ASSESSING A KEY FACET OF THE RULE OF LAW IN POST-1997 HONG KONG

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Simon NM Young and Yash Ghai (eds), *Hong Kong’s Court of Final Appeal: The Development of Law in China’s Hong Kong* (Cambridge: Cambridge University Press, 2014), 735 pages. USD150, GBP 95. ISBN 97811070011212.

Abstract: The intellectually ingenious but practically challenging “one country-two systems” formula has enabled Hong Kong to maintain its British-style colonial institutional façade following its absorption into the Chinese body politic. A high degree of freedom and a measure of pluralism have been sustained against the backdrop of orderly governance architecture. However, a gradual process of mainlandization has been under way, slowly blurring some of the fundamental distinctions between local structural patterns and processes and those prevailing across the “border”. Inter alia, threats to judicial autonomy and effectiveness have possibly emerged. The picture is explored comprehensively and methodically in this rich set of extensively researched and soundly constructed studies on the territory’s Court of Final Appeal. Further vital insights could potentially be generated by actively encouraging scholars from disciplines other than the law to contribute to the exploration of the crucial issues raised by the authors.

I. Introduction

The transfer of sovereignty over Hong Kong from democratic United Kingdom to authoritarian, even if of the increasingly “soft” rather than previously “hard” variety, China had been a politically, psychologically and, at times, economically a highly complicated affair. Expectations, initially decidedly cautious, largely stabilized at the time of the handover and crossing the proverbial Rubicon turned out to be a generally orderly and relatively painless experience. Nearly two decades have passed since that diplomatically and emotionally momentous event and the new post-colonial entity, the Hong Kong Special Administrative Region of the People’s Republic of China (HKSAR), has continued to move forward, albeit not always vigorously and smoothly, on some major policy fronts.

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In the crucial, strategic value-enhancing and welfare-sustaining, economic domain, the “goose that lays golden eggs” has lost little lustre. Output expansion has inevitable moderated because of aging of the population, sharp decline in the birth rate and structural change featuring a far-reaching shift from manufacturing to services, which has unavoidably led to some drop in productivity. However, it has remained healthy, displaying moderate volatility, generating sufficient activity to ensure full employment by conventional standards, not exerting excessive upward pressure on consumer prices, and underpinning a persistently robust foreign trade and investment sector.

Hong Kong’s remarkably swift transformation from a leading international manufacturing centre to a prominent international service centre has coincided with its emergence as a “global metropolis”, a genuinely worldwide provider of intermediary services, merely one of a handful of major cities that may claim to have achieved such an elevated status. It could be argued that progress in this direction has slowed down somewhat because of the impact of bottom-up (business initiatives) and top-down (government strategies, both in Hong Kong and Beijing) forces driving Hong Kong inexorably towards China. If so, this trend may have to be placed on the negative side of the post-1997 economic ledger.

On the other hand, post-colonial Hong Kong has evolved into a vibrant linchpin of the Greater China economy, a development which may be viewed as an offsetting factor in this intricate context. The large interconnected and multi-layered region for which the territory now effectively functions as an economic nerve centre encompasses the Hong Kong — Guangdong nexus/Greater Hong Kong as its core, Greater Southeast China (Hong Kong, Taiwan and the Mainland’s Southeast coastal provinces: Guangdong, Fujian, Jiangsu, Zhejiang and Shanghai) as its inner layer and the Greater China/Chinese economic area/CEA (Hong Kong, Taiwan and the Mainland) as its outer layer. This entire structure is firmly and productively linked to the adjacent Northeast Asian and Southeast Asian economies.

Post-1997 Hong Kong has also experienced tangible gains in its social capital. The territory’s community has traditionally been predominantly family-oriented or micro-driven. This pattern has been portrayed as “familial utilitarianism/utilitarianist familism”. In recent years, a stronger sense of identity — and, by

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1 See generally David B. Meyer, Hong Kong as a Global Metropolis (Cambridge University Press, 2000); Stephen WK. Chin and Tak-luk Lui, Hong Kong: Becoming a Chinese Global City ( Routledge, 2009).


3 See generally Lau Siu Kai, Society and Politics in Hong Kong (Chinese University Press, 1982); Lam Wai Man, Understanding the Political Culture of Hong Kong: The Paradox of Activism and Decapitalization (ME Sharpe, 2004).
implication, community — has crystallised at the macro level. It is not devoid of negative undertones, because of the significant role that a desire to assume sociopsychological distance from China and unfavourable exposure to Chinese realities has played in the process. Nevertheless, progressively deeper community ties and wider social mobilization may be considered as a valuable asset for Hong Kong.

On the negative side of policy ledger, there has been a marked deterioration in the environmental quality of life, although the problem predates the transfer of sovereignty from the United Kingdom to China. De-industrialisation normally has the opposite effect, but this has not been the case in Hong Kong. In this respect, the territory clearly differs from other leading international service centres, where air and water pollution, and even their noise counterpart, have been prevented from escalating to levels seen in Hong Kong. The circumstances are of course not entirely comparable because of complexities arising from the cross-border relationship. However, it is noteworthy that the mostly pro-Beijing, whether by design or due to the absence of other realistic options, post-1997 Hong Kong government has failed to devise, unilaterally and bilaterally, more effective institutional mechanisms for arresting ecological degradation.

The institutional space is one where further loss of policy momentum, with broader ramifications, may be observed. Specifically, there is sufficient evidence, albeit not quantitative in nature, to support the assertion that decolonisation has led to an erosion of Hong Kong’s institutional capital.

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4 See generally Gordon Mathews, Erik KW Ma and Tai Lok Hui, *Hong Kong, China: Learning to belong to a Nation* (Routledge, 2008).
7 See generally Mushkat and Mushkat, “The Political Economy of Hong Kong’s Transboundary Pollution”, (n.6); Mushkat and Mushkat, “Endemic Institutional Fragility in the Face of Dynamic Economic Integration in Asia”, (n.6).
9 See generally Mushkat and Mushkat, “The Political Economy of Hong Kong’s Transboundary Pollution” (n.6); Mushkat and Mushkat, “Endemic Institutional Fragility in the Face of Dynamic Economic Integration in Asia” (n.6).
in this regard, again in qualitative terms but not without empirical foundation, is that the territory has undergone in the past two decades or so a process of creeping “mainlandization”. This has been the result of a deliberate effort by China, reinforced by the acquiescence of key segments of Hong Kong’s policy establishment, to bring about a convergence, or at least a greater convergence, between the institutional façade on both sides of the border.

The strategy, while risking grassroots backlash, is believed to have been quite successful. Its impact is reflected in a wide array of symptoms of political decay. Thus, the post-1997 “HKSAR is characterised by a more personal style of governance; a chaotic implementation of public policies; an increasingly politicised judiciary whose decisions have been... challenged by Beijing and its supporters in Hong Kong; endangered civil liberties including academic freedom; an amalgamation of political labelling and mobilisation; a failure of political institutions to absorb public pressure and demands; and a governmental insensitivity to public opinion”.

This explains the importance of the book under review. The rule of law is arguably the major ingredient of Hong Kong's institutional capital, a feature of the governance regime that may ensure "prosperity" and "stability", even in the absence of full-fledged democracy, provided the political centre is adequately constrained from within and/or without. Moreover, an autonomous and rule-bound judiciary, with the Court of Final Appeal (CFA) as its fulcrum, is the mainstay of the territory’s rule of law system. For this reason, as well as the fact the judiciary in general and the CFA in particular have not been subject to extensive academic scrutiny, this book's broad-in-scope, informative, multifaceted and stimulating survey merits close intellectual and policy attention.

II. Origins, Scope, Structure and Substance

This hefty volume is the product of an intensive multi-year effort that began in 2007, crystallised at a conference held in 2010 at the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong, and partly drew its inspiration from the exemplary professional leadership of Andrew KN Li, HKSAR’s first chief justice, known for his steadfast commitment to uphold the rule of law in the face of so

11 See generally Lo, Governing Hong Kong, (n.10); Lo, “The Mainlandization and Recolonization of Hong Kong”, (n.10); Lo, The Dynamics of Beijing-Hong Kong Relations, (n.10); Lo, Competing Political Visions, (n.10); Peter TY Cheung, “Who is Influencing Whom? Exploring the Influence of Hong Kong on Politics and Governance in China” (2011) 51 Asian Survey 713–738.

12 See generally Lo, Governing Hong Kong, (n.10); Lo, “The Mainlandization and Recolonization of Hong Kong”, (n.10); Lo, The Dynamics of Beijing-Hong Kong Relations, (n.10); Lo, Competing Political Visions, (n.10).

13 Lo, Governing Hong Kong, (n.10).

of external and internal challenges. It covers the period from the resumption of sovereignty over the territory by China effectively up to Li’s surprising retirement in August 2010, at the relatively young age of 62.

The project was initiated and spearheaded by two Hong Kong University legal scholars, one of whom, Yash Ghai, is no longer a full-time member of its law faculty, and bears their intellectual and organizational imprint. However, it is a genuinely collective endeavour, with the road map charted by the conference coordinators and editors of the collection of papers presented at the event firmly and productively underpinned by contributions by nearly 20 other academic researchers and legal practitioners, including a former Attorney-General of Hong Kong and one non-permanent judge of the CFA, who previously served as the Chief Justice of Australia.

The editors and their collaborators focus on the CFA, its historical evolution, the institutional milieu in which it operates and consequent implications, its role, its prominence, its impact, its modus operandi, its members and their orientations and areas of the law where it has exerted influence and in what form. In search of a comparative dimension, they also venture beyond the confines of Hong Kong and seek to place the CFA within a broader international framework, not exclusively confined to neighbouring countries/territories. Given the specific purpose of the undertaking, palpable need to maintain structural coherence and inevitable resource constraints, including space limitations, this particular angle is explored more selectively than is the case elsewhere.

The book is divided into five parts: “final appeals: setting and context”, “the Hong Kong Court of Final Appeal”, “judges and judging”, “jurisprudence of the court” and “perspectives from beyond Hong Kong”. They cover a multitude of subjects, such as “autonomy and the Court of Final Appeal: the constitutional aspects”, “two interpreters of the Basic Law: the Court of Final Appeal and the Standing Committee of the National People’s Congress”, “a worthy successor: the Privy Council on appeal from Hong Kong, 1853 to 1997”, “genesis of Hong Kong’s Court of Final Appeal”, “final appeals then and now”, “jurisdiction and procedure”, “a practitioner’s perspective”, “a human rights lawyers’ perspective”, “role of the Chief Justice”, “the judges”, “concurring and dissenting in the Hong Kong Court of Final Appeal”, “the common law”, “the Basic Law jurisprudence of the Court of Final Appeal”, “human rights”, “administrative law”, “criminal law”, “commercial law”, “land law”, “tort law”, “civil procedure”, “impact of jurisprudence beyond Hong Kong”, “Macau’s Court of Final Appeal” and “foreign judges: a European perspective”.

As to be expected, the concept of autonomy, in general and in relation to the CFA, looms large, directly and indirectly, in this wide-ranging collection of essays, notably in the first part, which lays the foundation for the entire survey. One of the editors reiterates that the HKSAR enjoys a rather unique form of autonomy in that it does not entail self-government but features tangible manifestations of semi-sovereignty, de jure and de facto. Yet, this constitutional arrangement coincides with an institutional configuration that materially impinges on the exercise of

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discretionary powers because of the authority vested in the head of the executive arm of the government, whose selection, tenure and actions are heavily influenced by decisions emanating from the Mainland. Nor is the composition and behaviour of the legislature unaffected by impulses stemming from the same source.

Moreover, to the extent that the robustness of the constitutional order hinges on how it may be readjusted and who may take the initiative in this respect, HKSAR control over its destiny is further restricted. While in theory, there may be some room for manoeuvre, in practice this is, to all intents and purposes, a Mainland-driven process. To complicate matters, to put it mildly, constitutional interpretation ultimately rests with a highly politicised top-level People's Republic of China institution, the Standing Committee of the National People's Congress (NPCSC), and proceeds in a politico-legal context that is inimical to autonomy because of its denial of residual powers.

Against this backdrop of potential constitutional fragility, the author of the first substantive chapter highlights the distinct character and pivotal role of HKSAR's judiciary, with the CFA at its apex. Specifically, he places strong emphasis on the fact that it is the most sharply "separated" of all the territory's institutions from the Mainland "in terms of the appointment or dismissal of judges (which, at least formally, require no reference to Beijing); the principal source of law (the common law) that it applies is unknown in the Mainland; there are no appeals from Hong Kong to judicial authorities on the Mainland; and foreigners may, and in the case of the CFA must, be appointed to Hong Kong courts".\(^{15}\)

In a similar vein, he additionally stresses that HKSAR's judiciary, particularly the CFA, "is the custodian of the common law, as a live, developing jurisprudence; has independent links to the wider world of common law and law more generally; and cites numerous authorities from other jurisdictions, not only from common law countries on common law issues but [interestingly] none from the Mainland ([it is especially noteworthy that] not even on human rights where, for the most part, Hong Kong and the Mainland are part of the same international regimes of rights".\(^{16}\)

However, as pointed out above, these positive dimensions of an otherwise generally problematic constitutional architecture are said to be overshadowed, in the final analysis, by Chinese politico-legal "absolutism". The idea that the Danish/Scandinavian two-level model — whereby judicial settlement is resorted to, if political negotiations prove unsuccessful — was appropriate for post-1997 Hong Kong was tentatively floated at some juncture in the constitution-making process, but unsurprisingly it found little favour on the Chinese side, where the Communist Party enjoys total domination (ie, China does not qualify as a "constitutional

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\(^{15}\) Yash Ghai, "Autonomy and the Court of Final Appeal: The Constitutional Framework" in Young and Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of Law in China's Hong Kong* (Cambridge University Press, 2014), 54–55.

\(^{16}\) Ibid., p.55.
the executive’s influence and behavior.

Order hinges on the fact that HKSAR may be somewhat a Mainland-interpretation bloc of China’s NPCSC, because of its role in the first of HKSAR’s emphasis on the situations from which, at least in the common laws from Hong Kong, in the case of y, particularly in cases generally described as constitutional review, rather than merely interpretation, and underscores that this is a realm where the NPCSC is constrained vis-à-vis HKSAR in four respects. First, it has no authority to review pre-existing laws that have remained valid beyond 1997. Second, it cannot review the common law. Third, it is only concerned with legal provisions involving the Central Government, broadly defined. Fourth, it can only return the law in such circumstances, without offering any amendments. However, she notes that the question of where to draw the line between local and Mainland interests is shrouded in ambiguity. What is more, she does not challenge the assertion that the CFA, the “highest court of the HKSAR — a common law court — does not enjoy the final, unchallengeable authority to decide on the interpretation of the BL.”

The author delves more deeply than is generally the case into the task of identifying motives, or objectives, that shape NPCSC responses when performing its constitutional interpretation function in Hong Kong. She invokes

17 Ibid, p.58.
18 Ibid.
19 Ibid.
20 Xiaoman Yang, “Two Interpreters of the Basic Law: The Court of Final Appeal and the Standing Committee of the National People’s Congress” in Young and Ghai (eds), Hong Kong’s Court of Final Appeal: The Development of Law in China’s Hong Kong (Cambridge University Press, 2014), 69.
the new institutionalism for this purpose, opining that a body such as the NPCSC should not be regarded as a passive entity, detached from the wider economic — political — social setting in which it is embedded, but as an institution whose conduct might be best understood by exploring how it adapts to the changing requirements of that setting. Given the challenges and opportunities facing Hong Kong and the Mainland in a complex and dynamic internal and external milieu, the NPCSC is believed to be guided by a desire to sustain the prosperity and stability of Hong Kong, to preserve the authority of "one country" and to act with a significant measure of self-restraint as BL interpreter.

This is a fruitful perspective to embrace because it goes some way towards potentially restoring a modicum of balance to a picture heavily skewed in favour of the Mainland regime. Formally speaking, HKSAR autonomy and judicial independence may not match the spirit of relevant international (the Sino-British Joint Declaration) and constitutional (BL) law, but partly offsetting factors may be at play. Benign motives, or objectives, such as a concern for the welfare of Hong Kong and conservative leanings, may steer the NPCSC, or the powers in Beijing, in a direction more consistent with sanguine visions of local autonomy and judicial independence. The problem with an unqualified version of this reading is that the motives, or objectives, are expressed in rather elastic terms and are open to markedly different interpretations. By the same token, they include the preservation of the authority of "one country", which may well be the overarching goal, since hierarchical relationships/weights are not specified in a precise and transparent fashion.

Several other contributors also engage in what amounts, in some ways, to a "rebalancing act". Ample information is provided to show the variety of cases adjudicated by the CFA in a procedurally and substantively rigorous sound manner, genuinely consistent with the precepts of the rule of law, as understood at the heyday of the colonial era — and, in fact, in the United Kingdom (chapters on "final appeals then and now" and "jurisdiction and procedure"). Most of these cases relate to matters that have no direct constitutional ramifications and where "one country-two systems" tensions remain very much in the background. The contributions on CFA input — output in spheres such as administrative law, criminal law, commercial law, land law, tort law, civil procedure and even human rights fulfil, implicitly if not explicitly, the same purpose by portraying a disciplined, forward-looking, productive and self-driven institution.

Similar themes may be discerned, in varying degrees, in chapters focused on the CFA's jurisdiction and its judges ("the common law", "the Basic Law jurisprudence of the Court of Final Appeal", "role of the chief justice", "the judges", "concurring and dissenting in the Hong Kong Court of Final Appeal", "impact of jurisprudence beyond Hong Kong" and "foreign judges: a European perspective"). A number of noteworthy institutional characteristics are highlighted in this space: the Chief Justice's strong leadership within a clearly delineated framework, the evidently deep common law and BL roots of the CFA's jurisprudence, its versatility and willingness to pursue creative adaptation, considerable insulation of the judges
from extraneous influences, valuable presence and impact of foreign judges and sense of independence displayed by individual judges, reflected in the prevalence of dissenting opinions. This favourable assessment needs to be considered in conjunction with the critical observation that, in highly sensitive domains such as human rights, the CFA tends to be "executive-led" (chapter on "a human rights lawyer's perspective").

A particularly interesting "rebalancing act" is performed, albeit not as a result of deliberate intent, by the contributors endeavouring to place the Hong Kong experience in a comparative — or, to be exact, Macau and European — context. The contrasts between the, respectively, common law- and civil law-underpinned judicial architectures in the former British and Portuguese colonies serve to reinforce the impression that, at least relatively speaking and in terms of some key yardsticks, the Hong Kong CFA proverbial glass may be half full rather than half empty (chapter on "Macau's Court of Final Appeal"). Certain European institutional patterns, on the other hand, suggest that the differences between common law and its civil counterpart, often highlighted in analytical discourse on the seemingly insurmountable chasm separating the Hong Kong and Mainland legal systems, may be easier to bridge than generally assumed (chapter on "Foreign judges: a European perspective"). Although this chasm, whether formidable or not, is not necessarily at the root of the strains manifesting themselves in the challenging relationship between the two entities,21 the author offers thought-provoking insights that further enhance the value of the finely balanced academic project of which it is conceptually an integral part.

III. Venturing Beyond the Confines of Traditional Legal Inquiry

This rich collection of essays maintains a high intellectual standard throughout and possesses several virtues, the principal of which have been identified earlier. As has been pointed out in the introduction and has been made apparent in the preceding section, one of the great strengths of the book lies in its remarkable breadth and diversity. While this may be observed in many of the contributions, even those exclusively concerned with Hong Kong, the comparative section brings into a particularly sharp focus the wide scope and far-reaching nature of the product. It is not unusual for such surveys to provide, in one form or another, references to Macau realities, but here, as the chapter incorporating a European viewpoint illustrates, the journey stretches well beyond the Greater China space.

The volume even selectively bears the hallmarks of modern-style socio-legal investigation. At least six of the contributions rely, extensively and meticulously

21 See generally Roda Mushkat, "Killing the Proverbial Two Birds with One Stone: New Ways to Expand the Comparative Law Methodological Repertoire and Enhance the Effectiveness of Inter-Jurisdictional Environmental Governance Regimes". Law, Trade and Development (forthcoming).
so, on empirical data in order to shed light on various aspects of the CFA modus operandi and judicial behaviour (chapters on “genesis of Hong Kong’s Court of Final Appeal”, “final appeals then and now”, “jurisdiction and procedure”, “role of the Chief Justice”, “the judges” and “concurring and dissenting in the Hong Kong Court of Final Appeal”). Much useful information is generated in the process, substantially expanding the body of knowledge in this vital yet inadequately researched field of legal studies in the resilient but pressured HKSAR.

Nevertheless, this is an area where there is considerable room for pushing the scientific frontiers by turning the study of Hong Kong’s judiciary — in its descriptive, explanatory and prescriptive aspects — into a genuinely multidisciplinary, perhaps even interdisciplinary, enterprise. It is noteworthy that the contributors to this book are all legal scholars or practitioners. A significant number utilise, selectively but fruitfully, conceptual frameworks and methodological tools borrowed from other realms of academic specialisation. However, the intricate subject they thoroughly examine within boundaries largely defined by their specific expertise arguably requires active collaboration with scholars of different backgrounds, notably those with solid grounding in the social sciences. Such collaboration could yield a variety of theoretical and practical benefits, five of which are singled out below, for purposes of illustration.

First, it might lead to a better understanding of the limits of Hong Kong’s autonomy, including in the constitutional and judicial domain. If one merely focuses on the law, in the formal sense of the term, it is difficult to avoid the conclusion that the HKSAR Lilliput does indeed confront a Mainland Gulliver. The Centre in Beijing possesses not merely incomparably superior resources but may also readily avail itself of strictly legal mechanisms to overwhelm the Hong Kong periphery. However, this decidedly asymmetrical configuration is not consistent with the picture that emerges from the social science literature, where the Mainland is portrayed as a seriously fractured — both horizontally and vertically — polity, whose by no means unambiguously dominant centre constantly struggles to maintain effective control over its defiant periphery. This fragile institutional pattern has been referred to as “de facto federalism”, “fragmented authoritarianism”, “negotiated state” and “network mode of governance”.

Second, pronounced power asymmetries do not invariably place the weak parties in a position of total disadvantage. Social scientists have produced sufficient evidence to suggest that this is not inevitably the case. The Sino-British negotiations regarding the future of Hong Kong are a notable example of what is known as the “structuralists’ paradox”, seen when players with more modest capabilities make meaningful headway, and at times even prevail, when facing better endowed adversaries. The paradox stems from the fact that the weaker party “enjoys certain fundamental advantages [in such circumstances] which, if reinforced by an appropriate bargaining style and pertinent skills, may stand him/her in good stead.” Such was, to some extent, Britain’s experience while it wrestled with China over arrangements for post-1997 Hong Kong.

The corollary is that the HKSAR’s constitutional pains, where they manifest themselves, are partly self-inflicted. Again, there is concrete empirical support for this assertion. Strong grassroots resistance in the territory has thwarted efforts to introduce unpalatable national security legislation and a civic education programme with unmistakable Mainland/national/patriotic characteristics. Such resistance may not always prove effective, and its success too may hinge on the style and skills employed by the participants, as well as a host of situational factors. However, it is surprising that so little has been done to promote the cause of the rule of law and judicial independence in Hong Kong itself and elsewhere, on behalf of the territory (including in the Mainland). The academic profession and the Hong Kong Bar Association have been virtually the sole advocacy groups and socialisation agents, displaying vigilance and resorting to activism on this front. The record of the Hong Kong Law Society under its most recent leadership barely qualifies as neutral.

Third, when grappling with seemingly intractable Chinese “absolutism”, it is desirable to distinguish, social science-style, between legal principle and behaviour, or theory and practice. The relevance of this distinction may be amply observed in several spheres of external and internal affairs, but most vividly in relation to attitudes to sovereignty. After all, “[i]f China’s foreign policy pronouncements and protestations are taken at face value, sovereignty remains the lingua franca of Hong Kong’s public discourse”.

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24 Ibid.
25 Ibid., p.1141.
26 See generally Mushkat (n.8).
29 See generally Mushkat, “The Intricacies of Implementing International Law: A Juxtaposition of Theories with the Actualities of the Sino-British Joint Declaration Regarding the Future of Hong Kong” 31 Chinese (Taiwan) Yearbook of International Law and Affairs (forthcoming). See also Cheung “Who Is Influencing Whom?” (n.11).
of its international comportment and the chrysalis of international order”. There may have been “twists and turns in [its] international conduct over the years, [but] the Chinese Government has remained compulsively sovereignty-bound on most global issues and problems”. Indeed, “[i]n the normative domain of global politics, China is perhaps beyond compare”. It may well be argued that “[i]t is the wayward stranger from another planet, doing content analysis of the annual debate on the state of the world, could take sovereignty as a quintessentially Chinese idea”.

This of course is a reflection of a principle or theory at a particular point in time or during a specific period. Actual behaviour or practice has seldom followed a similar path, normally being more consistent, and increasingly so, with the notion of relative rather than absolute sovereignty. One external domain where one would expect a marked divergence from this pattern is territorial disputes. Yet, interestingly, if anything, the opposite is true. The historical record, extending over several decades and encompassing different regime constellations, shows a surprising degree of flexibility, or pragmatism, even when confronting less formidable neighbours. The implication is that caution should be exercised in drawing inferences regarding China’s posture vis-à-vis Hong Kong on the basis of a conventional-type dissection of formal policy statements and legal/quasi-legal documents alone. This is a complex issue ultimately requiring recourse to conceptual and methodological vehicles usually found in social scientists’ toolkit.

Fourth, another academic realm where students of the law, notably those concerned with its constitutional and administrative dimensions, may seek like-minded collaborators from other disciplines is the political economy of non-majoritarian institutions. This is a sphere of intellectual inquiry in which social scientists are exploring ways to enhance the independence and performance of unelected officials — such as central bankers, judges and regulators — charged with the pursuit of the public interest. The subject is touched upon briefly in the

31 Ibid.
32 Ibid.
33 Ibid.
35 See generally Mushkat, “Chinese Border Disputes Revisited”, (n 34).
book under review (chapter on “the judges”). Nevertheless, there is considerable scope here for cooperating with political economists who have addressed it, both in theoretical and prescriptive terms, from a broader perspective and may be able to shed additional light on the thorny question of how to design internally (i.e., without direct Mainland input) mechanisms to allow the HKSAR judiciary to adhere to its mission, as currently understood, in an optimal fashion.

Fifth, besides institutional independence, understandably the paramount concern for scholars focused on Hong Kong’s legal system in the context of the relationship with the Mainland, judicial effectiveness is worthy of careful scrutiny on the part of researchers working at the interface between the law and the social sciences. This is a theme that pervades virtually the entire collection of essays examined here and is addressed with meticulousness and thoughtfulness marking the whole survey. Nevertheless, the socio-legal approach, with an emphasis on the social component, may productively complement the more traditional legal method — which tends to be descriptive, doctrinal, open-ended and qualitative in its orientation — by systematically highlighting determinants of individual and aggregate performance, operational definitions, quantitative indicators of effectiveness and theoretical underpinnings of the concept. In a period featuring heightened anxiety about the HKSAR’s autonomy, exacerbated by the recent publication of the Mainland’s White Paper, which inter alia contains some controversial statements regarding the judicial element of the territory’s constitutional fabric, much could potentially be gained, intellectually and practically, by decisively crossing disciplinary boundaries in order to build on the sturdy analytical, factual and policy foundation elaborately and skillfully built in this pioneering work.
