

## **Human Rights Development in the First 20 Years of the Hong Kong Special Administrative Region**

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### **Abstract**

Have human rights been improved since the establishment of the Hong Kong Special Administrative Region (HKSAR)? Perspectives will be drawn from comments of the United Nations (UN), public perception, application of UN human rights conventions, enactment of human rights laws and landmark judgments by the Court of Final Appeal (CFA). Major human rights improvements were achieved before the 1997 handover whereas little progress has been made thereafter. Human rights deterioration after 1997 was signified by the first interpretation of the Basic Law by the Standing Committee of the National People's Congress (NPCSC) in June 1999. Anti-national security law movement in 2003 and the Umbrella Movement in 2014 substantially changed the political landscape as well as the human rights environment. The Central People's Government (CPG) has been tightening control on HKSAR's autonomy, resulting in lowering the degree of autonomy and less protection of human rights.

**Keywords:** *human rights, law, HKSAR, United Nations, democratic development*

## **1. Introduction**

On 13th May 2017, Elsie Leung (梁愛詩), the Deputy Director of the Basic Law Committee of the HKSAR and former Secretary for Justice (1997-2005) said the human rights situation has improved after the handover, signified by the setting up of the Women's Commission and the Independent Police Complaints Council (IPCC). The HKSAR Government has remained effective, corruption-free, and fair.<sup>1</sup> Has the human rights situation been improved since the establishment of the HKSAR? Elsie Leung's observations provide a very good starting point for discussion.

## **2. UN Comments and Recommendations**

### **2.1. Women's Commission**

In May 2000, the then Chief Secretary for Administration Anson Chan (陳方安生) announced the setting up of a Women's Commission (婦女事務委員會). It was established in January 2001, the month she announced to resign from the government. As a matter of fact, before the establishment of the Women's Commission, there is no central mechanism "tasked to take a strategic overview over women's issues, develop a long-term vision and strategy for the development and advancement of women, and advise the Government on policies and initiatives which are of concern to women." "The Commission also plays an important role in assisting the Government in implementing the Convention on the Elimination of All Forms of Discrimination against Women and the Beijing Platform for Action."<sup>2</sup>

In 2001, the UN Committee on Economic, Social and Cultural Rights (CESCR) welcomed the establishment of the Women's Commission.<sup>3</sup>

However, it is far from satisfactory, and does not qualify as a human rights institution and is well below international standards:

The Committee [CESCR] is concerned that the Women's Commission may not have appropriate resources and powers to ensure that a gender perspective is integrated into the formulation of policy.<sup>4</sup>

Besides, it is not a statutory body but an advisory body under the Labour and Welfare Bureau. It is therefore not a high-level mechanism. It is not truly independent as all its members are appointed by the Chief Executive. UN CESCR thus recommended as follows:

The Committee urges the HKSAR to provide the Women's Commission with sufficient powers and resources to improve the status of women in Hong Kong and to integrate gender in its policy-making and to ensure wider participation of women in all spheres of public life.<sup>5</sup>

## ***2.2. Independent Police Complaint Council (IPCC)***

Before 2009, the Independent Police Complaint Council (IPCC) was an advisory body responsible for monitoring and reviewing investigations by the Complaints Against Police Office (CAPO) into public complaints against police force.<sup>6</sup> The IPCC Ordinance, Cap. 604 came into force in June 2009. It cannot be denied that the IPCC in becoming a statutory body is a human rights improvement. However, the restrictions on its power and effectiveness are unfortunately rigidly entrenched in this new law. Ronny Wong Fook-hum, the former IPCC Chairperson described

the system as having “all the odds stacked against the complainant”. He warned that such a statutory basis to IPCC would actually make IPCC “an instrument being used to protect the police”. (Chong *et al.*, 2009: 45)

With reference to the IPCC, serious concerns were made by the UN human rights treaty bodies. The UN Human Rights Committee (HRC) stated that:

While noting that the statutory framework has reinforced the role of the Independent Police Complaint Council (IPCC), the Committee remains concerned that investigations of police misconduct are still carried out by the police themselves through the Complaints Against Police Office (CAPO) and that IPCC has only advisory and oversight functions to monitor and review the activities of the CAPO and that the members of IPCC are appointed by the Chief Executive (arts. 2 and 7).<sup>7</sup>

The UN HRC made the following recommendation:

Hong Kong, China, should take necessary measures to establish a fully independent mechanism mandated to conduct independent, proper and effective investigation into complaints about the inappropriate use of force or other abuse of power by the police and empowered to formulate binding decisions in respect of investigations conducted and findings regarding such complaints.<sup>8</sup>

Similar observations were made by the UN Committee against Torture (CAT) in paragraph 8 of its Concluding Observations on the HKSAR report dated 3 Feb 2016:

Recalling its previous recommendation (see CAT/C/HKG/CO/4, para. 12), the Committee remains concerned that investigations of police

complaints continue to be conducted by the Complaints Against Police Office, which is a separate division of the police force. It is also concerned that the Independent Police Complaints Council remains an advisory and oversight body of the investigations of the Complaints Office, with no power to conduct investigations on its own. The Committee regrets the failure of Hong Kong, China to provide complete statistical data with regard to the number of complaints of torture or ill-treatment (including police abuse) received by the Complaints Office in the reporting period, as well as on the outcome of those complaints. It also remains concerned at the lack of an independent and effective mechanism for lodging complaints without fear of reprisals within the detention facilities under the police department, the immigration department or the correctional services department (arts. 12 and 13).

The UN CAT made a rather comprehensive recommendation to the HKSAR in its 2016 Concluding Observations, paragraph 9:

The Committee reiterates its previous recommendation that Hong Kong, China consider establishing a fully independent mechanism mandated to receive and investigate complaints against all officials and ensure that there is no institutional or hierarchical relationship between the investigators of that particular body and the suspected perpetrators of the acts that form the basis of a complaint. The Committee also urges Hong Kong, China to:

(a) Ensure that the Prosecutor's office is duly informed of all the allegations of torture or ill-treatment received by that particular body and launch investigations on its own initiative whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed;

- (b) Guarantee that alleged perpetrators of torture and ill-treatment are immediately suspended from duty for the duration of the investigation, subject to the observance of the principle of presumption of innocence;
- (c) Establish confidential complaints mechanisms in all places of detention to facilitate the submission of complaints by victims of torture and ill-treatment to the investigating body, including for obtaining medical evidence in support of their allegations, and to ensure in practice that complainants are protected against any reprisals as a consequence of their complaint or any evidence given;
- (d) Ensure that the suspected perpetrators are duly prosecuted, tried and, if found guilty, punished in a manner that is commensurate with the gravity of their acts.”

From the above UN comments, it shows that Ms Leung may not have provided good examples to illustrate human rights improvement after the handover. Perhaps, these were the two best examples she could think of at the time. If this was the case, it implies that human rights development has made little improvement only.

### **3. Public Perception of Rights**

#### ***3.1. Social Indicators***

Has the condition of human rights improved after 1997? Public opinion provides an important aspect. The Public Opinion Programme of the University of Hong Kong (HKU) is the most prestigious studies in the opinion poll arena. Sadly, human rights is not one of the items in the questionnaire. Indeed, many rights-related concepts have been continuously asked throughout these twenty years.

**Table 1** Public Perception of Rights: Social Indicators

Degree of:	Date of survey	
	7-12/1997	1-6/2017
Freedom	7.65	6.90
Fairness	6.42	5.66
Civilization	7.52	6.83
Corruption-free Practices	7.02	6.17
Equality	6.52	6.09
Democracy	6.70	6.02

Note: 10 indicates absolute freedom, 0 indicates absolute lack of freedom, 5 indicates half-half.

With respect to social indicators, Table 1 shows that rankings of all selected items closely related to human rights have dropped when comparing the figures of 1997 and 2017. It implies that human rights were perceived to be deteriorated.

With 10 indicating absolute freedom, 0 indicating absolute lack of freedom and 5 indicating half-half, among the 11 freedom indicators, only 2 items' ratings in 2017 are higher than those of 1997, as shown in Table 2.

**Table 2** HKU POP: Freedom Indicators

	Date of survey	
	7-12/1997	1-6/2017
Freedom of Speech	7.14	6.59
Freedom of Press	7.15	6.37
Freedom of Publication	7.21	6.22
Freedom of Procession and Demonstration	6.22	6.51
Freedom of Association	6.49	6.46
Freedom to Strike	6.10	6.48
Freedom to Enter or Leave Hong Kong	8.17	7.85
Freedom to Engage in Academic Research	8.02	6.91
Freedom to Engage in Artistic and Literary Creation	7.81	6.99
Freedom of Religious Belief	8.61	8.49

Source: <https://www.hkupop.hku.hk/chinese/popexpress/freeind/index.html>

### 3.2. Freedom Indicators

With respect to the freedom of procession and demonstration, informants considered there was more freedom in 2017 than in 1997, which may be due to protests becoming more frequent and larger in scale. In particular,



there were two big demonstrations in 2003, with over 500,000 people protested at the street level (Civil Human Rights Front, 2004: 26), and in 2014, with 1.2 million people participated in occupation areas (The Chinese University of Hong Kong, 2014: 2), which gave an impression that Hong Kong people enjoy more freedom of procession and demonstration after 1997. However, the UN treaty bodies pointed to the contrary.

### ***3.3. UN's Comments on Certain Freedoms***

On 15th November 1999, the UN HRC Concluding Observations advised a review of the Public Order Ordinance, Cap. 245:

With regard to freedom of assembly, the Committee is aware that there are very frequent public demonstrations in HKSAR and takes note of the delegation's statement that permission to hold demonstrations is never denied. Nevertheless, the Committee is concerned that the Public Order Ordinance could be applied to restrict unduly enjoyment of the rights guaranteed in article 21 of the Covenant.

The HKSAR should review this Ordinance and bring its terms into compliance with article 21 of the Covenant.<sup>9</sup>

In the 2013 UN HRC Concluding Observations, the HRC reiterated its concerns over the Public Order Ordinance:

The Committee is concerned about (a) the application in practice of certain terms contained in the Public Order Ordinance, inter alia, “disorder in public places” or “unlawful assembly”, which may facilitate excessive restriction to the Covenant rights, (b) the

increasing number of arrests of, and prosecutions against, demonstrators, and (c) the use of camera and video-recording by police during demonstrations (arts. 17 and 21).

Hong Kong, China, should ensure that the implementation of the Public Order Ordinance is in conformity with the Covenant. It should also establish clear guidelines for police and for records for the use of video-recording devices and make such guidelines accessible to the public.<sup>10</sup>

The Committee expresses concern about reports of excessive use of force by members of the police force, not compatible with the United Nations Principles on the Use of Force and Firearms by Law Enforcement Officials, in particular by the inappropriate use of pepper spray to break up demonstrations to restore order, notably with regard to demonstrations surrounding the annual Hong Kong march on 1 July 2011, the visits of Vice-Premier and President of China, respectively in August 2011 and July 2012 (arts. 7, 19 and 21).

Hong Kong, China, should increase its efforts to provide training to the police with regard to the principle of proportionality when using force, taking due account of the United Nations Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>11</sup>

In the 2014 UN CAT Concluding Observations, CAT expressed concerns over excessive use of force when containing demonstrations of the Umbrella Movement:

The Committee is concerned at consistent reports of excessive use of tear gas, batons and sprays against protesters during the 79-day protest of the so-called “umbrella” or “occupy” movement in 2014. It is also

concerned at consistent reports that police resorted to violence against more than 1300 people, and around 500 were subsequently admitted to hospitals. The Committee expresses concern at allegations of threats of sexual violence and assaults by the police to demonstrators while they were following the instructions of leaving the scene. Furthermore, it notes with concern of various instances of violence perpetrated by counter-demonstrators. As regards the complaints received by the Complaints Against Police Office during the protest and their investigation, the Committee is concerned that, out of 527 complaints made by a total of 2078 complainants, only 172 complaints were considered “reportable”. Of those 172 reportable complaints, the Complaints Office submitted investigation reports to the Independent Police Complaints Council for 151 cases, which were considered unsubstantiated by the Complaints Office.

The Complaints Council endorsed the findings of the Complaints Office in 104 cases. The Committee is also concerned at the lack of information with regard to the outcome of the 47 complaints not endorsed by the Complaints Council (arts. 12, 13 and 16).<sup>12</sup>

Hong Kong, China should:

- (a) Conduct an independent investigation into the allegations of excessive use of force by the police and anti-demonstrators during the so-called “umbrella” or “occupy” movement protest in 2014;
- (b) Duly prosecute alleged perpetrators, including those officers who were complicit in those acts or allowed them to occur, and ensure that those found guilty are convicted and adequate penalties applied;
- (c) Provide full redress to the victims, including fair and adequate compensation;

- (d) Publicize the police general orders and related guidelines on the use of force and make sure that they are in compliance with international standards;
- (e) Strengthen ongoing training for all law enforcement officers on the absolute prohibition of torture and on international standards on the use of force, as well as on their liability in the event of excessive use of force.<sup>13</sup>

Informants considered there was more freedom to strike in 2017 than in 1997 which may be due to two big strikes after 1997: 2007 rebar workers went on strike (lasted for 36 days)<sup>14</sup> and 2013 dock workers went on strike at the Hongkong International Terminals (HIT, 香港國際貨櫃碼頭) (lasted for 40 days)<sup>15</sup>. Both strikes reached an amicable settlement that gave the public an impression that the freedom to strike flourished. Further, Hutchison Whampoa (和記黃埔) Limited's subsidiary failed to apply for a court order for the removal of temporary structures outside the Cheung Kong Center (長江集團中心) building. In light of section 46 of the Trade Unions Ordinance (Cap 332) that protected peaceful picketing, the High Court declined to grant injunction to remove all temporary structures outside the building (*Turbo Top Limited v Lee Cheuk Yan*, HCA 694/2013, 6 May 2013, paragraphs 1, 3, 6, 48 and 74). This can be seen as a victory of unionists in the strike.

In the 2001 UN CESCR Concluding Observations, it was concluded that:

The Committee is concerned that the Public Order Ordinance may be used to restrict trade union activities, such as peaceful campaigns to promote labour rights, which are protected by article 8(c) of the Covenant.<sup>16</sup>

The Committee recommends that the Public Order Ordinance be reviewed with a view to amending its provision to ensure freedom of trade union activities as provided for under article 8(c) of the Covenant.<sup>17</sup>

Indeed, the above public perceptions will probably not be shared by social activists and human rights bodies too. On 13th June 2014, the UN CESCR Concluding Observations (paragraph 44) stated that:

The Committee notes with concern that, despite the recognition of the right to strike, trade unionists dismissed for participating in a strike cannot be reinstated, and can only claim for compensation. The Committee regrets that Hong Kong, China, has not adopted legislation on collective bargaining (art. 8).

The Committee strongly recommends that, in line with its obligations under article 8 of the Covenant, Hong Kong, China, take all necessary measures to amend the Employment Ordinance to allow the reinstatement of trade unionists arbitrarily dismissed for participating in trade-union activities. The Committee also recommends that Hong Kong, China, accelerate the process of adopting legislation on collective bargaining.

#### **4. UN Human Rights Conventions Applied to HKSAR**

Before the handover, six core international human rights conventions, including the International Covenant on Civil and Political Rights, 1966 (ICCPR), and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), have been applied to Hong Kong. This laid a solid foundation of human rights protection. After 1997, only one

core international human rights convention was applied to the HKSAR, namely, the Convention on the Rights of Persons with Disabilities, 2006 (CRPD). The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (ICMW), and the International Convention for the Protection of All Persons from Enforced Disappearance, 2006 (CPED), were not even signed for the HKSAR.<sup>18</sup> Table 3 shows UN human rights core instruments applied to Mainland China and the HKSAR.

**Table 3** UN Conventions Applied to PRC and HKSAR

Convention	Applied to Hong Kong	Applied to Mainland China
ICERD	1969.3.7	1981.12.29
ICESCR	1976.5.2	2001.3.27 (signed 1997.10.27)
ICCPR	1976.5.20	Not applied to Mainland China (signed on 1998.10.5)
CEDAW	1996.10.14	1980.11.4 (signed on 1980.7.17)
CAT	1992.12	1988.10.4 (signed on 1986.12.12)
CRC	1994.9.7	1992.3.2 (signed on 1990.8.29)
CRPD	2008.8.31	2008.8.1 (signed on 2007.3.30)
ICRMW	Not applied to Hong Kong	Not applied to Mainland China
CPED	Not applied to Hong Kong	Not applied to Mainland China

In 1979, the United Kingdom (UK) signed for Hong Kong as the port of first asylum. On 8th January 1998, the HKSAR announced the abolishing of the port of first asylum policy for Vietnamese arriving in Hong Kong illegally.<sup>19</sup> On 15th September 2009, the Concluding Observations of the UN Committee on the Elimination of Racial Discrimination (CERD) recommended the ratification of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (paragraph 29):

While noting the planned legislative framework for torture claimants in Hong Kong SAR, the Committee is concerned that the State party has not adopted a refugee law as such, including a screening procedure for asylum claims. (art. 5 (b))

The Committee recommends the adoption of a law on refugees, with a view to establishing a comprehensive procedure for the screening of individual asylum claims. It furthermore recommends that the rights of asylum-seekers to information, interpretation, legal assistance and judicial remedies be guaranteed. The Committee also encourages the renewed consideration of the ratification of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

The 1951 Convention and its 1967 Protocol were applied to Mainland China and Macau but the HKSAR has no intention to accept the UN's recommendation. There are 16 human rights treaties being applied to HKSAR.<sup>20</sup> Only two of them were applied after 1997. They are CRPD and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OP-CRC-AC). These two were adopted in UN in 2006 and 2000 respectively and were also applied to Mainland China. There are nine Optional Protocols

of these core human rights Conventions. Only two of them were adopted in UN before 1997. Only the above OP-CRC-AC was applied to HKSAR after 1997.

## 5. Major Human Rights Laws Enacted in HKSAR

Most human rights laws were enacted in Hong Kong before the handover, in particular in early and mid-1990s. Table 4 shows major human rights laws which were legislated before 1997 while Table 5 lists the same thereafter.

**Table 4** Major Human Rights Legislations Enacted before the Handover

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1974	Independent Commission Against Corruption Ordinance, Cap. 204
1988	The Ombudsman Ordinance, Cap. 397
1991	Hong Kong Bill of Rights Ordinance, Cap. 383
1995	Sex Discrimination Ordinance, Cap. 480 Personal Data (Privacy) Ordinance, Cap. 486 Disability Discrimination Ordinance, Cap. 487
1996	Legal Aid Services Council Ordinance, Cap. 489
1997	Employee's Rights to Representation, Consultation & Collective Bargaining, Cap. 530 (Repealed) Family Status Discrimination Ordinance, Cap. 527 Protection of the Harbour Ordinance, Cap. 531

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**Table 5** Major Human Rights Legislations Enacted after the Handover

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2006	Interception of Communications & Surveillance Ordinance, Cap. 589
2008	Race Discrimination Ordinance, Cap. 602
2009	Independent Police Complaints Council Ordinance, Cap. 604
2010	Minimum Wage Ordinance, Cap. 608
2013	Competition Ordinance, Cap. 619

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Among the statutes listed in Table 4 and Table 5, the most important legislation is the Hong Kong Bill of Rights Ordinance (HKBORO). Its section 8 incorporated most articles of the ICCPR that empowers it with legal binding effect. The ICCPR also enjoys constitutional status as it was entrenched by constitutional instruments before the handover by the Letters Patent (Article VII (5)) and thereafter by the Basic Law (article 39). Before 1997, sections 3 and 4 of the HKBORO required all Hong Kong laws (both pre-existing and subsequent legislations) to be interpreted with consistency with ICCPR. However, these two sections were repealed by the Provisional Legislature in 1997.

In light of this revised legislation, the HKSAR courts continue to strike down legislation which is inconsistent with the HKBORO. The landmark Court of Final Appeal (CFA) judgment in *Ng Ka Ling v Director of Immigration* (FACV 14/1998, 29th January 1999, paragraphs 132 and 142) illustrated this legal point. The Immigration (Amendment) (No 3) Ordinance enacted on 10th July 1997 was deemed to have come

into operation on 1st July 1997. Article 15 of ICCPR provided that “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence”. (cf. article 12 of Part II of HKBORO). The CFA held that section 1(2) of Immigration (Amendment) (No 3) Ordinance was unconstitutional. Though the NPCSC interpreted the Basic Law to reject the judgment, the NPCSC interpretation does not overrule the decision of CFA in respect of the retrospective issue.

After 1997, most enactments of the human rights statutes cannot be seen as a proactive measure for the advancement of human rights. For instance, the Interception of Communications & Surveillance Ordinance was drafted as a result of the High Court Order (*Leung Kwok Hung v Chief Executive of HKSAR*, HCAL 107/2005, 10th February, 2006).

The government decided to legislate on the Race Discrimination Ordinance as a result of the strong criticism of UN treaty bodies and continuous local campaigns. In 2001, UN CESCR Concluding Observations (paragraph 30) stated that:

It is the Committee’s view that the HKSAR’s failure to prohibit race discrimination in the private sector constitutes a breach of its obligations under article 2 of the Covenant. The Committee calls upon the HKSAR to extend its prohibition of race discrimination into the private sector.

The background of the IPCC Ordinance is that various UN treaty bodies and NGOs (Chong *et al.*, 2008: 35) criticised the IPCC. Besides, massive leakage of many complainants’ personal data by the IPCC in 2006<sup>21</sup> revealed that appointed lay members of the IPCC did not enjoy any immunity in performing their functions. Hence, section 41 of IPCC Ordinance was made to protect IPCC members from civil proceedings if

they performed their functions under the IPCC Ordinance in good faith.

In order to fight for statutory minimum wage, Leung Kwok Hung (梁國雄) started a judicial review but failed (*Leung Kwok Hung v Chief Executive in Council*, CACV 197/2007, 8th May 2007, paragraph 23). The judgment stated that there was no evidence to show that the government would never use the Trade Boards Ordinance, Cap.63 to establish minimum wage. As a result of strong campaign, in particular by the Hong Kong Confederation of Trade Unions, the Legislative Council passed the Minimum Wage Ordinance in 2010.

The background of the enactment of the Competition Ordinance is that there has always been a strong demand in society to restrict strong monopoly of big enterprises. Since the 2000s, there has been much criticism of collusion between the government and the businessmen (官商勾結) and this became the theme of the big demonstration on 1st July 2005.<sup>22</sup> To conclude, the above legislations were made upon a pressing social and even urgent need instead of any action plan on human rights.

The following legislations for human rights protection should be in place. There should be domestic laws to implement all human rights instruments applicable to the HKSAR. Such human rights laws should bind all private individuals (not the government and public authorities only), confer cause of action, provide effective remedy and be enforceable by an independent human rights institution (with a broad mandate and in accordance with the Paris Principles) and an independent and competent tribunal. A comprehensive anti-discrimination law, including prohibition of discrimination on the basis of gender identity, sexual orientation, age, nationality and residence status, should be legislated. The government should draft the bill to protect freedom of information, archives and academic freedom.

## 6. Some Landmark CFA Judgments

In common law jurisdictions, case law is very crucial in protecting human rights. The CFA delivered various landmark judgments which have tremendous impact on human rights development. On the whole, the CFA has been seen to be a rights defender and tries hard to be in line with human rights protection in other common law jurisdictions.

**Table 6** Some Landmark CFA Judgments after 1997

Case name	Case number	Judgment date	Subject matter	Rights
1 <i>Ng Ka Ling v. Director of Immigration</i>	FACV 14/1998	29/1/1999	Claim permanent resident status	Right of abode, independent judicial power, prospective overruling
2 <i>Chan Kam Nga v. Director of Immigration</i>	FACV 13/1998	29/1/1999	Claim permanent resident status	Right of abode, unity of family
3 <i>HKSAR v Ng Kung Siu</i>	FACC 4/1999	15/12/1999	Defiling of national flag	Freedom of expression
4 <i>Albert Cheng v Paul Tse Wai Chun</i>	FACV 12/2000	13/11/2000	Defamation	Freedom of speech
5 <i>Secretary for Justice v Chan Wah</i>	FACV 13/2000	22/12/2000	Village representative election	Participation in public life, sex equality
6 <i>Director of Immigration v Chong Fung Yuen</i>	FACV 26/2000	20/7/2001	Claim permanent resident status	Right of abode

**Table 6** (Continued)

Case name	Case number	Judgment date	Subject matter	Rights
7 <i>Yeung May Wan v HKSAR</i>	FACV 19/2004	5/5/2005	Obstruction in public place	Freedom of demonstration, freedom of the person
8 <i>Leung Kwok Hung v HKSAR</i>	FACC 1/2005	8/7/2005	Unauthorised assembly	Freedom of peaceful assembly
9 <i>Koo Sze Yiu v HKSAR</i>	FACV 12/2006	12/7/2006	Covert surveillance	Communication privacy
10 <i>Secretary for Justice v Yau Yuk Lung</i>	FACC 12/2006	17/7/2006	Homosexual buggery otherwise in private	Sexual orientation equality
11 <i>HKSAR v Hung Chan Wa</i>	FACC 1/2006	31/8/2006	Trafficking dangerous drugs	Presumption of innocence, right to fair trial
12 <i>Lam Siu Po v Commissioner of Police</i>	FACV 9/2008	26/3/2009	Disciplinary procedure	Fair trial, right to legal representation
13 <i>Democratic Republic of Congo v FGH Associates LLC</i>	FACV 5/2010	8/6/2011	State immunity	Judicial independence, continuance of common law
14 <i>Fok Chun Wa v Hospital Authority</i>	FACV 10/2011	2/4/2012	Subsidized obstetric service in public hospital	Equality before the law

**Table 6** (Continued)

Case name	Case number	Judgment date	Subject matter	Rights
15 <i>Ubamaka v Secretary for Security</i>	FACV 15/2011	21/12/2012	Drug trafficking, deportation	Absolute prohibition against torture, cruel, inhuman or degrading treatment
16 <i>W v Registrar of Marriages</i>	FACV 4/2012	13/5/2013	Definition of sex of a post-operative male-to-female transsexual	Right to marry
17 <i>Vallejos v Commissioner of Registration</i>	FACV 19/2012	16/7/2013	Foreign domestic helper claim permanent resident status	Right of abode
18 <i>Kong Yuming v Director of Social Welfare</i>	FACV 2/2013	17/12/2013	Comprehensive Social Security Scheme	Right to social welfare
19 <i>T v Commissioner of Police</i>	FACV 3/2014	10/9/2014	Public entertainment licence	Freedom of assembly & expression
20 <i>GA v Director of Immigration</i>	FACV 7/2013	18/2/2014	Refugees, torture claimants	No right to work, ICESCR not confer individual rights

## **7. Significant Democratic Development**

Since 1843, all Hong Kong Governors were appointed by the United Kingdom. In 1996, the Chief Executive (CE) were elected by 400 Selection Committee members under the NPC's decision on the method for the formation of the first government. Thereafter, the CE was elected by the Election Committee members under article 45 and annex 1 of the Basic Law. It cannot be denied that it is an improvement of human rights in respect of political participation with the increasing number of voters. Though many criticised that the franchise of the election remains too narrow, it is better than appointment in any event.

Though the NPCSC allowed the HKSAR to have universal suffrage for the CE election in 2017, the law was unable to pass in the Legislature in June 2015 as the democrats were dissatisfied that the Nomination Committee could screen out candidates whom the Central Authorities disliked. Table 7 shows the appointment of Governors under the colonial regime and election of CE under the HKSAR regime.

Significant democratisation process started in 1982 after the British realised that the Chinese government would take back Hong Kong. In 1982, District Board, a district organization which was by nature a consultative body, instead of an organ of political power, was established with 27 percent of members returned by direct elections. In 1983, the Urban Council largely extended its franchise and resulted in many political leaders entering the establishment by direct elections.

In 1985, part (24 members) of the Legislative Council (LegCo / 立法局, and 立法會 after 1997) were returned by elections, other than geographical direct elections. In 1986, Regional Council was set up and direct elections were held in the New Territories. In 1991, 18 Legislative Councilors were returned by its first geographical direct elections. In 1995, 20 Legislative Council members (one third of all seats) were constituted by geographical direct elections.

**Table 7** Appointment of Governors and Election of CE

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1843-1992	All Governors were appointed by UK
1996	CE was elected by 400 Selection Committee members
2002	CE was elected by 800 Election Committee members
2005	CE was elected by 800 Election Committee members
2007	CE was elected by 800 Election Committee members
2012	CE was elected by 1,200 Election Committee members
2016	CE was elected by 1,200 Election Committee members

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**Table 8** Democratic Development under the Colonial Regime

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Year	LegCo & district organizations' elections
1982	First District Board elections
1983	Urban Council election with extended franchise
1985	First LegCo elections
1986	Setting up & election of the Regional Council
1991	First LegCo direct elections (direct election 18/60)
1994	Removing of all appointed seats in District Board
1995	LegCo elections (direct election 20/60), removing all appointed seats

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Table 8 shows the democratic development under the colonial regime while Table 9 informs the same under the HKSAR regime under article 68 and annex II of the Basic Law.

**Table 9** Democratic Development under the HKSAR Regime

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Year	LegCo & district organizations' elections
1996	Provisional Legislature (elected by 400 Selection Committee members)
1998	LegCo elections (direct election 20/60)
2000	LegCo elections (direct election 24/60) Dismantling of 2 Municipal Councils Resuming of appointed seats in District Council after its election in 1999
2004	LegCo elections (direct election 30/60)
2008	LegCo elections (direct election 30/60)
2012	LegCo elections (direct election 35/70)
2016	LegCo elections (direct election 35/70) Removing of all appointed seats in District Council after its election in 2015

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The above tables show that there was a “great leap forward” in the democratic movement, when comparing with most of the colonial times and even under the HKSAR regime. There were in fact some progress of the democratic development in the composition of the legislature.

However, the establishment of the Provisional Legislature and dismantling of the Urban Council and Regional Council were obvious setbacks to democratic development. In brief, the HKSAR permanent residents cannot fully enjoy the right of political participation under article 25 of the ICCPR. To date, no timetable is made to achieve the ultimate aim of universal suffrage of CE and all members of LegCo under articles 45 and 68 of the Basic Law respectively.

## **8. Major Human Rights Events after 1997**

### ***8.1. 1997-98 Emphasis on Smooth Transition***

From 1997 to 1999, the HKSAR emphasised the smooth transition and people did not feel any drastic policy change. On 26th June 1999, the NPCSC interpreted the Basic Law that was not referred by the CFA. Instead, it was requested by the CE Tung Chee Hwa (董建華) after the government lost two lawsuits (*Ng Ka Ling* and *Chan Kam Nga*) on the issue of the right of abode. The referral for interpretation was not in accordance with the procedures set out in article 158(3) of the Basic Law. Indeed, the Administration defended that the CE, as the head of the HKSAR, has the implied authority to make such a request. The first interpretation of the Basic Law is a serious blow to the autonomy, judicial independence and the right to fair hearing of HKSAR.

In 1999, UN HRC stated in its Concluding Observations:

The Committee is seriously concerned at the implications for the independence of the judiciary of the request by the Chief Executive of HKSAR for a reinterpretation of article 24 (2)(3) of the Basic Law by the Standing Committee of the National People's Congress (NPC) (under article 158 of the Basic Law) following upon the decision of the Court of Final Appeal (CFA) in the *Ng Ka Ling* and *Chan Kam*

*Nga* cases, which placed a particular interpretation on article 24 (2)(3). The Committee has noted the statement of the HKSAR that it would not seek another such interpretation except in highly exceptional circumstances. Nevertheless, the Committee remains concerned that a request by the executive branch of government for an interpretation under article 158 (1) of the Basic Law could be used in circumstances that undermine the right to a fair trial under article 14.<sup>23</sup>

## ***8.2. Commencement of Obvious Social Control since 2000***

The deterioration of governance did not start from the consultation of article 23 legislation in 2002. Indeed, the source of public discontent can be traced back to various problematic decisions and policies made by the CPG and the HKSAR Government. In January 2000, the Xinhua News Agency / 新華通訊社 (Hong Kong branch) was renamed as the Liaison Office of the CPG in the HKSAR (中央人民政府駐香港特別行政區聯絡辦公室, abbreviation as the Liaison Office, 中聯辦). The Liaison Office became active in making public comments about the sovereignty issue as the candidate of Democratic Progressive Party won the presidential elections in Taiwan. Besides, an iconic fence enclosing the Central Government Offices in 2000 was a symbolic measure of the government to keep its distance from the Hong Kong people.

In 2000, the Administration initiated various reforms together with some incidents that shook the foundation of its governance. As for the people's livelihood, the Mass Transit Railway became a listed company in January. In 2001, the UN CESCR was concerned that homemakers, persons with disabilities, and older persons, were excluded from the Mandatory Provident Fund (MPF) Scheme.<sup>24</sup> Two public housing blocks in Shatin (沙田) had to be demolished due to construction corruption. The Chair of the Housing Authority was forced to resign in June. There

were big protests by various sectors in that month. Teachers opposed language tests (Language Proficiency Assessment for Teachers). Social workers opposed the lump sum grant reform. Civil servants opposed pay cuts. Medical doctors opposed medical reforms. Small property owners took to the streets to protest because their properties became negative assets (負資產). The economic downfall stirred up much grievance in the society. Three Thousand people protested on 1st July 2000 to voice their anger.<sup>25</sup> The MPF Scheme entered into force in December that year.<sup>26</sup>

In July 2000, the CE was accused of interfering in the academic freedom of a HKU scholar Robert Chung (鍾庭耀) and an inquiry by HKU was held. After the inquiry, Vice-Chancellor Cheng Yiu Chung (鄭耀宗) resigned.<sup>27</sup> In August, university students and activists who fought for the right of abode were arrested for unauthorised assembly under section 17A of the Public Order Ordinance. This is the first arrest after the handover under this section. Due to rigorous protest by civil society, the HKSAR decided not to prosecute.

### ***8.3. Undermining Autonomy after the Withdrawal of the National Security Bill***

In September 2002, the government announced a consultation paper to implement article 23 of the Basic Law. Civil society responded by large-scale protest with 60,000 people in December. In March 2003, the outbreak of severe acute respiratory syndrome (SARS) in Hong Kong posed a serious threat not only to the health of Hong Kong people, but also a big blow to its economy and the government's popularity.

On 1st July 2003, more than 500,000 people protested against the draconic National Security Bill and the Administration was forced to suspend the legislative progress. The Financial Secretary, Secretary for Security and Secretary for Health resigned in July after the big

demonstration. In September, the government formally withdrew the Bill.

In 2004, the civil society's demand for full democracy in the HKSAR was strong and the response of NPCSC was the second interpretation of the Basic Law to tighten the control of political reform of the HKSAR. In 2005, CE Tung Chee Hwa stepped down when his popularity remained very low since mid-2003. The NPCSC made its third interpretation to clarify that his successor could fill his remaining term instead of a full term under article 46 of the Basic Law: the term of CE of HKSAR "shall be five years". A comparison of three interpretations of the Basic Law by the NPCSC shows that the NPCSC had less hesitation to do so. In 1999, the government alleged that the impact of the judgments would open the floodgate to allow 1.67 million mainlanders migrating to the HKSAR. Hong Kong society could not accommodate their needs so the CE asked for interpretation of the Basic Law by the NPCSC. In 2004, the interpretation of the Basic Law was out of the Central Government's initiative to cool down the rigorous campaign for full democracy. While the third interpretation of the Basic Law by the NPCSC was to clarify the term of the CE only, whether the remaining term of two and a half years or a full term of five years.

In December 2007, the NPCSC decided to permit universal suffrage of CE in 2017 and LegCo in 2022. In August, the police removed the protesters who opposed the demolition of Queen's Pier (皇后碼頭). This campaign marked the trend of heritage conservation and the strong link of the Hong Kong identity to the general public, and in particular, the young people. In December 2009 and January 2010, there were large-scale demonstrations outside the then LegCo building against the funding of Express Rail construction.

In May 2010, some democrats launched five districts' LegCo members' resignation for a *de facto* referendum for universal suffrage. In

June, the LegCo passed a political reform package with only little progress of democratic development. Till now, there is still controversy over whether the reform is really progressive towards full democracy.

In 2011, the NPCSC made its 4th interpretation of the Basic Law with little dispute as it was referred by the CFA under article 158(3) of the Basic Law. In July 2012, CY Leung (梁振英) came to power as the third CE. In September 2012, there was a widespread campaign, especially among secondary school students, to protest against national education. Tens of thousands of people gathered outside the Central Government Offices and the government suspended the plan of compulsory subject of national education shortly before the LegCo elections.

#### ***8.4. Fading out of the “Two Systems” since 2014***

In June 2014, the State Council announced a White Paper on “One Country, Two Systems” (一國兩制) that emphasized the power of the Central authorities. On 31st August, the NPCSC decided that the CE candidates must have the majority vote of the Nomination Committee members before the public can cast their vote. In late September, the Hong Kong Federation of Students organized a class boycott and a protest outside Central Government Offices. As a result of the firing of 87 canisters of tear gas by the police at peaceful protesters on 28th September, a 79-day Occupy or Umbrella Movement was started. The public perception of police impartiality has been seriously damaged. Hong Kong society has become more divided and polarised through varied political stands. The action ended on 11th December and failed to persuade the NPCSC to withdraw its 831 Decision. On 18th June 2015, the LegCo failed to pass the political reform package based on the 831 Decision.

In January 2016, a Causeway Bay bookshop (銅鑼灣書店)

incident caused a public outcry. There was an accusation that a Mainland law enforcement agency arrested Hong Kong residents in Hong Kong which would be a blatant violation of the Basic Law if proven. On 8th January 2016, the European Union issued a statement to show its concern:

As Hong Kong Chief Executive C Y Leung has stated, it would be a violation of the Basic Law if, as media allege, mainland law enforcement agencies had been operating in Hong Kong. This would be inconsistent with the ‘one country two systems’ principle.

Respect for freedom of expression underpins all free societies. The relevant authorities in Thailand, China and Hong Kong should investigate and clarify the circumstances of the disappearances in conformity with the rule of law.

In February 2016, the UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein also expressed concern over the recent cases of disappearances of booksellers from Hong Kong.<sup>28</sup>

In February 2016, there was a riot during the Lunar New Year known as the Fishball Revolution (魚蛋革命). Some participants chanted slogans for Hong Kong independence. More young people supported the independence of Hong Kong after the failure of Umbrella Movement to remove the 831 Decision.

In summer 2016, six LegCo candidates were disqualified as they could not pass a new administrative requirement in respect of Confirmation Letter. The returning officer can disqualify candidates whom he believes do not genuinely uphold the Basic Law and allegiance to the HKSAR under article 104 of the Basic Law.

On 12th October 2016, Sixtus Leung Chung Hang (梁頌恆) and Regine Yau Wai Ching (游蕙禎), who won the LegCo elections in

September, took their LegCo oaths. They used the term “Hong Kong nation” at the outset of the oath-taking, mispronounced the word “China” as “Geen-na” or “Sheen-na” ( “支那” ), and unfolded and displayed a blue banner bearing the words “HONG KONG IS NOT CHINA”. The CE commenced legal proceedings to disqualify their LegCo members’ status as they contravened the requirements under article 104 of the Basic Law (*CE v. Sixtus Leung Chung Hang and Yau Wai Ching*, HCAL 185/2016, 15th November 2016, paragraphs 1, 4, 5 and 10). On 7th November 2016, four days after the court hearing, the NPCSC made its 5th interpretation of the Basic Law on article 104. On 15th November 2016, the Court delivered its judgment. Two LegCo members were disqualified by the High Court and their appeal was dismissed by the Court of Appeal (CACV 224/2016, 30th November 2016, paragraphs 1, 8 and 88).

## **9. Concluding Remarks**

### ***9.1. Human Rights Trend: Obvious Improvement Shortly before 1997 and Little Progress after 1997***

Human rights development having steadily improved in 1970s has sped up since 1980s and accelerated in 1990s shortly before the handover. Though there are scattered human rights improvements after 1997, on the whole, there has been a continuous deterioration of human rights, in particular after the Central authorities have tightened the autonomy since 2003.

Before 1997, one of the most important factors of human rights development was the Sino-British relationship. After 1997, rights enjoyed by Hong Kong people, to a large extent, are affected by the degree of autonomy allowed by the Central authorities.



**Table 10** Major Human Rights Events after 1997

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1997	The Handover of Hong Kong from UK to PRC
1999	NPCSC 1st interpretation of Basic Law on the right of abode
2000	Academic freedom (Robert Chung) incident; Public Order Ordinance incident
2003	1 July protest & HKSAR withdrew article 23 Bill
2004	NPCSC 2nd interpretation of Basic Law on political reform
2005	NPCSC 3rd interpretation of Basic Law on CE term
2007	NPCSC decided CE & LegCo might have universal suffrage in 2017 & 2020
2008	Campaign against demolition of Queen's Pier
2010	Protest against Express Rail; Five districts' resignation; LegCo passed political reform package
2011	NPCSC 4th interpretation of Basic Law on state immunity
2012	Protest against national education subject
2014	State Council White Paper on "One Country, Two Systems"; NPCSC 831 Decision; Occupy/Umbrella Movement
2016	Causeway Bay bookshop incident; Fishball Revolution; 6 LegCo candidates disqualified due to Confirmation Letter; NPCSC 5th interpretation of Basic Law on taking oath; 2 LegCo members were disqualified due to violating Basic law article 104

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Three years have most significant far-reaching impact on human rights development: 1989, 2003 and 2014. After the crackdown of 1989 democratic patriotic movement in the Mainland, the Hong Kong government proposed the Hong Kong Bill of Rights Bill which was enacted in 1991. Since 2000, various reforms and measures were launched to tighten social control. The withdrawal of national security law in 2003 marked a setback of the trend of the undermining of autonomy. After CY Leung became CE in 2012, human rights conditions have worsened. Shortly after the State Council White Paper on “One Country, Two Systems” and NPCSC’s 831 Decision in June and August 2014 respectively, the Umbrella Movement broke out in late September. Unprecedented serious deterioration of human rights has commenced. Very serious human rights violation incidents involved the missing booksellers of the Causeway Bay bookshop, the disqualification of six LegCo candidates by the new Confirmation Letter procedure and two LegCo members being disqualified under article 104 of the Basic Law.

Rights awareness of Hong Kong people were raised during the above three movements. Democracy, human rights and autonomy have been enhanced in 1989, 2003 and 2014 respectively. Unfortunately, the response of the Central authorities towards the strong demand on rights is narrowing the scope of autonomy as well as the tightening of social control.

“Fast forward” can be used to describe the speed of human rights development shortly before the handover. By contrast, little human rights progress after 1997 can be described as “slow motion”. Since 2014, “fast rewind” can illustrate the human rights deterioration.

## ***9.2. Dilemma of One Country and Two Systems***

There has always been tension between the socialist “One Country” and the capitalist “Two Systems”. As commented by Rimsky Yuen

(袁國強), Secretary for Justice, as the “One Country, Two Systems” is a new concept, it is understandable, normal and foreseeable to incur some conflicts in implementing the same.<sup>29</sup>

**Table 11** Different Emphases on Some Issues from the Perspectives of “One Country” and “Two Systems”

“One Country” emphasis	“Two Systems” emphasis
Socialism	Capitalism
Unity	Diversity
Assimilation	Pluralism
Collectivism	Individualism
Rule by law	Rule of law
Hostile to democratic movement which is a conspiracy of the West	Democracy is international human rights standard and normal phenomenon
Social control	Active civil society
National identity	Regional identity
National education	Civic education
Patriotic education	Fear of indoctrination
Expect the CE to be accountable to the CPG	Expect the CE to defend autonomy

With decreasing importance of Hong Kong to the Mainland's politics and economy, Hong Kong has less bargaining power and enjoys less autonomy after the handover. The successful implementation of the "One Country, Two Systems" depends, to a large extent, on the Central authorities exercising self-restraint not to intervene in the HKSAR.

The Central authorities have anticipated that the problem can be solved by the shortening of the differences between the economic strength of the two systems. It seems that the tensions remain serious even if the gap in the per capita Gross Domestic Product (GDP) becomes smaller and smaller. However, the difference with respect to rights enjoyed by the Mainland and Hong Kong people is still big. The way to narrow the gap should not be by lowering or reducing the rights of Hong Kong people. Instead, the proper response should be better protection of the rights of the Mainland people.

### ***9.3. Three Main Challenges to the Human Rights Development***

Though a high degree of autonomy is promised under the Basic Law, the degree of autonomy has been steadily reduced after the handover, in particular since 2003 and 2014. More control by the Central authorities resulted in more confrontation and less trust between Beijing and Hong Kong. Will more autonomy for Hong Kong result in more respect for "One Country"? Will enhancing autonomy enable the two systems to co-exist more peacefully and the "One Country, Two Systems" to be implemented more smoothly and successfully?

The second challenge is posed by increasing exclusion and polarisation in Hong Kong society in respect of political, social and economic aspects. The gap between the rich and the poor becomes wider. Less social mobility becomes the source of social discontent. More hatred, hostility and violence have become evident in recent years,

especially since 2014. Is the better protection of civil, political, economic, social and cultural rights the best strategy to overcome this problem?

The third challenge is the weakened checks and balances in the political system after 2003 with more emphasis on executive-led governance. Less transparency of governance and more corruption incidents by senior and even top government officials have been exposed in recent years. Is genuine full democracy with transparency and accountability in governance as soon as possible the best solution?

#### ***9.4. Positive Aspects of Human Rights Development***

Despite the challenge ahead, the strong Rule of Law tradition and culture in Hong Kong is the cornerstone of human rights protection. An active civil society and vigorous media prevent a sudden and drastic depreciation of rights. Besides, Hong Kong is an international city with strong overseas connections that have also enabled better protection of rights. Further, with several big movements in 1989, 2003 and 2014, rights awareness and political participation of Hong Kong people have been raised and enhanced.

#### **Notes**

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