

# A TALE OF TWO ISLANDS: COMPARATIVE REFLECTIONS ON CONSTITUTIONALISM IN HONG KONG AND TAIWAN

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*Both Hong Kong and Taiwan have been major sites of constitutional experimentation in East Asia in the last two decades. Constitutionalism is characterised by the rule of law and of the constitution, separation of powers and judicial independence, and the constitutional protection of human rights. It subjects political power to legal control, and enables peaceful transfer of political power in accordance with electoral rules of the game. Both Hong Kong and Taiwan have made significant progress in developing constitutionalism since the 1980s. This article compares the records of these two “islands” (territories) in this regard, and explore the future of a constitutionalism rooted in Chinese culture and society. It concludes that the constitutional projects in both Hong Kong and Taiwan are still works in progress that await completion.*

## 1. Introduction

Both Hong Kong and Taiwan have been major sites of constitutional experimentation in East Asia in the last two decades.<sup>1</sup> In the case of Hong Kong, the constitutional experiment was based on the concept of “one country, two systems”, which was originally invented by senior Chinese statesman Deng

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<sup>1</sup> Democratisation in South and South-East Asian countries can be understood as part of what Huntington described as “The Third Wave of Democratization”; see Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman and London: University of Oklahoma Press, 1991); Larry Diamond and Marc F. Plattner (eds), *The Global Resurgence of Democracy* (Baltimore: John Hopkins University Press, 1993); Dennis Austin (ed), *Liberal Democracy in Non-Western States* (St. Paul: Professors World Peace Academy, 1995).

Xiaoping in the late 1970s<sup>2</sup> to entice Taiwan into re-unification with mainland China. In the event, the concept proved to be totally unattractive to Taiwan<sup>3</sup> but was actually implemented in Hong Kong, a British colony which Britain in 1984 promised to return to the People's Republic of China (PRC) in 1997.<sup>4</sup>

Under colonial rule, a kind of benign authoritarianism was practiced in Hong Kong. Political power was concentrated in the hands of the Governor appointed by London, with all members of the legislature appointed by the Governor. At the same time, the English tradition of the common law and of judicial independence was transplanted to the colony. A reasonable degree of civil liberty was recognised, particularly after the riots of the 1960s subsided.<sup>5</sup>

Like Hong Kong, Taiwan also formed part of the Qing Empire in China before it was ceded to a foreign power. Whereas the island of Hong Kong was ceded to Britain in 1842 after China's defeat in the Opium War, the island of Taiwan was ceded to Japan in 1895 after China's defeat in the First Sino-Japanese War. Hong Kong was also occupied by Japan during the Pacific War, but British colonial rule resumed immediately thereafter. Japanese colonial rule in Taiwan ended in 1945 with Japan's defeat in the Second World War. The Kuomintang (Nationalist Party) Government of the Republic of China (ROC) established its rule over Taiwan.<sup>6</sup> After the establishment of the PRC in the Chinese mainland in 1949, Taiwan constituted the only remaining territory of the ROC. One-party authoritarian governance was practiced in Taiwan for four decades. A limited degree of rule by martial law was imposed. Although a constitutional court existed in the form of the Council of Grand Justices, it did not play any significant role. As of the 1970s, the human rights record in Taiwan was poorer than that in Hong Kong. But economically, both Hong Kong and Taiwan prospered as two of the "Four Little Dragons" of East Asia.<sup>7</sup>

<sup>2</sup> See Deng Xiaoping on "One Country, Two Systems" (Hong Kong: Joint Publishing, 2004); Albert H.Y. Chen, "The Concept of 'One Country, Two Systems' and its Application to Hong Kong", in C. Stephen Hsu (ed), *Understanding China's Legal System* (New York: New York University Press, 2003), Ch 9.

<sup>3</sup> See Ying-jeou Ma, "Policy Towards the Chinese Mainland: Taipei's View", in Steve Tsang (ed), *In the Shadow of China: Political Developments in Taiwan Since 1949* (Hong Kong: Hong Kong University Press, 1993), Ch 8.

<sup>4</sup> Macau, a Portuguese colony neighbouring Hong Kong, was also returned to the PRC in 1999 under the framework of "one country, two systems".

<sup>5</sup> For the history of Hong Kong, see G.B. Endacott, *A History of Hong Kong* (Hong Kong: Oxford University Press, 2nd edn 1964); G.B. Endacott, *Government and People in Hong Kong 1841-1962: A Constitutional History* (Hong Kong: Hong Kong University Press, 1964); Frank Welsh, *A History of Hong Kong* (London: HarperCollins, 1993); Steve Tsang, *A Modern History of Hong Kong* (Hong Kong: Hong Kong University Press, 2004).

<sup>6</sup> For the history of Taiwan, see Murray A. Rubinstein (ed), *Taiwan: A New History* (Armonk, New York: M.E. Sharpe, 1999); John F. Copper, *Taiwan: Nation-State or Province?* (Boulder: Westview Press, 3rd edn 1999); Denny Roy, *Taiwan: A Political History* (Ithaca: Cornell University Press, 2003); Ito Kiyoshi, *History of Taiwan* (Taipei: Qianwei Press, 2004) (English-Chinese bilingual edition).

<sup>7</sup> See Ezra F. Vogel, *The Four Little Dragons* (Cambridge, Mass: Harvard University Press, 1991).

The 1980s saw the beginnings of liberalisation and democratisation in both Hong Kong and Taiwan. Elected members were introduced into the Legislative Council of Hong Kong for the first time in 1985.<sup>8</sup> In Taiwan, Chiang Ching-kuo lifted the martial law in 1987. More civil liberties were allowed, civil society flourished, and the opposition party – the Democratic Progressive Party – gained strength. The constitutional court began to assert itself and to promote democratisation. In 1990, the court ruled that the parliamentary institutions, elections to which had been largely frozen for four decades, were to be elected afresh.<sup>9</sup>

In 1990, the Basic Law of the Hong Kong Special Administrative Region of the PRC was enacted by the PRC parliament. In 1991, Hong Kong enacted its Bill of Rights, inaugurating the era of constitutional judicial review of legislation in Hong Kong. In the 1990s, the Hong Kong courts built up a body of jurisprudence on human rights. Also in 1991, a proportion of legislators in Hong Kong were elected directly by universal suffrage for the first time in the colony's history. After the handover in 1997, Hong Kong courts, now under the leadership of the new Court of Final Appeal, have continued to play an important role in constitutional developments. The proportion of legislators elected by universal suffrage has continued to increase.

Since 1991, the ROC Constitution in force in Taiwan has undergone seven rounds of amendment. At the same time, the constitutional court in Taiwan has established itself as a major force in constitutional review, legal reform, human rights protection and in arbitrating jurisdictional conflicts between different branches of government. Also in the 1990s, Taiwan achieved full democratisation, with the first-ever direct election of the President in 1996, and the first-ever change of ruling party in 2000.

Constitutionalism is characterised by the rule of law and of the constitution, separation of powers and judicial independence, and the constitutional protection of human rights. It subjects political power to legal control, and enables peaceful transfer of political power in accordance with electoral rules of the game. Both Hong Kong and Taiwan have made significant progress in developing constitutionalism since the 1980s. This article will compare the records of these two "islands" (territories) in this regard, and explore the future of a constitutionalism rooted in Chinese culture and society.

<sup>8</sup> For an overview of Hong Kong's democratisation process, see Kathleen Cheek-Milby, *A Legislature Comes of Age: Hong Kong's Search for Influence and Identity* (Hong Kong: Oxford University Press, 1995); Lo Shiu-hing, *The Politics of Democratization in Hong Kong* (Basingstoke and London: Macmillan Press, 1997); Alvin Y. So, *Hong Kong's Embattled Democracy* (Baltimore: John Hopkins University Press, 1999).

<sup>9</sup> For an overview of Taiwan's democratisation process, see Roy (n 6 above); Linda Chao and Ramon H. Myers, *The First Chinese Democracy: Political Life in the Republic of China on Taiwan* (Baltimore: Johns Hopkins University Press, 1998); Hung-mao Tien, *The Great Transition: Political and Social Change in the Republic of China* (Stanford: Hoover Institution Press, 1989); Steve Tsang and Hung-mao Tien (eds), *Democratization in Taiwan* (Basingstoke: Macmillan Press, 1999).

The article, apart from this introduction, will consist of the following sections. Section 2 defines constitutionalism and examines from a historical perspective the origins of constitutionalism in Hong Kong and Taiwan. It also provides the historical background that paved the way for constitutional developments in the two territories in the last two decades, and outlines the general pattern of the evolution of constitutional thinking and practice in the two territories before the 1980s. Section 3 considers constitution-making activities with regard to or in Hong Kong and Taiwan in the last two decades. These include the enactment of the Hong Kong Basic Law by the PRC, constitutional reform in Hong Kong undertaken by the British colonial government, and the seven constitutional amendments enacted in Taiwan since 1991. Section 4 deals with constitutional interpretation. In the case of Taiwan, the discussion focuses on the work of the Council of Grand Justices (CGJ) of the Judicial Yuan, whereas in Hong Kong's case, which does not have a centralised system of constitutional review, the constitutional record of the Hong Kong courts will be considered. A comparison is offered of constitutional law issues in Hong Kong and Taiwan by identifying selected cases decided by the Hong Kong courts and selected interpretations of the CGJ. Finally, Section 5 reflects on the current state of constitutionalism in Hong Kong and Taiwan, and explores the comparative significance of their constitutional developments and their implications for constitutionalism in China itself.

## 2. The Origins and Evolution of Constitutionalism in Hong Kong and Taiwan

Constitutionalism as a theory and practice of government and law is a product of modern Western civilisation. Like science, it has proved to have universal appeal to humanity and has in the last two centuries been transplanted to all corners of the earth. The possession of a constitution has come to be a hallmark of the modern sovereign state. Countries of different political persuasions, whether capitalist or communist, have unanimously pronounced that their constitution is the authoritative and supreme law of their land. Like science, democracy and human rights, constitutionalism has come to be regarded as a sign of modernity and modernisation.

Yet the history of the modern world has taught us that all too often rulers and governments pay no more than lip service to their constitutions and constitutionalism. Authentic constitutionalism is hard to come by. Attempts at transplanting constitutionalism from the West to developing countries have frequently ended in failures. Karl Loewenstein<sup>10</sup> drew a conceptual distinc-

<sup>10</sup> Karl Loewenstein, *Political Power and the Government Process* (Chicago: University of Chicago Press, 1957), pp 147–153.

tion between “nominal”, “semantic” and “normative” constitutions. Nominal constitutions do not correspond to the reality of the political system at all and are no more than words. Semantic constitutions do tell us something about what the political system is and how it operates, but play no role in controlling the behaviour of political actors. Normative constitutions determine who become power holders, and really regulate the exercise of power and the relationship between power holders; their normative force is internalised by political actors who really take the rules stipulated in the constitution seriously, respect them and abide by them. A normative constitution is thus an essential ingredient of the practice of authentic constitutionalism.

As pointed out by Nino, the word “constitutionalism” “has a range of meanings that vary in their conceptual thickness”.<sup>11</sup> These meanings include (1) the rule of law (government being conducted according to legal rules), (2) the constitution being a higher law, (3) the law having certain characteristics such as being general, precise, public, non-retroactive and impartially applied, (4) separation of powers and judicial independence, (5) the protection of individual rights, (6) judicial review, and (7) democracy. However, this analysis has not clarified the relationship between these ingredients of constitutionalism. For the purpose of this article, constitutionalism will be understood as the combination of a legal system that practices the rule of law (including elements (1), (3) and (6) above) and a political system that practices separation of powers and internal checks and balances, where this combined system ensures that human rights are respected and protected. The protection of human rights is a matter of degree, and a democracy is where political rights as ingredients of human rights are fully practiced.<sup>12</sup>

The historical origins or roots of constitutionalism in Hong Kong and Taiwan are quite different. Constitutionalism in Taiwan can be traced back to the enactment of the ROC Constitution in Nanking, capital of the ROC, in December 1946 by a National Assembly dominated by the Kuomintang but in which other political forces in China (other than the Communists) also participated.<sup>13</sup> That constitution was the culmination of several decades of constitution-making in China beginning with the promulgation of the first

<sup>11</sup> Carlos Santiago Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1996), p 3.

<sup>12</sup> Constitutional democracy is thus the highest level of achievement of constitutionalism. Taking Britain as an example, constitutionalism was in place when a constitutional monarchy was established towards the end of the 17th century after the Glorious Revolution. However, full democratisation was only completed in the 20th century. See Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Boston: Ginn & Co., revised edn, 1950), pp 2, 31, 45, 50, 128; John Canning (ed), *The Illustrated Macaulay's History of England* (London: Weidenfeld and Nicolson, 1988); W.A. Speck, *A Concise History of Britain 1707–1975* (Cambridge: Cambridge University Press, 1993).

<sup>13</sup> See Jing Jiren (蔣知仁), *History of Chinese Constitutionalism (中國立憲史)* (Taipei: Lianjing, 1984), Ch 16.

provisional constitution of the ROC in 1912; its immediate predecessors include the Provisional Constitution of 1931 and the Draft Constitution of 1936.<sup>14</sup> On the other hand, constitutionalism (particularly the rule of law, judicial independence and respect for civil liberties as ingredients of constitutionalism discussed above) in Hong Kong was originally a product of British colonial rule.<sup>15</sup> Constitutional government in Hong Kong was ensured by a colonial constitution and colonial practice of government until 1 July 1997, when Hong Kong was re-united with China and became a Special Administrative Region (SAR) governed by the Basic Law of the Hong Kong SAR enacted by the Chinese parliament – the National People’s Congress.<sup>16</sup> It is therefore ironic that while Hong Kong today is part of the PRC<sup>17</sup> and the debate about reunification or independence still tears the people of Taiwan apart, constitutionalism in Taiwan has in fact been a continuous outgrowth from a constitution made in China and for the whole of China, whereas Hong Kong’s pre-1997 experience of constitutionalism was derived from British colonial rule.

The 1946 ROC Constitution was, unlike the subsequent constitutions of the PRC, based on the Western model of the liberal democratic state. It provides for popular sovereignty, the rule of law and the supremacy of the constitution, the separation of powers (both horizontal and vertical), checks and balances, and the protection of human rights and people’s welfare. It envisages multi-party politics and the democratic election of parliamentary bodies. It even establishes the CGJ of the Judicial Yuan, a constitutional court that can interpret the Constitution and review whether laws and orders are consistent with the Constitution – a very progressive arrangement in 1946 when the German Constitutional Court – the principal model of constitutional courts in the second half of the twentieth century in legal systems belonging to the continental European Civil Law family – had not yet been established.<sup>18</sup>

<sup>14</sup> See Jing (n 13 above).

<sup>15</sup> For an overview of the constitutional, political and legal systems of colonial Hong Kong (especially in the 1980s), see Norman Miners, *The Government and Politics of Hong Kong* (Hong Kong: Oxford University Press, 4th edn, 1986); Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Hong Kong: China and Hong Kong Law Studies, Vol I, 1987, Vol II, 1988); Peter Harris, *Hong Kong: A Study in Bureaucracy and Politics* (Hong Kong: Macmillan, 1988); Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (Hong Kong: Oxford University Press, 1987).

<sup>16</sup> See Wang Shuweng (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Beijing: Law Press, 2000); Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Beijing: Peking University Press, 2001); Yash Ghai, *Hong Kong’s New Constitutional Order* (Hong Kong: Hong Kong University Press, 2nd edn, 1999).

<sup>17</sup> Article 1 of the Basic Law of the Hong Kong SAR (hereinafter the “Basic Law”) provides that the Hong Kong SAR is an inalienable part of the PRC.

<sup>18</sup> The Basic Law of West Germany was enacted in 1949. Articles 92–94 provide for the establishment of the Federal Constitutional Court.

Yet the ROC Constitution never had the chance of being put into practice in mainland China. Enacted to bolster the legitimacy of the Kuomintang regime at a time when China was on the brink of civil war, the fate of the 1946 Constitution was to be a sorry one. Full-scale civil war did erupt in 1947; the Kuomintang forces were defeated, and in 1949 the Kuomintang government fled from the Chinese mainland to Taiwan, which had come under the rule of the ROC regime when the Japanese surrendered in 1945. In April 1948 – only a few months after the ROC Constitution came into force in December 1947, the National Assembly (the organ which had the authority to amend the Constitution) enacted, in the form of additional provisions to the Constitution, the Temporary Provisions for the Period of National Mobilization to Suppress the Communist Rebellion (“the Temporary Provisions”), which had the effect of superseding some of the provisions of the Constitution which limited presidential power. In December 1948, a state of martial law (similar to the “state of siege” in continental European legal systems) was declared in mainland China by the Kuomintang government.<sup>19</sup> In May 1949, a martial law decree was also promulgated with regard to Taiwan.<sup>20</sup> Under the rule of martial law, civilians accused of certain crimes were to be tried by military courts.<sup>21</sup> Civil liberties were curtailed by martial law decrees and other laws and regulations. Dissidents were persecuted and prosecuted for political crimes; many were imprisoned and some put to death. Martial law was only lifted in July 1987, thus ending probably the longest martial law rule within a state in modern history.

Although the text of the Constitution has remained intact, the Temporary Provisions were amended four times in 1960, 1966 (in which year the Temporary Provisions were twice amended) and 1972.<sup>22</sup> The 1960 amendment removed the constitutional limit of one person’s presidency to two terms, so that Chiang Kai-shek could serve a third term. In fact he also served a fourth (1966 to 1972) and fifth term until his death in 1974. Other amendments served to enhance presidential power. The CGJ was called upon in 1954 to resolve the question of whether members of the Legislative Yuan and the Control Yuan (and by implication also the National Assembly) elected all over China in 1947 to 1948 could stay in office despite their constitutional term of office having expired (since it was impossible to hold fresh

<sup>19</sup> Martial law was lifted in January 1949, but was re-imposed in July 1949; see Chen Xinmin (陳新民), *Constitutional Law* (憲法學釋論) (Taipei: Sanmin, 5th edn, 2005), p 464.

<sup>20</sup> For an overview of Taiwan’s legal history during, before and after the state of martial law, see Lin Shantian (林山田), *Fifty Years of Taiwan Legal History 1945–1995* (五十年來的臺灣法制 1945–1995) (Taipei: National Taiwan University Department of Law, 1995); Wang Taisheng (王泰升), *Taiwan Legal History* (臺灣法律史概論) (Taipei: Yuanzhao, 2001).

<sup>21</sup> See Chen (n 19 above), pp 468–469, 472–473; Hungdah Chiu, “Constitutional Development in the Republic of China in Taiwan”, in Steve Tsang (ed) (n 3 above), p 17, at pp 25–28.

<sup>22</sup> See Chen (n 19 above), pp 926–934.

elections in mainland China because of the “Communist Rebellion”). The CGJ in Interpretation No 31 said yes. In 1960, when Chiang sought an amendment by the National Assembly of the Temporary Provisions regarding the two-term limit to the office of the presidency (which required a quorum of two-thirds of all members of the Assembly), the CGJ was called upon again to answer the question of what constituted a quorum of the Assembly given that many members originally elected were not in Taiwan. Again the CGJ (in Interpretation No 85) gave the answer expected by the government and defined the quorum with reference to members available to attend meetings in Taiwan. In the first three decades of its existence, the CGJ (with one possible exception<sup>23</sup>) never exercised its power to declare any law or regulation unconstitutional.<sup>24</sup> The CGJ was generally perceived as a tool or accomplice of the regime to add constitutional legitimacy to its rule rather than a true guardian of constitutional norms and rights.<sup>25</sup>

The Chiang regime tried to promote the image of Taiwan under its rule as that part of China that was still free and not subject to the tyranny of communism. It was claimed that constitutional government was practiced in Taiwan.<sup>26</sup> Compared to mainland China at the time (from the 1950s to the 1970s), the government in Taiwan can probably be regarded as having practiced more constitutionalism than the communist government in mainland, if constitutionalism is a matter of degree, and a low degree of constitutionalism is still better than none at all. In Taiwan at the time, the rule of law existed to some extent, though the law was draconian and largely an instrument of rule. Property rights were protected, and there was freedom in the economic domain. Some degree of social and political pluralism was also tolerated. For example, elections were held at the level of local government (of counties and cities other than Taipei and Kaohsiung). Pursuant to the 1966 and 1972 amendments to the Temporary Provisions, elections to a limited proportion of seats in the central parliamentary institutions (ie the National

<sup>23</sup> The possible exception is Interpretation No 86 (in 1960) in which the CGJ hinted, but did not expressly declare, that a particular arrangement whereby the lower courts were administratively under the Ministry of Justice of the Executive Yuan rather than the Judicial Yuan was unconstitutional. No action however was taken by the Government to rectify the matter until 1980. See text accompanying n 140 below.

<sup>24</sup> See Su Yongqin (蘇永欽), “Interpretations by the Council of Grand Justices and Social Change in Taiwan” in Su Yongqin, *The Theory and Practice of the Control of Constitutionality (合憲性控制的理論與實踐)* (Taipei: Yuedan, 1994), p 271; Ye Junrong (葉俊榮), *Democratic Transition and Constitutional Change (民主轉型與憲法變遷)* (Taipei: Yuanzhao, 2003), Ch 7.

<sup>25</sup> See Ye (n 24 above), pp 267–268; Jau-yuan Hwang and Jiunn-rong Yeh, “Taiwan”, in Cheryl Saunders and Graham Hassall (eds), *Asia-Pacific Constitutional Yearbook 1995* (Melbourne: Centre for Comparative Constitutional Studies, University of Melbourne, 1997), p 279, at pp 282–286; Tsung-fu Chen, “The Role of Law in Taiwan: Culture, Ideology, and Social Change”, in C. Stephen Hsu (ed), *Understanding China's Legal System* (New York: New York University Press, 2003), p 374, at pp 383–384.

<sup>26</sup> See Tsung-fu Chen, *ibid.*, pp 381–382.

Assembly, the Legislative Yuan and the Control Yuan) were also instituted. Some non-KMT or “opposition” (or “Tang-wai”) politicians were successfully elected in these elections, despite severe restrictions on freedoms of speech, press, publication, assembly and association, and the fact that they were not allowed to form any political party.<sup>27</sup>

Whereas Taiwan had been under Japanese colonial rule for half a century before it was incorporated into the Republic of China in 1945, Hong Kong experienced colonial rule for one and a half century since the island of Hong Kong was ceded to Britain in 1842 after China’s defeat in the Opium War. Both Japanese and British colonial rule had contributed to introduce Western ideas of constitutionalism or at least the rule of law to Taiwan and Hong Kong respectively. Although Japan did not establish any parliament or legislative assembly for Taiwan and the Governor of Taiwan under Japanese rule exercised both executive and legislative power, and although the police exercised enormous powers, a modern court system was established in Taiwan and a legal profession also developed.<sup>28</sup> Unlike Hong Kong, where a two-way free movement of population existed across the Hong Kong-mainland border until the communist takeover of the mainland,<sup>29</sup> Taiwan was largely separated from the Chinese mainland while it was a Japanese colony. Being insulated from political and social developments in China, Taiwanese people began to develop their own sense of identity under Japanese rule.<sup>30</sup> Since the 1920s, Japan actually pursued the policy of assimilation (into Japanese language and culture) in Taiwan.<sup>31</sup> Some enlightened Taiwanese desired self-government under Japanese rule and campaigned for it. The rise of political consciousness among the Taiwanese elite in the 1920s and 1930s was a significant phenomenon.<sup>32</sup> After Japan’s defeat in the Second World War, many Taiwanese at first welcomed Taiwan’s re-incorporation into China.<sup>33</sup> It was only after the massacre and repression of the “28 February incident” (of 1947)<sup>34</sup> and with the subsequent authoritarian rule or “White Terror” of the Chiang Kai-shek

<sup>27</sup> See Chao and Myers (n 9 above), Chs 3, 4; Roy (n 6 above), Ch 6.

<sup>28</sup> For an overview of Taiwan’s legal system under Japanese rule, see Wang (n 20 above); Wang Tay-sheng, *Legal Reform in Taiwan Under Japanese Colonial Rule 1895–1945: The Reception of Western Law* (Seattle: University of Washington Press, 2000).

<sup>29</sup> See Albert H.Y. Chen, “The Development of Immigration Law and Policy: The Hong Kong Experience” (1988) 33 *McGill Law Journal* 631; Johannes Chan and Bart Rwezaura (eds), *Immigration Law in Hong Kong: An Interdisciplinary Study* (Hong Kong: Sweet & Maxwell Asia, 2004).

<sup>30</sup> This contrasts with the case of Hong Kong under British rule, where the people identified themselves as Chinese at that time and were concerned about China’s destiny. See Fok Kai-cheong, *Lectures on Hong Kong History: Hong Kong’s Role in Modern Chinese History* (Hong Kong: Commercial Press, 1990).

<sup>31</sup> Ito (n 6 above), Ch 7.

<sup>32</sup> *Ibid.*

<sup>33</sup> Roy (n 6 above), p 79.

<sup>34</sup> See Li Xiaofeng (李筱峰), *Understanding February 28* (解讀二二八) (Taipei: Yushanshe, 1998).

regime that some Taiwanese came to resent rule by the exiled regime from the mainland and sought to establish Taiwan eventually as an independent nation state consisting only of the people of Taiwan.<sup>35</sup>

Unlike Taiwan, which has been governed since 1947 on the basis of a constitution that is liberal and democratic on the face of it though in practice subject to the Temporary Provisions and martial law decrees, Hong Kong before the 1980s was ruled by the British<sup>36</sup> on the basis of a very rudimentary constitution contained in the Letters Patent and Royal Instructions issued by the British monarch.<sup>37</sup> Whereas the ROC Constitution was designed for the most populous nation in the world, the Hong Kong Letters Patent and Royal Instructions were similar to other constitutional instruments for the conquered colonies of the British Empire.<sup>38</sup> They were nineteenth century-style constitutional documents with few principles of constitutionalism enshrined in them. Power was concentrated in the hands of the Governor, who ruled with the assistance of an Executive Council and a Legislative Council appointed by him. By co-opting leading members of the local business and professional elite into these Councils,<sup>39</sup> the colonial government was able to practice a kind of government by consultation and consensus even though there was no democratic election<sup>40</sup> except to a municipal council (called the Urban Council, with responsibilities in the domains of public health, environmental hygiene and recreational facilities) on the basis of a very limited franchise.<sup>41</sup> The English legal system based on the common law, the rule of law and judicial independence was transplanted to Hong Kong. So was the English model of a legal profession divided into solicitors and barristers.<sup>42</sup> There was no bill of rights in the colonial constitution, and laws enacted by the colonial regime placed considerable restrictions on freedoms of speech, publication,

<sup>35</sup> See C.L. Chiou, *Democratizing Oriental Despotism: China from 4 May 1919 to 4 June 1989 and Taiwan from 28 February 1947 to 28 June 1990* (New York: St Martin's Press, 1995).

<sup>36</sup> The legal basis was three treaties (regarded by the PRC as "unequal treaties") which the government of the Qing Dynasty signed with Britain regarding the cession of Hong Kong Island and Kowloon Peninsula, and the 99-year lease of the New Territories. See Peter Wesley-Smith, *Unequal Treaty 1898–1997* (Hong Kong: Oxford University Press, revised edn, 1998).

<sup>37</sup> See Miners (n 15 above), Ch 5 and appendix; Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (n 15 above), Vol I, Ch 4.

<sup>38</sup> See Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966); Albert H.Y. Chen, "From Colony to Special Administrative Region: Hong Kong's Constitutional Journey", in Raymond Wacks (ed), *The Future of the Law in Hong Kong* (Hong Kong: Oxford University Press, 1989), p 76, at 76–79.

<sup>39</sup> Ambrose King, "Administrative Absorption of Politics in Hong Kong", in Sing Ming (ed), *Hong Kong Government & Politics* (Hong Kong: Oxford University Press, 2003), p 69.

<sup>40</sup> For an overview of the original political system in Hong Kong, see references cited in n 15 above, and Steve Tsang (ed), *Government and Politics: A Documentary History of Hong Kong* (Hong Kong: Hong Kong University Press, 1995).

<sup>41</sup> See Fan Zhenru (范振汝), *The Electoral System of the Hong Kong Special Administrative Region (香港特别行政区的选举制度)* (Hong Kong: Joint Publishing, 2006), pp 39–43.

<sup>42</sup> See Wesley-Smith, *An Introduction to the Hong Kong Legal System* (n 15 above), Ch 11.

assembly and association, although in practice some of these laws were not rigorously enforced.<sup>43</sup>

However, the paradox – or some would say the miracle – of Hong Kong under British colonial rule was that by the 1970s, the people of Hong Kong enjoyed more civil liberties (particularly freedom of the person, freedom of speech, press and publication and freedom of association and assembly) than the people of mainland China and even the people of Taiwan.<sup>44</sup> Hong Kong's reputation in terms of the rule of law and efficiency of government was one of the best in Asia.<sup>45</sup> In terms of civil liberties – key ingredients of constitutionalism, Hong Kong's performance as of the 1970s surpassed those of the other three of the "Four Little Dragons" of East Asia – Singapore, Taiwan and South Korea. In his book on *A Modern History of Hong Kong*, the historian Steve Tsang described the Hong Kong Government by the time of the Sino-British negotiation on Hong Kong's future in the early 1980s as "the best possible government in the Chinese political tradition": "building on the basis of its own record and responding steadily to changes after 1945, the government produced a paradox. While it remained an essentially British colonial administration, it also fulfilled the basic conditions for [an ideal Confucian] government, namely, efficiency, fairness, honesty, benevolent paternalism, and non-intrusion into the lives of ordinary people. This was an achievement that had no match in over two thousand years of China's history as a unified country, and could be rivalled only after Taiwan successfully transformed itself into a democracy in 1996."<sup>46</sup>

This may to some extent be an over-statement, but it is probably true that by the early 1980s, most Hong Kong people preferred the continuation of Hong Kong's political status quo to the risks and uncertainty of its reunification with the PRC. Indeed, the very reason why by the 1970s the British Hong Kong government could afford to allow Hong Kong people to enjoy more civil liberties than, say, the people of Taiwan was to do with the existence of this "Other" – mainland China under Communist rule. Although the Cultural Revolution in China had a spillover effect in Hong Kong in the

<sup>43</sup> See Raymond Wacks (ed), *Civil Liberties in Hong Kong* (Hong Kong: Oxford University Press, 1988); Nihal Jayawickrama, "Public Law", in Raymond Wacks (ed), *The Law in Hong Kong 1969–1989* (Hong Kong: Oxford University Press, 1989), Ch 2.

<sup>44</sup> For an overview of the history and the present status of human rights in East and South-East Asian countries, see Kenneth Christie and Denny Roy, *The Politics of Human Rights in East Asia* (London: Pluto Press, 2001); Randall Peerenboom, Carole J. Petersen and Albert H.Y. Chen (eds), *Human Rights in Asia* (London: Routledge, 2006).

<sup>45</sup> For an overview of the history and the present status of rule of law in East and South-East Asian countries, see *The Rule of Law: Perspectives from the Pacific Rim* (Washington, DC: Mansfield Center for Pacific Affairs, 2000); Randall Peerenboom (ed), *Asian Discourses of Rule of Law* (London: Routledge Curzon, 2004).

<sup>46</sup> Steve Tsang, *A Modern History of Hong Kong* (Hong Kong: Hong Kong University Press, 2004), p 197.

form of the riots against colonial rule in 1967, the overwhelming majority of the population of Hong Kong stood on the side of the colonial government at the time.<sup>47</sup> Since then, and particularly since the introduction of new social (and social welfare) policies<sup>48</sup> of the 1970s by Governor MacLehose,<sup>49</sup> it was obvious to all that the people of Hong Kong supported the continuation of colonial rule, for they realised that the only alternative to colonial rule was integration into Communist China. Thus, despite the growth of a local identity (as “Hongkongers”) among members of the new generation born in Hong Kong after the War,<sup>50</sup> who, unlike their parents who were refugees from mainland China fleeing to Hong Kong, considered Hong Kong their home and never experienced living elsewhere in China, there was never an independence movement in Hong Kong, unlike the case of Taiwan. And since the population accepted the legitimacy of British rule, there were few dissidents<sup>51</sup> or political prisoners in Hong Kong (though the Communists or pro-Communist elements in Hong Kong had been under surveillance and discriminated against by the colonial government).<sup>52</sup> The security of colonial rule in Hong Kong,<sup>53</sup> as contrasted with the sense of insecurity of the Kuomintang regime in Taiwan when faced with demands for Taiwanese independence and the end of one-party rule by the Kuomintang (as well as problems of international non-recognition and isolation after being expelled from the United Nations in 1971), can thus explain the greater degree of civil liberties in Hong Kong.

Thus as of the early 1980s, Hong Kong enjoyed the rule of law, an open society, a fair degree of civil liberties as well as a prosperous economy, but under the colonial rule of the British and a rudimentary constitution that did

<sup>47</sup> Tsang, *ibid.*, pp 183–190; David Bonavia, *Hong Kong 1997* (Hong Kong: South China Morning Post, 1983), Ch 3; Richard Hughes, *Hong Kong: Borrowed Place – Borrowed Time* (London: Andre Deutsch, 1968).

<sup>48</sup> Tsang (n 46 above), p 192; Joe England and John Rear, *Industrial Relations and Law in Hong Kong* (Hong Kong: Oxford University Press, 1981), pp 21–23, 203–205; Nelson W.S. Chow, “A Review of Social Policies in Hong Kong”, in Alex Y.H. Kwan and David K.K. Chan (eds), *Hong Kong Society: A Reader* (Hong Kong: Writers’ & Publishers’ Cooperative, 1986), Ch 6.

<sup>49</sup> Governor MacLehose also established the Independent Commission Against Corruption (ICAC) to combat the then prevalent corruption: see H.J. Lethbridge, *Hard Graft in Hong Kong: Scandal, Corruption and the ICAC* (Hong Kong: Oxford University Press, 1985).

<sup>50</sup> See Tsang (n 46 above), pp 190–196; David Faure, “Reflections on Being Chinese in Hong Kong”, in Judith M. Brown and Rosemary Foot (eds), *Hong Kong’s Transitions, 1842–1997* (Basingstoke: Macmillan Press, 1997), Ch 5.

<sup>51</sup> Although there were pressure groups opposing particular government policies, there was no organisation seeking to overthrow the colonial Hong Kong Government or holding political ideology of such aim. See Miners (n 15 above), Ch 13.

<sup>52</sup> For discussion of the rightist (pro-Kuomintang) and the leftist (pro-Communist) elements in the Hong Kong political arena and their respective relationship with the colonial Hong Kong Government, see Yu Shengwu (余繩武) and Liu Shuyong (劉蜀永) (eds), *Hong Kong in the Twentieth Century (20世紀的香港)* (Hong Kong: QilinBooks, 1995), Chs 8, 9.

<sup>53</sup> See Miners (n 15 above), Ch 3; Lau Siu-kai, *Society and Politics in Hong Kong* (Hong Kong: Chinese University Press, 1982); Ambrose Y.C. King and Rance P.L. Lee (eds), *Social Life and Development in Hong Kong* (Hong Kong: Chinese University Press, 1981).

not expressly guarantee human rights and did not provide any democracy. At the same time, Taiwan, while economically successful in market capitalism and possessing the semblance of a modern constitution that is liberal and democratic on the face of it, practiced severe restrictions on civil liberties and repression of political dissidents, though ordinary people could vote in local elections as well as (since 1969) elections for limited numbers of seats in the national parliamentary bodies, and some opposition politicians were elected into office. These, then, are the points of departure for the liberalisation, democratisation and constitution-making in Hong Kong and Taiwan in and after the 1980s.

### 3. Constitution-Making for and in Hong Kong and Taiwan Since the 1980s

With the death of Mao Zedong in 1976 and the rise of Deng Xiaoping as supreme leader of the Chinese Communist Party in the late 1970s, the leftist excesses of the Maoist era came to an end and a new era of “reforming and opening” began in China. A new policy towards Taiwan was also adopted.<sup>54</sup> Instead of calling for the “liberation” of Taiwan from Kuomintang rule and from capitalism and thus extending communism to Taiwan, a new concept was developed for the purpose of reunification of Taiwan with the Mainland. This was “one country, two systems”, which would allow the peaceful co-existence of capitalism (in Taiwan) with socialism (in the Mainland), a high degree of autonomy for Taiwan under PRC sovereignty and the preservation of the existing social and economic systems in Taiwan after reunification. In the new (and fourth) Constitution of the PRC enacted in late 1982, Article 31 provides for the possibility of the establishment of Special Administrative Regions in the PRC which practice social and economic systems different from those in the Mainland.

In September 1982, Britain and China began negotiations over the constitutional future of Hong Kong.<sup>55</sup> It is believed that the negotiations were initiated not because China took the initiative to demand from the British the return of Hong Kong, but because by the early 1980s the British Government was concerned that there was no legal basis for its continued governance of the New Territories after 1997 (the New Territories being that part of the Hong Kong colony which was leased by the Qing Dynasty Government in

<sup>54</sup> See references cited in n 2 above.

<sup>55</sup> For an overview of the Sino-British negotiation and Hong Kong's return to China, see Chung Sze-yue, *Hong Kong's Journey to Reunification* (Hong Kong: Chinese University Press, 2001); Steve Tsang, *Hong Kong: An Appointment with China* (London: I.B. Tauris, 1997); Mark Roberti, *The Fall of Hong Kong: China's Triumph and Britain's Betrayal* (New York: John Wiley & Sons, 1994).

China to Britain for 99 years in 1898, unlike Hong Kong Island and the Kowloon Peninsula which were permanently ceded to Britain in 1842 and 1860 respectively) and wanted to seek from the Chinese Government its agreement to continued British administration of the whole of Hong Kong after 1997.

The PRC considered all the three treaties constituting the legal basis for British rule in Hong Kong to be “unequal treaties” and not binding on the PRC. The creation of the British colony of Hong Kong as a result of the Opium War and its subsequent expansion in size was part and parcel of the story of humiliation and shame for the Chinese people in the face of Western imperialism in modern history, and being fervent nationalists, the Chinese Communists ruled out completely the option of legally consenting to continued British rule in Hong Kong. The concept of “one country, two systems”, though originally conceived for Taiwan, was at hand and thus offered to Britain as the solution for Hong Kong’s constitutional future. It was proposed that the whole of the Hong Kong colony would be returned to the PRC in July 1997, and it would become a Special Administrative Region (SAR) of the PRC enjoying a high degree of autonomy. Its existing social and economic systems and laws, and the lifestyle and liberties of its people would all be preserved. Communism would not be imposed on Hong Kong, nor would Communist Party cadres take over the Hong Kong Government. The principle of rule was “Hong Kong people ruling Hong Kong”, in accordance with a Basic Law in which China’s promises for post-1997 Hong Kong would be translated into the text of a constitutional instrument. After nearly two years of strenuous negotiations, the British found that they had no choice but to accept the Chinese proposal. The result was the Sino-British Joint Declaration on the Question of Hong Kong signed in 1984.

The drafting of the Basic Law which began in 1985 and concluded in 1990 was one of the most significant exercises in constitution-making in the history of the PRC.<sup>56</sup> The Basic Law would serve as a “mini-constitution” for the Hong Kong SAR. It would define and regulate the domestic political system of Hong Kong as well as its constitutional relationship with the central government in Beijing. It also had to guarantee the continuation of Hong Kong’s existing laws, civil liberties and human rights, and social and economic systems. If the Basic Law were to achieve its objectives, it had to do even better than some of the previous constitutions of the PRC itself, which, in Loewenstein’s terminology (as discussed in section 2 of this article) were no more than “nominal” or “semantic” constitutions. If the constitutional

<sup>56</sup> See references cited in n 16 above, and Peter Wesley-Smith and Albert H.Y. Chen (eds), *The Basic Law and Hong Kong’s Future* (Hong Kong: Butterworths, 1988); Ming K. Chan and David J. Clark (eds), *The Hong Kong Basic Law* (Hong Kong: Hong Kong University Press, 1991).

experiment of “one country, two systems” was to work, the Basic Law had to become a “normative” constitution.

The drafting of the Basic Law was entrusted to a Drafting Committee appointed by Beijing consisting of both Mainland and Hong Kong members. At the same time, a Consultative Committee was set up in Hong Kong consisting of Hong Kong people elected from different sectors and walks of life.<sup>57</sup> The first draft of the Basic Law was published for public consultation in April 1988. After extensive discussion and debates, amendments were made and the second draft was published in February 1989. The final version was enacted by the National People’s Congress in April 1990.

The most controversial issues arising from the drafting of the Basic Law concerned how democratic the political system of the Hong Kong SAR was to be and how much power the central government in Beijing could exercise over Hong Kong.<sup>58</sup> As mentioned above, despite the growth of self-identification as “Hongkongers” among the post-War generations of Hong Kong people, there was by the early 1980s no political movement for either Hong Kong’s independence or reunification with China. When the Sino-British negotiations on Hong Kong’s future began in 1982, there was also no movement for Hong Kong’s self-determination or independence. There were two major schools of thought among the political and intellectual elite and leaders of public opinion at the time. One school supported and lobbied for the continuation of the status quo (ie British rule in Hong Kong). The other school supported the PRC’s proposal for Hong Kong’s reunification with China under the umbrella of “one country, two systems”, but insisted that autonomy for the Hong Kong SAR must be accompanied by democracy. In other words, while this school supported the principle of “Hong Kong people ruling Hong Kong”, it considered essential that those Hong Kong people ruling Hong Kong be elected freely and democratically by the people of Hong Kong.

The history of the drafting of the Basic Law was intertwined with that of political and constitutional reforms launched by the British Hong Kong Government. These proceeded in several stages.<sup>59</sup> In 1982, the District Boards – advisory bodies at local levels – were established consisting of members appointed by the Government as well members elected by universal suffrage. At the same time, the franchise for the existing Urban Council was broadened to become universal suffrage. Secondly, some of the seats in the Legislative Council – hitherto an entirely appointed body – were opened up for election for the first time in the colony’s history in 1985. The election was not however

<sup>57</sup> See references cited in n 16 above; and Emily Lau, “The Early History of the Drafting Process”, in Wesley-Smith and Chen (eds) (n 56 above), Ch 6.

<sup>58</sup> See references cited in n 56 above; and William McGurn (ed), *Basic Law, Basic Questions* (Hong Kong: Review Publishing Company, 1988).

<sup>59</sup> See references cited in n 8 above.

by universal suffrage. Instead, “functional constituencies” were created, such as the constituency of members of a chamber of commerce, the constituency of members of an industrialists’ federation, the constituency of banks, the constituency of trade unions, the constituency of lawyers, the constituency of doctors, the constituency of engineers, the constituency of teachers, etc. District Boards, the Urban Council and the newly created Regional Council could also elect members to the Legislative Council (LegCo).<sup>60</sup> In 1987, there was a great debate over whether in the 1988 election to LegCo, some seats should be opened up for direct election (ie by universal suffrage) on a district basis.<sup>61</sup> Pro-democracy politicians, intellectuals and civil society groups pushed hard for direct election in 1988. However, the Chinese Government, pro-China political forces in Hong Kong and many in the business community in Hong Kong harboured reservations about rapid democratisation in Hong Kong. It was argued that before the blueprint for Hong Kong’s post-1997 political system was unveiled by the Basic Law, the British Hong Kong Government should not unilaterally introduce a political system of its own design in Hong Kong and impose a *fait accompli* before the Basic Law was enacted. Ultimately, the Hong Kong Government adopted a compromised solution of not introducing direct election in 1988 but promising it for 1991.<sup>62</sup>

After the Tiananmen Incident of 4 June 1989, there was an upsurge in demands for democratisation in Hong Kong. The Basic Law, which was enacted in 1990, did not rule out direct election (by universal suffrage). Instead, it provides for the “gradual and orderly” democratisation of Hong Kong, and stipulates that the ultimate goal for the development of the political system of the Hong Kong SAR is the election of the Chief Executive and of all members of LegCo by universal suffrage.<sup>63</sup> However, this would not be possible immediately upon the establishment of the Hong Kong SAR in 1997. The first two Chief Executives of the SAR were to be elected by electoral colleges.<sup>64</sup> The number of LegCo members elected by universal suffrage would increase from 20 (out of 60) in the first LegCo of the SAR to 24 in the second and to 30 in the third. The remaining seats would be elected mainly (and

<sup>60</sup> See *White Paper: The Further Development of Representative Government in Hong Kong* (Hong Kong: Government Printer, Nov 1984).

<sup>61</sup> See *Green Paper: The 1987 Review of Developments in Representative Government* (Hong Kong: Government Printer, May 1987).

<sup>62</sup> See *White Paper: The Development of Representative Government: The Way Forward* (Hong Kong: Government Printer, Feb 1988).

<sup>63</sup> See Basic Law, Arts 45 and 68. Article 45 provides that candidates in the election of Chief Executive by universal suffrage must be “nominate[d] by a broadly representative nominating committee in accordance with democratic procedures”.

<sup>64</sup> For the method of establishing the first HKSAR Government, see The Decision of the National People’s Congress on the Method for the Formation of the First Government and the 1st Legislative Council of the Hong Kong Special Administrative Region, adopted by the 3rd Session of the 7th National People’s Congress on 4 Apr 1990.

completely in the third LegCo) by functional constituencies (and partly by an electoral college in the case of the first and second LegCos).<sup>65</sup>

The Basic Law (particularly as contrasted with the PRC Constitution itself) can be said to be liberal democratic in orientation. Ironically, there are interesting parallels between the Basic Law of the Hong Kong SAR and the ROC Constitution of 1946 (rather than the PRC Constitution itself), which as mentioned above is also a liberal democratic one. Both constitutional documents contain a bill of rights. Both allow for free and open competition for parliamentary seats in accordance with electoral rules of the game rather than one-party rule. Interestingly, the functional constituencies prescribed by the Basic Law find a parallel in the occupational constituencies provided for in the ROC Constitution which (together with geographical district constituencies) can elect some of the members of the National Assembly and the Legislative Yuan.<sup>66</sup> Also, as in the case of the ROC Constitution which provides for checks-and-balances between, for example, the President, the Premier of the Executive Yuan and the Legislative Yuan,<sup>67</sup> the Basic Law provides for checks-and-balances between the Chief Executive and the Legislative Council.<sup>68</sup> Ji Pengfei, Chairman of the Basic Law Drafting Committee, explained to the National People's Congress in 1990 that the executive and legislature of the Hong Kong SAR should both mutually cooperate with and mutually provide a check against one another.<sup>69</sup> This is reminiscent of what Sun Yat-sen said about the relationship between government organs in the five-Yuan constitutional system.<sup>70</sup> Thus the Basic Law provides that if the Chief Executive refuses to assent to a bill passed by the Legislative Council, he may return it to LegCo for reconsideration.<sup>71</sup> If LegCo then passes the original bill again by a two-thirds majority, the Chief Executive must either sign the bill into law or dissolve LegCo (Articles 49, 50).<sup>72</sup> If LegCo is dissolved and the re-elected LegCo against passes the bill by a two-thirds majority, the Chief Executive must either sign it or resign (Article 52).<sup>73</sup> These arrangements are comparable to those stipulated in Article 57(3) of the ROC Constitution. The Basic Law (Article 64) also provides that the executive is accountable to the legislature. This again is reminiscent of Article 57 of the ROC Constitution.

<sup>65</sup> See Basic Law, Annexes I and II.

<sup>66</sup> See ROC Constitution, Arts 26 and 64.

<sup>67</sup> ROC Constitution, Arts 39, 43, 55 and 57.

<sup>68</sup> Basic Law, Arts 49–52.

<sup>69</sup> *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Related Documents* (Hong Kong: Joint Publishing, 2007), pp 58 (Chinese version), 202 (English version).

<sup>70</sup> See Hu Fo (胡佛) et al, *The Constitution of the Republic of China and the Spirit Behind the Founding of the Nation* (中華民國憲法與立國精神) (Taipei: Sanmin, 1993), Ch 14.

<sup>71</sup> Basic Law, Art 49.

<sup>72</sup> Basic Law, Arts 49 and 50.

<sup>73</sup> Basic Law, Art 52.

The Basic Law was enacted in 1990, but it was only going to come into effect in 1997. The enactment of the Basic Law in 1990 did not however put an end to constitutional controversies in Hong Kong. In 1991, some of the seats in LegCo were opened to direct election by universal suffrage for the first time. The pro-democracy politicians, who had led the massive demonstrations in Hong Kong in support of the student movement in Beijing in 1989, won a landslide victory.<sup>74</sup> In 1992, the newly arrived Governor of Hong Kong, Christopher Patten, announced an ambitious plan for political reform in Hong Kong which involved a radical broadening of the franchise for the seats elected by functional constituencies (increasing the number of eligible voters in these constituencies from less than 100,000 to over two million).<sup>75</sup> The Chinese Government condemned the plan as being inconsistent with the Basic Law and the agreement reached in 1990 between the Chinese and British Governments over the political development in Hong Kong.<sup>76</sup> After 17 rounds of negotiation between the two governments from April to November 1993, the negotiations broke down.<sup>77</sup> Governor Patten then unilaterally put the bill for the reform to LegCo<sup>78</sup> which passed it by a narrow majority. The 1995 LegCo election was thus conducted in accordance with the new electoral scheme.<sup>79</sup> The Chinese Government responded by “establishing another stove”,<sup>80</sup> rescinding its previous consent (given tacitly in 1990) to LegCo elected in 1995 continuing as the first LegCo of the Hong Kong SAR in 1997, and arranging for the establishment of a Provisional Legislative Council in 1997 to take charge of Hong Kong legislative matters before the first LegCo could be elected in accordance with the Basic Law.<sup>81</sup>

Apart from the enactment of the Basic Law and the Patten political reform, the other major effort in constitution-making in Hong Kong was the enactment of the Hong Kong Bill of Rights Ordinance in 1991.<sup>82</sup> This legisla-

<sup>74</sup> See Lau Siu-kai and Louie Kin-sheun (eds), *Hong Kong Tried Democracy: The 1991 Elections in Hong Kong* (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, Chinese University of Hong Kong, 1993).

<sup>75</sup> See Alvin So (n 8 above), Ch 7.

<sup>76</sup> See Kaifang Zazhi She (Open Magazine Press) (ed), *The Struggle of the Century Between China and Britain: Collection of Articles on the Debate Regarding Patten's Political Reform Proposal* (中英世紀之爭：彭定康政改方案論戰集) (Hong Kong: Kaifang Magazine Press, 1994).

<sup>77</sup> See Lai Qizhi (賴其之) (ed), *The Negotiations Regarding Electoral Arrangements in Hong Kong in 1994–95* (關於香港 94–95 選舉安排問題會談的前前後後) (Hong Kong: Guangyu Press, 1994).

<sup>78</sup> See *Representative Government in Hong Kong* (Hong Kong: Government Printer, February 1994).

<sup>79</sup> See Kuan Hsin-chi et al. (eds), *The 1995 Legislative Council Elections in Hong Kong* (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, Chinese University of Hong Kong, 1996).

<sup>80</sup> See Lei Jingxuan, “Evaluation of the Progress and Expected Consequences of Beijing’s Strategy of ‘Establishing Another Stove’” (評估北京“另起爐灶”策略之進展與預期後果), in Tian Hongmao (田弘茂) (ed), *The 1997 Transition and Taiwan-Hong Kong Relations* (一九九七過渡與台灣關係) (Taipei: Yeqiang, 1996), Ch 10.

<sup>81</sup> See Kuan Hsin-chi et al. (eds), *Power Transfer and Electoral Politics: The First Legislative Election in the Hong Kong Special Administrative Region* (Hong Kong: Chinese University Press, 1999).

<sup>82</sup> See Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong: Butterworths Asia, 1993).

tive measure was part of the British Hong Kong Government's response to the crisis of confidence in Hong Kong arising from the 4 June incident in 1989. The Hong Kong Bill of Rights Ordinance translated into domestic law the provisions of the International Covenant on Civil and Political Rights (ICCPR) which Britain had already applied to Hong Kong in 1976. Corresponding amendments were made to the Letters Patent, Hong Kong's constitutional instrument.<sup>83</sup> The Government conducted an extensive review of all existing laws to identify which laws needed to be amended in order to bring them in line with the Bill of Rights, and a number of amendments were enacted.<sup>84</sup> Some new laws were also introduced to implement the Bill of Rights, such as laws on anti-discrimination and on the privacy of personal data.<sup>85</sup> Under the new constitutional regime, Hong Kong courts were empowered to review and if necessary to strike down laws and administrative actions that are inconsistent with the human rights guarantees in the Hong Kong Bill of Rights or the ICCPR. Since 1991, a body of case law has developed in which the Hong Kong courts have exercised this power of constitutional review,<sup>86</sup> a power available to CGJ under the ROC Constitution since 1947. After 1997, the courts of Hong Kong have interpreted Article 39 of the Basic Law (on the continued application of the ICCPR in Hong Kong) in such a manner as to preserve the courts' power of constitutional review.<sup>87</sup> Indeed, this review power has since 1997 been extended to laws or actions which contravene provisions of the Basic Law other than the human rights guarantees in the ICCPR.

When the Sino-British Joint Declaration was concluded in 1984 and Hong Kong entered the era of rising consciousness of rights, the rule of law and democracy and of heated debates on how the Basic Law should be drafted and what Hong Kong's future constitutional order should be, Taiwan was still in the era of authoritarianism. In the late 1970s and early 1980s, under the presidency of Chiang Ching-kuo, dissidents were still subject to persecution,

<sup>83</sup> These amendments sought to ensure that the laws of Hong Kong would be consistent with the human rights standards set out in the ICCPR. See Andrew Byrnes and Johannes Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Hong Kong: Butterworths, 1993).

<sup>84</sup> See Andrew Byrnes, "And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights", in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 2000), Ch 9 (p 318), at pp 342–348.

<sup>85</sup> For example, the Personal Data (Privacy) Ordinance (Cap 486), Sex Discrimination Ordinance (Cap 480), Disability Discrimination Ordinance (Cap 487) etc.

<sup>86</sup> See Byrnes (n 84 above); Yash Ghai, "Sentinels of Liberty or Sheep in Wolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights" (1997) 60 *Modern Law Review* 459; Albert H.Y. Chen, "The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives" (2000) 30 *HKLJ* 380 at 418–420.

<sup>87</sup> Important cases on this issue include *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442; *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480; *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, [2005] 3 HKLRD 164. Cases decided by Hong Kong courts discussed in this article are available at the website of Hong Kong judiciary: <http://legalref.judiciary.gov.hk>. See generally Albert H.Y. Chen, "Constitutional Adjudication in Post-1997 Hong Kong" (2006) 15 *Pacific Rim Law & Policy Journal* 627.

prosecution and imprisonment, and anti-government publications were still suppressed.<sup>88</sup> For example, the “Kaohsiung Incident” of 1979 resulted in more than a hundred dissidents being arrested and tens of them convicted and imprisoned.<sup>89</sup> Despite periodic crackdowns, the political opposition (then called the “Tang-wai”, which literally means “outside the Party (ie the Kuomintang)”) was gaining in strength. So was civil society, with many social movements emerging and campaigning on issues such as labour, environment, consumers’ rights, women’s rights, etc.<sup>90</sup> With the establishment of full diplomatic relationship between the PRC and the USA in 1979 and the US de-recognition of the Taipei ROC regime, Taiwan’s isolation in the international community was growing more serious than ever before. The discussion about “one country, two systems” in Hong Kong and the examples of democratisation in the Philippines and South Korea probably also had some impact upon Taiwan at the time. The Chiang Ching-kuo regime ultimately decided to embark upon the road of political reform. Thus unlike the constitutional movements in Hong Kong in the 1980s which flowed from the joint decision of the PRC and Britain to change Hong Kong’s future status, constitutional reform in Taiwan in the 1980s was initiated by the government in Taiwan itself. Nevertheless, the role of the opposition political forces should not be under-estimated. Without their efforts, Taiwan’s liberalisation and democratisation would not probably have come in the way they did.

The reforms were launched by Chiang Ching-kuo not long before his death.<sup>91</sup> In March 1986, Chiang established a committee to look into issues of political reform.<sup>92</sup> In September 1986, the Democratic Progressive Party (DPP) was formed in defiance of the existing law under which the formation of new political parties was prohibited. However, the Government decided not to take action against it. In July 1987, the martial law decree that had been in force in Taiwan since May 1949 was lifted. This was followed by the loosening of the existing restrictions on the formation of political parties, on freedom of the press and of publication and on assemblies and demonstrations.<sup>93</sup> The termination of the martial law decree and the many regulations and orders promulgated as part of the martial law regime resulted in a dramatic liberalisation of the political domain in Taiwan. Voices for freedom,

<sup>88</sup> Roy (n 6 above), Ch 6; Ito (n 6 above), pp 310–316.

<sup>89</sup> See *The Kaohsiung Incident* (高雄事件專輯) (New York: Editorial Committee for the Special Collection on the Kaohsiung Incident, 1980).

<sup>90</sup> See Chang Mau-kuei (張茂桂), “Civil Society, Resource Mobilization, and New Social Movement: Theoretical Inclinations for the Study of Social Movements in Taiwan” (民間社會、資源動員與新社會運動——臺灣社會運動研究的理論志向), (1994) 4 *Hong Kong Journal of Social Sciences* (香港社會科學學報) 33.

<sup>91</sup> See references cited in n 9 above.

<sup>92</sup> Chao and Myers (n 9 above) at 143.

<sup>93</sup> See Chao and Myers (n 9 above) at 152–168; Chen Xinmin (陳新民), *On the Rule-of-Law State* (法治國家論) (Taipei: Xuclin Culture, 2001) at 229ff.

democracy and reform could be heard more loudly than ever before. Rather suddenly, the level of civil liberties in Taiwan rose to a level close to that in Hong Kong, though under the new National Security Law (1987) promulgated at the same time as the lifting of martial law, advocacy of communism and of secession in assemblies or by civic associations was still prohibited.

In January 1988, Chiang Ching-kuo died, and Vice-President Lee Teng-hui succeeded to the Presidency. There were power struggles within the Kuomintang (KMT) but Lee won and became chairman of the KMT in July 1988. When his term of office as President for the remaining term of Chiang's presidency expired in 1990, the National Assembly elected him as President for another term (1990 to 1996). With his political power secured, Lee embarked upon the task of constitutional reform. However, under the ROC Constitution, the National Assembly was the only state organ with the power to amend the Constitution. As of 1990, three-fourths of the seats in the National Assembly (766 out of 979) were still occupied by senior members elected from the whole of China in 1947<sup>94</sup> who were allowed to stay in office indefinitely on the pretext that it was impossible to hold any election in mainland China (the remaining members being elected in Taiwan itself in accordance with the amended Temporary Provisions mentioned above). Similarly, senior members elected four decades ago still occupied the majority of the seats in the Legislative Yuan and the Control Yuan. Although a law to encourage the voluntary retirement of these senior representatives was passed in 1989, some of them still resisted the idea of retirement. The issue of the retirement of senior members of the parliamentary institutions was referred to the CGJ in 1991. In the most important decision ever made by the CGJ, the GGJ in Interpretation No 261 (21 June 1990) declared that due to a change in situation, Interpretation No 31 was no longer applicable, and required all senior members of the parliamentary institutions to retire by 31 December 1991 so that new elections could be held for all the seats in the parliamentary institutions. This deadline in fact coincided with that stipulated in the government's proposal for the retirement of the senior members.<sup>95</sup>

Although Interpretation No 261 contemplated new elections and even required that some of the seats should be reserved for "national representatives" (ie representing the Republic of China as a whole rather than just Taiwan), it did not address the constitutional mechanism for the purpose of achieving this. Issues of constitutional reform were discussed in the National Affairs Conference convened by President Lee in June/July 1990.<sup>96</sup> The most

<sup>94</sup> See Wen-Chen Chang, *Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective* (JSD dissertation, Yale Law School, 2001), pp 340, 359–360.

<sup>95</sup> *Ibid.*, p 365. See also Li Nianzu (李念祖), *Constitutional Law Cases I: Constitutional Principles and Fundamental Human Rights* (案例憲法I: 憲法原理與基本人權概論) (Taipei: Sanmin, 2002), pp 52–62.

<sup>96</sup> See Chao and Myers (n 9 above), Ch 9; Chiu (n 21 above), pp 34–37; Chiou (n 35 above), Ch 7.

important issue was whether constitutional reform should proceed by way of amending the Temporary Provisions, or abolishing the Temporary Provisions and replacing them by other amendments to the Constitution, or enacting an entirely new constitution. The making of a new constitution for Taiwan was advocated by the DPP.

The KMT government ultimately decided to embark upon a two-stage process for constitutional reform.<sup>97</sup> The first stage was to be undertaken by the existing National Assembly before the retirement of the senior members by the end of 1991 as required by the CGJ. This stage would only involve the abolition of the Temporary Provisions and the making of new provisions for the election of the parliamentary institutions. The second stage was to be conducted by the new National Assembly to be elected in December 1991, which would then deal with substantive revisions to the constitution. The KMT government also made the crucial decision that the constitutional reform would leave the text of the ROC Constitution intact. While the Temporary Provisions were to be abolished, new amendments to the ROC Constitution would take the form of Additional Articles appended to the Constitution rather than the substitution of specific provisions in the text of the Constitution. Thus the continuity and identity of the ROC regime would be preserved to the maximum extent in the midst of constitutional reform.

Accepting the constitutional authority of the CGJ and abiding by its Interpretation No 261, the National Assembly proved to be cooperative and duly enacted 10 Additional Articles to the Constitution in April 1991 in the first stage of the constitutional reform. At the same time, the Temporary Provisions were abolished and the "Period of National Mobilization to Suppress the Communist Rebellion" came to an end. The first-ever election to all the seats of the (second-term) National Assembly was duly held in December 1991. In this election, the KMT achieved a landslide victory against the DPP (which advocated Taiwanese independence) and won more than three quarters of the seats (which was the majority required to pass constitutional amendments).<sup>98</sup> The second-term National Assembly proceeded to the second stage of constitutional reform. In 1992, eight Additional Articles were enacted. The roles of the Control and Examination Yuans in the five-Yuan constitutional system were re-defined; the term of office of the President was changed to four years. One of the most important provisions in the new Additional Articles was that when the term of office of the current President expired in 1996, the next President was to be elected by the people of Taiwan. However, it was not settled whether the President was to be elected

<sup>97</sup> See Chen (n 19 above) at 943–947; Chiu (n 21 above), pp 37–39.

<sup>98</sup> See Chiu (n 21 above), pp 41–42; Chao and Myers (n 9 above) at 245–248; Roy (n 6 above), pp 256–258.

directly by universal suffrage, or indirectly through an electoral college. There was still a difference of opinion within the KMT on this issue, though the DPP preferred direct election which would promote the collective identity of the people of Taiwan.<sup>99</sup>

Upon the election of the National Assembly in December 1991 and the election of the Legislative Yuan in December 1992 both by universal suffrage, Taiwan could be said to have achieved a degree of democratisation that not only surpasses what Hong Kong achieved in the 1990s but also surpasses what is possible under the Hong Kong Basic Law before the ultimate destination of universal suffrage for the election of all the seats in the legislature is achieved at an indefinite future point of time. Just as the liberalisation of the late 1980s enabled Taiwan to catch up with Hong Kong in the domain of civil liberties where Taiwan had lagged behind Hong Kong for decades, the democratisation of the early 1990s was so rapid that it put Taiwan at least two decades ahead of Hong Kong in terms of democracy (as Beijing had in 2004 ruled out direct election to all the seats in the Hong Kong legislature in 2008,<sup>100</sup> the earliest possible time at which this may be achieved is now 2012, but judging from the present political climate it is unlikely that this will be achieved in Hong Kong in 2012).

The constitutional amendments of 1991 and 1992 were however only the beginning of the process of gradual, peaceful and incremental constitutional change in Taiwan in the 1990s which has achieved what has been called a “silent revolution”.<sup>101</sup> A third constitutional amendment was introduced by the second-term National Assembly in 1994. The fourth, fifth and sixth constitutional amendments were introduced by the third-term National Assembly (elected in 1996) in 1997, 1999 and 2000 (the 1999 amendment being struck down by the CGJ). The last and seventh amendment was introduced in 2005 by a National Assembly specially elected for the purpose.<sup>102</sup>

The most important provision in the third amendment in 1994<sup>103</sup> was on the direct election of the President by universal suffrage in Taiwan as from 1996. The amendment also reorganised and consolidated the 18 Additional Articles introduced in 1991/1992 into 10 Additional Articles. Presidential power was enhanced to some extent by this amendment. The fourth

<sup>99</sup> See Chiu (n 21 above), pp 42–44; Chao and Myers (n 9 above), Ch 11; Roy (n 6 above), pp 259–260.

<sup>100</sup> See Albert H.Y. Chen, “The Constitutional Controversy of Spring 2004” (2004) 34 HKLJ 215; Johannes Chan and Lison Harris (eds), *Hong Kong’s Constitutional Debates* (Hong Kong: Hong Kong Law Journal Limited, 2005).

<sup>101</sup> Many commentators used this term. See, eg, Li Denghui (李登輝), *Taiwan’s Opinions* (臺灣的主張) (Taipei: Yuanliu, 1999), pp 162–163; Ye (n 24 above), pp 17, 255, 259, 267.

<sup>102</sup> For an overview of various constitutional amendments and general comments, see Chen (n 19 above), s 48.

<sup>103</sup> See Li Bingna (李炳南), *Uncertain Constitutionalism: The Third Stage of Constitutional Reform* (不確定的憲政：第三階段憲政改革之研究) (Taipei: Yangzhi, 1998).

amendment in 1997, enacted by a new National Assembly in which the KMT no longer controlled a three quarters majority, was based on consensus arrived at between the KMT and the DPP in the second National Affairs Conference in 1996.<sup>104</sup> It is highly significant in moving the existing political system (which was a hybrid system with features of both parliamentary and presidential systems) closer to a presidential system. The amendment also abolished popular elections to the office of the Governor of the Taiwan Province (introduced by the 1992 constitutional amendment) so that the original distinction between the central government of the ROC and the provincial government of Taiwan loses significance. The fifth amendment was also intended to implement bipartisan consensus<sup>105</sup> – this time on the diminution of the significance of the National Assembly relative to the Legislative Yuan. The amendment suffered from procedural defects and substantive unreasonableness and was struck down by the CGJ (in Interpretation No 499 in March 2000).<sup>106</sup> The National Assembly hastily responded by introducing the sixth amendment in April 2000 which effectively abolished the National Assembly as a standing institution when the term of the third-term Assembly expired. Finally, the seventh and last amendment to date in June 2005 completely abolished the National Assembly and transferred its power of constitutional amendment to the Legislative Yuan acting jointly with the people at a referendum.

In 1997, Hong Kong came under a new constitutional order governed by the Basic Law of the Hong Kong SAR. By the time the fourth amendment to the ROC Constitution was passed in Taiwan in the same year, a new constitutional order had also come into existence in Taiwan. In both constitutional orders, elements of the old and the new co-existed, both “backward legality” and “forward legitimacy”<sup>107</sup> were strangely intertwined, and both continuity and change were skilfully integrated. Although the Hong Kong Basic Law is a new creation, it attempts to preserve Hong Kong’s pre-existing laws, social and economic systems, and even to some extent its semi-democratised political system. Although the text of the old ROC Constitution has been left intact and still constitutes the foundation of the constitutional order in Taiwan, the Additional Articles grafted on to it have breathed a completely new life into it, and have been adapted to become a constitution for the operation of a government of, by and for the people of Taiwan.

<sup>104</sup> See Roy (n 6 above), pp 280–282; Jih-wen Lin, “Transition through Transaction: Taiwan’s Constitutional Reforms in the Lee Teng-hui Era” (2002) 20 *American Asian Review* 123, 148–150.

<sup>105</sup> See Lin, *ibid.*, pp 150–152.

<sup>106</sup> See Li (n 95 above), pp 66–95, 177–209.

<sup>107</sup> These two concepts are borrowed from Chang Wen-chen, *Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective* (unpublished SJD dissertation, Yale, 2001), pp 354, 412, 518, which draw on Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: Johns Hopkins University Press, 1996).

#### 4. Constitutional Interpretation in Hong Kong and Taiwan

An important component of the practice of constitutionalism is the interpretation and implementation of the constitutional text. Although government agencies and officials and the legislature are actually involved in the interpretation and implementation of the constitution in their daily activities, in most legal systems the courts of law or constitutional courts are the most authoritative interpreters of the constitution, and the constitutional jurisprudence they develop through the accumulation of case law enables the text of the constitution to be enriched and adapted to the changing needs of society. Thus if a constitution may be conceived of as a living tree, the judiciary as authoritative interpreters of the constitution are largely responsible for the healthy growth of the tree. It is therefore right that the judiciary is often referred to as the guardian of the constitution. This guardianship role has been consciously assumed by courts in both Hong Kong and Taiwan in the last one to two decades.

A comparative study of the cases or (in the case of Taiwan) interpretations decided by the courts (or the CGJ in the case of Taiwan) in Hong Kong and Taiwan can reveal much about the practice of constitutionalism in these territories. However, before any such study is undertaken, the difference in the institutional structure of the system of constitutional review and interpretation in the two territories should be borne in mind. Hong Kong's system of constitutional review is similar to that in common law jurisdictions with a written constitution such as Australia, India, Canada and the USA.<sup>108</sup> Constitutional review is decentralised in the sense that any court in the judicial system may in the course of deciding a case before it review whether a law, regulation or administrative action relevant to the case is constitutional and valid. Taiwan under the ROC Constitution practices centralised constitutional review. Only the CGJ may perform the task of constitutional review.<sup>109</sup> Historically speaking,<sup>110</sup> at first the review may only be initiated by a government organ petitioning to the CGJ. The Law on the Council of Grand Justices of the Judicial Yuan enacted in 1958 made it possible for individual citizens

<sup>108</sup> See Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971); Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989).

<sup>109</sup> Arguably ordinary courts also engage in constitutional review to some extent, when they decide to apply a law which they consider to be consistent with the Constitution, or decide to refer the question of whether a law is constitutional to the CGJ. However, ordinary courts may not refuse to apply a law in a case on the ground that it is unconstitutional. For an overview of the system of constitutional review in Taiwan, see Lin Ziyi (林子儀) et al, *Constitutional Law – Separation of Powers (憲法——權力分立)* (Taipei: Xuelin Culture, 2003), Ch 2; Li Nianzu (李念祖), *Constitutional Law Cases II: The Procedure of Human Rights Protection (案例憲法II：人權保障的程序)* (Taipei: Sanmin, 2003), pp 94–167.

<sup>110</sup> See *Materials on the History of Constitutional Interpretation by the Grand Justices (大法官釋憲史料)* (Taipei: Judicial Yuan, 1998).

to petition for a constitutional interpretation after they have exhausted all other legal remedies. The Law on the Procedure of Adjudication of the Council of Grand Justices of the Judicial Yuan enacted in 1993 further broadened the categories of petitioners for review to include, for example, legal entities other than natural persons, and one-third of the members of the Legislative Yuan acting jointly. Various interpretations made by the CGJ itself have also had the effect of broadening access to the CGJ (eg judges in lower courts may refer constitutional issues arising from cases being heard by them to the CGJ and suspend the proceedings in the cases concerned pending the CGJ's interpretation<sup>111</sup>) and of expanding the scope of subject matter that it may review (eg to include precedent cases of other courts<sup>112</sup>).

Apart from the question of which court has the power of constitutional review and interpretation, there are other important differences between the system of constitutional review in Hong Kong and Taiwan. In Hong Kong, it is not possible for anyone to petition for constitutional interpretation as such. A constitutional issue may only be dealt with by a court if it arises in the context of a particular case (or, to use American terminology, a "case or controversy") (eg a criminal case, a civil case, or a case involving judicial review of administrative action). In Taiwan, a government organ or (after 1993) one-third of the members of the Legislative Yuan may petition the CGJ requesting it to exercise its power of constitutional interpretation even if no case has arisen in which a law alleged to be unconstitutional is being applied. Thus the system in Taiwan is known as abstract constitutional review (as distinguished from concrete constitutional review).<sup>113</sup> Secondly, where a law or regulation is challenged as unconstitutional, the CGJ may only declare in the abstract whether the impugned provision is unconstitutional or interpret the meaning of the relevant provisions in the Constitution. It has no power to decide on how a particular law or provision in the Constitution should be applied to the facts of a particular case.<sup>114</sup> On the other hand, in Hong Kong, the primary task of the court in deciding a case involving constitutional law is to decide the case itself (eg whether the accused in a criminal case is guilty as charged, whether an applicant for judicial review succeeds in having an administrative action quashed, whether the plaintiff in a civil case wins and is awarded damages), and the task of determining the constitutionality of a law or administrative action is only incidental to that of deciding the case itself.

<sup>111</sup> See the CGJ's Interpretations Nos 371 (1995) and 572 (2004). The CGJ's Interpretations discussed in this article are available at its website: <http://www.judicial.gov.tw/constitutionalcourt>.

<sup>112</sup> See, eg, the CGJ's Interpretations Nos 153 (1978), 154 (1978), 177 (1982), 185 (1984), 375 (1995).

<sup>113</sup> See references cited in n 109 above.

<sup>114</sup> Lin (n 109 above), p 39.

In one sense, the range of constitutional cases considered by the Taiwan CGJ is broader than that considered by the Hong Kong courts, and yet in another sense it is narrower. It is broader in the sense that constitutional issues may be raised in the abstract even if no concrete “case or controversy” has arisen in which the issues are raised. A purely “academic” question regarding whether a provision in a law is unconstitutional or how a provision in the Constitution should be interpreted may be brought before the CGJ by, for example, one-third of the legislators.<sup>115</sup> Furthermore, upon a petition for interpretation, the actual interpretation made by the CGJ need not be confined to the legal issues raised by the petition, but the CGJ may on its own initiative deal with other related issues on which it considers appropriate to express its views authoritatively in the form of a constitutional interpretation.<sup>116</sup> On the other hand, as far as petitions by individuals are concerned (individuals may petition the CGJ after other remedies have been exhausted), only a small proportion of such petitions are actually entertained by the CGJ and decided upon in the form of a constitutional interpretation. The great majority of individuals’ petitions are dismissed without any interpretation being issued one way or the other.<sup>117</sup> This can be contrasted with the Hong Kong system, under which if a constitutional issue is raised in a case being tried before a court and the issue is relevant to the case, the court must pronounce judgment on the issue.

This article will consider the actual record of constitutional cases or interpretations in Hong Kong and Taiwan. As mentioned above, until the enactment of the Hong Kong Bill of Rights Ordinance in 1991, Hong Kong’s colonial constitution was rudimentary and contained few provisions on rights or on checks and balances as between government organs. There was thus little scope for constitutional litigation. The leading pre-Bill of Rights cases on Hong Kong constitutional law involved issues such as (a) whether proceedings on a bill introduced in the Legislative Council should be stopped because, given the subject matter of the bill, its introduction violated the provisions of the Royal Instructions (being part of Hong Kong’s colonial constitution),<sup>118</sup> (b) whether a law and related government action affecting land

<sup>115</sup> See, eg, the CGJ’s Interpretation No 328 (1993) on the question of the meaning or scope of “the territory” of the ROC under the ROC Constitution. The CGJ, relying on the “political question doctrine”, declined to answer the question. See Li (n 109 above) at 168–181. Other examples include Interpretations Nos 76 (1957) and 364 (1994).

<sup>116</sup> See, eg, the CGJ’s Interpretation No 445 (1998). See also Thomas Weisheng Huang, “Judicial Activism in the Transitional Polity: The Council of Grand Justices in Taiwan” (2005) 19 *Temple International and Comparative Law Journal* 1, 29 (n 181) and 53.

<sup>117</sup> For statistics about the CGJ, including the number of petitions and interpretations, see *Materials on the History of Constitutional Interpretation by the Grand Justices* (n 110 above) at 477–511; Wen-Chen Chang, “The Role of Judicial Review in Consolidating Democracies: The Case of Taiwan” (2005) 2 *Asia Law Review* 73.

<sup>118</sup> *Rediffusion v Attorney General* [1970] AC 1136.

rights in the New Territories was invalid because it was contrary to the provisions of the treaty by which the New Territories were leased to Britain,<sup>119</sup> (c) whether the appointment of magistrates was invalid because the appointment was made by the Chief Justice purportedly under power delegated to him by the Governor whereas (it was argued that) there had not been any valid and effective delegation under the colonial constitution,<sup>120</sup> and (d) whether the Government had the lawful authority under the Civil Service Regulations and Colonial Regulations to suspend without pay civil servants who went on strike.<sup>121</sup> These cases illustrate that though the scope for constitutional litigation was limited under the colonial constitution, the rule of law was taken seriously and litigants were willing to take matters to the courts (whose independence they had confidence in) and to challenge government actions as unconstitutional. This is not to mention that even before the enactment of the Bill of Rights in 1991,<sup>122</sup> there was a long tradition of administrative law litigation in Hong Kong in which citizens challenged (sometimes successfully and sometimes not) administrative actions as unlawful or challenged subordinate legislation enacted by officials or organs acting under delegated power as *ultra vires* (ie outside the scope of the power conferred by) the relevant primary legislation (which provided for the delegation) and thus null and void.

The enactment of the Hong Kong Bill of Rights Ordinance in 1991 inaugurated a new era of constitutional judicial review in Hong Kong.<sup>123</sup> Before this time, although Hong Kong courts had in theory the power to strike down legislation enacted by the local legislature on the ground that it was contrary to the Letters Patent or other constitutional limitations on the power of the colonial legislature, in practice no legislation had been struck down, because there was little substantive content in the Letters Patent that could be used to challenge legislation. After 1991, legislation could be challenged on Bill of Rights grounds. The most celebrated case before the 1997 handover in which the power of constitutional judicial review was exercised by the Hong Kong courts was the case of *R v Sin Yau-ming*<sup>124</sup> decided by the Court of Appeal in 1991. This case concerned the constitutional validity of a presumption for the purpose of the law of evidence contained in the Dangerous Drugs Ordin-

<sup>119</sup> *Winfat Enterprise v Attorney General* [1983] HKLR 211.

<sup>120</sup> *Attorney General v David Chiu Tat-cheong* [1992] 2 HKLR 84.

<sup>121</sup> *Lam Yuk-ming v Attorney General* [1980] HKLR 815.

<sup>122</sup> See Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (n 15 above), Chs 16–18; Jayawickrama (n 43 above); David Clark, *Hong Kong Administrative Law* (Singapore: Butterworths, 1989). On Hong Kong administrative law after the enactment of the Bill of Rights, see Peter Wesley-Smith, *Constitutional and Administrative Law* (Hong Kong: Longman Asia, 1995), Chs 8–9; David Clark and Gerard McCoy, *Hong Kong Administrative Law* (Hong Kong: Butterworths, 2nd edn, 1993).

<sup>123</sup> See Chan and Ghai (eds) (n 82 above); Albert H.Y. Chen, “The Interpretation of the Basic Law” (2000) 30 *HKLJ* 380, 417–420.

<sup>124</sup> (1991) 1 *HKPLR* 88, [1992] 1 *HKCLR* 127.

ance. The presumption was that if the accused was found in possession of a specified amount (0.5 grams) of dangerous drugs, it would be presumed that they possessed it for the purpose of trafficking (possession for the purpose of trafficking was a more serious crime than mere possession) unless they could prove otherwise. The court referred extensively to overseas jurisprudence (particularly Canadian jurisprudence) – which was a rare practice in the past when Hong Kong courts relied almost exclusively on English and Hong Kong case law – and struck down the presumption as contrary to the presumption of innocence in the Bill of Rights and the ICCPR. Since this case, other similar presumptions in Hong Kong legislation placing the onus to disprove certain presumed facts on the accused have also been challenged and sometimes struck down. Most cases on the Bill of Rights were in the domain of criminal law and procedure. Other leading cases have touched upon the freedom of the press, the freedom of assembly, the right to vote, and the right to stand as a candidate in an election.<sup>125</sup>

On 1 July 1997, Hong Kong was reunified with China and became a Special Administrative Region of the PRC. The Basic Law came into force. As mentioned above, the implementation of the Basic Law actually broadened the scope for constitutional litigation in Hong Kong and enhanced the role of the Hong Kong judiciary – now led by the newly established Court of Final Appeal which replaced the Privy Council in London as the top appellate court in Hong Kong<sup>126</sup> – as guardian of the constitution or the Basic Law. Rights that were enshrined in the Basic Law itself but not in the Hong Kong Bill of Rights or the ICCPR came to be litigated for the first time before the Hong Kong courts. These newly litigated rights include, for example, the right of abode in Hong Kong,<sup>127</sup> the right to travel,<sup>128</sup> the right of indigenous inhabitants in the New Territories,<sup>129</sup> and the right of civil servants not to be subject to terms of service less favourable than before.<sup>130</sup> As regards rights

<sup>125</sup> See Byrnes (n 84 above); Ghai (n 86 above); Johannes M.M. Chan, “Hong Kong’s Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence” (1998) 47 *ICLQ* 306.

<sup>126</sup> See the Basic Law, Arts 81–82 and the Hong Kong Court of Final Appeal Ordinance (Cap 484). For the background to the establishment of the Court of Final Appeal, see Lo Shiu Hing, “The Politics of the Debate over the Court of Final Appeal in Hong Kong” (2000) 161 *China Quarterly* 221.

<sup>127</sup> The most celebrated cases were the twin decisions of the Court of Final Appeal (CFA) on 29 Jan 1999 in *Ng Ka-ling v Director of Immigration* (1999) 2 HKCFAR 4, [1999] 1 HKLRD 315 and *Chan Kam-nga v Director of Immigration* (1999) 2 HKCFAR 82, [1999] 1 HKLRD 304. The Court of Final Appeal’s interpretations of two relevant provisions in the Basic Law in these cases were subsequently overruled (prospectively and without the litigants in these cases being affected) by the Standing Committee of the National People’s Congress in exercise of its power to interpret the Basic Law under Art 158, upon the request of the Hong Kong SAR Government. See Johannes M.M. Chan, H.L. Fu and Yash Ghai (eds), *Hong Kong’s Constitutional Debate: Conflict over Interpretation* (Hong Kong: Hong Kong University Press, 2000).

<sup>128</sup> See, eg, *Bahadur* (n 87 above); *Official Receiver v Chan Wing Hing* (2006) 9 HKCFAR 545, [2006] 3 HKLRD 687.

<sup>129</sup> See, eg, *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459.

<sup>130</sup> See, eg, *Secretary for Justice v Lau Kwok Fai* (2005) 8 HKCFAR 304; [2005] 3 HKLRD 88.

which were already constitutionally entrenched before 1997, the Hong Kong courts have also decided landmark cases on them after 1997, including cases on freedom of expression,<sup>131</sup> freedom of assembly,<sup>132</sup> the right to political participation,<sup>133</sup> the right to equality and non-discrimination,<sup>134</sup> the liberty of the person<sup>135</sup> and due process,<sup>136</sup> the right not to be subject to cruel and inhuman punishment,<sup>137</sup> and, most recently, the right to privacy and freedom from surveillance.<sup>138</sup>

In the case of Taiwan, the system of constitutional review was developed several decades earlier than in Hong Kong, as the ROC Constitution of 1946 contained elaborate provisions on separation of powers, checks-and-balances and the protection of human rights, and established a constitutional court (the CGJ) for the purpose of interpreting them. Although the CGJ did not actually declare any law or regulation unconstitutional until 1980<sup>139</sup> (except that in Interpretation No 86 in 1960 it hinted that the arrangement whereby the lower courts were administratively under the Ministry of Justice of the Executive Yuan rather than the Judicial Yuan was unconstitutional, but the interpretation was ignored by the Government<sup>140</sup>) and did not effectively invalidate any law or regulation<sup>141</sup> until 1986,<sup>142</sup> it had steadily built up a body of jurisprudence on matters such as the separation of powers and gradually consolidated its position and authority in the legal and political system. The extraordinary potential of this latent institutional capacity and capital was revealed in Interpretation No 261 in the grand historical moment of constitutional reform as discussed above. In fact, even before this interpretation, the CGS had already started to become activist with the liberalisation of the political climate in the late 1980s.

After Interpretation No 261 in which the CGJ proved to be able to play a crucial role in facilitating Taiwan's political and constitutional transformation, the "golden age" arrived for the CGJ's role in promoting legal reform,

<sup>131</sup> See, eg, *HKSAR v Ng Kung Siu* (n 87 above).

<sup>132</sup> See, eg, *Leung Kwok Hung v HKSAR* (n 87 above).

<sup>133</sup> *Chan Shu Ying v Chief Executive of the HKSAR* [2001] 1 HKLRD 405.

<sup>134</sup> See, eg, *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690.

<sup>135</sup> See, eg, *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381.

<sup>136</sup> See *Stock Exchange of Hong Kong Limited v New World Development Company Limited* (2006) 9 HKCFAR 234; [2006] 2 HKLRD 518.

<sup>137</sup> *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415.

<sup>138</sup> *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441; [2006] 3 HKLRD 455. See also text accompanying nn 165 and 167 below. See generally Chen (n 87 above).

<sup>139</sup> See the CGJ's Interpretation No 166 (1980). In this Interpretation, CGJ hinted that provisions in the Law on Offences Punishable by the Police which provided for punishments involving restrictions on the liberty of the person was unconstitutional. See text accompanying n 150 below.

<sup>140</sup> See Ye (n 24 above) at 278; Chang (n 94 above) at 234–236.

<sup>141</sup> See Ye (n 24 above) at 282; Chang (n 94 above) at 307–308.

<sup>142</sup> See the CGJ's Interpretation No 210 (1986); Lawrence Shao-liang Liu, "Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan" (1991) 39 *American Journal of Comparative Law* 509, 535–536. Interpretation No 166 was not effective as it was ignored by the Government.

enhancing human rights, dismantling the authoritarian institutions of the past and arbitrating the political conflicts within the revitalised political system that was no longer controlled by a strongman or single political party. Partly because the CGJ is a specialised agency for constitutional interpretation and its jurisdiction can be exercised in the abstract in the absence of any case or controversy, partly because Taiwan (with a population of 23 million) is a larger society than Hong Kong (with a population of seven million), and partly because of the different legal, political and social environments in the two societies, the number of constitutional interpretations by the CGJ far surpasses the number of constitutional cases in Hong Kong.

One area of the law in Taiwan that has been reformed as a result of a series of interpretations by the GGJ concerns the doctrine of special power relationships inherited from Weimar Germany. This doctrine restricted, for example, the right of civil servants to sue the government or the right of students to sue the school. Starting from the mid-1980s, the CGJ in a series of interpretations<sup>143</sup> did much to dismantle this doctrine. In Hong Kong, which practices the common law and has no specialised system of administrative courts, there was never any legal principle equivalent to the doctrine of special power relationship.

Another series of interpretations,<sup>144</sup> also beginning in the mid-1980s but maturing in the 1990s, involved the rigorous application of the doctrine of legislative reservation which was derived from German law. In the past, much of Taiwan's legal norms were contained in administrative regulations, decrees or orders promulgated by government agencies in pursuance of laws that were drafted in vague terms and conferred on executive organs broad or unfettered discretion. By applying strictly the doctrine of legislative reservation, the CGJ has in the 1990s established that where constitutional rights (that may be restricted by law) are affected by administrative instruments (such as instruments authorising the imposition of administrative sanctions), the latter are only valid if they are enacted in pursuance of a law that clearly and specifically authorises the administrative agency concerned to promulgate an administrative instrument on the relevant subject matter and of the relevant scope. In the case of Hong Kong, although there is no doctrine of legislative reservation, the application of the doctrine of *ultra vires* in the review of subordinate legislation (promulgated by administrative agencies in pursuance of power conferred by primary legislation enacted by the legislature) has a similar effect.<sup>145</sup> The CGJ has identified in Article 23 of the Constitution the basis

<sup>143</sup> See, eg, the CGJ's Interpretations Nos 187 (1984), 201 (1986), 243 (1989), 295 (1992), 298 (1992), 312 (1993), 323 (1993), 382 (1995), 430 (1997).

<sup>144</sup> See, eg, the CGJ's Interpretations Nos 210 (1986), 217 (1987), 268 (1990), 313 (1993), 367 (1994), 394 (1996), 443 (1997), 566 (2003), 567 (2003).

<sup>145</sup> See n 122 above.

for the doctrine of legislative reservation.<sup>146</sup> Article 23 provides that constitutional rights may not be restricted by law except where necessitated by certain specified grounds (such as the maintenance of social order, promotion of the public interest, etc). It is interesting to note that Article 23 finds a parallel in Article 39 of the Hong Kong Basic Law, which provides that rights and freedoms “shall not be restricted unless as prescribed by law”, and such restrictions should not contravene the ICCPR. The Hong Kong courts’ interpretation of this provision comes close to that adopted by the CGJ on Article 23 of the ROC Constitution in that they emphasise that constitutional rights may not be restricted by mere executive orders,<sup>147</sup> and that the law that restricts such rights must satisfy the requirements of legal certainty and predictability<sup>148</sup> in addition to the principle of proportionality.<sup>149</sup>

Some of the interpretations of the CGJ with the greatest impact concern the protection of the liberty of the person (the subject of an elaborate provision in Article 18 of the ROC Constitution) and the criminal process. In Interpretation No 251 (1990) (affirming Interpretation No 166 of 1980) the CGJ declared as unconstitutional provisions in the Law on Offences Punishable by the Police (enacted before the ROC Constitution itself was enacted) which authorised the police to arrest, detain and impose punishments (including compulsory labour or reformatory education) for minor crimes without resorting to a judicial process. In this case, the CGJ stipulated a deadline of one and a half year for the law to be changed.<sup>150</sup> In Interpretation No 384 (1995), the CGJ declared as contrary to due process and unconstitutional several provisions of the Law for the Eradication of Gangsters which empowered the police to classify a person as a “gangster” (*liumang*) (which classification could not be challenged by administrative litigation), to arrest them without a judicial warrant, to rely on “secret witnesses” (whose identity would not be revealed to the alleged gangster and against whom they did not have the right of confrontation) and to sentence them to “rehabilitation”. The CGJ again gave a grace period of one and a half year for the law to be reformed.<sup>151</sup> In Interpretation No 392 (1995), the CGJ declared as unconstitutional key provisions of the Law of Criminal Procedure which authorised the procurators (ie prosecutors) to detain suspects for two months (with possible extensions) without the court’s approval, a practice that had been followed

<sup>146</sup> See, eg, the CGJ’s Interpretations Nos 313 (1993), 394 (1996), 567(2003).

<sup>147</sup> See *Koo Sze Yiu v Chief Executive of the HKSAR* (n 138 above), and text accompanying nn 165 and 167 below.

<sup>148</sup> See *Shum Kwok Sher v HKSAR* (n 135 above).

<sup>149</sup> See *HKSAR v Ng Kung Siu* (n 87 above).

<sup>150</sup> Unlike the CGJ’s Interpretation No 166 on the same subject matter, Interpretation No 251 was complied with by the Government. The law was reformed in 1991 with the enactment of the Law on the Maintenance of Social Order.

<sup>151</sup> The law was reformed in 1996.

by the ROC authorities for more than half a century.<sup>152</sup> These Interpretations led to substantial law reforms in the domain of criminal procedure. In Hong Kong, however, practices similar to those outlawed by the CGJ in Taiwan have not existed, so there was no opportunity or need for Hong Kong courts to deal with issues of personal liberty similar to those dealt with in these interpretations.

Several other interpretations in the field of education also concern practices which have not existed in Hong Kong and thus need not be struck down by the Hong Kong courts. In Interpretation No 380 (1995), the CGJ declared as contrary to the principle of legislative reservation provisions of the Enforcement Rules of the University Law which required all students in all universities to take and pass a common set of prescribed courses. In Interpretation No 450 (1998), the CGJ declared as contrary to the constitutional protection of academic freedom provisions in the University Law requiring all universities to establish offices of military training in order to provide military training courses. In Interpretation No 373 (1995), the CGJ declared as contrary to the constitutional protection of the freedom of association a prohibition in the Trade Unions Law on technical workers (not being teachers) in the education industry to form trade unions. In Hong Kong, the leading constitutional law case in the domain of education was *Equal Opportunities Commission v Director of Education*.<sup>153</sup> In this case, the High Court declared as contrary to the right to equality and non-discrimination a long-standing practice adopted by the Government's Education Department relating to entrance to secondary schools of adjusting the examination marks of boys and girls. The adjustment resulted in a boy's chances of getting into a preferred secondary school being better than a girl's where the boy and girl achieved equal marks. The practice was originally designed to achieve a more equal proportion of male to female students in the best secondary schools in Hong Kong (given that the marks of girls at the end of their primary school education were generally higher than those boys of the same age).

In the field of freedom of speech, the CGJ in Interpretation No 509 (2001) upheld the provision in the Criminal Code making defamation punishable as a criminal offence.<sup>154</sup> It is interesting to note in this regard that after the enactment of the Hong Kong Bill of Rights, the Hong Kong Government reviewed all existing laws as to their compatibility with the Bill and introduced amendments to address issues of incompatibility. In this law reform exercise, the existing Hong Kong law on criminal punishment for defamatory

<sup>152</sup> This time the CGJ allowed a grace period of 2 years for the law to be reformed. The interpretation led to substantial changes in the law of criminal procedure in Taiwan.

<sup>153</sup> [2001] 2 HKLRD 690.

<sup>154</sup> For other interpretations in the field of freedom of speech, see, eg, the CGJ's Interpretations Nos 407, 414 and 577.

libel was partly repealed.<sup>155</sup> The leading post-1997 Hong Kong case on the civil law of defamation was *Cheng v Tse Wai-chun*.<sup>156</sup> In this case, the Court of Final Appeal extended the defence of fair comment (on matters of public interest) to situations where the defendant was motivated by personal or private interests when he made the defamatory statement. The decision thus expanded the scope of freedom of expression in Hong Kong.<sup>157</sup>

One of the most celebrated decisions of the CGJ in the domain of human rights is Interpretation No 445 (1998) which concerns freedoms of assembly, demonstration and expression. Here the CGJ reviewed the Law on Assembly and Parades. It upheld the requirement of prior permission for demonstrations, but struck down (as contrary to the constitutional protection of freedom of expression) the proposed advocacy of communism or secession during the demonstration as a ground for denying permission for it to go ahead. The CGJ also struck down the power to deny permission for a demonstration on the basis of the risk (not amounting to clear and present danger) of the demonstration endangering national security, social order or the public interest, or endangering persons' life, bodily integrity or liberty or causing severe damage to property, holding that these grounds failed to satisfy the requirements of legal precision and certainty and of the proportionality test. It also held that as far as spontaneous demonstrations were concerned, it was unreasonable to require permission to be applied for two days in advance.

Interpretation No 445 can be usefully compared to three leading cases decided by the Hong Kong Court of Final Appeal on the freedom of assembly and expression. In *Leung Kwok-hung v HKSAR*,<sup>158</sup> the CFA (like the CGJ) upheld the requirement of prior notification of the authorities for assemblies or demonstrations, but (like the CGJ) struck down one of the several grounds for refusing to allow a demonstration to take place or for imposing restrictions on it. The ground struck down was that of "*ordre public*" (a term in the ICCPR and copied into Hong Kong's Public Order Ordinance), which the CFA considered to be too broad and imprecise to satisfy the requirement of legal certainty and predictability. However, unlike the CGJ, the CFA upheld the grounds (for refusing to allow a demonstration to take place or for impos-

<sup>155</sup> The criminal offences of defamatory libel were originally provided for in ss 5 and 6 of the Defamation Ordinance (Cap 21). Section 6 was repealed (*see* Ord No 68 of 1995), but s 5 has been retained. However, prosecutions for defamatory libel are almost unheard of, so the constitutionality of s 5 has not been challenged. The original s 6 criminalized defamatory libel by providing that any person who maliciously published any defamatory libel was liable to imprisonment for one year and to pay such fines as the court may award; and s 5 provides that any person who maliciously publishes any defamatory libel, *knowing the same to be false*, shall be liable to imprisonment for two years, and, in addition, to pay such fine as the court may award (emphasis added).

<sup>156</sup> *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339; [2000] 3 HKLRD 418.

<sup>157</sup> This decision also contributed to the development of the relevant jurisprudence in the common law world. *See* Denis Chang, "Has Hong Kong Anything Special or Unique to Contribute to the Contemporary World of Jurisprudence?" (2000) 39 HKLJ 347.

<sup>158</sup> (2005) 8 HKCFAR 229; [2005] 3 HKLRD 164.

ing restrictions on it) relating to public order (in the “law and order” sense of prevention of disorder), public safety and national security. At the same time, the court held that concrete decisions or actions by the police prohibiting or restricting demonstrations on these grounds are subject to judicial review on the basis of the principle of proportionality. In *Yeung May-wan v HKSAR*<sup>159</sup> (which concerned a demonstration staged by Falun Gong activists outside the Liaison Office of the Chinese Central Government in Hong Kong), the CFA quashed all the convictions by the lower courts on the ground that the obstruction caused by the demonstration (which was the main offence with which the demonstrators were charged) was not of such an extent as to amount to unreasonable use of the pavement having regard to the right to peaceful assembly and demonstration. In *HKSAR v Ng Kung-siu* (the “flag desecration” case),<sup>160</sup> the CFA reversed the decision of the Court of Appeal and held that the flag desecration law passed the proportionality test and was not an excessive and unconstitutional restriction on freedom of expression.

There are a number of interpretations in which the CGJ reviewed the severity of the criminal punishment imposed for certain crimes, including the death penalty and life imprisonment.<sup>161</sup> In Hong Kong, the death penalty had not been carried out since 1970s<sup>162</sup> and was formally abolished in 1993.<sup>163</sup> In *Lau Cheong v HKSAR*,<sup>164</sup> the prisoner challenged the mandatory life imprisonment for convicted murderers (which in practice however can allow for early release of the prisoner) as an unconstitutional restriction on liberty of the person and as cruel and inhuman punishment. The CFA deferred to the judgment of the legislature on this matter of penal policy and upheld the relevant law.

One of the recent CGJ interpretations of great jurisprudential significance is Interpretation No 603 (2005), which invalidated the requirement to produce fingerprints in applying for an identity card. Fingerprinting has been required in Hong Kong’s similar system of identity cards, but the rule has not been challenged by groups in civil society, not to mention being litigated in the courts. However, in this domain of privacy, recent Hong Kong cases (since 2005) have questioned the constitutionality of covert surveillance by law enforcement authorities (by, example, audiovisual recording) and telephone interception. *Leung Kwok-hung v Chief Executive of the HKSAR*<sup>165</sup> declared

<sup>159</sup> (2005) 8 HKCFAR 137; [2005] 2 HKLRD 212.

<sup>160</sup> See n 87 above.

<sup>161</sup> See, eg, the CGJ’s Interpretations Nos 194 (1985), 263 (1990), 471 (1998), 476 (1999), 512 (2000), 528 (2001), 544 (2002) and 551 (2002).

<sup>162</sup> See Athena Liu, “The Right to Life”, in Raymond Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992), Ch 7.

<sup>163</sup> See Crimes (Amendment) Ordinance 1993.

<sup>164</sup> (2002) 5 HKCFAR 415.

<sup>165</sup> Unrep., HCAL 107/2005 (Hartmann J, Court of First Instance, 9 Feb 2006), available at <http://legalref.judiciary.gov.hk>.

the relevant law and executive order in this regard to be unconstitutional, and, for the first time in Hong Kong's legal history (though this is a practice frequently used by the CGJ in Taiwan since the late 1980s),<sup>166</sup> gave a grace period (of 6 months) for the Government to amend the law.<sup>167</sup>

In the domain of property rights, the CGJ has been active at an earlier stage of its history than in the domain of civil and political rights, and has developed an elaborate jurisprudence containing many important principles<sup>168</sup> which subsequently found their application in the domain of civil and political rights.<sup>169</sup> This jurisprudence is based directly on the ROC Constitution, which provides expressly for the protection of property rights (Article 15). In the case of Hong Kong, there were no provisions on property rights either in the colonial constitution or in the Hong Kong Bill of Rights Ordinance. However, the Basic Law does provide explicitly for the protection of property rights and requires full compensation for the deprivation of private property for public purpose (Articles 6 and 105).<sup>170</sup> A few cases have been litigated since 1997 on the constitutional protection of property rights,<sup>171</sup> but their number and impact pale in comparison with the interpretations of the CGJ on property rights.

Some of the most well-known interpretations of the CGJ address political conflicts which were referred to the court for resolution. This is an area in which there is no corresponding Hong Kong case law. Although the relationship between the legislature and the executive in Hong Kong has not been

<sup>166</sup> See Ye (n 24 above), Ch 8.

<sup>167</sup> See *Leung Kwok Hung v Chief Executive of the HKSAR*, unrep., CACV 73/2006 (Court of Appeal, 10 May 2006); *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441, [2006] 3 HKLRD 455 (*Koo* and *Leung* are different names of the same case, as both *Koo* and *Leung* were the applicants in the original action for judicial review. The Court of Final Appeal agreed that the government and the legislature should be given 6 months to amend the relevant laws. However, unlike the lower courts, the Court of Final Appeal refused to declare that the relevant laws were still valid during these 6 months. It only held that the declaration that these laws were unconstitutional would be suspended. The declaration would only be brought into effect six months from the date of the judgment of the Court of First Instance. This means that although the government would not be in breach of the declaration made by the court in this case by acting under those laws, the government is not shielded from legal liability for functioning pursuant to what has been declared unconstitutional.

<sup>168</sup> See Su Yongqin (蘇永欽), *Constitutional Review (違憲審查)* (Taipei: Xuelin Culture, 1999), pp 75ff; Chen Ai'e (陳愛娥), "The Evolution of the Right to Property in the Interpretations of the Council of Grand Justices", in Liu Kongzhong (劉孔中) and Li Jianliang (李建良) (eds), *The Theory and Practice of Constitutional Interpretation (憲法解釋之理論與實務)* (Taipei: Academia Sinica, Institute of Social Sciences, 1998), pp 393 ff.

<sup>169</sup> See Ye (n 24 above) at 284, 292.

<sup>170</sup> See Albert H.Y. Chen, "The Basic Law and the Protection of Property Rights" (1993) 23 HKLJ 31.

<sup>171</sup> See *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277; *Yook Tong Electric Company Limited v Commissioner for Transport*, unrep., HCAL 94/2002 (Hartmann J, Court of First Instance, 7 Feb 2003); *Kaisilk Development Ltd v Urban Renewal Authority* [2004] 1 HKLRD 907; *Fine Tower Associates Ltd v Town Planning Board* [2006] 2 HKC 507; *Fine Tower Associated Ltd v Town Planning Board* [2006] 4 HKLRD 347; *Harvest Good Development Limited v Secretary for Justice*, unrep., HCAL 32/2006 (Hartman J, Court of First Instance, 16 July 2007).

cordial in recent years (and as in the case of Taiwan after 2000, in recent years the Hong Kong Government could not easily secure LegCo's support for controversial bills and policies, and on some occasions LegCo had debated or even passed non-binding motions of no confidence or censure on individual Government officials),<sup>172</sup> the courts of Hong Kong have not had the opportunity to address issues similar or comparable to those in the following CGJ interpretations. In Interpretation 387 (1995), the CGJ declared that the Premier must resign when the Legislative Yuan was re-elected. In Interpretation No 419 (1996), the CGJ dealt with the issue of whether the Vice-President could simultaneously occupy the office of Premier. In Interpretation No 520 (2001), the CGJ considered the consequences of the Executive Yuan not proceeding with the construction of a nuclear power plant even though the Legislative Yuan had already approved the budget for it. In Interpretation No 499 (2000), the CGJ went so far as to declare as unconstitutional and invalid the fifth amendment of the Constitution introduced by the National Assembly. In Interpretation No 585 (2004), the CGJ examined the validity of a law giving a Legislative Yuan committee a range of powers to investigate the gun shooting incident on the day (19 March) before the Presidential election of 2004 in which President Chen Shui-bian and Vice-President Annette Lu Hsiu-lien were injured while campaigning for re-election. And in Interpretation No 613 (2006), the CGJ held that the Organic Law of the National Communications Commission was unconstitutional, as it in effect deprived the Executive Yuan of decision-making power in personnel matters.

As mentioned above, the Hong Kong courts have since *Sin Yau-ming* began to refer to a wide range of jurisprudential sources in their judgments. These include the case law of common law jurisdictions elsewhere, the case law of the European Court of Human Rights, materials generated by the United Nations framework for the protection of human rights, and scholarly writings on international human rights law.<sup>173</sup> The range of sources referred to by the CGJ is even broader, which can partly be explained by the diverse educational backgrounds of the Taiwan Grand Justices.<sup>174</sup> In Hong Kong, all judges are trained in the English common law tradition. Scholars do not sit as judges; when the CFA hears a case, one of the five judges may be an invited judge

<sup>172</sup> For discussion on the relation between the executive and the legislature in Hong Kong after 1997, see Li Pang Kwong, "The Executive-Legislature Relationship in Hong Kong", in Joseph Y.S. Cheng (ed), *Political Development in the HKSAR* (Hong Kong: City University of Hong Kong, 2001), Ch 4; Ma Ngok, "Executive-Legislative Relations: Assessing Legislative Influence in an Executive-Dominant System", in Lau Siu-kai (ed), *The First Tung Administration* (Hong Kong: Chinese University Press, 2002), Ch 14. For the developing political system in post-1997 Hong Kong, see generally Albert H.Y. Chen, "The Basic Law and the Development of the Political System in Hong Kong" (2007) 15 *Asia Pacific Law Review* 19.

<sup>173</sup> See Chan (n 125 above).

<sup>174</sup> See Huang (n 116 above), pp 5, 15–16.

from a common law jurisdiction (in practice usually Britain and Australia).<sup>175</sup> The CGJ consists of both career judges and scholars of the law. Unlike the case in Hong Kong, many Taiwan Grand Justices have doctoral degrees in law. Some are trained in the common law tradition and some in continental European law, particularly German law.<sup>176</sup> It is now not uncommon for the CGJ in its interpretations and reasoning to refer to or quote directly sources in English, German and Japanese,<sup>177</sup> even though the main body of the interpretation or reasoning is in Chinese. In Hong Kong, English is still the language in which most judgments of the higher courts is written. The judgments of the CFA are all written in English, although a small number of them have been translated into Chinese.<sup>178</sup>

Both the Hong Kong courts and the CGJ in Taiwan have risen to the challenge of constitutional interpretation in the last one to two decades. Both have won respect in their respective societies as trustworthy guardians of the constitution. In Hong Kong, there has since the 1970s been a high degree of trust in the judiciary in general.<sup>179</sup> In Taiwan, historically there seems to have been a lack of trust in the courts,<sup>180</sup> but the CGJ has definitely in the course of the last two decades won the trust and esteem of the people of Taiwan, and particularly the legal and political elite.<sup>181</sup> The roles of the courts in Hong Kong and the CGJ in Taiwan have both been enhanced by constitutional and political developments in the last two decades. In Hong Kong, the catalyst for judicial activism was first the Hong Kong Bill of Rights and then the coming into force of the Basic Law. In Taiwan, the bill of rights in the ROC Constitution that had lain dormant in the era of martial law and “national mobilization to suppress the communist rebellion” has been revitalised by the CGJ in the new era of liberalisation and democratisation, and aggressively used to remove the vestiges of authoritarianism and to promote legal reform to enhance human rights and dignity.

There were more cases in Taiwan than in Hong Kong in which the courts (the ordinary courts in Hong Kong and the CGJ in Taiwan) struck down laws

<sup>175</sup> Article 82 of the Basic Law provides that the Court of Final Appeal “may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal.” These invited judges are called Non-Permanent Judges, and include the former Chief Justice of Australia, Sir Anthony Mason, who sat on most of the important constitutional cases before the Court of Final Appeal after 1997. For the background to the drafting of this article, see Lo Shiu Hing (n 126 above).

<sup>176</sup> See Chen Junrong (陳俊榮), *Grand Justices* (大法官) (Taipei: Yangzhi Culture, 1999).

<sup>177</sup> See Huang (n 116 above), p 16.

<sup>178</sup> For discussion of the bilingual nature of Hong Kong’s legal system, see Zhang Daming (張達明), “The Prospects of the Bilingualisation of Hong Kong Law” (香港法律雙語化前景初探), in Lu Wenhui (陸文慧) (ed), *Legal Translation* (法律翻譯) (Hong Kong: Zhonghua Bookstore, 2002).

<sup>179</sup> See Lau Siu-kai and Kuan Hsin-chi, *The Ethos of the Hong Kong Chinese* (Hong Kong: Chinese University Press, 1988), Ch 4; Berry Fong-Chung Hsu, *The Common Law: In Chinese Context* (Hong Kong: Hong Kong University Press, 1992).

<sup>180</sup> See Tay-sheng Wang, “Taiwan”, in Poh-ling Tan, *Asian Legal Systems* (Sydney: Butterworths, 1997), p 124, at pp 153, 158.

<sup>181</sup> See Su (n 24 above) at 271; Ye (n 24 above), Ch 7.

and regulations on human rights grounds. This can at least be partly explained by the fact that the general state of protection of human rights in Hong Kong as of the 1980s was better than Taiwan's, and more laws and regulations were in need of reform in Taiwan than Hong Kong as far as human rights were concerned. In the domain of the operation of the political system and checks-and-balances, the CGJ has been active while the Hong Kong courts have not. This is explicable in terms of the increasing tensions and conflicts experienced in Taiwan's political system as democratisation proceeded in the 1990s, as contrasted with the situation in Hong Kong where although some such tensions have also existed, they have not reached such a level as to require or be susceptible to judicial resolution. The existence of the power of the National People's Congress to interpret the Basic Law,<sup>182</sup> which it has used on two of the three occasions for the exercise of the power<sup>183</sup> to clarify or supplement the meaning of the text of the Basic Law on the operation and development of Hong Kong's political system, has also served to avoid judicial resolution of such issues in Hong Kong.

## 5. Concluding Reflections

It has been suggested in the introduction to this article that both Hong Kong and Taiwan have been important sites of constitutional experimentation in Asia in the last two decades. This article has sought to tell the story of these constitutional experiments and the experience and the struggles of the people of Hong Kong and Taiwan in using constitutional thinking and practices for the purpose of securing a better future for themselves and their children. In the world of human affairs, meaning is humanly constructed, and actions are meaningful only insofar as they contribute to the realisation of the goals and dreams of the actors themselves. The story of constitutionalism in Hong Kong and Taiwan must therefore ultimately be told from the perspectives of the people of Hong Kong and Taiwan and testify to their hopes and aspirations as well as their concerns and anxieties. The story can also be told in terms of what challenges they have faced and what they have achieved so far in responding to the challenges.

In the case of Hong Kong, the main theme of the story is how to maintain Hong Kong's high level of civil liberties and of the rule of law as well as its social stability and economic prosperity – all of which it had achieved by the

<sup>182</sup> See n 127 above for the first interpretation, which was related to the right of abode.

<sup>183</sup> The two occasions were in 2004 (interpretation on the procedure for further democratisation in Hong Kong) and 2005 (interpretation on the term of office of the successor to Tung Chee-hwa who resigned before completing his second term of office as Chief Executive of the HKSAR). See Chen (n 100 above); Albert H.Y. Chen, "The NPCSC's Interpretation in Spring 2005" (2005) 35 *HKLJ* 255.

early 1980s – as the people of Hong Kong confronted the uncertain prospects of the 1997 handover. Since the 1980s, there has been in Hong Kong a dramatic rise in the consciousness of rights and of the importance of the rule of law, and in the demand for democratisation and self-control of one's destiny. Although the Basic Law was drafted mainly by mainland officials, and although the constitutional reforms during the years of transition from 1984 to 1997 were primarily conceived of and managed by the British colonial government of Hong Kong, the people of Hong Kong have participated actively in both constitutional projects. They – including officials, politicians, judges, lawyers, leaders of public opinion as well as ordinary citizens – have also contributed much to making the Basic Law work after it came into force in 1997. The success of the Basic Law is evidenced by the internationally recognised high degree of autonomy, of the rule of law and of the protection of civil liberties in Hong Kong after the handover,<sup>184</sup> although Hong Kong is not yet as democratic as Taiwan.

In the case of Taiwan, which as of the early 1980s had achieved economic prosperity as one of the “Four Little Dragons” of East Asia but still lagged behind Hong Kong in terms of civil liberties, the people's quests have been for liberalisation and democratisation. As this article demonstrates, their achievements in these regards in the last two decades have indeed been remarkable. Within a short time span, the level of civil liberties rose to a level comparable to that of Hong Kong, and the pace of democratisation quickly put Taiwan far ahead of Hong Kong in terms of democratic self-rule. The most significant achievement lies in the fact that its transition from authoritarianism to democracy has been peaceful and fully in accordance with constitutional mechanisms. The liberal democratic promises of the ROC Constitution of 1946, though apparently broken during three and a half decades of “martial law” and “mobilisation to suppress the communist rebellion”, finally materialised in the 1990s. For the first time<sup>185</sup> in the history of Chinese civilisation, a liberal democracy that fully recognizes human dignity and human rights has come into existence in a Chinese society.

In section 2 of this article, the distinction between nominal, semantic and normative constitutions has been alluded to. The operation of the Basic Law in post-1997 Hong Kong and that of the ROC Constitution (and the Additional Articles) in Taiwan since the early 1990s suggest that they are both normative constitutions. In both Hong Kong and Taiwan, all political actors

<sup>184</sup> See James C. Hsiung (ed), *Hong Kong the Super Paradox: Life After Return to China* (New York: St Martin's Press, 2000); Robert Ash et al. (eds), *Hong Kong in Transition: One Country, Two Systems* (London: RoutledgeCurzon, 2003); Lau Siu-kai (n 172 above); Wong Yiu-chung (ed), “One Country, Two Systems” in *Crisis: Hong Kong's Transformation Since the Handover* (Lanham: Lexington Books, 2004); Ming K. Chan and Alvin Y. So (eds), *Crisis and Transformation in China's Hong Kong* (Armonk: M.E. Sharpe, 2002).

<sup>185</sup> See Chao and Myers (n 9 above).

accept the norms of the constitution from the internal point of view (in H.L.A. Hart's language)<sup>186</sup> as "rules of the game" for competition for and exercise of political power. There is freedom to form political parties, freedom of speech and assembly, and free and fair elections are regularly held. Constitutional rights can be litigated in the courts of law, including the constitutional court in the case of Taiwan. The judges who serve as constitutional interpreters in Hong Kong and Taiwan apply progressive and international norms of constitutional and human rights in their adjudication, and are well respected by the community and the political and legal elites. These are all hallmarks of a normative constitution at work.

The following similarities between Hong Kong and Taiwan may also be identified. They are both Chinese societies that have experienced colonial rule and separation from mainland China. The people of Hong Kong and Taiwan have both developed in the course of their history a sense of identity as "Hongkongers" ("Hong Kong people") or "Taiwanese" ("Taiwan people"). Both Hong Kong and Taiwan are now open and pluralistic societies that respect human rights and the rule of law and practice constitutional government. In both Hong Kong and Taiwan, there is a vibrant civil society and a free press, and members of the public who are vigilant of their rights. As the Hong Kong Court of Final Appeal has repeatedly said in its judgments,<sup>187</sup> the civil and political rights that receive constitutional protection in Hong Kong stand at the heart of Hong Kong's separate system in "one country, two systems". Similarly, the awareness of the existence of civil and political rights in Taiwan also contributes to the self-identity of the people of Taiwan<sup>188</sup> and their sense of difference from the people of mainland China.

Thus for both Hong Kong and Taiwan, mainland China plays the role of being "the Other". In the case of Hong Kong, the most dramatic display of the ambivalent feeling towards the Other is the demonstration of an estimated half a million people on 1 July 2003 against the proposed national security law to implement the requirements of Article 23 of the Basic Law. In the case of Taiwan, alienation towards the Other is expressed in the movement for Taiwanese independence.

It is precisely the problems of how the people of Hong Kong and Taiwan should position themselves towards this Other, and of how this Other would view Hong Kong and Taiwan, that present the greatest challenge for the people of Hong Kong and Taiwan in further developing the constitutionalism which they have already achieved so far. In an important sense, the constitutional

<sup>186</sup> See H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2nd edn, 1994).

<sup>187</sup> See, eg, *Ng Ka Ling* (n 127 above); *Ng Kung Siu* (n 87 above); *Bahadur* (n 87 above); *Yeung May-wan* (n 159 above).

<sup>188</sup> See Long Yingtai (龍應台), *Please Persuade Me By Civilisation* (請用文明來說服我) (Hong Kong: Tiandi tushu, 2006).

projects in both Hong Kong and Taiwan are still works in progress that await completion. Both Hong Kong and Taiwan are constitutional systems in transition. In the case of Hong Kong, the ultimate goal is defined in the Basic Law itself, which is universal suffrage for the election of the Chief Executive and of all legislators. In the case of Taiwan, the transitional nature of the existing constitutionalism is evidenced in the text of the ROC Constitution that is in force in Taiwan subject to the Additional Articles. This constitutional text makes it clear that it is a constitution of and for China as a whole. How the people and government of present-day Taiwan relate to the people and government of China as a whole remains unresolved in the ROC Constitution that has long lost its force in mainland China but is still valid in Taiwan. The question cannot be resolved without the two governments putting aside their differences and negotiating a solution in the form of a new constitutional arrangement that transcends the conflicting texts of both the existing Constitution of the PRC and the ROC Constitution. When that happens, the experiment of Chinese constitutionalism that began in Hong Kong and Taiwan in the last two decades will have reached the pinnacle of its achievement. For in the final analysis, constitutionalism is a human invention for peaceful co-existence and the peaceful resolution of political conflict.