

CONSTITUTIONALITY OF HONG KONG'S EMERGENCY REGULATIONS ORDINANCE: CONCEPTUALITY, TEXTUALITY AND CONTEXTUALITY

Yuxin Jin* Wei Shen**

ABSTRACT: *2019 was a tough year in Hong Kong, which witnesses a large scale of violence and riots against an extradition bill proposed by the government. Among political controversies was the Hong Kong government's attempt to deescalate the violent movement by proposing a ban on facial covering so as to identify protestors. Relying on the Emergency Regulations Ordinance, the government bypasses the regular legislative process, which further worsened the tensions between the government and protestors. In a call for judicial review, the Court of First Instance rendered a ruling claiming the reliance on the ERO was unconstitutional. This article takes a close look at the Court's ruling, engaging with legal and political debates with the aim of providing (i) a detailed account of the eventful months leading up the judicial decision on the constitutionality of the Chief Executive's invocation of the ERO, (ii) a legal analysis of the Court's decision, and (iii) casting the issue in the light of the contrasting political process and the roles of judiciary in mainland China and Hong Kong.*

KEYWORDS: constitutionality, Hong Kong's emergency regulations ordinance, conceptuality, textuality, contextuality

INTRODUCTION

2019 was an unusual year in Hong Kong (Hong Kong Special Administrative Region, or SAR) filled with contentions, charged with emotions, and preoccupied with political debates as well as social unrest, all of which crystalized in a ruling by the Hong Kong Court of First Instance (CFI, or the "Court") striking down the constitutionality of Emergency Regulations Ordinance (ERO).

Serving as judicial nexus connecting mainland China and Hong Kong, the judiciary in Hong Kong has inevitably assumed a political role besides judiciary functions. The politicalized role stems from the different views of judiciary of the two regimes. Standing at the focal point of the contention is the constitutional rules of the Basic Law – the *de facto* constitution of Hong Kong – that is legally and structurally subordinate to the Constitution of People's Republic of China (PRC).

The discussion here focuses on the following questions: (i) whether the Hong Kong courts are authorized to decide on the questions of Basic Law, or they are solely under the purview of the National People's Congress Standing Commission (NPCSC); (ii) the constitutionality of the ERO under the Basic Law; (iii) whether the court of Hong Kong, in denying the Chief Executive's

invocation of the ERO, challenges the PRC's legal authority, thereby harming Hong Kong's political legitimacy.

The rest of this article proceeds as follows. Section 2 offers some contextual background of the dispute by outlining the key features Hong Kong governance system has. Section 3 moves to the Hong Kong courts' jurisdiction over constitutional issues, which is the core of dispute between the mainland China and opponents in Hong Kong. The key of Section 4 concerns the constitutionality of the ERO and analyzes the arguments in favor of or against the Court's ruling. A conclusion ends in Section 5. The key theme of this article focuses on conceptuality, textuality and contextuality of the controversy with the hope that the understanding of the dispute is not biased. Conceptuality leads us to appreciate the uniqueness of Hong Kong's governance system including its judiciary and the power split not only between Hong Kong and the central government but also between the legislative and executive bodies in Hong Kong. Textuality refers to some legal provisions in Hong Kong law framing a structure for the legal analysis. Eventually all these technical dimensions rely on a contextual framework for a better understanding of the interplay between laws, social events and legal consequences. Given a narrow bandwidth of the discourse on the Hong Kong issue in Western media and academic community, there is a need for intellectuals to expand the horizons and adopt a factual, comparative approach.

Historical Context of the Dispute

Before turning to the questions outlined above, it would be helpful to place the contemporary issues in a broader historical context. This section engages an institutional understanding of the struggle among the judiciary and the legislature of the central government of mainland China and Hong Kong.

Upon the return of sovereignty in the 1997 by the Great Britain to the PRC, Hong Kong has been ruled under the "one country, two systems" regime that was agreed upon by the two national sovereignties in the 1984 Joint Declaration. Under the "two systems" framework, Hong Kong has been operating with different political, social, and legal systems than that of mainland China. Arguably, the region with a complete separate constellation of regulations and normative principles has developed some substantially different political, economic and cultural expectations from its motherland, giving rise to a number of conflicts and disputes over political and legal questions between Hong Kong and the mainland China's government and its ruling Chinese Communist Party (the "CCP").

The issue that this article proposes to examine arose out of the protracted disputes and turmoil in Hong Kong started in June 2019. The beginning of all the heated disputes was an extradition law that was proposed to be introduced to the SAR through the legislation process. The proposed law would allow case-by-case extraditions to mainland China. The sweeping scope of the extradition law was perceived by the Hong Kong society as the central government tightening its grip on the SAR's long-enjoyed political freedom. People of Hong Kong saw the broad language of the

extradition law as subject to arbitrary use by the government to erase political dissents thus significantly endangering Hong Kong citizens' fundamental rights granted by the Basic Law.¹

Protesting to push back on the extradition law proposal, the Hong Kong citizens took their discontent to the streets. Over time, the protests spiraled into a broader pro-democracy, anti-government movement, with demonstrations becoming increasingly violent and being escalated into public vandalism, disrupting businesses and conducts of regular citizens in significant ways. Both sides of the police and the demonstrators were accused of using excessive violence, evidenced in the use of police tear gas, the protestor petrol bombs, and brutal marks of vandalism on the walls of business and subway station entrances.²

In February 2003, the then Hong Kong government proposed the National Security (Legislative Provisions) Bill 2003 to the Legislative Council (LegCo), Hong Kong's legislature, to implement Article 23 of the Basic Law, which states that the HKSAR "shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies". Due to widespread fear of the central government's intervention into the Hong Kong governance by relying on this so-called National Security Bill, the Hong Kong people had a large scale of protests against this Article 23 bill. The bill was not "fairly draconian" as a whole because many of the provisions actually would liberalized the Hong Kong law (e.g., the provisions on sedition).³ Local drafts were not just "doing Beijing's bidding", and were genuinely trying to craft something that would satisfy Beijing while maintain Hong Kong's legal system intact. From a technical perspective, the 2003 bill would have been an acceptable compromise though not perfect by any means as some of the drafting was a bit convoluted. At least, that would be a local ordinance and interpreted by the Hong Kong courts to comply with the International Convention on Civil and Political Rights (ICCPR).⁴ The key problem was the process, and the local government tried to push through the bill without publishing a "white paper" and without allowing certain key amendments. Ironically, the proposed amendments that the government initially resisted were to remove things that were not all necessary to implement Article 23 (e.g., the extraordinary investigation powers; the expanded

¹ Mike Ives, *What is Hong Kong's Extradition Bill?*, N.Y. Times (Jun. 10, 2019) <https://www.nytimes.com/2019/06/10/world/asia/hong-kong-extradition-bill.html>

² Jessie Yeung, *As Violence and Vandalism Escalate in Hong Kong, Some Protest Supporters Have Had Enough*, CNN (Oct. 27, 2019) <https://www.cnn.com/2019/10/26/asia/hong-kong-destruction-support-intl-hnk/index.html>

³ Fu Hualing, Carole J. Peterson and Simon N.M. Young (eds), *National Security and Fundamental Freedoms – Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press 2005).

⁴ The provisions of the International Convention on Civil and Political Rights ostensibly continue to apply to Hong Kong, and exceptions to the rights it refers to, e.g., the provisions on the invocation of national security exceptions, ought to be narrowly interpreted.

liability for disclosure of government information; and the link to mainland China's procedures for prohibiting local organizations).

The protests in 2003 against the passage of the Article 23 bill was widely considered a success in terms of its results. The protests in 2003, though hugely indicative of disagreement people may have had in Hong Kong, could be seen as an extension of the "Chinese democracy" or "liberal Chinese" traditions. After 2003, the central government appeared to make a decision to go "hands off" and leave the governing of Hong Kong to local elites, who then proceeded to loot the city and left the city woefully unprepared for the future. This probably led the young and poor were heavily protesting in 2019 as they see gross inequality and no future. The protests also spread to the middle class since they were under economic distress. Similarly, the central government assumed that the anti-extradition bill could be resolved in the same way as the Article 23 protests in 2003. However, what happened in Hong Kong in 2019 relating to the anti-extradition bill turned out be a political revolution and with revolutions everything changes. There were exaggerations of the media and "worldwide outcry" consisting of the US and a few Western allies against Beijing's follow-up legislative move.

The focus of this article is on a particular legislation promulgated to deal with the chaotic and violent situation developed from mass protests. It is not disputed that the protest at the beginning stage was orderly and peaceful, however, later the situation became rather chaotic that the protesters started vandalizing public facilities and using self-made bombs in various locations of the city, significantly disrupted and intruded in the daily life of the ordinary citizens.

Against the backdrop of the social turmoil and the ineffective governmental efforts to restore peace in the city, the Chief Executive announced a law – the Prohibition on Face Covering Regulation (PFCR) - prohibiting facial covering of the protesters and authorizing police officers the power to ask masked individuals to reveal their identity. The Chief Executive purported that such measures would reduce the violence of the region and restore social order in Hong Kong, invoking a highly unusual procedure to circumvent the normal legislative process of public consultation and promulgation through the LegCo. The basis of the Chief Executive's power was the ERO, a law passed from the colonial time that enables fast-track law-making. The invocation of emergency powers may have even worse impacts on the law and order in Hong Kong than violence and tear gas in the streets as the ERO is a *de facto* blank check for the government to restrict human rights without any conditions or safeguards.⁵

This seemingly arbitrary process, combined with the legislation's permissive language, immediately fueled tremendous amount of hostility in the society thus giving rise to an even more aggressive wave of protests and vandalism in the city. The PFCR was challenged by judicial review, brought by 24 opposition lawmakers who argued that the ban was beyond the scope and power granted to the Chief Executive by law, and then constituted a disproportionate interference

⁵ Jan Wetzel, "The Hong Kong Government's Use of Emergency Regulations Must Be Challenged", Time, October 22, 2019, available at <https://time.com/5706707/hong-kong-emergency-regulations-ordinance/>

with a person's liberty and privacy. The Hong Kong government appealed the decision. In November 2019, answering the challenges to the legitimacy of the anti-facial covering law, the CFI ruled on the constitutionality of the ERO and the legality of the anti-face covering law itself, declaring ERO is in violation of the Basic Law and the prohibition of facial covering illegal. In the name of defending national sovereignty, the central government promptly reacted to the court ruling and stated its strong objection to the Court's decision on the questions of the court's jurisdiction over constitutional questions and on the legality of the anti-facial covering law, implying a possibility of NPCSC inviting itself to interpret the law.⁶ Hong Kong was a British colony until 1997 when the sovereignty was handed over to the PRC by the British government under terms imposed by the 1984 Sino-British Joint Declaration. The Joint Declaration outlined such governing principles that the Chinese government will respect the autonomy of Hong Kong's economic, social, political, and legal affairs. On the legal front, Section 3 of the Joint Declaration guaranteed Hong Kong's right to maintain an independent judicial system. It stipulated that upon the turnover, "The Hong Kong Special Administrative Region will be vested with executive, legislative, and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged."⁷

This seemingly unequivocal declaration over the independent judiciary is complicated by the constitutional structure imposed by the Joint Declaration and later the Basic Law. Two sections before the line vesting independent judiciary in Hong Kong, the Declaration established the legal status of the territorial as a "special administrative region" of the PRC and is governed by Article 31 of China's Constitution, which in turn states that "(t)he systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of the specific conditions."⁸

In the Joint Declaration the Chinese government made all sorts of promises to the people. The debate has never stopped over the nature and scope of these promises. One school of thought insisted that these promises were the Chinese government's specific commitment to Western-style democracy while the opposite view holds that these promises are vague and non-binding to the Hong Kong's democracy project.⁹ On other matters, e.g., all the clauses giving the people of Hong Kong civil liberties that do not exist in mainland China and the clauses that limit what the Chinese government can lawfully do in Hong Kong, are specific promises. The Basic Law's endorsement

⁶ "HK Court's Ruling Draws Criticism" (HK court's ruling draws criticism November 20, 2019) <<http://en.people.cn/n3/2019/1120/c90000-9633735.html>>

⁷ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on Question of Hong Kong (signed on December 19th, 1984).

⁸ Constitution of the People's Republic of China (adopted on March 14th, 2004)

⁹ Alvin Y. So, *Hong Kong's Embattled Democracy: A Societal Analysis* (John Hopkins University Press 1999). So characterized the negotiations about the "democracy project as simply "muddling through", meaning that the negotiating parties settled on vague language that could mean whatever each side wanted it to mean (pp.78-84), making the Joint Declaration as compatible with a "colonial" model of Hong Kong's government, or "existing systems" in the Chinese team's words (p.78).

of a raft of Western-style civil liberties is unequivocal, distinguishing the model of governance described in the Joint Declaration from the model of governance that existed for Hong Kong under British colonial rule. However, these provisions relating to rights and freedoms do not translate into a political vision of democracy.

The broad language in the Basic Law seems to afford Hong Kong a wide range of self-governance, including final authority of legislative power. However, one point remains clear from the Joint Declaration, not conflicted out by the constitutional language – the final adjudication authority is granted to the Hong Kong’s courts, not the central government. It remains the case after the enactment the Basic Law.

The Basic Law replaced the colonial Letters Patent and Royal Instructions as Hong Kong’s constitution when the SAR transferred from Britain to the PRC. Article 2 of the Basic Law confirms that Hong Kong will continue to have an independent judiciary. Further, Article 8 provides that laws previously in force remains in effect to the extent that they do not contravene the rest of the Basic Law. Article 85 stipulates that Hong Kong’s courts should operate independently from interference of the central government.¹⁰

To subordinate the Basic Law to the Chinese Constitution, independence of Hong Kong’s judicial function is contained in the language of both the Basic Law and the PRC Constitution. In the Constitution, a number of sections allow the central government to step into Hong Kong’s judiciary matters. The aforementioned Article 31 of the PRC Constitution was referred to in Article 11 of the Basic Law. Most importantly, Article 158 of the Basic Law explicitly vests the NPCSC with the power to interpret the Basic Law when such interpretation is requested by Hong Kong courts. The same article provides for conditions under which Hong Kong courts’ obligation to report to the NPCSC arises. Article 160 allows the NPCSC to determine whether the laws in force contradict the Basic Law.

Hong Kong clearly did not have true independent judiciary in its colonial era. While the subordinating status of the territory did not change over the handover, something penetratingly transformative to its legal system occurred. Namely, the ruling politics of Hong Kong changed from one of common law system that celebrates constitutionalism to one that embraces continental legal system majorly as a practical instrument of the government.

The clash of the two legal systems is subtly buried in the language of the cross-references between the two constitutional texts, maybe even without the realizations of the drafters from either side that a gaping contrast of understandings of interpretative authority vis-à-vis adjudicative authority will eventually reveal itself as the Hong Kong court handles Basic Law questions.

Whereas in the common law systems such as the one that Hong Kong has, both the interpretation of law and adjudication based on such interpretation reside in the judicial branch of the government,

¹⁰ See *Id.*

the Chinese regime considers the interpretative authority part of the function of the top-down ruling structure reigned by the CCP. While the courts in mainland China performs adjudication, they follow closely and loyally the instructions from the legal interpretations passed down from the Supreme People's Court and the Supreme People's Procuratorate.¹¹

The NPCSC has utilized its powers under Articles 158 and 160 of the Basic Law, and more broadly Article 31 of the PRC Constitution, to influence Hong Kong's judiciary on several occasions since 1997. The NPCSC's recent interpretation is not the first time that the CCP has relied on an extraordinarily broad construction of its powers under the Basic Law to intervene in Hong Kong's judiciary. The November 19, 2019 interpretation, however, may very well be the CCP's most brazen, and most consequential, intervention to date though it is technically legal under both Constitution and Basic Law. For an indication of why this might be the case, we turn to the central question of the CFI's judgment – the regional court's jurisdiction over constitutional questions.

HK Court's Jurisdiction Over Constitutional Questions

The central point made by the central government in its November 19th statement was a categorical statement that the local court has no final authority to decide on constitutional issues. This jurisdictional question has long been disputed by legal scholars from both sides. Since the question first arose in the 1999 right of abode controversy, it has focused on the narrower question of the Hong Kong courts' authority over whether an NPC-promulgated law violates the Basic Law.¹² Yet, the long-time dispute has left out the nuanced nature of that authority, especially from the arguments defending the Chinese government's position – few has bothered to elaborate to what extends the Hong Kong court's ruling manifests interpretative authority and to what extent manifests adjudicative authority. While the NPCSC could intervene the judicial process of the SAR with authoritative and binding interpretations, the SAR courts still possess a consolidated power of adjudicating on the facts of the cases and is the sole commander of the outcomes.

The first constitutional case reviewed by the Hong Kong court involved plaintiffs asserting right of abode under Article 24(a) of the Basic Law, despite non-compliance with the formalities of mainland and Hong Kong immigration law. In *Ng Ka Ling and Others v. Directors of Immigration*, the Court of Final Appeal agreed with the plaintiffs and laid out its view of the SAR court's power of constitutional interpretation. On the question of the court's power of judicial review over Hong Kong Law, the court was bold and direct, stating that the courts of the SAR “undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the

¹¹ In Chinese legal system, only the Supreme People's Court, the Supreme People's Procuratorate, and the NPC can interpret the law. Interpretation of the law is not strictly a legal business, but it is meshed with the underlying political goals of the central government.

¹² Thomas E. Kellogg, *Excessive Deference or Strategic Retreat? The Impact of Basic Law Article 158*, 9 Hong Kong L. J., Jan. 2008. <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2017/07/Kellogg-Excessive-Deference-or-Strategic-Retreat-hong-kong-journal-jan-2008.pdf>

executive authorities of the Region are consistent with the Basic Law and, if inconsistent to hold them to be invalid.”

In the right of abode case, the court dealt with the question of when the court should refer to the NPCSC a question of legal interpretation under Article 158 of the Basic Law. There the court created a two-pronged test for deciding when a question arising in the Hong Kong courts should be referred to the NPCSC for further interpretation. Two conditions need to be met before the court can refer a case to the central government – a “classification condition” and a “necessity condition.” A question had to both concern a provision of the Basic Law that dealt with the responsibilities of the central government and also that the interpretation affects the outcome of the case. Apparently, “the Court of Final Appeal, in setting up an additional hurdle to referral, effectively limited the number of opportunities that Beijing would have to weigh in on the meaning of the Basic Law.”¹³ Technically, this two-pronged test sets a high bar.

The court’s apparent gesture of power gleaning in *Ng Ka Ling* was met with intense criticism from the mainland and the episode ended with the court issuing a declaration accepting and reaffirming the NPCSC’s authority under Article 158 of the Basic Law. Before turning to it, it would be useful to highlight some of the arguments deployed by scholars supporting the court’s position to illustrate how the contention has always been contextualized by the realpolitik.

For instance, Kellogg asserts that when law enacted by the NPC is inconsistent with the text or the spirit of the Basic Law, “the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found. It is right that we should take this opportunity of stating so unequivocally.”¹⁴ Further in the article, Kellogg laid out the clash between the two regimes and the diverged function of judiciary as the basis for understanding the controversy. “Though its declaration would cause controversy, nonetheless, the Court’s position is not without merit: as the facts of the *Ng Ka Ling* case demonstrate, it is inevitable that certain mainland laws and regulations will touch upon Basic Law provisions; in order to give full effect to the Basic Law, the courts of Hong Kong would almost certainly have to review mainland law when and as necessary. Yet such an approach would have to overcome one of the key precepts of mainland constitutional law: legislative supremacy, which is referred to in the Chinese context by the term “democratic centralism.” Under the mainland constitution, the government eschews a system of checks and balances in favor of, on paper at least, the supreme authority of the legislature. Under Article 3 of the Chinese constitution, the People’s Congress is given the authority to supervise both the courts and the executive. The CFA’s assumption of authority to review mainland legislation, while consistent with the common law governmental structure laid out in the Basic Law, is nonetheless fundamentally incompatible with the central government’s constitutional framework.

The dispute is more of a political one at the heart rather than a legal one, as many have argued. One can view the handover of Hong Kong by the Britain government back to the Chinese

¹³ *Id.*

¹⁴ *Id.*

government as a matter of enforcement of an international treaty, therefore consequences flowing from the handover should be treated and analyzed on a legal basis. Meanwhile, an execution of international treaty is as much a product of political negotiations as it is a legal one. It is a document memorializing the final results of an extended period of balancing and negotiating over a wide dimension of political causes.¹⁵

Legal Interpretation against Political Backdrop

The handover is political in nature with a legal façade. The Joint Declaration was a manifestation of the two countries' show force, a document crystalizing the negotiation at arm's length with a political core inside the legal interpretation. The party's intention as memorialized by the Joint Declaration and the associated documents hinges on their political motives. Putting weight on the political nature of the Joint Declaration is not to deny that the treaty is a legal document which thereby should be enforced as a technical legal matter within the framework of existent regulatory and doctrinal regime. Conceptualizing the turnover as primarily a political matter supplemented by a legal instrument would naturally lead to the interpretation of the legal documents in the light of political discussions on the topic, thereby affording a solid understanding of the political structure upon which the laws operate.

First, as a political body, Hong Kong was administratively subordinate to the British Parliament then to the central government of the PRC. During the negotiations of the treaty and the turnover, both sovereign bodies with each state's, instead of Hong Kong's, best interests in mind and arguably neither of them represents Hong Kong people's independent will per se. Although international support to Hong Kong's autonomy was announced, they were also raised in the interests of national interests of countries such as the U.S.¹⁶ This conceptualization allows the HKSAR to subordinate to the PRC and CCP's reign following the handover. Under the one country two system order, the Basic Law assumes a subordinate position under the PRC constitution.

Understanding the handover as a political process affords the possibility to argue from the PRC's perspective. The Joint Declaration and the Basic Law has never vested the power to review constitution in the courts of Hong Kong. Like Albert Chen argued, even in federal or common law jurisdictions like the US, Canada, Australia and India, the ultimate constitutional guardian and final arbitrator which enforces the constitution in the context of judicial review of the constitutionality of legislation made by the federal legislature is the federal supreme court.¹⁷ However, a subtle differentiation may be made between interpretative authority and adjudicative

¹⁵ Stephen Seawright, "Hard-fought Sino-British Negotiations over Hong Kong Revealed in Declassified Files", South China Morning Post, August 18, 2013, <https://www.scmp.com/news/hong-kong/article/1297462/hard-fought-sino-british-negotiations-over-hong-kong-negotiations>

¹⁶ United States (1997). *Hong Kong's reversion to the People's Republic of China: hearing before the Subcommittee on Asia and the Pacific of the Committee on International Relations, House of Representatives, One Hundred Fifth Congress, first session, February 13, 1997*. Washington: U.S. Government Printing Office. ISBN 0160556651.

¹⁷ Albert H.Y. Chen, *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press 2014).

authority as distinct realms of power. While the former may have never been vested with the courts in Hong Kong, the latter is clearly within the purview of them.

Dispute on Jurisdiction

Reacting to the November 18th High Court ruling, the NPC made probably the most brazen statement it has made on this topic by displacing the Hong Kong courts from adjudicating any Basic Law questions.¹⁸ In English, the extraordinary statement reads “whether the laws of the HKSAR are in compliance with the Basic Law can only be judged and decided by the Standing Committee of the National People’s Congress, all other agencies have no authority to judge or decide on the question.” The statement made it clear that only the Standing Committee can decide on constitutional questions, all other agencies, including the courts in Hong Kong, have no authority to preside over questions that implicate the Basic Law.

While the spirit of the statement is consistent with that of the statement made by NPCSC reacting to the right of abode case, it is not the same statement substantive. Focus of the earlier case was whether the SAR courts could preside over constitutional questions stemming from NPC-promulgated laws. In contrast, statement by NPCSC was a blanket denial of the SAR courts’ judicial authority on any constitutional questions. It should be recognized that in a legal regime based on deference to constitutional order, constitutional questions shall arise in all departments of the social, political, and economic life of such society. Autonomous power of Hong Kong, without overstepping on legislative supremacy upon which the Chinese legal system operates, clearly encompasses the judiciary’s power to adjudicate on the questions of the Basic Law when the issues are contained within its border. The complete denial of the Hong Kong courts’ jurisdictional authority over constitutional questions arguably violates the provision affording the SAR independent judiciary system and final adjudicative authority as announced in the Joint Declaration.¹⁹

One possible way of salvaging the NPCSC’s statement from the outright confliction is taking “judge or decide” to be only implying interpretation of the statute, but not adjudication of the legal dispute. Even under such an extremely narrow interpretation, the attempt would quickly prove to no avail. Taking “judge or decide” to refine legislative interpretation, the statement in effect means that only the NPCSC has the authority to interpret the Basic Law, no other agencies, including the HKSAR courts, can interpret the Basic Law. Although seemingly consistent with the Article 158

¹⁸ Zang Tiewei, a spokesman for the Legislative Affairs Commission of the NPC Standing Committee stated that “(w)hether a law of the HKSAR is in conformity with the Basic Law of the HKSAR can only be judged and decided by the NPC Standing Committee, and no other organ has the right to judge or decide,” further, “The ruling of the Court of First Instance of the High Court of the HKSAR has seriously undermined the legitimate power of the chief executive and the HKSAR government to govern in accordance with laws, and is inconsistent with the Basic Law of the HKSAR and the relevant decisions of the NPC Standing Committee”, “HK court’s ruling draws criticism”, China Daily, Nov 20, 2019 . <http://en.people.cn/n3/2019/1120/c90000-9633735.html>.

¹⁹ Section 3(3), Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on Question of Hong Kong (signed on December 19th, 1984).

of the Basic Law, the statement taken as a whole shows that the NPC is exercising adjudicative authority, rather than interpretive authority, when it jumped to the adjudicative conclusion and declared that the ERO is a constitutionally permissible legislation under the Basic Law.

The NPC and some legal scholars often take the jurisdiction question as a challenge to the nation's sovereignty over the SAR.²⁰ However, allowing Hong Kong courts' jurisdiction over constitutional issues in limited situations and carry on the promise of final adjudicative authority to the courts in Hong Kong, while preserving the NPCSC's interpretation authority presents no challenge to the administrative sovereignty of the PRC's political regime. A law by its clear directives that respects the central government's administrative sovereignty at the time of enactment does not turn around threatening the regime's legitimacy when being complied with. Allowing the Hong Kong courts final adjudication authority imposes no threat to the PRC's sovereign legitimacy, in fact if anything, it would possibly make the "one country, two systems" regime only stronger.

It may be argued that lack of sovereign status renders the courts in Hong Kong with no authority to preside over constitutional issues. This argument originates from the theory of constitutional authority's sovereignty foundation, an impulse of rooting the constitutional question in the commanding power of governing nation state. Admittedly, constitution prescribes the outer boundary of which the SAR's legislation can go, symbolizing the highest judiciary authority of the SAR governed by the constitution and indicating the SAR constitution's connection with the sovereign-derived power. Rather, it is an institutional consequence of the high degree of autonomy Hong Kong enjoys under the "one country, two systems" regime.

The "one country, two systems" regime, the Basic Law, and the Joint Declaration collectively provide the constitutional basis for the Hong Kong court's jurisdictional and judicial authority. The autonomous regime was designed not only to protect the economic vibrancy of Hong Kong upon the turnover, but also to safeguard its way of life with respect to social orders and certain political rights.²¹ The economic and political system in mainland China, from the time of turnover to now, has not changed much from a single party dominated Leninist state. The functioning of legislature (namely, the National People's Congress and its local counterparts), judiciary and other state agencies is to implement the policies of the Communist Party. While the CCP has led mainland China to achieve unprecedented economic success, striking contrast remains between the two societies, particularly in the role of judiciary and state's interaction with the court system.

The differences of judiciary in these two societies not only lie in the formal structures of law, but also in the function of the different purposes that judiciary serves in the political structures. Mainland China is under civil law system, while Hong Kong inherited the British common law

²⁰ As presented in the aftermaths of cases implicating Basic Law from the responses by the central government and mainland legal scholars.

²¹ Article 5, Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on Question of Hong Kong (signed on Dec. 19th, 1984).

jurisprudences. In mainland China, the law serves more of an instrumental function of helping the government to implement their agendas. The common courts have no authority in making legislation. They function to apply the law and enforce the rule on practical cases. Commonly, the judges do not review the legality of the actions taken by administrative agencies.²²

The law in Hong Kong assumes a very different function with respect to mediating the relation between the government and the governed. The law and the court function as a check on the power of the state agencies and the legislature. Courts are generally respected and supported by the public and are being regarded as independent to the regime setting function of the state. The contrasting roles of the judiciaries might not have been as important to the discussion here if legality were not of a great importance to Hong Kong. The Basic Law is the supreme law of the SAR. For Hong Kongers, defending the law is defending the people's rights to a wide range of political, social and economic opportunities and rights they have aspired for since the colonial time and since the turnover. Grounded in the Joint Declaration, the independent judiciary is entrenched in the Basic Law. The PRC authorities play no role in the appointment or dismissal of Hong Kong judges.²³ Such high level of freedom of judiciary functioning was promised by the CCP and has been counted on by the Hong Kong citizens as the safeguard to the autonomy of the region, which is critical to the continuing success of "one country, two system." Additionally, since the Basic Law subordinates to the PRC Constitution, the Chinese state remains tasked with a number of other political, social, and legal means to exercise its sovereignty over the autonomous region.

Some may question the relative independent position of the Basic Law in the grand order of the PRC constitution. Seeing the Basic Law as a chapter of the PRC supreme constitution and allowing the courts in Hong Kong to interpret the Basic Law is to grant the court power to step into the business of constitutional law interpretation that the mainland China regards as a manifestation of supreme power of the communist state. However, such argument is negligent about the fact that final authority of interpreting the Basic Law firmly is in the grip of the NPCSC,²⁴ prescribing limits to which the courts in Hong Kong can reach. Moreover, the concern pointing at threatening the state government's supremacy does not seem practical. Common law jurisprudence customarily allows lower courts adjudicate constitutional questions.²⁵ For example, all levels of federal courts in the US can hear questions pertaining to constitutionality of the laws.

²² Xiaonan Yang, "Two interpreters of the Basic Law: The Court of Final Appeal and the Standing Committee of the National People's Congress" (Simon N. M. Young et al. eds., 2013).

²³ Yash Ghai, *Litigating the Basic Law: Jurisdiction, Interpretation and Procedure* (Johannes M.M. Chan et al. eds., 2000) 7-8.

²⁴ Article 158, the Basic Law of Hong Kong Special Administrative Region of the People's Republic of China.

²⁵ *Court Role and Structure*, United States Courts. <https://www.uscourts.gov/about-federal-courts/court-role-and-structure>.

The courts in Hong Kong have dealt and will continue to deal with highly politicalized questions such as interpreting the Basic Law. As stated by a well renowned scholar studying the Hong Kong constitution for decades, “the judiciary’s role, as being dictated by the constitution, is political, but political in a legally principled way. The judicial rules, the process of adjudications, and the universe of sources the court may draw upon are all rather clear.”²⁶ The value of upholding an independent judiciary branch and general acceptance of the bounded process of the court have long been integrated into the Hong Kong society. Allowing the courts in Hong Kong adjudicative authority is giving due respects to the way the SAR has been functioning for over a century long.

Old Answer to the New Situation

The question arises with the dispute over the ERO diverges from that associated with the right of adobe case. Here, the legislation of dispute is not a law of the mainland that extended to the SAR, but a local legislation that has been on the book for almost a century, albeit the possibility that the legislation was invoked per the Central government’s instruction.

The same arguments of the old disputes denying the Hong Kong court’s jurisdiction are potentially applicable to the new situation. The core of the question does not pertain on whether it is a mainland-derived legislation or a Hong Kong based legislation that is subject to constitutional review. Rather, the question is whether the courts in Hong Kong possess final adjudicative authority.

In 1999, reacting against the ruling on the right of adobe, a lengthy objection reasoned by four Chinese scholars was a strong attack from the Mainland side on Hong Kong judiciary’s legal authority.²⁷ The arguments centered around the question of whether courts in Hong Kong can exercise its judicial review power over legislation promulgated under the sole legislative authority of the National People’s Congress. And the answer, as later agreed by the Court conceding to the NPC’s interpretation,²⁸ is negative.

The narrow question in the instant case is whether the Article 19 confers on Hong Kong courts the power to determine the constitutionality of legislation prior to 1997. According to the Joint Declaration, the legislation prior to 1997, if not repealed by the NPC, are presumed to be effective continuing into the new historical era of SAR. However, it is a new question that has never surfaced – whether the SAR courts have the jurisdiction to review constitutionality of the legislation that is presumed to be effective, meaning that they are presumed to be in compliance with the Basic Law. A broader question that is implicated here is whether the SAR courts, in its judicial power to

²⁶ Yash Ghai, *Litigating the Basic Law: Jurisdiction, Interpretation and Procedure* (Johannes M.M. Chan et al. eds., 2000) 3-4.

²⁷ Xiao Weiyun *et al.*, *Why the Court of Final Appeal Was Wrong: Comments of the Mainland Scholars on the Judgement of the Court of Final Appeal*, reprinted in *Hong Kong’ Constitutional Debate: Conflict Over Interpretation* 53 (Johannes M.M. Chan trans., Johannes M.M. Chan et al. eds., 2000).

²⁸ Hong Kong court’s announcement responding to the NPC’s interpretation.

oversee all legislative acts by the LegCo, can review a legislation that was put forth by the colonial legislature almost a century ago and was re-authorized by the judiciary upon the handover.

In the right of abode dispute in 1999, the mainland scholars advanced that the Court of Appeal in Hong Kong, though the final court of the SAR, is a regional/local and subordinate court which do not oversee legislators of the central government, namely, the NPC. According to the Basic Law, Hong Kong's autonomous regime derives from the authorization by the NPC. More importantly, the Hong Kong courts' interpretations are blessed by the central government when the power is exercised over local legislatures that are permissible under the Chinese Constitution.²⁹ However, when the local court declares an NPC promulgated law to be in violation of the Basic Law, in the eyes of the mainland legal system, the regional judiciary branch is overstepping on the territory of the centralized legal powerhouse.

Similar arguments could be made for the present case. While the ERO was not devised and promulgated under the auspices of NPC's authority, it was implicitly authorized by the central government upon the handover of the region. The ERO's effectiveness has been supported by central legal authority.

Provisions of the Basic Law proffers other possible arguments supporting the position that the SAR courts cannot preside over question of constitutionality of legislation authorized by the NPC under the Chinese Constitution's hierarchical power structure.

First, Article 160 of the Basic Law authorizes the NPCSC to declare any law to be in contravention of the basic law upon and after the establishment of the HKSAR. The language of the provision, though broad in nature, does not explicitly authorize the SAR courts the power to declare any law to be in contravention of the Basic Law. One possible statutory interpretation is simply that by excluding the court's authority in the language, the local courts have no power of doing so. However, one may also argue that the statute, by remaining silent on the issue, intends to preserve Hong Kong's autonomy and that the court could make autonomous decisions when such questions arise.

Second, as it was raised in the right of adobe dispute, another point of contention is whether the SAR court should have referred statutory interpretation question to the NPC as dictated by Article 158. On its face, Article 158 provides a backdoor for the central government to extend judiciary authority over the SAR, lurking at the background of every case rendered by the region's highest judiciary authority.³⁰ While the extension of power has been legalized, it is yet to be

²⁹ See Xiao Weiyun, *et al.*

³⁰ Thomas E. Kellogg, *Excessive Deference or Strategic Retreat? The Impact of Basic Law Article 158*, 9 Hong Kong L. J., Jan. 2008. <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2017/07/Kellogg-Excessive-Deference-or-Strategic-Retreat-hong-kong-journal-jan-2008.pdf>

institutionalized. In fact, only in a few cases where Beijing has used or threatened to invoke the Article 158 power to interfere directly.³¹

After the verdict of the right of abode case came down, a critique pointed out that the Hong Kong Court failed to ask the SCNPC whether mainland migrants needed permission from Chinese authorities to leave the mainland, opining that the regional court set in motion the whole political clash.³² The CFI, taking in the critics, issued a clarification of its verdict, reaffirming the NPC's authority under Article 158 to issue interpretation. However, the fiasco left us with a threshold test for when the CFA should refer to issues that is still good law, as it was articulated in the Ng Ka Ling case. Under the test, the CFA need to refer legislative interpretation to the NPC if the bearing question predominantly pertains the relation between the mainland and the SAR. In the present case, the anti-mask legislation is predominantly and substantively a law enacted to maintain civil obedience among Hong Kong citizens. The disobedience has been an indirect result of the proposal of extradition law, such a beginning point has everything to do with the relation between the mainland and the SAR.

Constitutionality of the ERO

A complete separate question from the one of jurisdiction remains in the center of the dispute – the substantive legal question of whether the ERO is in compliance with the Basic Law. While strong arguments can be made for a positive answer on Hong Kong courts' adjudicative authority over the Basic Law-related questions, the same cannot be said with respect to the 'CFI's ruling on constitutionality of the ERO.

Despite the plausible arguments made the CFI, the question of whether ERO is in compliance with the Basic law is up in the air. Strong arguments were made supporting the position that the ERO is in compliance with the Basic Law.

ERO and its status

The Emergency Regulations Ordinance is a rather antique law put into force back to 1922 when Hong Kong was under the ruling of the British government, yet until recently the law was never invoked by the Hong Kong authority since the turnover. The ERO, labelled as an out-of-date, oppressive and authoritarian statute,³³ allows the Chief Executive in times of emergency or public danger to make any regulation he/she considers in the public interest, without going through the

³¹ *Id.* "In June 1999, the Standing Committee of the National People's Congress issued an interpretation of two Basic Law provisions, establishing their authority to issue interpretations even in the absence of a request from the Court of Final Appeal that it do so. Both that intervention and subsequent interpretations established Beijing's broad-based view of its own authority under Article 158, despite textual ambiguities inherent in that Article that might be construed to limit the central government's interpretative authority."

³² See Cliff Buddle, Court Flunked Test, Says U.S. Professor, S. CHINA MORNING POST, Dec. 6. 1999, at 4, available at 1999 WL 30351120.

³³ Verna Yu, "Hong Kong Emergency Law 'Marks Start of Authoritarian Rule'", The Guardian, October 5, 2019, available at <https://www.theguardian.com/world/2019/oct/05/hong-kong-emergency-law-marks-start-of-authoritarian-rule>

LegCo. These regulations may remain effective until the Chief Executive declares otherwise. The ERO was invoked in the 1967 riots to allow police to enter and search premises without a warrant, and to detain suspects for up to a year without trial. Hong Kong has laws to the same effect of a mask-ban. Under the Police Force Ordinance, the police officer can demand proof of identity from any person deemed suspicious and demand the mask be removed.

Apart from the arguments against the effectiveness of anti-mask law to deescalate societal unrests, relying on the ERO to pass any emergency rules can contravene Hong Kong's Bill of Rights and Article 39 of the Basic Law which guarantee rights and freedom under the International Covenant on Civil and Political Rights, and is for sure to trigger judicial review. On October 4th 2019, reacting to the escalating riots and public vandalization by protestors, the Chief Executive in Council (CEIC) promulgated PFCR pursuant to the ERO which grants the CEIC legislative power in situations of emergency and public danger.³⁴

The challenges in front of the court was made by 24 members of the LegCo against the CEIC and the Secretary of Justice as defendants. The court decided that the ERO was an effective legislation but "is unconstitutional because it amounts to an impermissible grant or delegation of general legislative power by the legislature to the CEIC and contravenes the constitutional framework under the Basic Law."³⁵

The ERO was first formulated out of a situation that was similar to Hong Kong in the 2019 turmoil. In 1922 the ERO was passed during the height of a general strike in support of seaman's protest against shipping companies over their wages. Since then, The ERO has been amended multiple times regarding the highest amount of fine it can impose, possibly reflecting inflation and the change of legal culture. The last ERO amendment was in 1999 after the turnover.³⁶ Additionally, over the years since its enactment, numerous regulations have been made under the ERO.³⁷ In general, though antique, ERO is not as dormant as many people may imagine.

4.2 The Temporary Nature of Regulations Made under ERO

Despite the government's contention including that "regulations made under the ERO are not intended to be permanent and are subject to negative vetting by the LegCo,"³⁸ the CFI responded with only a passing comment on the temporary nature of regulations made under the ERO.³⁹ The temporary nature of the ERO-derived regulations cannot be isolated from the validity review. The temporal qualification on the ERO is particularly critical when it comes to the argument that the

³⁴ Article 2(1), CAP 241 Emergency Regulations Ordinance, Hong Kong Ordinances.

³⁵ HCAL2945A/2019, KWOK WING HANG AND OTHERS v. CHIEF EXECUTIVE IN COUNCIL AND ANOTHER, at 8.

³⁶ WLM Wong, "Social Control and Political Order – Decolonization and the Use of Emergency Regulations in Hong Kong", (2011) 41(2) Hong Kong L.J. 449-80.

³⁷ HCAL2945A/2019, KWOK WING HANG AND OTHERS v. CHIEF EXECUTIVE IN COUNCIL AND ANOTHER, at 14.

³⁸ *id.*, at 19.

³⁹ *id.*, at 46.

ERO grants impermissible legislative power to the CEIC, which rests on the antithesis of unqualified power. In other words, under the ERO power is qualified and limited.

ERO's temporal limitation is presented in two aspects - the temporary authority delegated to the CEIC and the temporary effectiveness of the regulation under ERO. Few arguments could be advanced supporting the temporary nature, thereby the constitutionality, of the ERO.

First, as matter of fact, all past regulations made under the ERO has either been repealed or incorporated into statutory code through regulator legislative process.⁴⁰

In the detailed account of regulations promulgated under the emergency law authored by Norman Miners, a clear pattern of invoking the emergency power to deal with short-period unexpected societal disorders, particularly in the years post 1945 when the politics of mainland China presented multiple challenges to the ruling and order of Hong Kong.⁴¹ According to the court in the verdict, ERO since its effective date has been invoked at least ten times during various kinds of emergent situations, including general strikes, drought, anti-Japanese riot, outbreak of cholera and etc. By the 1940s, most of the existing regulations were consolidated into the Emergency (Principal) Regulations. The court noted that before the making of PFCR, the ERO had not been invoked to make new regulation since the 1970s. Particular, in 1995, "all the remaining extant regulations made under the ERO, including the Emergency (Principal) Regulations, several regulations relating to deportation and detention, and regulations relating to requisition of land for use by British military forces, were revoked by the Governor in Council."⁴²

Arguably the ERO was a tool of control against the colony by the British government, thereby denying the legitimacy of using such power in the post-handover era. However, the ERO's legality was never denied during and post the transition. According to Article 8 of the Basic Law, the old Ordinance not repealed by the Basic Law remains effective post return of sovereign control.

Second, the language of the ERO well qualifies the extent of power that the Chief Executive may have by invoking the ordinance, both in terms of substance and span of time. The Ordinance provides that the power only becomes relevant in situations of emergency and public danger, and the Ordinance shall stop being effective when repealed by the Chief Executive. As highlighted by the statute, the seemingly broad legislative power is only invocable in the time of emergency and public danger. It logically follows that the Chief Executive presumably would consider repealing the regulation made under ERO once the unusual situation passed. Although the Ordinance itself does not provide definition of emergency and public danger, as the government argues, such

⁴⁰ Norman Miners, "The Use and Abuse of Emergency Powers by the Hong Kong Government", (1996) 26 *HKLJ* 47-57, 57.

⁴¹ WLM Wong, "Social Control and Political Order – Decolonization and the Use of Emergency Regulations in Hong Kong", (2011) 41(2) *Hong Kong L.J.* 449-80.

⁴² HCAL2945A/2019, *KWOK WING HANG AND OTHERS v. CHIEF EXECUTIVE IN COUNCIL AND ANOTHER*, at 15.

definitions are implied in the Basic Law including Article 18(4) and Article 72(5),⁴³ delineating a limited spectrum of situations where the legislative power may come to life.

These arguments directly oppose the opinion of the CFI, in finding support for the unconstitutionality of the ERO, that the ERO provides the executives with unconfined and unlimited power not permissible under the Basic Law. The big question remains – can legal arguments be made for the Constitutionality of the ERO?

4.3 ERO is an effective law

We shall first trace the basis of the legislative authority in Hong Kong, grounding it in the statutory language of the Basic Law. Article 2 of the Basic Law clearly states that the executive, legislative and judicial power in HKSAR is vested by the authority from the NPC; and such powers should be exercised in accordance with the provisions of the Basic Law.⁴⁴ Article 8 provides for continuity of the laws prior to turnover in Hong Kong subject to amendments by the legislature.⁴⁵ Accordingly, like the Hong Kong government opined, “the ERO was in force before 1997 and was therefore part of the laws that were carried over into the Hong Kong SAR under Art 8 of the Basic Law, unless it contravenes the Basic Law. The ERO had been twice held to be valid by the full court. There is nothing that indicates any intention that the arrangements in relation to the ERO were to change upon the resumption of exercise of sovereignty by the People’s Republic of China over HK.”⁴⁶ In the present case, the CFI agreed with this position.

Arguments against the CFI’s Reasoning

The CFI opines that the ERO is unconstitutional because it grants impermissible legislative power to the executive. The court arrived at this conclusion predominantly through a close reading of the Basic Law. However, even if the text of the Basic Law really was subject to the interpretation of the Hong Kong courts, an opposite conclusion shall be reached.

The CFI discussed the Basic Law provisions pertaining both the political structure and the power division of between the Chief Executive and the LegCo. After listing provisions providing for the function of the Executive Authorities of the region, the CFI concluded that “the powers and functions of the Executive Authorities under the Basic Law are to draft and introduce bills, (in the case of the Chief Executive) to sign bills after they are passed by the LegCo and to promulgate laws, and to make and introduce subordinate legislation.” The Executive’s function, in the CFI’s opinion, is limited to the announced items. The CFI concluded that the allocation in the ERO of de facto legislative powers to the executive for situations of public danger violated the separation of powers under the Basic Law as the Basic Law’s new constitutional order differed from that in the colonial era. This struck out “pre-constitutional” cases which were no longer relevant to Hong Kong after the 1997 takeover. Further, a blanket ban of masks and other facial coverings at

⁴³ HCAL2945A/2019, KWOK WING HANG AND OTHERS v. CHIEF EXECUTIVE IN COUNCIL AND ANOTHER, at 20.

⁴⁴ Article 2, CAP 241 Emergency Regulations Ordinance, Hong Kong Ordinances.

⁴⁵ HCAL2945A/2019, KWOK WING HANG AND OTHERS v. CHIEF EXECUTIVE IN COUNCIL AND ANOTHER, at 20.

⁴⁶ Article 8, CAP 241 Emergency Regulations Ordinance, Hong Kong Ordinances.

assemblies and in other public places was a disproportionate infringement of the freedoms of expression and assembly and the right to privacy.⁴⁷

A close examination of the provisions offers grounds for an opposite conclusion. For instance, one of the articles listed was Article 48 that sets out the Chief Executive's powers and functions, including that the Chief Executive is responsible for the implementation of the Basic Law and *other laws* that are in accordance with the Basic Law that are applicable to the HKSAR.⁴⁸ While making and enforcing regulation under the ERO presumably fall under this provision, the CFI spelled out no words defending how this provision provides no constitutional justification for the ERO. As preceding section already discussed, the ERO is a currently effective law in compliance with the Basic Law, thereby the Chief Executive at least enjoys a constitutionally derived power of putting forward legislation in accordance with ERO as *other laws* under Article 48.

Another article cited by the CFI could also be the ground for opposing argument. The CFI points out that Article 56 stipulates that with the exception of adoption of measures in emergencies the Chief Executive shall consult the Executive Council before making important policy decisions, including introducing bills. Again, the CFI did not spell out how this provision is in supportive to the court's position, despite obvious easy argument to the contrary of the court's position based on the provision – the unraveling situation at the time amounts to “emergency” thereby allowing the Chief Executive the right of making decision without consulting the Executive Council. The ERO is intended to deal with emergent situations that are deemed in public danger, and that regulations made thereunder are supposed to be temporary measures necessitated by the exigencies of the occasions. With a confined definition of emergency, one can hardly say that the Chief Executive's legislative power under the ERO is bound by no limit.

Aside from the particular provision granting or limiting the power of Chief Executive, the CFI also pointed out that Articles 59 to 65 concern the Executive Authorities, the head of which is the Chief Executive.⁴⁹ Without explicitly spelling out how these provisions are relevant to the argument that the Chief Executive has limited legislative power under the Basic Law, the CFI seems to suggest that the Chief Executive, as part of the Executive Authorities, does not enjoy power exceeding those authorized by the Basic law to the executive branch. The logic seems to be that, because Chief Executive belongs to the greater Executive Authorities, the limits of the Chief Executive's function and power should similarly be subject to that of the Executive Authorities. However, a more logical reading would lead to the opposite reasoning, namely that the Executive Authorities' power is bound by that of their leader – the Chief Executive. That is, the leader's power is not confined by the institution, instead, the institution's power upper limited is circumscribed by that of the leader. Moreover, the CFI's logic is not sustainable in light of the division of function and power between the Executive Authority and the head of it (i.e. the Chief Executive). A simple

⁴⁷ [2019] HKCFI 2820.

⁴⁸ Basic Law, article 48.

⁴⁹ HCAL2945A/2019, KWOK WING HANG AND OTHERS v. CHIEF EXECUTIVE IN COUNCIL AND ANOTHER, at 21-22.

analogy is that while the U.S. President is the head of the executive branch of the country, he/she serves a symbolic function as the face of the sovereign, the position is vested with distinctively different function from that of the executive branch as a whole.

For one thing, the Basic Law dedicated different sections under Chapter IV (Political Structure) to the Chief Executive and the Executive Authorities, which undeniably suggests divergent constitutional functions and power of the two political apparatus. Contrary to the CFI's summary combining the functions of the two, the Basic Law in black letters provides a clear division of power. While the Chief Executive and its office is the predominant organization bridging the Central Government and the SAR, the Executive Authorities operates under the direction of the Chief Executive and supplements the Chief Executive's function⁵⁰.

Mistakenly confusing the Chief Executive and the Executive body in general by the CFI conveniently provides a pathway for the court's furthering arguments of how the legislative power of the executive should categorically submit to that of the legislature. The CFI takes the position that the LegCo is *the* legislature of the HKSAR.⁵¹ As it comes to the division of legislative power between the LegCo and the Executive Authorities, the court believes that "the Executive is not vested with any general legislative power or the general power to enact, amend or repeal laws, but only the power to sign or refuse to sign bills ... and the power to make subordinate legislation."⁵² To arrive at this conclusion, the CFI relied on custom and reasoned as following:

"Although not expressly set out amongst the powers of the LegCo, the existence of the power for the LegCo by statute to authorize subordinate legislation to be made is necessarily implied, not only because it had long been the custom and usages of the system previously in place, without which the multitudinous matters that need to be legislated for would be beyond the work capacity of the LegCo, but also because the Basic Law expressly includes as part of the powers and functions of the Executive and making of subordinate legislation. This necessarily envisages the Executive being authorized by the LegCo by statute to make subordinate legislation, although, as is well known, other bodies may also be so authorized in relation to specific matters, such as the Rules Committee which is authorized to make rules of court."⁵³

CFI essentially invokes the doctrine of non-delegation in arguing the subordinate position of the Executive body. The doctrine flows from the principle of division of power, prohibiting the delegation of one branch's power to another branch. In the U.S. legal tradition, non-delegation is commonly connected with the executive branch's limited ability to set up regulations unless there

⁵⁰ Ian Scott, "The Disarticulation of Hong Kong's Post-Handover Political System", *The China Journal*, no. 43 (Jan., 2000): 29-53.

⁵¹ HCAL2945A/2019, KWOK WING HANG AND OTHERS v. CHIEF EXECUTIVE IN COUNCIL AND ANOTHER, at 24.

⁵² *Id.*, at 25.

⁵³ *Id.*

are intelligible legislations directing clear authorizations.⁵⁴ However, limits proscribed by the non-delegation doctrine do not necessarily lead to the subordinating power dynamic, though subordination is a good way of enforcing limitation. Without addressing why the intelligible principle is less than sufficient to protect the integrity of the separation of power, the CFI also failed to offer strong doctrinal support of subordination as a mechanism to enforce non-delegation.

Without the CFI's creation of subordination as part of non-delegation, the ERO examined under non-delegation doctrine seems to sit well within the boundaries of the traditional interpretation, at least from a U.S. legal perspective.

Even if the non-delegation doctrine implies subordination as the CFI alleged, the court made an argument that is at most uncomprehensive. The Basic Law did not imply a subordinating relation between the Executive and the LegCo. Rather, as the CFI acknowledged, it is silent on the division of legislative power, nor does it spell out how the legislative power among the Chief Executive, the Executive Authorities, and the LegCo is distributed. CFI built its arguments on a confusion between the function and power of the Chief Executive and that of the Executive Authorities. The two should be designated as separate political organs of the HKSAR.

Another argument advanced by the CFI bears on the separation of power.⁵⁵ Articles 49, 50, and 52 offer grounds for the LegCo to check on the Chief Executive's legislative power. These few articles seem to suggest that the LegCo functions as the gatekeeper of checking on the legislative authority of the Chief Executive – no piece of legislation can be promulgated single-handedly by the Chief Executive. Though capable of dissolving a LegCo, the Chief Executive is constitutionally limited to enact/deny a law without LegCo's approval. These provisions offer great support to the CFI's position – the Chief Executive's legislative power is subject to that of the LegCo. However, this argument does not conflict with the exception carved out for emergent situations as aforementioned. Under usual situations, the LegCo submits intended legislation for Chief Executive's review. The second time the Chief Executive objects to the proposal, it may dissolve the LegCo and form a new one which would more likely to act in accordance of the Chief Executive's desire. However, such back and forth process of legislative compromise does not apply to situations of emergency cases, where according to the Article 56 the Chief Executive is not subject to the limitation of going through LegCo acting upon its authority.

Overtaking CFI's ruling, the Hong Kong Court of Appeal (HKCA) backed the Chief Executive's legislative authority with principle of delegation⁵⁶. Delegation to the executive branches of legislative power continues to operate subject to the requirements of common law principles in the

⁵⁴ Non-delegation doctrine cases of US; the HK BL has a similar article (article 66) reads the LegCo shall be the legislature of the HKSAR, without mentioning whether the legislative power can be delegated or to what extent can it be delegated.

⁵⁵ HCAL2945A/2019, KWOK WING HANG AND OTHERS v. CHIEF EXECUTIVE IN COUNCIL AND ANOTHER, at 23.

⁵⁶ Kwok Wing Hang and Others v Chief Executive in Council and Another Leung Kwok Hung v Secretary for Justice and Another CACV541/2019 and CACV542/2019 [2020] HKCA para. 96-100.

colonial era. Both pre and post 1997, the LegCo enacted laws authorizing the executive branch to make regulations. Such empowering laws are permissible under separation of power that is a defining principle of rule of law. The principle of separation of power does not prescribe absolute division of power. In fact, it is a constellation of concepts, including checks and balances principles that can be traced back to Locke's early work.⁵⁷ The doctrine of delegation embraces check and balances principles by confining legislative delegations within in intelligible and reasonable boundaries. Modern courts have acknowledged the necessity of delegation give executive branches' expertise of handling the ever-evolving civil situations.

In general, the CFI misinterpreted the nature of legislative power granted to the Chief Executive by the Basic Law. The Chief Executive has a limited and confined legislative authority to promulgate regulations and rules under imminent circumstances defined in the black-letter codes, contrary to what the Court believes. Therefore, the ERO is within the boundary set up by the Basic Law since it grants permissible legislative authorities to the Chief Executive.

The CFA later overturned the CFI's decision and upheld the face-mask ban. By applying two colonial era cases, *To Lam Sin*⁵⁸ and *Li Bun*,⁵⁹ the Court of Appeal held that the LegCo could delegate the making of emergency regulations as it retains close control as much as the pre-1997 era. The Court of Appeal was also satisfied that Hong Kong was facing a time of public danger and was not concerned with the absence of a statutory or common law definition of public danger. Different from the CFI who found the absence of a definition of public danger troubling, the Court of Appeal held that "whether such a state [of public danger] exists can be objectively gauged by the prevailing circumstances"⁶⁰ and is subject to "the tests of reasonableness and good faith".⁶¹ Although the Court of Appeal's ruling criticized some provisions in the PFCR are not proportional to extend the mask-ban to some lawful and authorized public meetings and processions, upholding the ERO and PFCR constitutional has been condemned to be sympathy over the Hong Kong government's colonial and authoritarian ambition.⁶²

⁵⁷ John Locke, *Two Treatises of Government* (1689) ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), pp. 326–330

⁵⁸ *R v To Lam Sin* (1952) 36 HKLR 1 (the court held that the LegCo's power to delete was a full one, limited only by ... the Letters Patent, and the LegCo retained close control because it could amend or repeal any regulations made under the ERO by virtue of the Interpretation Ordinance, section 14).

⁵⁹ *R v Li Bun & Others* [1957] HKLR 89 (the court held that the ERO's use was restricted by emergencies and thus did not confer too much legislative power on the executive).

⁶⁰ *Kwok Wing Hang and Others v Chief Executive in Council and Another Leung Kwok Hung v Secretary for Justice and Another* CACV541/2019 and CACV542/2019 [2020] HKCA para. 133.

⁶¹ *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 99.

⁶² Samuel Pitchford and Cheuk Yi, "Fear for Safety in Hong Kong as Court Upholds Mask Ban Amid Covid-19", May 3, 2020, available at <https://www.humanrightspulse.com/mastercontentblog/fear-for-safety-in-hong-kong-as-court-upholds-mask-ban-amid-covid-19>

CONCLUSION

Since Hong Kong was handed over to the sovereignty of the PRC, its legal system has gone through critical changes to adapt to the new political reality. Against this background, the question of constitutional jurisdiction of Hong Kong's court is a legal question as well as a political one. Lurking in the background of all constitutional question in Hong Kong is the clash of the two political systems and their fundamentally different views over the function of judiciary branch. While Leninist state of mainland China is only interested in the instrumental function of law under the "rule by law" regime, Hong Kong inherited characteristics of a constitutional state from the Britain where the executive power submits to "rule of law."

As this article argues, many critiques can be raised on the legal ground to the ruling of the CFI. Regardless of the issue whether the court may preside over the constitutionality of a legislation authorized by the NPC at the time of handover, the claim that ERO is in violation of the Basic Law may not be legally solid. The statement made by the NPC after the verdict of this case is not without merit. However, contrary to what the central government believes, the Hong Kong court is vested with the final adjudicative power as it is clearly stated in the Joint Declaration, which deserves respect by all the stakeholders.

The complexity of Hong Kong issue rests on the innovative but vague nature of one country two systems regime. There is no way to define or practice it in a scientific or legalistic manner. Hong Kong as it was before the extradition bill posed absolutely no threat to the mainland China. However, the anti-extradition bill caused huge riots in Hong Kong, and the "mass incident" strategy Carl Minzner criticizes certainly is very worrying:

"For many Western observers, there is an understandable tendency to view such [apparently leaderless public protests] through rose-colored glasses tinged with nostalgic memories of their own participation in 1960s-era protest movements. Long-suffering workers receiving compensation. Aggrieved villagers forcing the local Party boss to capitulate. But look deeper. This back-and-forth between China's state and society is not producing positive change. In reality, Beijing's short-term efforts to respond to outbursts of popular anger are steadily undermining China's institutions and norms."⁶³

The anti-extradition bill protests are now turned to a new chapter. The central government moved to pass a national security law to be implemented in Hong Kong. As some commentators observed, this move may threaten fundamental political systems and civil liberties of Hong Kong people⁶⁴ and quash Hong Kong's semi-autonomy,⁶⁵ while broadening the central government's power over

⁶³ Carl Minzner, *End of an Era – How China's Authoritarian Revival is Undermining Its Rise* (Oxford University Press 2018) 94.

⁶⁴ Nectar Gan, "China Approves Controversial National Security Law for Hong Kong", CNN, May 28, 2020, available at <https://www.cnn.com/2020/05/28/asia/china-npc-hk-security-law-intl-hnk/index.html>

⁶⁵ Jeremy A. Cohen, "Is Hong Kong Still Autonomous? What to Know About China's New Laws", Council on Foreign Relations, May 29, 2020, available at <https://www.cfr.org/in-brief/hong-kong-still-autonomous-what-know-about->

Hong Kong. The NPC approved the introduction of new legislation that is expected to prevent, stop and punish any acts occurring within Hong Kong that are aimed at splitting China, subverting state power, organizing and carrying out terrorist activities, or otherwise seriously endangering national security.⁶⁶ The legislation also extended its jurisdiction to cover any activities by foreign or external forces that interfere in Hong Kong's affairs. This legislation, being inserted into Annex III of the Basic Law, forms a national security framework in Hong Kong, bypassing Hong Kong's LegCo via a rarely-enacted constitutional backdoor. To implement this new legislation, a national security institution would be set up in Hong Kong. This certainly is the beginning of an end.

Yuxin Jin is an associate at Reed Smith, New York. The article was written prior to the author's joining the firm and does not represent the firm's view on relevant legal issues.

Wei Shen is KoGuan Distinguished Professor of Law, Shanghai Jiao Tong University Law School. Correspondence should be addressed to shenwei@sjtu.edu.cn. Mailing Address: No. 1954 Huashan Road, Shanghai Jiao Tong University Law School, Shanghai 200030 P.R. China

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⁶⁶ "Hong Kong Security Law: What Is It and Is It Worrying?", BBC, May 29, 2020, available at <https://www.bbc.com/news/world-asia-china-52765838>