The Rule of Law in Hong Kong Is Intact and Robust

By Chan Chak-Ming

Hong Kong’s reputation as one of Asia’s world-class cities and an important global financial hub is deeply rooted in its commitment to the rule of law. It is a concept that its residents cherish. But since the student-led pro-democracy demonstrations that rocked the city in 2014, political debate in Hong Kong has increasingly included expressions of fear that the rule of law is being eroded. CM Chan argues that those fears are misplaced and that the rule of law is intact and robust.

“RULE OF LAW” is a complex concept with very different meanings in different jurisdictions. In Hong Kong, it has been cherished as one of the city’s “core values.” The Oxford English Dictionary defines it as “the authority and influence of law in society … the principle whereby all members of society [including those in government] are considered equally subject to publicly disclosed legal codes and processes.” For the purpose of this article, I shall focus on “legality,” “equality before the law” and “judicial independence,” which are universally accepted as essential components of the rule of law. I will then argue that the rule of law remains robust in Hong Kong, notwithstanding the lack of full democratization in its political system.

RULE OF LAW BEFORE AND AFTER 1997

In many ways, Hong Kong’s Basic Law was designed to preserve the rule of law after 1997, when Hong Kong’s sovereignty was returned to China, by, for instance, expressly stating that the laws previously in force in Hong Kong (namely, the common law, rules of equity, ordinances and customary law) should be maintained, save for any that contravene the Basic Law.

In Hong Kong, the notions of legality and equality have been deeply entrenched in the government. All Hong Kong citizens, regardless of their race, religion and social status, are subject to the same laws, and no one — including the government — can take any actions that deprive a citizen’s rights unless there is a legal justification. Any aggrieved person can resort to the courts for adjudication. In support, the Basic Law guarantees that Hong Kong courts are independent of the executive.

The English political philosopher A.V. Dicey famously listed three crucial elements for the rule of law, namely that: every person is protected equally before the law; no one is punishable without breaching the law; and individual rights are protected by legal precedence and not a constitution. The first two elements have received widespread endorsement and are beyond doubt. The last, however, may not be applicable in Hong Kong, as Dicey’s third element originated from the United Kingdom, which does not have a written constitution. Unlike its former colonial sovereign, Hong Kong has a written constitution in the Basic Law. Separation of powers has sometimes been regarded as important to maintain the rule of law. The paradigm model is that of the United States, where government power has been clearly divided into executive, legislative and judicial branches, with proper checks and balances.

As a former British colony with a political structure more akin to the British Westminster model, Hong Kong has seen a certain degree of fusion between the executive and legislative branches. For instance, the former colonial governor, as the representative of the British monarch, was the head of both the government and the Legislative Council, but the judiciary was clearly independent even in colonial days. This tradition of judicial independence has been preserved and guaranteed by the Basic Law after the 1997 handover. Nowadays, Hong Kong’s political structure has adopted some features of the US-style separation of powers, with Hong Kong’s Legislative Council completely separated from the government.

I would argue that such changes in Hong Kong’s political system since the handover, coupled with the power of the Standing Committee of the National People’s Congress (NPCSC) to interpret the Basic Law (see below), have given an unfortunate impression that China is interfering with Hong Kong affairs and/or undermining Hong Kong’s rule of law. “One Country, Two Systems” is unique and unprecedented; there are no comparable systems in the world. One cannot simply judge Hong Kong’s system by comparing it with other sovereign states (as Hong Kong is not an independent country).

I prefer to focus on the known safeguards to maintain Hong Kong’s rule of law that have been put in place since the handover. Article 2 of the Basic Law preserves Hong Kong’s independent judicial and final adjudicating power; Article 19 provides that Hong Kong shall be vested with judicial independence; and Article 85 requires Hong Kong courts to operate independently, free from any interference. In addition to these, the Basic Law devotes an entire chapter to protecting various fundamental human rights, incorporating the International Covenant on Civil and Political Rights.

THE JUDICIAL SYSTEM UNDER ‘ONE COUNTRY, TWO SYSTEMS’

Under the Basic Law, Hong Kong established its own Court of Final Appeal (CFA) on July 1, 1997. The CFA has an uncommon composition in that it is made up of five judges, with four permanent local judges, and a non-permanent overseas judge selected from a panel of judges from other common-law jurisdictions. Another unique feature of Hong Kong’s judicial system is that under the Basic Law, the NPCSC has the plenary power to interpret the Basic Law and any interpretation is binding on the courts in Hong Kong. The CFA has recognized the NPCSC’s authority in the case of Lau Kong Yung and Others v The Director of Immigration.

Under the Basic Law, Hong Kong courts are authorized to interpret it. But under Article 158,
Hong Kong courts have the duty to refer the interpretation of articles concerning issues of national defense, foreign policy and the relationship between the Central Government and Hong Kong to the NPCSC. Since 1997, the NPCSC has issued five interpretations. From a common-law viewpoint, such an interpretation of law by a legislative body (the NPCSC is the standing committee of China’s parliament) overriding Hong Kong judgments may seem to have an adverse effect on judicial independence in Hong Kong. However, the NPCSC’s power to interpret is completely legal, valid and binding under Hong Kong’s unique constitutional order. I must also add that such interpretations have no retroactive application whatsoever, and do not affect previously decided cases.8

IS THE RULE OF LAW BEING UNDERMINED?

In 2017, when the Court of Appeal imposed custodial sentences on three student leaders of the Occupy Central movement, many international commentaries billed it a serious threat to the rule of law and accused the Hong Kong government of a politically motivated conviction.9 Unfortunately, this view, rightly or wrongly, is also shared by many local citizens. However, if one reads the Court of Appeal judgment carefully, one can see that the rationale behind the conviction was the defendants’ unlawful acts and not their political beliefs. The defendants were sentenced not because they exercised their lawful rights to demonstrate, assemble, or freedom of speech, but because they had acted in contravention of the law. Citing this Court of Appeal judgment to argue that China is undermining Hong Kong’s rule of law is unfair. (The case subsequently went to the CFA, which earlier this year struck down the prison sentences handed to the three activists.)

CONCLUSION

Lord Bingham, a former UK Lord Chief Justice, once suggested that the core of the rule of law is that “all persons and authorities … should be bound by and entitled to the benefit of law publicly and prospectively promulgated and publicly administered in the courts.”10 His suggestion is still applicable to Hong Kong today. In the latest Rule of Law Index published by the World Justice Report,11 Hong Kong has once again been ranked a respectable 16th in the world, ahead of France (18th), the US (19th) and mainland China (75th). The ranking was compiled through an assessment of 44 different indicators under eight measurements, including corruption, fundamental rights, order and security, civil justice and criminal justice. It is noteworthy that for the fundamental rights category (which measures a country’s equal protection, freedom of opinion and expression and other civil rights), Hong Kong came in 29th, an improvement of two places from the previous report. The index seems to support my argument that Hong Kong’s rule of law has not been undermined. Hong Kong’s destiny is inextricably linked to that of China and the sovereignty of China must always be fully respected, but to me, respecting China’s sovereignty and maintaining the rule of law in Hong Kong are not mutually exclusive, as some may have suggested.

Chan Chak-ming is a Research Fellow at the Hong Kong Policy Research Institute/Hong Kong Vision, and practices law in Hong Kong.