

Speech to the Medico-Legal Society of Victoria¹

The Mystery of the Missing Booksellers

or

A Tale of Two Systems

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Introduction

1. From late 2015 until the middle of 2016, a series of extraordinary events unfolded in Hong Kong concerning five booksellers connected to a bookstore in the heart of the city. The story developed piecemeal and captured the attention of the public and the press both in Hong Kong and also overseas. For reasons that I think will become obvious, these events provide a useful context in which to consider the rule of law and free speech in Hong Kong and to examine the “one country, two systems” principle under which Hong Kong’s constitutional arrangements operate.

2. I shall begin with a roughly chronological review of the facts – these are so unusual that it is worth devoting some time to them. I shall then examine some of the legal questions that this incident raises. Finally, I shall offer a reflection on the state of the rule of law in Hong Kong as things stand in this year, 2017, which marks the 20th anniversary of the establishment of the Special Administrative Region.

¹ Delivered in Melbourne, at the Melbourne Club, on 24th March 2017.

² Permanent Judge of the Hong Kong Court of Final Appeal. I wish to acknowledge my gratitude to Mr Victor Lui and Ms Katrina KW Lee, Judicial Assistants in the Court of Final Appeal (2016-17), for their assistance in the preparation of this talk.

The Facts

3. I start, then, with the story. If you are a fan of crime and detective fiction, it is one which you may find intriguing. Had you set out to write a fictional account of a modern day thriller involving mysterious cross-border movements, you would probably be hard pressed to have invented a more unusual set of events. I have taken my description of the events from matters publicly reported. However, I make no comment as to the accuracy of those facts, which have not been verified in any formal way. I should also add the obvious further caveat that, given that these events could conceivably lead to court proceedings, I will refrain from expressing any opinion on them.

4. Causeway Bay Books is a bookshop in the busy shopping district of Causeway Bay in Hong Kong. Before its closure, it sold books including some which contained material that was sensitive in that it was critical and disparaging of Mainland Chinese political figures. The bookstore had become popular amongst Mainland Chinese tourists who could not otherwise obtain the books it sold. The bookstore was acquired in 2014 by a publishing company called Mighty Current Media Company Limited, which published and widely distributed books sold by the bookstore. It had three shareholders: Gui Minhai, Sophie Choi Ka-ping and Lui Por.

5. Between October 2015 and June 2016, the whereabouts of five individuals connected with the company and the bookstore were, at various times, unknown to their families and the Hong Kong authorities. It would seem that, between October and December 2015, the five went missing in the following circumstances.

6. Gui Minhai (“Gui”), one of the shareholders of Mighty Current Media, who was also a Swedish citizen, disappeared having last been recorded on CCTV at his apartment in Pattaya, Thailand, on 17 October 2015. About two weeks later, Gui apparently left a Skype message for his daughter Angela in which he said: “*I have put [HK\$30,000] in your account in Hong Kong, and hope you will be fine with everything.*”³ Notwithstanding that he called his wife in November 2015 and told her he was safe, his family reported his disappearance to the Swedish embassy in Thailand and the Swedish police filed a report through INTERPOL.⁴ The Thai authorities had no record of Gui leaving the country.⁵

7. Lui Por (“Lui”), the general manager of Causeway Bay Books and another of the shareholders of Mighty Current Media disappeared after he was apparently taken away from his wife’s home in Shenzhen, the Mainland city just over the border from Hong Kong, on 24 October 2015.⁶ Also on that day, Cheung Jiping (“Cheung”), who worked as Lui’s assistant, was taken away from his wife’s home in Dongguan, near Shenzhen, by Mainland police⁷ and Lam Wing-kee (“Lam”), the founder of Causeway Bay Books, went missing, apparently having been intercepted by Mainland officers when crossing the border on his way from Hong Kong to Shenzhen.⁸

³ Siu, P. and Lam, J., (2016), “‘What has happened to him is abduction’: Gui Minhai was involved in drink drive accident but trip to mainland dubious, close friend reveals”, *South China Morning Post*, 18 January. Available at <http://www.scmp.com/news/hong-kong/politics/article/1902296/what-has-happened-him-abduction-gui-minhai-was-involved>.

⁴ Holmes, O., (2015), “Gui Minhai: the strange disappearance of a publisher who riled China’s elite”, *The Guardian*, 8 December. Available at <https://www.theguardian.com/world/2015/dec/08/gui-minhai-the-strange-disappearance-of-a-publisher-who-riled-chinas-elite>.

⁵ Siu, P. and Lai, YK., (2016), “Thai authorities investigating case of missing bookseller Gui Minhai after it emerges there is no record of him leaving Thailand”, *South China Morning Post*, 19 January. Available at <http://www.scmp.com/news/hong-kong/law-crime/article/1902800/thai-authorities-investigating-case-missing-bookseller-gui>.

⁶ (2016), “在內地接受《星島》專訪 呂波張志平人：林榮基講大話 疑有人背後操縱”, *Ming Pao Daily*, 18 June. Available at: http://news.mingpao.com/ins/instantnews/web_tc/article/20160618/s00001/1466247740473.

⁷ *Ibid.*

⁸ Siu, P., Ng, KC. and Fung, O., (2016), “Bookseller Lam Wing-kee reveals explosive details of his mainland China detention, claims Lee Po told him he was ‘taken away from Hong Kong’”, *South China Morning*

8. On 5 November 2015, Cheung, Lui and Lam were reported to the Hong Kong authorities as missing, each having apparently left Hong Kong via the immigration control point at Lo Wu on the border between Hong Kong and the Mainland.⁹ So at this stage, the whereabouts of four of the five booksellers were unknown.

9. During the month of November 2015, Lee Bo (“Lee”), the operator of Causeway Bay Books and husband of Sophie Choi, a shareholder in Mighty Current Media, and a British citizen gave an interview in which he claimed: “*I am not worried. I have avoided going to the mainland for many years.*”¹⁰ On 30 December 2015, Lee was last seen in Hong Kong in the company’s warehouse and later that evening called his wife from a Shenzhen telephone number saying he was assisting with an investigation.¹¹

10. On 1 January 2016, Sophie Choi reported her husband missing to the Hong Kong police. She reported having received two telephone calls from Lee from a Shenzhen number in which he spoke in Putonghua instead of Cantonese.¹² There was no record of Lee having left Hong Kong.¹³

Post, 16 June. Available at <http://www.scmp.com/news/hong-kong/politics/article/1976489/bookseller-lam-wing-kee-reveals-explosive-details-his>.

⁹ Lo, C., (2016), “Mystery investor bought into Causeway Bay books as owners disappeared, source tells *Post*”, *South China Morning Post*, 8 January. Available at <http://www.scmp.com/news/hong-kong/law-crime/article/1899541/mystery-investor-bought-causeway-bay-books-owners>.

¹⁰ Lai, YK., (2016), “Before he vanished, Hong Kong bookseller thought no harm would come to him if he stayed away from mainland”, *South China Morning Post*, 6 January. Available at <http://www.scmp.com/news/hong-kong/law-crime/article/1898370/he-vanished-hong-kong-bookseller-thought-no-harm-would-come>.

¹¹ Lam, J., (2016), “Lee Po, the main actor in the mystery of the missing booksellers, and the five questions to be solved”, *South China Morning Post*, 30 January. Available at <http://www.scmp.com/news/hong-kong/politics/article/1907061/lee-po-main-actor-mystery-missing-booksellers-and-five>.

¹² Ma, L., (2016), “Timeline: Hong Kong’s missing booksellers and what we know so far”, *South China Morning Post*, 20 January. Available at <http://www.scmp.com/news/hong-kong/law-crime/article/1903405/timeline-hong-kongs-missing-booksellers-and-what-we-know-so>.

¹³ Lam, J., (2016), “Lee Po, the main actor in the mystery of the missing booksellers, and the five questions to be solved”, *South China Morning Post*, 30 January. Available at <http://www.scmp.com/news/hong-kong/politics/article/1907061/lee-po-main-actor-mystery-missing-booksellers-and-five>.

11. So, by the very beginning of 2016, the five men had each disappeared in the sense that their families had reported them missing to the authorities. Over the next two months, the story developed in a curious manner and the bookstore has remained closed since Lee's disappearance.

12. On 2 January 2016, Sophie Choi received another call from her husband from a Shenzhen number and, on 4 January 2016, the Taiwanese state-owned news agency published a letter dated the previous day and purportedly handwritten by Lee, stating that he had "*returned to [the] mainland my own way and am working with the concerned parties in an investigation which may take a while*" but also stating "*I am now very good and everything is normal*".¹⁴ Choi then withdrew her request to the police for help regarding her husband and, on 5 January 2016, Choi commented that she believed Lee "*wrote the letter out of his own free will that's why I withdrew the request for police help*".¹⁵

13. On 9 January 2016, Choi received a second letter and video from her husband, Lee, in which, it is reported, he said that it was his own decision to return to the Mainland "*in order to get an understanding of some personal issues. It is none of anyone's business.*"¹⁶

14. On 17 January 2016, Gui appeared on China Central TV saying he had surrendered to the Mainland authorities the previous October after absconding

¹⁴ Lai, YK., (2016), "Missing booksellers mystery: CY Leung vows Hong Kong will press on with investigation, urges Lee Bo to come forward", *South China Morning Post*, 5 January. Available at <http://www.scmp.com/news/hong-kong/politics/article/1898005/missing-booksellers-mystery-cy-leung-vows-hong-kong-will>.

¹⁵ Ng, N., (2016), "Wife of missing Hong Kong bookseller Lee Bo says his note had his 'real handwriting' as lawmaker alleges he fled with associates to seek prostitutes", *South China Morning Post*, 5 January. Available at <http://www.scmp.com/news/hong-kong/law-crime/article/1898121/wife-missing-hong-kong-bookseller-lee-bo-says-his-note-had>.

¹⁶ Ngo, J., (2016), "New claim Lee Bo sent a video and a letter to his wife saying his visit to mainland was 'personal decision'", *South China Morning Post*, 10 January. Available at <http://www.scmp.com/news/hong-kong/politics/article/1899705/new-claim-lee-bo-sent-video-and-letter-his-wife-saying-his>.

from a suspended two-year jail term for causing the death of a university student while drunk-driving in Ningbo in 2004. Amongst other things, Gui said:

- “*I was afraid of going to jail, and there was no way I could develop on the mainland, so I thought I better run*”;
- “*I have to shoulder my own liability, and I’m willing to be punished*”; and
- “*Even though I am a Swedish national, I truly feel that I am still Chinese and my roots are still in China. So I hope that the Swedish side would respect my personal choice, rights and privacy and let me solve my own problems*”.¹⁷

15. That same day, it was reported that Choi had received a third letter from her husband, Lee, in which he wrote that he was “*fine and healthy*” and that the investigation by the Mainland authorities had made “*good progress*”.¹⁸ Also on the same day, Gui’s daughter Angela said she had received a message from her father’s Skype account claiming that he was “*ok*” and had returned to China on his own “*to sort some personal problems.*” However, she also stated that she had not heard of the traffic incident and that she did not believe her father would have returned to China without telling her.¹⁹

16. On 18 January 2016, the Guangdong Provincial Public Security Bureau (“the Guangdong PSB”) confirmed, in response to inquiries from the Hong Kong Police, that Lee was detained in the Mainland.²⁰

17. On 24 January 2016, the Hong Kong Police issued a statement saying:

¹⁷ Mok, D., (2016), “Missing Hong Kong bookseller says he turned himself in for 2003 drunk driving death on state TV”, *South China Morning Post*, 17 January. Available at: <http://www.scmp.com/news/hong-kong/law-crime/article/1902198/missing-hong-kong-bookseller-says-he-turned-himself-2003>. As this article shows, there are certain discrepancies in the facts.

¹⁸ *Ibid.*

¹⁹ Siu, P., Cheung, T. and Chou, O., (2016), “China finally confirms it has detained Hong Kong bookseller Lee Bo after his Swedish associate is paraded on state television”, *South China Morning Post*, 19 January. Available at: <http://www.scmp.com/news/hong-kong/politics/article/1902734/china-finally-confirms-it-has-detained-hong-kong-bookseller>.

²⁰ *Ibid.*

- *“The Hong Kong Police yesterday night (January 23) were informed by the wife of Mr. Lee Bo that she had met with Lee Bo in the afternoon of January 23 at a guesthouse on the Mainland”*;
- *“According to Mrs. Lee, Lee Bo was healthy and in good spirits, and said that he was assisting in an investigation in the capacity of a witness. After the meeting, Lee Bo asked her to pass on a letter addressed to the Hong Kong Police. The letter’s content was similar to previous letters penned by Lee Bo”*; and
- *“Mrs Lee did not disclose any further details regarding the location of the meeting or the nature of the investigation Lee Bo was involved in”*.²¹

18. On 4 February 2016, the Guangdong PSB confirmed that the three remaining booksellers, Lui, Cheung and Lam were in custody and being investigated in the Mainland.²² So, by this stage, the whereabouts of all five booksellers was confirmed to be the Mainland.

19. On 29 February 2016, the Hong Kong Police met with Lee in the Mainland.²³ Shortly afterwards, a Mainland TV channel aired an interview with Lee in which he said he *“sneaked”* into the Mainland to assist in an investigation into Gui. He also stated his and his wife’s decision to abandon their British citizenship and that he had notified the British authorities of this decision.²⁴

²¹ Hong Kong Police Force Press Release (24 January 2016), “Police receive the latest letter from Lee Po”. Available at: http://www.police.gov.hk/ppp_en/03_police_message/pr/pr201601.html.

²² Mok, D. and Lau, S., (2016), “Remaining three missing Hong Kong booksellers surface in mainland China, accused of ‘illegal activities’”, *South China Morning Post*, 5 February. Available at: <http://www.scmp.com/news/hong-kong/law-crime/article/1909679/remaining-three-missing-hong-kong-booksellers-surface>.

²³ Hong Kong Police Force Press Release (24 January 2016), “Police meet with Lee Po on the mainland”. Available at http://www.police.gov.hk/ppp_en/03_police_message/pr/pr201602.html.

²⁴ Mok, D., (2016), “I sneaked into mainland China illegally to help an investigation ... and gave up my British citizenship too, says missing Hong Kong bookseller Lee Po”, *South China Morning Post*, 1 March. Available at: <http://www.scmp.com/news/hong-kong/law-crime/article/1918997/i-sneaked-mainland-china-illegally-help-investigation-and>.

20. At this point, the story seemed to have reached a rather unresolved state. On 1 March 2016, the Hong Kong Commissioner of Police told journalists that he suspected that Lee was hiding something but that the police would have to accept his story that he had entered the Mainland voluntarily; that there was “*no evidence to support speculation that Lee was kidnapped by Mainland agents [the previous] December over the sale of banned books across the border*”; and that the police would have to wait for Lee to return to Hong Kong to meet him again.²⁵

21. On 2 March 2016, the Guangdong PSB wrote to the Hong Kong Police to inform them that Lui, Cheung and Lam would be released on bail pending investigation in the coming few days, stating that they were accused of involvement in the case of Gui, who was accused of selling banned books across the border.²⁶

22. Four of the five booksellers then made reappearances (some briefly) in Hong Kong.

23. On 4 March 2016, Lui returned to Hong Kong and was visited by the Hong Kong Police. He told them he was safe and did not need any assistance from them.²⁷ He asked them to drop his missing person case and then, hours later, returned to the Mainland.

²⁵ Siu, P. and Leung, C., (2016), “Hong Kong bookseller Lee Po is not telling the full story, police chief says”, *South China Morning Post*, 2 March. Available at: <http://www.scmp.com/news/hong-kong/law-crime/article/1919564/hong-kong-bookseller-lee-po-not-telling-full-story-police>.

²⁶ Mok, D. and Leung, C., (2016), “Booksellers’ release in ‘few days’ after televised confessions, but return to Hong Kong uncertain”, *South China Morning Post*, 3 March. Available at: <http://www.scmp.com/news/hong-kong/article/1919989/booksellers-release-few-days-after-televised-confessions-return-hong>.

²⁷ Siu, P., Lo, C., Lam, J. and Cheung, E., (2016), “The first missing bookseller returns: Lui Por in Hong Kong”, *South China Morning Post*, 4 March. Available at: <http://www.scmp.com/news/hong-kong/law-crime/article/1920594/first-missing-bookseller-returns-lui-por-hong-kong>.

24. On 6 March 2016, Cheung returned to Hong Kong in the morning and said he did not require any assistance and requested that his missing person case be dropped. Hours later, he too returned to the Mainland.²⁸

25. On 24 March 2016, Lee returned to Hong Kong and stated he did not require any assistance. He stated he was “*free and safe whilst on the Mainland*” and asked again that his missing person case be cancelled.²⁹ He said he was free to travel between Hong Kong and the Mainland and would return to the Mainland with his wife for the traditional ancestral tomb sweeping in the next few days. On 25 March 2016, Lee returned to the Mainland.³⁰

26. On 14 June 2016, Lam returned to Hong Kong and asked the police to drop their investigation into his disappearance.³¹

27. There was then a dramatic change of direction in the story. On 16 June 2016, Lam stated that in fact he had been taken away, blindfolded and handcuffed, by a special task force while he was crossing the border into Shenzhen the previous October and taken to Ningbo. He said that, after March, he was taken to work in a library in Shaoguan (a city in the north of Guangdong Province) and prevented from leaving the Mainland. He stated that his release was conditional on retrieving a hard drive from the bookstore containing lists of

²⁸ Siu, P., Chou, O. and Lo, C., (2016), “Booksellers slipped back to mainland China after requesting Hong Kong police drop missing persons cases”, *South China Morning Post*, 9 March. Available at: <http://www.scmp.com/news/hong-kong/law-crime/article/1922757/quick-turnabout-two-booksellers-hurried-back-across-border>.

²⁹ Siu, P. and Fung, O., (2016), “Missing Hong Kong bookseller Lee Po returns home from mainland China after disappearing last December”, *South China Morning Post*, 24 March. Available at: <http://www.scmp.com/news/hong-kong/law-crime/article/1930052/missing-hong-kong-bookseller-lee-po-returns-home-mainland>.

³⁰ Siu, P. and Chou, O., (2016), “‘I’ll never publish banned books again’: Hong Kong bookseller Lee Po quits book trade upon return to city”, *South China Morning Post*, 25 March. Available at: <http://www.scmp.com/news/hong-kong/law-crime/article/1930513/ill-never-publish-banned-books-again-hong-kong-bookseller>.

³¹ Hong Kong Police Force Press Release (14 June 2016), “Police meet with Lam Wing Kee in Hong Kong”. Available at http://www.police.gov.hk/ppp_en/03_police_message/pr/pr_archives.html?month=201606.

readers who had bought books from it. He said his confession on Mainland TV was scripted and that Lee was also taken away from Hong Kong.³²

28. But this was followed by another dramatic turn of events. The next day, on 17 June 2016, Lee rejected Lam's story and denied printing out lists of customers of the bookstore or passing them to Mainland police. He asserted he was assisting with the investigation by the Ningbo Public Security Bureau ("Ningbo PSB").³³

29. On 18 June 2016, Lam responded to Lee's comments asserting that the latter was being coerced to make the statements he did because of his family members on the Mainland. But on the same day, Cheung and Lui told the Hong Kong press that Lam was lying and disputed his account.³⁴

30. On 21 June 2016, Lam gave an interview with Hong Kong's *South China Morning Post* in which he stated that two Mainlanders who had escorted him back to Hong Kong were officers from a special investigative unit and that he had been instructed to text them messages regarding his whereabouts in Hong Kong after his return and to obtain a computer hard drive listing customers of

³² Ng, J., (2016), "'I was to be their eyes and ears': Hong Kong bookseller claims mainland agent told him to report on customers", *South China Morning Post*, 6 August. Available at: <http://www.scmp.com/news/hong-kong/politics/article/2000041/i-was-be-their-eyes-and-ears-hong-kong-bookseller-claims>; and Siu, P., Ng, K.C. and Fung, O., (2016), "Bookseller Lam Wing-kee reveals explosive details of his mainland China detention, claims Lee Po told him he was 'taken away from Hong Kong'", *South China Morning Post*, 16 June. Available at: <http://www.scmp.com/news/hong-kong/politics/article/1976489/bookseller-lam-wing-kee-reveals-explosive-details-his>.

³³ Siu, P., (2016), "I wasn't abducted by mainland agents ... Lam Wing-kee has it wrong, Lee Po insists", *South China Morning Post*, 17 June. Available at: <http://www.scmp.com/news/hong-kong/politics/article/1976820/i-wasnt-abducted-mainland-agents-lam-wing-kee-has-it-wrong>.

³⁴ Siu, P., Cheung, T. and Siu, J., (2016), "Bookseller Lam Wing-kee leads thousands in protest through streets of Hong Kong", *South China Morning Post*, 18 June. Available at: <http://www.scmp.com/news/hong-kong/law-crime/article/1977089/bookseller-lam-wing-kee-leads-thousands-protest-through>.

the bookstore.³⁵ Lam subsequently met with Hong Kong Police on 29 and 30 June 2016.³⁶

31. Lam declined to participate in the annual July 1 march in Hong Kong, claiming he had been followed by strangers. On 2 July 2016, Lam met with Hong Kong Police and went into hiding after what Hong Kong legislators assisting him described as a “*serious threat*” to his personal safety.³⁷

32. On 5 July 2016, the Mainland Ministry of Public Security issued a statement alleging that Lam had violated his bail conditions, which required him to stay in Shaoguan and to register any change of address in advance. The statement quoted the Ningbo PSB as saying that compulsory measures against Lam would be tightened and could entail his arrest.³⁸

33. On 8 July 2016, Hong Kong Police made a press release stating that, although there was no evidence to suggest Lam’s personal safety was at risk, they would provide personal protection for him in view of his worries.³⁹ On 6 August 2016, Lam released a 14-page account of his detention in the Mainland to the press⁴⁰ and, on 27 September 2016, Hong Kong Police withdrew round-the-clock protection for Lam at his request.⁴¹

³⁵ Cheung, G. and Cheung, T., (2016), “Beijing pressed for answers on Hong Kong bookseller”, *South China Morning Post*, 21 June. Available at: <http://www.scmp.com/news/hong-kong/law-crime/article/1978402/beijing-pressed-answers-hong-kong-bookseller>.

³⁶ See Hong Kong Police Force Press Release (29 June 2016), “Police meet with Lam Wing Kee again” and on 30 June 2016, “Police meet with Lam Wing Kee”. Available at: http://www.police.gov.hk/ppp_en/03_police_message/pr/pr_archives.html?month=201606.

³⁷ Siu, P., (2016), “Hong Kong bookseller speaks of safety fears in meeting with police at secret location”, *South China Morning Post*, 2 July. Available at: <http://www.scmp.com/news/hong-kong/politics/article/1984286/hong-kong-bookseller-speaks-safety-fears-meeting-police>.

³⁸ Lau, S. and Siu, P., (2016), “Bookseller Lam Wing-kee could face even tougher legal action, Beijing warns”, *South China Morning Post*, 5 July. Available at: <http://www.scmp.com/news/hong-kong/politics/article/1985662/bookseller-lam-wing-kee-could-face-even-tougher-legal-action>.

³⁹ Hong Kong Police Force Press Release on 8 July 2016, “Police meet with Lam Wing Kee”. Available at: http://www.police.gov.hk/ppp_en/03_police_message/pr/pr_archives.html?month=201607.

⁴⁰ Ng, J., (2016), “‘I was to be their eyes and ears’: Hong Kong bookseller claims mainland agent told him to report on customers”, *South China Morning Post*, 6 August. Available at:

34. So where are they now? As of the end of 2016, it was reported that: Gui remains under investigation in Ningbo; Cheung and Lui are living in Dongguan and Shenzhen respectively; Lee splits his time between Hong Kong and Ningbo (where it is said he must report regularly); and Lam lives in Hong Kong (where it is said he remains on the Mainland police's wanted list).⁴²

Is Mainland law applied in Hong Kong?

35. So much for the bare bones of what is said to have happened. The story certainly created headline news and, as we shall see, remains topical. It raises a number of questions about the legal system in Hong Kong. Perhaps foremost among them is the question of whether, and to what extent, it may suggest that Mainland law is being applied in Hong Kong. This is a question which naturally provokes much debate in Hong Kong in relation to the maintenance of the integrity of the “one country, two systems” principle.⁴³

36. The short answer to that question, I believe, is that the booksellers' case does not suggest this. So far as the application of Mainland law in Hong Kong is concerned, one starts with the basic proposition that Hong Kong and the PRC

<http://www.scmp.com/news/hong-kong/politics/article/2000041/i-was-be-their-eyes-and-ears-hong-kong-bookseller-claims>.

⁴¹ Siu, P. and Cheung, G., (2016), “Hong Kong bookseller Lam Wing-kee gets his life back as police end 24-hour protection”, *South China Morning Post*, 27 September. Available at: <http://www.scmp.com/news/hong-kong/politics/article/2023015/hong-kong-bookseller-lam-wing-kee-gets-his-life-back-police>.

⁴² Chou, O. and Siu, P., (2016), “One year on: Hong Kong bookseller saga leaves too many questions unanswered”, *South China Morning Post*, 30 December. Available at: <http://www.scmp.com/news/hong-kong/politics/article/2058000/one-year-hong-kong-bookseller-saga-leaves-too-many-questions>.

⁴³ See also, e.g., in the practical context of the arrangements for a co-located immigration checkpoint for the proposed high-speed train link between Hong Kong and Guangzhou: see Yeung, R., (2017), “All you need to know about the Hong Kong-mainland rail link, co-located checkpoints and law enforcement issues”, *South China Morning Post*, 13 March. Available at: <http://www.scmp.com/news/hong-kong/economy/article/2078359/what-you-need-know-about-hong-kong-mainland-rail-link-co>.

are two separate legal systems.⁴⁴ Under the Basic Law of the Hong Kong Special Administrative Region (“HKSAR”), enacted by the PRC to give effect to the Sino-British Joint Declaration of 1984, the only laws which apply in Hong Kong are the provisions of the Basic Law itself, the laws previously in force in Hong Kong and the laws enacted by the legislature of the HKSAR.⁴⁵ It is expressly provided that national (i.e. PRC) laws shall not be applied in Hong Kong except for those specifically listed in Annex III to the Basic Law.⁴⁶ However, it is provided that the laws listed in Annex III “*shall be confined to those relating to defence and foreign affairs as well as other matters falling outside the limits of the autonomy of the Region as specified by [the Basic] Law*”.⁴⁷

37. The laws listed in Annex III of the Basic Law are therefore limited to matters which are self-evidently outside Hong Kong’s limited autonomy, relating as they do to: the Capital, Calendar, National Anthem, National Flag, National Day, and National Emblem of the PRC; the PRC’s Declaration on its Territorial Sea; the PRC Nationality Law; Regulations concerning Diplomatic Immunities and Privileges and Immunities; and the Law on Judicial Immunity from Compulsory Measures Concerning the Assets of Foreign Central Banks.⁴⁸

38. Save for the exceptional circumstances of a state of war or state of emergency in Hong Kong, in which case the Central People’s Government

⁴⁴ In the context of the conflict of laws, they are two separate law districts: *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* (2012) 15 HKCFAR 569 at [43]; *Ryder Industries Ltd v Chan Shui Woo* (2015) 18 HKCFAR 544 at [37].

⁴⁵ Basic Law, Article 18(1).

⁴⁶ Basic Law, Article 18(2).

⁴⁷ Basic Law, Article 18(3).

⁴⁸ Basic Law, Annex III, as amended by various Decisions of the Standing Committee of the National People’s Congress: http://www.basiclaw.gov.hk/en/basiclawtext/annex_3.html.

could issue an order applying a relevant national law in Hong Kong,⁴⁹ the list of laws in Annex III marks the limit of the application of PRC law in Hong Kong.

39. Absent from that list is any law relating to the publication or distribution of books or the operation of a bookshop in Hong Kong and, given the high degree of autonomy guaranteed to Hong Kong,⁵⁰ this is hardly a surprise. Those activities are neither matters of foreign affairs nor do they concern the defence of Hong Kong. Suffice it to say that it does not appear to have been suggested that the booksellers were acting contrary to any law of Hong Kong in relation to their activities connected to the bookstore or the books it sold.

Does this incident indicate an erosion of fundamental rights and freedoms?

40. A perhaps more pertinent question, and one which has certainly been raised in press reports and commentaries about the booksellers, is whether the incident indicates an erosion of fundamental rights and freedoms in Hong Kong.

41. It is true, of course, that if Lam's version of the story is accurate, questions do arise as to crimes that may have been committed in Hong Kong and of which the booksellers would have been victims. These might include: false imprisonment,⁵¹ kidnap,⁵² or (if deception was used to procure consent to leave Hong Kong under false pretenses) fraud.⁵³ But, given the conflicting accounts between the booksellers, there is simply no way to draw any conclusions in this regard. Nor would it be appropriate for me to attempt to do so in any event. There have been no reports of any complaint having been made

⁴⁹ Basic Law, Article 18(4).

⁵⁰ Basic Law, Article 2.

⁵¹ At common law, punishable under s.101I of the Criminal Procedure Ordinance (Cap.221).

⁵² *Ibid.*

⁵³ Theft Ordinance (Cap.210), s.16A.

to the police in respect of any offences relating to the booksellers. Nor would it appear has any criminal prosecution or civil action been initiated.

42. So far as the question of whether the incident shows the erosion of fundamental rights and freedoms generally, this can only properly be considered in context. The relevant context here is the extent to which human rights are given effect and protected under Hong Kong law. A full panoply of rights and freedoms is firmly embedded in the laws of Hong Kong at a constitutional level and also in its domestic law. In particular, the rights under the International Covenant on Civil and Political Rights (“ICCPR”) are given constitutional protection under Article 39 of the Basic Law and are applied in Hong Kong through the Hong Kong Bill of Rights Ordinance (Cap.383). Specifically, in the context of the booksellers, Hong Kong residents enjoy the freedom of speech, of the press and of assembly and demonstration.⁵⁴ Hong Kong residents may not be subjected to arbitrary or unlawful arrest, search, detention or imprisonment.⁵⁵ Anyone who is arrested shall be promptly informed of the charges against him and be entitled to trial within a reasonable time.⁵⁶ Persons lawfully arrested have the right to a fair and open trial and shall be presumed innocent until proved guilty according to law.⁵⁷

43. The courts of Hong Kong have been active in their protection of fundamental human rights. As early as 1999, the Hong Kong Court of Final Appeal held that the courts should give a generous interpretation to the provisions in the Basic Law containing the constitutional guarantees for the freedoms that lie at the heart of Hong Kong’s separate system in order to give to

⁵⁴ Basic Law, Article 27; ICCPR, Article 19; Hong Kong Bill of Rights, Article 16.

⁵⁵ Basic Law, Article 28; ICCPR, Article 9; Hong Kong Bill of Rights, Article 5.

⁵⁶ ICCPR, Article 9; Hong Kong Bill of Rights, Article 5.

⁵⁷ Basic Law, Article 87; ICCPR, Article 14; Hong Kong Bill of Rights, Articles 10 and 11.

Hong Kong residents the full measure of the fundamental rights and freedoms so constitutionally guaranteed.⁵⁸

44. Specifically, in respect of freedom of expression, the Hong Kong courts have consistently emphasised that freedom of expression is a fundamental constitutional guarantee in a democratic society and must be given a generous interpretation. It includes the freedom to express ideas which the majority may find disagreeable or offensive, and the freedom to criticise governmental institutions or the conduct of public officials or persons in authority.⁵⁹

45. Similarly, in relation to the freedom of assembly, the courts have held that the freedom of peaceful assembly is a fundamental right closely associated with the freedom of speech, and that the two rights are precious and lie at the foundation of a democratic society. The courts have also recognised that these freedoms are of cardinal importance for the stability and progress of society for a number of reasons, including the fact that they enable the resolution of conflicts, tensions and problems through open dialogue and debate. These freedoms enable citizens in a democratic society to voice criticisms, air grievances and seek redress. They also ensure that minority views can be properly ventilated; views which may be disagreeable, unpopular, distasteful or even offensive to others but which, in a pluralistic society, should be tolerated.⁶⁰

46. I emphasise all of this to demonstrate that the edifice of rights enjoyed by the people of Hong Kong can legitimately be described as being founded on rock rather than sand. It is certainly also appropriate to contrast these liberties enjoyed in Hong Kong with the position under the PRC legal system.

⁵⁸ *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4 at pp.28I-29B.

⁵⁹ *Yeung May Wan & Ors v HKSAR* (2005) 8 HKCFAR 137 at [1]; *HKSAR v Ng Kung Siu & Anor* (1999) 2 HKCFAR 442 at p.455H-I; *HKSAR v Chow Nok Hang & Anor* (2013) 16 HKCFAR 837 at [1]-[2].

⁶⁰ *Leung Kwok Hung & Ors v HKSAR* (2005) 8 HKCFAR 229 at [1]-[2].

47. That the edifice is built on rock is reinforced by the limits of any lawful incursions on those rights and freedoms. Whenever any fundamental constitutional right is restricted or limited, the courts of Hong Kong apply a proportionality test to determine the constitutionality of any such restriction or limit. In the case of fundamental rights such as freedom of expression or assembly, the courts apply a strict minimal impairment test: does the restriction go no further than necessary to achieve the legitimate objective in question?⁶¹

48. I use the biblical analogy deliberately to suggest that, whatever erosion might be thought to have been made by the booksellers' case to rights and freedoms in Hong Kong, a house built on rock is surely better equipped to withstand weathering of its foundations. But, of course, to assume erosion one must first start from a premise of interference with those rights.

49. So far as the freedom of expression is concerned, it is not clear that there is any evidence of such interference. As I have already said, no one has suggested that the booksellers' activities were unlawful under Hong Kong law and there is no evidence that they have been prevented from exercising any rights of expression or from carrying out their business as booksellers in Hong Kong. That the booksellers may have been subjected, lawfully or otherwise, to legal processes elsewhere does not itself amount to an erosion of fundamental rights in Hong Kong.

50. Such rights continue to be exercised in Hong Kong. For example, on 10 January 2016, approximately 6,000 people – exercising their rights of assembly and demonstration – marched from the Hong Kong Government's offices to the

⁶¹ *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950 at [40]; *Hysan Development Co Ltd and Others v Town Planning Board* [2016] HKCFA 66; FACV 21/2015 (26 September 2016), Section F (Assessing Proportionality).

PRC's Liaison Office to protest the disappearances of the booksellers. I have also already mentioned the annual 1 July march in which a broad range of social and political issues forms the subject of protest and demonstration.

51. It may be said that a chilling effect has resulted from actions taken in the PRC against the booksellers which may have influenced their carrying out their bookselling activities in Hong Kong. Whether that is so or not is a matter of speculation but, even assuming it is, one would certainly question whether any such chilling effect can fairly be laid at the door of the Hong Kong legal system. It is, of course, a fact of geography that Hong Kong is in close proximity to the PRC and also a fact that the two legal systems are very different. However, the fact that PRC laws and legal procedures may influence the behaviour of persons engaged in business or other activities with a cross-border dimension is ultimately not a matter that can be said to reflect on the protection of rights under Hong Kong law.

What does the incident tell us about cross-border law enforcement?

52. Instead, given the realities of geography, one may ask what the incident tells us about cross-border law enforcement between Hong Kong and the PRC.

53. Despite having bilateral treaties with about 30 countries concerning mutual legal assistance,⁶² the surrender of fugitive offenders⁶³ and the transfer of sentenced persons,⁶⁴ Hong Kong does not have any such agreements with the PRC. There is no formal extradition arrangement between Hong Kong and the PRC. An arrangement for the surrender of fugitive offenders is still under

⁶² <http://www.doj.gov.hk/eng/laws/table3ti.html>.

⁶³ <http://www.doj.gov.hk/eng/laws/table4ti.html>.

⁶⁴ <http://www.doj.gov.hk/eng/laws/table5ti.html>.

discussion between the HKSAR Government and the Mainland authorities⁶⁵ but, to date, the HKSAR Government has never surrendered any fugitive to the PRC.⁶⁶

54. In theory, this does not preclude informal co-operation with another jurisdiction under the provisions of Hong Kong's Mutual Legal Assistance in Criminal Matters Ordinance⁶⁷ but this would necessitate the provision of a reciprocity undertaking by the requesting place which satisfies the Secretary for Justice in Hong Kong that the requesting place will entertain future requests from Hong Kong for assistance in criminal matters. Mutual legal assistance under treaty or informal arrangements is subject to statutory grounds for refusal of assistance, including where the Secretary for Justice is of the opinion that: the request relates to a political offence; or is based on an ulterior purpose based on race, religion, nationality or political opinion; or relates to an act or omission that, if it has occurred in Hong Kong, would not have constituted an offence there.⁶⁸ It may also be refused if the requested assistance relates to an offence punishable with the death penalty if the requesting place does not give an undertaking that the death penalty will not be imposed or carried out.⁶⁹

55. The differences between the legal systems of Hong Kong and the PRC mean that there are complicated issues regarding cross-border law enforcement. In practice, though, given their close geographic proximity, there have been various forms and levels of co-operation between the two jurisdictions.

⁶⁵ The Fugitive Offenders Ordinance (Cap.503), which governs the surrender of fugitive offenders between Hong Kong and specified jurisdictions, does not apply in respect of the Mainland.

⁶⁶ HKSAR Government Press Release (18 May 2016), Reply in LegCo by Lai Tung-kwok (Secretary for Security): <http://www.info.gov.hk/gia/general/201605/18/P201605180403.htm>.

⁶⁷ (Cap.525); see, esp., ss.7, 9, 11, 14, 16 and 25.

⁶⁸ (Cap.525), s.5(1).

⁶⁹ (Cap.525), s.5(3).

56. There has been informal co-operation between law enforcement agencies in Hong Kong and the Mainland from at least the early 1980s,⁷⁰ with the Hong Kong and Mainland police authorities co-operating in accordance with INTERPOL practice.

57. An administrative arrangement put in place before 1997 continues to apply under which fugitive offenders can be returned from the Mainland to Hong Kong (but not vice versa) if: the person sought to be returned was a Hong Kong resident; the crime was committed entirely in Hong Kong; and the person was not accused of having committed an offence in the Mainland.⁷¹

58. In March 1998, the Hong Kong and Mainland police established a guideline in relation to cross-border criminal investigation. Under this, when the authorities of one jurisdiction seek assistance, they must give prior notification and explain the nature of the case and the scope of assistance sought. The requested party may gather and provide relevant information to the requesting party. Police officers cannot, however, exercise police powers in the territory of the other jurisdiction and cannot take enforcement action on their own.⁷²

59. In short, the two jurisdictions remain entirely distinct and, apart from informal arrangements for co-operation, there is limited cross-border activity as regards law enforcement. In the case of the booksellers, though, it is difficult to see how mutual legal assistance would have been available to the Mainland public security bureau had they sought this from their Hong Kong counterparts.

⁷⁰ H. Fu (1997), "The Relevance of Chinese Criminal Law to Hong Kong and its Residents", 27(2) HKLJ 229 at 242.

⁷¹ D.W. Choy & H. Fu (2009), "Cross-Border Relations in Criminal Matters", in M.S. Gaylord, D. Gittings & H. Traver (eds.), *Introduction to Crime, Law and Justice in Hong Kong* (Ch. 13), 236.

⁷² Legislative Council Panel on Security, "Allegation that Mainland Public Security Bureau Officials Performed Duties in Hong Kong", LC Paper No. CB(2)2944/03-04(01), p.2.

The alleged investigation into Gui's drink driving offence might have formed the basis of a legitimate request for assistance but, on its face, investigations into the sale of banned books would be unlikely to have done so.

60. A practical question which emerged from the case related to the length of time it took for the Mainland authorities to notify their Hong Kong counterparts of the whereabouts of the booksellers. Under a reciprocal notification mechanism proposed by the HKSAR Government in 2000 and in operation since 1 January 2001, the HKSAR Government and the Mainland Ministry of Public Security have agreed to notify each other of: the criminal prosecution of, or imposition of criminal compulsory measures on, suspected offenders; and unnatural deaths of residents of the other.⁷³ In the course of the inquiries after the booksellers were reported missing, it was stated that there was an unwritten convention that notification would be made within 14 days of detention. It is unclear whether that convention was observed in respect of the four booksellers who were Hong Kong residents. One of the results of the case is that talks took place between the Hong Kong and Mainland authorities with a view to strengthen the reporting mechanism and to agree that each side would inform the other within 14 days of detention of one of their residents.

What does the case say about the treatment of dual nationals?

61. I digress now to address a discrete topic that arises from the booksellers' case, namely what the case says about the treatment in China of Chinese nationals who are dual nationals of other countries. You will recall that Gui held Swedish citizenship and Lee held British citizenship. Their respective

⁷³ Legislative Council Panel on Security, "Information note prepared by the Legislative Council Secretariat for the special meeting on 26 January 2016", LC Paper No. CB(2)727/15-16(02).

disappearances were therefore matters of concern to those countries as well as, in the case of Lee, who is a Hong Kong resident, to Hong Kong.

62. Early on in the story, on 5 January 2016, the then British Foreign Minister met with his Chinese counterpart and the two held a joint press conference. The former expressed the hope that any charges against Lee would be brought against him in Hong Kong. The latter stressed, however, that Lee was “*first and foremost a Chinese citizen*”.⁷⁴ This highlights a tension that arises under the Nationality Law of the PRC in respect of ethnic Chinese who hold foreign passports.

63. In the case of British citizens, the UK recognises dual nationality and British nationals who acquire a foreign nationality do not lose their British nationality.⁷⁵ Nor does the acquisition by a British national of the nationality of a country that does not recognise dual nationality affect that person’s nationality status under UK law. The UK Government normally provides diplomatic protection for its nationals outside the UK, subject to the Master Nationality Rule⁷⁶ (under which a state may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses).

64. The PRC does not recognise dual nationality.⁷⁷ Since the Nationality Law of the PRC is one of the laws listed in Annex III to the Basic Law as being applied in Hong Kong, this has the practical effect that a national of a foreign country who is also a Chinese national will not be recognised as a foreign

⁷⁴ Reuters, (2016), “Missing Hong Kong bookseller ‘first and foremost a Chinese citizen’, says China’s foreign minister”, *South China Morning Post*, 5 January. Available at: <http://www.scmp.com/news/china/policies-politics/article/1898193/missing-hong-kong-bookseller-first-and-foremost-chinese>.

⁷⁵ <https://www.gov.uk/dual-citizenship>.

⁷⁶ Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930, 179 LNTS 89, Article 4.

⁷⁷ Nationality Law of the PRC, Article 3.

national by the PRC. It raises interesting questions in relation to the extent of consular protection in Hong Kong for Chinese nationals holding foreign passports but so far I am not aware of any particular controversies in this regard having yet occurred.

The interface between the two systems

65. Taking a step back, what the case of the missing booksellers does remind us is that there is a complex interface between the two legal systems of Hong Kong and the PRC. The principle of “one country, two systems” is a unique and in many ways ingenious way in which to marry two ostensibly incompatible systems. The more different they are, though, coupled with their physical proximity, the greater the possibility of friction at the interface.

66. Time does not permit a more detailed discussion of this interface on this occasion. However, on this subject, I would commend an article written by Sir Anthony Mason in the *Sydney Law Review*⁷⁸ in which he commented on the judgment of the Hong Kong Court of Final Appeal in a case⁷⁹ involving a reference by that court of a question of interpretation of the Basic Law to the Standing Committee of the National People’s Congress (“NPCSC”) under Article 158(3) of the Basic Law.⁸⁰ The distinction in the Basic Law between the power of final adjudication (which lies with the Hong Kong courts) and that of final interpretation (which lies with the Standing Committee) marks a departure from the traditional separation of powers integral to the rule of law. Sir Anthony’s conclusion was that, despite the tensions inherent, Article 158 is an

⁷⁸ *The Rule of Law in the Shadow of the Giant* (2011) 33(4) *Sydney Law Review* 623.

⁷⁹ *Democratic Republic of the Congo v F.G. Hemisphere Associates LLC (No.1)* (2011) 14 HKCFAR 95.

⁸⁰ This article confers the power of interpretation of the Basic Law in the NPCSC and requires that, if the Hong Kong Court of Final Appeal has to interpret one of the excluded provisions of the Basic Law in adjudicating a case (i.e. a provision relating to defence or foreign affairs or lying outside the autonomy of the HKSAR), it must seek an interpretation of that provision from the NPCSC.

ingenious link between the two legal systems and debate on the rule of law in Hong Kong must proceed from the centrality of that Article.

Hong Kong 20 years on

67. This brings me, in conclusion, to a reflection on the state of the rule of law in Hong Kong. In July 2017, we shall have had 20 years of experience of “one country, two systems” in operation. How has the rule of law fared?

68. I shall say at once that I believe the rule of law in Hong Kong is in good health and is being vigilantly protected and applied in our courts. Continuing the common law tradition introduced in 1844,⁸¹ the courts have built up a considerable body of jurisprudence under the new constitutional order, recognising the importance of the rule of law and upholding fundamental rights and freedoms.

69. The tradition of open and transparent court proceedings and the requirement that judges give reasons for their decisions provides a means of verifying that claim independently. So too does the participation in the work of the Hong Kong Court of Final Appeal of eminent judges from other common law jurisdictions including Australia. Similarly, the robust respect for the rule of law in Hong Kong is often given as the reason for the willingness of overseas investors to carry out business in Hong Kong and to resolve disputes in the jurisdiction. As an example, let me read from an answer given by the Secretary-General of the Hong Kong International Arbitration Centre in an interview last year. To the question, “*How important is the rule of law in Hong Kong to HKIAC?*”, she replied:

⁸¹ By the Supreme Court Ordinance 1844; see, *China Field Ltd v Appeal Tribunal (Buildings) (No 2)* (2009) 12 HKCFAR 342 at [8] and [74].

“It is vital. Because Hong Kong and HKIAC are so closely linked, and many of our arbitrations are seated here, the rule of law and the judiciary’s independence and pro-arbitration stance are paramount. Hong Kong enjoys a very high level of judicial independence. Hong Kong’s ranking for judicial independence on the 2015 World Economic Forum is first in Asia and fourth globally after only Finland, Norway and New Zealand. The next ranked Asian jurisdiction in 2015 was Japan at 12. Singapore came in at 23. In fact, the judicial independence of Hong Kong’s courts is one of its most attractive features, particularly when it comes to arbitration. ...”⁸²

70. Ultimately, you will draw your own conclusions as to the state of the rule of law in Hong Kong. Confidence in an intangible commodity like the rule of law is difficult to measure and inevitably will rise and fall in response to immediate events. The case of the missing booksellers was a reminder of the differences between the two legal systems of Hong Kong and the PRC and the delicate interface that exists between them.

71. The questions which the booksellers’ case raised will remain topical. In late January this year, we were again reminded of this by another strikingly similar incident involving a Mainland businessman, Xiao Jianhua, who was seen being escorted in a wheelchair from his luxury service apartment and taken by car across the border into Shenzhen. His family reported him missing the next day only to withdraw that report the very next day. It is reported that he is

⁸² Sarah Grimmer, Secretary-General, Hong Kong International Arbitration Centre, interview in *Hong Kong Student Law Gazette*, Fall 2016, Issue 9, p.42.

the subject of investigations in the Mainland into his alleged involvement in market manipulation in 2015.⁸³

72. Xiao's case raises similar questions to those raised by that of the booksellers. At the very least, it reminds us again (if we need reminding) that Hong Kong's situation, physically and jurisdictionally, within "one country, two systems" means that we shall continue to live in interesting times. One might say, "*It was the best of times, it was the worst of times ...*".⁸⁴

24th March 2017

⁸³ Choi, CY., (2017), "The big questions about missing tycoon: why and why now?", *South China Morning Post*, 19 February. Available at: <http://www.scmp.com/news/china/policies-politics/article/2071780/big-questions-about-missing-tycoon-why-and-why-now>.

⁸⁴ Charles Dickens, *A Tale of Two Cities*.