

## Hong Kong's Legislative Council and the rule of law

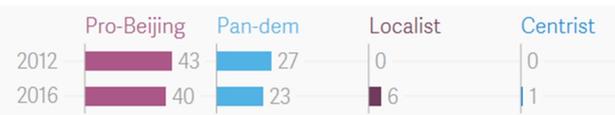
Hong Kong 'localists' won six seats in the 2016 Legislative Council elections. Calling for greater autonomy or self-determination for Hong Kong, or even its independence from mainland China, they have challenged the fragile balance of power under the city's 1997 'one country, two systems' regime. The attempts of the now ousted members-elect to cross Beijing's bottom line has prompted mainland China to tighten its grip on the city's executive, legislature and judiciary, adding to concerns over creeping erosion of the rights and freedoms guaranteed by Hong Kong's Basic Law.

### The localists' short-lived presence in the newly elected Legislative Council (LegCo)

The 2016 elections to [LegCo](#), Hong Kong's unicameral legislative body, marked a watershed in the city's political development that had traditionally been characterised by the division between the [pro-Beijing](#) and 'pan-democratic' camps. A [diverse](#) group of [localists](#), partly linked to the [2014 Umbrella Movement](#) and champions of Hong Kong's local interests and its way of life against a perceived '[mainlandisation](#)', emerged

as a new political force, strongly [polarising](#) the city's political landscape. Although six [localist](#) candidates were [disqualified](#), inter alia for failure to sign a [loyalty pledge](#) recognising Hong Kong as an 'inalienable part of China', the localist group nonetheless won six LegCo seats. They added a radical faction to the opposition, made up of the 23 seat-strong pro-democracy camp and one centrist. The pro-Beijing camp returned 40 LegCo seats (Figure 1). Although the opposition was in the minority in LegCo at large (29 out of 70) and within the functional constituencies (10 of 35), it enjoyed a majority in the geographical constituencies (19 of 35) (Figure 2), allowing it to block certain legislative initiatives of the pro-Beijing camp under LegCo's '[separate count vote](#)' rule. However, Hong Kong courts ultimately disqualified [six members](#) (five localists and one independent) from LegCo membership for taking their oath improperly, with some of them having held banners stating 'Hong Kong is not China'. The opposition is now left with 23 seats until the 2018 by-elections. It has lost its GC majority and power to veto changes to the Basic Law. The pro-Beijing camp may [capitalise](#) on this to enact controversial laws such as a [national security law](#) to ban treason, secession, sedition or subversion against the Chinese central government.

**Figure 1 – LegCo election results – distribution of seats by political affiliation as of September 2016**



Source: [Quartz](#), 6 September 2016.

**Figure 2 – Constituencies of Hong Kong's LegCo**



Source: [CNN](#), 4 September 2016

### Rule of law concerns in selected cases

Although the UK Foreign Secretary's recent ([39th](#), [40th](#), and [41st](#)) six-monthly Hong Kong reports to the UK Parliament concluded that the 'one country, two systems' regime 'continued to function well in the vast majority of areas', they stressed that 'there were specific grounds for serious concern about rights and freedoms'. The 2016 [report](#) on Hong Kong by the European External Action Service (EEAS) and the European Commission broadly shared this view. While the city's press freedom status is currently rated as only [partly free](#), its [rule of law performance](#) has remained robust. The cases that have drawn criticism (see below) concern two main areas. One is mainland China's [use](#) of direct and indirect channels to eliminate Hong Kong's '[separatists](#)' from the political scene, and reaffirm the [red lines](#) regarding the 'one country, two systems'



regime. The other is alleged interventions by mainland agents on the city's territory to bring 'voluntarily' to mainland China, Hong Kong citizens, such as [five booksellers](#) in 2015, to be [charged](#) under mainland laws, and Chinese-born foreign passport [holders](#), such as [tycoon Xiao Jianhua](#) in early 2017, to settle [mainland issues](#).

*The National People's Standing Committee interpretation of Hong Kong's Basic Law and its implications*

The improper oath-taking by some LegCo members-elect prompted pro-Beijing members [to walk out of LegCo](#) and the executive to seek a [judicial review](#) of these oaths with Hong Kong's High Court. While court proceedings were ongoing, the National People's Standing Committee (NPCSC), Beijing's top legislative body, published, on its own initiative, what some have deemed a '[strongly political](#)' [interpretation](#) of Article 104 on oaths of Hong Kong's [Basic Law](#), in the light of its competence under Article 158. The interpretation [sets out](#) the precise wording of the oath that legislators-elect have to read out affirming their allegiance to the 'Basic Law of Hong Kong of the People's Republic of China'. Some analysts have [seen](#) the intervention as pre-empting pending litigation and 'dictating outcomes to Hong Kong courts'. The timing of the interpretation was criticised by the [Hong Kong Bar Association](#), as it 'would inevitably give the impression that the NPCSC is effectively legislating for Hong Kong, thereby casting doubts on the commitment of the Central People's Government to abide by the principles of "one country, two systems"'. As for the substance of the interpretation, the Bar Association argued that it was 'unnecessary and inappropriate', as the Hong Kong [Oaths and Declarations Ordinance](#) already contained related provisions. Moreover, the interpretation – like an amendment – actually added requirements to Article 104 to the extent that an oath deemed invalid cannot be re-taken. In the case at hand this was tantamount to ousting the members concerned from LegCo.

Hong Kong lawyers staged a [silent march](#) in November 2016 to protest against Beijing's [fifth](#) interpretation of the Basic Law since 1997. According to some [lawyers](#) the related Court of Appeal [judgment](#) suggests that 'there is virtually no limitation on the NPCSC's power to interpret the Basic Law' and that 'an NPCSC interpretation, issued at any time and with [retrospective effect](#), can cause serious concerns as to the rule of law in Hong Kong ...'. The judgment stresses that the NPCSC interprets the Basic Law under mainland China's civil law system, with the Basic Law thus [trumping](#) common law principles, such as the [principle of non-intervention](#) by courts in matters of the legislature, which has not been applied in this dispute.

*The Hong Kong executive's moves to secure harsher punishments of activists for deterrent purposes*

In two recent cases, Hong Kong's Secretary for Justice, [Rimsky Yuen](#) – whether [on political grounds](#) or [not](#) – [appealed](#) the High Court's community service sentences against democracy and land rights activists, which he considered [too lenient](#). In one case three pro-democracy activists, including a localist LegCo member-elect, were found guilty of taking part in unlawful assembly and/or inciting others to do so in relation to the 2014 Umbrella Movement protests. The Hong Kong Court of Appeal overturned the lower court's ruling and [sentenced](#) them to a [custodial sentence](#) of [six to eight months](#), mandating a [five-year hiatus](#) in their political careers. In an [open letter](#), prominent lawyers have denounced the imprisonment of the three activists 'as a serious threat to the rule of law'. The co-chair of the US Congressional-Executive Commission on China, Senator Marco Rubio, [stated](#): 'The political prosecutions and resentencing of these young people is shameful and further evidence that Hong Kong's cherished autonomy is precipitously eroding'. The [second case](#) concerned 13 [environmental activists](#) who attempted to [storm](#) LegCo over the government's [North East New Territories Development Plan](#). Hong Kong's Court of Appeal overruled a lower court's non-custodial sentence against the group for unlawful assembly, and increased it to a prison sentence of six to thirteen months.

*Hong Kong citizens caught between autonomy and the cross-border grip of mainland law enforcement*

In 2015, five Hong Kong [booksellers](#), who exported gossip books critical of China's top leadership to the mainland, were allegedly abducted by Chinese agents from [Thailand](#), [Hong Kong](#) and within [mainland China](#) to face charges as [Chinese citizens](#) in mainland China for having violated mainland laws. This incident has been widely interpreted as the most [serious](#) encroachment on Hong Kong's autonomy. The EEAS [urged](#) the relevant authorities to investigate. The European Parliament passed a [resolution](#) calling for the immediate safe release of the booksellers. Amnesty International, meanwhile, stressed that the Chinese authorities were [showing](#) 'total contempt for due process and the rule of law'. In the case of the booksellers, who reappeared in 2016, the city's chief executive, [Carrie Lam](#), stated that the booksellers' detention in China was [not an issue](#) the city's government should take up, since it had to be dealt with 'in accordance with the mainland systems'. The future [high-speed train link](#) between Hong Kong and mainland China will entail the permanent presence of Chinese law-enforcement officials in the Hong Kong terminal and on trains, [to enforce](#) mainland laws, [spurring fears](#) that this could increase the likelihood of more people suddenly and mysteriously leaving Hong Kong for the mainland on a voluntary basis, to settle issues related to the mainland.