

‘One Country, Two Systems’: The Middle Way for Protecting Human Rights in Hong Kong

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Johnson Man*

I INTRODUCTION

'One country, two systems' is the constitutional principle that underpins Hong Kong's status as a Special Administrative Region of the People's Republic of China. In recent times, however, there have been calls for a total rejection of 'one country, two systems' and the pursuit of Hong Kong's independence instead. Indeed, the Hong Kong National Party, one of two pro-independence parties currently in existence, has publicly repudiated Hong Kong's *Basic Law*, the region's primary constitutional document.¹ These calls have intensified since the Hong Kong booksellers' incident, where five booksellers were arrested by Chinese mainland law enforcement in October 2015,² with some allegedly being abducted in Hong Kong by mainland officials.³ One of the booksellers who disappeared and later returned to Hong Kong, Lam Wing-kee, has publicly called for independence and, by extension, the end of 'one country, two systems'.⁴

This article argues that 'one country, two systems' is Hong Kong's most viable option to protect its citizens' freedom and rights given the

* Johnson is a first year student studying Law/Social Research and Policy at the University of New South Wales. Born in Hong Kong but raised in Australia since the age of one, he retains a keen interest in Hong Kong politics.

1. *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ('Basic Law')*; Ng Kang-chung and Owen Fung, 'Hong Kong National Party is Born: Will Push for Independence, Will Not Recognise the Basic Law', *South China Morning Post* (online), 28 March 2016 <<http://www.scmp.com/news/hong-kong/politics/article/1931384/hong-kong-national-party-born-will-push-independence-will>>.
2. David Brunnstrom and Mohammad Zargham, 'Concerns Rise Over Disappearance of Hong Kong Booksellers', *The Sydney Morning Herald* (online), 9 January 2016 <<http://www.smh.com.au/world/concerns-rise-over-disappearance-of-hong-kong-booksellers-20160108-gm2dh0.html>>; Greg Torode and Nick Macfie (ed), 'Chinese Police Break Silence on Missing Hong Kong Bookseller', *Reuters* (online), 29 January 2016 <<http://www.reuters.com/article/us-hongkong-bookseller-idUSKCN0V803C>>.
3. Jennifer Ngo, 'Full Transcript of Lam Wing-kee's Opening Statement at his Hong Kong Press Conference', *South China Morning Post* (Hong Kong), 17 June 2016 <<http://www.scmp.com/news/hong-kong/law-crime/article/1976598/full-transcript-lam-wing-kees-opening-statement-his-hong>>; but see *South China Morning Post*, "'Dear Ping..." Another Letter from Missing Hong Kong Bookseller Lee Bo Surfaces', *South China Morning Post* (Hong Kong), 18 January 2016 <<http://www.scmp.com/news/hong-kong/law-crime/article/1902304/dear-ping-another-letter-missing-hong-kong-bookseller-lee>>.
4. Wei Du, "'Doable" for Hong Kong to Seek Independence: Bookseller Lam Win-kee', *Channel News Asia* (online), 19 June 2016 <<http://www.channelnewsasia.com/news/asiapacific/doable-for-hong-kong-to/2885976.html>>.

political realities they confront. The alternative, namely, the pursuit of independence by force, would cause disastrous costs to human life, economic prosperity and social harmony. Given the power imbalance between mainland China and Hong Kong, a push for independence would likely result in a violent crackdown by Beijing authorities. Both sides should instead work towards effective adherence to ‘one country, two systems’ in order to balance Hong Kong’s rights and freedoms with China’s national security.

II THE VALUE OF RIGHTS AND FREEDOMS

Conceptually, rights and freedoms exist in a liberal society because they allow an individual to exercise their liberty. The purpose of ideas such as freedom of speech, freedom of religion and the rule of law in a democratic society are to prevent minorities from being ignored or marginalised by the majoritarian nature of democracy.⁵ This is because, theoretically, in a pure democracy, only the views of the majority are taken into consideration,⁶ a scenario that worried even the Founding Fathers of the United States. In order to prevent a ‘tyranny of the majority’, liberal democracy aims to carefully balance the interests of the minority with those of the majority.⁷

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In Hong Kong’s context, liberal rights and freedoms can protect the voice of minority groups that may not otherwise receive appropriate attention from the state. Freedom of association, for instance, allows for the formation of non-government organisations that have sought to raise awareness of the treatment of Filipino maids in the city. Over 321 000 foreign domestic workers in Hong Kong have historically been the subject of discrimination.⁸ Under an exclusion clause in the *Immigration Ordinance*,⁹ these workers have been excluded from obtaining Hong Kong permanent residency, even after living in the region for seven

5. Graham Maddox, *Australian Democracy in Theory and Practice* (Pearson Education Australia, 5th ed, 2005) 20; Margaret Canovan, ‘Trust the People! Populism and the Two Faces of Democracy’ (1999) 47 *Political Studies* 2, 7; see generally Christopher Wellman, *Liberal Rights and Responsibilities: Essays on Citizenship and Sovereignty* (Oxford University Press, 2013).
6. Canovan, above n 5, 7.
7. Maddox, above n 5, 3.
8. Ronald Mok, ‘Foreign Domestic Helpers in Hong Kong: Towards Equality of Rights’ (2008) 1 *Queensland Law Student Review* 102, 110–12.
9. *Immigration Ordinance* (Hong Kong) cap 115, s 2(4)(a)(vi).

years. Freedom of speech, meanwhile, has enabled pro-democracy groups to challenge and criticise the government without fear of retribution. As such, rights and freedoms in Hong Kong play a pivotal role in protecting the voice of minorities and furthering the development of a democratic political culture.

III HONG KONG'S POLITICAL REALITY

Since the resumption of Chinese sovereignty over Hong Kong on 1 July 1997,¹⁰ Hong Kong has faced the reality of Chinese Communist Party ('CCP') rule over its liberal and relatively democratic city-state. It is well known that the CCP is preoccupied with national security, given its commitment to preserving national unity and stability.¹¹ The CCP has repeatedly and emphatically demonstrated that it is ready to use whatever means necessary to defend national security. Chinese policies in Tibet and Xinjiang, as well as its actions during the Tiananmen Square crackdown on 4 June 1989 are evidence of this. As such, it is likely that Hong Kong will be forced to compromise its freedoms in order to meet China's national security interests. The push by Beijing in 2003 for the passage of a National Security Bill¹² to fulfil article 23 of the *Basic Law*¹³ is an example of this. Though, in the face of community opposition, the government ultimately dropped the Bill.

However, it must be emphasised that the need to compromise rights and freedoms is not unique to the recent period of Chinese sovereignty over Hong Kong. Indeed, during the days of British colonial rule, freedoms in Hong Kong were similarly curtailed in order to satisfy the interests of the British government. Issued by decree of the Governor in the aftermath of the 1967 riots,¹⁴ the *Public Order Ordinance* gave sweeping

10. China's resumption of sovereignty over Hong Kong on 1 July 1997 is also known internationally as the 'The Handover'.

11. See, eg, Kerry Brown, *CEO, China: The Rise of Xi Jinping* (I B Tauris, 2016); Daniel A Bell, *The China Model: Political Meritocracy and the Limits of Democracy* (Princeton University Press, 2015); David Shambaugh, *China's Communist Party: Atrophy and Adaptation* (Woodrow Wilson Center Press, 2008).

12. <<國家安全 (立法條文) 條例草案>> [*National Security (Legislative Provisions) Bill*] 2003 (Hong Kong Special Administrative Region) Legislative Council, 10 July 2003.

13. <<中華人民共和國香港特別行政區基本法>> [*Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*] art 23.

14. The 1967 riots were large-scale leftist riots by pro-communists against the British colonial administration. What initially began as peaceful demonstrations on the streets of Hong Kong rapidly escalated to violent clashes between protesters and the British

powers to the police including the power to prohibit any public gatherings, meetings or processions.¹⁵ Additionally, before the *Joint Declaration on the Question of Hong Kong* was signed in 1984, Hong Kong’s Legislative Council was wholly appointed by the Governor, with no elected members to give voice to the community.¹⁶ It is important to note that whilst Britain itself was a liberal democracy, for most of Hong Kong’s colonial history there was little desire to govern Hong Kong democratically. Indeed, the Governor of Hong Kong was not elected and was appointed by the British monarch; by contrast, the Chief Executive today is elected by an Election Committee of 1200 members.¹⁷

As such, since the beginning of British colonial rule through to the present post-handover era, Hong Kong has faced and will continue to face the political reality of needing to accommodate the concerns of a national government.

IV THE MIDDLE WAY – ‘ONE COUNTRY, TWO SYSTEMS’

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‘One country, two systems’ functions as an effective compromise between the Chinese mainland and Hong Kong’s priorities. Originally proposed by Chinese leader Deng Xiaoping, the principle is the ultimate exercise in political compromise. Through the *Basic Law*, it melds the interests of both Hong Kong and China into a viable ‘middle way’. Mutual adherence to ‘one country, two systems’ can fulfil the needs of both China and Hong Kong, albeit imperfectly.

At its core, ‘One country, two systems’ protects Hong Kong’s distinctive characteristics whilst also upholding Chinese national unity by ensuring Chinese sovereignty over Hong Kong. The principle guarantees a ‘high degree of autonomy’ for Hong Kong as stipulated in the *Sino-British*

authorities. Order was finally restored through the imposition of emergency regulations by the British authorities and a crackdown by police and British military forces against the leftists. The riots left 52 dead, 802 injured and over 1936 were arrested by the authorities.

15. *Public Order Ordinance* (Hong Kong) cap 245, s 17E.

16. Hong Kong, *Charter of the Colony of Hong Kong*, No 26, 5 April 1843, 283; *Joint Declaration on the Question of Hong Kong*, China-United Kingdom, signed 19 December 1984, 1399 UNTS 33 (entered into force 27 May 1985) (*Sino-British Joint Declaration*).

17. Though most would argue that this is not sufficiently democratic, and have called for the introduction of universal suffrage to elect the Chief Executive. These calls stem from *Basic Law* art 45 which states that the ultimate aim in the selection of the Chief Executive is ‘by universal suffrage upon nomination by a broadly representative nominating committee’.



*Joint Declaration*¹⁸ and the *Hong Kong Basic Law*.¹⁹

The *Basic Law* serves as the ‘mini-constitution’ of Hong Kong, with all systems and policies based on its provisions.²⁰ It protects ‘wide-ranging rights and freedoms’ for Hong Kong residents which conform to international standards.²¹ For instance, article 27 specifically protects ‘freedom of speech’ for Hong Kong residents.²² Article 28 prohibits ‘unlawful arrest, detention or imprisonment’.²³ Additionally, article 39 and the *Bill of Rights Ordinance* incorporate the provisions of the *International Covenant on Civil and Political Rights* into Hong Kong law.²⁴ These are but a small selection of the plethora of rights that are protected in Chapter III of the *Basic Law*.²⁵ Other articles reinforce the separateness of Hong Kong’s political, legal and economic systems from the mainland.²⁶ These protections enable minority or opposition groups to exercise their rights, express their views and criticise the government without fear.

At the same time, the *Basic Law* imposes obligations on Hong Kong to ensure its compliance with the ‘one country’ aspect of the principle. At its simplest level, the *Basic Law* places Hong Kong under the sovereignty of the mainland Chinese government. Articles 13 and 14 also give the Chinese government exclusive power to administer matters concerning foreign affairs and defence in Hong Kong.²⁷ Article 17 provides the National People’s Congress with the power to reject a law passed by the Hong Kong Legislative Council that goes against the *Basic Law*.²⁸ As

18. *Sino-British Joint Declaration* art 2.

19. *Basic Law* art 2.

20. Rao Geping and Wang Zhenmin, ‘Hong Kong’s “One Country, Two Systems” Experience under the Basic Law: Two Perspectives from Chinese Legal Scholars’ (2007) 16 *Journal of Contemporary China* 341, 343; Department of Justice, *Legal System in Hong Kong* (11 March 2016) Department of Justice of the Hong Kong Special Administrative Region of the People’s Republic of China <<http://www.doj.gov.hk/eng/legal/>>.

21. Geping and Zhenmin, above n 20, 352.

22. *Basic Law* art 27.

23. *Ibid* art 28.

24. *Ibid* art 39; *Hong Kong Bill of Rights Ordinance* (Hong Kong) cap 383.

25. *Basic Law* arts 25–41.

26. For provisions on Hong Kong’s separate political system, see *Basic Law* arts 3, 5, ch IV. For the article that prohibits mainland Chinese interference on Hong Kong’s own affairs, see *Basic Law* art 22(1). For provisions on the judiciary, see *Basic Law* ch IV s 4, and specifically on the independence of the judiciary see *Basic Law* art 85. For provisions on the economic system of Hong Kong, see *Basic Law* arts 5–7, ch V.

27. *Ibid* arts 13, 14.

28. *Ibid* art 17.

stated earlier, article 23 requires Hong Kong to implement its own legislation on national security issues.²⁹

V INDEPENDENCE AS THE ALTERNATIVE?

However, not everyone in Hong Kong would agree that ‘one country, two systems’ is the only option. Pro-independence groups, such as the Hong Kong National Party and Hong Kong Independence Party advocate for Hong Kong to pursue independence from China. According to these groups, independence would allow Hong Kong to determine its own laws and protect rights and freedoms to the fullest extent, without any need to conform to Chinese national interests. They also cite the example of Singapore, which similarly to Hong Kong, is a city-state that gained independence from Malaysia in the 1960s and still succeeded in becoming a prosperous developed country.³⁰

Unfortunately, this author believes that Hong Kong independence is entirely unrealistic. There is no scenario where China would allow Hong Kong to become independent. As established earlier, the CCP is committed to maintaining national unity. It has even threatened Taiwan with war should it declare independence, even though Taiwan possesses a formidable conventional military and an alliance with a nuclear-armed United States.³¹ Any attempt at independence by Hong Kong through negotiation or lawful means would not succeed simply because China has no reason to compromise. Additionally, a core problem of the comparison between Hong Kong and Singapore is that Singapore was actually expelled from Malaysia, rather than having actively sought independence,³² partly due to racial tensions with the majority Chinese in Singapore.³³ There is no such situation in Hong Kong today, as Hong Kong is seen as an integral part of the Chinese nation.

29. Ibid art 23.

30. Peter Kammerer, ‘Seekers of Hong Kong Independence Must Get Real’, *South China Morning Post* (online), 11 April 2016 <<http://www.scmp.com/comment/insight-opinion/article/1935185/seekers-hong-kong-independence-must-get-real>>.

31. See, eg, Ben Blanchard, J R Wu and Nick Macfie (ed), ‘China Says its People Will Never Stand for Taiwan Independence’, *Reuters* (online), 27 May 2016 <<http://www.reuters.com/article/us-china-taiwan-idUSKCN0YH08R>>; «反分裂国家法» [Anti-Secession Law] (People’s Republic of China) Presidential Decree No 34, 14 March 2005.

32. Kevin Tan, *Constitutional Law in Singapore* (Kluwer Law International, 2011) 16.

33. Lee Kuan Yew, *From Third World to First: The Singapore Story 1965–2000* (Harper Collins, 1st ed, 2000).

Even if Hong Kong were to seek independence through violence as advocated by some pro-independence activists,³⁴ the chance of success is minimal. Hong Kong has no military forces of its own, has a population of approximately 7 million and has no formal allies in the global community. By contrast, China has a military force of over 2 million regular soldiers and a large militia and security force that are veterans of the long-running unrest in Xinjiang and Tibet.³⁵ Additionally, China has a population of over 1.4 billion, as well as significant and growing diplomatic clout.³⁶ The CCP is prepared to go to war over Taiwanese independence. It also has a history of responding firmly against threats to national unity through its ‘hard power strategies’ in Tibet and Xinjiang,³⁷ or at Tiananmen Square. Thus, it is not difficult to discern the CCP’s likely stance on Hong Kong independence. Any pro-independence uprising would first be contained by the Hong Kong authorities under existing laws.³⁸ Should this be insufficient, the Chinese mainland would likely intervene to firmly quash the unrest with its own security forces.

The costs of such an attempt at independence would be significant. At a minimum, a loss in business confidence would engender economic costs. At worst, it could result in the actual loss of lives from the unrest and subsequent crackdown. More fundamentally, it may lead to the end of Hong Kong’s status as a Special Administrative Region of China. The CCP, fearing further threats to national unity, may exercise direct control over Hong Kong in the aftermath, abolish the *Basic Law* and end Hong Kong’s ‘high degree of autonomy’. Human rights such as freedom of the press, freedom of association and the rule of law would no longer be guaranteed.

34. At a news conference in March 2016, Hong Kong National Party leader Chan Ho-tin stated that ‘staging marches or shouting slogans is obviously useless now. Regarding using violence, we would support it if it is effective to make us heard’: Kang-chung and Fung, above n 1.
35. Michael S Chase et al, ‘China’s Incomplete Military Transformation: Assessing the Weaknesses of the People’s Liberation Army (PLA)’ (Report, Research and Development Corporation, 2015) 22, 26, 53.
36. See, eg, G John Ikenberry, ‘The Rise of China and the Future of the West: Can the Liberal System Survive?’ (2008) 87(1) *Foreign Affairs* 23.
37. Liselotte Odgaard and Thomas Nielsen, ‘China’s Counterinsurgency Strategy in Tibet and Xinjiang’ (2014) 23 *Journal of Contemporary China* 535, 554.
38. *Public Order Ordinance* (Hong Kong) cap 245, s 17E is the most obvious of the laws that would be enforced by Hong Kong Police against any pro-independence groups resorting to violence.

As such, Hong Kong independence is not a realistic or desirable alternative to ‘one country, two systems’. This is not to say that ‘one country, two systems’ is the perfect solution. On the contrary, there are a plethora of ways in which the implementation of this principle can be improved. Universal suffrage to elect the Chief Executive should be further pursued, following the failure of the electoral reform plan in 2015.³⁹ Additionally, China should clarify what transpired with the Hong Kong booksellers’ incident, and should endeavour to not abduct Hong Kong residents to the mainland.

VI CONCLUSION

Rights and freedoms are essential to a liberal society because they protect minorities whilst also allowing individuals to exercise their liberties. Hong Kong has a well-developed tradition of liberalism inherited from the days of British colonial rule. These liberal values now form part of Hong Kong’s unique identity – they cannot be separated or excised. In order to protect these values, ‘one country, two systems’ and the *Basic Law* must be closely followed by both China and Hong Kong. China must respect Hong Kong’s ‘high degree of autonomy’, whilst Hong Kong must enthusiastically embrace its place in the Chinese nation.

39. For background details on the 2015 electoral reform plan, see Government of the Hong Kong Special Administrative Region of the People’s Republic of China, ‘Method for Selecting the Chief Executive by Universal Suffrage’ (Consultation Report and Proposals, April 2015) <http://www.2017.gov.hk/filemanager/template/en/doc/report_2nd/consultation_report_2nd.pdf>.