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The Extradition Bill of Hong Kong revisited, the National Security Law and the irony of human rights protection in "one country, two systems"

A Proposta de Lei da Extradição de Hong Kong revisitada, a Lei da Segurança Nacional e a ironia da proteção de direitos humanos em "um país, dois sistemas"

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Abstract: This article focuses on two recent episodes that shook the Hong Kong Special Administrative Region of the People's Republic of China. It analyzes the main features of the failed Extradition Bill and confronts them with those of the National Security Law that was later enacted by the People's Republic of China. It also addresses the question as to whether the latter's provisions are in breach of the basic policies for Hong Kong agreed upon in 1984 between the United Kingdom and the PRC. It concludes that, rather ironically, while the failed Extradition Bill was largely in tune with those basic policies and the human rights protections enshrined therein, the National Security Law is not.

Keywords: Extradition Bill; Hong Kong; National Security Law; People's Republic of China; Human Rights; "One Country, Two Systems".

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Resumo: *O presente artigo incide sobre dois recentes acontecimentos que agitaram a Região Administrativa Especial de Hong Kong da República Popular da China. Além de analisar as principais características da falhada Proposta de Lei da Extradição de Hong Kong e de contrastá-las com as da Lei da Segurança Nacional subsequentemente aprovada pela República Popular da China, o artigo avalia se as disposições do segundo instrumento jurídico se encontram em conformidade com as políticas fundamentais para HK acordadas em 1984 entre o Reino Unido e a China. O artigo conclui que, ironicamente, a Proposta de Lei da Extradição respeitava em grande medida aquelas políticas e os direitos humanos nelas ínsitos, o que não acontece com a Lei da Segurança Nacional.*

Palavras-chave: *Proposta de Lei da Extradição; Hong Kong; Lei da Segurança Nacional; República Popular da China; Direitos Humanos; "Um País, Dois Sistemas".*

Introduction

This article focuses on two recent episodes that shook the Hong Kong Special Administrative Region (HK) of the People's Republic of China (PRC): (i) the introduction (and withdrawal) of an Extradition Bill that would apply (*inter alia*) between HK and the Mainland; and (ii) the subsequent enactment of a National Security Law (NSL) by the PRC. The article is formally structured around these two legal instruments, rather than on the basis of the different themes that each of them engages (notably human rights protection and the basic policies of HK). Such diachronic approach was in this case deemed preferable, not least of all because it was arguably the withdrawal of the former that sparked the enactment of the latter. Section I thus analyzes the failed Extradition Bill, and it concludes that, in several of its essential traits, it stood in conformity with the basic policies set out for Hong Kong in 1984 by the United Kingdom (UK) and the PRC; and it did not collide, either, with human rights protections under international law. Section II, in turn, analyzes the eventually enacted NSL insofar as it concerns extradition matters.

This paper relies on desk research of secondary sources, but it draws essentially on primary (notably normative) sources: in the first

place, the norms of the Extradition Bill and of the NSL are assessed and contrasted with one another; in the second place, each of those sets of norms is tested against those enshrined in regional and international legal instruments of reference in the field of either extradition law or human rights law. As such, the latter instruments function as criteria or parameters of control of the conformity of the Bill and of the NSL with human rights in extradition proceedings, on the one hand, and with the basic policies agreed upon for HK, on the other hand.

The fact that those regional and international legal instruments are assigned this function of benchmarks for analytical purposes should justify why this article refers occasionally to legal instruments that do not actually apply to HK, notably the European Convention of Human Rights (and related case law). The selection of those instruments for such purposes may certainly be called into question from a 'law in context' perspective whereby more emphasis might have been placed on certain idiosyncrasies of the Chinese legal culture (*lato sensu*), notably of its Confucianist inheritance and the particular importance it attaches to social harmony and stability. With that in mind, the perspective adopted in this article is nevertheless admittedly normative, grounded on the legal framework which at least until 2047 is objectively binding on HK (and on the PRC thereto). This, in our view, for reasons further expounded throughout, corresponds to the more solid and adequate methodological approach in view of the goals of this article.

On those bases, the article reaches the conclusion that some of the norms contained in the NSL do clearly breach such basic policies and hamper upon human rights, which would not have been the case with the Extradition Bill. Section III provides concluding remarks on what is meant by 'irony' in the protection of human rights within "one country, two systems".

I. The Extradition Bill

The original understanding of "one country, two systems", as applied to the Hong Kong situation, can be fleshed out from the twelve basic policies set out for Hong Kong in 1984 by the UK and the PRC in

the Joint Declaration on the Question of Hong Kong (hereinafter Joint Declaration)[3] which were later implemented by the Basic Law of HK (hereinafter Basic Law). Nonetheless, throughout the last two decades, the central authorities of the PRC and the Government of Hong Kong have contributed to a "demise" of that original understanding.[4] How that came to happen is a well-known story and needs not be revisited here.[5] Given the contribution of the Government of Hong Kong to the current state of affairs, it is unsurprising that many should have been suspicious of the Government's apparent eagerness to enact an Extradition Bill allowing for the surrender of persons to Mainland China, perceiving it as another initiative potentially aimed at accelerating the downfall of "one country, two systems".[6]

A particular concern related to the risk of having Hong Kong citizens "formally" extradited to the Mainland on account of activities that in Hong Kong are considered as a legitimate exercise of the freedom of expression. In fact, it is no well-guarded secret that some Hong Kong residents had already been non-formally seized or "kidnapped" from Hong Kong to the Mainland.[7]

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3 Joint Declaration on the Question of Hong Kong, China-UK, December 19, 1984, 1399 U.N.T.S. 23, 391.

4 Cora Chan, "Demise of "One Country, Two Systems"? Reflections on the Hong Kong Rendition Saga", *Hong Kong Law Journal* 49(2) (2019), p. 447-458.

5 See *id.*, "Thirty years from Tiananmen: China, Hong Kong, and the ongoing experiment to preserve liberal values in an authoritarian state", *International Journal of Constitutional Law* 17(2) (2019), p. 439-452; Miguel Lemos, "The Basic Laws of Hong Kong and Macau as Internationally Shaped Constitutions of China and the Fall Off of "One Country, Two Systems' ", *Tulane Journal of International and Comparative Law* 27 (2019), p. 277-338.

6 Arguably, the starting point of this demise occurred when, defeated in the Court of Final Appeal of Hong Kong (CFA), the Government of Hong Kong requested the help of central authorities, which ultimately issued an interpretation of the Basic Law that de facto overturned the decision of the CFA: see Johannes M. M. Chan / H.L. Fu / Yash Ghai (eds.), *Hong Kong's Constitutional Debate, Conflict over Interpretation*, Hong Kong University Press, 2000.

7 Carole J. Petersen, "The Disappearing Firewall: International Consequences of Beijing's Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong", *Hong Kong Law Journal* 50(2) (2020), p. 642-643.

Those suspicions were reinforced because – contrary to national security laws, which Article 23 of the Basic Law mandates Hong Kong to adopt "on its own" –[8] there is no provision in the Basic Law mandating Hong Kong or its Government to adopt any such type of extradition mechanism. According to Article 95 of the Basic Law (emphasis added):

> "The Special Administrative Region *may*, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other."

On its face, this provision does not command the adoption of any legal mechanism for regulating these "juridical relations",[9] but simply confers on the Special Administrative Region (or SAR) a prerogative that it may decide to use or not to use.

In reality, Article 95 was never used as a basis in a specific case of judicial cooperation for the surrender of a fugitive. That is unsurprising, given that authorities and scholars have long argued that the proper way of setting up cooperation for the surrender of fugitives is through the adoption of agreements between Hong Kong and the Mainland. Although news of on-going conversations with the central authorities on the possibility of an agreement of this type were recurrent, none had or has seen the light of day. Hence, the status quo – i.e. the lack of legal mechanisms specifically regulating the surrender of fugitives between Hong Kong and the Mainland – did not correspond to an actual legal loophole, but rather it was merely the result of political difficulties inherent to the proper functioning of "one country, two systems".

This goes a long way to explaining why the Government's alleged attempt to overcome such difficulties through a bill which bundles together the Mainland (and "other parts of the PRC") with all the countries in the world that do not have an extradition treaty with Hong Kong prompted

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8 See *infra* III.1.

9 On the term "juridical", see Janice M. Brabyn, "Extradition and the Hong Kong Special Administrative Region", *Case Western Reserve Journal of International Law* 20 (1988), p. 171-172.

a strong reaction by civil society and political forces unaligned with the Government. A "perfect storm" was in the making.[10]

The mismanagement of such a storm by the Government of Hong Kong is well-known.[11] Nevertheless, the very decision of the Government of Hong Kong to introduce *on its own* a bill regulating the surrender of fugitives to (*inter alia*) the Mainland, which would then be approved or rejected by the Legislative Council of Hong Kong *on its own*, is, in and of itself, an expression of the "very high degree of autonomy" that Hong Kong is supposed to have in relation to the Mainland. This is an underemphasized fact.

That Hong Kong is supposed to use its own legislature to enact a law of that type is a consequence of the very fact that all the rights and freedoms of Hongkongers can only be restricted if a Hong Kong law expressly restricts them. Central authorities are not supposed to enact such laws for Hong Kong. In fact, since criminal laws (*lato sensu*) are those that carry more serious intrusion into such rights and liberties, there was never any doubt that the appropriate forum to enact them is the legislature of Hong Kong. Neither was there ever any doubt that the power to introduce bills on those matters lies not exclusively with the Members of the Legislative Council, but also with the Government.[12] Thus, irrespective of the timing and motives underlying the Government's decision to introduce the Extradition Bill, one conclusion is safe: there were clear constitutional grounds to enact it.

The more intricate constitutional problem lies beyond the question of whether the Bill was legitimate. The interesting question is: was the Bill rightful? It should be useful to recall the case that reportedly sparked the process leading to the introduction of the Bill:

> "In March 2018, Chan Tong-kai, a 20-year-old Hong Kong resident travelling with his girlfriend to Taiwan on holiday, was suspected of having murdered her then fleeing back to Hong Kong. He was

[10] Albert H.Y. Chen, "A Perfect Storm: Hong Kong–China Rendition of Fugitive Offenders", *Hong Kong Law Journal*, 49(2) (2019), p. 419-429.

[11] Alvin Y.H. Cheung, "Unpalatable Realities, No Choices", *International Journal of Constitutional Law* 19(3) (2021), p. 1157 f.

[12] Basic Law, Articles 62 and 74.

> subsequently arrested in Hong Kong and prosecuted for money laundering. Taiwan authorities requested Chan's extradition to Taiwan. In any event, under the existing law, Hong Kong courts have no jurisdiction to try a murder case where the murder has been committed outside Hong Kong. It seems therefore that justice would require Chan's extradition to Taiwan for trial. However, given the exclusion of "other parts of the PRC" from the application of the FOO [Fugitive Offenders Ordinance of Hong Kong] (Taiwan being considered part of China under this law), the Hong Kong government found that there was no legal basis for Chan's extradition to Taiwan."[13]

Obviously, an absolute impossibility of bringing a suspected murderer to justice is not the most amenable state of affairs in any legal system concerned with the protection of fundamental rights, particularly where such paramount rights as the right to life are at stake, as was the case.[14] The situation is even more unpalatable where the victim is a member of one's own community, as was also the case. Naturally, such paramount rights as the right to life (and indeed all human rights) have a propensity to be universal; it is inherent in their very nature that *all* individuals should be their holders.[15] That is why the Bill of Rights of Hong Kong, which has constitutional rank *ex vi* Article 39 of the Basic Law, provides that "*[e]very* human being has the inherent right to life".[16] Nevertheless, the special bonds that link each polity to its own citizens may intensify the duty of the former to protect the latter, such that it is

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[13] Albert H.Y. Chen, "A Perfect Storm...", *op. cit.*, p. 422, 423.

[14] But see P.Y. Lo, "The Unprosecuted Taiwan Homicide, the Unaccepted Extradition Law Amendment Bill and the Underestimated Common Law", *Hong Kong Law Journal* 50(2) (2020), p. 373-394, claiming that Hong Kong courts do have jurisdiction to prosecute in a case like this.

[15] See *e.g.* Martin Scheinin, "European human rights as universal rights: In defence of a holistic understanding of human rights", in Eva Brems / Janneke Gerards (eds.), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, 2014, p. 260.

[16] Hong Kong Bill of Rights Ordinance, An Ordinance to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong; and for ancillary and connected matters, Article 2(1) (emphasis added).

normal for a legal system to be particularly concerned with this specific segment of individuals. This is crucial for explaining why so many States have jurisdiction over crimes committed against their nationals abroad (passive nationality).[17]

On the other hand, it should be uncontroversial that any constitutional document worthy of the name will impose upon the respective public authorities a positive obligation, if only implicit, to protect such paramount rights as the right to life. That is, a duty to take action towards upholding those rights, rather than only a duty to refrain from taking action in breach of those rights – even if the latter duty is more clear-cut both in its scope and in its theoretical underpinnings. It should therefore not be incidental that the abovementioned provision of Hong Kong's Bill of Rights establishes that the right to life "shall be *protected* by law".[18] Whether such a positive duty goes so far as to command the *criminalization* of acts that are harmful to those rights is a very contentious issue.[19] However, in the case under analysis such an issue is settled: the act in question (homicide) is in effect criminalized, and the only question open to debate is whether, this being the case, the absence of norms enabling an effective protection of the right to life should be deemed problematic.

It would at least be quite awkward – not only from an axiological perspective, but also from a perspective of normative coherence – that in a legal system where human life is cherished and homicide criminalized there should be no responsibility for adopting effective mechanisms aimed at deterring homicide. While this is not the place for an in-depth assessment of the complex issues that unfold from the question whether or not fundamental rights might sometimes require the deployment of criminal law, it should be sufficiently agreeable – which for our purposes will

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[17] A noteworthy example is the extradition request for Pinochet issued by Spain to the United Kingdom, which was based on the Spanish nationality of some of the victims: see *e.g.* David Turns, "Pinochet's fallout: jurisdiction and immunity for criminal violations of international law", *Legal Studies* 20 (2000), p. 566-591. On the issue of jurisdiction, see further below within this section.

[18] Hong Kong Bill of Rights Ordinance, Article 2(1) (emphasis added).

[19] On this issue, see *v.g.* Alon Harel, "The Duty to Criminalize", *Law and Philosophy* 34(1) (2015), p. 1-22.

suffice – that the deployment of criminal law does sometimes constitute a warranted and even a natural response of a legal system against threats to fundamental rights.

It is precisely this line of understanding that transpires from the relatively recent and symbolically rather meaningful ruling of the European Court of Human Rights (ECtHR) in *Romeo Castaño v. Belgium*.[20] The reason why this ruling is symbolic is that it was the first time in which an international human rights body found that a decision to *refuse* extradition[21] was in breach of human rights, more specifically of the right to life of Article 2 of the European Convention on Human Rights (ECHR)[22]. The applicants were the five children of Colonel Ramón Romeo and they complained that there had been a breach of their right to an effective investigation into the murder of their father due to the repeated decisions of Belgian courts (on Article 3 ECHR grounds) not to grant Spain the surrender of N.J.E., the suspect of their father's murder, committed in 1981 in an ETA-connected attack.[23] The ECtHR, while reiterating that a real risk of torture or ill-treatment could certainly impose a refusal of extradition on the basis of Article 3 (a longstanding principle originating in *Soering v. UK*),[24] nevertheless held that the applicants' rights under the procedural limb of Article 2[25] requires such a risk to be substantiated by a "sufficient factual basis", which according to the Court had not

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[20] ECtHR (Second Section), Judgment of 9 July 2019, application no. 8351/17.

[21] To be more precise, a decision not to execute a European Arrest Warrant (EAW), but for the purposes in debate in this article the differences between the EAW and classic extradition are immaterial.

[22] See also Pedro Caeiro / Miguel João Costa, "Extradition and Surrender: from a Bilateral Political Arrangement to a Triangular Legal Procedure", in Kai Ambos / Peter Rackow (eds.), *Cambridge Companion to European Criminal Law*, Cambridge University Press, forthcoming 2023.

[23] All the members of this commando unit were convicted by Spanish courts in May 2007, save for N.J.E., who reportedly fled to Mexico after the events of 1981 and later moved to Belgium: see par. 6.

[24] ECtHR (Plenary), Judgment of 7 July 1989, application no. 14038/88.

[25] The concept underpinning the procedural limb of the right to life – as put by Mattia Pinto, "Romeo Castaño: 'Meticulously Elaborated Interpretations' for the sake of Prosecution", *Strasbourg Observers*, 10 September 2019 – is that "investigation is required to secure retrospectively the substantive right of the victim".

been the case, as the examination carried out by Belgium had not been "sufficiently thorough".[26]

The ruling has been criticized for prioritizing "maximal efficiency over a better protection of fundamental rights".[27] The warning should not be overlooked, but the fact is that the ECtHR had already upheld on several occasions that human rights give rise to positive duties with transnational implications, namely to request the extradition of an accused or convicted individual.[28] This would already suffice to the point in making in this text, particularly if one considers that, even where a crime is extraterritorial, the fact that the perpetrator and the victim are citizens and habitual residents of a given State and the perpetrator later flees back to its territory could be regarded as acts committed 'under' the jurisdiction of that State. In this sense, this State would have a self-standing or direct duty to carry out an 'effective investigation'. But *Romeo Castaño* takes that case law further, by declaring that a State may be indirectly engaged even if the acts occurred under an altogether "different jurisdiction"[29]. The engagement here takes the shape of a duty to cooperate with such a jurisdiction.

Refocusing on the specific constitutional environment of the PRC, let us consider the following extreme examples, for the sake of reflection: X, a Hong Kong resident, organizes a conference in the Mainland in order to kill his/her Mainland and Hong Kong business partners, killing three of them; Y, a Hong Kong resident places a bomb in a station in the Mainland, killing a thousand people; Z, a Mainland resident murders several members of the Central Government in Beijing. Suppose that in all cases the suspects flee to Hong Kong. No *legal* mechanism is available that would enable Hong Kong to undertake any criminal-law measures to effectively deal with those situations. Not only does this increase the risk of deployment of extra-legal measures, but also it is difficult to sustain in most constitutional contexts – let alone within "one country", and particularly in cases such as those of Y and Z, which in contrast to that

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[26] *Romeo Castaño v. Belgium*, *cit*., §§ 85-92.

[27] Mattia Pinto, *op. cit*.

[28] See Matteo Zamboni, "Romeo Castaño v Belgium and the Duty to Cooperate under the ECHR", *EJIL:Talk*, 19 August, 2019.

[29] *Romeo Castaño v. Belgium*, *cit*., § 37.

of X are 'national security' cases. This should help to explain not only why Article 23 of the Basic Law *mandates* Hong Kong to adopt laws to protect national security, but also why the central authorities of the PRC adopted the National Security Law (or NSL) in order to overcome Hong Kong's lack of implementation of Article 23.[30]

We shall come back later to the connection between the 'loophole' in Hong Kong and Chinese national security, but for now it is sufficient to emphasize that the whole controversy surrounding the Extradition Bill should be framed and analyzed within the context of the unique operation of the "one country, two systems" principle. The fact that there are "two systems" does not mean that closing said 'loophole' is not justified under the "one country" tenet. Thus, the expression "may (...) and in accordance with the law" (Article 95 of the Basic Law), more than conferring discretion on the authorities of Hong Kong to decide whether or not to conclude agreements with the Mainland or other places of the PRC, may reasonably be construed as urging those authorities to create mechanisms for dealing with at least the most serious cases affecting the Hong Kong fraction of the "one country". This could certainly be attained by Hong Kong establishing own jurisdiction over the crime (*judicare*), rather than by extraditing suspects to other jurisdictions (*dedere*), but one should bear in mind that, regarding crimes committed in other jurisdictions, extraditing is in principle the preferable course of action from a neutral, politically detached, internationalist perspective.[31]

In sum, in introducing a Bill with a view to mending the identified 'loophole', the Government of Hong Kong acted not only within its constitutional powers, but possibly even in fulfilment of an implicit constitutional *mandate*. Still, a proper assessment of the Bill, of its implications for Hong Kong and for Hongkongers, requires a closer look into its actual *content*. Ultimately, the crucial question is whether it safeguarded sufficiently the fundamental rights of the person sought and the fundamental values of Hong Kong's criminal justice system. And such an assessment suggests that the Bill did to large extent comply with international standards.

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[30] See *infra*, Section III.

[31] See Miguel João Costa, *Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond*, Brill, 2019, p. 305-381.

Arguably, the core point of contention was whether or not the Bill was capable of protecting fundamental rights. In addressing this aspect, it is in the first place important to underscore that, in the context of international cooperation – as in general, one might say – trust is relevant mainly in respect of prospective events:[32] whether or not the requesting State will carry out a fair trial; whether or not it will live up to the promise not to apply a death penalty; etc. One of the main aspects where trust plays a key role is indeed the respect for human rights, and this is one of the main arguments against the Bill: it would theoretically allow Hong Kong to extradite a person to jurisdictions that it does not regard as sufficiently trustworthy in that respect. This is not a negligible point, and, as things stand, it certainly is relevant inasmuch as Mainland China is concerned. Cora Chan has addressed the question whether the concerns about Mainland China are justified. The author propounds that, while it is "indisputable" that "China's criminal justice system has improved", the key question is "whether it has improved to an extent sufficient to warrant trust". And on this point the author claims:

> "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, ie 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 per cent are fair), the problem remains that those in power can decide whether a case falls within the 95 per cent or the 5 per cent, much like the situation in the dual state of the Third Reich. 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."[33]

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[32] See Pedro Caeiro, "Reconhecimento Mútuo, Harmonização e Confiança Mútua (Primeiro Esboço de uma Revisão)", in Margarida Santos / Mário Ferreira Monte / Fernando Conde Monteiro (eds.), *Os novos desafios da cooperação judiciária e policial na União Europeia e da implementação da Procuradoria Europeia*, Centro Interdisciplinar em Direitos Humanos da Escola de Direito da Universidade do Minho, 2017, p. 35-38.

[33] Cora Chan, "Demise...", *op. cit.*, p. 451.

Yet, international *cooperation*, by its very definition, is not the context for casting judgments on other legal or political systems. This helps to explain why – as the author herself acknowledges – liberal democracies frequently do entertain extradition relations with States with different political regimes. In fact, before the handover of Hong Kong and Macau to the PRC in 1997 and 1999 by the UK and Portugal, respectively, these two States extradited individuals to the PRC from Hong Kong and Macau.[34] The problem is not so much whether one is cooperating with a legal system which contains rules that are inadmissible in one's own eyes, but whether one is cooperating with that legal system in a case where such rules may in effect come to be applied. If so, one may be held, co-responsible, for such an application. But if not, then there is no direct *normative* reason not to cooperate, and refusal to do so would boil down to an abstract repudiation of that legal system as such. This is why, for instance, a State that repudiates the death penalty may nevertheless extradite a person to a State where this penalty is in place, so long as it cannot possibly be applied in the case at hand – as was precisely the case, for instance, in some high-profile cases in which Portugal granted extradition to the PRC of individuals found in Macau.[35-36]

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[34] See Miguel Manero de Lemos / Simon N.M. Young, "Regional Judicial Co-operation in Criminal Matters: Mainland, Hong Kong and Macau", in Pedro Caeiro / Sabine Gless / Valsamis Mitsilegas / Miguel João Costa / Janneke de Snaijer / Georgia Theodorakakou (eds.), *Elgar Encyclopedia of Crime and Criminal Justice*, Edward Elgar Publishing, forthcoming 2023.

[35] A noteworthy case is *Leung*, concerning a Chinese citizen found in Macau (still under Portuguese administration) and wanted for homicide in the PRC, where he would likely face capital punishment. Extradition was granted to the PRC by the highest judicial instance in Macau in 1994. It was ultimately blocked by the Portuguese Constitutional Court (ruling no. 417/95, of 4 July), but not because it was always inconceivable to extradite to the PRC as a country that applied the death penalty; rather, because the Court found that, in the light of the Portuguese Constitution, the political guarantees of non-execution of the death penalty offered by the PRC were immaterial, and that the law internally binding on the PRC would have to preclude the applicability of the death penalty in the case, namely by virtue of commutation or an amnesty law. For a critical analysis of the case and the whole underlying legal problem, see Pedro Caeiro, "Proibições Constitucionais de Extraditar em Função da Pena Aplicável", *Revista Portuguesa de Ciência Criminal* 8 (1998), p. 157 *et passim*.

[36] On the arguments used by democratic Governments to justify entertaining extradition relations with States with doubtful human rights standards, see

On the other hand, also ironically, authoritarian regimes have, in one sense, more possibilities than democracies to provide certain international assurances, because their executive branch can bind their judicial branch. This authoritarian feature enables those States to guarantee that, for instance, their courts will not apply a given penalty in a specific case. In addition, as also acknowledged by Chan, if a case is politically sensitive, this will raise the attention of the international community, which in turn tends to increase the levels of deference and restraint with which the case will be dealt by the courts. Extradition cases being inherently sensitive, especially extradition cases from Hong Kong to the Mainland in the present context, this factor is not negligible when projecting what the conduct of the Mainland would be in relation to defendants that are extradited to it by Hong Kong.

Finally, and perhaps more importantly of all, while it is true that in extradition proceedings to the Mainland the role of the Chief Executive of Hong Kong – who is appointed by Beijing – would likely be ineffective,[37] it is also clear that the essential layer of protection would remain intact: the intervention of the judicial branch – which is "undoubtedly the most autonomous branch" in Hong Kong.[38] Even if the courts were the *only* organs actively engaged in assessing the viability of extradition to the Mainland, that could even reinforce their leeway for engaging in para-political evaluations of the circumstances of the case. This type of evaluation is rather inexorable in extradition cases, as is clearly exemplified by Section 5 (1) (c) and (d) of the Fugitive Offenders Ordinance of Hong Kong (FOO), which calls for an assessment as to whether the request "(though purporting to be made on account of a relevant offence) is in

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also Asif Efrat / Marcello Tomasina, "Value-free extradition? Human rights and the dilemma of surrendering wanted persons to China", *Journal of Human Rights* 17(5) (2018), p. 617 (claiming that these arguments are used to "rationalize" a decision which is mainly grounded in *realpolitik* reasons, namely to enhance diplomatic relations with rising economies).

[37] See Johannes Chan, "Ten Days that Shocked the World: The Rendition Proposal in Hong Kong", *Hong Kong Law Journal* 49(2) (2019), p. 437; Albert H.Y. Chen, "A Perfect Storm...", *op. cit.*, p. 427; P.Y. Lo, "The Unprosecuted Taiwan Homicide...", *op. cit.*, p. 387-388.

[38] Cora Chan, "Demise...", *op. cit.*, p. 450.

fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions" (*non-refoulement*).

Another novelty brought about by the Bill was that it abolished the traditional *treaty requirement*, according to which extradition can only be granted to States or jurisdictions with which an extradition treaty has been concluded.[39] At present, however, this is not really a controversial solution. Many States extradite in the absence of a treaty, so long as reciprocity guarantees are provided in the case by the requesting State.[40] Some States even extradite in the absence of such guarantees, if for instance the gravity of the case so justifies.[41]

Apart from the issues addressed so far, the articulation of the Bill and the FOO was in tune with the standards of extradition law. Regarding the classic *dual criminality* rule, according to which extradition is granted only for acts that are criminalized in both legal systems, it was already provided for in the FOO.[42] The Bill not only maintained it, but also it increased the *relevancy thresholds* for extraditions based on special arrangements: in these cases, the offence would have to be punishable under both laws with imprisonment for more than 3 years or greater punishment, instead of the more normal 1-year threshold.[43]

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[39] To be more accurate, the FOO already allowed for *ad hoc* extradition arrangements, as opposed to fully-fledged treaties, but they had to be vetted by the Legislative Council. In turn, as noted by Johannes Chan, "Ten Days...", *op. cit.*, p. 432, the Bill proposed to "do away with the scrutiny by the Legislative Council on the ground that it will take too long and the transparent nature of the deliberation at the Legislative Council would alert any fugitive." To the author, such reasons were "hardly convincing".

[40] Even States where the treaty requirement was well engrained historically have evolved in this respect. For example, in the UK, *ad hoc* arrangements may be concluded by the Home Secretary since the Extradition Act 1989: see Scott Baker / David Perry / Anand Doobay, *A Review of the United Kingdom's Extradition Arrangements (Following Written Ministerial Statement by the Secretary of State for the Home Department of 8 September 2010)*, Presented to the Home Secretary on 30 September 2011, Home Office, HO_01859_G, p. 272.

[41] As a mere illustration, see Article 4 (3) of the Portuguese statute on international cooperation in criminal matters (Law no. 144/99, of 31 August).

[42] Section 2 (3) and (4) of the FOO.

[43] Section 3A (4) and (5) of the FOO, as they would have been amended by the Bill.

Regarding the "general restrictions on surrender" provided for in section 5 of the FOO, they would continue to apply. This includes the following hypotheses: the acts constitute a *political offence*; the request seeks to persecute the person on account of his race, religion, nationality or political opinions, or the person would be prejudiced owing to such factors (*non-refoulement*, already mentioned shortly above); the person was convicted *in absentia* and was not given an opportunity of being tried in his/her presence and would not be entitled to a retrial; the prosecution or enforcement of the penalty would be barred on *double jeopardy* (*ne bis in idem*) grounds under the law of Hong Kong. As for the criticism that the *prima facie* case requirement is ineffective, it is worth noting that, if that is indeed the case, then the problem would not have been innovatively brought by the Bill, but is rather a problem of the FOO as it already stands. Furthermore, the very fact that the FOO does require a *prima facie* case already makes Hong Kong's extradition system more protective than most other systems, as these do not normally require a shred of evidence of criminal liability in order for extradition to be granted.

Section 5 of the FOO moreover provides for the specialty rule and for limitations on the re-extradition of the person to a third jurisdiction. Limitations on *re-extradition* have roughly the same rationale as the *specialty rule*, and the specialty rule is no less than one of the most central rules of extradition law, because if a State could prosecute a person for whichever acts upon obtaining his / her extradition, then this would render irrelevant the whole assessment carried out by the State that granted extradition, which is made by reference to the specific acts mentioned in the extradition request.[44]

On the other hand, the hypothesis of a *death penalty* being applied in the Mainland did not seem to trigger many concerns. In this aspect, there is relatively narrow room for discretion in the Chief Executive's intervention under Section 13 (5) of the FOO.[45] Furthermore, the courts

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[44] Further on this pivotal rule of extradition law, which is grounded on the international law principle of non-interference, see Miguel João Costa, *Extradition Law...*, *op. cit.*, p. 432-444.

[45] Which prescribes: "Where (a) a person is wanted in a prescribed place for prosecution, or for the imposition or enforcement of a sentence, in respect of a relevant offence against the law of that place; and (b) that offence is

have some powers of judicial review (even if not extensive) over the Chief Executive's decision to order extradition,[46] which may even allow for the assertion that extradition can only be ordered if a *magistrate* is satisfied that capital punishment will not be imposed.[47]

A final aspect worthy of consideration concerns the fact that the Bill did not contain a '*nationality exception*', according to which extradition of permanent residents of Hong Kong would not be granted. Extraditing one's own nationals to States where they have committed criminal offences is not only consistent with the legal tradition of Hong Kong, which is characterized by an extreme level of deference toward the principle of territoriality of criminal law, but also it is the most creditable approach from an internationalistic perspective (notwithstanding the fact that the nationality exception does remain in place in several States).[48] In any event, once again, this issue was not brought about by the Bill, but rather it would already be open to discussion by reference to the FOO, which does not provide for a nationality (residency) exception either.

The *political* concerns at the Bill were probably justified, and it is certainly a valid point that human rights are rendered somewhat secondary to other considerations when a democratic State undertakes to establish extradition relations with a non-democratic one.[49] However, in a politically detached analysis of the problem, one must acknowledge that

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punishable with death, then an order for surrender may *only* be made in the case of that person if that place gives an assurance which satisfies the Chief Executive that that punishment will not be imposed on that person or, if so imposed, not carried out" (emphasis added).

46 See Cora Chan, "Demise...", *op. cit.*, p. 449.

47 In this precise sense, see Johannes Chan, "Ten days...", *op. cit.*, p. 436. It is also interesting that – as conveyed by Albert H.Y. Chen, "A Perfect Storm...", *op. cit.*, p. 427-428 –, a Bill introduced in Macau in December 2015 (but withdrawn by the Government in June 2016) to regulate Interregional Criminal Judicial Assistance, including surrender, between Macau, the Mainland, Hong Kong and Taiwan, reportedly departed from many traditional principles of extradition law, such as the political offence exception and non-refoulement, but *not* from the death penalty exception.

48 See Miguel João Costa, *Extradition Law...*, *op. cit.*, p. 547-559.

49 See again Asif Efrat / Marcello Tomasina, "Value-free extradition?...", *op. cit.*, p. 616 ss.

the adoption of the Bill would have been legitimate in its constitutional underpinnings, and not unaligned with international standards.

Contrary to informal, non-legal and non-judicial transfer arrangements that come close to actual international kidnappings, formal extradition proceedings might have provided Hong Kong with a platform to showcase its differences vis-à-vis the Mainland. By ruling a given case to fall within the problematic 5% rather than within the reportedly unproblematic 95%, Hong Kong's courts would be underscoring just how different their legal system, worldview and human rights standards are from those of the Mainland. In the other 95% of the cases, there would be no clear *legal* reason not to extradite. Should a case ultimately prove to fall among the infamous 5% after extradition being granted (a risk which exists in the extradition relations of virtually all jurisdictions), then this would entitle Hong Kong's courts to re-evaluate whether and to what extent cooperation with the Mainland should continue – which again would only evince Hong Kong's autonomy.

II. The National Security Law

The protests that shook Hong Kong as a consequence of the Extradition Bill led the Government of Hong Kong to withdraw it, but eventually prompted the introduction of a very different type of law: the NSL.[50] The NSL criminalizes "a broad range of conduct that would be recognized elsewhere as ordinary civic and political participation",[51] and brings with it several constitutionally problematic issues which are in tension with the basic policies for Hong Kong and the human rights

[50] Cora Chan, "Can Hong Kong Remain a Liberal Enclave within China? Analysis of the Hong Kong National Security Law", *Public Law* (2021), p. 274: "Several unprecedented features of the 2019 protests, including the visibility of pro-independence forces, increased resort to violence and interventionist responses by certain foreign states, appear to have convinced Beijing that there was a real risk of Hong Kong becoming a base for subversion and separatism, a risk it believed to be honed by the absence of legislation implementing art.23 BL. The NSL was introduced to curb that risk".

[51] Alvin Y.H. Cheung, "Unpalatable Realities...", *op. cit.*, p. 1155.

that those polices were designed to protect.[52] For the purposes of this article, it suffices to focus on the most problematic issues.

First, the law was passed not (as the Extradition Bill would have) by Hong Kong, but by Beijing. However, Article 23 of the Basic Law states:

> "The Hong Kong Special Administrative Region shall enact laws *on its own* to prohibit any act of treason, secession, sedition, subversion against the Central People's Government [...]."[53]

Considering that Article 23 of the Basic Law is unambiguous in assigning on the Hong Kong Special Administrative Region the authority for adopting national security laws, it is difficult to disagree with the conclusion that the authority to enact such a law lies with the authorities in Hong Kong rather than with the central authorities.[54] The fact that Hong Kong is mandated by the Basic Law to enact "on its own" a national security law is a consequence of the abovementioned fundamental idea enshrined in the "one country, two systems" model, i.e. that all the rights and freedoms of the Hongkongers are only supposed to be limited if a Hong Kong law expressly allows for such a limitation. As also mentioned above, since the central legislative organs are not supposed to enact laws for Hong Kong limiting such rights and freedoms, the appropriate forum to pass such types of laws is the Legislative Council of Hong Kong. This is also the natural consequence of a basic policy for Hong Kong enshrined in Annex I (II) of the Joint Declaration:

> "The laws of the Hong Kong Special Administrative Region shall be the Basic Law [...] and laws enacted by the Hong Kong Special Administrative Region legislature [...]."[55]

Moreover, as criminal laws are those that represent a more serious intrusion into the rights and liberties enshrined in the legal system of Hong

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[52] Cora Chan, "Can Hong Kong Remain...", *op. cit.*, p. 279 *et passim*.

[53] Basic Law, Article 23 (emphasis added).

[54] On this, see Johannes Chan, "Five Reasons to Question the Legality of a National Security Law for Hong Kong", *Verfassungsblog: On Matters Constitutional*, May 2020.

[55] Joint Declaration, Annex I (II).

Kong, particularly where they provide for harsh imprisonment penalties, it is almost impossible to argue that the Joint Declaration or the Basic Law provide room for an implicit prerogative of the central authorities to enact laws of that character.[56] Indeed, reassuring Hongkongers that their rights, their freedoms and their way of life would be maintained was one of the most important driving forces behind the carefully devised protections enshrined in the Joint Declaration and the Basic Law. That is why the drafters of the Basic Law decided that, even in relation to the criminal laws that concern the most important "one country" interest of safeguarding national security, the appropriate constitutional mechanism to ensure that such a law would be adopted was the constitutional mandate of Article 23 entrusting the Hong Kong authorities with the power and obligation to adopt such a law[57].

A second issue concerns the fact that the NSL establishes, in Hong Kong, an "Office for Safeguarding National Security" which can "initiate investigations" and "exercise jurisdiction over [cases] concerning offence[s] endangering national security".[58] The exercise of powers in Hong Kong by this Office might lead to persons being informally 'extradited' from Hong Kong to Mainland China for prosecution and trial on account of acts practiced in Hong Kong.[59] This disguised extradition mechanism is not subject to the above mentioned protections, that were enshrined in the Extradition Bill for extradition proper (think, for example, of the *prima facie* case requirement), and other protections simply do not

[56] But see Albert Chen, "Constitutional Controversies in the Aftermath of the Anti-Extradition Movement of 2019", *Hong Kong Law Journal* 50(2) (2020), p. 622, 627, arguing that Article 23 does not change "the fundamental principle that, by its very nature, national security legislation is the power and responsibility of the central authorities", and mentioning an alleged power of the central authorities to "supplement the provisions of the Basic Law in response to changing circumstances in [Hong Kong] that were not anticipated when the Basic Law was made in 1990".

[57] Whether or not it was a wise political decision to trust Hong Kong itself to actually adopt such a law is immaterial from legal perspective and for present purposes.

[58] NSL, Articles 55, 56.

[59] NSL, Article 56.

make sense within the NSL mindset (think, for example, of the double jeopardy requirement and the political offence exception).

Most significantly, there is no intervention of the judicial branch of Hong Kong in the operation of that mechanism. This represents an unconstitutional circumvention of the natural jurisdiction of the authorities in Hong Kong to prosecute and adjudicate such cases. In fact, it should be trite to observe that, since laws on national security were supposed to be adopted by Hong Kong on its own, all Hong Kong territorial cases relating to national security would lie within the jurisdictional province of the courts in Hong Kong. Article 19 of the Basic Law is clear-cut in affirming:

> "The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication. The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region [...]."[60]

In connection with the possibility of transferring a person for prosecution and trial from Hong Kong to the Mainland, the NSL assigns certain roles to the supreme judiciary authorities in the Mainland:

> "[T]he Supreme People's Procuratorate shall designate a prosecuting body to prosecute [the case], and the Supreme People's Court shall designate a court to adjudicate it."[61]

The assignment of such roles contravenes fundamental parts of the third basic policy of the Joint Declaration, which prescribes that Hong Kong will have an "independent judicial power, including the power of final adjudication".[62] Consider the import of that policy, as extensively prescribed in Annex I (Section III) of the Joint Declaration:

> "[T]he judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication. Judicial power in the Hong Kong

[60] Basic Law, Article 19.

[61] NSL, Article 56.

[62] Joint Declaration, para. 3 (3).

> Special Administrative Region shall be vested in the courts of the Hong Kong Special Administrative Region. The courts shall exercise judicial power independently and free from any interference [...]. The courts shall decide cases in accordance with the laws of the Hong Kong Special Administrative Region [...]. The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the court of final appeal [...]. A prosecuting authority of the Hong Kong Special Administrative Region shall control criminal prosecutions free from any interference."[63]

It seems impossible to read in this provision a hidden possibility to assign any role whatsoever to the Supreme People's Procuratorate and to the Supreme People's Court in the prosecution and adjudication of national security cases. What is more, according to the NSL, in the prosecution and adjudication of such cases:

> "The Criminal Procedure Law of the People's Republic of China and other related national laws shall apply to procedural matters, including those related to criminal investigation, examination and prosecution, trial, and execution of penalty."[64]

Apart from the fact that the application of Mainland laws to Hong Kong territorial cases also flies in the face of the third basic policy of the Joint Declaration and Article 19 of the Basic Law, criminal law and procedure in the Mainland are substantially guided by the socialist principles and logics in force under the PRC Constitution. Indeed, courts and procuratorates act under the socialist principle of democratic centralism, which means that all the organs of the state come under the unified leadership of the central authorities.[65] Democratic centralism is the underlying reason why the judiciary does not have a real "institutional and functional independence".[66] This includes the Supreme People's

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[63] Joint Declaration, Annex I (III).

[64] NSL, Article 57.

[65] Jianfu Chen, *Chinese Law: Context and Transformation, Revised and Expanded Edition*, Brill, 2016, p. 141.

[66] Yash Ghai, "Litigating the Basic Law: Jurisdiction, Interpretation and Procedure, in Hong Kong's Constitutional Debate, Conflict Over Interpretation", in Johannes M. M. Chan / H.L. Fu / Yash Ghai (eds.), *op. cit.*, p. 45.

Court and the Supreme People's Procuratorate which act under the supervision and control of the NPC and its Standing Committee.[67] Due consideration to this fact leads to the conclusion that the assignment of those roles to these organs and the application of mainland laws cause unsurmountable constitutional obstacles arising from the basic policy prescribing that "the socialist system and socialist policies shall not be practiced [in Hong Kong] for 50 years".[68]

Of course, all these considerations are quite different from those put forward in Section I, which prompted us to hold that there is no constitutional obstacle in enabling Hong Kong courts to permit extradition of individuals to the Mainland where they conclude that the structural lack of independence of judicial authorities in the Mainland would be unlikely to have tangible effects in the case at hand.[69]

A third issue relates with the fact that, in contrast with Article 158 of the Basic Law, which authorizes Hong Kong courts to interpret all the provisions of the Basic Law, Article 65 of the NSL states that the power of interpretation of the NSL belongs to the Standing Committee and does not authorize Hong Kong courts to interpret it.[70] Under the PRC Constitution, assigning the interpretative power to the Standing Committee is also a specific consequence of the socialist principle of democratic centralism.[71] While some scholars might be tempted to read down the significance of Article 65,[72] the risk is clear, for what the explicit wording of this provision suggests is that, in the image of the courts in the Mainland, the courts in Hong Kong are not supposed to have the power to interpret the NSL. It thereby also conveys a warning: attempts by Hong Kong courts to construe the law in a sense which is not to the Standing Committee's liking may prompt the intervention of

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67 PRC Constitution, Articles 3, 128, 133.

68 Joint Declaration, Annex I (Section I); Basic Law, preamble, Article 5.

69 See *supra* sections II.2. and II.3.

70 NSL, Article 65.

71 Cai Dingjian, *Constitution: An Intensive Reading (*宪法精解*)*, Law Press China, 2004, p. 301.

72 Simon Young, "Why Beijing must respect Hong Kong courts' interpretation of national security law", *South China Morning Post*, 8 July 2020; Cora Chan, "Can Hong Kong Remain...", *op. cit.*, p. 281 *et passim*.

the Standing Committee in order to curb them, in which case "socialist legality prevails".[73] It also means that the Standing Committee might issue interpretations in order to prevent such attempts and influence ongoing or future adjudication of cases. While that would not be a first,[74] an increase of the (more or less subtle) interference of the central authorities in the functioning of the judicial system in Hong Kong is all but certain.[75]

Based on a certain view according to which a clear distinction can be drawn between applying the law and interpreting the law (let us assume, for the sake of the argument, that such a division is indeed possible), the NSL mandates courts in Hong Kong to simply *apply* the law. In addition to colliding with Article 158 of the Basic Law, such a mandate also violates the third basic policy of the Joint Declaration, because, if courts cannot interpret the law, it is impossible to argue that a real independent judicial power operating free from interference truly exists.

It also goes without saying that, while interpretation of the law in general is an integral part of the exercise of judicial power *tout court*, particularly strict interpretative techniques are supposed to be used in criminal matters in order to ensure that the human rights principles of legality, presumption of innocence, etc., are duly respected and that a simplistic and mechanic application of the words of the law does not result in arrests or imprisonments that are not warranted in view of all the competing values at stake. In other words, if the courts are disallowed to interpret the law, a vital part of the exercise of judicial power of Hong Kong is taken away from their province and assigned exclusively to a political and legislative body. Thus, the NSL contravenes the command of the Joint Declaration that the judicial system previously practiced in Hong Kong be maintained.

In reality, it might be difficult for the courts to refrain from interpreting the NSL and simply apply its words mechanically. However,

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[73] Cora Chan, "Can Hong Kong Remain...", *op. cit.*, p. 281.

[74] P.Y. Lo, "Two Kinds of Unconstitutional Constitutional Interpretations in China's Hong Kong", *I-CONnect – Blog of the International Journal of Constitutional Law*, 23 December 2016.

[75] Alvin Y.H. Cheung, "Unpalatable Realities...", *op. cit.*, p. 1162.

rather recently (on 9 February 2021), in *Lai Chee Ying* (a case concerning Jimmy Lai, a media tycoon supportive of the democratic movement in Hong Kong and the most prominent person arrested under the NSL since its coming into force), the CFA provided us with a glimpse of how a subtle difference between *interpretation* of the NSL in light of all the relevant principles and pure *application* of its provisions might actually play out. Article 42 of the NSL states:

> "*No bail* shall be granted to a criminal suspect or defendant *unless* the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security."[76]

The CFA held that the general rule in favor of bail established in the Criminal Procedure Ordinance of Hong Kong (CPO) was displaced by Article 42.[77] However, the general bail regime is "only a reflection" of relevant constitutional principles in force under the Basic Law (particularly, the right to personal liberty and the presumption of innocence),[78] and the court did not consider the effect of those principles "when it readily accepted" that Article 42 displaced the general regime's presumption in favor of bail.[79] Had the CFA considered this provision in light of the relevant constitutional principles, it might have reached the opposite

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[76] NSL, Article 42 (emphasis added).

[77] *HKSAR v Lai Chee Ying* [2021] HKCFA 3 (9 Feb 2021), at [53(b)]: "Under NSL 42(2), that presumption is excluded in the first instance. The starting point is that no bail shall be granted unless the judge has sufficient grounds for believing that the accused 'will not continue to commit acts endangering national security'. Plainly, NSL 42(2) introduces a considerably more stringent threshold requirement. Under the CPO, the rule is 'grant bail unless there are substantial grounds to believe violation will occur', while under NSL 42(2) it is 'no bail unless there are sufficient grounds to believe violation will not occur' ".

[78] See, *inter alia*, Articles 4 and 5 of the NSL, Article 28 of the Basic Law, Articles 9 and 14 of the ICCPR (as implemented in Articles 5 and 11 of the Bill of Rights of Hong Kong).

[79] Johannes Chan, "Judicial Responses to the National Security Law: *HKSAR v Lai Chee Ying*", *Hong Kong Law Journal* 51(1) (2021), p. 1-14.

conclusion.[80] However – so the argument goes –, such an interpretation would go against the "literal meaning" of Article 42.[81]

In abstaining from *interpreting* the relevant provisions, and instead *applying* Article 42 mechanically, the CFA not only complied with the legislative intent behind Article 65 of the NSL, but also it concomitantly declined to evaluate whether Article 42 is compatible with the relevant human rights norms. As the CFA has affirmed:

> "the legislative acts of the NPC and NPCSC leading to the promulgation of the NSL as a law of the HKSAR, done in accordance with the provision of the Basic Law and the procedure therein, are not subject to review on the basis of any alleged incompatibility as between the NSL and the Basic Law or the ICCPR as applied to Hong Kong."[82]

Ultimately, and for all practical purposes, the mere application of Article 42 by the CFA meant that bail was refused, and instead of being released Jimmy Lai was kept in jail. The CFA also signaled that it is going to faithfully execute the overall intent of the NSL. As Alvin Cheung has noted:

> "The [NSL] imposes not one but two separate state security apparatuses on the territory – one made up of carefully selected Hong Kong police, prosecutors, and judges; the other of the Mainland's own state security agents. Despite a cursory reference [...] to the protection of fundamental rights, the remainder of the text makes plain that – by design – neither security apparatus will be subject to meaningful legal or democratic accountability to any institution within Hong Kong."[83]

Most importantly, the highest judicial organ in Hong Kong did already make it abundantly clear (in *Lai Chee Ying*) that security concerns,

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[80] See, particularly, Article 5(3) of the Bill of Rights: "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial (...)".

[81] Johannes Chan, "Judicial Responses...", *op. cit.*, p. 8.

[82] *HKSAR v Lai Chee Ying*, *cit.*, at [37], [70].

[83] Alvin Y.H. Cheung, "Unpalatable Realities...", *op. cit.*, p. 1155.

as expressed *in casu* in Article 42 the NSL, trump whatever human rights might have previously prevailed in Hong Kong (rights to which the NSL itself pays lip service in Article 4).[84]

III. Conclusion

Whether or not the Extradition Bill was acceptable and whether or not the NSL is acceptable are two independent questions. The fact that the NSL constitutes a more serious threat to human rights than the Extradition Bill would have does not mean that the latter was flawless, nor does it, in itself, constitute a reason to retrospectively endorse it.

Objectively, however, it is tragically ironic that the reaction of civil society to the Extradition Bill and the failure of Hong Kong to enact a national security law – driven though they were by human rights concerns – eventually made room for the emergence of a law that in fact poses a grave threat to human rights. The Extradition Bill would have been constitutionally legitimate, it would have preserved the idea of "two systems", and it would not have shattered fundamental principles of extradition law. In contrast, the NSL introduced a mechanism for the transfer of persons from Hong Kong to the Mainland and other rules which conflict with the basic policies set out in the Joint Declaration and with the human rights they were designed to protect, as well as with international law principles on the transfer of persons to a different jurisdiction. This is well depicted by Carole Peterson:

> "[W]hile the NSL does not contain any explicit provision for extradition to the Mainland, it appears that the NSL has accomplished what Carrie Lam tried to achieve in 2019 – case-by-case extradition to the Mainland, where the ICCPR does not apply and there is no guarantee of a right to a fair trial."[85]

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[84] NSL, Article 4: "The rights and freedoms, (...) which the residents of the Region enjoy under the Basic Law of the Hong Kong Special Administrative Region and the provisions of the International Covenant on Civil and Political Rights [...] as applied to Hong Kong, shall be protected (...)".

[85] Carole J. Petersen, "The Disappearing Firewall...", *op. cit.*, p. 649.

It is also ironic that, prior to the handover of Hong Kong and Macau to the PRC, the UK and Portugal used to entertain extradition relations with the PRC concerning (not only, but also) individuals located in Hong Kong and Macau, provided that human rights and other paramount values were in the case respected.[86] In contrast, upon reintegration into the PRC – which formally brought the Mainland, Hong Kong and Macau closer together than they had been for centuries –, the political sensitivity of their relations has proven an insurmountable obstacle for an agreement to be reached on the conditions upon which extradition among them can reasonably take place. That obstacle, however, was forcefully overcome by the PRC through the NSL, the blade that cut this Gordian knot. With the "two systems" showing irreconcilable in this aspect, one of them eventually imposed itself on the other in the name of "one country", carrying the regrettable results assessed in this article.

Finally, it is yet ironic that this imposition – i.e. the enactment of the NSL, which encompasses norms that carry an ostensible interference with deeply-rooted rights and freedoms of Hongkongers – has sparked a strong reaction by liberal-minded countries leading to the cessation of extradition relations with Hong Kong,[87] and, as a consequence, compromised the main objective underpinning stable extradition relations, namely to ensure that crime (especially, serious crime) does not remain unattended, which in itself also has human rights resonance, as recently illustrated by the *Romeo Castaño* case in the ECtHR.

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[86] As illustrated by the *Leung* case mentioned above, in Section II.

[87] The fact alone that many such countries decided to cancel their extradition relations with Hong Kong (as well as to adopt other 'counter-measures') lends strength to the view that the NSL did breach basic constitutional and human rights rules that were supposed to be in force in Hong Kong at least until 2047. The view expressed by the UK was that the breach of the basic policies set out in the Joint Declaration and the curtailment of human rights enshrined in the NSL was so "clear and serious" that there was no room for a less forceful reaction: see William James, "UK says China's security law is serious violation of Hong Kong treaty", *Reuters* 7 July 2020.

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