

TEXT, CASES
and
COMMENTARY
on the
HONG KONG
LEGAL SYSTEM

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Introduction

The parameters of Hong Kong's "legal system" are not clearly defined. I have, broadly, covered those topics encompassed in the syllabus for "Hong Kong Legal System", as required for the pre-PCLL "conversion" examination for this subject. As such, this book should be very useful for those intending to take this examination, especially those preparing via self-study. However, I hope that by including a wide range of learned and thought-provoking readings I have produced a book that will be of interest to those (legal scholars and others) with no "functional" motive. This, I hope, will include those outside Hong Kong since, surely, Hong Kong's current system, influenced by internal and external forces, civil and common law, is unique.

Given that this unique system owes much to a "constitutional" document, Hong Kong's Basic Law, it is inevitable that there is a blurring of the lines between legal system and constitutional law. There is herein, as a result, significant reference to the Basic Law, specifically, and to the Deng Xiaoping-inspired "one country, two systems" doctrine generally. However, I do not claim to be a constitutional law expert and I have made numerous references to the work of such experts which will, hopefully, inspire the reader to look more closely at the constitutional position.

Similarly, while the aforementioned "Hong Kong Legal System" syllabus requires an introductory knowledge of the PRC legal system, I am not an expert thereon and have referred to works by those who are. Students able to read texts in Chinese will have an advantage, in attempts to deepen their PRC law expertise, over the rest of us.

Given the broad scope of this book and the dynamic nature of many of the included topics, the subject is constantly in flux. To take just one example, I mentioned (in my first draft) a relatively minor dispute relating to "anti-hawking" activities in Mong Kok at Chinese New Year, 2015. Twelve months later a similar dispute escalated into a "riot", participants in which have received lengthy prison sentences. This incident and its possible repercussions, given the opportunism of the pro-Beijing camp, threaten the very fabric of "one country, two systems". I have little doubt that, by the date of publication, some of the material herein will be superseded by events. There are times, perhaps, when one envies the scholar of Roman law!

Crucial to Hong Kong's success and well-being is a sustained international recognition of the continuation of the rule of law and an independent judiciary; the cornerstones of "two systems" and, in comparison with the legal system of mainland China, "Hong Kong's difference". Thus far these tenets have been maintained, in the face of enormous political pressure and despite an unsympathetic and increasingly pliant Hong Kong government. Optimism that "two systems" will survive after the 50 years guaranteed by the Basic Law (or even that long) is receding, but Hong Kong has proved its resilience over the years and we can still hope.

MJF

The Development of the Hong Kong Legal System, 1842–1997

OVERVIEW

When the British first came to Hong Kong they found a territory vastly different from the one we know today. Wesley-Smith¹ writes:

When Hong Kong was first taken over by the British it was rumoured to be a barren rock with hardly a house upon it. The island's few inhabitants were peasants and fishermen who lived under the rule of Chinese law and custom.²

The population of Hong Kong Island in 1841, when the British flag was first raised, was around 5,000.³ While that small population had previously been subject to the rule of the Chinese emperor, there was no complex, developed legal system in operation. Indeed, Ip writes that there “was not even a civil or military presence there.”⁴

The initial approach of the British was to allow Hong Kong's Chinese inhabitants to retain, generally, their previous laws and customs but to impose British law on non-Chinese. This approach gradually gave way to one in which British law would apply unless it ran counter to existing (Chinese) custom and practice. In most situations there was little difference, in practical effect, between the two approaches. This recognition of Chinese customary law became increasingly important with the annexation of the New Territories in 1898, adding around 100,000 largely rural dwellers to Hong Kong's population.

The system whereby English common law operated in Hong Kong unless inapplicable to Hong Kong's situation or specifically amended in Hong Kong remained essentially unchanged until the resumption of sovereignty of Hong Kong by China in 1997. Indeed, to a considerable extent, the system remains today, as a result of the

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1. Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (1st edn, Oxford University Press 1987).
 2. Ibid 35. By the 3rd edition Wesley-Smith omits reference to the “barren rock”, first attributed to Lord Palmerston, British foreign secretary and later prime minister. The “rock” was indeed barren but this was the result of tree-felling for charcoal rather than soil infertility.
 3. The estimate of various historians ranges from 5,000 to 10,000.
 4. Eric Ip, *Law and Justice in Hong Kong* (2nd edn, Sweet & Maxwell 2016).

guarantee in the Basic Law of the continuation of the “laws previously in force” for (at least) 50 years from 1997.⁵

1.1 The British occupation of Hong Kong

Writing in 1991, Miners⁶ states:

Hong Kong exists as a separate territorial unit today because of military aggression against the Chinese empire in the nineteenth century.⁷

Curiously, however, the acquisition of Hong Kong was almost accidental, as opposed to part of a planned strategy. At the commencement of the “First Opium War” (1840–1842) Lord Palmerston, British Foreign Secretary, had ordered Rear-Admiral George Elliot and his cousin Captain Charles Elliot to demand restoration of goods (impounded opium), satisfaction for a previous “affront” to Admiral Elliot, security for British traders and payment of debts to British merchants. This was to be either via cession of an island, or through a treaty allowing factories to be set up on the mainland. The aim, as articulated by Lord Palmerston, was “satisfaction for the past and security for the future”.⁸

Hong Kong was viewed as an excellent port because of its deep water (far superior to (then Portuguese) Macau) but “a long voyage from Macau and Canton”.⁹

Eventually, a somewhat reluctant Captain Elliot,¹⁰ now in charge of the British forces,¹¹ insisted on the cession of Hong Kong as part of the Convention of Chuenpi¹² (never ratified) in 1841, which followed a successful British expedition to seize the “Bogue forts”¹³ on the Pearl River leading to Canton (Guangzhou).

Following further hostilities and several British victories, Hong Kong was ceded to Britain “in perpetuity” under the subsequent Treaty of Nanking, signed in 1842.

Later, after the “Second Opium War”, China ceded the Kowloon peninsula to Britain, again “in perpetuity” under the Convention of Peking (Beijing) in 1860.

Finally, in 1898, Britain obtained the New Territories and Outlying Islands, via a further Convention of Peking (also known as the Convention for the Extension of

5. This is the combined effect of Articles 8 and 159 of the Basic Law, Hong Kong’s post-1997 quasi-constitution.

6. Norman Miners, *The Government and Politics of Hong Kong* (5th edn, Oxford University Press 1991).

7. *Ibid* 3.

8. Kevin Rafferty, *City on the Rocks* (Viking 1990) 115.

9. See Roger Houghton, ‘A People’s History 1793–1844 from the Newspapers’ <<http://www.houghton.hk/>> accessed 4 January 2018.

10. Elliot opposed opium use and, in a proclamation of 11 September 1839, stated: “I will not protect opium smugglers. The smugglers have put our lawful trade at risk.”

11. His cousin had resigned because of ill health.

12. Signed at Shajiao Fort.

13. A corruption of the Portuguese “Bocca Tigris” (tiger’s mouth), itself a translation of the Cantonese “Fu Moon”.

Hong Kong) taking advantage of China's defeat in war with Japan. This latter acquisition, however, was, crucially,¹⁴ under a 99-year lease, which expired in 1997.¹⁵

1.1.1 *Captain Elliot's proclamation(s)*¹⁶

Captain Elliot¹⁷ declared British sovereignty over Hong Kong on 26 January 1841 and, six days later, proclaimed that:

the natives of the Island of Hong Kong and all natives of China thereto resorting, shall be governed according to the laws and customs of China, every description of torture excepted.¹⁸

The proclamation(s),¹⁹ therefore, envisaged a binary legal system; one law applying (generally) to Chinese citizens and the other to non-Chinese. That this was the effect of the proclamation(s) the Hong Kong courts have endorsed on a number of occasions.²⁰

Elliot's declaration, whereby the inhabitants of Hong Kong would have been subject to alternative systems of law dependent on their nationality, the British soon sought to recant,²¹ on the basis that Elliot had no authority to make such a proclamation.²² The editor of the newspaper "Friends of China" stated that:

we doubt Elliot has authority to found a civil government on Hong Kong or sell any land (as he purported to do). We cannot even say whether the British government will retain the island.²³

Moreover:

These two Proclamations were . . . mere interim measures. The Treaty of Nanking, by which Hong Kong was formally ceded to Great Britain, was signed in 1842 and . . . provided that Hong Kong 'was to be governed by such laws . . . as Her Majesty . . . shall see fit to direct.'²⁴

14. See 1.5 below.

15. Miners (n 6) states that Britain would have preferred an "outright" cession but was hampered by the agreement of leases by the other colonial powers.

16. There were, strictly, two proclamations: one issued to the inhabitants of Hong Kong and the other (not identical) issued generally.

17. Officially "Chief Superintendent of Trade".

18. See GB Endacott, *A History of Hong Kong* (2nd edn, Oxford University Press, Hong Kong 1988) 26.

19. The first proclamation (of 1 February) was issued jointly with Commodore Bremer. The second (2 February) was issued by Elliot alone.

20. See 1.2 below.

21. Though they had always insisted that British in China would not be subject to Chinese law!

22. Elliot's conciliatory approach was viewed by Palmerston as a negation of Britain's military superiority.

23. R Houghton (n 10).

24. PC Woo, moving a resolution in the Legislative Council (LegCo), 7 May 1969.

Elliot was recalled to Britain and replaced by the more bellicose Sir Henry Pottinger.²⁵ However, despite doubts as to his authority,²⁶ Elliot's proclamation (or proclamations) remained an important constitutional document, relied on by the courts on numerous occasions.²⁷

1.2 The reception of English Law

Wesley-Smith²⁸ writes:

Even if the first British officials had bothered to look for it and utilise it, the Chinese legal system as it existed in Hong Kong was scarcely appropriate for the kind of place the colony was destined to become. In any event, the new rulers were intent on establishing a legal system which was familiar to them and which was assumed to be far superior to anything found in the Chinese empire . . .

One of the first things to do, therefore, was to introduce English law into Hong Kong.²⁹

The decision to import English law contradicted Captain Elliot's initial proclamation(s) of 1841, when he first took possession of Hong Kong Island. The revised position, following the ratification of the Treaty of Nanking in 1843, was that, instead of Chinese citizens continuing to be subject (in most cases) to Chinese law, English law would operate in Hong Kong *unless* it conflicted with the customs or circumstances of Hong Kong. Wesley-Smith, again, writes:

From 1846 to 1966, the formula by which English law was received into Hong Kong applied the laws of England which existed on 5 April 1843, the day Hong Kong obtained a local legislature. There was a proviso, however: English law considered not suited to the circumstances of Hong Kong or of its inhabitants was excluded. The intended result was to provide a basic source of legal precepts which, though developed thousands of miles away in response to the notions and traditions of the English people, could be fashioned in accordance with local needs and conditions.³⁰

While notionally different, and appearing to involve a different presumption (that English law *would* apply to Hong Kong Chinese citizens "*unless*" . . .) the reception of English law *practically* differed little from Elliot's design in most cases. English law would not apply if contrary to local custom. What would be the major indicator of local custom? In practice, it would be the existence of already established "laws

25. Endacott (n 19) states that Pottinger initially supported Elliot's "dual system" approach but later changed his mind. Tsang states that the British Government ordered Pottinger to disavow the dual system: Steve Tsang, *A Modern History of Hong Kong* (Hong Kong University Press 2004) 23.

26. See DME Evans, 'Common Law in a Chinese Setting' (1971) 1 HKLJ 9.

27. See, eg, *Chan Shun Cho v Chak Hok Ping (Re Chak Chiu Hang)* (1925) 20 HKLR 1; *Ho Tsz Tsun v Ho Au Shi & Others* (1915) 10 HKLR 69 discussed below.

28. Note 1.

29. *Ibid* 38–39.

30. *Ibid* 35.

and customs of China”. The practical continuance of Elliot’s “duality” concept may be seen in a number of cases, some of which will now be considered.

In *Ho Tsz Tsun v Ho Au Shi & Others*³¹ the Hong Kong Court of Appeal was called upon to determine the application of a Chinese will in Hong Kong and acceded to a request to insert the words “in accordance with Chinese law and custom” after the words “next of kin” in varying a judgment of the Chief Justice. The court president, Havilland De Sausmarez, stated:

We have in the Colony two systems of distribution, one under the Statute [of Distributions] which has been recognised by the Courts, and the other the Chinese law of inheritance or succession which according to the evidence is and always has been observed by Chinese residents . . .

. . . the practice in the Colony appears to have been to apply Chinese law to the devolution of the personalty of Chinese, and the Statute of Distributions to that of non-Chinese, and unless this is the rule, it is clear there will have to be legislation, as it is manifestly impossible that the legal system of either should apply to the other. But I have come to the conclusion that the practice is in conformity with the law . . .

. . . I have no doubt that the island was, prior to its cession, part of the dominions of the Emperor of China, and that its inhabitants were subject to Chinese law and custom . . . If proof of this were needed . . . we have it in the proclamation of Captain Elliot . . . and a similar proclamation was made in Chinese to the inhabitants . . .

. . . The common law of the Chinese is preserved, torture, which was prevalent, was excepted, and the foreigner is excepted from the common law of China and subjected to ‘British law’.³²

Similarly, in *Chan Chun Cho v Chak Hok Ping*,³³ a case involving an inheritance dispute, Sir Henry Gollan CJ stated:

Hong Kong is a colony obtained by cession from China and consequently the laws of China as in force in Hong Kong at that time remained operative, except such as were contrary to the fundamental principles of the English law e.g. laws permitting of torture, slavery etc. and subject to the right of the Crown to alter and change those laws . . .

Two proclamations were issued by Captain Elliott [*sic*] . . .

. . . these proclamations recognise a dual prospective system of law in the Colony. So far as British subjects and foreigners are concerned, security and protection according to the principles and practice of the British law are extended to them; whilst in the case of the Chinese the laws and customs of China are reserved in their favour.

31. (1915) 10 HKLR 69.

32. *Ibid* 72–76.

33. (1925) 20 HKLR 1.

Except, therefore, in so far as the laws and customs of China have been altered by legislation or Orders in Council in the nature of legislation and subject to the conditions above specified, those laws and customs as existing on the dates of Captain Elliott's [*sic*] Proclamations would continue to apply to 'the natives of the Island of Hong Kong and all natives of China thereto resorting.'³⁴

This "dual" approach to the "applicable law", based on ethnicity, was not unproblematic. What would be the position, for example, of those with dual ethnicity? Or those Hong Kong Chinese who wished, for example, to adopt the English rules on marriage or inheritance? And, where Chinese law was found to be applicable, should it be that obtaining at the date of Elliot's proclamation, or the date of trial? Some illustration of the difficulties is afforded in the case of *Tse Moon-sak v Tse Hung & Others (In re Tse Lai-chiu, deceased)*³⁵ involving the validity of a will made, in 1958, by a Chinese resident of Hong Kong. The case concerned an apparent conflict between section 5 of the Supreme Court Ordinance³⁶ and section 3 of the Wills Ordinance.³⁷ The former legislation incorporated the principle that English legislation in existence in 1843 (when Hong Kong first obtained a legislature) would apply to Hong Kong unless (locally) inapplicable or locally modified. The latter (Wills) legislation rendered valid wills made according to Chinese law by anyone "native of or domiciled in" Hong Kong or China. The specific issue was whether a testamentary disposition could be valid given the (asserted) rule that Ch'ing law regarded property as belonging to the family rather than an individual.³⁸

In reaching its decision the court adopted the principle that English law would apply unless its application would cause "injustice or oppression". Hogan CJ's judgment reveals a subtle reassessment of the significance of Captain Elliot's proclamation. He states:

The primary question for the court is whether the deceased, who was Chinese by race and domiciled in Hong Kong, was able by this will to exercise a testamentary capacity in accordance with English law. If that question were to be answered in the negative, a further question would arise as to whether the law applicable to the testator's will would be Chinese law as it stood when Hong Kong was ceded or some different or later form of Chinese law and custom . . .

. . . if it had been thought that the relevant English Law was not applicable to the circumstances of those, probably mainly fishermen, who were resident in Hong Kong in 1843 because, for example, of unfamiliarity with the system, would this necessarily mean that sophisticated individuals of the same race now in the Colony, who have long been accustomed to the comparatively cosmopolitan atmosphere which

34. Ibid 3–5.

35. [1969] HKLR 159.

36. Cap 4 (and see 1.2.2).

37. Cap 30.

38. A further argument that international law forbade testamentary capacity for Chinese was rejected.

has grown up here and the application of English principles of law and equity in so many matters, should be similarly precluded from the application of English Law?
 . . .

The earlier judgments were clearly influenced . . . by the terms of Captain Elliot's proclamations and they may have tended to impose on the relevant sections of the substantive law an interpretation attuned to giving effect to these proclamations, without making adequate allowance either for the difference in language or for the temporary nature of those parts of the proclamations . . . to making interim arrangements . . . in so doing, they have reversed the approach adopted in the legislation and have virtually assumed that Chinese law and custom should be applied unless found unsuitable whereas the legislation clearly indicates that English law will prevail, unless there are circumstances affecting the inhabitants which make it inapplicable . . .

I cannot think that in the circumstances prevailing in 1960, and indeed for many years before, it could seriously be contended that to permit the deceased to exercise the testamentary capacity . . . could be classified as unjust or oppressive . . . Consequently I think the testamentary capacity of the deceased is to be determined by referring to English law.³⁹

This lengthy extract highlights the court's view of changing circumstances. Chinese law, at the time of cession, was the "law of the land" in Hong Kong and would remain in force in the absence of English law rules to the contrary. However, it could not prevail over English law unless the latter operated "unjustly or oppressively". There would now be situations where, far from having English law *imposed*, Hong Kong Chinese citizens might welcome the adoption of English legal rules. Where there was no applicable English law, however, the court accepted that the court would require evidence of relevant Chinese law and custom, leaving vague the question of whether this would be 1843 Chinese law and custom or that of later amendment.

1.2.1 The mechanism for the reception of English law

The constitutional mechanism whereby the new, colonial procedures were implemented involved the introduction of two documents. The first, known as the "Letters Patent",⁴⁰ outlined the constitutional structure and conferred powers upon the Governor, while making provision for the assistance of an Executive Council and Legislative Council. The second constitutional document, the "Royal Instructions", set out the rules relating to the composition of the Executive and Legislative Councils and detailed the procedures to be observed in the passing of laws.

After 1843, this constitutional framework allowed laws to be created in Hong Kong. The first significant example was the Supreme Court Ordinance of 1844.

39. *Ibid* 164–193.

40. "Patent" indicated openness, transparency.

1.2.2 The Supreme Court Ordinances

The purpose of the Supreme Court Ordinance 1844 was to incorporate the laws of England into Hong Kong law. English laws were to have effect in the colony except where inapplicable to local circumstances in Hong Kong or its inhabitants. Amendments to the legislation in 1845 and 1846 established that only English laws existing before the institution of a separate Hong Kong legislature in 1843 would automatically apply, *prima facie*, in Hong Kong.

A further Supreme Court Ordinance, of 1873, added the further significant restriction that English laws would not be applicable in Hong Kong where they had been amended by local legislation.

The Supreme Court Ordinances also established the court system of Hong Kong. Although, technically, no distinction was drawn between legislative and common law English rules,⁴¹ in practice English post-1843 *statutory* rules (established by legislation) would not apply in Hong Kong (unless expressly or implicitly intended to have such effect) while *common law* (non-statutory) rules, established by the English courts post-1843, took effect in Hong Kong, unless inapplicable, via the “fiction”, known as the “declaratory” theory, whereby decisions of the court are deemed to have “explained” what the common law has always been.⁴²

1.3 The Application of English Law Ordinance

Because it became increasingly difficult to determine which laws were in force in England in 1843, and because many of such laws had been superseded by Hong Kong “domestic” legislation, the Application of English Law Ordinance⁴³ (AELO) of 1966 was passed. The Ordinance:

... split English law into two types (enactments, and common law and equity), dealt with each separately, and deleted the [1843] cut-off date.⁴⁴

Section 3 of the Ordinance provides that the common law and the rules of equity⁴⁵ shall be in force in Hong Kong:

- (a) so far as they are applicable to the circumstances of Hong Kong or its inhabitants;
- (b) subject to any modifications as such circumstances may require;
- (c) subject to any amendment thereof (whenever made) by:
 - (i) any Order in Council which applies to Hong Kong;
 - (ii) any Act which applies to Hong Kong;
 - (iii) any Ordinance.

41. For further discussion of the distinction between statutory and common law rules, see Chapter 2.

42. The declaratory theory has since been declared a myth: see Chapter 2.

43. Cap 88.

44. P Wesley-Smith (n 1) 40.

45. The concepts of common law and equity will be discussed in depth in Chapter 2.

Significantly, the 1843 cut-off date was abolished so that post-1843 common law and equitable developments would be applicable in Hong Kong. As has been noted, this legislative change largely gave force to existing practice whereby post-1843 common law rules continued to be incorporated via the “declaratory” fiction.

Section 4 of AELO stated that Acts of Parliament were to be in force in Hong Kong only if contained in the “schedule” (which contained only pre-1843 legislation) or where they were expressly or implicitly applicable to Hong Kong. The schedule had been drawn up after considerable scrutiny and was limited to those Acts relevant to Hong Kong. The list could be amended by the Legislative Council (LegCo) and, by 1997, was very short. AELO was not adopted as a law of the Hong Kong Special Administrative Region (HKSAR) following the resumption of Chinese sovereignty of Hong Kong on 1 July 1997; so the possibility of subsequent British legislation having effect in Hong Kong ended.

The effect of AELO seems, at first sight, to be relatively straightforward: the English rules of common law and equity would continue to operate in Hong Kong (irrespective of the date of their formation) while post-1843 statutes would apply only if specifically applicable to Hong Kong. The legislation was intended to facilitate considerably the task of legal “research”. Legal advisers seeking to determine the applicability of English legislation would only have to look at the schedule and a list of post-1843 legislation specifically stated to apply (or implicitly applicable) to Hong Kong.

The position in relation to common law and equity as developed through case law was, indeed, relatively simple. The cut-off date had largely been ignored anyway via the “declaratory” principle whereby an overruling precedent is “deemed” not to be creating new law but merely “explaining” what the common law always has been! This “fiction”, recognised as such and finally abolished by the English courts (post-1997) had the useful function of preventing Hong Kong law being dominated by English rules long considered to have outlived their usefulness.

In respect of statutes, unfortunately, AELO’s application in Hong Kong was problematic. A statute passed in the British Parliament might, of course, amend the English common law.⁴⁶ The statute would not be listed in the schedule and might not be directly applicable to Hong Kong. However, in so far as the legislation affected the English common law which *was* to be applicable, irrespective of its date of origin, the legislation would appear, *indirectly*, to apply in Hong Kong. The amendment of the English common law by English legislation thus produced a dilemma. If the amended law were to be deemed part of Hong Kong law it would mean that legislation not stated to apply in Hong Kong nor applicable by implication, would still be applicable in Hong Kong as part of the “revised” English common law. But this would negate the apparent legislative purpose of allowing, *prima facie*, common law rules to apply in Hong Kong but not, *prima facie*, legislative ones. Alternatively,

46. This would occur, at the latest, as soon as English courts had interpreted and applied the statutory rule.

to preclude the effect of “non-applicable” legislation would mean that Hong Kong would be applying an English common law no longer applicable in England itself.

To take an example, the doctrine of part performance was introduced in equity in response to the rigidity of the Statute of Frauds 1677 requirement that contracts for the disposition of land must be evidenced in writing. Part performance allowed the enforcement of a “land contract” where acts had been done which pointed inevitably to the conclusion that a contract (albeit not one evidenced in writing) had been concluded. The equitable doctrine of part performance was specifically endorsed by Parliamentary enactment of 1925, namely section 40(2) of the Law of Property Act. This subsection was re-enacted in Hong Kong by section 3(1) of the Conveyancing & Property Ordinance (CPO)⁴⁷ though, as part of the English common law,⁴⁸ it was presumably already part of Hong Kong law (section 3(1) serving merely to consolidate existing rules). The doctrine of part performance was abolished in England by subsequent legislation: the Law of Property (Miscellaneous Provisions) Act 1989. This *statutory* rule, of course, had no direct effect in Hong Kong. Could it take *indirect* effect in Hong Kong as an amendment to the English common law? The answer is no, since it would be inconsistent with Hong Kong legislation (the CPO). Thus, part performance, long-abolished in England whence it originated, remains part of Hong Kong law, post-1997, unless and until repealed in Hong Kong.⁴⁹

But what if the relevant consolidating section of CPO had *not* been enacted? In such circumstances the revised English common law would, indirectly, apply to Hong Kong under section 3 of AELO. By way of a further contract example, the archaic action for breach of promise of marriage was abolished in England in 1970. The relevant statutory rule, section 1 of the Law Reform (Miscellaneous Provisions) Act 1970, had no express or implicit relevance to Hong Kong so was not directly applicable in Hong Kong. Nonetheless, since breach of promise of marriage ceased to be part of the (revised) English common law by virtue of the English statute, it has never been doubted that, by virtue of section 3 of AELO, Hong Kong’s common law has been similarly amended, albeit indirectly, by the (legislative) change to the English common law.

Although AELO was “not adopted”, post-1997, as part of the law of the Hong Kong SAR, this change was relevant only to the inability of the English Parliament, or courts, to legislate, or establish common law rules, for Hong Kong *post-1997*, since Articles 8 and 18 of the Basic Law maintain (subject to exceptions)⁵⁰ the laws “previously in force” in Hong Kong on 1 July 1997. Indeed, under Article 8, the existing rules of common law and equity are *specifically* stated to remain in force (subject to exceptions), unless amended.

47. Cap 219.

48. “Common law” here means “non-statutory” law so, confusingly, includes principles of equity (see Chapter 2).

49. Article 8, Basic Law maintains the rules in force on 1 July 1997 (and see Chapter 2).

50. See Chapter 2.

The HKSAR and PRC Legal Systems Compared

OVERVIEW

It is clear that, in a work of this kind, consideration of the vast and complex area of the comparison between the legal systems of the Hong Kong SAR and the (mainland) People's Republic of China (PRC) needs to focus on “macro” issues. This chapter will consider the *core features* of Hong Kong's common law system and contrast these with the situation obtaining in the PRC.¹

The key, broad focus will be the “rule of law” in Hong Kong; what it means and the extent to which it is to be found in the PRC's rapidly developing legal system. In so far as consideration is given to specific “micro” issues, these will be by way of illustration of more general principles rather than as part of a detailed study of the PRC legal system, for the study of which students should refer to texts dedicated to this subject.²

While the PRC, in the past 30 or so years, has made enormous and rapid strides towards the development of a modern legal system, with a huge expansion of courts, judges, lawyers, legal assistance and alternative dispute resolution, a key consideration is the extent to which law in *practice* reflects the legal *form* in the PRC (what socio-legal writers describe as the “law in action/law in books” dichotomy) given, especially, the vastness of China and the practical problem of efficiently delivering centrally introduced reforms to the provinces.

11.1 The “two systems” aspect of “one country, two systems”

It is accepted, and indeed affirmed in the Basic Law, that Hong Kong's is a “common law” system.³ While, as has been noted, that expression is capable of differing meanings, in this context it refers to a system of law deriving initially from the

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1. In adopting a “generalist” approach, this chapter reflects the approach of the syllabus for Hong Kong Legal System, as approved for the PCLL “conversion examination”; namely that the focus should be on the “essential differences” between the two systems.
 2. A particularly recommended text is Professor Albert Chen, *An Introduction to the Legal System of the PRC* (4th edn, LexisNexis 2011).
 3. See especially Articles 8, 18, and 84 of the Basic Law.

English courts and adopted subsequently in various jurisdictions, *usually* having colonial links with Britain.⁴

A general characteristic of common law systems is their emphasis on “judge-made” law, law which derives *primarily* from cases, amended and supplemented as these may be by legislation.⁵

But if Hong Kong’s system is uncontroversially a common law one, what of the PRC system? It is most commonly described as a “civil law” one; that is, a system deriving from the “codification of law” approach of the Roman Empire subsequently adopted and spread, particularly by Napoleonic and post-Napoleonic France. But the ascription “civil law” is not uncontentious. Indeed, the first point to stress is that the whole concept of law and any sort of legal system has only recently re-emerged in the PRC. Chen,⁶ in describing “The Legal History of Modern China”,⁷ notes that the first “belated efforts” to modernise the Chinese legal system were not made until the early part of the twentieth century and adds that: “The Qing empire was overthrown in 1911 before it began to implement the new laws which had been drafted.”⁸

Chen goes on to state that:

In the period 1928–1935, a series of comprehensive codes of law were promulgated. They were partly based on the European (civil) continental model (such as the laws of Germany, Japan and Switzerland), partly on the Anglo-American model, and also to some extent on the existing traditions of the late Qing and warlord periods.⁹

Most significantly, however, *all* this extensive legal development was swept away during the Cultural Revolution in which:

The demise of the legal system . . . was not merely an incidental side-effect of the fanatic and violent political campaign . . . The legal system was one of the targets of deliberate attacks by the radicals. The very idea of law was discredited and held in contempt . . . legal institutions were attacked and paralysed or dismantled. Law schools were closed down. Members of the legal community were persecuted or forced to shift to other kinds of work. In short, law neither existed as an academic discipline nor as a rational mechanism of social control . . . It was not until 1972 that the court system was gradually re-established. The procuratorates [prosecuting departments] . . . were not resurrected until 1978.¹⁰

4. Occasionally, for political reasons, a jurisdiction may adopt the “common law” as a deliberate rejection of a “civil law” legacy: this appears to have occurred, to some extent, in Rwanda whose Tutsi government blame civil law France for assisting previous Hutu oppression of the Tutsi.

5. See in particular Chapters 2 and 4.

6. A Chen, *An Introduction to the Legal System of the PRC* (n 2).

7. *Ibid* Chapter 3.

8. *Ibid* 23.

9. *Ibid*.

10. *Ibid* 32–33.

The Mao era has been described by Cheng Li¹¹ as one of “legal nihilism”. Li adds, strikingly, that:

the neglect [in Mao’s China] of even a basic legal consciousness accounted for the fact that, from 1949 to 1978, the PRC promulgated only two laws, one being the constitution itself and the other being the marriage law.¹²

The importance of law was recognised by the post-Mao PRC leaders, none more so than Deng Xiaoping, twice “purged” in the turmoils of the Mao Zedong “lawless” era.¹³ The absence of a proper, developed legal system was seen as one reason for the emergence of the radical, “anti-rights” forces of the Mao era. The effective construction of a post-Mao legal system (involving the creation of thousands of courts and procuratorates, extension of judicial training, codification of laws and the development of alternative dispute resolution) has been effected with incredible speed for a country as large as China.

What has emerged, in this very short time, is a rapidly developing, rapidly evolving system,¹⁴ which is part codified civil law¹⁵ and part “socialist” law (the latter with its emphasis on the primacy of the political; the supremacy of the Communist Party). Indeed, even the common law has significance in the modern PRC system since, for example, the Contract Law Code draws heavily on concepts well understood by common lawyers,¹⁶ and the criminal procedure rules are argued to be moving from a civil law “investigating judge” tradition to a more “adversarial” common law-type procedure,¹⁷ at least in theory. Even the common law “bedrock” principle of “judicial precedent” has attained some significance in the PRC with the Detailed Rules on Implementing Guiding Cases introduced by the Supreme People’s Court in 2015.

Given such a rapid development of the PRC legal system it is perhaps inevitable that there will be, occasionally, government nervousness and “retrenchment”.

11. C Li, ‘The Rise of the Legal Profession in the Chinese Leadership’ *China Leadership Monitor*, No 42.

12. *Ibid* 12.

13. It has been suggested that Deng’s fateful “Tiananmen” decision was influenced by his fear of student-led terror, experienced at first hand during the “Red Guard” era.

14. Between 1979 and 2006 the number of cases filed in PRC courts increased from 520,000 per year to 7.89 million! The increase continues though the rate is slowing. A major impetus was China’s entry into the World Trade Organization in 2001.

15. The major influences have been the German civil code and Japanese law (itself influenced by German law).

16. “PRC’s contract law presents a hybrid version with key concepts from both Common law tradition and the Civil law tradition”: G Li, ‘The PRC Contract Law and Its Unique Notion of Subrogation’ (2009) 4.1 *Journal of International Commercial Law and Technology* 12, 21.

17. See G Zheng, ‘Towards an Adversarial System of Criminal Justice?’, University of Hong Kong/ National University of Singapore Law Symposium: ‘The Common Law in the Asian Century’, HKU Faculty of Law, 11–12 December 2006.

11.2 The rule of law: Meaning¹⁸

During the turmoil of “Occupy Central”, no phrase was used more widely (and to mean more different things!) than “rule of law”. Part of the problem with any definition is that the expression has no succinct and definitive meaning; that the expression may be used to accord with the writer’s “interest” in an issue; and that the expression may change over time. The problem is exacerbated by a recognition by some writers of a broad definition of rule of law (“thick” rule of law) encompassing such concepts as human rights¹⁹ which contrasts with a minimalist “thin” approach which recognises the impermanence and historical/geographical variation of human rights and seeks to restrict the rule of law to fewer, generally agreed, precepts.²⁰

The following²¹ well summarises the difficulties:

The ‘rule of law’ represents a symbolic ideal against which proponents of widely divergent political persuasions measure and criticise the shortcomings of contemporary State practice. This varied recourse to the rule of law is, of course, only possible because of the lack of precision in the actual meaning of the concept; its meaning tends to change over time and . . . to change in direct correspondence with the beliefs of those who claim its support and claim, in turn, to support it.²²

Nowhere was this statement more accurate than during the “Occupy Central” controversy of 2014. Opponents of the Occupy movement indicated that since the occupation was illegal, it undermined, *per se*, the rule of law. The assertion was manifestly absurd, in the same way as it would be absurd to suggest that (illegal) theft undermines the rule of law. The rule of law *would*, however, be at risk were there to be, as alleged, “selective” enforcement of laws; prosecuting Occupy supporters with vigour, for example, while ignoring police use of excessive force. The clearly fallacious use of the expression by opponents of Occupy was highlighted by Paul Shieh SC, outgoing Chairman of the Hong Kong Bar Association in his farewell speech at the 2015 Opening of the Legal Year.²³ Shieh said:

According to a report by the Hong Kong Examinations and Assessment Authority published last November, many secondary school students [*sic*] misunderstood the concept of ‘Rule of Law’ as merely meaning executing or obeying the law. The report recommended that students should enhance their understanding of the concept . . .

In a speech I delivered [last year] . . . I said the following:–

18. For the views of a former Hong Kong Chief Justice, see A Li, ‘The Rule of Law’ (2013) 43(3) HKLJ 43.

19. See T Bingham (Lord Bingham), *The Rule of Law* (Penguin Books 2011).

20. See, eg, J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979).

21. In G Slapper and D Kelly, *The English Legal System* (14th edn, Routledge London and New York 2013–14).

22. *Ibid* 23.

23. 12 January 2015.

“There is no universal definition of ‘Rule of Law’. Many countries . . . claim to practise the Rule of Law but in fact what they practise is not ‘Rule of Law’ as we understand the concept but, at most, Rule by Law or a very rudimentary form of Rule of Law namely that there shall be laws to regulate the conduct of individuals and that they should obey the laws made by the sovereign.

. . . Comical as it may sound, the Government in Hong Kong has become accustomed in recent years to preface almost every description of what it does by the phrase ‘doing so according to law’ . . . Everything is done according to law.

. . . in my view and in the view of the Hong Kong Bar, ironically that could have the opposite effect of misleading the public as to the meaning of the Rule of Law.

First, as we all know, Rule of Law means far more than just blind adherence to laws—respect for an independent judiciary, the need to ensure minimum contents of laws in terms of human rights protection, respect for the rights and liberty of the individual when law enforcers exercise their discretionary powers are examples of requirements of Rule of Law which go beyond just obeying the law. In fact it can be said that over-emphasis of the ‘obey the law’ aspect of ‘Rule of Law’ is the hallmark of a regime which is keen on using the law to constrain the governed, rather than as a means to constrain the way it governs.”

. . .

In particular, in a system without a truly independent judiciary and where laws are arbitrarily enforced, the judiciary and the executive ‘co-operate’ to ensure that laws are interpreted in a way preferred by the executive and are used to suppress persons or entities who do not find favour with the Government. This is often dressed up as ‘Rule of Law’, but is in fact ‘Rule by Law’. ‘Do things according to law’ means ‘do things according to our will’.

All the leading speakers at the 2015 Opening of the Legal Year gave prominence to the “rule of law”; particularly pertinent with the “Occupy Central” movement still to the fore. The stance of Secretary for Justice, Rimsky Yuen, however, leant more towards what Shieh would have described as “rule *by* law” or “obedience to law”, stating: “the law remains the law and is there to be obeyed.”

Ip²⁴ describes this approach as one of “mere legality” (“*yifa*”); a concept that “falls noticeably short of the rule of law standard” and talks of an “alarming” increase in the use of this limited definition of “rule of law” by Hong Kong public officials.

This rather narrow approach to rule of law is perhaps to be expected of a member of the government and is far less objectionable than the risible views of a previous Law Society president, Ambrose Lee, expressed some months later. The latter managed to depict a connection between the “Occupy” protests and the subsequent robbery and kidnapping (for ransom) of the granddaughter of Bossini founder, Law Ting-pong. The kidnapping, apparently perpetrated by mainland criminals, was evidence to Lee of a “reduced fear of the law”, inspired by “Occupy”.

The Chief Justice, Geoffrey Ma, in his Legal Year Opening speech, emphasised three features of the rule of law: “equality, fidelity to the law and its spirit, and

24. Eric Ip, *Law and Justice in Hong Kong* (2nd edn, Sweet & Maxwell 2016) 129.

judicial independence”. The political neutrality of the judiciary he saw as epitomised by equal treatment for all “parties” in the Occupy scenario.

Despite the difficulty of a definitive definition there are, as Shieh implies, certain features of a “rule of law” society which would distinguish it from others. “Primacy” of law is one such, as is “equality” before the law. An independent judiciary is essential in this context, since equality requires the protection, by the courts, of the individual from the excesses of the more powerful state. It is also implicit in Shieh’s statement that, despite its claim to a “rule of law”, the PRC (unlike Hong Kong) practises rule “by law” rather than rule “of law”. Indeed, as we shall see, the PRC leadership explicitly rejects certain tenets of the liberal-democratic concept of “rule of law” as examples of Western “*erroneous thought*”.

Before moving on to individual features of the rule of law, as enjoyed in Hong Kong, it should be noted that “rule of law” is, everywhere, an “ideal” form. All polities claiming to be guided by the rule will fall short of this ideal on occasion. No one, for example, could seriously claim that rich and poor are treated alike in the criminal justice system of the United States.²⁵ Likewise, it could hardly be argued that the litigant in person (unable to afford private legal representation but denied legal aid on financial grounds) has equal access to the law as the rich (or legally aided) litigant. The key point is whether deviation from the ideal is regarded as malign and deserving of improvement.

11.2.1 *The rule of law: The “primacy” of Law*

A key feature of the rule of law is the primacy of law. This means that law takes effect over and above political considerations; it is not secondary to them. Of course it may be that common law systems fall short of their ideals in *practice*, and permit political considerations to impinge on judicial decisions, but this will be exceptional rather than normal practice and deserving of criticism.

It can be asserted with some confidence that the Hong Kong courts have generally given their judgments without thought for the political implications. In his speech at the Opening of the Legal Year 2015, Chief Justice Geoffrey Ma asserted:

the administration of justice by the courts is not, nor can it be, influenced in the slightest by extraneous factors such as politics or political considerations. The courts and our judges apply only the law. The constitutional role of judges is to adjudicate on legal disputes between parties. It is no part of the courts’ function to solve political questions, but only to determine legal questions even though the reason for bringing legal proceedings may be a political one.

...

25. A simple example can be seen from the disparity in capital sentencing between the rich and the poor. Some would see the disparity in purely racial terms, but it could hardly be argued that the black (but wealthy) OJ Simpson was dealt with unfairly by the criminal justice system.

The constitutional role of judges to apply only the law is reflected in those provisions of the Basic Law dealing with the exercise of judicial power. Article 84 of the Basic Law states simply that judges shall adjudicate cases in accordance with the law. The Judicial Oath taken by all judges requires adherence to the law and the safeguarding of the law without fear or favour.

Certainly there were political “implications” in the *Democratic Republic of the Congo (DRC)*²⁶ case (dealt with elsewhere) where it fell to be determined whether Hong Kong courts should apply the more common “limited state immunity” doctrine rather than the “full state immunity” doctrine as recognised in the PRC. There was a political dimension to the case since the PRC government (or a satellite thereof) was involved in massive infrastructure work in the DRC and clearly had an interest in the DRC’s successful plea of state immunity against the (“vulture company”) plaintiff. However, despite some criticism on “legal autonomy” grounds, a strong case can be made for saying that Hong Kong’s Court of Final Appeal merely followed the clear requirements of the Basic Law in seeking an interpretation of that law by the NPC Standing Committee under Article 158.

Hong Kong, then, *may* sometimes fall short of its primacy ideals, but they remain ideals to which it seeks to aspire. A strong contrast can be drawn with the position in the PRC where law is always secondary to the rule of the Communist Party. Indeed, it is part of Marxist ideology that law is *always* subservient to the will of the dominant class; all that differs is the identity of the “dominant”. In capitalist systems, runs the theory, law always supports the interests of the capitalist class. Those legal innovations (case decisions, legislation) which *appear* adverse to the capitalist cause are mere ideological tools to convince the oppressed that the law is even-handed and to keep them from the path of revolution. In this context, E P Thompson’s celebrated postscript to his work “Whigs and Hunters” has been of great academic interest, positing as it does the “relative autonomy” of law and its capacity not merely to “appear” to support the underdog but (sometimes) actually to do so.²⁷

While the PRC has made great strides towards an increased emphasis on “legalism” and a rudimentary “rule of law”, it has yet to recognise the primacy of law over political considerations. Politicians still describe the PRC legal system as “socialist” and consider that its essential function is to “serve the Party”. Professor Albert Chen²⁸ describes the:

dominance of the Party apparatus over the state, and the Party’s unwillingness to subject itself to the supremacy and autonomy of the law.²⁹

26. *Democratic Republic of the Congo v FG Hemisphere Associates* (2011) 14 HKCFAR 95.

27. Contrast, for example, George Jackson’s *Soledad Brother*, and the author’s notion of the capitalist benefits of a move from “chattel” slavery to economic “wage” slavery, with Sian Rees’s *Sweet Water and Bitter*, detailing the clear financial loss and huge loss of (seamen’s) lives resulting from Britain’s determination to end the slave trade.

28. A Chen, *An Introduction to the Legal System of the PRC* (n 2).

29. *Ibid* 37.

Chen, however, adds optimistically that:

the supremacy of law rather than policy has not only won acceptance by constitutional theory but is also gaining ground in practice as the Chinese legal system evolves. A dynamic approach to the study of this system would recognise the increasing authority of legal norms as distinguished from mere policy documents issued by party and governmental authorities.³⁰

Despite this progress, Chen, elsewhere, notes:

attempts by the ruling party to prevent the logic of the Rule of Law . . . from threatening the political supremacy of the Chinese Communist Party, and to draw a distinction between the kind of Rule of Law that is being promoted in China from the Rule of Law as it is understood and practised in Western liberal democracies.³¹

11.2.1.1 Equality before the law

A specific aspect of “primacy” is the ideal of “equality before the law”. This means that all citizens (high or low) should be subject to the *same* law and treated alike, irrespective of wealth and position. The principle that “all Hong Kong residents shall be equal before the law” is enshrined in Article 25 of the Basic Law.

In his speech at the 2015 Opening of the Legal Year, noted above, Chief Justice Ma spoke of the importance of recognising and enforcing human rights. He asked:

How is this achieved in reality? The starting point is an acceptance that everyone is equal before the law. This includes everyone: the Government, the authorities, members of the public. No person, group of persons or organisation can claim to be above the law nor to enjoy any preferential treatment by the courts. This is key to the notion of respect for the rights of other persons.

There are really two aspects to this: that even the most humble enjoy basic rights, and even the powerful (including the government) are subject to the law. This ideal is often found wanting in the common law world but it is at least espoused as an “ideal”. A clear departure from the ideal clearly arises in relation to access to justice since it can be seen that the rich enjoy better legal representation than the poor.³² America’s criminal justice system, for example, provides many examples of the rich being treated more leniently and the poor being much more likely to be convicted and, if convicted, to be more harshly punished.³³ Again, though, this can be seen as the system falling short of its ideals rather than abandoning the ideals entirely.

30. Ibid 96.

31. Ibid 59.

32. Sarony writes that that a “squeeze” on legal aid funding means that Hongkongers are not equal before the law: N Sarony, ‘The Silk Purse’ *South China Morning Post* (Hong Kong, 29 April 2011). This remains a problem even though financial eligibility rules have been relaxed since his article.

33. See 11.4 below.

Hong Kong, too, has fallen short of the ideal of equal treatment for all, though such “lapses” have frequently been “extra-judicial”. The most shocking case was the decision of the then Secretary for Justice, Elsie Leung, not to prosecute Sally Aw, the chairman of Sing Tao Publishing Group (at the time, owners of the *Hong Kong Standard* newspaper). The Group had deliberately exaggerated circulation figures to encourage advertisers but, even though senior staff of the *Hong Kong Standard* were prosecuted for conspiring with Aw to defraud advertisers, the Department of Justice decided to take no action against Aw herself. The ostensible reason was that a prosecution was “not in the public interest”. There was little doubt that Aw’s position as a “friend to Beijing” as well as to then Chief Executive, Tung Chee Hwa, was the determining factor. Indeed, Leung’s absurd explanation that a prosecution might ruin the newspaper and cause the loss of jobs (itself a departure from equality before the law) was further undermined by the newspaper ceasing publication soon afterwards.³⁴ Some 15 years later, Grenville Cross, Director of Public Prosecutions at the time of the Aw case, asserted, in the *South China Morning Post*, that he had disagreed with Secretary for Justice Leung over the issue at the time.³⁵ Moreover, in the same article, former government lawyer Andrew Bruce SC is quoted as saying that prosecuting Aw “would have sent out a message that no one is above the law”.³⁶

Thankfully, departures from the principle of equality have been relatively rare since the departure of Tung Chee Hwa and Elsie Leung.³⁷ Serious disquiet was raised, at the time, over the allegedly over-lenient judicial treatment of Amina Bokhary; convicted of assaulting the police (not for the first time) and refusing to take a “breathalyser” test, but given a non-custodial sentence. The leniency was based on Bokhary’s known mental health problems and her “good family” background. Bokhary is related both to (uncle) Kemal, then a Permanent Judge of the Court of Final Appeal, and Ronald Arculli, a previous ExCo member. Criticism of “unequal” treatment came, in this case, mainly from the pro-establishment camp, eager for an opportunity to attack a relative of Hong Kong’s most liberal judge.³⁸

Inequality, if it did arise in the Bokhary case, was in the form of greater lenience for someone “from a good background”. This is quite common (and logical) in influencing a sentencing court to move in the direction of “rehabilitation” rather than “retribution”.³⁹ However, since the recipients of rehabilitative sentences tend to be

34. It should be noted that there is now, again, a *Standard* in Hong Kong but it is under new management.

35. C Buddle, ‘Ex DPP Tells of Split over News Tycoon Prosecution’ *Sunday Morning Post* (Hong Kong, 17 November 2013).

36. *Ibid.*

37. Other notable “non-prosecutions” in the Tung-Leung era included the decision not to prosecute disgraced ex-financial secretary, Anthony Leung (who resigned having been found to have bought a luxury car with notice of an impending tax hike announcement) nor Xinhua News Agency (Beijing’s unofficial pre-1997 “consulate”) for breach of personal data rules.

38. Bokhary was, at the time, a Permanent Judge of the Court of Final Appeal and regarded as its most independent member.

39. Those seen as having less family support tend to be perceived as less likely to respond to rehabilitative approaches. “Stable home background” was also a factor in the Nicholas Tse case, discussed in

those who have already had more advantages in life, inequality (of opportunity) may be seen to be the precursor of further inequality (of treatment in the criminal justice system).⁴⁰ “Equal treatment”, especially with regard to sentencing, is an elusive concept. Is, for example, a person with a “good background” likely to suffer more in prison than others? If so, should that justify a shorter custodial sentence? Would that apply to convicted policemen, or even foreigners?⁴¹

Worrying echoes of the Leung/Aw scenario have resounded with the tardiness in prosecuting policemen recorded on camera beating up an arrested and defenceless “Occupy” demonstrator. The policemen involved were identified sufficiently clearly to be immediately suspended from duty, yet a decision to prosecute was reached very slowly and only after significant public criticism.⁴²

While the PRC still refuses to recognise the “equality” of the citizen with the State/CCP, it has begun to act against “personal” inequality⁴³ in the legal sphere; not least because this may become a locus for civil unrest. To take one example, it was reported⁴⁴ that in Qinyang those “outsiders” who invested more than \$6 million were given the status of “honorary citizen” which would ensure discounted medical treatment, priority schooling *and* exemption from minor traffic laws! The scheme, it was reported, was halted by Central Government following local complaints.

A public perception of the law favouring “the rich” clearly has implications for social cohesion. Writing of the Hong Kong experience, Liu and Kuan⁴⁵ write:

Legal cynicism, as measured by the belief that the rich were given favourable treatment by the court, was connected with a pessimistic view of the future condition of the Hong Kong people, a defeatist view of long-term planning, and an inclination to adopt a passive attitude toward [*sic*] the future.⁴⁶

Recognising the potential for social unrest, former paramount leader Deng Xiaoping had said:

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40. In the Court of Appeal (CA), Stock VP said it was “unfortunate” that sentencing magistrate Anthony Yuen had referred to Bokhary’s “good background” but felt it had not affected the decision to impose a non-custodial sentence (which the CA endorsed). Eventually, having broken the terms of her probation order, Bokhary did serve a short prison sentence.
41. See SNM Young, ‘Justifying Sentencing Discounts for Foreigners’ (2002) 31(3) HKLJ 369.
42. As evidence of the increasing polarisation in Hong Kong society, the sentences given to the convicted policemen, while on the low side by Hong Kong standards were seriously criticised by the pro-establishment camp which seems to see nothing wrong with overt police brutality. In a rare Hong Kong example of criticism of an over-harsh sentence, there were numerous personal attacks on the “foreign” sentencing judge, Dufton J.
43. Article 33(2) of the PRC Constitution states: “All citizens of the People’s Republic of China are equal before the law”.
44. D Harris, ‘Chinese Law Makes Some More Equal than Others’ Harris & Moure pllc, 27 May 2007.
45. Z Liu and H-C Kuan, *The Ethos of the Hong Kong Chinese* (Chinese University Press 1988).
46. *Ibid* 128.

Crimes committed by the children of high-ranking officials and celebrities need to be treated urgently, for their bigger social impact and higher hazard.⁴⁷

With the increasing economic inequalities in modern, post-Deng China, considerable public disquiet had been voiced about the actions of cadres (and their families), seemingly able to break the law with impunity. Huge publicity was given to the eventual arrest, trial and conviction (for rape) of Li Tianyi, the son of two famous cadres.⁴⁸ Li, who like Ms Bokhary had been in trouble before, was convicted as the prime mover in a gang rape of a woman the group had met in a bar.⁴⁹ Li was sentenced to 10 years imprisonment which, in the PRC, is a very low sentence for such an offence. Again, the rationale was Li's (youth and) good background, making rehabilitation more likely. The Australian Broadcasting Company (ABC)⁵⁰ reported that:

In China the children of high-level Communist Party officials are seen by many as being spoilt and above the law.

Li has become the most prominent target of these complaints.

The judgment of the court appears to have much to commend it. Li was not only convicted, despite his parents' eminence, but the court emphasised, for the victim's sake, that the case was one of "rape and not solicitation of prostitution".⁵¹ Less laudable, given the public interest element, was the decision not to hold an open trial,⁵² though this is often the case when juvenile defendants are on trial. There is little doubt that there was government determination to have Li convicted, as evidence of "equality before the law", once public concern, and dislike of favouritism, had been aroused. It is to be regretted that the prosecution case was not particularly compelling⁵³ and was presented behind closed doors.⁵⁴

11.2.2 The rule of law: Separation of powers

Perhaps the greatest tension, in terms of the primacy of law, involves the question of the independence and autonomy of the judiciary, an aspect of the so-called

47. Deng Xiaoping, *Selected Works of Deng* (People's Publishing House 1993). Historically, this approach has not always been the norm in China (in Qing law, for example, status affected penalties).

48. Li's father is a PLA general and his mother a famous PLA singer.

49. While Li's co-defendants pleaded guilty, Li lodged a defence based on the "consensual prostitution" nature of the sex (which he also claimed to have been too drunk to remember!). The defence was given some succour by the assertion by Tsinghua University Professor, Yi Yanyou, that "raping a chaste woman is more harmful than raping a bar girl": J Kaiman, 'Chinese General's Son in Gang-Rape Trial' *The Guardian* (London, 28 August 2013). Yi later apologised for his comments.

50. S McDonnell, 'China Jails Famous Couple's Son Li Tianyi for Gang Rape in "Second Generation Rich" Case' (ABC/Reuters, 26 September 2013).

51. Li's co-defendants admitted that the victim had been unwilling to remove her clothes.

52. See 11.2.4 below.

53. Forensic evidence of sexual relations against Li was non-existent, for example.

54. For further discussion of "closed trials", see 11.2.4 below.

“separation of powers”. This cornerstone of United States and (to a lesser extent) British constitutional law is deserving of discrete discussion.

“Separation of powers”, in its purest sense, involves the recognition of three pillars of a constitution: the “executive”, the “legislature” and the “judiciary”; each, ideally, separate from, and independent of, the others and all acting as a system of “checks and balances”.⁵⁵ The “ideal” concept of separation of powers is of ancient origin, owing much to the work of Locke and Montesquieu around 300 years ago.⁵⁶

It is worth noting, before considering the extent to which the PRC and the Hong Kong SAR conform to the ideal of separation of powers, that the “ideal” is just that. In practice no constitutional system has a perfect separation of the three “pillars” and foolproof checks and balances do not exist. Indeed, it has been suggested that the British system which Montesquieu used as his exemplar fell far short of his “separation” ideal since:

[the] formulation by . . . Montesquieu, was based on an analysis of the English constitution of the early eighteenth century but an idealised rather than a real English constitution . . . No writer of repute would claim that it is a central feature of the modern British constitution.⁵⁷

To look, first, at the United States system; it is clear that the legislature (Congress) has a “checking” function on the executive arm. Classic examples are to be found in the failed attempt of the Clinton administration to introduce universal, affordable health care (introduced by President Obama and enacted only after intense debate and opposition). In extreme circumstances Congress may even remove an errant President, via the “impeachment” procedure.⁵⁸ The President, via his power of veto, may curb the power of the legislature. Even in the case of agreement between executive and legislature, the judiciary, in the form of the Supreme Court, has the power to overturn legislation; *not* on the grounds of unpopularity but on the basis of its “unconstitutionality”.

However, two examples may be used to show that even the United States system does not correspond to the “ideal” form. First, judges in America are not entirely apolitical. Locally, they are elected and run for election on overtly political grounds. Moreover, judges who make unpopular decisions may well forfeit re-election.⁵⁹ In the highest court of all, the Supreme Court, vacancies are filled by judges *nominated* by the President (though Congress may reject the nomination). The “legal realist”

55. Writers have questioned whether “checks and balances” are integral to the British constitutional system but they are certainly a pillar of the United States one.

56. See J Locke, *Second Treatise of Civil Government* (written in 1690, available widely in e-form) and Montesquieu, *The Spirit of Law* (written in 1748 [Batoche Books Canada 2001]).

57. S De Smith and R Brazier, *Constitutional and Administrative Law* (revised 7th edn, Penguin 1999).

58. This almost happened to Presidents Andrew Johnson and Bill Clinton (both impeached but acquitted) and would have happened to President Richard Nixon but for his resignation.

59. Questioning the legality/constitutionality of the death penalty is a definite “vote-loser” in most US states (not least Texas: see 11.7 below).

school of socio-legal researchers has, indeed, focused on the politico-economic background of Supreme Court judges and asserted a correlation between the “world view” of a particular Supreme Court bench and the outcome of the case before it. One important postscript should be added, however, since it is relevant to a consideration of the PRC situation: Supreme Court judges are “permanent appointments” and can only be removed on the grounds of gross misbehaviour.⁶⁰ This has led even clear political appointees to abandon, on principle, the anticipated wishes of their “patrons” free from concern as to the (employment) consequences.

A second, distinct “special case” is the wealth of “emergency” power that the President possesses and, in the Bush (younger) years, exercised, leading to complaints of an increasingly executive-led government. Under the Trump administration such complaints have increased.

To consider the British situation, there have been notable deviations from the ideal of separation, though some have been (belatedly) rectified. The (executive) Prime Minister is also a Member of Parliament (the legislature) as are members of his Cabinet. The (judges of the) House of Lords exercised, for hundreds of years, both a legislative function (as members of the “Upper House”) and, of course, a judicial one. Indeed, at one time *all* members of the House of Lords were free to exercise a judicial function, though few non-judicial Lords did so in practice. The Head of the House of Lords, the Lord Chancellor, even donned three hats since he was, in addition to being head of the House of Lords and the Judiciary, *also* a member of the Cabinet. The Lord Chancellor and Law Lords anomaly, indeed, was the chief cause of the abolition of the House of Lords’ judicial role and its replacement by the Supreme Court.⁶¹ Mention should also be made of the “political” nature of judicial appointments in Britain since, traditionally, judicial appointments have been made either by, or on the advice of, the Lord Chancellor (a member of the cabinet) or the Prime Minister. Indeed, Griffith’s⁶² conclusion is that:

The most remarkable fact about the appointment of judges [in Britain] is that it is wholly in the hands of politicians.⁶³

However, while in *theory* judicial appointments in Britain are still by the sovereign on advice from the Lord Chancellor⁶⁴ or Prime Minister, in *practice* the determination is made by a Judicial Appointments Commission (JAC) (established in 2005) except for appointment to the Supreme Court.⁶⁵ Indeed, the Prime Minister

60. They are said to be appointed “*dum bene gesserunt*” (as long as they behave well).

61. As a result of the Constitutional Reform Act, 2005.

62. JAG Griffith, *The Politics of the Judiciary* (Manchester University Press 1977).

63. *Ibid* 17. A notable example was Prime Minister Thatcher’s insistence on the appointment of Sir John Donaldson as Master of the Rolls.

64. The Lord Chancellor’s role has also been significantly modified since, while he may also hold the position of Secretary of State for Justice, he is no longer the senior member of the judiciary nor is he the Speaker (Head) of the House of Lords (see Constitutional Reform Act 2005).

65. New appointments to the Supreme Court (the original Justices being the former ‘Law Lords’) are nominated by a differently constituted Committee, reflecting the United Kingdom (rather than English) dimension of the Supreme Court’s work.

is required to put forward to the sovereign the candidate nominated by the JAC. The JAC is required to appoint solely on merit.⁶⁶

As to “checks and balances” in the British system, many political commentators have lamented the erosion of Parliament’s authority in the “Blair years”, with an almost total absence of debate in the House of Commons particularly. “Prime Minister’s Question Time” has been particularly affected, with the event now largely a stage-managed selection of pre-approved questions. Post-Blair his legacy remains and serious Parliamentary debate remains rare.

Moreover, the British judiciary lacks the power, existing in the United States, to overturn legislation on the basis of its unconstitutionality. The rationale has always been that Parliament is “sovereign” and may enact laws as it sees fit. The role of the judiciary is merely to interpret and apply the legislation that has been enacted. It is true that, with Britain’s membership of the European Union (formerly European Community) “sovereignty” has been eroded (or, it could be argued, at least indefinitely suspended) given that senior judges may now declare domestic legislation to be incompatible with EU law. Moreover, the judiciary does have the power to declare legislation incompatible with the Human Rights Act 1998. However, it is perhaps still too early to talk of the British judiciary as a significant “check” on the legislature. What *is* shared with its American Supreme Court counterparts is the British judiciary’s “security of tenure”, which goes some way to ensuring that political considerations do not need to weigh heavily on the judges when they make their judgments.

Turning now to the Hong Kong situation, it is clearly recognised that its politico-legal system is, and always has been, “executive-led”. The British colonialists ruled Hong Kong largely via the Executive Council (ExCo) which comprised hand-picked, largely pro-government figures, generally representing big business and other vested interests. While “opposition” figures might be co-opted, this was never such as to prevent the enactment of legislation which the colonial government (directly or “on orders from London”) wished to introduce. The less powerful Legislative Council (LegCo) was dominated by appointed officials and the representatives of the so-called “functional” constituencies; again predominantly pro-business. The small measures to extend the functional franchise and increase the number of directly elected LegCo seats, introduced by last Governor Patten, were *immediately* nullified on 1 July 1997. While, therefore, it is possible to identify three distinct branches in Hong Kong’s constitutional set up, it can scarcely be claimed that they are of equal “counterbalancing” force. Virtually all legislation in Hong Kong emanates from the executive and “member’s legislation” is almost unknown, especially post-1997.⁶⁷ LegCo, it is true, has a limited power to slow down the executive’s legislative proposals but, even here, controversial legislative moves, such as the arrangements for

66. Though it should “have regard” to the need to encourage diversity.

67. See Chapter 4.

the exorbitant and dubiously necessary “runway three”,⁶⁸ are taken via the procedure of the Chief Executive in Council, ousting LegCo’s oversight role. Moreover, given the guaranteed majority of the pro-government forces, most “government” legislation is, in practice, enacted eventually irrespective of opposition voices.⁶⁹ Only in respect of matters involving major constitutional change is LegCo able to hamper government initiatives, since these require a two-thirds LegCo majority.⁷⁰

Similarly, while the Hong Kong Judiciary is appointed apolitically⁷¹ and has ‘security of tenure’ (like its English counterparts),⁷² it has limited power to overturn legislation on the basis of unconstitutionality generally. In this respect Hong Kong’s judges are in a position more akin to their brethren in Britain than those in the United States. It was, formerly, intended that the Bill of Rights Ordinance (BORO) would give the Hong Kong judges a limited power of oversight in respect of legislation, since they had the right to construe prior legislation in a manner compatible with BORO. Moreover, in the absence of compatibility, such legislation could be struck down. This “superior” status of BORO was abolished on the grounds of inconsistency with the Basic Law.⁷³ More important, at least in theory, is the Hong Kong judiciary’s power to declare legislation inconsistent with the Basic Law itself. The superior status of the Basic Law, unlike that of BORO, is of course uncontentious. However, the unfortunate experience of the Hong Kong judges in attempting to strike down the “right of abode” legislation, enacted by the Provisional Legislative Council, on the basis of its inconsistency with the Basic Law,⁷⁴ indicates that further declarations of “unconstitutionality” by the Hong Kong courts (as opposed to the Standing Committee of the National People’s Congress) will be adopted with caution. The Court of Final Appeal has made such decisions, though, without controversy in such areas as declaring unconstitutional (as contrary to the Basic Law) legislation restricting the court’s “right of final adjudication”.⁷⁵

68. The third airport runway proposal has huge environmental costs and there is clear evidence that the current runways are not being operated to capacity and that nearby competition is rapidly increasing.

69. Only “people power” (as with mass opposition to government-proposed Article 23 legislation) has been able to halt the government juggernaut.

70. Democrats were able to prevent the passage of the government’s so-called “reform package” which was to give everyone in Hong Kong a right to vote for one from two to three candidates selected by a hand-picked 1,200 strong “nominating committee”. Even such limited obstructive power has now been reduced following the disqualification of six elected pan-democratic legislators (discussed at 4.4).

71. Article 92 of the Basic Law requires that judges be appointed (solely) on the basis of their “judicial and professional qualities”. The only, very limited, exception to the principle of appointment on merit is the nationality requirement for the Chief Justice and the Chief Judge of the High Court (see Chapter 6).

72. See Chapter 6.

73. Exercising the power conferred by Article 160 of the Basic Law, the Standing Committee of the NPC abolished ss 2(3), 3 and 4 as incompatible with Article 8 of the Basic Law.

74. See Chapter 4.

75. See *A Solicitor v Law Society of Hong Kong & Secretary for Justice* [2003] HKCFA 14, discussed in Chapter 3.

In serious contrast, the concept of “separation of powers” is not recognised in the PRC’s civil/socialist legal system; or at least it is felt, by the PRC leadership, inappropriate to such a system. Indeed, in its official statement of February 2015,⁷⁶ the PRC Supreme People’s Court stressed that:

[the country] must preserve the judicial system of socialism with Chinese characteristics . . . [rejecting] Western judicial independence and the separation of powers.⁷⁷

The PRC Constitution emphasises the leadership of the Chinese Communist Party, to which law, and legality, are formally subject. Moreover, the line separating the “executive” and “legislative” organs of government is blurred. Nor, in relation to “primacy”, is there provision for the courts to strike down legislation on the grounds that it offends the Constitution. Indeed, the PRC Constitution makes clear that the role of interpreting and enforcing the Constitution is that of the NPC Standing Committee *not* the courts. A single, “lowly”, attempt to overturn local legislation on the grounds of its conflict with national legislation was attempted by (the now famous) Judge Li Huijuan. While determining a contract dispute over the quantum of damages in a dispute over the (non) delivery of seeds,⁷⁸ the judge stated, in Luoyang Municipal Intermediate People’s Court (Henan Province), that the *local* mechanism for assessing seed price must be rejected as in conflict with the *national* seed law. It was reported that:⁷⁹

Judge Li defended her decision by citing Article 64 of China’s Law on Legislation which provides that ‘where a national law or administrative regulation enacted by the state has come into force, any provision in the local decree which contravenes it shall be invalid.’

At the insistence of an angry Henan Province People’s Congress, Judge Li was initially removed from office; though later reinstated following significant public concern. PRC constitutional lawyers have, generally, opined that Judge Li’s action was improper, since the right to review constitutionality resides solely with the NPC Standing Committee. Nonetheless, some sympathy was expressed given the difficulty and delay involved in seeking the Standing Committee’s intervention.⁸⁰ It appears that the more common, and less controversial, approach to these conflicts is for the court to apply the higher statutory authority and simply ignore (rather than

76. Supreme People’s Court (Party Leadership Group), 10 February 2015.

77. The two concepts were described as examples of “the West’s erroneous thought and mistaken viewpoints”.

78. For further discussion, see M Zhang, *Contract Law: Theory and Practice* (Martinus Nijhoff 2006) 15–24.

79. China Law & Governance Review, Luoyang City ‘Seed Case Highlights Chinese Courts Lack of Authority to Declare Laws Invalid’ (2004) Case Files No 2 June 2004.

80. A judge should first refer the matter to the Supreme People’s Court (Article 90, Law on Legislation). That court *may* then refer any conflict to the NPC Standing Committee which has the power to annul local laws under Article 67 of the PRC Constitution. In practice referrals to the Standing Committee are rare and resulting action rarer.

reject) the lower one.⁸¹ The “Judge Li” case, while of humble origins, gained great notoriety, not least amongst opponents of the PRC system. The *New York Times* feted Judge Li (and her “rags to riches” ascent to the bench) and described the case as one of “youthful ideals meet reality”.⁸² It continued:

‘The authority of the National People’s Congress is not to be challenged’ said Mao Yinduan, head of the legal office, in an interview. ‘The judge . . . had every right to choose which law to use. But courts have no right in a verdict to say which law is valid.’

. . . [yet] China’s Law on Legislation stated that local laws that conflicted with national laws should be abolished. [Li] thought including this point in her opinion was within her judicial purview.

The swift reinstatement of Judge Li illustrated considerable sympathy for her plight, not least amongst legal academics in China. Balme and Lihua write:⁸³

the affair attracted important controversies about the constitutional status of the law referred to [the Law on Legislation]⁸⁴ and about the procedure.

Essentially, however, the issue was one of procedure rather than substance: the role of the PRC judge in civil cases is to adjudicate as between the parties, *not* to determine the constitutionality of legal rules. Judge Li was entitled to follow the correct legislative rule. She was *not*, however, free to criticise the incorrect rule, since that is a matter solely for the Standing Committee.

The role of the PRC courts remains similarly circumscribed even 10 years after the Judge Li case. Moreover, even within the limits prescribed, and despite rapid moves to provide judges with greater freedom from political interference, such freedom remains significantly limited.

11.2.3 *The rule of law: Judicial independence and autonomy*

A specific aspect of separation of powers, important enough to warrant separate consideration, is the issue of judicial independence and autonomy. Tsang⁸⁵ writes:

What sets [Hong Kong] apart from the PRC more than anything else is the existence of the rule of law and an independent judiciary.⁸⁶

81. This was indeed the practice adopted by the Henan High Court which reheard the case.

82. Yardley J, ‘A Judge Tests China’s Courts, Making History’ *New York Times* (28 November 2005).

83. R Balme and Y Lihua, ‘The Politics of Constitutional Reform in China: Rule of Law as a Condition of or as a Substitute for Democracy?’ in F Grotz and T Toonen (eds), *Crossing Borders: Constitutional Development & Internationalisation* (De Gruyter Berlin 2007) 170.

84. Especially Article 64 thereof.

85. S Tsang, ‘Commitment to the Rule of Law & Judicial Independence’ in S Tsang (ed), *Judicial Independence & the Rule of Law in Hong Kong* (Hong Kong University Press 2001).

86. *Ibid* 1.

In Britain this is underpinned by the “security of tenure” of judges, who may act without fear of the political and employment consequences and give judgment “according to law”. As we have seen, similar security of tenure is enjoyed by the Justices of the United States Supreme Court. Security of tenure comes, of course, at a price. It is difficult to remove a judge from office on the grounds of incompetence (as opposed to venality) and both in England and Hong Kong there have been examples of judicial incompetence in respect of which formal sanctions are almost non-existent. Zander⁸⁷ talks of the Lord Chancellor (now President of the Supreme Court) having a “quiet word” with judges who act incompetently and there is little doubt that an “interview” with former Hong Kong Chief Justice, Andrew Li, would have been an unpleasant experience for a judge felt not to have acted with due care and attention.⁸⁸ Nonetheless, security of tenure for the (untypically) incompetent is felt to be a reasonable price to pay to ensure judicial integrity and impartiality. As Zander⁸⁹ writes:

Calls for the judge’s dismissal are wide of the mark. A judge cannot, and should not, be at risk of dismissal for incorrect decisions. That would threaten the essence of the independent judiciary.⁹⁰

Judges in Hong Kong enjoy a similar security of tenure to their British counterparts. A key component of the general continuation of Hong Kong’s existing legal system, post-1997 (prescribed by the Basic Law), was that:

The courts of the Hong Kong SAR shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.⁹¹

Moreover, judges then in post would be permitted to continue “post-1997” (irrespective of their nationality),⁹² their conditions would be “no less favourable”,⁹³ and the removal of judges (other than via retirement or resignation) would be exceptional and effected only by special procedures.⁹⁴ While the judicial system in Hong Kong has not been immune to “political” considerations, there has been no indication of any member of the judiciary being swayed by threat or inducement.⁹⁵ It is true that the recent sentences of imprisonment on pro-democracy legislators (with its resultant tipping of the LegCo balance of power) produced a “pro-government” outcome.

87. M Zander, *A Matter of Justice* (Oxford University Press 1989).

88. This was undoubtedly the case for Judge Pang, the “judge who changed his mind” (see Chapter 10 at 10.1).

89. *A Matter of Justice* (n 87).

90. *Ibid* 130.

91. Article 85, Basic Law.

92. Article 93, Basic Law.

93. *Ibid*.

94. Articles 89 and 90, Basic Law.

95. A greater threat has been “political” considerations in determining whether or not to prosecute; as in the infamous “Sally Aw” case (see Chapter 13).

This does not mean, however, despite international concern to the contrary, that Hong Kong's judiciary has become politicised.⁹⁶ In the Court of Final Appeal, which has been the subject of significant judicial-political analysis,⁹⁷ statistics⁹⁸ have shown clearly that the court has been more than prepared to make decisions unpopular to the Hong Kong government.⁹⁹ Gittings¹⁰⁰ states that:

Where the critics were right is in forecasting that Beijing would have difficulty learning to live with a court that—unlike its counterparts on the mainland—takes seriously the concept of judicial independence . . . [however . . .] The lack of reaction to the CFA's more recent rulings suggests a recognition that, like it or not, Beijing has learned to live with the reality of an independent judiciary in Hong Kong.¹⁰¹

Implicit in Gittings' statement, however, is the lack of full independence for the judiciary in the PRC. Chinese political leaders frequently praise the more accommodating approach of the Macau judges and their co-operation with the executive, as opposed to the "difficult" judges of the Hong Kong SAR (especially those of the Court of Final Appeal). The conceptual difference in perception of the judge's role, as between Hong Kong and the mainland, is exemplified in the furore surrounding the publication, by the PRC State Council, of a "White Paper" on "One Country, Two Systems". The description of judges as "administrators", who should be "patriotic", seemed uncontentious to the PRC "side" yet was regarded as highly sinister by many in Hong Kong. Outgoing Hong Kong Bar Chairman, Paul Shieh, stated:¹⁰²

I now address the publication of the White Paper by the State Council in June 2014. A lot of controversies focused on whether judges were correctly characterized as "administrators" of Hong Kong. The matter was blamed on translation. However, the real problem with the relevant part of the White Paper is that irrespective of translation, judges perform judicial tasks independently. The sovereign state should not purport to impose any ambiguous political requirements, such as to be "patriotic"¹⁰³ or to "safeguard the country's development interests".

96. See K Macdonald, 'Legality Is Vital to Upholding the Rule of Law' *South China Morning Post* (Hong Kong, 5 September 2017); C Buddle, 'Shock and Law' *South China Morning Post* (Hong Kong, 27 August 2017); C Lau and J Hollingsworth, 'Judiciary in the Dock' *South China Morning Post* (Hong Kong, 25 August 2017).

97. Much of this was presented at a conference entitled 'Hong Kong's Court of Final Appeal: The Andrew Li Court 1997–2010' at the University of Hong Kong, 5–6 March 2010; later published as Young and Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press 2014).

98. Especially those provided by Professor Simon Young. See SNM Young, 'Final Appeals Then and Now' in Young and Ghai (eds) (ibid).

99. According to Young, *op cit*, roughly half of appeals involving the Hong Kong government have been determined against it. The record of the Macau CFA has been far more "subservient"; cf Godinho and Cardinal, 'Macau's Court of Final Appeal' in Young and Ghai (eds) (n 96).

100. D Gittings, 'Changing Expectations: How the Rule of Law Fared in the First decade of the Hong Kong SAR' *Hong Kong Journal*, 1 July 2007.

101. *Ibid* 3.

102. Speech of Chairman of the Hong Kong Bar Association at the Opening of the Legal Year 2015.

103. Especially since Hong Kong's judges need not be Chinese (see Chapter 6).

. . . the White Paper sends a wrong message to the people of Hong Kong and the international community as to the role of the judiciary in Hong Kong. It also shows a gap in mindset. In systems subscribing to our concept of Rule of Law, the Government does not paternalistically issue edicts for judges to perform political tasks. This mentality may be commonplace on the Mainland, but it is inappropriate here.

Indeed, while PRC leaders may, reluctantly, accept the independence of the judiciary for Hong Kong, they are far from accepting it as a proposition for the PRC.¹⁰⁴ In the first place, implementation of a truly independent judiciary in the PRC is hampered by constitutional restraints since, while Article 126 of the PRC Constitution provides that courts:

exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organisation or individual.

This is subject to Article 128 which states that:

The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local People's Courts at various levels are responsible to the organs of state power, which created them.

While, following the Law on Judges (2000),¹⁰⁵ the judiciary is viewed as a separate organ, with separate rights and obligations from other state organs, and while improvements to qualification and training are integral to the developing judiciary, the subservient position of the courts is constitutionally maintained. One of the criteria for judicial office is that the judge "supports the Constitution of the People's Republic of China";¹⁰⁶ which includes, of course, reference to, "the leadership of the Communist Party of China" and adherence to "the socialist road". Senior judges are appointed by the People's Congress¹⁰⁷ (or the Standing Committee thereof)¹⁰⁸ or, in the case of local People's Courts, by local People's Congresses on the advice of the local President of the Court. Even though new appointments to the judiciary are now recruited "on merit"¹⁰⁹ via a standard, unified public examination (the State Judicial Examination, introduced in 2002)¹¹⁰ their numbers are still relatively small in comparison with those recruited previously, often with little legal expertise or training.

104. Article 126 affirms: "The People's Courts shall, in accordance with the law, exercise judicial power independently." However, the "removability" of judges, performance assessment and remuneration/promotion processes create significant indirect pressures (see J Cohen [n 111]).

105. Or Judges Law, depending on translation.

106. Article 9, Law on Judges.

107. In the case of the President of the Supreme People's Court (SPC).

108. On the recommendation of the President of the SPC.

109. This criterion, however, encompasses both "ability and political integrity".

110. Article 12, Law on Judges.

Moreover, in the context of judicial autonomy, the process of appointment is less significant than the rules on *removal*. Removal may be, at the local level, by local People's Congresses and, at the State level, by the National People's Congress (NPC). Judges may be removed for "incompetence", failure to perform judicial duties, lack of qualification, absenteeism and refusal to accept a transfer.¹¹¹ Moreover, "promotion and rewards" are dependent on *annual* "performance reviews". It is clear that the potential to remove, or at least deny promotion to, a judge on political grounds is a real one. The problem is far more acute at the local level of which Cohen,¹¹² writing in 2006, said:

Judges are hired, paid, promoted and fired by local officials . . . increasing numbers are now fresh out of law school and inexperienced in both law and life. Usually decisions in nonroutine [*sic*] cases are made by administrative superiors within the court rather than the customary panel of three judges who hear the case . . . Outside agencies . . . frequently influence rulings behind the scenes.¹¹³

Indeed, then, true judicial autonomy, as understood in the common law world, is not even an "ideal" in the PRC system (much less a reality). Article 5 of the Law on Judges explains that the function of a judge includes "to take part in a trial as a member of a collegial panel". Moreover, under Article 7(7) there is a duty to "accept legal supervision and supervision by the masses." The PRC Constitution itself proclaims that:

The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local People's Courts at different levels are responsible to the organs of state power which created them.

In short, judicial independence and autonomy exist *currently* neither in theory nor in practice. Nonetheless, as with all issues of law and legalism in the PRC, things are changing fast. The "professionalism" of judges, a key component of respect for, and the autonomy of, the judiciary, has been rapidly enhanced. The first step towards professionalisation, the Law on Judges, was not enacted until 1995 and before that "judges in mainland China were treated as cadres of the state".¹¹⁴

In the relatively few years since the Law on Judges, the status of judges has changed so that they are regarded as "separate" from other state officers; rules on qualification and training have been introduced; and, crucially, protections have been introduced to defend judges from political interference and to guarantee their security of tenure. With the increasing proportion of judges appointed via an open, unified and competitive examination system (with the establishment of a Commission for Examination and Assessment of Judges charged with the training and assessment of

111. Article 40, Law on Judges.

112. J Cohen, 'China's Legal Reform at the Crossroads' *Far Eastern Economic Review* (Hong Kong, March 2006).

113. *Ibid.*

114. Chen (n 2) 135.

judges) and with increasing moves towards central control of judicial appointments, there is room for cautious optimism. The advantage of having discontent vented in court rather than on the streets is obvious in a country as vast and disparate as China and this fact alone is likely to produce improvements in the quality of judicial selection, training and adjudication.¹¹⁵ Clear examples of the will to change and improve can be seen in the introduction of a Second Five Year Reform Programme for the People's Courts (introduced by the Supreme People's Court in 2004) and by the introduction of extensive programmes aimed at improving the professionalisation of the Chinese judiciary.¹¹⁶ Most recently, in July 2014, the Supreme People's Court announced a (fourth) Five-Year Reform Plan to Enhance Judicial Independence. The Plan seeks (*inter alia*) to improve selection processes for judges; to restrict the influence of local governments; to enhance judicial transparency; and to improve the administration of the courts. Among the more specific proposals,¹¹⁷ it is suggested that cases involving local environmental issues be held in superior courts or those outside the affected area; that circuit judges be appointed to assist local judges in difficult cases; that judicial performance be better monitored; that illegally obtained evidence be excluded; and that information on hearings be made available in advance to allow public attendance. The Economist¹¹⁸ describes an increasingly professionalised system in which well-qualified judges will receive substantial pay increases while the "old guard" judges (without qualifications) will be downgraded.

The power of the State, under President Xi Jinping, is being brought to bear against corruption, and it is clear that attempts to "influence" judges for corrupt motives are frowned upon. In *that* sense efforts are being made to increase the "independence" of the judges. At the same time, a full separation of powers is not to be contemplated. The dilemma faced by the PRC leadership is summarised in the *New York Times* article inspired by the "Judge Li case".¹¹⁹ It notes:

Faced with the complex demands of governing a chaotic, modernizing country, China's leaders have embraced the rule of law as the most efficient means of regulating society. But a central requirement in fulfilling that promise lies unresolved—whether the governing Communist Party intends to allow an independent judiciary.¹²⁰

Ten years later that theme is repeated by Cary Huang, writing in the *South China Morning Post*.¹²¹ He says:

115. Well-reported cases in 2010 of attacks on judges have illustrated the connection between respect for the judiciary and social stability.

116. Eg, the Judicial Studies Training Programme (JSP) involving a collaboration between Britain and the Supreme People's Court and similar collaborative schemes to improve judicial management.

117. There are 45 proposals in all.

118. *The Economist*, 'Judging Judges' (London, 26 September 2015).

119. See 11.2.2 above.

120. J Yardley, *New York Times* (n 82).

121. C Huang, 'Party Faces Catch 22 with Attempts at Judicial Reform' *South China Morning Post*, 'What the Mainland Media Say' (Hong Kong, 5 April 2015).

In an effort to implement the legal reforms announced at last October's party plenum, the central government has published new measures under which all officials who interfere in judicial cases will be publicly named.

Officials will be seen to have broken the rules if they tell judges how to handle a particular case, or ask court officials to meet litigants or defendants privately.

While hailing this development as a step forward in promoting the rule by law, [*sic*] state media have also cast doubt about how feasible it will be to implement within the existing legal system.

. . . the Legal Daily said it was time to draw a red line so people knew interference would no longer be tolerated and also make clear the division between executive power and the judiciary.

China's legal system is known to have been dogged by a lack of transparency, weak enforcement and allegations of rampant corruption. At the centre of the problem is the lack of 'judicial independence' . . .

. . . President Xi Jinping has put legal reform at the top of his agenda, including finding ways to reduce local governments' direct control over the courts and prosecutors.

Yet the concept of 'judicial independence' has also come under fire during Xi's leadership . . .

Currently China's judiciary is subject to a variety of internal and external controls that greatly limit the ability of the courts to make independent decisions.

At the moment, local courts and prosecutors are considered part of the civil service and are financed and administered by local governments. This means local governments often try to interfere in court cases.

. . .

The party wants to give judges and prosecutors greater independence . . . while not wanting to see the kind of separation of powers between the party and judiciary that has the potential of challenging the party's absolute grip on power.

Comment

Herein lies the dilemma for the PRC leadership. "Corrupt" attempts to influence judges are not to be tolerated and the "independence" of an increasingly professional judiciary will be maintained, except in the case of politically sensitive cases (a minority) where influence aimed at maintaining the primacy of the Chinese Communist Party (CCP) must continue to be brought to bear. However, since most local government "influencers" are also CCP members, the distinction between acceptable and unjustified interference is difficult to ascertain.

The judicial independence/CCP supremacy dichotomy is reflected in competing messages from the higher echelons. The Supreme People's Court, in October 2013, issued a paper stating that the PRC must "rid its courts of corruption and stop officials interfering in decisions" yet, little more than a year later, Chief Judge Zhou

Chiang, delivering the Court's report to the annual plenum meeting of the National People's Congress,¹²² asserted that:

We must unify the three tasks of maintaining the leadership of the party, treating the people as masters and ruling the country according to law, unswervingly walking the path of socialist rule of law with Chinese characteristics.

He went on to add that the PRC must: "Reject Western notions of 'judicial independence' and 'separation of powers' [indicative of] the West's erroneous thought."

Zhou emphatically repeated these sentiments in a speech to provincial judges on 14 January 2017.¹²³

The concept of a fully "independent" judiciary in the Western sense remains, therefore, far away. However, the more optimistic view is that, leaving aside the rhetoric, substantive moves are being made to improve the quality and independence of the judiciary.¹²⁴ It remains to be seen whether significant action results from these proposals. Indeed, pessimists would point to indications that, under the presidency of the reactionary Xi Jinping, the move towards judicial independence, in the "separation of powers" sense, has stalled or even gone into reverse. In this vein, Qian Gang¹²⁵ writes:

Following the recent Fourth Plenum on rule of law (or, as some would prefer, rule by law) the crux of official 'interpretations' loudly promoted in Party media as the Party's leadership of so-called rule of law . . . 'constitutionalism' was roundly attacked, so too was 'judicial independence' . . . in the wake of the Fourth Plenum, a gnawing fear of constitutionalism, of the checking of power . . . seems to have gripped China . . . as the gloves come off, as 'judicial independence' becomes the target of open hostility, the Party's declarations about 'the independent and fair exercise of the powers of trial and prosecution' can only become naked falsehoods. And all efforts at judicial reform in China can only become wasted energy.

Comment

While the Qian Gang "pessimistic" view appears to reflect the current mainland situation, more worrying for Hong Kong is the current emphasis, by PRC spokesmen, on the "subservience" of the Hong Kong courts to a Chief Executive holding a position "transcending" the executive, legislature and judiciary in an "executive-led"

122. Concluding remarks, 15 March 2015. Prompting S Lubman, 'Questions Loom over China's Legal Reform Drive' *Chinarealtime* (17 March 2015).

123. See C-y Choi, 'Chief Justice Unleashes Legal Storm' *South China Morning Post* (Hong Kong, 18 January 2017).

124. Kuhn, for example, emphasises improvements in the financing of the judiciary and the judicial appointments system: RL Kuhn, 'How US Critics Misread China' *South China Morning Post* (Hong Kong, 4 October 2015).

125. Qian Gang, 'Who Gave "Judicial Independence" a Death Sentence?' China Media Project (Hong Kong, 14 January 2015).

system.¹²⁶ Some of the most emphatic statements in this context have been made by Zhang Xiaoming, head of the highly influential CPG's Hong Kong Liaison Office. It is reassuring that current Chief Justice, Geoffrey Ma, while of course not entering into political "debate", has emphasised the Basic Law's endorsement of an independent judiciary and equality of all before the law.¹²⁷

11.2.4 The rule of law: Right to a fair trial

The right to a fair trial involves basic issues of natural justice; in particular, that an accused has the right to be heard¹²⁸ (and generally to be legally represented) and that the adjudicator should have no "interest" in the outcome (the "neutrality" principle). The right to be heard, of course, means that both parties to a civil action have a right to fully present their case to the court. More significantly, perhaps, in any criminal case (or disciplinary proceedings) the "defendant" should have the right to know precisely the nature of the offence with which he is charged and to present his defence, personally or via his legal representative. If the accused is convicted, this should be on the basis of the *evidence* produced in court, rather than on his "character". Any sentence, of course, should be based on a penalty *prescribed in advance* for the offence in question. These principles have developed with the evolution of the common law and, although they have not always been recognised, they are of significant longevity within the common law world.¹²⁹ The "interest" rule, that "no one should be a judge in his own cause", would require, for example, a judge who is related to the accused (or who has reason to dislike him) to stand down.¹³⁰ The "interest" rule is important, too, in relation to the decision to prosecute. In most cases,¹³¹ the Hong Kong decision to prosecute is taken independently¹³² by the Department of Justice (DOJ). An important contrast can be seen with approaches to corruption where Hong Kong has investigation by the independent ICAC, followed by a further filter of the DOJ's decision as to prosecution.¹³³ The PRC battle against corruption is, conversely, often seen as "selective" and a tool to bring down politi-

126. See G Cheung, 'Why Beijing Is Laying Down the Law' *South China Morning Post* (Hong Kong, 16 September 2015) and S Lau and J Ngo, 'Authority of HK Chief Is Above All: Beijing' *South China Morning Post* (Hong Kong, 13 September 2015).

127. J Ng, 'Hong Kong Chief Justice Geoffrey Ma Transcends Political Debate but Stands up for Separation of Powers' *South China Morning Post* (Hong Kong, 21 September 2015).

128. Sometimes described by the Latin maxim "*audi alteram partem*".

129. To take two examples: the "right of silence" derived from the old English common law rule that the accused was not *permitted* to speak in his own defence; further, the ancient English jury was selected precisely *because* it knew the defendant and could base its verdict on his known character.

130. Standing down is known as "recusal". The most spectacular example of the wrongful failure of a judge to recuse himself involves Lord Hoffmann (*Re Pinochet* [1999] UKHL 52).

131. The Securities and Futures Commission's power to investigate *and* prosecute has been criticised as an anomaly.

132. Though the "independence" of Secretary for Justice, Rimsky Yuen, on political issues in which he has a clear "interest" has been called into question (see Postscript).

133. Not to mention external scrutiny by no fewer than four independent advisory committees!

Postscript

It is some time since this text was originally submitted. In the meantime, there have been significant developments. While specific changes have been flagged in individual chapters, it is the *mood* in Hong Kong engendered by such changes which is most noteworthy.

Completing the circle, if we look back to Chapter 1 and the interface between “optimistic” and “pessimistic” expectations for 2047, what is most striking is how unrealistically optimistic the “optimistic” forecasts were. Few now seriously believe in “two systems” *post-2047*. Optimists now hope for some semblance of two systems to survive *until 2047*.

The chilling tone of the CPG’s 2014 White Paper, “explaining” the PRC’s “comprehensive jurisdiction” over Hong Kong and the description of our once proud judiciary as civil servants required to be “patriotic” and love China, has set the framework for the end of two systems; the pieces are now being rapidly put into place.

Examples abound of PRC interference with Hong Kong’s promised “high degree of autonomy”. No one seriously believes, for example, that the road bridge to Zhuhai was a “local” Hong Kong idea; merely one disproportionately financed by Hong Kong taxpayers. We now have the spectre of a convenient road link between Macau and Zhuhai being financed largely by Hong Kong, but to which most Hong Kong people will be denied access.

What is sometimes termed “mainlandisation”, but (barrister and former Democratic Party leader) Martin Lee has called “Tibetanisation”, increases apace. Over two million mainland citizens will have settled in Hong Kong between 1997 and 2047 via the so-called “family reunion” system, administered entirely by the PRC. This does not include the thousands of mainland business employees in banking, trade, policing (unofficially) and the armed forces. Only mass protest has, thus far, prevented the introduction of so-called “national education”, intended to buttress “patriotism” and “love of China”. However, with the imminent introduction of compulsory “Chinese history” (no doubt highly selective) for schools, only the *label* will actually be different.¹

1. See below. The *SCMP* has reported that, in a clear affront to two systems, the PRC’s education minister has called on Hong Kong teachers to do “a better job of instilling patriotism in the city’s

No end is in sight for Hong Kong's chronic housing problem. This is presented as a shortage of land but is actually a shortage of *affordable* housing. Since only mainland buyers can afford good quality housing in Hong Kong, a legislative curb on "external" purchasing could solve the problem at a stroke. Since this would upset the government's friends in the property industry (on either side of the boundary) the political will is lacking. Nor will the government use "agricultural" land for public housing in the New Territories, since this would involve confronting the vested interests of the Heung Yee Kuk whose soi-disant "indigenous" villagers demand the retention of their "small house" rights on the spurious ground that these are protected by the Basic Law.² Instead, the government via its so-called "Citizens Task Force on Land Resources" offers Hong Kong people the calamitous choice of building on country parks or yet more unnecessary land reclamation at the taxpayer's huge expense.³ Yet while over-priced housing remains as before, the "beneficiaries" have changed. The once despised "local" property barons are now rapidly giving way to those from the mainland. Once regal Lee Ka-shing rationalised his property and business empire and re-located much of it prior to retirement.

There have been other examples of the erosion of "two systems", many involving assaults on the Basic Law itself. It now appears that the joint checkpoint ("co-location") arrangement, whereby PRC officers will apply *all* mainland law in a specially designated part of the check-in area for the new Hong Kong–Guangzhou high speed train, is a *fait accompli*. This despite its apparent conflict with Article 18. This Article *clearly* states that mainland laws will *not* be enforced in Hong Kong *unless* listed in Annex III and locally enacted. While the PRC's right to *add to* the Annex III list of applicable laws is recognised in Article 18, there is *no* provision for the application of *all* mainland laws in one area of Hong Kong rather than another. The insistence on *all* mainland laws being enforced at the checkpoint area (rather than merely immigration ones) is legally dubious and unnecessary, given that those about to board will subject themselves to PRC law as soon as they arrive on the mainland. Co-location supporters have been unable to produce a convincing and

youth": V Zhou, 'Love Country First, HK Teachers Told' *South China Morning Post* (Hong Kong, 24 February 2017)].

2. See Chapter 2.

3. The government's latest choice appears to be the environmentally disastrous creation of an artificial island and the consequent destruction of most of Lantau. Chief Executive Carrie Lam has already shown her contempt for public opinion by stating, while the "consultation" process is ongoing, her preference for the awful artificial island option; despite its inevitable environmental destruction and cost/completion date overruns. For a succinct academic destruction of the artificial island plan see T Yam, 'Next white elephant' *South China Morning Post* (Hong Kong, 21 August 2018) showing that the sole beneficiaries of the plan will be the government's business friends. Lest this critique be considered "anti-government" note agreement with the sentiment by a normally pro-government journalist: A Lo, 'Just forget any East Lantau mega project' *South China Morning Post* (Hong Kong, 23 August 2018). Predictably, and without waiting for the Task Force's Report, Carrie Lam has announced plans for a huge "East Lantau" reclamation.

consistent legal argument⁴ and the Hong Kong Bar has expressed serious concern. While the effects of co-location are not *per se* worrying, there is a fear that this cession of Hong Kong jurisdiction to the mainland may be the “thin edge of the wedge”. Should we next expect mainland laws to be applied in the “Lok Ma Chau Loop”, on the basis that most businesses actually operating there will be Shenzhen ones?

Further, Article 27’s guarantee of freedom of speech and publication sits uneasily with the abduction from Hong Kong and elsewhere of those publishing or distributing material critical of the PRC leadership,⁵ and the same may be said of Article 28’s rejection of “arbitrary arrest”.⁶ Moreover, as newspaper publication becomes increasingly “mainlandised”, *freedom of the press*, except in online form, is rapidly eroding. To take just one example, Alibaba’s Jack Ma now owns Hong Kong’s main English-language newspaper, the *South China Morning Post (SCMP)*. This journal has campaigned to amend the “one share, one vote” company law regime which saw Ma (who insists on power without financial risk) unable to list on the Hong Kong Stock Exchange. Legal change to introduce Ma’s preferred variable voting rights has now been effected.⁷ To his credit, *SCMP* writer Jake Van der Kamp has opposed the legislative change and maintained an independent stance. However, editorial “influence” is evident in a change of tone by other *SCMP* writers. Alex Lo, for example, who not long ago wrote that Hong Kong people were right to be concerned about the joint rail checkpoint,⁸ now supports it and asks what all the fuss is about. The excellent Philip Bowring, often critical of the government, has been marginalised and, with notable exceptions,⁹ coverage has become increasingly pro-establishment.

Most disheartening of all, especially for young people, has been China’s refusal to honour its Article 45 pledge to (ultimately) introduce genuine universal suffrage in Hong Kong. China’s version of universal suffrage offered to Hong Kong for the 2017 Chief Executive “election” involved the selection of two or three candidates (by a Committee of 1,200) who, with the blessing of at least half of the Committee, could then be voted on by all. LegCo rejected China’s offer and prospects for genuine democracy in Hong Kong now appear dim.

This cynical version of universal suffrage saw thousands on the streets as part of the brave but doomed “Occupy Central” movement. Numbers swelled rapidly as scenes of police excesses were witnessed. After 79 days no concessions on the “fake democracy” package were obtained. Official retribution has been slow but harsh;

4. Li Fei, head of the Basic Law Committee, has said there is “no single Basic Law Article justifying the move”, and leftist academic, Professor Albert Chen, has admitted this is a “grey area”.

5. See Chapter 12.

6. *Ibid.*

7. On 2 January 2018 the *SCMP* proclaimed that there had been an IPO boost based partly on the introduction of two-class shares. [cf L He, ‘After a Poor Year, HK Set for IPO Boost’ *South China Morning Post* (Hong Kong, 2 January 2018)].

8. See Chapter 12.

9. To the name of Vanderkamp may be added some others, notably special projects editor, Cliff Buddle.

with democracy supporters imprisoned and elected democrats removed from the Legislative Council on various legal grounds.¹⁰ At the time of going to press, the additionally vindictive step of reclaiming LegCo salaries (to bankrupt the former members and thereby render them ineligible to stand) has just been abandoned by the Hong Kong government; not for altruistic reasons but on legal advice that the claim was likely to fail.

International support for Hong Kong's democracy movement has been muted; China is a powerful country and a wealthy potential trading partner. Such support for Hong Kong as has been voiced has been distressingly ill-informed. Former Governor, Chris Patten, has urged China to honour its Joint Declaration promises on democracy. In fact, none exist; the promise of an ultimate universal suffrage is to be found in the Basic Law *not* the Joint Declaration. Foolishly, "external" pro-democrats have also questioned Hong Kong's *judicial* independence in the light of the imprisonment of LegCo members involved in the Occupy protests. The jailing, effected via a successful Department of Justice appeal to the Court of Appeal against the non-custodial sentences initially imposed, was controversial. However, while some judicial comments in the Court of Appeal were undoubtedly intemperate,¹¹ it is too soon to assert that the judiciary has become politicised.¹² What *is* undeniable is that the decision of then Secretary for Justice, Rimsy Yuen, to seek a review of sentence was an egregious affront to the principles of natural justice.¹³ Proper procedures may have been followed¹⁴ but there can be no denying that Yuen, as a member of the government, had a professional interest in the imprisonment of the members; which reduced opposition to the government in LegCo. Moreover, Yuen had a *personal* interest, given "Occupy's" rejection of the "fake democracy" package which he had been (jointly) tasked with "selling" to Hong Kong.¹⁵ No clearer example could be seen of the need for a genuinely independent prosecutorial body.¹⁶ Implicit criticism of Yuen's professional judgement (though not his political motivation) is to be found in the Court of Final Appeal's determination that the application for sentence review should have been refused.¹⁷

The developments outlined above have had a significant effect on morale in Hong Kong; especially among the young. "Localism" has been a desperate response

10. By-elections to fill the now vacated seats have yet to be held and the government has made hay in the meantime; with its supporters changing LegCo rules of procedure to prevent the slowing up of unpopular legislation by the "opposition".

11. In particular, those of Wally Yeung JA.

12. See, in strong defence of the judges, G Cross, 'A Just decision' *South China Morning Post* (Hong Kong 30 August 2017).

13. Which dictate that no one should be a judge in his own cause (see chapter 13).

14. See R Yuen, 'Facts of the Case' *South China Morning Post* (Hong Kong, 24 August 2017).

15. Along with current Chief Executive, Carrie Lam and Raymond Tam, Secretary for Constitutional and Mainland Affairs.

16. See Chapter 13. It remains to be seen whether Yuen's successor, Teresa Cheng, will adopt a more independent approach.

17. [2018] HKCFA 4 at para 106.

to what is perceived as a desperate situation. The booing of the Chinese national anthem by localists at football matches has led to the introduction of the mainland anthem law into Hong Kong law (implemented by local legislation). While this need not be, in itself, an issue of great concern, more worrying has been the call from some in the establishment camp to give this legislation retrospective effect. This would conflict with both Hong Kong's Bill of Rights and Article 39 of the Basic Law.¹⁸ While the retrospective proposal is likely to be resisted, its very suggestion indicates the scant regard for the rule of law held by its proponents.

“Optimists” may hope that the views expressed here are merely jaundiced and anti-establishment. Note, then, the views of establishment journalist Alex Lo who writes:¹⁹

mainlandisation is going full steam ahead with cross-border integration. We are in the midst of an infrastructure-building boom with showcase projects . . . joint customs and immigration clearance anyone?

In education, Chinese history is being made mandatory again, and versions of national education are being revived. In the legislature, a loyalist majority in being entrenched. The list goes on.

Xi really does deserve full credit for a policy towards Hong Kong that is comprehensive, total and inevitable.

Not to be outdone in the “being realistic” stakes, Michael Chugani concludes an article on Hong's future²⁰ with the words:

As we head into the future, your choices are limited. Stand up for the national anthem, recognise Hong Kong as part of red China, and kiss genuine democracy goodbye . . .

If you can't bring yourself to do that, there is just one other alternative: pack up and leave.

Is it any wonder that our young people are losing hope, especially those for whom to “pack up and leave” is not an option?

MJF April 2018

18. See C Buddle, ‘Beware the Ills of Retroactive Punishment’ *South China Morning Post* (Hong Kong, 2 November 2017).

19. A Lo, ‘Give Xi Credit for an Inevitable HK Policy’ *South China Morning Post* (Hong Kong, 18 October 2017).

20. M Chugani, ‘HK's Democracy Dream Is Dead under Red China’ *South China Morning Post* (Hong Kong, 14 December 2017).

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