Demise of "One Country, Two Systems"?

Reflections on the Hong Kong Rendition Saga

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Since its return to Chinese sovereignty 22 years ago, Hong Kong has been governed by the "one country, two systems" framework, under which it enjoys a high degree of autonomy and practises separate economic, legal, and social systems from those of China. The framework is underpinned by the Sino-British Joint Declaration, an international treaty, and elaborated in Hong Kong's post-handover constitutional document, the Basic Law. The framework has been considered a constitutional experiment: it seeks to preserve a liberal pocket within a socialist party state, an ambition that is unprecedented. That experiment has not been plain sailing. The tensions between Leninist authoritarian and liberal constitutionalist ideas within the framework have been manifested at the social, institutional, and constitutional levels, calling into question the viability of maintaining two such highly divergent visions of constitutionalism within one sovereign roof on a long-term basis.[1]

Until June 2019, the largest demonstrations seen in post-handover Hong Kong were the 2003 demonstrations against the introduction of a national security law and the 2014 protests against Beijing's refusal to grant genuine universal suffrage, the latter of which became known internationally as the "Umbrella Movement". Both were responses to Beijing's attempts to curb Hong Kong's autonomy and freedoms to protect its own broad conceptions of sovereignty and security. Both revolved around constitutional questions that go to the heart of whether it is possible to sustain Hong Kong's liberal status while maintaining Chinese sovereignty. The saga over the Hong Kong government's proposed legislative amendments to the territory's extradition laws ("the Bill" hereafter), which led to even larger demonstrations in June, therefore seems atypical of what generally sparks large-scale civil resistance in Hong Kong: it was not a contest between China's perceived core interests and those of Hong Kong. The Bill was not imposed by China, and does not affect its perceived sovereign prerogatives over Hong Kong. On its face, the Bill (which Beijing supports but has expressly disclaimed ownership of) was introduced to tackle the problem of fugitives from mainland China, Taiwan, and elsewhere hiding out in Hong Kong. The substance of the dispute does not pertain to the viability of the "one country, two systems" governing model. The way in which the saga unfolded, however, reveals flaws in Hong Kong's political system that, if unrectified, may prove fatal to the model. In this commentary, I first evaluate whether the Bill contains sufficient human rights safeguards, and then analyse why democracy is needed to sustain the "one country, two systems" model. For the background to the Bill, see the earlier post by Albert Chen.

Does the Bill contain sufficient human rights safeguards?

The Bill proposes an *ad hoc* extradition arrangement that would be applicable to all jurisdictions, including those with which Hong Kong currently has no long-term extradition agreement, such as mainland China. It would lift the current absolute bar against rendition to China, a bar that has been considered a firewall that segregates Hong Kong's common law system that adheres to the liberal rule of law from China's socialist legal system. The proposal triggered widespread fears that people in Hong Kong would be exposed to the unfair aspects of China's criminal justice system,

[1] See Cora Chan, "Thirty years from Tiananmen: China, Hong Kong, and the ongoing experiment to preserve liberal values in an authoritarian state" (2019) 17(2) *International Journal of Constitutional Law* (forthcoming).

although the Hong Kong government argued that the rights of requested individuals would be protected by Hong Kong's independent courts. To assess the veracity of that argument, we need to evaluate the courts' powers at two levels: whether they have sufficient legal powers to safeguard rights, and whether they have sufficient political power to make use of those powers. Close analysis suggests that they fall short at both levels.

At the legal level, the Bill gives the Hong Kong courts the power to reject an extradition request on the grounds that, inter alia, the dual-criminality principle is not satisfied, the offence is a political offence, and there is no *prima facie* case for committal. The courts also have judicial review powers over the Chief Executive's decision to surrender. That these safeguards fall short of international rights standards has been extensively discussed elsewhere.[2] Here, I highlight just two points. First, the courts have no power to assess whether extradition is compliant with the International Covenant on Civil and Political Rights (or similar rights instruments), a power that has proved crucial for rights protection elsewhere. The courts may refuse an extradition request if they believe the individual concerned might be prejudiced at his/her trial by reason of his/her political views, race, religion or nationality, but trials in China can be unfair for reasons other than persecution on such grounds, e.g. one might simply be on the wrong side of those in power or as a general matter, the trial standards are inadequate.

Second, although the Hong Kong government promised by way of a policy statement that it may require the requesting jurisdiction to comply with further conditions concerning a fair trial, the operative word was "may" (not "must"). If a government decision is challenged by a judicial review, the policy statement at best provides a list of relevant considerations and the grounds for a rationality challenge. There is no substantive legitimate expectation that the government would include those conditions in a given extradition agreement. Even if it did so, it is unclear what role (if any) courts play in assessing the credibility of the assurances given by the requesting jurisdiction.

At the political level, the power imbalance between China and Hong Kong would make it difficult for the Hong Kong courts to refuse a request for rendition that comes from China. Although the judiciary is undoubtedly the most autonomous branch of government, its survival as an institution still depends on Beijing's grace. First, judges are appointed by the Chief Executive, who is in turn appointed by Beijing. It is not unimaginable that Beijing would interfere with the appointment process to screen out defiant judges. Second, Beijing's National People's Congress Standing Committee, which holds the final power to interpret the Basic Law, can curtail the Hong Kong courts' jurisdiction or alter their composition by issuing an idiosyncratic "interpretation" of that law's relevant provisions. Third, whether Hong Kong can, in the long run (especially after 2047, when China's commitment to Hong Kong's autonomy under the Sino-British Joint Declaration expires), continue to practise a separate common law legal system is, in reality, entirely subject to Beijing's discretion. Accordingly, the courts are under immense pressure not to defy Beijing's will. This is not mere speculation. Recent cases suggest that the courts are increasingly unwilling to challenge Chinese decisions.[3] A recent study also found the political sensitivity of a case to increase judicial deference.[4] From this trajectory the courts would very likely defer in case involving rendition requests from China. A proper understanding of the political constraints under which the Hong Kong courts operate thus reveals two points. First, legal safeguards that work elsewhere may not work in Hong Kong. Even if the Bill incorporated all possible safeguards (and it does not), the courts still might not be in a position to apply

[2] See e.g. the observations of the Hong Kong Bar Association and Law Society of Hong Kong and the joint observations of the Bar Human Rights Committee of England & Wales, Law Society of England & Wales, Human Rights Committee of the Law Society of England & Wales, International Bar Association's Human Rights Institute, Defence Extradition Lawyers Forum, International Forum of Extradition Specialists, and Fair Trials; Johannes Chan, "10 Days that Shocked the World: The Rendition Proposal in Hong Kong" (2019) *Hong Kong Law Journal* (forthcoming).

[3] *Chief Executive of Hong Kong Special Administrative Region v The President of The Legislative Council* [2016] HKCA 573, at [55]-[58]; [2017] HKCFA 54, at [35]-[36]; *Leung Chung Hang, Sixtus v President of Legislative Counsel and Secretary for Justice* [2018] HKCFI 2657, [53]-[76]; *Chan Ho Tin v Lo Ying-Ki Alan and others* [2018] HKCFI 345, at [46]-[49].

them as rigorously as the courts in some sovereign states can.[5] Second, the same set of safeguards might be sufficient vis-à-vis extradition requests from certain foreign states (which courts are not under the same kinds of pressure to accept) but not from China.

Are the concerns about China's criminal justice system justified?

If a requesting jurisdiction can be trusted to protect the rights of the individual concerned, then there is little to worry about vis-à-vis rights safeguards. Is distrust of China's criminal justice system warranted? The Bill's proponents argue that it is not. The system has undergone considerable improvement over the years, they argue, and evidence suggests that China has treated extradited individuals fairly in the past.[6] Hence, there is no reason to believe that it would treat individuals surrendered from Hong Kong unfairly.

That China's criminal justice system has improved is indisputable. However, the key question is not whether it has improved, but whether it has improved to an extent sufficient to warrant trust.[7] Despite having made great strides in legal reform, China has not cleared the fundamental impediment to its ability to flourish as a rule-of-law state, i.e. the Chinese Communist Party remains in control of the judiciary. Even if the overwhelming majority of trials are fair (and it is estimated that 95% are fair), the problem remains that those in power can decide whether a case falls within the 95% or the 5%,[8] much like the situation in the dual state of the Third Reich.[9] A trial is fair only insofar as those in power allow it to be. This element of leadership discretion renders the risk of an unfair trial different in nature from, and more worrying than, that existing in jurisdictions with judicial independence.

Nevertheless, proponents' observation that numerous liberal-democratic states have extradited individuals to China *and* that China has treated these individuals fairly is an important one. It reminds us that China's track records of fair trial can be divided into at least two types for present purposes: those involving purely domestic non-extradition cases, and those involving individuals extradited from other states. Whether a fair trial is possible in both types of cases ultimately hinges on the discretion of those in power, *but* the international attention attracted by the latter renders Beijing more cautious about not violating the defendant's rights. It is thus legitimate to ask: if even some liberal-democratic states can trust China to treat extradited individuals fairly, then why can't Hong Kong trust it as well? My tentative answer is that China's imperatives for guaranteeing a fair trial in cases involving individuals extradited from other *sovereign* states are not fully applicable in the China-Hong Kong context. Indeed, the insistence of some Chinese experts that rendition from Hong Kong is a domestic matter, and thus that international human rights standards do not apply, is not reassuring. Hence, the aforementioned second type of track record is not a proper reference point for assessing how China would treat individuals surrendered from Hong Kong (although, as recent events affirm, Hong Kong matters generally attract much more international attention than those in mainland China, so the first type of track records may not be the proper reference point either.)

Democracy and future of the "one country, two systems" experiment

The story of the Bill – from its inception, promotion, and suspension to post-suspension events – reveals that Hong Kong's lack of democracy threatens not only its governability but also the sustainability of the

[4] Cora Chan, "Rights, Proportionality and Deference: A Study of Post-Handover Judgments in Hong Kong" (2018) 48(1) *Hong Kong Law Journal* 51.

[5] See e.g. *Kim v Minister of Justice* [2019] NZCA 209 where the New Zealand Court of Appeal struck down the executive's decision to extradite an individual to China.

[6] See e.g. Grenville Cross, "Fugitive surrender: Rights and responsibilities", China Daily (12 June 2019).

[7] I thank Peter Chau and Lusina Ho for helpful discussions on this point.

[8] Hualing Fu, presentation at a panel discussion on "The Authoritarian Rule of Law – Legal Theory and the Politics of Legal Space" organized by HKU's Centre for Comparative and Public Law (9 May 2019).

[9] Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (OUP, 1941).

constitutional order of "one country, two systems". The Basic Law guarantees eventual universal suffrage for the election of the Chief Executive and entire legislature. However, despite the people of Hong Kong calling for that promise to be honoured – the underlying cause of the 2014 Umbrella Movement – Beijing has thus far refused to grant genuine universal suffrage. Currently, the Chief Executive is selected by a 1,200-person pro-Beijing selection committee, and only half the legislature is returned by direct election (the other half being returned by pro-Beijing functional constituencies). The lack of democracy creates both centripetal and centrifugal forces that are tearing down the "one country, two systems" concept: centripetal forces that are pushing the two systems together, creating pressure for integration, and centrifugal forces that are pulling the nation apart. The rendition controversy reveals democracy is needed to contain these forces.

Centripetal force 1:

The story of the Bill is shocking in part because the Hong Kong government failed to heed the voice of a significant portion of the Hong Kong people until a small number resorted to violence. That failure was due to a combination of ignorance of and wilful neglect of people's concerns,[10] both traceable (at least partly) to the lack of democracy.

The knowledge that it can be voted out of office is a powerful incentive for a government to discern and deliver what the people want. If Hong Kong had a democratic political system, the government would likely have been able to grasp and take steps to allay the worries of the Hong Kong people at an earlier stage. That the government became cognisant of the nature and full extent of those worries only after a million people had taken to the streets shows the extent to which it has lost touch. If the promise of autonomous governance under "one country, two systems" is to be fulfilled, institutional mechanisms ensuring that the government knows, and acts on, the people's wishes must be put in place.

Furthermore, without democracy, there is no institution guarding Hong Kong's autonomy and systems *against Chinese pressure*. The trend of liberal backsliding in the past decade or so will only continue. Although Hong Kong's executive and legislature enjoy more autonomous powers than most other subunits in the world, unlike in many federal or devolved regions there is no institutional mechanism to ensure that those powers are exercised autonomously. The current selection methods for the Chief Executive and legislature give these institutions an incentive to side with Beijing when its interests diverge from Hong Kong's,[11] as vividly illustrated by their full cooperation in implementing Beijing's tight restrictions on democratic reform in 2014-15, Beijing's mandate to disqualify pro-independence advocates from standing for election and taking office since 2016, and Beijing's preferred "co-location" arrangement (the application of Chinese laws in Hong Kong without going through the Basic Law's procedures for doing so) in 2018. The extradition bill was not imposed by Beijing, but developments at every stage of the events surrounding it demonstrate the immense hold Beijing has on these institutions:

- Pro-China legislators were unified in their support for the Bill after Beijing openly expressed its support (although it is interesting that they did so *only* after). The Chief Executive dared to bypass normal consultation and legislative procedures in order to push through the Bill – and was ready to push forward with it even after one million people protested against it – because she knew she had Beijing's support and hence sufficient pro-China votes in the legislature.

- Although both the 2003 controversy over a national security law and the current extradition dispute led to the bills in question being shelved, there is an important difference between them: in 2003, some pro-China legislators changed their stance immediately after a

[10] Johannes Chan, "10 Days that Shocked the World: The Rendition Proposal in Hong Kong" (2019) *Hong Kong Law Journal* (forthcoming).
[11] Cora Chan, "Thirty years from Tiananmen: China, Hong Kong, and the ongoing experiment to preserve liberal values in an authoritarian state" (2019) 17(2) *International Journal of Constitutional Law* (forthcoming).

peaceful demonstration by half a million people, whereas this time none did so even after a peaceful demonstration by twice that number. It was only after violent scuffles between the police and a small number of protestors and an apparent green light from Beijing to halt the Bill (likely because it did not want Hong Kong issues to interfere with China-US trade negotiations and impending G20 discussions) that the Chief Executive decided to suspend the Bill and pro-China legislators accepted the suspension, evidence of Beijing's growing influence on Hong Kong politics since 2003. It also casts doubt on Albert Chen's observation that the governments followed "the logic of reason rather than the logic of coercion".

- There are signs that even the way in which the Bill was aborted and its aftermath have been shaped by Beijing. The Hong Kong government has insisted on "suspending" rather than "withdrawing" the Bill notwithstanding two million people taking to the streets to demand the latter and that there is no practical difference between the two, presumably because it does not want to be seen as fully giving in to public pressure, a move that would be antithetical to the philosophy and strategies of a Leninist party-state. Furthermore, all officials responsible for the Bill remain in office despite widespread calls for their resignation, likely for reasons of face and because Beijing has yet to identify suitable replacements.

All of these developments illustrate the failure of the Chief Executive, her cabinet, and the legislature to function as institutions *for Hong Kong*. They readily disregard the voice of the Hong Kong people when their boss in Beijing directs otherwise. The mass demonstrations against the extradition bill are in a way a continuation of the 2014 Umbrella Movement:[12] they are protests against a political system that fails to account to a significant portion of the Hong Kong people. This is affirmed by protestors' latest slogan of "Democracy Now" at the G20 conference.

The lack of democracy not only affects the ability of the executive and legislature to protect Hong Kong's liberal status against Beijing's advances, but also that of the courts. Universal suffrage would arm the Chief Executive with the independence needed to safeguard the integrity of the judicial appointment process. It would also ease (although not entirely alleviate) the power imbalance between Beijing and Hong Kong institutions that makes it politically difficult for the latter to defy the former's will.

Centripetal force 2

The second reason democracy is needed to sustain "one country, two systems" is that it would provide institutional channels for resolving the tensions inherent therein, thereby reducing the imperative for mass mobilisation and the backlash on Hong Kong's autonomy that such mobilisation may well attract.

The current biased selection system has led to the absence of a fair institutional mechanism for settling clashes between China's sovereign interests (represented by pro-China quarters in Hong Kong) and Hong Kong's autonomy and freedoms (represented by the pan-democrats in Hong Kong). In frustration, those standing for the latter have had to resort to mass mobilisation. The present controversy over rendition is a case in point. Large-scale civil resistance is problematic for Hong Kong's autonomy for at least one reason: it attracts suspicion from Beijing, which experience suggests is likely to react with heavy-handed suppression. This was the case in the aftermath of the 2003 and 2014 protests, and is expected to be the case after the current rendition episode as well. Life under "one country, two systems" is unlikely ever to be tranquil – indeed, I have argued elsewhere that the perennial tension is to be celebrated rather than lamented – but if institutional channels were in place to absorb at least some of that tension (e.g. universal suffrage of the Chief Executive and legislature, a level decision-making playing field in the legislature, greater checks and balances between politically emboldened courts in Hong Kong and institutions in Beijing), the need for

[12] This point was inspired by a discussion with Michael Yim.

large-scale social resistance, and hence recoils on Hong Kong's autonomy, would be reduced.

Centrifugal force

Finally, the greater the frustration over the existing political system, the greater the appeal of secession to the Hong Kong people. Although it currently enjoys little support, secession could well become more popular if the flaws in that system remain uncorrected. The current protests against the Bill reveal how much Hong Kong society has evolved in just five years (since the 2014 Umbrella Movement): the general public has become more tolerant of the unrest caused by social movements; protest action has become more participatory and flexible; civil society has made creative use of technology and other means to mobilize every corner of society and to gain international support; leaders are now dispensable in a social movement; the preservation of Hong Kong identity (defined by what China is not) is now a majority priority; and, inspired by the first generation of "political prisoners" (as some consider those imprisoned for their involvement in the Umbrella Movement), many more people are now willing to make personal sacrifices, including physical injury, financial loss, and even criminal responsibility, to safeguard Hong Kong's freedoms. The only way to prevent the seeds of secession from taking root in this soil is to grant Hong Kong more political autonomy. It is uncertain whether granting democracy to Hong Kong would encourage secessionist ideas in the long term, but recent developments show that continuing to deny it will definitely fuel them. It is no accident that the first call for secession in Hong Kong was heard after Beijing rejected demands for genuine democracy in 2014. If the Chief Executive is unable to step down for whatever reason, she would do well to consider using her remaining time in office to redeem her legitimacy by trying to get a better deal on universal suffrage from Beijing.

And yet, a socialist dictatorship would never grant democracy to a subunit, would it? This is a key conundrum of the experiment to preserve a liberal enclave within a sovereign authoritarian state: the former's liberal nature cannot be sustained without democracy, which the latter is unlikely to grant. The lesson Beijing ought to have learnt from the recent protests is that its tough approach since 2003 has not only failed to curb civil society in Hong Kong, but has locked the two jurisdictions into a cycle of mistrust that even strengthened such society.[13)] Repression may or may not work in mainland China, where society was not free to begin with, but it simply does not work in Hong Kong, where "freedom runs in the blood".[13] Every time Beijing seeks to undermine Hong Kong's civil society, that society returns stronger and more resilient. If Beijing wants to preserve its sovereignty, a major change in approach is needed i.e. it must grant Hong Kong political autonomy. Its actions in Hong Kong also echo in Taiwan, which remains high on Beijing's agenda. The unexpected boost in the popularity of Taiwan's pro-independence camp by the rendition dispute illustrates that developments in Hong Kong can jeopardize China's plans for Taiwan. This factor, together with monitoring by the international community and intercessions of international politics (e.g. China-US trade war), will continue to serve to restrain China from overt interference. However, their impact should not be overestimated given the formidable economic power China enjoys over the rest of the world.

[13] Michael Chugani, "Beijing's tightening grip is suffocating freedom-loving Hong Kongers. It's no wonder they keep rising up in protest", https://www.scmp.com/comment/opinion/article/3016106/beijings-tightening-grip-suffocating-freedom-loving-hongkongers-its'>South China Morning Post (27 June 2019).

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