is reason unaffected by desire.<sup>30</sup>

The Romans had a dichotomic relationship with the rule of law. Some philosophers, as Cicero, argued that both the sovereign and the citizens are bound by the law:

a magistrate's function is to take charge and to issue directives which are right, beneficial, and in accordance with the laws. As magistrates are subject to the laws, the people are subject to the magistrates. In fact it is true to say that a magistrate is a speaking law, and law a silent magistrate.<sup>31</sup>

However, when the evolution from the Roman Republic into the Roman Empire took place, the governing doctrine became that of the ruler’s supremacy over the law. This point of view was incorporated into *Lex Regia* and *Corpus Iuri Civilis*, which stated that “the prince is not bound by the laws,” and that “what has pleased the prince has the force of law.”<sup>32</sup>

On the other hand, while the Middle Ages are not instinctively associated with the rule of law, they have greatly contributed to its conceptualisation<sup>33</sup> with: the *Magna carta*, which made the king subject to law<sup>34</sup>; the Germanic customary law, which

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<sup>27</sup> Tamanaha, *supra* note 11 at 8.

<sup>28</sup> Plato, cited in Tamanaha, *supra* note 11 at 8–9.

<sup>29</sup> Tamanaha, *supra* note 11 at 9.

<sup>30</sup> Aristotle, cited in Tamanaha, *supra* note 11 at 9.

<sup>31</sup> Cicero, cited in Tamanaha, *supra* note 11 at 11.

<sup>32</sup> Tamanaha, *supra* note 11 at 13.

<sup>33</sup> *Ibid* at 15.

<sup>34</sup> *Ibid* at 25.

stipulated that the king is under the law<sup>35</sup>; and the papal/imperial contest for supremacy, which resulted in the stating of the monarch's accountability before the Christian law.<sup>36</sup>

Medieval philosophers have also spoken extensively on the question of the rule of law, with a notable example of Aquinas who, while agreeing that the sovereign is above the law, remarked that the ruler also has the power to subject himself to the law, as "whatever law a man makes for another, he should keep for himself"<sup>37</sup>, noting also that "an unjust positive law is 'no law at all'."<sup>38</sup>

The history of the concept of the rule of law was not that of, to quote Brian Z. Tamanaha, an uninterrupted flowering.<sup>39</sup> The rise of the absolutist monarchies in Europe put its evolution into a temporary halt, however even the absolute kings often acted within 'legal restraints'.<sup>40</sup>

Ultimately, the idea of the rule of law found its full understanding in the doctrine of liberalism.<sup>41</sup> Liberalism created four principles with relation to law: political liberty, *i.e.* being able to self-rule, to be 'at once ruler and ruled';<sup>42</sup> legal liberty, *i.e.* being free to do whatever the law permits<sup>43</sup>; personal liberty, *i.e.* having civil and human rights respected by the government<sup>44</sup>; and the institutionalised preservation of liberty, *i.e.* the separation of powers.<sup>45</sup> According to liberalism, when all the four principles are respected, the rule of law is in place.

Looking from today's perspective we might classify the historical concepts of the rule of law into 'thick' (Aristotle's, liberal), 'in-between' (Plato's, Roman Republic's), and thin (Roman Empire's, Aquinas', absolutist).

#### D. Contemporary theories of the rule of law

The evolution of the rule of law, as I have mentioned earlier, has led to numerous, often varying definitions. There is, for example, a basic disagreement "whether the term relates to outcomes or to process and whether the rule of law is based mainly on natural law or positive law principles."<sup>46</sup> The most basic, 'thin' definition proposed by Brian Z. Tamanaha, for whom the rule of law "means that government officials and citizens are bound by and abide by the law."<sup>47</sup> It is based on five elements—

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<sup>35</sup> *Ibid* at 23.

<sup>36</sup> *Ibid.*

<sup>37</sup> Aquinas, cited in *ibid* at 19.

<sup>38</sup> Tamanaha, *supra* note 11 at 19.

<sup>39</sup> *Ibid* at 28.

<sup>40</sup> *Ibid* at 29.

<sup>41</sup> *Ibid* at 33.

<sup>42</sup> *Ibid* at 34.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid* at 35.

<sup>45</sup> *Ibid.*

<sup>46</sup> Richard Cullen, *The Rule of Law in Hong Kong* (Clayton: Civic Exchange, 2005) at 1.

<sup>47</sup> Brian Z Tamanaha, "The History and Elements of the Rule of Law" (2012) *Singapore Journal of Legal Studies* 232 at 233.



the existence of a system of laws, based on rules, not exceptions; a general knowledge and understanding of the law; the law creating only requirements possible to meet; equality before the law; enforcement of the legal norms<sup>48</sup>—and three themes—the limitation of the government by the law; “the notion of formal legality”; and “the rule of law, not man”.<sup>49</sup>

Other researchers have defined the rule of law in a ‘thick’ way, as “a system in which law imposes meaningful limits on the state and individual members of the ruling elite, as captured in a notion of a government of laws, supremacy of law and equality of all before the law,”<sup>50</sup> noting that

the rule of law places limits on the arbitrary or abusive use of power by government; demands equality before the law so that ‘everyman, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals’; and demands due process, or a formally rational, legal system.<sup>51</sup>

One of the most comprehensive, ‘thick’ definitions of the rule of law was created in 2004 by Kofi Annan, the UN Secretary General, who argued that the rule of law is

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.<sup>52</sup>

He also defined nine principles of the rule of law. These include: supremacy of law; equality before the law; accountability to the law; fairness in the application of the law; separation of powers; participation in decision-making; legal certainty; avoidance of arbitrariness; procedural and legal transparency.<sup>53</sup> Rachel Kleinfeld-Belton similarly argues that the rule of law is “not a single unified good,” distinguishing “five separate, socially desirable goods, or ends: a government bound by law, equality before the law, law and order, predictable and efficient rulings, and human rights.”<sup>54</sup>

While the UN adopts Annan’s definition of the rule of law, it is not accepted as a general one in international law, which often adapts it to fit the situation it tries to regulate. The EU argues for an ‘in-between’ definition, claiming that the rule of law is a concept that “guarantees fundamental rights and values, allows the application of EU law, and supports an investment-friendly business environment.”<sup>55</sup> The Council of

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<sup>48</sup> *Ibid* at 233.

<sup>49</sup> *Ibid* at 236.

<sup>50</sup> Cullen, *supra* note 46 at 4.

<sup>51</sup> *Ibid*.

<sup>52</sup> UN, “What is the rule of law?”, online: United Nations <[un.org/ruleoflaw/what-is-the-rule-of-law/](http://un.org/ruleoflaw/what-is-the-rule-of-law/)>.

<sup>53</sup> *Ibid*.

<sup>54</sup> Rachel Kleinfeld-Belton cited in Cullen, *supra* note 46 at 3.

<sup>55</sup> European Commission, “Justice and fundamental rights”, online: European Commission <[ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law\\_en](http://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law_en)>.

Europe, for whom the rule of law is one of the three founding principles<sup>56</sup>, lacks an authoritative definition of it<sup>57</sup>; however one of its advisory bodies, the Venice Commission (European Commission for democracy through Law) proposes its own ‘thick’ understanding of the notion, distinguishing six elements of the rule of law: legality, including a transparent, accountable and democratic process for enacting law; legal certainty; prohibition of arbitrariness; access to justice before independent and impartial courts, including judicial review of administrative acts; respect for human rights; and non-discrimination and equality before the law.<sup>58</sup>

Importantly, in spite of the rule of law’s omnipresence in international organisations and treaties, it is still disputed whether or not it exists on an international level. As Hisashi Owada observes, there are several problems with the application of the rule of law in the international legal system, because it is a concept created “to control the exercise of power within the domestic constitutional framework,” and as such it might not be “successfully duplicated in the international legal system where no central power exercises control over the community.”<sup>59</sup> He remarked that some elements of the rule of law would have to be ‘reconceptualised’ for it to enter the international setting, *i.e.* it would have to take a substantive form (the idea I discuss below), and it would have to “extend beyond the relationships between sovereign states to the rights and duties on an international level of individuals.”<sup>60</sup>

However, Jennifer A. Hillman argues that certain institutions, the World Trade Organization (WTO) for example, “continue to move toward a full-fledged ‘international rule of law’”<sup>61</sup>, and its dispute settlement mechanisms may already be regarded (to a certain extent) as a “potential model for how the rule of law can be applied in international settings.”<sup>62</sup>

## **E. The place of democracy in the concept of the rule of law**

At the end of this part of the first chapter I would like to ponder whether or not democracy is a prerequisite of the rule of law. Legal theorists disagree on this matter. Brian Z. Tamanaha argues that “the relationship between the rule of law and democracy is asymmetrical: the rule of law can exist without democracy, but democracy needs the rule of law, for otherwise democratically established laws may be eviscerated at the stage of application by not being followed.”<sup>63</sup> According to him, neither democracy, nor the human rights have a place in the rule of law’s definition, as

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<sup>56</sup> Jörg Polakiewicz and J Sandvig, “Council of Europe and the Rule of Law” (2015) 4:4 *Journal of Civic and Legal Sciences* 1 at 1.

<sup>57</sup> *Ibid* at 7.

<sup>58</sup> *Ibid* at 2.

<sup>59</sup> Hisashi Owada cited in Jennifer A Hillman, “An Emerging International Rule of Law? The WTO Dispute Settlement System’s Role in its Evolution” (2010-2011) 42:2 *Ottawa L Rev* 269 at 275.

<sup>60</sup> Hisashi Owada cited in *ibid* at 275.

<sup>61</sup> *Ibid* at 6.

<sup>62</sup> *Ibid* at 12.

<sup>63</sup> Tamanaha, *supra* note 11 at 37.

they would have the “effect of defining the rule of law in terms of institutions that match liberal democracies,” which would suggest that “only liberal democracies have the rule of law” and that “if a society wishes to acquire the rule of law, it must [...] come to resemble a liberal democracy,” which he regards as “unjustifiable”.<sup>64</sup>

Many other researchers, on the other hand, regard democracy and human rights as integral parts of the rule of law. One of the best examples is the Kofi Annan’s definition mentioned above, which is now used by the UN as the main definition of the rule of law.<sup>65</sup>

Guillermo O’Donnell, rather interestingly, postulates that what is needed in the 21st century is a ‘broader’ rule of law, which he calls a democratic rule of law. As the rule of law “works intimately with other dimensions of the quality of democracy, [...] only under a democratic rule of law will the various agencies of electoral, societal, and horizontal accountability function effectively, without obstruction and intimidation from powerful state actors,” and only then “will the responsiveness of government to the interests and needs of the greatest number of citizens be achieved.”<sup>66</sup>

In his view, the ideal, democratic rule of law would be in place if the legal system extended ‘homogenously’ in the entire country<sup>67</sup>; if the state institutions treated everybody equally; if the state institutions extended ‘horizontal accountability’; if the judiciary were free from any influences and did not pursue their own corporate interests; if there was a ‘fair and expeditious access’ to courts; if there existed legal counsel for those in need; if prisons provided adequate conditions; if all state institutions treated everybody ‘with fairness, consideration, and respect’; if ‘prompt and effective’ mechanisms were in place “to prevent, stop, or redress state violations of citizens”<sup>68</sup>; if the right to associate, the right to participation, labour rights, and the functioning of various social organisations was guaranteed; if the human rights violations on all levels were monitored and fought with; and if foreigners were granted the same civil rights as citizens, including participation in political matters at least on the local level.<sup>69</sup>

It is not the role of this paper to settle the debate on the place of democracy in the definition of the rule of law. However, as the second and third chapter will show, the O’Donnell’s broader definition of the concept is shared by the citizens of Hong Kong themselves and thus I will use it when analysing the state of the rule of law in the city.

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<sup>64</sup> *Ibid* at 37.

<sup>65</sup> Tamanaha, *supra* note 47 at 234.

<sup>66</sup> Guillermo O’Donnell, ‘Why the Rule of law Matters’ [2004] 15:4 *Journal of Democracy* 32 at 32.

<sup>67</sup> *Ibid* at 43.

<sup>68</sup> *Ibid* at 43.

<sup>69</sup> *Ibid* at 43–45.

## F. Introduction to the theories of conflict

Having briefly reviewed the matter of the rule of law, I would now like to focus on the second question: What exactly is conflict? According to Encyclopaedia Britannica, conflict is “the arousal of two or more strong motives that cannot be solved together.”<sup>70</sup> However, the answer to the question ‘What conflict exactly is?’, is neither that simple, nor that univocal. Over the years, many theories of conflict have been created. From antiquity to the modern times numerous thinkers investigated that idea, including Han Feizi, Polybius, Nagarjuna, Kant, Hegel, and Weber (to mention but a few).

Whenever they have been created, conflict theories share some common traits. It has been noted that “conflict theories tend to be specific restricted to the interrelationship between two or more units within society. Racial tension, class war, religious conflicts, strikes, protests, student power movements, revolutions, peasant uprisings and the like often become subjects of analysis.”<sup>71</sup> A list of general causes of conflict has also been created on the basis of various theories. It includes: class and identity differences; territorial or land disputes; economic competition; differences in ideas, values, ideology and religion; scarce resources; competition (in many fields, from politics, business, entertainment, to sports); diplomacy or intellectual prowess as the most common sources of conflict.<sup>72</sup>

## G. Historical theories of conflict

The length of this paper does not allow me to analyse all of the major conflict theories profoundly, however I would like to remark on the most potent ones in the past century and a half.

One of the ‘fathers’ of the modern conflict theory is, of course, Karl Marx, who created his political doctrine around the idea of conflict. For Marx, our society is a place of permanent conflict between the ruling classes, who own the means of production, and the working classes, who are selling their work for the wages to the ruling classes. According to Marx, the conflict between the ruling and working classes is the engine for the development of our society.<sup>73</sup>

Another major conflict theorist is Georg Simmel, who argued that conflict is a normal part of the social order, merely an ‘intense’ form of interaction and that it is “thus designed to resolve divergent dualisms; it is a way of achieving some kind of unity, even if it be through the annihilation of one of the conflicting parties.”<sup>74</sup>

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<sup>70</sup> Encyclopaedia Britannica, “Conflict”, online: <britannica.com/topic/conflict-psychology?>.

<sup>71</sup> M Francis Abraham, *Modern Sociological Theory*, (Oxford: Oxford University Press, 1983), cited in Austin Inyundele, “Conflict Theory”, online: Academia.edu <academia.edu/12077161/CONFLICT\_THEORY>.

<sup>72</sup> *Ibid.*

<sup>73</sup> Maciej Marszał, “Karol Marks” in Elżbieta Kundera, Marek Maciejewski, eds, *Leksykon myślicieli politycznych i prawnych* (Warszawa: C. H. Beck, 2009) at 563.

<sup>74</sup> Kurt H Wolff, “Introduction” in Georg Simmel, ed, *The Sociology of Georg Simmel* (Glencoe: The Free Press, 1950) at 13–17.

Max Weber also investigated the idea of conflict. Similarly to Marx, Weber looked into conflict from the perspective of class. He argued that a class is “a group of individuals who share a similar position in market economy” and because of that receive similar economic rewards.<sup>75</sup> However, Weber did not focus only on economy in class distinction, but also on social prestige (status) and political influence. Ultimately, he observed that “distribution of power and authority is the basis of social conflict,” but only if the authorities are not seen as legitimate, a conflict occurs. When the subjects agree with the authorities’ holding of power, they tend to avoid conflict.<sup>76</sup>

Ralf Dahrendorf, similarly to Weber, argued that social inequalities lie not only in economics, but also in bureaucratic and political powers. In Dahrendorf’s theory those with more power give orders to those with less power, and these relations lead to antagonisms. He distinguished three groups in society where antagonisms may occur: ‘quasi groups’, which include people occupying identical power (conflicts may appear in this group, but they are usually ‘overt’); ‘interest groups’, which include people sharing similar goals, who are mobilised to act to achieve them (for Dahrendorf interest groups are real agents of conflict); and ‘conflict groups’, which emerge from interest groups (in Dahrendorf’s opinion, conflict groups may attempt to instigate revolutionary social change). Dahrendorf also argued that as every society is subjected at every moment to change, thus social change is ubiquitous. As every society experiences at every moment social conflict, thus social conflict is ubiquitous. And as every element in a society contributes to its change, it is also subject to the process of change.<sup>77</sup>

Lewis Coser, on the other hand, defined conflict as a “struggle over values and claims to scarce status, power and resources in which the aims of the opponents are to neutralize, injure or eliminate their rivals.”<sup>78</sup> Coser distinguished between external and internal conflicts. He argued that external conflict is essential to the establishing of a group’s identity. Internal conflict in turn acts as a crucial safety valve under “conditions of stress, preventing group dissolution through the withdrawal of hostile participants,” because it increases groups’ stability, cohesion, and chances of survival.<sup>79</sup> Coser is thus the author of the so-called functionality conflict theory, which argues that:

the more differentiated and functionally interdependent are the units in a system, the more likely is the conflict to be frequently but of low degrees of intensity and violence; the more frequent are conflicts, the less is their intensity and the lower is their level of violence, then the more likely are conflicts in a system; the more the conflict increases the level of innovation and creativity of system units, the more it releases hostilities before they polarize system units, the more it promotes normative regulation of conflict relations, the more it increases awareness of realistic issues, and the more it increases the number of associative coalitions among social units, thus the greater will be the level of internal social integration of the system and the

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<sup>75</sup> Inyundele, *supra* note 71.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Amrit Barla, “The conflict functionalism of Lewis A Coser” online: Academia <[academia.edu/11530474/THE\\_CONFLICT\\_FUNCTIONALISM\\_OF\\_LEWIS\\_A\\_COSER](http://academia.edu/11530474/THE_CONFLICT_FUNCTIONALISM_OF_LEWIS_A_COSER)>.

<sup>79</sup> *Ibid.*

greater will be its capacity to adapt to its external environment.<sup>80</sup>

C. Wright Mills, who is often called the ‘father’ of contemporary conflict theory, argued that social structures are created because of conflict between differing interests and resources of the ‘elite’ and the ‘others.’ As “all major decisions are made by a fairly autonomous few whose interest is cohesive”<sup>81</sup> (*i.e.* the power elite), and as the interests of this elite are opposed to the interests of the others, the power elite’s decisions may lead to “increased escalation of conflict, production of weapons of mass destruction, and possibly the annihilation of the human race.”<sup>82</sup>

On the other hand, Randall Collins, argues that “human being are sociable but highly conflict-prone animals. [...] There is conflict because violent coercion is always a potential resource, and it is a zero-sum sort.”<sup>83</sup> As in every society there is an unequal partition of goods, there is a continuing competition between different groups for these goods. Thus, conflict arises. Collins notes that

the basic premises of the conflict approach are that everyone pursues his own best line of advantage according to resources available to him and to his competitors; and that social structures — whether formal organizations or informal acquaintances — are empirically nothing more than men meeting and communicating in certain ways.<sup>84</sup>

## H. Contemporary conflict theories

I would like to finish this short review of various conflict theories with two more contemporary theories, which instead of analysing past conflicts, look mostly into the future.

Samuel P. Huntington, in his 1993 article “The Clash of Civilizations,” argued that

the fundamental source of conflict in this new world will not be primarily ideological or economic. The great divisions among humankind and the dominating source of conflict will be cultural. Nation-states will remain the most powerful actors in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations.<sup>85</sup>

He later developed this idea in a 1996 book “The Clash of Civilizations and the Remaking of World Order.” Noting that at a time of crisis “people rally to those

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<sup>80</sup> *Ibid.*

<sup>81</sup> Inyundele, *supra* note 71.

<sup>82</sup> *Ibid.*

<sup>83</sup> Randall Collins, cited in Stephen K Sanderson, *The Evolution of Human Sociality: A Darwinian Conflict Perspective* (Lanham: Roman and Littlefield Publishers, 2001) at 88.

<sup>84</sup> *Ibid.*

<sup>85</sup> Ebenezer Agbeko, “Reconciling Huntington and Mueller’s Theories of Conflict: A Critical Analysis of Race, Culture and Conflict”, online: Academia <[academia.edu/5679014/Reconciling\\_Huntington\\_and\\_Muellers\\_Theories\\_of\\_Conflict\\_A\\_Critical\\_Analysis\\_of\\_Race\\_Culture\\_and\\_Conflict](https://academia.edu/5679014/Reconciling_Huntington_and_Muellers_Theories_of_Conflict_A_Critical_Analysis_of_Race_Culture_and_Conflict)>.

with similar ancestry, religion, language, values, and institutions”<sup>86</sup>, and underlining the importance of religion, Huntington analysed a variety of factors and subsequently divided the world into eight major civilizations: Western civilization (geographical category, subcategories: ideology, economics, politics), Confucian civilization (philosophical concept, subcategory: geography), Japanese civilization (ethnic category, subcategories: geography, politics, possibly religion–Shintō), Islamic civilization (religious concept), Hindu civilization (religious concept, subcategories: ethnicity, geography), Slavic Orthodox civilization (linguistic and religious concept, subcategory: geography), Latin American civilization (geographical concept, subcategory: language/s), African civilization (geographical category, subcategory: ethnicity).<sup>87</sup> While Samuel P. Huntington’s theory is often criticised for being too Western-centred, oversimplified, and, in the era of globalisation, just abstract<sup>88</sup>, some researchers tend to see 9/11, the rise of ISIS and ‘war on terrorism’ as the clash between the Western and Islamic civilizations predicted by Huntington.

The last conflict theory which I would like to analyse was created by John Mueller, who, when analysing the conflicts in former Yugoslavia and Rwanda in the 2000 article “The Banality of ‘Ethnic War’,” argued that

the mechanism of violence in the former Yugoslavia and in Rwanda [...] is remarkably banal. Rather than reflecting deep, historic passions and hatreds, the violence seems to have been the result of a situation in which common, opportunistic, sadistic, and often distinctly non-ideological marauders were recruited and permitted free rein by political authorities. Because such people are found in all societies, the events in Yugoslavia and Rwanda are not peculiar to those locales but could happen almost anywhere under the appropriate conditions. On the other hand, there was nothing particularly inevitable about the violence there: with different people in charge and with different policing and accommodation procedures, the savagery could have been avoided.<sup>89</sup>

In his theory, Mueller proposes an unorthodox thesis that “what happened in Yugoslavia and Rwanda was not inevitable”<sup>90</sup>, emphasising the role of people in charge in the time of conflict, who use opportunistic and often drunken thugs to achieve their goals.<sup>91</sup> Quoting Martin van Creveld, Mueller also argues that “we have entered a ‘new era,’ in which war will not be waged by armies but by groups whom we today call terrorists, guerrillas, bandits, and robbers.”<sup>92</sup>

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<sup>86</sup> Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, New York 1996) at 126.

<sup>87</sup> Nurlan Tussupov, Christian W Spang & Kuanish Beisenov, “Civilizations in International Relations: Huntington’s Theory of Conflict” online: Academia <academia.edu/1014558/Civilizations\_in\_International\_Relations\_Huntington\_s\_Theory\_of\_Conflict>.

<sup>88</sup> *Ibid.*

<sup>89</sup> John Mueller, “The Banality of Ethinc War” *International Security*, online: <politicalscience.osu.edu/faculty/jmueller/is2000.pdf>.

<sup>90</sup> *Ibid* at 27.

<sup>91</sup> *Ibid* at 28.

<sup>92</sup> Marin van Creveld, cited in *ibid* at 28.

A preliminary review of the legal conflicts in Hong Kong suggests that several conflict theories may be used to explain them: Coser's, Mills', and Huntington's. Only after a more profound analysis of their nature in chapter three I will be able to determine which of the three best explains the nature of the conflicts in this city.

## II. Rule of Law in Hong Kong – From Conceptualisation to Erosion

### A. History of the rule of law in Hong Kong

The people of Hong Kong have a relatively long relationship with the rule of law, at least in the thin, formal sense. In spite of being a colony, once the British realised the importance of Hong Kong as an international harbour, they have made sure that the local judiciary enforced “a due and even-handed administration of English law,” which allowed for a peaceful settlement of trade disputes and gave protection to commercial agreements, without any elements of political liberalisation of the system in mind.<sup>93</sup>

This typically colonial approach towards the rule of law prevailed for most of the city's history—while the 1970s saw an increase in the protection of labour rights, “in place of political accountability, legal accountability was rigorously enforced, with government and its officials becoming more accountable than ever before to the law.”<sup>94</sup> The basis for the functioning of Hong Kong remained the Letters Patent, which “provided only a crude and rudimentary written constitution for the colony.”<sup>95</sup>

The situation radically changed when the transition to China became imminent, and in 1991 the *Hong Kong's Bill of Rights* (known as *BORO*) was adopted. As it incorporated many of the provisions of the *International Covenant on Civil and Political Rights*, granting Hong Kongers such civic freedoms like the right to fair trial and due process<sup>96</sup>, it was supposed to become one of the bricks in the ‘wall of laws’<sup>97</sup> against the Mainland post-transition.

### B. Introduction to the Hong Kong legal and political system

The fear that with the return to China, corruption and guanxi will enter the city was predominant. Beijing was supposed to “destroy that which made Hong Kong prosperous and stable.”<sup>98</sup> Twenty-one years after the transition we can see that these

<sup>93</sup> Jian Xu, “ICAC Prosecution, Capital Investment, and the Rule of Law in Hong Kong” at 1-2, online: SSRN eLibrary <papers.ssrn.com/sol3/papers.cfm?abstract\_id=3202330>.

<sup>94</sup> *Ibid* at 2.

<sup>95</sup> Albert H Y Chen, “The Rule of Law Under ‘One Country, Two Systems’: The Case of Hong Kong 1997-2009” at 6, online: SSRN eLibrary <papers.ssrn.com/sol3/papers.cfm?abstract\_id=1474748>.

<sup>96</sup> Xu, *supra* note 93 at 5.

<sup>97</sup> See Carol A G Jones, *Lost in China? Law, Culture and Identity in Post-1997 Hong Kong* (Cambridge: Cambridge University Press, 2015) at 55–60.

<sup>98</sup> *The Hong Kong Transition Project Survey*, Baptist University of Hong Kong, April 2002 cited in Xu, *supra* note 93 at 4.



fears did not come true, at least for the most part, and that Christopher Patten was right to believe that the “set of institutional arrangements,” such as “the rule of law, representative government, freedom of speech, independent courts, clean police, and free trade”<sup>99</sup>, will be enough to protect Hong Kong.

The aforementioned set of institutional arrangements rests on two elements: the Sino-British joint *Declaration of 1984*, which introduced the ‘one country, two systems’ principle; and the *Basic Law of Hong Kong’s special administrative region*, its *de facto* constitution.<sup>100</sup> The *1984 Declaration*, the result of several years of negotiations, not only did seal Hong Kong’s future, but also created the basis for the city’s semi-autonomous system, guaranteeing the rule of law, democratisation and human rights, emphasising the application of *ICCPR* and *ICESCR*.<sup>101</sup> It also assured that Hong Kong will maintain its common law system, along with the existing laws, and that its judiciary will be completely independent.<sup>102</sup>

The *Basic Law*, which entered into force on the day of Hong Kong’s handover to China, creating the legal and political framework for the functioning of the SAR, provides a “significant underpinning to the rule of law.”<sup>103</sup> However, while it has incorporated most of the *Declaration*’s provisions, there are two notable exceptions: those regarding democratisation and the ‘completeness’ of judiciary independence, which has posed a danger to the city’s rule of law ever since.<sup>104</sup>

Democracy is one of the elements of the rule of law in its broader definition. However, in spite of the Sino-British *Declaration*’s provisions, Hong Kong still is not a fully democratic city. Both the elections of the city’s Chief Executive (SAR’s president) and legislative Council, or LegCo (SAR’s parliament) are what one might call ‘semi-democratic’. While the articles 45 and 68 of the *Basic Law*, respectively, state that the ‘ultimate aim’ is to have ‘universal suffrage’, the Chief Executive is still elected by a 1,200-member, largely pro-Beijing<sup>105</sup> Election Committee, composed of individuals and bodies from 28 functional constituencies<sup>106</sup>, and only 35 out of 70 representatives of LegCo are chosen in direct elections, with the other half selected by individuals and business groups<sup>107</sup>, or what Sheriff A. Elgebeily simply calls the ‘elite’.<sup>108</sup> The failure to achieve this ‘ultimate aim’, and China’s reluctance towards it (the NPC’s Standing Committee has so far pushed the possibility of the universal

<sup>99</sup> Christopher Patten cited in Xu, *supra* note 93 at 4.

<sup>100</sup> See Mirosław M Sadowski, “Crossroads of the World, Crossroads of the Law: Hong Kong and Macau Legal Systems Approaching 20 Years Post-Transition” (2016) 7 *Comparative Law Review*.

<sup>101</sup> Michael C Davis, “The Basic Law, Universal Suffrage and the Rule of Law in Hong Kong” (2015) 38 : 2 *Hastings International and Comparative Law Review* 275 at 28–281.

<sup>102</sup> *Ibid* at 281–282.

<sup>103</sup> Cullen, *supra* note 46 at 20.

<sup>104</sup> Davis, *supra* note 101 at 282–283.

<sup>105</sup> Sheriff A Elgebeily, “Hegemony and Post-Colonial Hong Kong Hybridity: Jūnzǐ, Yi, Li, Xin, and Concepts of the Rule of Law in a Confucian Context” (2017) 5:1 *The Chinese Journal of Comparative Law* 154 at 165.

<sup>106</sup> *The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, Annex I, online: <basiclaw.gov.hk/en/basiclawtext/annex\_1.html>.

<sup>107</sup> *Ibid*, Annex II, online: <basiclaw.gov.hk/en/basiclawtext/annex\_2.html>.

<sup>108</sup> Elgebeily, *supra* note 105 at 165.

suffrage further into the future several times)<sup>109</sup>, led to the serious frustration among Hong Kong citizens and to a serious conflict in 2014, which I will analyse in the next part of the paper.

### C. The question of judiciary in Hong Kong

Compared to the level of democracy in Hong Kong, the SAR's judiciary has remained, contrary to the pre-transition fears, independent, but not absolutely.<sup>110</sup> Despite the fact that Hong Kong's courts "shall exercise judicial power independently, free from any interference" (article 85 of the *Basic Law*), and in spite of the article 158 (2) of the *Basic Law* which gives the city's courts the power "to interpret on their own [...] the provisions of this [Basic] law which are within the limits of the autonomy of the region," the article 158 (3) states that when the interpretation relates to the provisions "concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the central authorities and the region," Hong Kong's courts have to

seek an interpretation of the relevant provisions from the standing Committee of the national people's Congress [...] When the standing Committee makes an interpretation of the provisions concerned, the courts of the region [...] shall follow the interpretation of the standing Committee.<sup>111</sup>

The stipulations of the article 158 (3) of the *Basic Law*, along with the need to report any "appointment or removal [of a judge] to the Standing Committee of the National People's Congress"<sup>112</sup> give Beijing a 'backdoor' power to "supersede or overturn the content of decisions of an appointed judiciary," which "unnecessarily creates avenues easily exploited for a politicisation of the judiciary."<sup>113</sup>

It is worth noting, that these 'backdoor' have rarely been opened by the PRC in the first two decades after the handover. However, every time they have, it has led to conflicts. The first clash over the interpretation between Hong Kong's Court of final appeal (CFA) and the NPC's Standing Committee came in 1999 with the right to abode case of *Ng Ka Ling v Director of Immigration*. Looking at it from perspective, as Danny Gittings acutely notes, it seems to have been "unwise for the court to pick a fight with Beijing in the first case it heard concerning the *Basic Law*, especially over an issue that was not necessary to decide the case."<sup>114</sup> Even without today's hindsight, the court's declaration that it held the power "to invalidate actions of the national people's

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<sup>109</sup> Davis, *supra* note 101 at 287–289.

<sup>110</sup> Elgebeily, *supra* note 105 at 170.

<sup>111</sup> *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Annex I, *supra* note 106.

<sup>112</sup> *An Ordinance to establish a Court of Final Appeal for Hong Kong, and for matters incidental thereto and connected therewith*, CAP 484 1997, Section 7A. Endorsement of Appointment or Removal of Judges of the Court (2), online: <elegislation.gov.hk/hk/cap484?xpid=ID\_1438403251506\_001>.

<sup>113</sup> Elgebeily, *supra* note 105 at 170–171.

<sup>114</sup> Danny Gittings, "Changing Expectations: How the Rule of Law Fared in the First Decade of the Hong Kong SAR" at 4, online: SSRN eLibrary <papers.ssrn.com/sol3/papers.cfm?abstract\_id=2373860>.

Congress and its Standing Committee if they breached the *Hong Kong Basic Law*”<sup>115</sup> seems a bit naïve. Ultimately, under huge pressure from the Mainland, the court backtracked, and issued a supplementary judgement reaffirming the supremacy of NPC’s Standing Committee, which “contained sufficiently deferential language [...] for Beijing to view it as an apology.”<sup>116</sup>

However, since the court decided to seemingly defy article 158 (3) of the *Basic Law* and not to ask the Standing Committee for interpretation of certain substantive issues relating to the *Ng Ka Ling* case, Hong Kong’s Chief Executive decided to step in and ask the Standing Committee for an interpretation himself. As a result, in June the Standing Committee did not only invalidate certain elements of the court rulings, but also established a “right to interpret any part of the *Basic Law* at any time, including those provisions which are supposed to fall within Hong Kong’s autonomy.”<sup>117</sup> CFA conceded and recognised the need to ask the Standing Committee for interpretation in another case several months later. As Jerome Cohen noted, the whole situation saw “the court veering from being “unnecessarily provocative” to the opposite extreme of having “unnecessarily prostrated itself before Beijing” within less than a year.”<sup>118</sup>

This whole situation, which resulted in Beijing asserting the power to interpret any part of *Basic Law*, has clearly led to the erosion of the rule of law in Hong Kong. Despite the fact that the CFA successfully defied Beijing on more than one occasion, notably in the *Falun Gong* case of 2005,<sup>119</sup> the damage was clearly done and the NPC’s Standing Committee proceeded with several interpretations of the *Basic Law* in the next years.<sup>120</sup>

#### **D. The analysis of the state of the rule of law in Hong Kong**

While the issues regarding democratisation and the finality of the judiciary’s decisions have had an eroding effect on the rule of law in Hong Kong, most researchers are quite positive about its preservation. Sheriff A. Elgebeily notes that “currently, the situation remains precarious but stable.”<sup>121</sup> Danny Gittings adds that, in spite of the occasional tensions, it is clear today that “Beijing has learnt to live with the reality of an independent judiciary in Hong Kong.”<sup>122</sup> As Albert H.Y. Chen remarks in rather flamboyant words,

by trial and error, episode by episode, sometimes painful, sometimes joyful, we have gradually mastered the legal art of the practice of ‘One Country, Two Systems’. Tuition fees have been paid; lessons have been learned. And history has been written. It is a history that the people of Hong Kong have

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<sup>115</sup> *Ibid* at 4.

<sup>116</sup> *Ibid*.

<sup>117</sup> *Ibid* at 5.

<sup>118</sup> Jerome Cohen cited in *ibid* at 5.

<sup>119</sup> *Ibid* at 5–6.

<sup>120</sup> Chen, *supra* note 95 at 13.

<sup>121</sup> Elgebeily, *supra* note 105 at 19.

<sup>122</sup> Gittings, *supra* note 114 at 9.

participated in making; a history that we can justifiably feel proud of; and a history that inspires confidence about ourselves, faith in our partners, and hope for the future.<sup>123</sup>

What are the reasons for such optimism? First of all, Hong Kong has a buoyant civil society, which comes together to protect the rule of law when such need arises (sometimes leading to conflict, as I will show in the next part of the paper). One of the past examples in the city's post-transition history was the infamous case of article 23. Article 23 of the *Basic Law* allows the Hong Kong government to "enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the central people's Government" and has been a cause for anxiety ever since the *Basic Law* came into force.<sup>124</sup> Thus when the local government announced its plans to introduce changes into this article in 2002, it led to huge public outcry and mass demonstrations (the one on the 1st of July 2003 gathered 500,000 people)<sup>125</sup>, as Hong Kongers feared the changes would curtail human rights and introduce 'Mainland standards' with regard to the questions of treason and the theft of state secrets.<sup>126</sup> Ultimately, the changes were indefinitely shelved<sup>127</sup>, clearly thanks to the public's stance against them.

Secondly, the Hong Kong's courts, despite the sword of Damocles hanging over their head in the form of possible NPC's Standing Committee interpretation, have managed to find "the middle path or the 'golden mean' between confrontation with and subservience to Beijing, and between judicial activism and judicial restraint [taking] an approach that may be described [...] as 'neither too proud nor too humble' (bukang bubei)"<sup>128</sup>, if one was to use a Chinese expression. Such an approach has been labelled as 'appropriate' with regards to the 'one country, two systems' principle.<sup>129</sup>

Moreover, Hong Kong courts have already managed to establish a clear pattern of protecting various human rights in several cases since 1997, such as the right to freedom of peaceful assembly (the *Falung Gong* case mentioned above, *Yeung May-wan v HKSAR*, and *Leung Kwok Hung v HKSAR*)<sup>130</sup>; the right to freedom and privacy of communication (the *Leung Kwok Hung and Koo Sze Yiu v Chief Executive of the HKSAR*)<sup>131</sup>; the equality of homosexuals before the law (*Leung T C William Roy v Secretary for Justice*)<sup>132</sup>; and the voting rights of prisoners (*Chan Kin Sum v Secretary for Justice*)<sup>133</sup>, to mention but a few.

Thirdly, Hong Kong's anti-corruption force has remained firmly in place after the handover. Established in 1974, the ICAC (Independent Commission Against Corruption) is completely separate from the SAR's civil service. Accountable only

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<sup>123</sup> Chen, *supra* note 95 at 21.

<sup>124</sup> *Ibid* at 11.

<sup>125</sup> *Ibid* at 12.

<sup>126</sup> *Ibid* at 11.

<sup>127</sup> *Ibid* at 13.

<sup>128</sup> Chen, *supra* note 95 at 20.

<sup>129</sup> *Ibid*.

<sup>130</sup> *Ibid* at 13–14.

<sup>131</sup> *Ibid* at 15–16.

<sup>132</sup> *Ibid* at 16–17.

<sup>133</sup> *Ibid* at 17–18.

before the Chief executive<sup>134</sup>, it holds extensive legal instruments allowing it to investigate corruption, such as searching both private and business bank accounts, restraining disposal of property, or retaining travel documents.<sup>135</sup> After completing an investigation, the Secretary of Justice decides whether or not to prosecute.<sup>136</sup> As noted on figure 1<sup>137</sup>, the ICAC has responded to the public fears of guanxi entering the city, as the number of investigations soared after the handover, while the numbers of prosecutions and convictions remained similar to the pre-transition ones, which leads us to believe the level of corruption in Hong Kong has remained more or less the same. Thanks to the ICAC's work, the city has been awarded 77 points and the 13th place in the world in Transparency International's Corruption Perceptive Index 2017.<sup>138</sup>

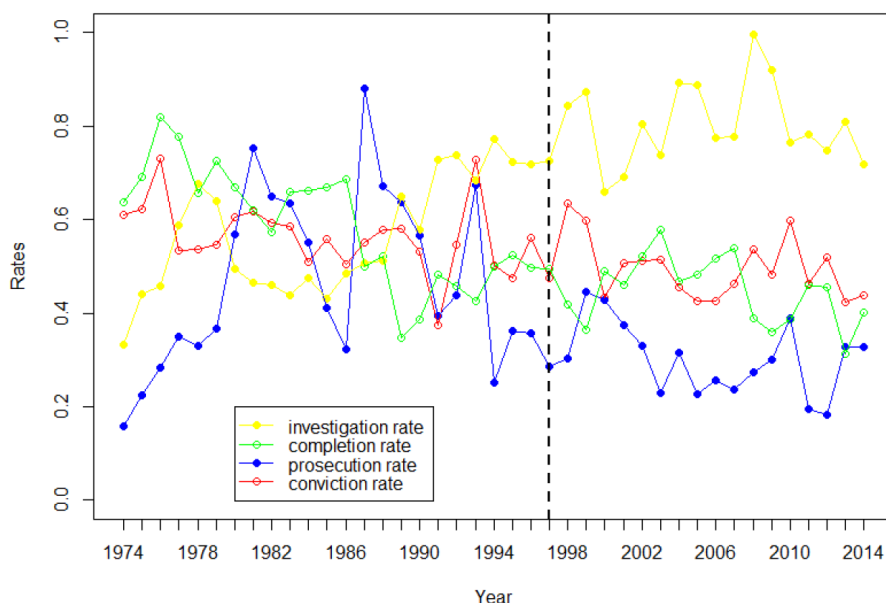


Figure 1 — Law enforcement activities regarding the ICAC<sup>139</sup>

Various surveys seem to confirm the optimism of the academics, showing that Hong Kong has remained a place ruled by the rule of law, and not by law, even in the eyes of its own citizens. In a 2005 study the Special Administrative Region's assessors and citizens' comparison group awarded the city's rule of law 72.6 points out of a

<sup>134</sup> Xu, *supra* note 93 at 7.

<sup>135</sup> *Ibid* at 8.

<sup>136</sup> *Ibid* at 8.

<sup>137</sup> *Ibid* at 16.

<sup>138</sup> *Transparency International*, "Corruption Perceptions Index 2017", online: [Transparency International <transparency.org/news/feature/corruption\\_perceptions\\_index\\_2017>](http://Transparency International <transparency.org/news/feature/corruption_perceptions_index_2017>).

<sup>139</sup> Xu, *supra* note 93 at 16.

hundred possible (see figure 2)<sup>140</sup>, with highest scores given to the categories of ‘procedural fairness’ (80 among the assessors, 77.78 among the members of the comparison group) and of ‘basic requirement of law’ (78.82 and 70.56, respectively), and the lowest to the categories of ‘rule against arbitrary powers’ (70.59 and 70.78), ‘accessibility to justice’ (71.32 and 66.1), and ‘government under law’ (72.06 and 68.89). Interestingly, the members of the comparison group in all cases but one regard the respective elements of the rule of law to be worse shape than the assessors, which is also visible in the overall score of the rule of law (74.66 among the assessors, 70.54 among the members of the comparison group).

	Criterion	Assessors		Comparison Group	
		Importance Weighting	Score	Importance Weighting	Score
		1-10	0-100	1-10	0-100
1	Basic requirement of law	9.00	78.82	9.22	70.56
2	Government under law	9.12	72.06	9.00	68.89
3	Rule against arbitrary powers	8.88	70.59	9.44	70.78
4	Equality before law	9.18	74.41	9.67	69.22
5	Impartial enforcement of law	9.29	75.00	9.33	70.56
6	Accessibility to justice	8.71	71.32	9.00	66.11
7	Procedural fairness	9.41	80.00	9.00	77.78
	<b>Index of Rule of Law (0-100)</b>		<b>74.66</b>		<b>70.54</b>

Figure 2 — Hong Kong’s rule of law according to the city’s assessors and a comparison group in 2005<sup>141</sup>

The 2017/2018 World Justice Project’s Rule of Law Index grants Hong Kong 0.77 points out of 1 maximum, which puts it on the 16th place in the world (see Figure 3).<sup>142</sup> Hong Kong scored the lowest in the categories of ‘constraints on government powers’ (0.66), ‘fundamental rights’ (0.67), and ‘criminal justice’ (0.72). While most of the 2017 results were similar those in 2016, what is quite worrying are the lower assessments of Hong Kong’s independent auditing, sanctions for official misconduct, and the effectiveness of the correctional system.

The two studies, completed within more than ten years from each other, clearly show that, despite the researcher’s optimism, the key issue with regards to the rule of law in Hong Kong seems to be the status quo. Ever since the handover problems have remained quite similar—the questions of accountability of the government, the level of both the government’s and the judiciary’s autonomy, and the protection of fundamental rights still need to be addressed if the city is about to have a ‘fuller’ rule of law.

<sup>140</sup> Benny Y T Tai, “Developing an Index of the Rule of Law: Sharing the Experience of Hong Kong” (2007) 2 *Asian Journal of Comparative Law* 1 at 14.

<sup>141</sup> *Ibid.*

<sup>142</sup> *World Justice Project*, “Rule of Law Index 2017-2018” at 95, online: World Justice Project <[worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\\_0.pdf](http://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf)>.

The existence of such legal provisions as the ambiguous Section 161 (1) of the *Hong Kong Crimes Ordinance*, which states that

any person who obtains access to a computer: with intent to commit an offence; with a dishonest intent to deceive; with a view to dishonest gain for himself or another; with a dishonest intent to cause loss to another, whether on the same occasion as he obtains such access or on any future occasion, commits an offence and is liable on conviction upon indictment to imprisonment for 5 years,<sup>143</sup>

which was used by the police in order to arrest several social media activists in June 2015,<sup>144</sup> clearly has a detrimental effect on the rule of law.

In conclusion of this chapter I would like to remark on the state of the rule of law in Hong Kong from a theoretical point of view. The premises of ‘thin’, ‘in-between’, and even ‘thick’ concepts of the rule of law are clearly fulfilled. However, a ‘broader’ understanding of the rule of law is still not in place. As both Beijing and the Hong Kong’s government have shown on more than one occasion, they cannot be entirely trusted when it comes to the preservation of the rule of law in the SAR, and their policies often lead to conflicts. I will discuss several cases of such clashes in the next chapter.

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<sup>143</sup> *Hong Kong Crimes Ordinance*, online: <[elegislation.gov.hk/hk/cap200!en](http://elegislation.gov.hk/hk/cap200!en)>.

<sup>144</sup> Jennifer Zhang, “Hong Kong’s Activist Social Media Culture Under Threat” *The Diplomat* (June 14 2015), online: [The Diplomat <thediplomat.com/2015/06/hong-kongs-activist-social-media-culture-under-threat/>](http://thediplomat.com/2015/06/hong-kongs-activist-social-media-culture-under-threat/).

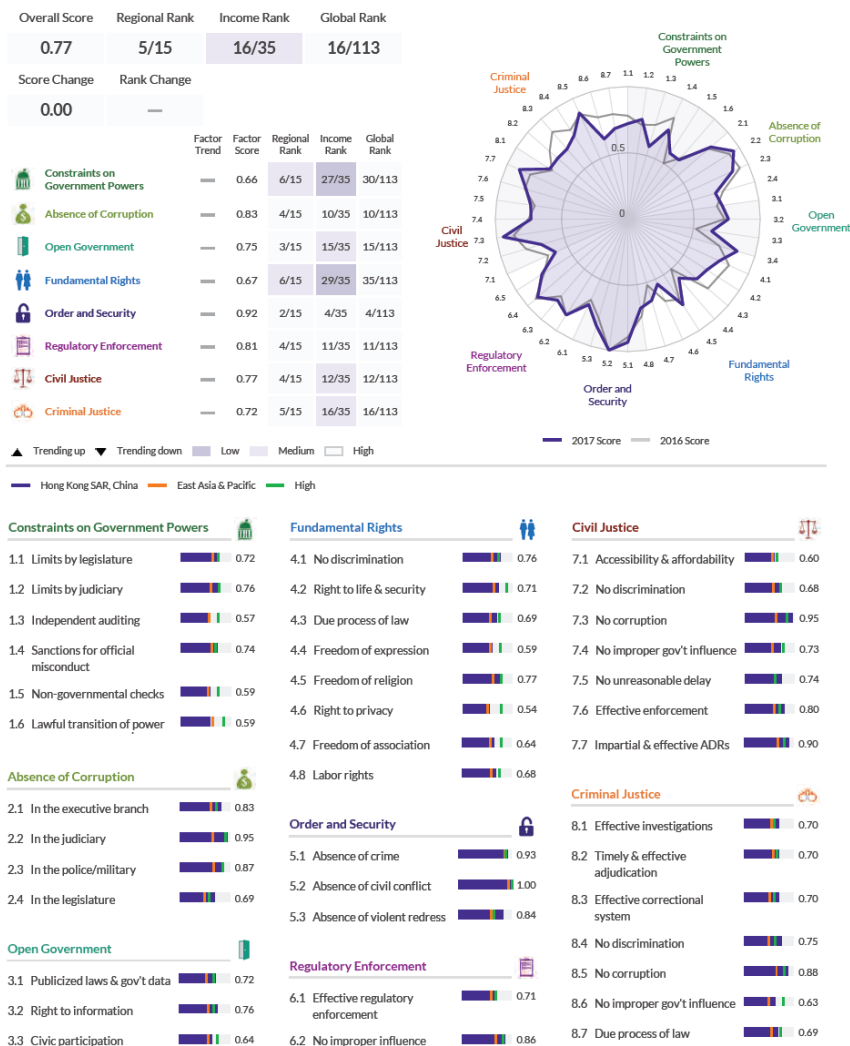


Figure 3 — Hong Kong's rule of law according to the World Justice Project in 2017 <sup>145</sup>

### III. Hong Kong — Law and Conflict

#### A. Background of the conflicts in Hong Kong

Under the Chinese rule, Hong Kong has been transformed into the protest capital of the world: as Jean Philippe Bèja notes, there have been about 1,000 demonstrations per year, or three a day since 1997, if one was to count the

<sup>145</sup> World Justice Project, *supra* note 142.



different forms of protest.<sup>146</sup> Some of them big, some of them small—many concerning the matter of the rule of law in the city.

It is thus important to review and analyse the nature of conflicts in Hong Kong, as they are inextricably linked to the question of rule of law—and investigating them can show us what threats the rule of law is facing in the present, and what issues may become most problematic with regards to its preservation in the future. One might argue that all of the main conflicts in the SAR are connected to law in a way; hence I will focus on these ‘legal’ conflicts in this chapter.

## B. Conflicts regarding democratisation

One of the biggest conflicts over the rule of law—or rather the ‘broader’ understanding of the rule of law—has erupted over the Hong Kongers right to universal suffrage, promised, as I have mentioned earlier, in the *Joint Declaration* and described as ‘the ultimate aim’ in the *Basic Law*. However, two events during the 2014 debate over the 2017 elections of the Chief Executive<sup>147</sup> (whether they should be the first direct ones, as initially stipulated)<sup>148</sup>, *i.e.* Beijing’s White Paper on the ‘one country, two systems’ rule announced on the 10th of June, and the August 31st NPC’s Standing Committee decision have brought the process of democratisation to a halt, which, understandably, led to social unrest.

The White Paper seemingly disavowed the Chinese obligations under the *Joint Declaration*, ‘grounding’ Hong Kong’s functioning only in the *PRC Constitution* and the *Basic Law*<sup>149</sup>, with Chinese diplomats arguing later that the *Joint Declaration* was either ‘void’, or that its purpose has already been achieved through the handover.<sup>150</sup> Furthermore, Beijing argued in the white paper that it is the primary guardian of the rule of law in Hong Kong, that it had a ‘sovereign authority’ to amend or interpret the *Basic Law*, that Hong Kong’s courts were ‘administratively subservient’ to PRC’s national security concerns, and that Beijing exercised the ‘comprehensive jurisdiction’ over Hong Kong, similar to the one exercised over all other Chinese regions.<sup>151</sup> The white paper also underlined that Hong Kong’s ‘high degree of autonomy’ does not mean a ‘full autonomy’<sup>152</sup>, and remarked that for the preservation of Hong Kong’s ‘capitalist system’ and autonomy to continue, the SAR “must fully respect the socialist system practiced on the mainland.”<sup>153</sup>

<sup>146</sup> Jean-Philippe Bèja, “Is Hong Kong Developing a Democratic Political Culture?” (2007) 2 *China Perspectives* 1 at 9.

<sup>147</sup> Davis, *supra* note 101 at 15.

<sup>148</sup> Banyan, “Can Hong Kong’s next leader satisfy her masters and the public?” *The Economist* (30 March 2017), online: The Economist <[economist.com/news/china/21719816-divided-society-it-will-be-tough-carrie-lam-can-hong-kongs-next-leader-satisfy-her](http://economist.com/news/china/21719816-divided-society-it-will-be-tough-carrie-lam-can-hong-kongs-next-leader-satisfy-her)>.

<sup>149</sup> Davis, *supra* note 101 at 2.

<sup>150</sup> *Ibid* at 2, n 6.

<sup>151</sup> *Ibid* at 3.

<sup>152</sup> *Ibid* at 16.

<sup>153</sup> Stuart Hargreaves, “From the Fragrant Harbour to Occupy Central: Hong Kong’s Democratic Development & ‘Rule of Law’ Discourse” at 38, online: SSRN eLibrary <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2714776](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714776)>.

While the white paper was worrying in itself, just two months later the NPC's Standing Committee interpreted the article 45 of the *Basic Law*, which promises that the Chief Executive will be elected in the process of universal suffrage out of candidates nominated by a broadly representative committee. The Standing Committee's decision argued that the 'broadly representative' committee would be modelled on the current, largely unrepresentative 1,200 members Election Committee, that any candidate would have to receive a majority vote, and that the number of candidates would have to be limited to only two or three—which, along with the white paper stipulation that any Chief Executive candidate has to be a person "who loves the country and loves Hong Kong"<sup>154</sup>, would effectively block any anti-Beijing candidate from standing in the Chief Executive elections.<sup>155</sup>

As Michael C. Davis remarks, this drastic change of PRC's approach towards Hong Kong, "from 'put your hearts at ease' to Beijing is the boss with 'comprehensive jurisdiction'"<sup>156</sup>, was deeply worrying. This situation, perceived by many Hong Kongers as an infringement of the rule of law, led to huge protests. First, soon after the publication of the white paper, Hong Kong Bar Association organised a demonstration in front of the CFA.<sup>157</sup> Then, the pan-democratic camp decided to hold an unofficial referendum on the possible ways of selecting the Chief Executive. In the end, almost 800,000 people voted in eighteen polling stations, with 87.7% in favour of LegCo's vetoing any proposal of the Chief Executive election which would not meet international standards.<sup>158</sup> The tensions remained high on the annual pro-democracy march on the 1st of July.<sup>159</sup>

After the NPC's Standing Committee August interpretation, leaders of the pro-democracy movement 'Occupy Central' declared that the 'next stage' of protests would be civil disobedience.<sup>160</sup> Said civil disobedience took form of the occupation of some of the major roads in Hong Kong, with initial protests starting from the 25th of September 2014, and the major ones from the 28th of September. The protesters had two major claims—the retraction of the Standing Committee's interpretation, and a new start of the discussion on the way of electing the Chief executive.<sup>161</sup> As the protesters used cheap plastic umbrellas to shield themselves from the tear gas used by the police, the whole movement soon became called the 'Umbrella Revolution'.<sup>162</sup>

The protests—and clashes with the police—continued into October and November. However, as public support waned<sup>163</sup>, they slowly petered out, and were ultimately dissolved by the police in early December.<sup>164</sup>

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<sup>154</sup> See the white paper cited in Davis, *supra* note 101 at 17.

<sup>155</sup> Davis, *supra* note 101 at 3–4.

<sup>156</sup> *Ibid* at 20.

<sup>157</sup> Hargreaves *supra* note 153 at 38.

<sup>158</sup> *Ibid* at 38–9.

<sup>159</sup> *Ibid* at 39.

<sup>160</sup> *Ibid* at 41.

<sup>161</sup> *Ibid* at 43.

<sup>162</sup> *Ibid* at 44.

<sup>163</sup> Hargreaves *supra* note 153 at 47.

<sup>164</sup> *Ibid* at 48.

Nevertheless, the tensions regarding the elections have not simmered down completely. The recent—on 26 March 2017—elections of the Hong Kong Chief executive, which saw Beijing-backed Carrie Lam win, receiving 777 votes to public-favourite John Tsang’s 365 votes,<sup>165</sup> were dubbed “a selection, not an election.”<sup>166</sup> Protests, during which Hong Kongers hurled toilet paper at toilet paper at China liaison office, soon broke out.<sup>167</sup>

### C. The 2016 LegCo elections conflict

Beijing’s reluctance towards Hong Kong’s democratisation has, unsurprisingly, led to the creation of pro-independence parties, such as Hong Kong National Party. These parties have encountered serious problems when running in the 2016 LegCo elections<sup>168</sup>, with the leader of Hong Kong National Party being one of the six people barred from being a candidate.<sup>169</sup> The increasingly tense situation even prompted Feng Wei, the deputy director of the Hong Kong and Macau affairs office in Beijing, to give a rare interview, in which he tried to tone down the emotions, declaring that “it will be normal that several radical young people [*i.e.* pro-independents] will be returned as lawmakers (in September).”<sup>170</sup>

The elections did not prove him wrong, however, thanks to the semi-democratic electoral system I have analysed above, while the anti-Beijing camp (consisting of the pan-democrats, localists and pro-independents) received 59,83% of votes, it returned only 30 seats in LegCo, and to pro-Beijing’s 40.

The 2016 elections also resulted in another legal conflict, the oath-swearing dispute, or the ‘oath-swearing saga,’ as some of the Chinese media<sup>171</sup> called it. The dispute has been, one may argue, a direct result of the election of several ‘radicals’—

<sup>165</sup> Catherine Hardy, “Hong Kong gets a new leader” *Euronews* (26 March 2017), online: Euronews <euronews.com/2017/03/26/hong-kong-gets-a-new-leader>.

<sup>166</sup> Emily Rauhala, “‘A selection, not an election’: Pro-Beijing committee picks loyalist to lead Hong Kong” *Washington Post* (23 March 2017), online: Washington Post <washingtonpost.com/world/a-selection-not-an-election-pro-beijing-committee-picks-loyalist-to-lead-hong-kong/2017/03/26/93c5292a-1055-11e7-b2bb-417e331877d9\_story.html?utm\_term=.81130ee47638>.

<sup>167</sup> Catherine Lai, “Video: Toilet paper hurled at China Liaison Office in protest of Carrie Lam’s ‘appointment’” *Hong Kong Free Press* (26 March 2017), online: Hong Kong Free Press <hongkongfp.com/2017/03/26/video-toilet-paper-hurled-at-china-liaison-office-in-protest-of-carrie-lams-appointment/>.

<sup>168</sup> *Coconuts Hong Kong*, “Hong Kong government threatens *action* against independence party” (31 March 2016), online: <hongkong.coconuts.co/2016/03/31/hong-kong-threatens-action-against-independence-party>.

<sup>169</sup> Kris Cheng, “Police have advised Hong Kong government to ban pro-independence party, convener says” *Hong Kong Free Press* (17 July 2018), online: Hong Kong Free Press <hongkongfp.com/2018/07/17/just-police-advised-hong-kong-government-ban-pro-independence-party-convener-says/>.

<sup>170</sup> “Beijing expects young pro-democracy ‘radicals’ to become Hong Kong lawmakers”, *Coconuts Hong Kong* (15 March 2015), online: <hongkong.coconuts.co/2016/03/15/beijing-expects-young-pro-democracy-radicals-become-hong-kong-lawmakers>.

<sup>171</sup> See series of articles under “Legislative Council oath-taking saga”, *South China Morning Post*, online: South China Morning Post <scmp.com/topics/legislative-council-oath-taking-saga>.

localist, pro-independence candidates. When they were supposed to be sworn in along with other lawmakers during the inaugural session of the new LegCo on 12th of October, some of them decided to turn the otherwise simple procedure into a form of a protest. When taking the oath, two of them displayed a blue banner bearing the words “Hong Kong is not China,” and one mispronounced “People’s Republic of China” as “people’s re-f[ucking] of Chee-na.” A third inserted his own words into the oath, and eleven other localist or pan-democratic legislators either shouted slogans or made extra statements before or after taking their oaths.<sup>172</sup>

As a result, the oaths of the two of the localist legislators were invalidated, and then the pro-Beijing legislators walked out of the LegCo’s proceedings in order to force adjournment to block the pair from retaking their oaths on the following day. Ultimately, on the 18th of October the Chief Executive and Secretary for Justice asked the court to disqualify the two from seating in LegCo. The opposition then accused local government of “ruining separation of powers,” which prompted a baffling response that “the Basic Law makes ‘no mention’ of separation of powers,” thus it is not in place in Hong Kong.<sup>173</sup>

Even more surprisingly, on the 4th of November the NPC’s Standing Committee declared it was going to interpret article 104 of the *Basic Law* (this article regulates the process of oath-taking). This move led to large protests on the 6th of November.<sup>174</sup> Nonetheless, the Standing Committee passed the interpretation on the 7th of November, stating that “if oath-taker refuses to take the oath, he or she cannot retake the oath and shall be disqualified from assuming public office.”<sup>175</sup> More protests ensued, and the very next day Hong Kong lawyers joined a silent march against the interpretation of the *Basic Law*, claiming it harmed judicial independence.<sup>176</sup>

The Hong Kong courts’ rulings on the case, which soon followed, did little to ease the tensions. Despite the fact that ultimately the Court of Appeal’s review came to the same conclusions as the High Court’s earlier one, and despite the fact that the judges stressed that their findings were independent<sup>177</sup>, as they both reached the same

<sup>172</sup> Tony Cheung, Joyce Ng and Stuart Lau, “Three rejections and multiple deviations mark Hong Kong Legislative Council swearing-in”, *South China Morning Post* (12 October 2016), online: South China Morning Post <[scmp.com/news/hong-kong/politics/article/2027413/three-rejections-and-four-deviations-mark-hong-kong](http://scmp.com/news/hong-kong/politics/article/2027413/three-rejections-and-four-deviations-mark-hong-kong)>.

<sup>173</sup> Stuart Lau, “What’s in three words? Hong Kong debates whether principle of separation of powers applies to city”, *South China Morning Post* (23 October 2018), online: South China Morning Post <[scmp.com/news/hong-kong/politics/article/2039376/whats-three-words-hong-kong-debates-whether-principle](http://scmp.com/news/hong-kong/politics/article/2039376/whats-three-words-hong-kong-debates-whether-principle)>.

<sup>174</sup> Raymond Yeung, Danny Mok, Josh Ye, Clifford Lo and Elizabeth Cheung, “Four arrested after violence at thousands-strong rally over Beijing’s review of Basic Law”, *South China Morning Post* (6 November 2016), online: South China Morning Post <[scmp.com/news/hong-kong/politics/article/2043425/thousands-hongkongers-join-protest-march-against-beijings](http://scmp.com/news/hong-kong/politics/article/2043425/thousands-hongkongers-join-protest-march-against-beijings)>.

<sup>175</sup> *Ibid.*

<sup>176</sup> Joyce Ng and Raymond Yeung, “Hundreds of Hong Kong lawyers in silent march against Beijing oath ruling”, *South China Morning Post* (8 November 2018), online: South China Morning Post <[scmp.com/news/hong-kong/politics/article/2044122/hundreds-hong-kong-lawyers-silent-march-against-beijing-oath](http://scmp.com/news/hong-kong/politics/article/2044122/hundreds-hong-kong-lawyers-silent-march-against-beijing-oath)>.

<sup>177</sup> Joyce Ng, Chris Lau, Jeffie Lam and Tony Cheung, “Barred Hong Kong localists vow to keep fighting after High Court decision”, *South China Morning Post* (15 November 2016), online: South China

conclusions as the Standing Committee, public upheaval continued.

Moreover, as the verdict clearly stated that the two lawmakers “have declined respectively to take the [Legislative Council] Oath, [w]hat has been done was done deliberately and intentionally”<sup>178</sup> thus

as a matter of law and fact, [they] have failed the constitutional requirement [and] they were automatically disqualified forthwith from assuming their offices. [As a result] they ‘shall ... vacate [their respective offices].’ There is therefore no question of allowing them to retake the LegCo Oath,<sup>179</sup>

the local government and some pro-Beijing groups have decided to use this judgment as the basis for the invalidation of the oaths of six other localist and pan-democratic legislators.<sup>180</sup> Ultimately, when the oath-swearing saga concluded in July 2017 (a ‘concerned citizen’ seeking to disqualify two more legislators failed to put court deposit), the pan-democratic camp lost six seats in the LegCo. The loss of the seats thwarted them from blocking the government’s proposals, and become a bitter lesson for the opposition that it is better to protest once one has been sworn into an office, not before.<sup>181</sup>

#### D. Other legal conflicts

Another major problem which has arisen in the recent years, and, according to the Hong Kongers, endangers the city’s autonomy and is a threat towards the preservation of the rule of law, is the question of freedom of press. According to the ‘freedom of press’ report, “financial and political pressures from mainland China have gradually eroded Hong Kong’s historically free media over the past decade.”<sup>182</sup> Some political commentators based in Hong Kong have even said that ultimately, Hong Kong media will resemble the Mainland ones, meaning more censorship and self-censorship.<sup>183</sup> Two events, the purchase of South China Morning Post by a media group

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Morning Post <[scmp.com/news/hong-kong/politics/article/2046162/hong-kong-court-rules-localist-lawmakers-must-vacate-legco](http://scmp.com/news/hong-kong/politics/article/2046162/hong-kong-court-rules-localist-lawmakers-must-vacate-legco)>.

<sup>178</sup> The Court of Appeal’s judgment related to the proceedings initiated by the Chief Executive and the Secretary for Justice against Leung Chung-hang Sixtus, Yau Wai-ching and the President [2016] CB(3)/A/42, online: <[legco.gov.hk/general/english/procedur/matters/yr16-20/procb3-181-1617-e.pdf](http://legco.gov.hk/general/english/procedur/matters/yr16-20/procb3-181-1617-e.pdf)>.

<sup>179</sup> *Ibid.*

<sup>180</sup> Chris Lau, “Legal bid mounted against two more Hong Kong pan-democrat lawmakers”, *South China Morning Post* (6 March 2017), online: [South China Morning Post <scmp.com/news/hong-kong/law-crime/article/2076425/legal-bid-mounted-against-two-more-hong-kong-pan-democrat>](http://scmp.com/news/hong-kong/law-crime/article/2076425/legal-bid-mounted-against-two-more-hong-kong-pan-democrat).

<sup>181</sup> Chris Lau, “Citizen’s legal bid to disqualify Hong Kong lawmakers over oath saga fails due to unpaid deposit” *South China Morning Post* (31 July 2017), online: [South China Morning Post <scmp.com/news/hong-kong/politics/article/2104720/citizens-legal-bid-unseat-hong-kong-lawmakers-fails-due>](http://scmp.com/news/hong-kong/politics/article/2104720/citizens-legal-bid-unseat-hong-kong-lawmakers-fails-due).

<sup>182</sup> Cited in Madeline Earp, “‘Mighty Current’: Beijing’s Creeping Control over Hong Kong Media” *The Diplomat* (29 April 2016), online: [The Diplomat <thediplomat.com/2016/04/mighty-current-beijings-creeping-control-over-hong-kong-media>](http://thediplomat.com/2016/04/mighty-current-beijings-creeping-control-over-hong-kong-media).

<sup>183</sup> Bao Pu cited in *ibid.*

with close ties to Beijing in April 2016<sup>184</sup>, and the disappearance (and their subsequent reappearance in the Mainland) of five Hong Kong booksellers selling books critical of the Chinese authorities in October and December 2015<sup>185</sup>, seem to prove this theory. The booksellers' case had particularly negative and long-lasting implications—even now, three years on, the number of books critical of PRC has fallen, and even if they are written, they fail to be distributed. While independent bookshops have virtually disappeared, president Jinping's governance of China is omnipresent in stores this year.<sup>186</sup>

There are also many smaller legal issues that eventually lead to conflict in Hong Kong—the best example of which have been the 2016 Fishball Riots when people took it to the streets after the government announced its plans to remove iconic (but illegal) food stands, selling, among other things, said fishballs.<sup>187</sup> As some of the protesters decided to turn the demonstration into a pro-independence gathering, violence erupted between the protesters and the police, which resulted in over 60 people being arrested and more than 120 injured. The whole situation has been called “the worst outbreak of rioting since the 1960s”<sup>188</sup>, and raised serious questions with regards to the behaviour of the police, of which 90 were injured.<sup>189</sup>

At the end of this chapter I would like to return to the question I have raised earlier: Which of the conflict theories best explains the situation in Hong Kong? Coser's idea of conflict as a struggle between different values comes to mind, supported by Huntington's ‘clash of civilisations’—Western and Confucian in this case—and Mills' view of conflict as a fight between the ‘power elites’ and the ‘others’. As Hong Kongers share Western values, and Western idea of the rule of law, they find themselves at odds with the Mainland's Confucian tradition, which has a completely different understanding of the concept. Moreover, the legal and political system inscribed in the Hong Kong *Basic Law* seems to be responsible for setting the elites and the regular citizens against one another, at least until the electoral system becomes entirely democratic. Ultimately, whether or not we look at the background of Hong Kong's conflicts and see clash of values or struggle for power, it seems that the city is destined for conflict in the near future.

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<sup>184</sup> Yonden Lhatoo, “Paywall down as Alibaba takes ownership of SCMP”, *South China Morning Post* (5 April 2016), online: South China Morning Post <[scmp.com/news/hong-kong/article/1933763/paywall-down-alibaba-takes-ownership-scmp](http://scmp.com/news/hong-kong/article/1933763/paywall-down-alibaba-takes-ownership-scmp)>.

<sup>185</sup> Earp, *supra* note 182.

<sup>186</sup> Ilaria Maria Sala, “Independent publishing in Hong Kong – a once-flourishing industry annihilated by fear”, *Hong Kong Free Press* (17 February 2018), online: Hong Kong Free Press <[hongkongfp.com/2018/02/17/independent-publishing-hong-kong-flourishing-industry-annihilated-fear/](http://hongkongfp.com/2018/02/17/independent-publishing-hong-kong-flourishing-industry-annihilated-fear/)>.

<sup>187</sup> Stephen Moss, “Is Hong Kong really rioting over fishball stands?” *The Guardian* (9 February 2016), online: The Guardian <[theguardian.com/lifeandstyle/shortcuts/2016/feb/09/hong-kong-fish-ball-revolution-china-riot](http://theguardian.com/lifeandstyle/shortcuts/2016/feb/09/hong-kong-fish-ball-revolution-china-riot)>.

<sup>188</sup> “Street violence and politics”, *The Economist* (13 February 2016), online: The Economist <[economist.com/news/china/21692930-street-violence-and-politics](http://economist.com/news/china/21692930-street-violence-and-politics)>.

<sup>189</sup> Kris Cheng, “Local newspaper journalist to file complaint after being ‘beaten up’ by police”, *Hong Kong Free Press* (10 February 2016), online: Hong Kong Free Press <[hongkongfp.com/2016/02/10/local-newspaper-journalist-to-file-complaint-after-being-beaten-up-by-police/](http://hongkongfp.com/2016/02/10/local-newspaper-journalist-to-file-complaint-after-being-beaten-up-by-police/)>.

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May the events such as analysed in the previous chapter lead to a deeper erosion of the rule of law in Hong Kong? The answer to this question is not simple. Hong Kong should have had the universal suffrage by 2017, and instead the situation in the SAR is as tense as ever. However, while Beijing is tightening its grip on Hong Kong, it has to be noticed that the harder China tries, the stronger retort it gets. Some researchers have pointed out that this situation has already happened before, albeit on a much smaller scale. When in the 1960s, during the Cultural Revolution, Mao's supporters tried to spread chaos around the city in order to undermine the colonial authorities, they have actually helped to create Hong Kong's local identity, in contradiction to the Mainland, communist Chinese one.<sup>190</sup>

Perhaps the governing, in spite of all its issues, rule of law will put the city into a perpetual—or at least until 2047, as the *Basic Law* is open for changes after fifty years—*circulus vitiosus* of protests repeating themselves. In the tortuous reality created by the 'one country, two systems' principle, legal conflicts seem to be the only possible scenario for Hong Kong. But, to quote Carol A. G. Jones' observation, what gives Hong Kong's liberal society a space within which it can survive, are the very 'walls of law' themselves.<sup>191</sup>

As the citizens of Hong Kong continue their fight for the preservation of the rule of law, "so widely valorised and so deeply entrenched in local culture"<sup>192</sup>, we can only hope that the fight will not take more dramatic form in the future. According to Michael C. Davis, the first step towards change would be "for leading officials in Hong Kong and Beijing to stop blaming Hong Kong people and look in the mirror."<sup>193</sup> This is, unfortunately, unlikely to happen at this moment, as shown by the recent police probe, concluded with suggestions of a ban of the 'fringe', pro-independence HK National Party over 'national security' concerns,<sup>194</sup> regarded even by the anti-independence Hong Kongers, who joined a large protest in favour of the right to association, as "part of a wider trend of using existing laws to restrict political freedoms."<sup>195</sup>

Such clashes between the people of Hong Kong on the one side, and the SAR's government and Beijing on the other, are bound to happen in the near future—and, as *The Economist* has declared not long ago, "China's leaders should get used to it."<sup>196</sup>

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<sup>190</sup> *Ibid.*

<sup>191</sup> Jones, *supra* note 97 at 255.

<sup>192</sup> *Ibid* at 259.

<sup>193</sup> Davis, *supra* note 101 at 23.

<sup>194</sup> See Kris Cheng, *supra* note 169; Ben Bland, online: Twitter <[twitter.com/benjaminbland/status/1019569110638682112](https://twitter.com/benjaminbland/status/1019569110638682112)>.

<sup>195</sup> Venus Wu, "Hundreds protest over Hong Kong's move to ban separatist political party", *Reuters*, online: <[reuters.com/article/us-hongkong-politics/hundreds-protest-over-hong-kongs-move-to-ban-separatist-political-party-idUSKBN1KB0ES](https://reuters.com/article/us-hongkong-politics/hundreds-protest-over-hong-kongs-move-to-ban-separatist-political-party-idUSKBN1KB0ES)>.

<sup>196</sup> Banyan, *supra* note 148.