

# Judicial Independence and the Rule of Law in Hong Kong

Edited by

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# 1

## Commitment to the Rule of Law and Judicial Independence

*Steve Tsang*

In spite of its cosmopolitan character Hong Kong remains essentially a Chinese city. What sets it apart from the People's Republic of China (PRC) more than anything else is the existence of the rule of law and an independent judiciary. They are generally accepted in Hong Kong as the most important legacy of 156 years of British imperial rule.<sup>1</sup> They are also seen as the cornerstone for the future of Hong Kong as a Special Administrative Region (SAR) in the PRC which retains a Leninist political system.<sup>2</sup> The inherent contradictions between the latter, in which the supremacy of the Communist Party cannot be challenged, and Hong Kong's liberal and capitalist system are real. In an important sense whether Hong Kong can maintain its own system and way of life, as provided for in the Sino-British Joint Declaration of 1984 and enshrined in the Basic Law for the Hong Kong SAR (1990), will depend on the survival of what underpin them – the rule of law and an independent judiciary. Equally significant is the commitment on the part of the SAR – the government, the judiciary and the people – to upholding these two principles once they are no longer guaranteed by the built in supremacy of the British legal and judicial systems before July 1997.

The importance of the rule of law and an independent judiciary as the cornerstone for Hong Kong's future is such that most people tend to take it for granted that they had always worked perfectly well in British Hong Kong. As Christopher Munn makes clear in Chapter 2, this is a gross simplification. The development of both in the crown colony of Hong Kong has to be put in historical perspective. The great emphasis which has been laid on them by senior officials of the SAR government since the handover also needs to be put into context. Leo Goodstadt is right in highlighting in Chapter 8 the reality that the

continuation of the rule of law and judicial independence have been hailed by the SAR government not least because Hong Kong has not developed democracy and, in its absence, it is advantageous to, and politically astute for, the administration to focus public attention upon them rather than on the issue of democratization. There is also a question of how Hong Kong's common law tradition and judicial system can coexist or dovetail the socialist and Chinese legal system in the PRC.<sup>3</sup> This is strictly speaking a matter to be governed by the Basic Law. However, as Byron Weng aptly explains in Chapter 3, it is unrealistic to expect the Basic Law alone to safeguard the rule of law and judicial independence in the SAR since the Basic Law is a piece of legislation in a country with a different legal tradition. It is also a country where the respect for the constitution has been haphazard at best and where the Maoist axiom of 'politics in command' remains a fact of life.

### **An uncertain beginning**

The record of China's handling of relations with Hong Kong since the handover appears to suggest it has basically respected the maintenance of the rule of law and judicial independence in the SAR. Indeed, since July 1997 the Chinese authorities have been much less vocal and interventionist over events in Hong Kong than previously. This was the result of an order issued by Jiang Zemin, Chairman of the PRC and General Secretary of the Communist Party, by which he prohibited heads of government ministries, their equivalent departments in the Communist Party, provinces and special municipalities from interfering into affairs of the SAR.<sup>4</sup> The issuance of this order and its being enforced are useful to illustrate the actual implementation of the 'one country, two systems' policy. The enforcement of this order was greatly assisted by the careful positioning of the Chief Executive of the SAR in the hierarchy of the state bureaucracy and the Communist Party in China as a whole. As soon as the SAR was founded, its Chief Executive was given the rank of a Vice-Premier or State Councillor, one bureaucratic grade above that of a minister in Beijing or a governor in the provinces.<sup>5</sup> Even in the all important party-state relations a similar special arrangement was made. In terms of its importance, the SAR ranks equal to the special municipalities of Beijing, Tianjian and Shanghai whose party chief is of Poliburo rank. In order not to put a party man senior in rank to Tung Chee-hwa in the SAR Beijing deliberately appointed a mere member of the Communist Party's Central Committee, and not of the Poliburo, to head the Party's Work

Committee in Hong Kong. This party head, Jiang Enzhu has also been instructed to operate under the cover of his public duties as Director of the local branch of the Xinhua News Agency rather than like a normal party secretary in a special municipality. This anomaly is undoubtedly intended to prevent lower ranking PRC cadres from putting pressure on the higher ranking SAR Chief Executive and thus minimize any attempt by them to further their selfish personal, provincial or departmental interests. This is also in line with Beijing's established policy towards Hong Kong which is to exercise maximum flexibility within the rigid framework of protecting the sovereignty of the PRC and the supremacy of the national interests as defined by the Communist Party leadership.<sup>6</sup> The continuation of this basic policy represents the commitment on the part of Beijing to give the SAR reasonable scope to uphold the rule of law and judicial independence.

The survival and prospering of the rule of law and judicial independence do not depend solely on Beijing's policy and actions, however. They are also dependent on the commitment of the SAR. This is reflected in the protection against abuse in the name of national security which is examined by Hualing Fu in Chapter 4, the state of institutional protection which forms the focus of Peter Wesley-Smith's inquiry in Chapter 5, respect for upholding the due process which Johannes Chan scrutinizes in Chapter 6, and an independent and free press which is analyzed by Richard Cullen in Chapter 7. They are further affected by events within the SAR, such as the approach and behaviour of its judiciary, law officers and the executive branch. In this regard Hong Kong has a mixed record in its first two years as the SAR.

In the celebrated and controversial case concerning the SAR courts' handling of the right-of-abode of illegitimate children born to at least one parent who has such right in Hong Kong, the Court of Final Appeal (CFA) ruled on the basis of the law in January 1999 and ignored the very serious political and other practical problems which its ruling would cause. Under the Basic Law children born to Chinese citizens who are permanent residents of Hong Kong are deemed to have the right of abode.<sup>7</sup> What is not clear are whether children born out of wedlock or before their parents acquired the right of abode can enjoy the same right, and whether the Court should secure an interpretation from the National People's Congress (NPC) or its Standing Committee on the relevant provisions in the Basic Law, which will be binding on the Court.<sup>8</sup> On the first two questions the Court ruled in favour of the children. With regard to the last the Court decided that it did not need an interpretation from the NPC. Indeed, it worked on the basis that it

had the authority 'to examine whether any legislative acts of the NPC are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent.'<sup>9</sup> By its ruling the Court disregarded the prevailing local public opinion and the views of the SAR government which opposed letting in hundreds of thousands of mainland migrants.<sup>10</sup> It also faced a torrent of criticisms from the Chinese authorities which accused it, above all, of attempting to challenge the NPC's authority to interpret all ambiguous provisions in the Basic Law.<sup>11</sup>

The strong reactions from Beijing raised the prospect for either a constitutional crisis involving the jurisdiction of the CFA or a decision of the Court being overruled, subverted or otherwise set aside by the PRC or by the SAR executive branch acting under instructions from Beijing. This potential constitutional crisis was averted in February 1999 by a compromise worked out between the governments of the SAR and the PRC. Under this arrangement the SAR government asked the Court to 'clarify' its ruling. In response the Court declared that it accepted the NPC as the supreme law-making body of the land and did not question that authority though it did not alter its ruling.<sup>12</sup> Whether the CFA ruling is sound according to the law or not, it was widely and rightly accepted in Hong Kong as a positive landmark development in protecting the rule of law and judicial independence.<sup>13</sup> Since Beijing accepted the compromise and the ruling of the Court was allowed to stand, this dispute did not in a strictly technical sense undermine the rule of law or the independence of the judiciary in Hong Kong.

The SAR government's albeit pragmatic intervention to defuse the situation did raise the question whether this may reflect a pattern of executive actions that will eventually undermine the rule of law, however.<sup>14</sup> This issue is examined further in Chapter 3 by Weng.

To begin with, the SAR government suggested sometime in 1998 to the CFA that before the latter rendered its final judgment it should seek a binding interpretation of Articles 22 and 24 of the Basic Law from the NPC Standing Committee.<sup>15</sup> This action was no doubt taken to protect what it saw as the best interest of the SAR, as it realized the political sensitivity of the case and deemed it politically advantageous to pre-empt a development which could lead to a confrontation with the PRC authorities. However well intentioned this might have been it still casts a shadow over the priority set by the Justice Department and the government as a whole – do they put the law or political considerations of the day first?

What is more worrying is that about two months after the danger of a constitutional crisis was removed, the SAR government reversed course and sought to set aside the decision of the CFA when it calculated that this decision could result in up to 1.67 million mainland Chinese being able to exercise the right of abode and settle in Hong Kong over a period of seven years and thus put what it called 'a very heavy – even unbearable – burden' on the SAR.<sup>16</sup> In order to pre-empt this worst case scenario the Chief Executive Tung announced in May 1999 that he would try to reduce what he saw as the negative impact of the Court's decision, by either seeking an amendment to the Basic Law or asking the NPC Standing Committee to reinterpret the Basic Law.<sup>17</sup> Whether the SAR government's calculation of the likely number of immigrants is sound or not, there is no doubt that the Court's decision will result in at least hundreds of thousand Chinese being able to claim the right to live in the SAR and thus generate enormous pressure on housing, education, health and other social services.<sup>18</sup> This is a daunting challenge for a metropolis of 6.5 million already suffering from one of the highest population pressures in the world. The magnitude of this problem is not the real cause for worry, however.

It is the manner by which the SAR government handles the issue which may pose a serious challenge to the rule of law. Instead of devoting itself to devise policies and make plans to deal with the implications of the decision of the CFA, as is normal in a common law jurisdiction, the SAR government seems to have dedicated itself to seek ways to circumvent what it no doubt believes to be an ill conceived decision of the Court. Hence, the government has chosen to scare the population into rejecting the implementation of the decision of the Court by hailing the worst possible scenario as if it were a certainty. It dismissed out of hand the possibility of making arrangements to regulate the settlement of those people concerned in a reasonable manner, which will on the one hand recognize their right of abode and on the other hand allow the SAR scope to deal with a large and steady inflow of people.<sup>19</sup> The alleged need for the SAR to overturn in effect the decision of the CFA also seems to be based on dubious premises. The government has apparently not taken into account several crucial considerations. First, the movement of people from the PRC to the SAR is regulated not only by the SAR but also by the border control exercised on the PRC side. Given the PRC authorities' hostility to the CFA decision and long established policy in controlling internal migration it is doubtful that all the illegitimate offspring of Hong Kong residents

will be allowed to leave the mainland freely for the SAR. Second, it is questionable that a decision of the SAR Court is legally binding on government organizations in the PRC. Third, the PRC simply does not have the institutional infrastructure to deal with a massive migration of this kind since this is a new demand generated only as a result of the SAR Court's ruling at the end of January. Unless the PRC government will devote significantly more resources to deal with the issue, about which there is no indication, there will almost certainly be a long delay for applications to leave to be processed. Fourth, the estimated figure is highly problematic as it includes, for example, those who are not yet born or conceived but are believed to be eligible on the basis of the fertility rate of the prospective immigrants.<sup>20</sup> Likewise, the SAR government has reportedly compiled data on those eligible but indicated that they have no intention to relocate to Hong Kong, but suppressed the data and simply worked on the assumption that all who are entitled to will in fact migrate.<sup>21</sup> Finally, the illegitimate offspring will also need to establish proof of parentage. With so many imponderables the SAR government's projected pressure on Hong Kong's society and resources seems exaggerated. If the pressure were not such that it would be a matter of survival, why had the SAR government proposed to take such an extraordinary course which would undermine the rule of law? Does this not reflect the basic attitude of the government and a lack of commitment to uphold the rule of law?

Of the two options which the SAR government initially put on the political agenda in Hong Kong – to amend the Basic Law or ask the NPC to reinterpret the Basic Law – the Chief Executive chose the latter.<sup>22</sup> This is highly problematic. According to Article 158 of the Basic Law the power to interpret does rest with the NPC Standing Committee but it is supposed to do so on the basis of a request from the SAR Courts – not from the SAR government. The really controversial issue is whether the CFA had the right to decide not to seek an interpretation on the issues at hand. Whether the Court was right or not in this matter it adjudicated without requiring interpretation. (The rule of law does not imply the Courts never make mistakes, but if they do such mistakes should be rectified through the due process – not by executive fiat.) This being the case it is questionable if the SAR government has the constitutional right to request an interpretation clearly with an intention to side-track the decisions of the Court. In the common law tradition the only situation for the CFA to change its mind (or, in this case, request an interpretation) is for a new case that

presents new and significant evidence to justify a change of judgment being put to it – not a matter within the remit of the Chief Executive. The other option, amendment of the Basic Law, is at least constitutionally viable, though it can only be done by the full NPC, which is not scheduled to meet until around March 2000. In any event the Chief Executive's proposal amounts to subverting, or at least setting aside, a decision of the Court duly arrived at on the basis of the law. By choosing to invite Beijing to relieve it from its obligations under the Basic Law the SAR government is, despite its rhetorical commitment, resorting to an expedience with little or no regard to upholding the rule of law.<sup>23</sup>

The irony in this incident is that there is no evidence to suggest the SAR Chief Executive has acted under pressure from Beijing. He almost certainly took the initiative on his own accord, or on the advice of his law officers, though the views of Beijing had undoubtedly been taken into account as well. What is particularly worrying is one of the considerations which the Justice Department appears to have based its advice to the government. In the *South China Morning Post*, Deputy Law Officer R. Allcock made the following disconcerting comment on this matter:

Under the common law, the ultimate power to interpret the law is vested in the judiciary. However, Hong Kong is part of the People's Republic of China, which has a civil law system. Under the mainland's system, the ultimate power to interpret statutes is vested in the NPCSC.<sup>24</sup>

However incredible it may seem this view of the Deputy Law Officer does appear to represent that of the SAR government, as the Justice Secretary herself publicly states that the replacement of the Letters Patent and the Royal Instructions by the Basic Law has resulted in 'an earth-shaking change in the most fundamental part of this legal system'.<sup>25</sup>

This development raises the question of whether the SAR government has the intention to uphold all the rights given to the SAR by the Basic Law, including Article 8 which specifically stipulates that the common law – not the civil or socialist legal – system should be maintained. It is ironic that in the first two years of Hong Kong as the SAR the threat to the rule of law has come more from failings of the SAR government than from interference from the Leninist party in control of the PRC. If the SAR government's bowing to political and

socio-economic considerations in the illegitimate migrants case is but an isolated exception, it will not constitute a pattern of executive actions and its significance should be assessed accordingly. By setting this incident against the record of the SAR government's handling of a few other cases a pattern does appear to exist, however.

To begin, there was the widely reported case concerning the trial and execution of a gangster leader Cheung Tze-keung, popularly known as Big Spender, in the PRC in 1998. Cheung was a Hong Kong citizen who committed, among various serious offences, the kidnapping of two business tycoons, Walter Kwok of the Sun Hung Kai group and Victor Li, son of Li Ka-shing, in Hong Kong. Neither Kwok's nor Li's family reported the kidnapping to the Hong Kong Police. However, they apparently asked for help from Chairman Jiang Zemin, which led to the arrest by the PRC police of Cheung and his gang.<sup>26</sup> Together with his gang Cheung was put on trial in the Guangzhou Intermediate People's Court, in spite of the fact that he was a Hong Kong citizen who was alleged to have committed crimes against other Hong Kong citizens in Hong Kong. Given the almost certain outcome of such a trial in a PRC court – conviction and swift execution – Cheung's counsel and family asked the SAR government to seek his return to face trial in Hong Kong. However nasty a criminal Cheung might have been he undoubtedly had the right as a Hong Kong citizen to expect to face justice in a Hong Kong court for crimes he was alleged to have committed locally. The SAR government ignored the pleas of Cheung's lawyer, family and human rights advocates and declined to seek his return.<sup>27</sup> The government had apparently chosen not to press the issue in order to avoid confronting the PRC. Although this was probably an astute political move in the context of maintaining good PRC-SAR relations, it raised two serious questions. Does this case imply Hong Kong citizens who commit criminal offences within the SAR can – contrary to Article 18 of the Basic Law – be subjected to the Chinese Criminal Code should they be arrested in the PRC? Furthermore, does the politically astute move on the part of the SAR government mean that, in cases where it is politically expedient, it in effect concedes it cannot be expected to stand up for the human rights of SAR citizens who may have incurred the wrath of the Chinese government or top leaders and thus find themselves in trouble with law enforcement agencies in the PRC?

The 'Big Spender' case should also be seen in the context of how the SAR government dealt with another somewhat similar case. This one concerns a PRC citizen Li Yuhui (Lee Yuk Fai in Hong Kong usage). Li

worked as a Feng Shui master and allegedly committed five murders in Telford Gardens in the SAR but was apprehended in the PRC. Similar to the Big Spender case the SAR government refused to secure his return to face justice in Hong Kong. What happened to Li subsequently was no surprise. He was convicted and executed in Guangdong.<sup>28</sup> Whether he should have been tried in the PRC instead of in Hong Kong is debatable. The case for trial in the PRC is essentially based on the extraterritorial reach of the Chinese Criminal Code, which gives PRC Courts the right to try a PRC citizen who committed an indictable offence overseas.<sup>29</sup> However, under Article 18 of the Basic Law the Chinese Criminal Code should have no application in the SAR since the Code is not one of those PRC national laws specifically listed in Annex III of the Basic Law.<sup>30</sup>

Any doubt that this provision of the Basic Law can override the extraterritorial jurisdiction of the Chinese Criminal Code should be dispelled by the very special nature of the Basic Law which was promulgated to found the SAR. The Basic Law is clearly meant to resolve anomalies or discrepancies in law between the PRC and the SAR inherent in the 'one country, two systems' principle in favour of the SAR practice. This is based on the same principle upon which the constitutionality of the Basic Law itself is established. Under various provisions of the PRC Constitution the existence of anything like a SAR is prohibited. Article 1, for example, stipulates specifically and clearly that the PRC 'is a socialist state under the people's democratic dictatorship' and the 'sabotage of the socialist system by any organization or individual is prohibited'. This is reinforced by Article 5, which 'upholds the uniformity and dignity of the socialist legal system' and adds that 'no law or administrative or local rules and regulations shall contravene the Constitution'. Since the capitalist Hong Kong SAR committed to the common law is neither socialist nor conducive to upholding the socialist legal system in the PRC, it would have been logical that the creation of the SAR is prohibited by the Constitution. However, this problem is, according to all Chinese legal authorities, resolved by Article 31 of the Constitution.<sup>31</sup> This article authorizes the establishment of SARs in which their systems 'shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions'. In the same spirit that Article 31 can override the other articles of the Constitution and make the establishment of the Hong Kong SAR constitutional, Article 18 of the Basic Law ought to take precedent over the applicability in the SAR of the extraterritorial scope of the PRC Criminal Code. Li should therefore

have been prosecuted and tried in the SAR only for the crimes which were wholly committed there. Similar to the Big Spender case, this incident raises the questions of whether, and indeed why, PRC courts have the authority to try a person for crimes committed in the SAR and whether the SAR's Justice Department prefers to abdicate its responsibilities in a criminal case if it might lead to a negative political reaction from the PRC?

Another case which is equally problematic concerns the decision by the Secretary for Justice Elsie Leung not to prosecute Sally Aw, Chairman of the Sing Tao Group which publishes an English language newspaper the *Hong Kong Standard*. (See also Chan's analysis in Chapter 6.) Three senior executives of the Sing Tao Group were prosecuted and jailed for fraud, for inflating the circulation figures of the *Hong Kong Standard* in order to boost advertising revenue in 1998, but Aw herself, named as a co-conspirator, was not prosecuted. This caused an outcry in the SAR. Speculation circulated as to the reasons for her special treatment. They include allegations that she was spared because she is a member of the Chinese People's Political Consultative Conference, an advisory body to the PRC government, or because the Chief Executive had previously served on the board of Sing Tao. Reacting to public pressure Secretary Leung explained that Aw was not prosecuted because it was not in 'the public interest' to do so since prosecution might lead to the collapse of her business empire. Leung elaborated on her reasoning by saying that 'apart from the staff losing employment, the failure of a well-established, important media group at that time could have sent a very bad message to the international community.'<sup>32</sup> Whether the Secretary for Justice acted entirely on the basis of her own judgement or not, her decision and reasoning have raised two important questions. First, does this not set a precedent which will encourage the super rich to ignore the law in Hong Kong provided they are major employers with an international profile and, thus, raise the prospect that the legal system will treat the rich and the poor differently? Second, does this not make a mockery of Article 25 of the Basic Law, by which 'all Hong Kong residents shall be equal before the law'?

While the four cases above have shown a pattern of behaviour which raises doubt as to the determination of the SAR government and its ranking law officer to uphold the law rather than yield to political considerations, except for the illegitimate immigrants case there is no evidence that the PRC government has put pressure on the legal or judicial process in Hong Kong. Even in the illegitimate immigrants

case what pressure Beijing applied at the time of the Court of Final Appeal's ruling was put on the SAR government rather than on the judiciary directly. Does the record of the PRC government in the first two years of the SAR therefore provide reasonable grounds to suggest it demonstrates sufficient commitment to the maintenance of the rule of law and judicial independence in the SAR?

Although the self-restraint which the PRC government has exercised so far should be recognized, it also needs to be put in context. In three out of the four cases examined above, the SAR government had gone out of its way to avoid any development which might provoke the PRC into taking actions against the judicial system in the SAR. The exception was the Sally Aw case, for which there is no tangible evidence to suggest the Secretary for Justice had acted to placate the PRC government. The reluctance of the SAR government to do anything about the Big Spender and Telford Gardens murder cases were clearly meant to neutralize any concern the PRC government might have in terms of any challenge from Hong Kong about the legality of its actions. Even in the illegitimate migrants case, once the PRC authorities indicated its displeasure over the alleged challenge by the CFA to the sovereign authority of the NPC, the SAR government promptly took the initiative to broker a compromise which Beijing accepted. However, as Wesley-Smith argues in Chapter 5, the public criticism of the Court's decision by quasi-government officials in the PRC 'came perilously close to infringing judicial independence' and the whole incident did 'a good deal of damage ... to the dignity and independence of the court'.

Nevertheless, in a strictly technical sense, neither was infringed upon. The PRC's record so far confirms that its policy towards Hong Kong has continued to be governed by the principle of exercising maximum flexibility within a rigid framework. While this remains true, the lack of direct interference into the legal and judicial processes in the SAR from the PRC is also, above all, because the PRC government has no reason or need to interfere. The SAR government has studiously made sure of that. The assumptions which the PRC authorities took in the Big Spender and the Telford Gardens cases remain a cause for concern. In neither case did the PRC authorities appear to feel restrained by Article 18 of the Basic Law which excludes the application of the PRC Criminal Code to the SAR. The fact that the SAR government has never raised this issue with Beijing does not mean it is not important.

All in all the record of Hong Kong in its first two years or so as the SAR is a mixed one. On the one hand the independence of the

judiciary has continued. The CFA has proved its mettle by resisting the temptation to bow to political and other considerations, even in the particularly controversial case of the illegitimate immigrants. On the other hand the SAR government and its Justice Department have on balance demonstrated a lack of determination to uphold the rule of law though they essentially respected the independence of the judiciary. The real commitment to the rule of law and judicial independence from the people of Hong Kong has just been put to the test. Their responses to the Chief Executive's move to circumvent the decision of the CFA over the illegitimate migrants case will provide good indication of their sense of commitment. The SAR government has so far disguised the issues and most people in Hong Kong have not yet realized that if they want to maintain the rule of law as the cornerstone for their future, they will have to be prepared to pay a price, which is that if the Court has ruled strictly in accordance with the law its decision must be respected, even if it should have undesirable social or economic consequences.

### **Continuity and changes**

How does this mixed picture of the SAR's commitment to the rule of law and judicial independence compare to the record of British Hong Kong? What do the differences amount to in reality? Does this mixed picture mean the rule of law and judicial independence still form the cornerstone of Hong Kong's future?

A useful starting point for looking at these questions is Munn's meticulously researched critical survey of the imperfection in the rule of law in the early years of British Hong Kong (see Chapter 2), which helps to put things in better perspective. It is important to remember that while Munn has documented several different ways by which the rule of law was circumvented, or set aside, in the first half-century of British administration, he nevertheless concludes that 'the rule of law still set the standards for government and justice in the colony'. One should also not lose sight of the fact that since the nineteenth century the world has changed and so have the standards and the public expectations of the standards in the rule of law, whether in Hong Kong or in the common law world at large. Despite the somewhat bleak account of early justice given by Munn, an imperfect start to the rule of law does not necessarily mean it cannot take root and flourish later. The rule of law can eventually thrive provided there is an institution or an authority higher than the local government which will provide

a redress to abuses. In the colonial period it was the existence of supervision from London, where its democratic government often checked excesses or rectified specific failings by colonial officials or judicial officers, that had resulted in, for example, administrative meddling and the miscarriage of justice.

In this new era when Hong Kong is a Chinese SAR, for which a high degree of autonomy is guaranteed in writing, the higher authority for this purpose is neither Britain, the old colonial master nor Beijing, the new sovereign power. It is or, at least, ought to be the Basic Law. Although the Sino-British Joint Declaration also provides for the rule of law and judicial independence in Hong Kong to be protected it is the Basic Law which ultimately matters. It is not only the legal instrument to turn the agreed principles in the Joint Declaration into reality but is also the constitutional instrument for the SAR – the ultimate point of reference for any dispute between the executive, legislative and judicial branches in Hong Kong. How effective it can be in replacing the role played by Britain before 1997 remains to be seen. In Chapter 3 Weng highlights the limitations which the Basic Law has for this purpose. In addition to a careful examination of the inadequacies of the Basic law, for example, in only preserving the independence of the courts and not of individual judges, he carefully analyzes in some detail the first major test of the Basic Law as the ultimate defender of the rule of law and judicial independence. As explained briefly earlier this involves the case of the right of abode for the illegitimate immigrants from China. On the basis of his research he concludes that while Hong Kong's government system was 'entrenched in the tradition of the rule of law and the principle of judicial independence ... there is little ground to assert that the principle of judicial independence will be upheld in the SAR as it was in the British period'.

As the constitutional instrument protecting the rule of law and judicial independence in the SAR, one issue which can cause serious reservation concerns its provision on national security – a cause which can be used to justify undermining these two principles on the ground of exigency. The relevant provision in the Basic Law is Article 23, which Fu examines in depth in Chapter 4. He not only gives the historical context for the inclusion of Article 23, which was essentially Beijing's response to the Tiananmen incident of 1989, but highlights the fact that even under British Hong Kong there was a body of law which could have met practically all the legitimate requirements for national security under Article 23 in a common law jurisdiction. It is worthy of note that despite the long existence of some fairly draconian

pieces of legislation, such as the Emergency (Principal) Regulations (1949) which could make it 'possible for the Hong Kong government, at least in principle, to abuse its extensive emergency powers in conditions which elsewhere would not have justified the use of such powers',<sup>33</sup> checks from London and self-restraint exercised by the government in Hong Kong had prevented serious abuse under the British. It is possible, as Fu argues cogently, to reconcile concerns over national security and the protection of human rights. A basic change that has happened in this connection inherent in the handover of sovereignty is the replacing of democratic and human rights respecting Britain by the authoritarian PRC where neither the rule of law nor respect for civil and political rights can be taken for granted. This difference is fundamental to the concern that Article 23 can neutralize the other elements protective of human rights in the Basic Law. It underlines the need to ensure the rule of law and the independence of the judiciary in the SAR. The fact that despite the modification of Article 23 and the passing of the Crimes (Amendment) Bill in 1997 incorporating 'secession' and 'subversion' as criminal offences into Hong Kong's body of law, the SAR government has not given notice to bring this amendment into effect and has not come under pressure from Beijing to do so is significant. It is further testimony to Beijing's adherence to the principle of exercising maximum flexibility within a rigid framework in matters dealing with the SAR.

Compared to the early years of British Hong Kong when it was treated by many of its residents as a kind of a colonial frontier town at a time when the rule of law in Britain itself was less well developed and entrenched than now, the SAR has the great advantage of having inherited a wealthy and sophisticated community in which an independent judiciary functions healthily and the rule of law is well established after 156 years of practising the common law. As Wesley-Smith explains in considerable detail (see Chapter 5) an entire infrastructure exists to buttress the institutional and individual independence of the judiciary and the rule of law, which were so much more tenuous in the nineteenth century. In his careful, detailed and perceptive study of the many different factors that affect the independence of judicial personnel and institutions, Wesley-Smith brings out clearly both the continuity and the changes between Hong Kong as a Crown Colony and a Chinese SAR. A basic issue which stands out in his inquiry is the simple fact that few, if anyone, questioned the many and various arrangements in place before the prospect of a transfer of sovereignty loomed because they were deemed to be consistent with

British experiences, but that they have become subjected to more searching standards as that prospect became a reality. The differences in the legal and judicial traditions in China and in a British jurisdiction, and the lack of confidence in the former, account for this shift.<sup>34</sup>

How well will the common law culture of Hong Kong, slowly but steadily acquired under British rule, survive and develop now that it is a Chinese SAR? A critical test of Hong Kong's commitment is the respect for the due process in the courts and by the government. Chan reviews in Chapter 6 a few particularly interesting and significant cases in the SAR. He points out that at first the Courts seem to have taken a restrained view of their role in cases where major government policies appeared to be at stake. They include the court's handling of the illegitimate migrants case before it eventually reached the CFA which, as explained earlier, took a much more robust stance than its lower courts. If Chan's concern over the courts' assertion over their independence can basically be laid to rest by the CFA's bold ruling over this case in January 1999, the same cannot be said of the SAR government. Chan's dispassionate and judicious study of various cases, including that of the non-prosecution of Sally Aw and the Xinhua News Agency (a PRC state organ that serves as cover for Communist Party's Work Committee) for what appeared to be a clear breach of the law, provide serious cause for reflection and concern.

The future of the rule of law and judicial independence also depends on the community's commitment, which is most effectively reflected in the existence of a free press. The role of the media is particularly important in Hong Kong since it still does not have a democratic political system and, in accordance with Annex II of the Basic Law, cannot have one before 2007. As Cullen explains in Chapter 7, Hong Kong had a free and very vibrant media under the British, which has survived the change of sovereignty. Nevertheless, the issues of press freedom and self-censorship in the formative period of the SAR are not simple ones. They are more than just a matter of whether the courts uphold the freedom of the press or whether the SAR government starts to infringe upon it, or if the PRC government has started to put pressure on the local media tycoons, though they are all important and relevant questions. They also depend on economic, financial, business or management calculations in the media world. Here, as Cullen highlights, even senior members of the press can prove a problem. The attack launched by the publisher of the *Mirror* magazine on Radio Television Hong Kong in March 1998 is a case in point. It is important to recognize that the judiciary is a key agent in maintaining the

freedom of the media, and a free press, in turn, has a vital role to play in supporting the rule of law and the independence of the judiciary. Whether this somewhat symbiotic relationship can develop into a virtuous circle in the new political environment of the SAR remains to be seen.

This brief survey of Hong Kong's commitment to the rule of law and judicial independence suggests that while the community as a whole is keen, often taking it as an article of faith, the same cannot be said of its government after the change of sovereignty. Despite its public rhetoric the SAR government seems to support them more for pragmatic calculations than as a matter of principle. As Goodstadt aptly observes in Chapter 8, expressing verbal commitment is useful to the SAR government as it distracts public attention from the retrogression in democratic development following the handover, helps to maintain business confidence, and reassures the general public that their way of life has not changed. The PRC government has likewise accepted this state of affairs out of utilitarian considerations. Beijing is keen to make a success of the takeover for prestige and for practical reasons. It sees the existence of a stable legal order as the key to the economic miracle of postwar Hong Kong. It is prepared to keep this going, as Hong Kong makes a vital contribution to the success of economic reform on the mainland, and its legal order serves as a useful point of reference to Chinese reformers who want to build up a legal system which will ensure political stability amid rapid, major economic changes in an authoritarian political order. The extent of Chinese pragmatism in this matter was reflected in the negotiations which they had with the British in setting up the CFA in the twilight years of British rule. However, the PRC government's handling of the Big Spender and the Telford Gardens murder cases as well as the ruling by CFA over the illegitimate migrants demonstrates the harsh reality. Despite its policy of non-interference, the PRC government does not understand what the rule of law in Hong Kong means; certainly not the principle that it is there to protect the rights of individuals rather than to further government policies. Thus, the continuation of the rule of law and an independent judiciary in the first two years of the SAR is no ground for complacency. As Goodstadt aptly highlights vested interests and the SAR government, if not the PRC government itself, must join with the general public in Hong Kong and display a commitment beyond rhetoric and expediency which is rooted in genuine respect for the principles before the rule of law and judicial independence can really entrench themselves in the SAR.

## Notes

1. See, for example, Ming Chan, 'The Legacy of the British Administration of Hong Kong: A view from Hong Kong', *The China Quarterly*, no.151 (1997), pp. 567–82.
2. For the defining characters of a Marxist–Leninist system as a distinct subset of the world's political system see Archie Brown, *The Gorbachev Factor* (Oxford: Oxford University Press, 1996), p. 310.
3. *Yiguo Liangzhi Chongyao Wenxian Xuanbian* (Beijing: Zhongyang wenxian chubanshe, 1997), p. 306 (speech by Qian Qichen).
4. *South China Morning Post (SCMP)*, 2 July 1997 (Jiang's speech at the SAR establishment ceremony); Guo Shiping and Qian Xuejun, *Jiuqi hou Zhonggang Xinguanxi* (Hong Kong: Taipingyang Shiji chubanshe, 1998), p. 53. The head of state in the PRC is in Chinese 'Chairman of the state' though it is often translated into 'President' in English.
5. Steve Tsang, 'Changes in Continuity: Government and Politics in the Hong Kong Special Administrative Region', *American Asian Review*, Vol.XV, no.4, Winter 1997, pp. 51–2.
6. For a detailed examination of this policy, see Steve Tsang, 'Maximum Flexibility, Rigid Framework: China's Policy Towards Hong Kong and its Implications', *Journal of International Affairs*, Vol.49, no.2, Winter 1996, pp. 413–33; and Steve Tsang *Hong Kong: An Appointment With China* (London: I.B. Tauris, 1997), especially pp. 132–55.
7. *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (Hong Kong: Government Printing Department, undated), p. 23 (Art. 24).
8. *Immigration Department Annual Report 1997/1998* (Hong Kong: HKSAR Immigration Department, undated 1999), pp. 55–6.
9. Quoted in Frank Ching, 'Judgement Call', *Far Eastern Economic Review (FEER)*, 18 February 1999, p. 21.
10. *Ibid.*, pp. 20–1.
11. Albert H.Y. Chen, *The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case: Congressional Supremacy and Judicial Review* (Law Working Paper no.24), (Hong Kong: Hong Kong University Law Faculty, 1999), p. 1.
12. Alkman Granitsas, 'Compromising Issue', *FEER*, 11 March 1999, p. 20.
13. Albert H.Y. Chen, *The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law* (Law Working Paper no.23), (Hong Kong: Hong Kong University Law Faculty, 1999), p. 1. Chen is a leading advocate that the Court was wrong in its judgment.
14. Granitsas, 'Compromising Issue', *op. cit.*
15. Frank Ching, 'Inviting Trouble', *FEER*, 21 January 1999, p. 23.
16. Frank Ching, 'Scare Tactics', *FEER*, 13 May 1999, p. 18.
17. Rachel Clarke, 'Tung to seek law change to beat \$71b migrants bill', *SCMP*, 6 May 1999.
18. For a sceptical view of the SAR government's calculation see, for example, 'True test of the SAR's mettle', *SCMP*, 7 May 1999.
19. *Right of Abode: The Solution*, paper tabled by the SAR government at the

- Legislative Council House Committee special meeting on 25 May 1999, paragraph 7.
20. Ching, 'Scare Tactics', pp. 18–19.
  21. *Ibid.*, p. 19.
  22. Jimmy Cheung and Angela Li, 'NPC likely to intervene', *SCMP*, 7 May 1999.
  23. The NPCSC duly accepted the SAR government's request to reinterpret sections under Articles 22 and 24 of the Basic Law at the end of June 1999. Chris Yeung, 'NPC lays down the law', *SCMP*, 27 June 1999.
  24. R. Allcock, 'NPC's Standing Committee must decide', *SCMP*, 19 May 1999.
  25. Angela Li, 'Justice chief's view of law branded "terrifying"', *SCMP*, 22 July 1999.
  26. Frank Ching, 'Another Place, Another Crime', *FEER*, 5 November 1998, p. 26.
  27. Cheung was executed shortly after his appeal was dismissed. The execution verdict was returned not for the kidnapping but for firearms and smuggling offences for which he was also charged and prosecuted.
  28. 'Regional Briefing', *FEER*, 29 April 1999, p. 17.
  29. See Richard Cullen and H.L. Fu, 'Some Limitations in the Basic Law Exposed', *China Perspectives*, no.22, March/April 1999, pp. 54–7.
  30. Margaret Ng puts her case on a different basis. M. Ng, 'Fundamental Questions Raised by the Trial of Cheung Tse Keung and Others', *Policy Bulletin*, no.9, February/March 1999 (Hong Kong), p. 3.
  31. See, for example, *The Basic Law*, p.94 (Decision of the NPC on the Establishment of the Hong Kong SAR); and Xiao Weiyun (ed.), *Yiguo Liangzhi yu Xianggang Tebie Xingzhengqu Jibenfa* (Hong Kong: Wenhua Jiaoyu chubenshe, 1990), pp. 63–5.
  32. Quoted in *The Financial Times*, 5 February 1999.
  33. Steve Tsang (ed.), *Government and Politics: A Documentary History of Hong Kong*, Volume 1 (Hong Kong: Hong Kong University Press, 1995), p. 53.
  34. For an excellent exposition of the Chinese legal tradition, see Philip C.C. Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford: Stanford University Press, 1996).

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