The Rule of Law in Hong Kong
Fifteen Years After the Handover

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The summer of 2012 marked the fifteenth anniversary of the handover of sovereignty over Hong Kong from the United Kingdom to the People’s Republic of China. Under the “one country, two systems” principle established in the handover agreements, Hong Kong was permitted to retain a “high degree of autonomy” and the existing judicial system was to be maintained. For more than two decades, both before and after the handover, Justice Kemal Bokhary sat on Hong Kong’s highest court—the Court of Final Appeal. In this Essay, originally offered as remarks at the University of Zurich, Justice Bokhary reviews Hong Kong’s judicial independence over the past fifteen years, describes the challenges it currently faces and provides his assessment of its future.

INTRODUCTION

“The past is a foreign country: they do things differently there.”¹ As to Hong Kong, the first part of that celebrated line of LP Hartley is literally true. We were a British colony from early Victorian times until the stroke of midnight on June 30, 1997.² Then came “the handover,” whereupon we became a Chinese special adminis-

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2. A detailed discussion of the relevant treaties is to be found in Anthony Dicks, Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong, 95 CHINA Q. 427, 441–451 (1983).
trative region. This is under the “one country, two systems” principle by virtue of which we have a system fundamentally different from the Mainland’s. The second part of Hartley’s line involves comparing how we did things before the handover with how we do them now. I will address it essentially from a lawyer’s point of view—essentially, but not exclusively. The law operates in a wider context. That context is a process of evolution. Central to it is the rule of law. How stands the rule of law in Hong Kong fifteen years after the handover?

Once an entrepôt, later a hive of manufacturing and tourism, Hong Kong is today an international financial center. In 1841, it was dismissed by Lord Palmerston as “a barren rock with nary a house upon it.” But the public supply of electricity there began in 1890, less than a decade after it had begun in London and New York. By 2005, we had more skyscrapers than any other city in the world. Sometimes they remind me of St. Thomas More’s lament of being surrounded by houses so tall that he could not even see the heavens. It is, from one point of view at least, a story of economic success. By what resources has this success been—and continued to be—achieved? There used to be two. The first is a matter of geography: an excellent harbor, proximity to the Pearl River Delta and having the vast and populous mainland of China as a hinterland. The second is a product of circumstances that have fashioned an exceptionally enterprising and hardworking population.

Now there is a third resource. It is a collective commitment of the people to the rule of law. As the handover approached, the “ideology of the rule of law contributed to the raising of public consciousness of rights and the value of fair administration.” So recorded our leading constitutional scholar Professor Yash Ghai. The Sino-British Joint Declaration on Hong Kong, signed in 1984, promises that “[t]he current social and economic systems will remain unchanged, and so will the life-style.” In his first report to Parliament

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on that treaty, the British Foreign Secretary stressed that judicial independence “is crucial to the territory’s success.”

I. The Constitutional Instruments

As promised in the Joint Declaration, China promulgated the Basic Law as Hong Kong’s post-handover constitution. The Basic Law was adopted by China’s legislature, the National People’s Congress, in 1990. It came into force on July 1, 1997. So the establishment of our new constitutional order did not take place in a rush. Even so, the period leading up to the handover was one of great uncertainty. Our commitment to the rule of law was forged in the fires of that uncertainty.

These things being “part of a larger historical whole,” I begin with our pre-handover constitutional instruments. Initially and for most of the British era, there were two: the Letters Patent and the Royal Instructions. In 1991, they were joined by a third constitutional instrument: namely, the Bill of Rights, which reproduces almost word-for-word the International Covenant on Civil and Political Rights. The Ordinance that introduced the Bill of Rights repealed all pre-existing legislation inconsistent with it. Simultaneously, the Bill of Rights itself was entrenched by amending the Letters Patent. It is to the Letters Patent that our legislature, the Legislative Council, owes its powers and, indeed, its existence. The amendment prohibited any legislation restricting rights and freedoms enjoyed under the International Covenant on Civil and Political Rights as applied to Hong Kong. That means the Bill of Rights, which embodies the Covenant’s application to us.

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11. Passed under the Great Seal and under the Royal Sign Manual and Signet, respectively.


II. CONSTITUTIONAL REVIEW

As a national law, the Basic Law is beyond the power of the Legislative Council—being a regional legislature—to repeal or amend, so our constitution is safeguarded by the judicial power of constitutional review. The courts strike down legislation inconsistent with the constitution. Such power has existed in Hong Kong ever since the Legislative Council was created by the Letters Patent in 1843. The judiciary has said that our legislature is supreme “subject to its constitution” and that any enactment beyond the legislative power provided by the Letters Patent would be pronounced bad. But that legislative power was to make laws for “peace, order and good government.” Those words were used throughout the British Empire. At the judicial apex of that empire was the Privy Council in London, which was our court of last resort until that role was inherited by the Court of Final Appeal in 1997. The Privy Council has always said that the words “peace, order and good government” confer the widest possible law-making power. So until the advent of the Bill of Rights in 1991, there was little, if any, real scope for constitutional review in Hong Kong.

The Basic Law enumerates a wide range of fundamental rights and freedoms. It also entrenches those in the Bill of Rights. All these fundamentals are safeguarded by guaranteed access to the courts and by constitutional review. So are the structural arrangements of our constitution. Our legal system has English roots. Constitutional review is not at present exercised in England, but as Dr. Claire Palley noted, an English case on jurisdiction to adjudge

19. XIANGGANG JIBEN FA art. 39 (H.K.) (The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China) [hereinafter Basic Law].
20. Id. art. 35 (providing that “Hong Kong residents shall have . . . access to the courts”). See also Solicitor v. Law Soc’y of H.K., [2003] 6 H.K.C.F.A.R. 570, 587 (C.F.A.) (“Access to the courts . . . [i]s an arterial right, being the avenue through which all other rights are enforced by an independent judiciary . . . .”).
legislation void is the precursor of the exercise of such jurisdiction by the United States Supreme Court. As Mr. Justice Holmes said, the law embodies the story of a nation’s development through many centuries. A polity’s law may have roots far older than the polity itself.

III. THE REINTERPRETATION

As I have said elsewhere, discussing judicial independence in Hong Kong without mentioning the “Reinterpretation” would be to ignore the elephant in the room.

Article 158 of the Basic Law vests the power of interpretation in the Standing Committee of the National People’s Congress. But then—and vitally to the “one country, two systems” principle—the Standing Committee, by the same article, authorizes the Hong Kong courts to interpret on their own the provisions of the Basic Law which are within Hong Kong’s autonomy. That means the whole of the Basic Law excluding only a category of provisions: those that concern affairs that are the Mainland Government’s responsibility or that concern the relationship between the Mainland authorities and Hong Kong. Also according to Article 158, the Hong Kong courts are required to seek an interpretation from the Standing Committee if they need to interpret any excluded provision. That requirement, it is to be stressed, applies only to excluded provisions. And the Court of Final Appeal did not consider any such provision to be involved in either of the two cases out of which the Reinterpretation arose.

They were the first two right-of-abode cases that we decided, both in January 1999. In Na Ka Ling v. Director of Immigration we held that persons who have the right of abode in Hong Kong under

the Basic Law\textsuperscript{29} do \textit{not} require exit approval\textsuperscript{30} to leave the Mainland for the purpose of exercising that right. But then in May 1999 the Hong Kong Government—throwing away the rulebook, some might say—requested an interpretation by the Standing Committee. And in June 1999 the Standing Committee responded by making the Reinterpretation, which said, among other things, that such persons need exit approval \textit{even} for that purpose.

In Chan Kam Nga v Director of Immigration,\textsuperscript{31} we held that where a child seeks to derive the right of abode through at least one parent, it matters \textit{not} whether the parent acquired such right before the child’s birth or thereafter.\textsuperscript{32} The May 1999 request for a Standing Committee interpretation was in respect to this case too. And the resulting Reinterpretation said that the parent had to have acquired such right \textit{before} the child’s birth.

IV. RECOVERING FROM THE REINTERPRETATION

Our recognition of the Reinterpretation’s effect is confined to actual interpretations.\textsuperscript{33} Importantly, it does not extend to other observations. We said so in a case\textsuperscript{34} concerning the provision in the Basic Law that confers the right of abode on Chinese citizens born in Hong Kong before or after the handover.\textsuperscript{35} Despite this provision, legislation was enacted in 1999 to deny the right of abode to any such person unless at least one of her or his parents had that right. In 2001 we struck down this legislation. We did so even though the Standing Committee had cited an opinion that excludes persons born to illegal immigrants, overstayers or people residing temporarily in Hong Kong. This decision of the Court was the high point in the recovery from the Reinterpretation.

\textsuperscript{29} Basic Law, supra note 19, art. 24 §§ 2–3.
\textsuperscript{30} Id. art. 22 § 4.
\textsuperscript{31} Chan Kam Nga v. Dir. of Immigration, [1999] 2 H.K.C.F.A.R. 82, 93 (C.F.A.) (holding that one “can become a Hong Kong permanent resident . . . by virtue of a parent’s Hong Kong permanent resident status . . . whether such status of the parent’s was acquired \textit{before} or \textit{after} the appellant’s birth”).
\textsuperscript{32} In reliance upon Basic Law, supra note 19, art. 24 §§ 2–3.
\textsuperscript{34} Chong Fung Yuen v. Dir. of Immigration, [2001] 4 H.K.C.F.A.R. 211, 233 (C.F.A.) (noting that the interpretation regarding citizenship before or after a child’s birth is not binding on art. 24 § 2(1) of the Basic Law).
\textsuperscript{35} Basic Law, supra note 19, art. 24 § 2.
In 2002, we decided a case\textsuperscript{36} in which 5,000 Mainland-born Chinese nationals lay claim to the right of abode. By the time we gave judgment in the first two abode cases, each of them had at least one parent who had that right. So they all had that right under the Basic Law as interpreted in those two cases. Article 158 guarantees that judgments previously rendered are unaffected by Standing Committee interpretations. Relying on this guarantee, they argued that their judgment-acquired right of abode survived the Reinterpretation. We split four to one. The majority took the view that the guarantee’s reference to “judgments” should be understood in a strict sense. On that view, they held that the 5,000 could not rely on the guarantee because they were not named parties in the first two abode cases. I saw the protection of crystallized rights as the guarantee’s purpose. So I held that anyone whose pre-Reinterpretation circumstances fit the law as stated in the first two abode judgments had acquired a crystallized right of abode that survived the Reinterpretation. That meant every one of the 5,000.

V. JUDICIAL INDEPENDENCE

There you have the Reinterpretation and the partial recovery from it. At least this saga shows that we decided those cases on our own, and not in consultation with the executive.

On June 8, 2011, the Court for the first time and by a bare majority of three to two, with me as one of the dissenting judges,\textsuperscript{37} sought a Standing Committee interpretation. That was in the Congo Case,\textsuperscript{38} a case on which the dust will never settle. Before the handover, it was for the judiciary independently to say whether the state immunity available in our courts was absolute or restrictive, so as not to immunize states from liability under commercial transactions. And that, the minority said, remained so after the handover. But the majority held otherwise by a ruling which the leading text published since the decision described as “unwelcome, but . . . not entirely unexpected.”\textsuperscript{39} The judgments are lengthy. They are there to be read.


\textsuperscript{37} I had the honor of dissenting in the company of Mr. Justice Mortimer NPJ.


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The “one country, two systems” principle consists of two components. And the gravest danger to the rule of law in Hong Kong lies in allocating to the “one country” component what truly belongs to the “two systems” component.

VI. PURSUIT OF EXPECTATIONS

Constitutional litigation in Hong Kong has been far more frequent since the handover than ever before. One reason for this growth, perhaps the main one, is a fundamental change in the mindset of the population.

There was a time—not all that long ago—when the people of Hong Kong saw things very differently from how they see them now. They generally accepted whatever the government chose to do or not do. The attitude was of self-reliance in whatever circumstances resulted from official action or inaction. Even those living in extremely deprived conditions accepted their lot with resignation. They lived in hope—sometimes realized but all too often disappointed—of a more comfortable life for their children. This hope was, to adopt an expression which Malinowski once used, “the hold which life [had] on [them].” 40 Whatever the pros and cons of this mindset and whatever the reason or reasons why it has changed, one simple fact emerges: the population now expects more of the government and more from the government. Some people do not like this change. On balance, I think that its upside exceeds its downside. But I refrain from debating the point. As another distinguished anthropologist has pointed out, “what we choose to call progress depends upon the standard chosen.” 41

In evolved democracies, it is essentially through the electoral process that expectations are pursued. But in Hong Kong democracy is still evolving and far from fully realized. As I said in a presentation made in London in 2010, everybody in Hong Kong agrees that democracy must be increased, but the pace and form of the increase are matters of political controversy. 42 Meanwhile people resort to

40. Bronislaw Malinowski, Argonauts of the Western Pacific 25 (1922).
various ways in which to augment what they can do through the ballot box. These include demonstrations in the streets and public law litigation in the courts. Such litigation is not limited to rights and freedoms. It extends to other matters of public concern such as the protection of natural resources. Our constitutional judgments include two on free assembly. People often demonstrate for greater democracy. Democracy—whether representative, direct or both—must be accompanied by other fundamentals, especially but not exclusively for the protection of minorities.

The rule of law is, as Lord Steyn said, “closely linked with the values of a liberal democracy.” Absent full democracy, can the rule of law prevail? Yes, on certain conditions. First, there has to be independent judicial stewardship of an entrenched constitution. Second, powers must be properly separated. Third, human rights must be protected conformably with international norms. Fourth and finally, the existence of the rule of law must not be treated as justification for delay in democratic development.

Without defining the rule of law, these conditions go towards illustrating its nature. They also tell you something about Hong Kong, which our last Governor called “the only place [he has] ever been able to identify that is liberal but not (alas) democratic.” Re-inforcing its liberal nature, Hong Kong’s people are now urgently engaged in redressing this democratic deficit. Meanwhile, if such deficit increases the burden on our courts, so be it. Professor Yash Ghai has observed that “[i]n Hong Kong, the most profound and engaged deliberations occur in the Court of Final Appeal.”

VII. PRINCIPLED, PRACTICAL AND PREDICTABLE

“[T]he tone and temper in which the modern judge should set

45. As by election.
46. As by referendum.
47. JOHAN STEYN, DEMOCRACY THROUGH LAW 133 (2004).
about his task,” Mr. Justice Cardozo said, “are well expressed in the first article of the Swiss Civil Code of 1907.”50 That quotation illustrates the respect that common lawyers everywhere have for other well-developed systems. Mr. Justice Avory once spoke of “the rules of common law [having] the incalculable advantage of being capable of application to new combinations of circumstances perpetually occurring.”51 That is true, but I daresay that a properly drawn code can be applied to similar effect. Common lawyers are aware of the Swiss courts’ achievements in the development of new law through established principles.52

Precedent is, as you know, central to the common law. Lord Mansfield explained that “[t]he reason and spirit of cases make law, not the letter of particular precedents,”53 and that the purpose of precedents is “to illustrate principles, and to give them a fixed certainty.”54 The common law is therefore directed to solving problems in a principled, practical and predictable way. I am sure that the same is true of your law.

VIII. FUNDAMENTALS

By the tenth anniversary of the handover, the Court of Final Appeal under the leadership of Chief Justice Li had decided over forty constitutional cases55 covering a broad spectrum of fundamental rights and freedoms: old ones like equality56 and free speech,57 and new ones like adequate housing58 and indigenous rights.59 As you

would expect, indigenous rights are enforced only after they have been judicially divested of any unacceptable practices such as gender discrimination.\textsuperscript{60}

The matter of housing reminds me to acknowledge the disparity in wealth afflicting Hong Kong. We are no exception to the troublesome rule that Lord Desai noted when he said that “across Asian society there is a very intimate relationship between business and government.”\textsuperscript{61} That does not make reducing the disparity in wealth any easier. It is an urgent problem to be addressed. This is not to say that the present situation is one of social Darwinism with the weakest left by the wayside. To the contrary, almost a third of Hong Kong’s population lives in public housing at subsidized rent. And Article 145 of the Basic Law calls for the development and improvement of social welfare in the light of economic conditions and social needs. I am heartened by Dr. David Shankland’s recent statement that anthropology now “seeks applicability and relevance in the study of inequality in all its global variety.”\textsuperscript{62} As Adam Smith is credited with having understood, “the law of a society sits, a little uneasily perhaps, between its morality and its economics.”\textsuperscript{63}

\textbf{IX. Three Categories of Post-Handover Legal Development}

Post-handover legal developments can be divided into three categories. The first category consists of developments that would have taken place in any event. Some were effected by legislation in the ordinary course of law reform. Others were effected by the courts doing what Lord Nicholls of Birkenhead pellucidly described as “keeping [the common law] abreast of current social conditions and expectations.”\textsuperscript{64} For it should always be borne in mind that, as Lord Scott of Foscote said, “tradition, no matter how longstanding... cannot justify practices that fall short of [current] stand-

\begin{itemize}
  \item \textsuperscript{59} See Chan Wah, 3 H.K.C.F.A.R.
  \item \textsuperscript{60} Id. at 474J–476G. See also Law of the Hong Kong Constitution ¶ 29.077, at 908 (Johannes Chan & C.L. Lim, eds., Sweet & Maxwell 2011).
  \item \textsuperscript{61} Meghnad Desai, The Resurgence of Asia, 43 Asian Aff. 1, 9 (2012).
  \item \textsuperscript{62} David Shankland, Anthropology in the World: Limits and Unity, 28 Anthropology Today 4 (2012).
  \item \textsuperscript{63} Peter Stein, Adam Smith’s Jurisprudence, in Jubilee Lectures Celebrating the Foundation of the Faculty of Law, University of Birmingham 136, 152 (J.M.B. Crawford, ed., 1981).
  \item \textsuperscript{64} In re Spectrum Plus Ltd., [2005] 2 A.C. 680 at 697E (Eng.).
\end{itemize}
ards.” 65 From time to time, it is necessary, as Lord Denning explained, to “create new precedents so as to meet new situations.” 66

In the second category are developments not exclusively or even mainly referable to the handover but influenced by it. Here three factors are especially influential. One is easier access to the court of last resort (now in Hong Kong instead of London). The second is an eclectic jurisprudence open to overseas ideas. And the third is people’s heightened awareness of what can be achieved through the courts. This awareness has spun off into increasing demands for legislative reform in areas such as competition law.

Initiatives generated by the handover and designed to make it work form the third category. It consists of a growing body of constitutional law that draws on international law 67 and cases decided in other municipal jurisdictions in regard to transnational norms. 68

This body of constitutional law includes two novel features. One is the striking down of a statutory provision that is not itself unconstitutional but which, if not excised, would drag down the entire statutory scheme of which it is a relatively minor part. 69 The other is the recognition of a jurisdiction—exercisable when necessary—to suspend the operation of a striking-down order for a limited period to afford an opportunity for corrective legislation. 70 After all, as Lord Atkin said, legislation “may have a perfectly lawful object . . . but may seek to achieve that object by invalid methods.” 71 Then suspension may be appropriate where the lawful object is of vital importance.

Those two features accord to the legislature what is within its province. Government, as Thomas Paine wrote in the eighteenth century, “has of itself no rights; they are altogether duties.” 72 It follows

67.  In Mabo v Queensland (No.2) [1992] 175 CLR 1, 42 (Austl.), Mr. (later Chief) Justice Brennan stressed the influence on the common law of international law declaring universal human rights.
71.  Gallagher v. Lynn, [1937] A.C. 863 (H.L.) at 870 (Eng.).
that each branch of government must permit the other branches to perform their duties.

Of post-handover developments, the first category is natural. The second reflects easier court access and a greater appreciation of what the law can do. And the third concerns developments that I think are indispensable and must be taken even further. The polymath Thomas Young spoke of deep and difficult investigations that bring out beautiful and simple results. That quotation captures how the best judgments are prepared and what they offer. The lawyer’s mission is to free the law from technicalities and infuse it with justice.

X. OUR PEOPLE’S ASSERTIVENESS: THE MAINSTAY OF OUR LEGAL SYSTEM

Human rights and democracy each play an “irreducible” role, and the rule of law is “intimately linked” with observing human rights. All of this I believe to be universally true. For I agree with John Donne that no man is an island. Nor is any culture or community an island. Inhumanity anywhere diminishes humanity everywhere.

However high a constitutional objective, its attainment is possible if the judiciary is true to its duty and is supported in that duty by an alert population, a free media, a learned academy and a dedicated profession. In Hong Kong, we are engaged in preserving our liberties, enhancing our democratic institutions and furthering social justice.

Last year, it was my privilege to go to Kenya where I made two presentations to the judges of its newly established Supreme

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77. See Teo Soh Lung, Beyond the Blue Gate: Recollections of a Political Prisoner (Strategic Information and Research Development Centre, Petaling Jaya, 2010).
Court. They have to administer a new constitution\textsuperscript{78} that reconfigures the socio-economic landscape of their nation for the benefit of her people. In Hong Kong, the scope for judicial enforcement of socio-economic rights is enlarged by our constitution’s incorporation of the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{79} It is true that courts are not ideally equipped to undertake resource allocation. Nevertheless, the courts will—as the Swiss judiciary has pointed out—intervene if legislation fails to accord people the basic necessities to which they are constitutionally entitled.\textsuperscript{80} One of the most important and challenging tasks of lawyers everywhere in the years ahead will be to articulate enforceable duties corresponding to socio-economic rights and devising effective remedies for breaches of such duties.

Some fear of change is understandable, but should never be permitted to block progress. As Professor A. Berriedale Keith said, “there is a time when the true wisdom lies in a generous enthusiasm to incur risks in an honorable endeavor to meet legitimate aspirations.”\textsuperscript{81}

Eradicating social injustice may generate disharmony where preserving civil liberties has not. Some compromise may prove unavoidable. It is told in The Book of Changes (易經) that “[t]o carry the conflict to the bitter end has evil effects even when one is in the right, because the enmity is then perpetuated.”\textsuperscript{82} The people of Hong Kong have not forgotten the classic teachings of traditional China, which have influenced Chinese thought for thousands of years. But as a Western philosopher has observed, though life must be understood backwards, it must be lived forwards.\textsuperscript{83} Our people are more assertive nowadays. This assertiveness is the mainstay of our system.

The present state of the rule of law in Hong Kong is better than many had feared at the time of the handover. And we were making progress. Recently, however, there have been signs of going

\begin{itemize}
\item \textsuperscript{78} See Pal Y. Ghai & J. Cottrell, Kenya’s Constitution: An Instrument for Change (Katiba Institute 2011).
\item \textsuperscript{79} Basic Law, supra note 19, art. 39.
\item \textsuperscript{80} See Bundesgericht [BGer] [Federal Supreme Court] Oct. 27, 1995, 121 Entscheidungen des Schweizerischen Bundesgerichts [BGE] I 367 (Switz.).
\item \textsuperscript{81} Arthur Berriedale Keith, Speeches and Documents on Indian Policy, 1750–1921, at vi (Oxford University Press 1922).
\item \textsuperscript{82} T.L. Yang, Bentham Meets Confucius, 44 Current Legal Probs. 261, 269 (1991).
\item \textsuperscript{83} Soren Kierkegaard, 4 Journals and Papers of Soren Kierkegaard, ¶ 164 (“It is quite true what philosophy says: that life must be understood backwards. But then one forgets the other principle: that it must be lived forwards.”).
\end{itemize}
into reverse. A free and fair society is not easy to build and maintain. But I bid you have faith in the people of Hong Kong to regain any lost ground and start moving forward again.