

# Chapter 1

## Introduction

From deciding who has the right to live in Hong Kong to determining how the government is allowed to spend taxpayers' money, virtually every aspect of life in Hong Kong is affected in innumerable ways by the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (or "Hong Kong Basic Law", as it will be called in this book). As the highest law with practical effect in Hong Kong, it sets the framework for Hong Kong's system of government, how its courts operate, and the rights and freedoms enjoyed by its residents, to name just a few examples.

That makes an introductory knowledge of the Hong Kong Basic Law vital for anyone who wishes to understand not only Hong Kong's legal system, but also Hong Kong's way of life and system of government—as well as how these can be expected to evolve in years to come. The good news is that the Hong Kong Basic Law is a relatively youthful document, by comparison with many other constitutional documents around the world. Students of the US Constitution, for instance, must wade through more than 200 years of court cases to understand its provisions. By contrast, in Hong Kong's case, it is still less than 20 years since the Hong Kong Basic Law came into force on 1 July 1997.

That does not mean ignoring everything which happened before that date. As is explained in Chapter 2 on the "Birth of the Hong Kong Basic Law", many of the biggest controversies in modern-day Hong Kong involve issues first fought while the Hong Kong Basic Law was being written between 1985 and 1990. From the arguments over what form democratization should take to the battles over who has the power to interpret the Hong Kong Basic Law, the debates during the drafting process often had a profound effect on where Hong Kong finds itself today.

Take, for instance, the persistent suspicions about any attempt to enact the national security legislation required under Article 23 of the Hong Kong Basic Law. In 2003, such suspicions brought more than half a million protesters onto the streets in a watershed moment which, as we will see in this book, prompted Beijing to tighten its policy towards Hong Kong. The origins of such suspicions can be traced back to the history of the drafting of the Hong Kong Basic Law, which saw much tougher language inserted into Article 23 in the final draft of the Hong Kong Basic Law, primarily to punish Hong Kong people for supporting the Tiananmen protests that were crushed on 4 June 1989.

Official histories tend to portray the emergence of the Hong Kong Basic Law in its final form as the carefully calibrated result of a long and thoughtful process. But the picture presented in this book is of a series of historical accidents which—partly through

luck—resulted in a largely fortuitous outcome, although less fortuitous than what might have been achieved had the Hong Kong Basic Law been finalized only a year earlier, before the events of June Fourth.

Those accidents began with the British colonizers agreeing, for reasons of diplomacy, to hold most parts of the territory on a 99-year lease with an expiry date of 30 June 1997—so setting a deadline by which the issue of Hong Kong’s future would have to be resolved. They continued with China’s emergence from decades of international isolation under the pragmatic leadership of Deng Xiaoping who sought to copy Hong Kong’s economic success, just as the future of that success was starting to come into question because of increasing concerns about what would happen after 1997. That a solution presented itself in the shape of the “one country, two systems” formula which China devised for Taiwan was a stroke of luck. Perhaps fortuitously for Hong Kong, Taiwan rejected this formula—so prompting the change of strategy in Beijing that resulted in this formula being applied to Hong Kong instead.

As we will see in Chapter 2, the result of that series of historical accidents was first the Sino-British Joint Declaration, the 1984 international treaty in which Beijing and London agreed on how one country, two systems would be applied in Hong Kong, and then the Hong Kong Basic Law in which those promises were written into a law enacted by China’s National People’s Congress. Although it endured an often rocky path, with disagreements between Britain and China persisting up until the night of 30 June 1997, that agreement has proved strong enough to survive. More than a quarter of a century later, what is striking is how much the provisions of that 1984 treaty still provide a generally accurate picture of Hong Kong today. It is an agreement that has, to a large extent, stood the test of time and for all its undoubted flaws probably represents a better deal for Hong Kong than might well have been secured at almost any other time in Hong Kong’s history.

Some of the more confusing aspects of the Hong Kong Basic Law are its multiple dimensions. In Chapter 3 on “What Is the Hong Kong Basic Law?”, this book seeks to disentangle them. As already noted, its origins lie in the 1984 agreement between Britain and China, so providing an international dimension to the Hong Kong Basic Law which means that the Joint Declaration is still sometimes referred to in court cases to help understand the correct meaning of ambiguous provisions in the Hong Kong Basic Law. But the actual legal status of the Hong Kong Basic Law is that of a statute enacted by the National People’s Congress, the highest body of constitutional power in China. That gives rise to its domestic dimension, as well as the name “basic law”—which, in fact, more properly describes a whole class of laws enacted by the National People’s Congress rather than this one single enactment.

By far the most important dimension from Hong Kong’s perspective is the constitutional one, with the Hong Kong Basic Law serving as the highest law with practical effect in Hong Kong, and the benchmark against which the legality of all other laws in Hong Kong are judged. Note, however, the qualification imposed by those three words: with practical effect. As we will see in Chapter 3, the Hong Kong Basic Law is not the highest

law of all—a title which, instead, goes to the national constitution, the Constitution of the People’s Republic of China 1982. But since most of the provisions in that constitution concern the socialist system on the mainland which are of little practical effect in Hong Kong, that raises difficult—and, to some extent, unanswered—questions about how much of the national constitution actually applies in Hong Kong, and the nature of its relationship with the Hong Kong Basic Law.

At the heart of the Hong Kong Basic Law is the concept of a high degree of autonomy. However, nowhere is this concept precisely defined. Instead, Article 2 of the Hong Kong Basic Law refers only in general terms to Hong Kong enjoying “executive, legislative and independent judicial power, including that of final adjudication”. That refers to three of the fundamental powers that international experts on autonomy have identified as central to most autonomous arrangements elsewhere in the world—the right of any area to administer its own affairs, make its own laws and judge its own cases.

As we will see in Chapter 4 on “How High a Degree of Autonomy?”, in all three respects the Hong Kong Basic Law confers, at least on paper, extraordinarily wide-ranging powers upon Hong Kong. From exclusive jurisdiction to administer its financial affairs and participate in some international organizations to the power to make laws on almost every subject and the existence of a Court of Final Appeal, Hong Kong enjoys powers which are rarely exercised at a local level under even the most generous autonomy arrangements elsewhere in the world. But we will also see that, in all three respects, much depends on how much self-restraint China chooses to exercise. From its control over the Chief Executive to the power to impose national laws and supplant decisions of the Hong Kong courts with its own interpretations of the Hong Kong Basic Law, the provisions of the Hong Kong Basic Law give Beijing ample means to exercise much greater control over Hong Kong should it wish to do so.

The degree of self-restraint which China has exercised in using these powers has varied. As is explained in Chapter 4, China’s self-restraint was at its greatest in the years immediately after 1 July 1997, when the eyes of the world were on Hong Kong. However, it subsequently took a turn towards a more interventionist approach after the huge public protest against national security legislation on 1 July 2003. When Beijing does choose to exercise its powers in a way which reduces the extent of Hong Kong’s autonomy—as with a 2004 interpretation from the National People’s Congress Standing Committee seizing control of decisions on any changes to the system for electing the Legislative Council—there is no legal mechanism for Hong Kong to challenge this. As we will see, that is one of the biggest shortcomings of the autonomy granted to Hong Kong under the Hong Kong Basic Law since, unlike many autonomous arrangements elsewhere in the world, there is no independent mechanism for resolving any disputes about who exercises any particular power.

One of the most important functions of the Hong Kong Basic Law is to set out the system of government in Hong Kong. Nearly 40% of its 160 provisions are devoted to this, more than any other subject. But as is explained in Chapter 5 on the “System of Government”, despite this large number of provisions, there are some important points

missing from its description of Hong Kong's system of government. The Hong Kong Basic Law goes into great detail about the powers of the Chief Executive who, as the head of the Hong Kong SAR Government, is responsible for leading Hong Kong. The powers of Hong Kong's legislature, known as the Legislative Council, are described in similar detail. What is missing is a full description of the precise relationship between the Chief Executive's powers and those of the Legislative Council, an omission which has arguably done much to contribute to the repeated conflicts—and persistently poor relations—between the executive and legislature throughout much of the history of the Hong Kong SAR.

China prefers to describe the system of government set out in the Hong Kong Basic Law as one of “executive-led government”. That description, inherited from the colonial era, focuses on the powers of the Chief Executive and so has the advantage, from Beijing's perspective, of emphasizing the powers of the one part of Hong Kong's political structure which lies directly under the Central Government's control. As we will see in Chapter 5, the Hong Kong Basic Law does grant the Chief Executive sweeping powers, such as the power to make appointments without any need for approval by the legislature. Those powers are so sweeping, at least on paper, that one comparative study even found that the Hong Kong Basic Law grants the Chief Executive theoretically greater powers than popularly elected presidents in 33 other countries, including the US.

Despite its frequent use by both Chinese and Hong Kong SAR Government officials, the term “executive-led government” does not appear anywhere in the text of the Hong Kong Basic Law. Many scholars, pointing to the other important powers placed in the hands of the Legislative Council and the courts, argue that it is more accurate instead to describe the system of government under the Hong Kong Basic Law as one of “separation of powers”—so placing more emphasis on the division of powers between the executive, legislature and judiciary.

In addition, the small-circle election process which has always been used to choose the Chief Executive so far deprives Hong Kong's leader of the legitimacy that a democratic mandate confers on popularly elected leaders in many other countries. As is explained in Chapter 5, this makes it very difficult in practice for Hong Kong's Chief Executive to exercise many of the sweeping powers granted to the Chief Executive under the Hong Kong Basic Law.

Many members of the Legislative Council are also elected through small-circle elections in functional constituencies, some of which have only a few hundred voters. However, since half of all seats in the legislature are elected through universal suffrage, the overall franchise in Legislative Council polls is currently far higher than in elections for the Chief Executive. That has given the Legislative Council a greater democratic legitimacy which has helped the legislature push the exercise of its powers much further than Beijing appears to have originally envisaged during the drafting of the Hong Kong Basic Law, prompting angry complaints from some mainland scholars.

That may also have been one motive behind Beijing's decision to allow the Chief Executive to be elected by universal suffrage from 2017 onwards, with elections for all

seats in the Legislative Council expected to follow the same path at a later date. But, as we will see in Chapter 5, it is far from clear how far the nomination procedures prescribed in the Hong Kong Basic Law will restrict the range of candidates allowed to stand in any future Chief Executive contest, and whether functional constituencies will be abolished when universal suffrage is eventually introduced for elections to all seats in the Legislative Council.

In contrast to its detailed descriptions of the powers of both the Chief Executive and the Legislative Council, the Hong Kong Basic Law says relatively little about the role of the courts. As is explained in Chapter 6 on the “Role of the Courts”, this reflects an emphasis on continuity rather than detail since the judicial system that existed in Hong Kong prior to 1 July 1997 was widely viewed as one of the ingredients of Hong Kong’s success. As a result, the Hong Kong Basic Law preserves that judicial system largely unchanged, with the exception of the creation of the Court of Final Appeal to succeed the Judicial Committee of the Privy Council in London, which had served as Hong Kong’s highest court under colonial rule.

The Hong Kong Basic Law goes to some lengths to seek to protect the independence of the judiciary, particularly when it comes to judicial appointments. These are placed in the hands of an independent commission, so severely limiting the Chief Executive’s influence over the process. Once appointed, judges enjoy near absolute job security until they reach retirement age, although their salaries are not similarly protected, a point of some concern to the judiciary, which has unsuccessfully sought to persuade the Hong Kong SAR Government to change this.

As we will see in Chapter 6, the absence of any detailed description of the powers of the courts in the Hong Kong Basic Law has left the courts free to define some of these powers for themselves. That is particularly true in the field of judicial review, an important and growing area of law, where the courts exercise the power to determine the legality of actions of the government and other public bodies. In its landmark January 1999 decision in *Ng Ka Ling v Director of Immigration*,<sup>1</sup> the first case decided by the Court of Final Appeal on the Hong Kong Basic Law and one of the most important cases in Hong Kong’s legal history, the court asserted that this power includes the power to invalidate any other Hong Kong laws which it decides are in breach of the Hong Kong Basic Law. Although this power is not explicitly granted to the courts under the Hong Kong Basic Law, and at least one mainland drafter claims it was never China’s intention to do so, the court’s assertion of the right to exercise this power has never been seriously challenged in Hong Kong since then—and has become an important part of the rule of law in Hong Kong.

In the *Ng Ka Ling* case, the Court of Final Appeal also sought to extend this power even further, controversially claiming the Hong Kong courts have a power to invalidate any actions of the National People’s Congress and its Standing Committee which they decide are in breach of the Hong Kong Basic Law. That provoked a furious response

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1. (1999) 2 HKCFAR 4.

from Beijing, which calls into question whether the courts would ever dare to exercise this power in practice. It also put the Court of Final Appeal on the defensive, especially after a June 1999 interpretation of the Hong Kong Basic Law by the Standing Committee reversed much of the substance of what the court had decided in the *Ng Ka Ling* case.

The result, as is explained in Chapter 6, was a couple of questionable decisions in subsequent politically charged cases, where the Court of Final Appeal appeared to be at least partly motivated by a desire to avoid another confrontation with Beijing so soon. But this period of apparent retreat only lasted from 1999 to 2001, ending when the court demonstrated once more in the important case of *Director of Immigration v Chong Fung Yuen*<sup>2</sup> that it was still willing to take unpopular decisions that risked angering Beijing where this was the inevitable consequence of the clear wording of the Hong Kong Basic Law. After that case, most observers agree the Court of Final Appeal recovered its confidence and, throughout most of the period when it was headed by Andrew Li (the first Chief Justice of the Hong Kong SAR from 1997 to 2010), the court played a strong role in protecting the fundamental freedoms guaranteed under the Hong Kong Basic Law.

Nonetheless, the shadow of the National People's Congress Standing Committee's power to interpret any part of the Hong Kong Basic Law at any time continues to hang over the Hong Kong courts. As is explained in Chapter 7 on "Interpretation and Amendment", there is strong evidence to suggest that it was never the intention of the drafters of the Hong Kong Basic Law to confer such an unrestricted power of interpretation on the Standing Committee, especially the power to determine the meaning of the large parts of the Hong Kong Basic Law which concern matters that fall within Hong Kong's autonomy. Nonetheless, that is the position which has emerged in practice after the Standing Committee's June 1999 interpretation was swiftly accepted by the Court of Final Appeal in an unfortunate decision in the case of *Lau Kong Yung v Director of Immigration*.<sup>3</sup> Decided at a time when the court was still in its period of judicial retreat, that case saw the Court of Final Appeal adopt an even wider view of the Standing Committee's powers than the Standing Committee had, at that time, unequivocally asserted for itself.

Although the accepted position now is that there are no legal limits on the Standing Committee's power to interpret the Hong Kong Basic Law, the Standing Committee has been very cautious about exercising this power so far. The Standing Committee issued only a handful of interpretations during the early years of the Hong Kong SAR and only one of these, in 2004, was at the Standing Committee's own initiative. That 2004 interpretation, on changes to Hong Kong's electoral system, illustrated the importance of Standing Committee interpretations by taking a power which Hong Kong would have been allowed to exercise on its own under the original wording of the Hong Kong Basic Law, and interpreting it in a way which instead gave the Standing Committee the final decision on the matter.

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2. (2001) 4 HKCFAR 211.  
3. (1999) 2 HKCFAR 300.

However, as we will see in Chapter 7, on other issues the Standing Committee has so far declined to intervene, even when it strongly disagreed with decisions of the Hong Kong courts, such as after the *Chong Fung Yuen* case. The Hong Kong SAR Government also seems to have adopted a cautious approach to requesting interpretations from the Standing Committee, generally trying to exhaust all other legal avenues first. The Court of Final Appeal showed similar caution during the early years of the Hong Kong SAR, despite a provision in the Hong Kong Basic Law requiring it to seek an interpretation from the Standing Committee of those provisions in the Hong Kong Basic Law covering matters outside Hong Kong's autonomy, when these are necessary to decide a particular case. In early decisions such as *Ng Ka Ling* and *Chong Fung Yuen*, the Court of Final Appeal always found reasons for concluding that these were not cases which needed to be referred to the Standing Committee.

Only in 2011, did the court finally overcome its reluctance to refer an issue of interpretation to the Standing Committee by a narrow 3 to 2 majority in the case of *Democratic Republic of Congo v FG Hemisphere*.<sup>4</sup> Even then, the Court of Final Appeal was careful to keep as much control as possible over the process, presenting its own views to the Standing Committee on how these provisions should be interpreted in a lengthy judgment which the Standing Committee swiftly endorsed.

One of the most important tasks of the Court of Final Appeal, and indeed the Hong Kong courts as a whole, is to uphold the wide range of fundamental freedoms guaranteed under the Hong Kong Basic Law. As is explained in Chapter 8 on "Protection of Human Rights", these freedoms go beyond the long list of rights specifically mentioned in the Hong Kong Basic Law to include many more in several international human rights treaties such as the International Covenant on Civil and Political Rights, most parts of which continue in force under the Hong Kong Basic Law.

Comprehensive protection of fundamental freedoms in Hong Kong did not start with the Hong Kong Basic Law. In 1991, the enactment of the Hong Kong Bill of Rights Ordinance (Cap. 383) marked Hong Kong's first human rights revolution as it wrote most of the rights listed in the International Covenant on Civil and Political Rights into Hong Kong law, allowing government actions that breached those fundamental freedoms to be challenged in the courts for the first time.

But, as we will see in Chapter 8, the Hong Kong Basic Law marked Hong Kong's second human rights revolution, setting off a further wave of legal challenges, especially over its generous—but often controversial—provisions on who has the right to reside permanently in Hong Kong (which is known as the "right of abode").

That does not mean that the rights listed in the Hong Kong Basic Law can never be restricted. In any society, it is sometimes necessary to restrict even such fundamental rights as freedom of speech and the right to protest if only to protect, for example, the rights and freedoms of others. The Hong Kong Basic Law explicitly recognizes this but

4. (2011) 14 HKCFAR 95.

then, again drawing heavily on provisions of the International Covenant on Civil and Political Rights, lays down a succession of stringent tests which must be satisfied before any restriction can be imposed, so ensuring that any restrictions on rights are kept to a minimum.

Since 1 July 1997, the Hong Kong courts have generally adopted a rigorous approach in applying these tests in defence of the fundamental freedoms protected under the Hong Kong Basic Law. But, as is explained in Chapter 8, there have been isolated exceptions such as the Court of Final Appeal's December 1999 decision in the politically sensitive case of *HKSAR v Ng Kung Siu*,<sup>5</sup> which involved a law protecting China's national flag and was decided at a time when the court was still in its period of judicial retreat.

The Hong Kong Basic Law is often referred to as spanning a period of 50 years from 1997, with the implication that everything it says about Hong Kong's separate system and current way of life will suddenly come to an end on 30 June 2047. But, as is explained in the conclusion to this book, Chapter 9 on "What Will Happen After 2047?", the Hong Kong Basic Law does not explicitly mention this date, except in the context of a now outdated provision about renewing some land leases before 30 June 1997.

Nor, despite occasional suggestions by some scholars to the contrary, is there anything in the Hong Kong Basic Law to suggest that its provisions will automatically expire come 30 June 2047. What does become possible after that date are fundamental changes to the Hong Kong Basic Law which are, at least in theory, forbidden before that date.

To some, that is an opportunity for Hong Kong to rid itself of any provisions which have become outdated by that date. Already there have been suggestions that the advent of 30 June 2047 could be used to help solve the problems posed by a provision in the Hong Kong Basic Law protecting the special rights enjoyed by indigenous inhabitants of the New Territories.

But, as we will see in Chapter 9, the issue of how much change to push for in the run-up to 30 June 2047 presents a delicate balancing act. While some changes may be considered desirable, once you start fiddling with the current structure of the Hong Kong Basic Law it raises the risk of providing an opportunity for anyone on the mainland resentful of Hong Kong's privileges to press for other changes (such as curtailing rights and freedoms) which would certainly not be considered desirable in Hong Kong. It is this delicate balancing act which may well prove to be one of the most important issues Hong Kong will have to grapple with in the coming decades.

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5. (1999) 2 HKCFAR 442.