

Safeguarding individual freedoms

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holds a Bachelor of Arts (Law) and Master of Arts (Law) degrees from Cambridge University and was called to the bar in England & Wales and Hong Kong in 1987. He sat as Deputy High Court Judge of the Court of First Instance in July and August 2003, was a member of the Council of the Hong Kong Bar Association from 1989-1990, 1997-2002 and 2003-2005, and was Chairman of the Special Committee on Legal Education of the Hong Kong Bar Association from 2003-2005. Mr Wong has served as Chairman of a number of boards and tribunals in Hong Kong, including the Buildings Appeal Tribunal, the Criminal and Law Enforcement Injuries Compensation Boards and the Non-local Higher and Professional Education Appeal Board.

It is often said that Hong Kong's defining ideology is the rule of law. In fact, of all the legacies of Britain's former administration, the rule of law is probably the most cherished.

Before China resumed the exercise of sovereignty over Hong Kong in 1997, many people prophesied the fall of Hong Kong. They said that opposition politicians would be jailed; that the constitutional guarantees vouchsafed to Hong Kong people would be worthless; and that fugitives surrendered to Hong Kong would be handed over to the Mainland, despite promises to the contrary. None of this has happened.

The fact is that the visionary concept of "One country, Two systems" is being faithfully implemented. Hong Kong's legal system, based on the common law, the rule of law and an independent judiciary, remains intact, and is quite separate from the system in the Mainland.

I was recently honoured to be appointed the Hong Kong SAR's second Secretary for Justice. I see very clearly my mission in terms of upholding the rule of law, making prosecution decisions free from any interference, and defending human rights.

New constitutional order

When China resumed the exercise of sovereignty over Hong Kong in 1997, a new constitutional order was put in place. This is found in the Basic Law of the Hong Kong Special Administrative Region, a law enacted by the National People's Congress, based upon the Sino-British Joint Declaration. So far as the legal system is concerned, the essential feature of the Basic Law is continuity.

- The common law and laws previously in force are to be maintained, unless found inconsistent with the Basic Law or amended by the legislature.
- The independence of the judiciary is guaranteed, and judges are given full security of tenure.
- Hong Kong residents are assured of the right to bring legal proceedings against acts of the executive authorities.

These, and other guarantees ensure that the rule of law prevails in Hong Kong. Proceedings against the government by way of judicial review are commonplace. Many of these proceedings relate to the way in which an administrative discretion was exercised – for example, in determining an application for a licence.

However, under the new constitutional order there is a much larger scope for judicial challenge of government action than before Reunification.

This is because the Basic Law provides constitutional guarantees not only in respect of the legal system and the political structure, but also in respect of the economy, education, science, culture, sports, religion, labour and social services. Government action or legislation in respect of any of these areas can therefore be challenged in court as being inconsistent with the Basic Law.

This is not merely a hypothetical possibility. Challenges have actually been brought, for example, in respect of:

- legislation to reduce civil servants' salaries;
- the abolition of municipal councils;
- legislation requiring registration of social workers;
- a statutory provision precluding an appeal to the Court of Final Appeal in respect of a lawyer's disciplinary decision.

These examples indicate that the rule of law, and constitutionalism, have not only survived Reunification but are stronger than ever.

I do not, however, wish to suggest that there have been no events that aroused concern.

Prosecution Decisions

There have, for example, been one or two prosecution decisions made by the Department of Justice that have been questioned. Prosecution decisions are inherently controversial. I will not go into details about past cases, but I am committed to ensuring that future prosecution decisions are made both independently and fairly.

In order to promote consistency, fairness and transparency, the Department of Justice in Hong Kong has published the principles and practices that it adopts when making such decisions. Those principles and practices will be scrupulously followed. They are, in fact, an aspect of the rule of law. Moreover, the community's vigilance in raising concern if an improper approach is suspected indicates how strong the commitment to the rule of law is in Hong Kong.

NPCSC Interpretations

There is one other area where concerns over the rule of law have been raised. Under Article 158 of the

Basic Law, the ultimate power to interpret the Basic Law is vested in the Standing Committee of the National People's Congress. Hong Kong courts are authorised to interpret the Basic Law in adjudicating cases, although in certain situations they must seek an interpretation by the Standing Committee before deciding a case.

The Standing Committee of the National People's Congress is a legislative, not a judicial, body. Lawyers trained in the common law system may be uncomfortable with the idea of a legislative body interpreting the law. But this reflects the Chinese Constitution. All national laws in China are subject to interpretation by the Standing Committee. However, this type of interpretation does not occur as part of judicial proceedings. It is a type of clarification of the relevant legislation, and is therefore described as "legislative interpretation".

Since Reunification, there have been three interpretations of the Basic Law by the Standing Committee. Two of these were made at the request of Hong Kong's Chief Executive. Although each of these interpretations helped to resolve pressing problems in Hong Kong, there was much concern expressed that they might affect Hong Kong's promised high degree of autonomy and the rule of law. As a result, the SAR Government undertook that it would not lightly again seek an interpretation of the Basic Law by the Standing Committee. As Secretary for Justice, I will try my best to avoid the need for the Chief Executive to seek another interpretation during my term. It will only be in very extreme and exceptional circumstances that such a course will be considered. And, if such a situation does arise, I will do my best to minimise its effect on the rule of law.

Human rights

The protection of human rights is a fundamental aspect of life in Hong Kong. The constitutional documents of the former colony of Hong Kong did not originally contain any guarantees of human rights. In 1976, the British Government extended to Hong Kong the application of the International Covenant on Civil and Political Rights ("ICCPR"), subject to certain reservations and declarations. However, that extension was a matter of international law, and did not create enforceable rights under Hong Kong law.

In 1991 – six years before Reunification – the Hong Kong Bill of Rights Ordinance was enacted, incorporating ICCPR guarantees into domestic law. At the same time, the colonial constitutional documents were amended so as to entrench those rights. In the six years before Reunification, various challenges were brought in the courts, based on these new guarantees.

Despite fears to the contrary, the Bill of Rights Ordinance survived Reunification and remains in force today. Moreover, Chapter III of the Basic Law contains 19 articles guaranteeing particular human rights, such as freedom of speech, freedom of association, freedom of religious belief and so on. Article 39 is of particular importance, since it provides for the continued application of the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong.


At the international level, the six major human rights treaties continue to apply to Hong Kong, and the Hong Kong SAR Government continues to report regularly to the treaty monitoring bodies. The preparation of those reports is done entirely by the Hong Kong SAR Government. Hearings of the reports, and the monitoring bodies' concluding observations, are the subject of wide media coverage in Hong Kong.

Human rights are therefore protected at the domestic, constitutional and international levels. Again, this is not merely theoretical protection. Here are some examples of court challenges made in the past seven years.

- A provision in immigration legislation, the electoral arrangements for villages in the New Territories, and the system for allocating secondary school places, were all successfully challenged as improperly discriminating between males and females.
- Provisions making it an offence to desecrate the national or regional flags were unsuccessfully challenged on the basis of freedom of expression.
- A decision to refuse entry to a non-permanent resident who was returning to Hong Kong after a foreign visit was successfully challenged as being inconsistent with residents' right to travel and to enter Hong Kong.

These examples demonstrate that human rights are fully protected in Hong Kong.

Conclusion

More than eight years have now passed since Reunification. The unique concept of 'One Country, Two Systems' has naturally created novel challenges and occasional controversies. But, overall, I believe that the new constitutional order has been a resounding success. And Hong Kong's legal system remains as strong as ever. The success of the transition is also reflected in the six-monthly reports on Hong Kong made by the British Government. In its report for January to June 2005, for example, it stated that 'during this period "One Country, Two Systems" has generally worked well in practice and the rights and freedoms promised in the Declaration and the Basic Law continue to be upheld'. 

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