

“One Country, Two Systems”: Human Rights Protection and Political Development in Hong Kong

PART I – Human Rights Protection

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British Colony of Hong Kong

- The Opium War
- Treaty of Nanking 1842
- Convention of Peking 1860
- Convention of Peking 1898
- The “unequal treaties”
- The Sino-British Joint Declaration on the Question of Hong Kong 1984

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“One country, two systems”: origins

- Late 1970s: change of People's Republic of China (PRC) policy towards Taiwan - from “liberation” to “peaceful re-unification”
- 1981-82: ideas of “special administrative region” and “One country, two systems”
- Dec 1982: new Constitution, art 31 - special administrative regions - different social systems

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Hong Kong under “One Country, Two Systems”

- Sino-British Joint Declaration 1984
- Basic Law of the Hong Kong Special Administrative Region (HKSAR) 1990: a “mini-constitution”
- A high degree of autonomy
- Preservation of British-style legal system and the common law ; civil liberties
- Democratization

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The Basic Law (1990)

- Government structure of the HKSAR
- Sources of law in the HKSAR
- Human rights
- Social and economic systems and policies
- Relationship between HKSAR government and Central Government in Beijing; scope of Hong Kong's autonomy
- Hong Kong's powers regarding external affairs

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Characteristics of Hong Kong's system of autonomy (1)

- Broad scope of autonomy: broader than states / provinces of federal states like USA, Canada, Australia
 - Few national laws applicable
 - No tax payable to central government
 - Hong Kong's own currency
 - Hong Kong's power to control entry and exit of persons
 - Separate customs territory
 - Participation in international relations and organisations using name "Hong Kong, China"

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Characteristics of Hong Kong's system of autonomy (2)

- Democratization: in progress & not yet completed
- Legal security of autonomy?
 - Lack of constitutional entrenchment
 - Overriding authority of National People's Congress Standing Committee (NPCSC) in interpretation of the Basic Law

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Challenges for Hong Kong courts

- New constitutional order in 1997
- Dual challenge
 - Defining Hong Kong's constitutional relationship with Beijing: tension between socialist legality in mainland and the common law tradition & judicial independence in Hong Kong
 - Defending rights while delineating limits of rights: balance between individual rights & public interest, conflicting interests in society

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The “right of abode” case

- The *Ng Ka Ling & Chan Kam Nga* cases (《吳嘉玲案》及《陳錦雅案》)
- (Court of Final Appeal (CFA), Jan 1999)
- Interpretation of who entitled to “right of abode”: reference to the NPCSC for interpretation – June 1999 Interpretation

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Debate on the NPCSC’s power of interpretation

- Implications for Hong Kong’s autonomy, judicial authority, Rule of Law & protection of rights?
- Practice of self-restraint by the NPCSC: 3 interpretations in total - 1999, 2004 (process of democratization), 2005 (term of office of Chief Executive (CE))

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Judicial protection of rights & liberties

- Background: HK Bill of Rights 1991; International Covenant on Civil & Political Rights; Basic Law, article 39; constitutional judicial review of executive & legislative acts
- Courts’ approach: rights & freedoms - “heart of Hong Kong’s separate system” - generous interpretation; restrictions narrowly interpreted

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Cases on rights & liberties

- Freedom of travel (Basic Law, art 31), right to re-enter
 - *Gurung Kesh Bahadur*
 - *Lau Fong* (劉芳)
- Freedom of speech & expression
 - *Ng Kung Siu*: “flag desecration” case (《吳恭劭：「國旗案」》) - “public order (ordre public)” - “proportionality” test applied by the CFA

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Cases on rights & liberties (cont'd)

- Freedom of speech & expression (cont'd)
 - *Cheng v Tse* (《鄭經翰訴謝偉俊》): defamation - defence of fair comment broadened ("malice" re-interpreted)
- Freedom of assembly & procession
 - *Yeung May Wan* (楊美雲) (Falung Gong demonstrators in front of Liaison Office of Central Government): convictions for obstruction of public places quashed
 - *Leung Kwok Hung* (梁國雄): "ordre public" in Public Order Ordinance struck down; proportionality test applied to police control of demonstrations 13

Cases on rights & liberties (cont'd)

- Right to equality & non-discrimination
 - *Chan Wah* (陳華) (non-indigenous inhabitants in village elections)
 - *Equal Opportunities Commission v Director of Education* (《平等機會委員會訴教育署署長》) (allocation of secondary school places to male & female students)
- Rights of civil servants
 - *Lau Kwok Fai* (劉國輝): art 100 of Basic Law; pay cut for civil servants upheld

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Assessment (I)

- Courts: guardian of the Rule of Law, constitutionalism, human rights and civil liberties
- Hong Kong courts steering a middle course between judicial activism & judicial restraint - moderately liberal; borrowing of overseas jurisprudence

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Assessment (II)

- institutional & social environment favourable for discourse of constitutionalism and rights
 - law-abiding government,
 - vibrant civil society,
 - strong middle class,
 - free media,
 - active party politics,
 - vocal legal profession, vigilant public opinion

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