

Hong Kong 20 Years On: Freedom, Human Rights and Autonomy Under Fire

A report on Lord Ashdown's trip to
Hong Kong: November 2017



Executive Summary

Twenty years after the handover of Hong Kong, the city is at a critical juncture. In recent years we have seen booksellers abducted, democracy activists denied the right to stand in elections, elected lawmakers thrown out of the Legislative Council, and student protest leaders imprisoned.

With the 19th Chinese Communist Party Congress bringing back echoes of a Maoist past, and the British human rights activist Benedict Rogers denied entry into Hong Kong on direct orders from Beijing, I decided to travel to Hong Kong to better understand the situation.

This report contains my reflections on my recent visit to Hong Kong in November. I met with fellow legislators, legal experts and political activists in Hong Kong. The visit highlighted that the rights enshrined in Hong Kong's Basic Law and the Sino-British Joint Declaration appear under threat in the following areas:

Rule of Law in Hong Kong

- Senior international lawyers engaged in Hong Kong assured me that the rule of law remains intact in the city, and that judges retain their objectivity. However, the independence of officials at the Department for Justice is in doubt, which has led to questions being raised about the threat to the rule of law in Hong Kong. This must be monitored closely.
- Recent events, including the abduction of Hong Kong booksellers into the mainland simply for having published books critical of China's leaders in 2015, the retrial and sentencing of democracy activists, the disqualification of lawmakers, and the recent decision to implement mainland law at the new West Kowloon high-speed rail terminus, set a dangerous precedent and could undermine confidence in the rule of law;

Democracy in Hong Kong

- Despite being promised in Hong Kong's Basic Law, there is still a considerable way to go before universal suffrage is realised in Hong Kong.
- The functional constituencies, which make up nearly half of the 70-strong Legislative Council, are the worst legacy left behind by Britain. They continue to be a major barrier to the realisation of universal suffrage in Hong Kong.
- Hong Kong's democracy has been further damaged by the recent changes to the rules of the Legislative Council in Hong Kong. Time is the only weapon that the opposition have in a Parliamentary democracy. The decision to increase the powers of the Legislative Council Chairman to close-down debates will reduce the ability of pro-democracy groups – who represent the majority of Hong Kong's people – to properly scrutinise and question legislation.

Article 23 – National Security Law

- The Executive Council of Hong Kong are entitled to introduce National Security Legislation to protect Hong Kong; however, the enactment of Article 23 has the potential to lead to violations of freedom of expression.
- It is vital that any new legislation is introduced with appropriate regard to Hong Kong's Basic Law and conforms to international human rights standards. Legislation must only be enacted after appropriate consultation with stakeholders from across Hong Kong.

British National Overseas (BNO) Passport Holders

- I advocated for BNO passport holder to be given right of abode in the 1990s, and continue to favour the BNO being extended to the right of abode if the situation for basic freedoms, human rights, the rule of law and autonomy in Hong Kong deteriorates to such an extent that those who hold the BNO passport to feel so vulnerable that they can't live there any longer.

In my view, it is in the interests of Britain, China and Hong Kong to continue to uphold the rights enshrined at the handover.

- Will China enhance their soft-power if they continue to erode Hong Kong's autonomy and freedoms, thereby breaching an international treaty?
- A year before the handover of Hong Kong, then Prime Minister Sir John Major promised Hong Kong that "if there were any suggestion of a breach of the Joint Declaration, we would have a duty to pursue every legal and other avenue available to us," and that "Hong Kong will never have to walk alone." This is not a promise that can be lightly broken. Will Britain risk selling its honour by abandoning the people of Hong Kong?
- The new mood places new responsibilities on the Hong Kong government, too. If things continue to regress further, will the government of Hong Kong have the courage to defend the territory's autonomy and values?

Recommendations

To the government of Hong Kong

- Ensure that all new legislation, including the proposed legislation of Article 23, conforms to the standards laid out in international human rights law and protected by Article 39 of the Basic Law;
- Introduce universal suffrage for the election of the Chief Executive of Hong Kong, removing the functional constituencies;
- Continue to uphold the rule of law, ensuring that the Department of Justice does not interfere in legal judgements;

To the government of the People's Republic of China

- Continue to uphold the Sino-British Joint Declaration and 'one-country, two systems', respecting the autonomy of Hong Kong and Basic Law as the constitution of the Special Administrative Region;

To the government of the United Kingdom

- Continue to monitor the situation of human rights in Hong Kong, upholding the Sino-British Joint Declaration and 'one-country, two-systems', taking meaningful action when human rights in Hong Kong have been breached;
- Consider reviewing the status of BNO holders, and taking steps to protect BNO passport holders if the human rights situation in Hong Kong significantly worsens.

Introduction

Background to the trip

I travelled to Hong Kong in the last week of November 2017 both in my capacity as a Member of the House Lords and a patron of *Hong Kong Watch*.

As a patron of *Hong Kong Watch*, I was particularly interested in gathering information about human rights, rule of law and democracy in the area. On the visit, I met with fellow legislators, legal experts and political activists in Hong Kong. *Hong Kong Watch* seeks to be an independent watchdog, wishing Hong Kong well but blowing a whistle if the rights of the people of Hong Kong are violated. It was my intention to listen to diverse voices during my trip in order to provide a balanced account of the situation.

The Basic Law and the Sino-British Joint Declaration

When Hong Kong was transferred from the United Kingdom of Great Britain and Northern Ireland to the People's Republic of China in 1997, it was done so on the condition that the people of Hong Kong would continue to enjoy human rights, rule of law and gradually progress towards democracy in Hong Kong.

Article 39 of Hong Kong's Basic Law is clear that the provisions of the International Covenant on Civil and Political Rights shall remain in force through the legal system of the Special Administrative Region.

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region." (Article 39, Basic Law)¹

Article 45 of Hong Kong's Basic Law states that the 'ultimate aim' of the Constitution is for the Chief Executive to be chosen by 'universal suffrage'.²

The Sino-British Joint Declaration, a legally binding treaty at the United Nations, places responsibilities on the United Kingdom and the China governments to protect these rights and freedoms.

"The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law." (Article 3.5 of the Sino-British Joint Declaration).³

¹ 'The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China', Article 39, http://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html

² 'The Basic Law of Hong Kong', Article 45

³ Constitutional and Mainland Affairs Bureau, 'Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong', Article 3.5, <http://www.cmab.gov.hk/en/issues/jd2.htm>

The Erosion of Freedoms

Over the past five years, the freedoms guaranteed to the people of Hong Kong in its mini-constitution, the Basic Law, have been increasingly eroded. In Hong Kong, the rule of law is under pressure, human rights are undermined, and the city appears no closer to democracy. Legislators, legal experts and activists that I spoke to expressed concerns about the direction of travel: the situation appears likely to worsen in the coming years unless the people of Hong Kong and international governments unify to protect the rights of those living there.

Areas of Concern

Rule of Law in Hong Kong

While the Hong Kong judiciary is still largely intact and independent, the rule of law is under real and increasing pressure from Beijing. Senior international lawyers working in Hong Kong informed me that the rule of law in the city is valid, but *Hong Kong Watch* must closely monitor political cases and remain vigilant in observing the independence and impartiality of the Department of Justice.

Events in 2017 have raised serious concerns. The abduction of Hong Kong booksellers into the mainland simply for having published books critical of China's leaders, undermines confidence both in the rule of law and in free speech.⁴

Beijing's recent decision to implement mainland law at the new West Kowloon high-speed rail terminus is also significant. The Hong Kong Bar Association have said that they are 'appalled' by a plan which is the 'most retrograde step to date in the implementation of the Basic Law'.⁵ The former head of Hong Kong's legislature and pro-establishment heavyweight, Jasper Tsang, wrote in a column last week that the government should "admit frankly" the arrangement does not comply with the Basic Law.⁶ The decision of the National People's Congress (NPCSC) to push through the law, despite objections from Hong Kong lawyers that such a move is unconstitutional as it breaches Article 18 of the Basic Law, sets a dangerous precedent. If the Basic Law can be ignored at the whim of the National People's Congress, there are dangers that the constitution will be cast aside next time a controversial and unconstitutional measure needs to be pushed through.

My visit did not provide me with sufficient data to assess whether or not the arrest of Joshua Wong, Nathan Law and Alex Chow among others was justified and within the law. But one must ask whether it was wise for the full might of the law to come down on three young enthusiastic student demonstrators, one of whom a directly elected legislator, as happened earlier this year.

4 Hong Kong Watch, 'Benedict Rogers: 2 years on, Gui Minhai is still missing. It is time for us to speak out', 17 October 2017, <https://www.hongkongwatch.org/all-posts/2017/10/18/one-question-for-china-where-is-gui-minhai>

5 Hong Kong Free Press, 'Appalled': Bar Associations says joint checkpoint 'irreparably' breaches Hong Kong's Basic Law', 29 December 2017, <https://www.hongkongfp.com/2017/12/29/appalled-bar-association-says-joint-checkpoint-irreparably-breaches-hong-kongs-basic-law/>

6 Reuters, 'China says part of Hong Kong rail station to be subject to mainland laws', 27 December 2017, <https://www.reuters.com/article/us-china-lawmaking-hongkong/china-says-part-of-hong-kong-rail-station-to-be-subject-to-mainland-laws-idUSKBN1ELOGI>

The disqualification of lawmakers and the prohibitive fines that were placed on them followed a Chinese 'reinterpretation' or modification of Basic Law. This type of interference has led to criticism from some Hong Kong based lawyers that the integrity and authority of the Basic Law is under threat.⁷

The right to protest within defined limits is part of that law. The right to due process by a judicial system independent of political interference is part of it too. The right to be free from the hazard of double jeopardy if you break the law is widely regarded as a fundamental principle of justice worldwide. The rule of law has traditionally been a jewel in the crown of Hong Kong: we will monitor to ensure that it continues to be upheld.

Democracy in Hong Kong

Despite being promised in Hong Kong's Basic Law, there is still a considerable way to go before universal suffrage is realised in Hong Kong.

One major barrier to this are the functional constituencies of the Legislative Council. Currently 35 of the 70 Legislative Council members represent 'functional constituencies', while 35 represent 'geographical constituencies.' The 'functional constituencies' were introduced under British rule, and represent professional or special interest groups in Hong Kong. These constituencies are elected by the respective sector groups' members only.⁸ The fact that they decide half of the members of the Council has effectively entrenched the power of the establishment as it is not in the interest of business elites to upset the Chinese government.

These trade-based seats, which make up nearly half of the 70-strong Legislative Council, are the worst legacy left behind by Britain. The functional seats were acceptable in the transition but should gradually be removed. They are a major barrier to the realisation of universal suffrage in Hong Kong.

Hong Kong's democracy has been further damaged by the recent changes to the rules of the Legislative Council in Hong Kong. My visit in late November came two weeks before the Legislative Council passed controversial rule changes.⁹ Many of those that I spoke with expressed considerable concerns that these changes had the potential to undermine Hong Kong's democracy.

Time is one of the only defences that a minority opposition has in a Parliamentary system. The decision to increase the power of the Legislative Council Chairman to close-down debates will reduce the ability of pro-democracy groups – who represent the majority of Hong Kong's people – to properly scrutinise and question legislation.

7 Wilson Leung and Kevin Yam, 'China is rapidly squandering the unique opportunity that Hong Kong represents,' 14 November 2016, <http://time.com/4567529/china-hong-kong-indepence-oath-democracy/>

8 *The Diplomat*, 'What exactly is Hong Kong's Legislative Council?', 6 September 2016, <https://thediplomat.com/2016/09/what-exactly-is-hong-kongs-legislative-council/>

9 Hong Kong Free Press, 'Explainer: Why the proposed changes to the Hong Kong legislature's house rules are so contentious', 14 December 2017, <https://www.hongkongfp.com/2017/12/14/explainer-proposed-changes-hong-kong-legislatures-house-rules-contentious/>

Another concerning amendment passed in December was the decision to raise the quorum from 20 people to 35 people when investigating public officials. A public petition signed by 20 Hong Kong-based academics underlined the problem with this:

“Raising the requested number of petitioners to 35 before petitions can be presented as tantamount to dictating a pro-establishment camp endorsement before petitions can be referred to select committees. This would mean the similar, investigative committees would have little chance of being set up in future. The Legislative Council will have even greater difficulty in initiating investigations into suspected dereliction of duty by officials while costs to officials and public officers for abuse will be even less.”¹⁰

Despite representing the majority of Hong-Kongers, pro-democracy voices already only have limited powers for holding the executive to account. These measures reduce the power of their voice further.

Democracy provides two competing mandates: it grants the majority the right to rule, and it grants those in opposition the mandate to hold those in power to account. These measures undermine the ability of the pro-democracy opposition in Hong Kong to properly fulfil their mandate, and therefore undermine the democratic process in Hong Kong.

It is not coincidental that the rule changes come at a time when pro-establishment figures have stated their intention to push through unpopular legislation which have the potential to breach human rights, including most notably the legislation of Article 23.

Article 23 – National Security Legislation

The government of the People's Republic of China and the Executive Council of Hong Kong are entitled to introduce National Security Legislation to protect the people of Hong Kong; however, I have spoken to multiple people who have expressed fears that the enactment of Article 23 has the potential to lead to violations of freedom of expression.

In November, a senior Chinese parliamentarian Li Fei said that the enactment of Article 23 was a “duty that can't be shirked” while the chief of China's Liaison Office in the city also called for action.¹¹ It appears to be a key priority for Carrie Lam's government. It is critical that any legislation which is passed meets international human rights standards, and is done with appropriate consultation of the people of Hong Kong.

The enactment of Article 23 has the potential to lead to violations of freedom of expression. Its prohibition of ‘foreign political organisations or bodies from conducting political activities in the region’ is vague and could inhibit constructive dialogue between Hong Kong's active political class and their contemporaries further afield. Its prohibition on ‘political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies’ is also arbitrary and unnecessary.

¹⁰ Petition by 20 Hong Kong based academics, ‘Objection to amending the Legislative Council's Rules of Procedure to weaken its deliberation and oversight powers’, <https://docs.google.com/forms/d/e/1FAIpQLSfqlcuCvO8jeOKPdj-3PzcW-PVKEvHGEIfuhYqktJBNDscZA/viewform>

¹¹ Reuters, ‘Looming national security laws raise fresh fears for Hong Kong's freedoms’, 24 November 2017, <https://af.reuters.com/article/worldNews/idAFKBN1DOOS2>

There are fears that the impending legislation will lead to the discussion of independence in Hong Kong being banned as 'seditious'. Although I am unequivocally clear that I do not in any way support Hong Kong Independence, it is vital for the health of democracy that civil society space allows for the expression of diverse opinions. Banning these perspectives would be an unacceptable infringement of freedom of expression.

Concerns about the enactment of Article 23 are compounded when one observes the precedent which has been set in mainland China. In 2015, Zeid Ra'ad Al-Hussein, the United Nations High Commissioner for Human Rights, commented that the Chinese government were using:

*"national security measures to restrict the rights to freedom of expression, association and peaceful assembly, and also as a tool to target human rights defenders and silence critics."*¹²

Hong Kong's Basic Law guarantees human rights, as stipulated in the ICCPR. The enactment of Article 23 must meet the requirements laid out in this constitutional commitment, or else the legislation should be shelved.

The rights of BNO (British Nationals Overseas) Passport Holders

The BNO (British Nationals Overseas) passport was created in 1987 and is issued to permanent residents of Hong Kong. Holders can visit the UK for up to six months.

I advocated for BNO passport holders to be given right of abode in the 1990s and continue to favour very strongly the BNO being extended to the right of abode if the situation for basic freedoms, human rights, the rule of law and autonomy in Hong Kong deteriorates to such an extent that those who hold the BNO passport to feel so vulnerable that they can't live there any longer. Emily Lau asked me if Britain would throw a lifeline to Hong Kong and give them right of abode, *"so that they can feel they have a home to go to, if things go desperately wrong here."*

I don't say we should do it now, but if it is the case that those who have BNO passports feel so vulnerable that they can't live there any longer, and that is proven to be a case, then I think Britain should certainly be prepared to show generosity in that matter. However, clearly such a policy may not prevail in Britain's current political climate where immigration is not favoured.

¹² OHCHR, 'UN human rights chief says China's New Security law is too broad, too vague,' 7 July 2015 www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16210&LangID=E

Conclusion

In this report I have laid out a variety of concerns raised by my trip to Hong Kong. As I conclude, I want to underline that it is in the interests of Britain, China and Hong Kong to continue to uphold the rights enshrined at handover.

Will China enhance their soft-power if they continue to erode away Hong Kong's autonomy and freedoms, thereby breaching an international treaty? It is not in China's interest to publicly break an international treaty. The joint declaration has a really important function to play, as a symbol that China is a trustworthy leader in the contemporary world. It is valuable to China; and it is valuable to the wider world as well.

Britain bears the responsibility for the position in Hong Kong. Britain could have set a direction of travel earlier. And if we'd have done that, democracy here would be much more mature. When Beijing says there is a degree of hypocrisy beneath British calls for more democracy in Hong Kong, they are right. Our hundred and more years of rule of Hong Kong as a colony was not notable for its democratic reforms.

Whatever the motives however, the fact is that the Patten democratic reforms were locked into the Sino-British Joint Declaration which enables and protects the Basic Law. The least that the British can do now is continue to uphold the Joint-Declaration, monitoring the human rights situation in Hong Kong.

A year before the handover of Hong Kong, Prime Minister John Major promised Hong Kong that "if there were any suggestion of a breach of the Joint Declaration, we would have a duty to pursue every legal and other avenue available to us." In words which would have reminded every Hong Konger of President John F Kennedy's pledge that he would stand by Berlin, the British prime minister promised that Hong Kong "*will never have to walk alone.*" This is not a promise that can be lightly broken. As the last Governor Chris Patten has said, if Britain fails to live up to its responsibilities, legal and moral, it risks selling its honour.

The new mood places new responsibilities on the Hong Kong government, too. If things continue to regress further, then Hong Kong's government has an even greater duty to defend the territory's autonomy and values.

What happens next in Hong Kong will be judged by a watching world, for it will tell us whether the rise of Xi Jinping leads to a new more modern China, or back to an old more repressive one.

