Essays

Hong Kong Fifteen Years After the Handover: One Country, Which Direction?

MARTIN S. FLAHERTY*

In 2012, Hong Kong marked the fifteenth anniversary of the handover of sovereignty from the United Kingdom to the People’s Republic of China. In this Essay, Martin S. Flaherty gives an overview of the handover process, discusses its impact on the Hong Kong Judiciary, and provides an introduction to the themes discussed by Justice Kemal Bokhary in his Essay “The Rule of Law in Hong Kong Fifteen Years After the Handover.”

Just last year, during the Summer of 2012, as many as 400,000 people took to the streets of Hong Kong in marches marking the fifteenth anniversary of the return of that city from British to Chinese sovereignty. But rather than celebrating, the crowds marched to protest the swearing in of Leung Chun-ying as Hong Kong Chief Executive. The demonstrations were against the man, whom many perceive as pro-Beijing, as well as the process through which he was selected, which many see as undemocratic. Adding to the drama was the rare presence of China’s Communist Party General Secretary Hu Jintao, who had hoped that Leung’s accession would signal ever closer and more cordial relations between Hong Kong and the mainland.1 As it happened, later in the year China had its own change in

* Leitner Family Professor of International Human Rights Law, Fordham Law School; Visiting Professor, Woodrow Wilson School of Public and International Affairs, Princeton. My thanks to Elizabeth Wickeri and Joey Lee for reviewing this essay.

leadership, as Hu turned over his post to Xi Jinping.\(^2\) On the mainland, however, any public protest against either Xi or the opaque process for his selection would not just be illegal, but unthinkable.\(^3\) As if to underline the gulf between the two jurisdictions, reports indicate that mainlanders who took part in the Hong Kong demonstrations were arrested and sent to labor camps on their return home.\(^4\)

The contrast that the fifteenth anniversary demonstrations reflect on the surface confirms the perception of Hong Kong as an ongoing anomaly within the People’s Republic of China. The former British colony retains a fundamental commitment to the rule of law, free market capitalism and basic human rights.\(^5\) Its historic economic transformation notwithstanding, the mainland remains an authoritarian one-party state\(^6\) with among the most egregious and widespread human rights violations in the world. This divergence belies the tired notion that “Confucian” or “Asian” values point to a particular style of governance, and an authoritarian one at that.\(^7\) It also suggests radically different paths not just for China but also for Asia and beyond. Hong Kong’s commitments point in the direction mapped out by, among others, Taiwan, South Korea and the Philippines.

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5. XIANGGANG JIBEN FA art. 4–6, 8. (H.K.) (The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China) [hereinafter Basic Law].

6. The Central Government does allow certain minor political parties to cooperate, but only so long as they do not challenge the hegemony of the Chinese Communist Party. See State Department China Report, supra note 3, at 43–44.

degrees, Singapore, Vietnam and even North Korea.\textsuperscript{8}

A closer look, however, indicates that the contrast between Hong Kong and the mainland is not as starkly black and white as some might fear—or hope. Certain challenges involve unfulfilled promises. The anti-Leung demonstrations, for example, underscore how Hong Kong is still hampered by a “limited ability of citizens to participate in and change their government,” despite guarantees of an expanding suffrage.\textsuperscript{9} Of perhaps greater concern are those areas in which Hong Kong has slipped from pre-handover baselines. One widely noted issue is a trend toward self-censorship in the press despite robust legal protections.\textsuperscript{10} Less obvious, but just as worrisome, is slippage in the rule of law, including judicial independence. In this regard there has been no more steadfast defender of Hong Kong’s foundational commitments than Kemal Bokhary, who until recently had served as Permanent Justice of Hong Kong’s Court of Final Appeal since its inception. His reflections upon retirement demand attention. His evident erudition in jurisprudence, legal history and comparative law reward such attention with insights that should resonate both within, and far beyond, Hong Kong itself.

I. “One Country, Two Systems”

Hong Kong’s singular position formally rests upon its legal status in international and domestic Chinese law, both of which guarantee it a “high degree of autonomy”\textsuperscript{11} from the central government in Beijing. This arrangement became the basic condition of the “handover” of the territory from the United Kingdom to China. The U.K. obtained formal control over Hong Kong Island in 1842 under the terms of the Treaty of Nanking, which ended the First Opium War. Nearly two decades later, China ceded the Kowloon peninsula after its defeat in the Second Opium War. The U.K. obtained the rest of what is now Hong Kong, including the New Territories, in 1898 through a ninety-nine-year lease. As a British colony, Hong Kong grew from a small fishing village to a global commercial hub, a process that accelerated after the Communist takeover of the mainland in 1949. The city benefited from its status as a free port and from its common law legal system, though the native population notably did

\textsuperscript{8} See Yash Ghai, Asian Perspectives on Human Rights, 23 Hong Kong L.J. 342 (1993).

\textsuperscript{9} State Department China Report, supra note 3, at 97.

\textsuperscript{10} Id.

\textsuperscript{11} Basic Law, supra note 5, art. 2.
not enjoy any significant measure of democratic self-rule until late in the colonial era.\footnote{12}

That era would draw to a close as several factors coalesced. By the early 1980s the expiration of the New Territories lease undermined the ongoing feasibility of British rule. Even more importantly, Chinese leader Deng Xiaoping had embarked on his policy of economic liberalization, and viewed Hong Kong’s capitalist economy as a substantial asset. Deng is generally credited with the idea of “One Country, Two Systems”\footnote{13} as a basis for Hong Kong’s return to Chinese sovereignty. Under this framework, the U.K. would cede all of Hong Kong back to China, with the proviso that at least for a time, Hong Kong would retain its economic and legal structures unfettered by Beijing. “One Country, Two Systems” would restore China’s national pride while yielding economic benefits. It would permit the U.K. to protect the interests of the Hong Kong population, or at least permit London to save face. In addition, the policy—if successful—would serve as a model for the ultimate reunification between the mainland and the “renegade province” of Taiwan.\footnote{14}

“One Country, Two Systems” was first formally set forth in 1984 by the Sino-British Joint Declaration, which provides that the U.K. would restore Hong Kong to Chinese sovereignty on July 1, 1997.\footnote{15} In return, it obligates China to establish the territory as a “Special Administrative Region.”\footnote{16} As such, Hong Kong would enjoy “a high degree of autonomy, except in foreign and defense affairs, which are the responsibility of the Central People’s Government.”\footnote{17} In particular, the Joint Declaration requires that China, among other things: preserve Hong Kong’s economic system;\footnote{18} ensure self-governance based in some measure on local elections;\footnote{19} maintain an array of fundamental rights;\footnote{20} and, not least, uphold the

\footnote{12. For general histories of Hong Kong see, for example, STEVE TSANG, A MODERN HISTORY OF HONG KONG (2007); FRANK WELSH, A BORROWED PLACE: THE HISTORY OF HONG KONG (1993).}


\footnote{14. Id. at 8–10.}


\footnote{16. Id. ¶ 3(1).}

\footnote{17. Id. ¶ 3(2).}

\footnote{18. Id. ¶ 3(5).}

\footnote{19. Id. ¶ 3(4).}

\footnote{20. Id. ¶ 3(5).}
territory’s laws and common law system.\textsuperscript{21} China further agreed to implement “[t]he above-stated basic policies of the People’s Republic of China regarding Hong Kong . . . in a Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, by the National People’s Congress of the People’s Republic of China, and they will remain unchanged for 50 years.”\textsuperscript{22}

The National People’s Congress (NPC) enacted the “Basic Law of the Hong Kong Special Administrative Region (SAR)” in 1990, to take effect on the agreed July 1, 1997 date. Often called Hong Kong’s “mini-constitution,” the Basic Law is both less and more. Officially it is no more than a national statute, and as such could be amended or repealed at any time. Any significant change, however, would put China in violation of the Sino-British Declaration, providing the Basic Law a measure of entrenchment. More importantly, for Hong Kong itself it functions as the fundamental law that creates and constrains government for the SAR. In this sense it is analogous to a state or provincial constitution.\textsuperscript{23}

Substantively, the Basic Law elaborates the main commitments of the Joint Declaration. It first makes clear that Hong Kong “is an inalienable part of the People’s Republic of China,”\textsuperscript{24} albeit one that will enjoy the promised “high degree of autonomy” except with regard to external affairs and defense.\textsuperscript{25} Next, the Basic Law guarantees a range of fundamental rights for Hong Kong residents against the SAR government. Several are enumerated, including a right of abode, equality, voting, free speech and assembly, freedom from unlawful arrests and searches, security of the home and the right to seek legal advice.\textsuperscript{26} Notably, Article 39 incorporates the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{27} As befits a constitution, the Basic Law devotes considerable time to government structure, establishing a Chief Executive to replace the Royal Governor. Among other things, the Chief Executive provisions state that

\begin{thebibliography}{9}
\bibitem{21} Id. ¶ 3(3).
\bibitem{22} Id. ¶ 3(12). Neighboring Macau, which has a history similar to Hong Kong, reverted to Chinese sovereignty from Portugal in 1999. \textit{See} Basic Law of Macau Special Administrative Region of the People’s Republic of China (Dec. 20, 1999), \textit{available at} http://www.umac.mo/basiclaw/english/main.html.
\bibitem{24} Basic Law, \textit{supra} note 5, art. 1.
\bibitem{25} Id. art. 2, 12–23.
\bibitem{26} Id. art. 4, 24–41.
\bibitem{27} Id. art. 39.
\end{thebibliography}
“[t]he ultimate aim is the selection of the Chief Executive by universal suffrage,” though the initial selection process consisted of a vote by a mere 800 Hong Kong residents chosen by Beijing. The Basic Law also establishes a Legislative Council (LegCo), replacing a colonial predecessor, to exercise domestic lawmakers authority. Regrettably, the Basic Law limits LegCo’s authority, prohibiting its members from introducing bills that would affect Hong Kong’s public spending, governmental operations or political structure. Selection is also distinctive and controversial in these provisions. While the goal here is also “universal suffrage,” the initial system provided for some representatives to be directly elected, with others to be selected by “functional constituencies,” representing various professions and industries. After governance, the Basic Law addresses Hong Kong’s economic system to make good the pledge that Hong Kong’s “capitalist system and way of life shall remain unchanged for 50 years.”

Given Justice Bokhary’s focus, worthy of special notice is the Basic Law’s treatment of law and the judiciary. Article 8 guarantees that the “laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinance, subordinate legislation and customary law shall be maintained, except for any that contravene this [the Basic Law, and subject to any amendment]” by the LegCo, whose enactments themselves must accord with the Basic Law. To ensure this, the Basic Law further declares that the “judicial system previously practised in Hong Kong shall be maintained.” Here the one major change was the creation of the Hong Kong Court of Final Appeal as Hong Kong’s highest court, in lieu of the Privy Council in London. In what would become and remain a highly contested provision, Article 158 vests final interpretive authority of the Basic Law in the NPC, or more precisely, the NPC’s Standing Committee, directs that the Court of Final Appeal be authorized to interpret the Basic Law when adjudicating cases for provisions that are “within the limits of autonomy for this region,” and mandates that the Court

28. Id. art. 45.
29. Id. Annex I, art. 2.
30. Id. art. 62, 73, 74.
31. Id. art. 68.
32. Id. Annex II.
33. Id. art. 5.
34. Id. art. 8.
35. Id. art. 81.
36. Id. art. 82.
seek an interpretation of the Basic Law from the NPC in pending cases concerning affairs that are the responsibility of the Central Government or concern “the relationship between the Central Authorities and the Region.” 37

II. “HONG KONG, CHINA” 38

Since the handover, Hong Kong has not fared as badly as many had feared, but still not as well as some had hoped. The fifteenth anniversary demonstrations tend to confirm this general assessment. That such protests could take place indicates that the commitment to “two systems” has largely been maintained. That they reflected significant grievances illustrates that not all of the Basic Law’s commitments have been realized, while others show signs of regressing.

Nowhere has the Basic Law’s pledge succeeded more obviously than in the maintenance of Hong Kong’s “capitalist system and way of life.” To take just one marker, for the past seventeen years Hong Kong has remained ranked as “the world’s freest economy” by both the Heritage Foundation39 and the Cato Institute. 40 As such, it has fulfilled the Basic Law’s related goal of maintaining the status of Hong Kong as an “international financial centre.” 41 Ironically, one reason for this success is an erosion of the “Two Systems” idea, if only because in this area, China since Deng Xiaoping has moved closer to Hong Kong rather than the other way around.

The Basic Law’s guarantees of fundamental rights have also been largely successful, though not without significant areas of concern. Freedom House, to take another marker, ranks Hong Kong highly with respect to civil liberties while placing the mainland near the bottom. 42 The accused enjoy an array of due process rights be-

37. Id. art. 158.
38. Id. art. 151.
41. Basic Law, supra note 5, art. 109.
before independent courts, dozens of newspapers and press outlets operate free from direct government censorship, political demonstrations occur on a regular basis and the Falun Gong can and does practice openly. Yet within this context, certain rights have consistently appeared vulnerable to erosion. Despite formal freedom of the press, the Hong Kong media has frequently been cited as engaging in self-censorship in order to curry favor with Beijing-backed SAR officials, the Central Government and mainland business interests. Notwithstanding guarantees of free assembly, police increasingly have been cited for employing confrontational tactics against demonstrators. The SAR government has also repeatedly denied entry to human rights activists lawfully traveling to Hong Kong, apparently on political grounds.

Compared to the economy and fundamental rights, the promise of democratic self-government has been a clear disappointment. Less disillusioning, though only just, has been LegCo. In the most recent election, thirty-five of its seventy members were elected directly, thirty chosen by problematic “functional constituencies” and five through popular vote after nomination by local district councils—all of which is actually an improvement over the original ratio of twenty-four directly elected seats out of sixty in the first post-handover elections. Far more controversial has been the selection of the powerful Chief Executive, as witnessed by this year’s demonstration. Currently, the post is selected by an Election Committee of just 1,200 Hong Kong residents from different sectors of the society, themselves chosen by the Central Government. While this is up from the original number of 800, it falls somewhat short of the

2012/china-0 (last visited Feb. 5, 2013) (scoring a 6.5 on freedom rating, with a 6.0 on civil liberties).

43. State Department China Report, supra note 3, at 107; U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, International Religious Freedom Report for 2011, China (Includes Tibet, Hong Kong, and Macau), 33, 35–36, http://www.state.gov/documents/organization/192831.pdf. Falun Gong practitioners nonetheless point to pressure from Hong Kong authorities that originates in Beijing, including the denial of visas to technicians for the Falun Gong affiliated Shen Yun Performing Arts Group. Id. at 36.

44. State Department China Report, supra note 3, at 97, 104.

45. Id. at 105–06.

46. Id. at 97.

47. See FREEDOM HOUSE, Hong Kong, supra note 42.

48. Basic Law, supra note 5, Annex II.

49. See FREEDOM HOUSE, Hong Kong, supra note 42.

50. Basic Law, supra note 5, Annex I.
pledge for universal suffrage in a city of over seven million. But perhaps even more troubling are the most recent signals concerning that goal. In 2007, the NPC indicated that universal suffrage might be achieved as early as 2017 for the Chief Executive and 2020 for LegCo. When announcing election reforms in 2010, however, the NPC position on eventual universal suffrage was silence.51

III. LAW AND THE JUDICIARY

What remains to be considered is “The Rule of Law in Hong Kong Fifteen Years After the Handover.”52 Justice Bokhary’s review does just this with elegance and from the unique perspective of an original justice on the Court of Final Appeal. A few further words of context may nonetheless be in order.

In general, Hong Kong’s common law framework has remained about as robust as the capitalist free market that it helps safeguard. In this respect law in the two jurisdictions has continued to mean two distinct systems. If anything, the gulf may be growing. At least for the past ten years, the mainland in various ways has rolled back its previous commitment to the rule of law, from placing a new emphasis on non-judicial dispute resolution to what can only be characterized as a vicious crackdown on weiquan human rights lawyers.53 Conversely, in Hong Kong right consciousness through law has arguably deepened in the ways the Justice describes. Insufficiently appreciated as well is the post-handover project of translating the previous wealth of common law decisions into Chinese.54 Scrutiny nonetheless tends to follow the highest court in any legal system.55

51. See Freedom House, Hong Kong, supra note 42.
55. Leading studies on Hong Kong, the Basic Law and the Hong Kong judiciary include: Interpreting Hong Kong’s Basic Law: The Struggle for Coherence (Hualing Fu, Lison Harris & Simon N.M. Young eds., 2008); Johannes Chan, Basic Law and Constitutional Review: The First Decade, 37 Hong Kong L.J. 407 (2007); Hong Kong’s Constitutional Debate: Conflict over Interpretation (Johannes Chan, Hualing Fu, Yash Ghai eds., 2001); Yash Ghai, Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law (2d ed. 2001); Peter Wesley-Smith, An Introduction to the Hong Kong Legal System (3d ed. 1998); Public Law
In the case of Hong Kong, scrutiny may need to become concern.

Not long after the handover took place, the Court of Final Appeal drew worldwide attention in a controversy over its promised independence under the Basic Law. The dispute arose in the Court’s first major judicial review cases: in essence, its Marbury v. Madison.56 These cases involved challenges to certain SAR government measures as well as related enactments of the NPC that gave a restrictive reading to those in the mainland who were entitled to a “right of abode” in Hong Kong. A unanimous Court agreed with the challenges, holding that the various restrictions were inconsistent with Article 24’s definition of who qualified as a permanent resident.57 This bold ruling quieted fears that the Court would not act as an independent check. More profound concerns followed when the SAR government invoked Article 158 to seek a reinterpretation of the Basic Law from the National People Congress’s Standing Committee (NPCSC) in Beijing. Not surprisingly, the NPCSC in effect ruled for the SAR government with regard both to the narrow reading of the right of abode and its authority to do so. The prospect that the local authorities could run to a committee of China’s national legislature whenever they were affected by the Court of Final Appeal’s exercise of judicial review under the Basic Law did not bode well for judicial independence—and with it, the “One Country, Two Systems” idea.58

The worst did not take place. To the contrary, over the last fifteen years the Court of Final Appeal, and the Hong Kong judiciary generally, has maintained a reputation as learned, professional, cosmopolitan and zealous in guarding its autonomy.59 That said, it remains true that in most, though not all, rights cases since the right of abode controversy, the Court has ruled for the SAR government. Representative in this regard is HKSAR v. Ng Kung Siu, which involved a challenge to Hong Kong’s ban on the desecration of the Hong Kong and Chinese flags. As is typical, the Court’s opinions upholding the ordinance were not just colorable, but closely reasoned and eminently defensible, the concurrence in particular.60 The pat-
tern of holding in favor of the government did, however, give rise to concerns that the Court was being especially cautious in preserving its judicial capital.

But probably the most significant case implicating judicial independence since the right of abode controversy occurred only this year in Democratic Republic of the Congo and others v. FG Hemisphere Associates LLC. There the Court had to consider whether the doctrine of sovereign immunity precluded a civil action against a state when undertaking commercial activity. Under the prevailing common law “restrictive theory” of immunity, the suit could have proceeded. By a three to two majority, the Court nonetheless decided to refer the matter to the NPCSC in Beijing, on the ground that the application of sovereign immunity doctrine related to the relationship between the SAR and the mainland. Not surprisingly, the NPCSC agreed and decided that the older, more state protective view of the doctrine applied. More importantly, the Congo decision marked the first time the Hong Kong Court of Final Appeal referred an issue under the Basic Law to Beijing of its own volition.

Whatever the challenges facing Hong Kong’s common law system, one constant has been the jurisprudence of Justice Bokhary. Since the Court of Final Appeal was established, he has been its most steadfast defender of the rule of law and fundamental rights. As one prominent Hong Kong lawyer put it, Bokhary has “become an iconic figure in the territory’s legal profession for his dedication to safeguarding human rights . . . . Bokhary’s verdicts are always inspirational and he is willing to defend the autonomy of Hong Kong’s judiciary.” Among other things, he joined the majority in the right of abode cases. He wrote separately in the flag desecration case to confine the government’s ability to restrict free expression to cases of strict necessity. Especially powerful is his long and scholarly dissent in the Congo case arguing both for the restrictive view of sovereign immunity and the Court of Final Appeal’s authority to do so.


62. Id.


All this makes his retirement unfortunate. So too, it must be said, are the circumstances. Permanent Judges of the Court must be renewed once they turn sixty-five, which they typically are. Last year, after the Congo decision, Bokhary was not. It was also announced that his replacement would be an older jurist.66

Perhaps the best way to appreciate his perspective on the rule of law in Hong Kong, and to gauge the territory’s loss, is to paraphrase the epitaph of Sir Christopher Wren: “Si monumentum requiris, lege.”67 A good place to start this reading is his essay reviewing of the rule of law in Hong Kong since the handover.68

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66. See Luk, supra note 63.

67. Wren’s epitaph in St. Paul’s Cathedral, which he designed, translates as “if you seek his monument look around.” My paraphrase substitutes “read” for “look around.”

68. See Bokhary, supra note 52.