

# Hong Kong in Transition

One country, two systems

Edited by Robert Ash,  
Peter Ferdinand, Brian Hook  
and Robin Porter

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 **CENTRE FOR THE  
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# Hong Kong in Transition

*Hong Kong in Transition* offers a perspective on the exceptional constitutional and administrative experiment that has been taking place in Hong Kong, based on a substantial period under Chinese rule. There have been both successes and failures, and a perceptible process of change which is important to document.

The book explores major political, economic and legal themes in the life of Hong Kong since the beginning of Chinese rule. It analyses the effects of the Asian financial crisis and Hong Kong's recovery from it, the legitimacy of the new regime – demonstrated in a variety of ways: the response to structural change, the fluctuating fortunes of opposition political parties, and the measurable ups and downs in public support for the government – and the functioning in practice of 'one country, two systems', particularly focusing on issues which have given rise to conflict between two entirely different systems of law. Finally, *Hong Kong in Transition* discusses freedom of speech as a litmus test of 'one country, two systems', notably as it is represented by the behaviour of, and constraints on, the media in Hong Kong since the handover in 1997.

The particular appeal of this volume lies in the fact that it combines a broad overview with detailed study of individual topics. It is multidisciplinary, and its chapters may be read as 'stand-alone' studies or taken as complementary parts of a whole snapshot of Hong Kong in this critical early period. The chapters are pitched at a level to make them accessible both to undergraduates and to the specialist. Some contributors are established scholars with an international reputation; others are younger scholars whom the editors feel have something important to say. Contributors have been drawn from Hong Kong, Macau, the UK, the US, Australia and Germany, reflecting the international interest in the fate of Hong Kong.

**Robert Ash** is Chiang Ching-kuo Professor of Taiwan Studies at the School of Oriental and African Studies, University of London. **Peter Ferdinand** is Director of the Centre for Studies in Democratisation at the University of Warwick. **Brian Hook** is Emeritus Leverhulme Fellow at the Centre for Southeast Asian Studies, University of Hull and Honorary Research Fellow at the Centre of Asian Studies, University of Hong Kong. **Robin Porter** is Professor of Business – Regional Development Australia and Asia Pacific, La Trobe University.

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# Abbreviations

ADPL	Association for Democracy and People's Livelihood
BL	Basic Law
BORO	Bill Of Rights Ordinance
CA	Court of Appeal
CATI	Computer Aided Telephone Interviews
CE	Chief Executive
CFA	Court of Final Appeal
CJ	Chief Justice
CP	Citizens' Party
CPC	Communist Party of China
CPG	Central People's Government
CPPCC	Chinese People's Political Consultative Conference
CPSU	Communist Party of the Soviet Union
CTU	Confederation of Trade Unions
DAB	Democratic Alliance for the Betterment of Hong Kong
DB	District Board
DC	District Council
DP	Democratic Party
DPP	Democratic Progressive Party
DPP	Democratic People's Party (Taiwan)
EC	Election Committee
Exco	Executive Council
FC	Functional Constituency
FTU	Federation of Trades Unions
GC	Geographical Constituency
GDP	Gross Domestic Product
HKBR	Hong Kong Bill of Rights
HKEJ	Hong Kong Economic Journal
HKJA	Hong Kong Journalists' Association
HKOHR	Hong Kong Ordinance of Human Rights
HKPA	Hong Kong Progressive Alliance
HKSAR	Hong Kong Special Administrative Region
HKTP	Hong Kong Transition Project
ICAC	Independent Commission Against Corruption
ICCPR	International Covenant on Civil and Political Rights
JD	Joint Declaration
LAC	Legislative Affairs Commission
LegCo	Legislative Council
LP	Liberal Party
MAC	Mutual Aid Committee
MC	Municipal Council

MPF	Mandatory Provident Fund
MSAR	Macau Special Administrative Region
NPC	National People's Congress
NPCSC	National People's Congress Standing Committee
NT	New Territories
ONFNE	Ordinance on the National Flag and National Emblem
PLC	Provisional Legislative Council
POO	Public Order Ordinance
PR	Proportional Representation
PRC	People's Republic of China
PSB	Public Security Bureau
Regco	Regional Council
ROA	Right Of Abode
ROC	Republic of China
RTHK	Radio Television Hong Kong
SAR	Special Administrative Region
SCMP	South China Morning Post
SRO	Societies Registration Ordinance
Urbc	Urban Council
WTO	World Trade Organization





# Introduction

*Robin Porter and Brian Hook*

It is still close enough to the handover of 1997 for observers frequently to be asked whether Hong Kong has changed, and if so in which way and to what extent. Since it is axiomatic that all places change over time, even over relatively short periods, and even those whose chief characteristic seemed to be their very changelessness, such as the former imperial or so-called traditional China, it has become self-evident that the question is more often than not intended to be rhetorical rather than genuinely information-seeking.

Depending on the political persuasion of the one who puts it, the response anticipated is either an affirmation of ‘no’ or ‘very little’ change that conveys a positive signal, or an admission of ‘some’ or ‘significant’ change that conveys a negative signal. The former would convey an endorsement generally of the decisions taken and policies pursued by the administration under Mr C.H. Tung, in which the then Chief Secretary Anson Chan and Financial Secretary Donald Tsang played significant roles. The latter would not.

This book, following on from an earlier volume dealing with the years leading up to 1997, is designed for those seeking a balanced and informative response to the justifiable question as to the nature, source, scope and scale of change in Hong Kong under Chinese sovereignty. Its publication is timely. It comes as the administration begins to address the important constitutional issues deliberately left unresolved in the Basic Law when it was adopted by the National People’s Congress in 1990. Among them are whether the Chief Executive should be directly elected by universal suffrage in 2007, and whether there should be a majority of seats in the Legislature (LegCo) directly elected by Geographical Constituencies and a minority from Functional Constituencies in 2008.

Technical though these issues appear at first glance, they are, in practice, also extremely sensitive. Constitutional reform in Hong Kong was first seriously mooted in 1945 as the then post-war British Labour Government addressed the question of properly managing what, in effect, was the impending dissolution of the greatest empire in history. Those plans were shelved for fear of transposing the political struggle on the Chinese mainland to the hustings of Hong Kong. The triumph of the Communist Party of China in 1949 and the presence of the People’s Liberation Army at the gate emphasized the fact that Hong Kong was borrowed space in borrowed time. Without the travails of democratic government it prospered and, as a unique colonial anachronism, it survived until 1997.

Some time before then, however, the issue of representative government had re-entered the political agenda. In 1966, briefly, the administration revisited the question of constitutional reform by appointing the cautiously designated Working Party on Local Administration. There were conflicting views among its members, some of whom regarded the proposals for reform as culturally unsuitable and premature. It was overtaken by the events of the Cultural Revolution in Hong Kong, the response to which was the extension of the tried and trusted district officer system from the rural New Territories to the cities.

This practice of change within tradition continued until the creation of District Boards at the start of the 1980s. This was followed by over a decade of attempted constitutional reform. The process, which included the introduction in 1985 of elected representatives of Functional Constituencies to a hitherto appointed LegCo did not, however, extend to direct elections for Geographical Constituencies. At China's insistence, this step was postponed until 1991. By then, a head of steam for reform had built up in Hong Kong. The 1989 democracy movement had been suppressed in China. Locally, the progressives, the United Democrats, the forerunner of the Democratic Party, were poised to be swept to an election victory.

Electoral victory did not, however, carry with it the right to the assumption of political power. Hong Kong remained a colony. Its constitutional arrangements were set out in the arcanelly-named Letters Patent and Royal Instructions. These provided for an executive-led system under the governor rather than under the dominant party in the LegCo. The popularity of the Democratic Party was confirmed in elections for the three tiers of representative government, the District Boards, the Municipal Council and the LegCo in 1994–95, following the introduction of the controversial reform programme by Governor Patten in 1992. These victories further increased the pressure for change to the executive-led system that would translate political popularity into political power. But the reform programme had been based on an interpretation of the constitutional documents, the Joint Declaration and the Basic Law, which China refused to accept.

China was not alone. The distinguished former British ambassador who had negotiated the Joint Declaration, Sir Percy Cradock, and others (notably many members of the business community) averred China had a colourable case to argue. China threatened to reverse the programme to accord with its interpretation. By appointing a Provisional Legislature to serve for a year after the handover, China ensured its threat was carried out. In practice, the chief measures taken to reverse the Patten tendencies were: amendments to the Public Order Ordinance, the Societies Registration Ordinance, and to the Bill of Rights Ordinance, and the replacement of a first-past-the-post system with an electoral system based on party lists and proportional representation. This created a much less favourable legislative framework for political activism than had been in place in the approach to the handover. Nevertheless, all but one of the formerly elected politicians regarded as advocates of democratization, who were either members of, or allied to, the Democratic Party, and who had been summarily defenestrated in 1997, were returned in a record turnout in adverse weather in the May 1998 LegCo elections.

This re-assertion of the popular will was shortly to be overshadowed by the Asian regional economic crisis. At first, it appeared that Hong Kong would be

spared. Soon, however, the currency, which was pegged to the US dollar, was the object of speculation. Interest rates rose, and asset values, particularly property values, fell. The fragility of certain mainland-owned financial institutions caused concern. Unemployment rose. Political and constitutional considerations, already somewhat marginalized by a succession of crises including Avian flu, red tide, BSE, pharmaceutically-infected offal, and concerns over the environment and the quality of the water supply, were swiftly eclipsed by economic issues. An atmosphere of gloom descended as the population, at the best of times gastronomically and materialistically preoccupied, adjusted to uncertainties about the safety of food, the quality of the environment and job security.

Under these conditions, it was not possible for democratizers to make much headway. Moreover, they were often forced on to the back foot or even wrong-footed by events. For example, they appeared unwilling for reasons of principle, to endorse the government's intervention in the stock market in 1998. Consequently, when the intervention was shown to have been well-judged and successful in punishing external speculators, doubt was cast on their judgement. Similarly, in conditions of economic downturn, it was much easier for the business constituencies convincingly to question the wisdom of well-meaning proposals designed to promote the interests of employees. Arguably, the most difficult question was that which arose over the Right of Abode in Hong Kong of large numbers of children, many already adults, of a parent or parents resident in Hong Kong.

This issue involved questions of human rights, the rule of law, the exercise of a high degree of autonomy and the independence of the judiciary. All of these were firm ground upon which the democratizers would normally choose to fight any authority threatening to undermine them. In this case, however, there was a dangerous quicksand. The government successfully demonstrated that the ruling of the Court of Final Appeal (CFA) would lead to an intolerable population influx. In an unprecedented move, instead of seeking an amendment to the Basic Law which would have preserved both the reputation of the CFA and the appearance of a high degree of autonomy, claiming great urgency, the government sought a re-interpretation of the Basic Law by the Standing Committee of the National People's Congress. In the economic climate, the government won an important, popular victory over its critics. A precedent for intervention in the judicial process had, however, been created. The degree of autonomy enjoyed by Hong Kong appeared to have been reduced.

This episode appears to have marked a turning point in the prospects of the two major political parties. In the next tests, the District Council elections in 1999 and the LegCo elections in 2000, the Democratic Alliance for the Betterment of Hong Kong, a Beijing-nurtured and supported grass-roots party, fared better at the expense of the Democratic Party. Possibly, the latter was losing the support it had originally gained as the proponent of democracy, or it had lost popular support by appearing to focus on principles rather than issues directly affecting the livelihood of its constituents, or it was demonstrably powerless due to the cumulative effect of structural measures to uphold the executive-led system (such as the restrictions placed on members' attempts to challenge and change government policies through LegCo), or its activists had been frustrated by the reduction in the size of the

political arena. This occurred when the Municipal Councils, the second level of representative government, were abolished and the government reintroduced a proportion of appointed members to the hitherto directly elected District Boards, redesignating them as District Councils.

The explanation for the fall in popularity of the Democratic Party is probably to be found in a combination of all those factors. Despite having a significant presence, it remains divided and weakened. It is, however, also undeniable that a decade after the introduction of the Patten programme for constitutional reform, Hong Kong is much less politicized than it was. The administration of C.H. Tung has been characterized by caution and conservatism. The civil service, led until her insufficiently-explained resignation in 2001 by Anson Chan, has also been conservative in its outlook. The strengthening of the executive-led system under C.H. Tung was not unappealing, if only because it had been shown to have worked well in the past. This conservatism might, in future, even lead the civil service to attempt to resist reforms affecting its composition and role, particularly at the most senior level.

As stated earlier, however, Hong Kong is destined to change and to go on changing. Immediately before and after the handover, the focus was on local political and constitutional issues. Consequently, it became rather inward-looking. The regional economic crisis had the effect of both temporarily eclipsing its earlier preoccupations and, perforce, widening its vision. In the term of the current LegCo, and during the second term of the Chief Executive, political and constitutional issues will be revisited. The conditions will be very different from those surrounding the handover. Those involved must keep in view the regional implications of China and Taiwan adhering to the World Trade Organization system; the international significance of, and long-term prospects for, democracy on Taiwan; and, in those circumstances, the challenges of Shanghai and other Chinese and regional cities that seek to vie with Hong Kong for the privileges and international status it enjoys.

This begs two important questions for the future. First, can Hong Kong afford not to overcome a natural tendency towards conservative introspection as it again addresses the question of political and constitutional reform? Second, what must Hong Kong do to sustain its competitive advantage over other rapidly modernizing cities in China and elsewhere? The answer to the first is that in the long term, conservative introspection and all that such an approach entails, would be too high a price to pay. It follows that the answer to the second should be even greater investment in both the hard and the soft infrastructure deemed to be essential characteristics of a state-of-the-art international city. That would ensure Hong Kong continues to offer more than its competitors. The research and analysis on which the contributions to this book are based are designed to shed light on the background to and resolution of these important issues. The chapters are summarized very briefly below.

## **Business and economics**

For decades past, Hong Kong has been noted for its celebration of *laissez-faire* capitalism, and for its achievement of such economic success as to cause it to be ranked as one of the four little ‘tigers’ of Asia. Yet not all has been plain sailing.

Roberts and Peterson begin the book by addressing the evolution of the business environment in Hong Kong over the past several years. In public statements, they find a shift from 'gloom and doom' (during the Asian financial crisis of 1997) 'to light and optimism', but ask whether Hong Kong has truly turned the corner since 1997, and whether major changes in the business environment, which are widely perceived to be necessary, have in fact taken place. They describe the debate over the meaning of the Asian crisis, and highlight the various dimensions of the government's response to it which contributed to Hong Kong's recovery. At the very least they find an end to longstanding complacency, and a genuine change of attitude. In the end, though, the authors conclude, Hong Kong's character as a trading post, and a service economy progressively more reliant on China and on tourism, leaves it vulnerable and with limited options for evasive action should the international economy turn sour.

It is often asserted that Hong Kong people are interested in economic matters above all else. Lam in his chapter explores the relationship between the government and the public on issues of economic policy, tracing the evolving attitude of the Hong Kong Government towards intervention in the periods before and since 1 July 1997. This is particularly significant in the light of Hong Kong's reputation for non-intervention in the past. Lam finds a growing acceptance by the Hong Kong Government of the need to intervene to respond to the challenge of sustaining a sophisticated economy in a globalized world. Recent initiatives have included those directed toward increasing tourism, encouraging environmental awareness, improving opportunities for education and training, and protecting the stock market during the Asian financial crisis. Yet opinion polls show that the public has other concerns, the most pressing of which are rising unemployment, the lack of affordable housing, and the need for measures to promote economic growth. This may in part, he feels, account for the decline in popularity of the Chief Executive.

Ferdinand, in a variation on the same theme, in his chapter takes up the issue of the use of the currency board system to manage money supply in the form in which it is practised in Hong Kong. Contrasting the experience of economic growth over the decade of the 1990s in Hong Kong with that in Singapore with its central bank system, he finds that on most indicators Singapore outperformed Hong Kong, with a smoother growth curve, less inflation and lower unemployment. Economists may continue to discuss the advantages of currency boards in general, but the value of Hong Kong as a model may in fact be limited by the particular nature of its circumstances. Ultimately, the significance of Hong Kong's currency board system may be primarily political, he believes, denoting a link to the US dollar, and a significant manifestation of the 'one country, two systems' formula.

## **The political dimension**

It is widely recognized that in the years immediately leading up to the handover in 1997, the political map of Hong Kong changed dramatically, most notably with the emergence of political parties to contest the many more electoral opportunities in what previously had been a rather docile colony. In his review of the first four years since 1997, Hook links constitutional, social, legal and economic developments

to the emerging political realities of 'one country, two systems'. He finds that while there are aspects of political governance which differ significantly from trends apparent prior to the handover, economic preoccupations have more recently assumed priority, and Hong Kong has overcome successive crises through self-reliance. In the context of the gradual political reform which has replaced the Patten programme, he notes the decline of the Democratic Party and suggests that in future the Democratic Alliance for the Betterment of Hong Kong could play a significant role. The early years of the new century, he asserts, will be of particular significance in establishing the functional parameters of the Special Administrative Region (SAR).

How have the the institutions of government, and the ways in which government behaves, altered? Porter's contribution highlights the characteristics of the evolving political culture, in the broad sense, in Hong Kong since the handover. Following on from earlier work, he uses the framework of the democracy audit developed by David Beetham to assess the degree of change in political institutions and practice in Hong Kong over the past three years. Looking at electoral processes, the openness and accountability of government, rights and liberties, and the institutions of civil society, Porter finds that while there have been major and minor pressures resulting in change under the first three categories, Hong Kong's civil society remains as robust as ever. In the long term it may be this, he suggests, which will protect Hong Kong from critical encroachment by China.

Before the establishment of the SAR, the Hong Kong Democratic Party had become the leading elected force in Hong Kong's Legislative Council and other bodies, and the major voice for political change. Chan's chapter explores in some detail the fortunes of the Democratic Party over the period since the transfer of sovereignty, tracing a pattern of retreat, then rebound, followed by retrenchment. A renewed concern over socio-economic issues interacts with, but does not wholly displace, a continuing anxiety over the 'China factor' in voters' minds, Chan finds; the Democratic Party adjusts, taking to heart the economic priorities of ordinary people, while retaining its commitment to democracy, and doing well in the 1998 LegCo elections. Legislative impotence under the new LegCo arrangements, combined with inner-party conflict, led to Democratic Party losses in the District Board/District Council elections of 1999 and the LegCo elections of 2000, and gains for the Democratic Alliance for the Betterment of Hong Kong. Yet there is now more scope for cross-party consensus on bread and butter issues and 'rights and entitlements', Chan suggests. Hong Kong may be entering a new era of 'compensatory politics', negotiated along the twin axes of big business vs. grassroots and middle class, and pro-Beijing conservatives vs. democratic liberals, with even the Chief Executive being forced to make concessions on policy.

The administrative performance of the Hong Kong Government since 1997, through its impact on the LegCo elections of September 2000, is assessed in the chapter by Cheng. The author marks out factors in the emergence of discontent, with unsatisfied economic priorities very much to the fore, neglected, it is suggested, in part because of vested interests. The civil service, too, is criticized for mismanagement and lack of accountability resulting in a series of scandals, including the bird

flu epidemic, chaos at the new airport, and corruption in the public housing building programme. The prospects for a 'ministerial' system to run the civil service are considered, and the author speculates on the role of another major party, the Democratic Alliance for the Betterment of Hong Kong, in such a system. Public opinion and the position of the parties are discussed for the period immediately prior to the 2000 elections, and finally the results of the elections themselves are analyzed and explained. Cheng concludes that there are rising expectations of the government, but a public perception that its performance on key policy issues has actually been deteriorating. Moreover, the prospects for any political change, such as an early move to a wholly-elected LegCo, which might trigger more responsive policies, are not hopeful.

DeGolyer's chapter addresses issues of legitimacy and leadership in the Hong Kong SAR by documenting evolving public attitudes to government as tested by a comprehensive exercise in telephone sampling. The agency responsible for this survey is the Hong Kong Transition Project, a leading social research unit at Hong Kong Baptist University. Twenty-seven questions have been selected from surveys conducted over the past few years by the Hong Kong Transition Project to illustrate public opinion on a variety of matters and, as the author puts it, to determine the nature of the 'dialectic' between the leadership and the public. Subject matter includes corruption, political stability, personal freedom in the new SAR, the employment situation, the economy, the role and influence of big business, satisfaction with the leadership and the civil service, and relations with China. Some of the findings are predictable, others surprising. Overall, DeGolyer concludes that democratic structures and practices have broad public support in Hong Kong for the way they could facilitate expression of Hong Kong's modern aspirations, and that failure to reflect these aspirations helps to explain the low level of support for Hong Kong's current leaders as indicated by these polls.

## **Constitutional and legal issues**

The basis of the 'one country, two systems' arrangement under which Hong Kong reverted to China is the intended continued separation of their two legal systems. Fu leads the section of the book dedicated to legal issues with his consideration of the impact of the Chinese Criminal Law on Hong Kong since the transfer of sovereignty. Noting the unprecedented nature of the divided criminal jurisdiction within the boundaries of the People's Republic of China under the 'one country, two systems' formula for Hong Kong and Macau, and the 'loose-knit legal confederation' which it creates, he goes on to explore through several prominent cases how criminal law is applied in practice where jurisdictions are in conflict. In the 'flag' case, the CFA upheld the constitutionality of the local National Flag Ordinance, implementing the National Flag Law as mandated by the Basic Law, the foundation in Chinese law for 'one country, two systems', despite a 'reasonable restriction' on freedom of expression which would otherwise have been protected by Hong Kong law. On Article 23 of the Basic Law, requiring it to take action to create offences of treason, sedition, subversion, secession, and theft of state secrets,



the Hong Kong Government has so far taken no action. Yet the infamous ‘right of abode’ cases, notably Ng Ka Ling (1999), resulted effectively in the Standing Committee of the National People’s Congress asserting its power to ‘interpret’ articles of the Basic Law bearing on criminal matters as it so chose. With residence-based and nationality-based concepts of jurisdiction also in conflict, and no structure to generate consensus, Fu concludes that legal issues are easily politicized.

Wesley-Smith focuses on the central matter of the degree of Hong Kong’s judicial autonomy under the Basic Law. The ‘right of abode’ cases, resulting in re-interpretation of the Basic Law by the Standing Committee of the National People’s Congress, are examined for their significance. In these cases, recent immigrants to Hong Kong from China sought to advance and protect the status of their family members in Hong Kong using the Hong Kong legal system, ultimately for the most part unsuccessfully, as the matter was controversially referred by Hong Kong to China for reinterpretation of its Basic Law. The author discusses the constitutionality of the Basic Law, and the principal issues surrounding its re-interpretation. Wesley-Smith believes that ‘the relative autonomy of the legal from the political order, the formal nature of legal reasoning, equal access to the system, and the impartial administration of the law’ have all been damaged by the right of abode episode. However, in the final resort, judges can realistically only reflect and recognize the political context in which they operate.

Working from a somewhat different perspective, Gu and Lin address the critical issue of the power of constitutional judicial review, as exists in some Western systems of law, by the courts of the Hong Kong SAR with respect to provisions of the Basic Law. Examining first the norms which underlie the Basic Law as a constitutional document, the authors attempt to delineate the scope and content of the legislation which is widely believed to give autonomy to Hong Kong’s judicial system. The contention that the Basic Law gives Hong Kong courts the power to interpret the Basic Law, and therefore provides a foundation for constitutional judicial review, is put forward and tested, once again with reference to the ‘right of abode’ cases. In line with other commentators, Gu and Lin find much of the argument for the right of constitutional judicial review to be unrealistic in the context of Hong Kong’s political circumstances. Rather, they see a process by which elements of Chinese law ‘seep into’ Hong Kong common law, making for a judicial system which is no longer self-sufficient.

## **Journalism and the press**

A focus of major concern in the approach to the handover, both for itself and for what it might signify more generally for freedom of speech, was the fate of the news media in the new SAR. Two chapters on this theme bring the book to a close.

Holbig, in her chapter, tells the story of Hong Kong press freedom in transition, in which three episodes have particular significance. The discussion of self-censorship, both before and immediately after the handover, triggered by several events in the approach to the transfer of sovereignty, tapered off as the threat

appeared not to materialize and newspapers strove to keep afloat through the financial crisis of 1997–98. The criticism of Radio Television Hong Kong's editorial independence by a member of the Chinese People's Political Consultative Conference in Beijing in 1998 led to prolonged debate over, and public defence of, press freedom in Hong Kong; defence of the station by Anson Chan and Tung Chee-hwa, and Jiang Zemin's statement dissociating himself from the original remarks quietened things down, though the Radio Television Hong Kong Director's subsequent transfer to Tokyo showed some continuing ambiguity in the government's attitude. Concern over press standards led to a campaign for media ethics in 1999, and ultimately to a Law Reform Commission proposal to establish a statutory press council. The media, collectively, successfully opposed this measure, and a much weaker non-statutory body was formed to which not all newspapers subscribe. Taken as a whole, at the end of the year 2000 Holbig finds an 'unabated culture of vibrant public debate' in Hong Kong's news media, with the English-language press most active. Against this stand a particular taboo on publicly opposing 'one country, two systems', and the ubiquitous threat of implementing laws in Hong Kong to give voice to Article 23 of the Basic Law on treason and secession.

Finally, Cheung completes the discussion of the role of the media with her chapter on press coverage of the sensitive matter of China–Taiwan cross-straits tension in 1999 and 2000. This, she suggests, could serve as the acid test for media freedom in Hong Kong. The specific triggers here were a radio interview in July 1999 with Taiwan's representative in Hong Kong on Taiwan's new 'state-to-state' policy in dealing with the mainland, and an interview by Hong Kong Cable Television with the Vice-President-elect of Taiwan after the March 2000 election there. Cheung finds, despite a barrage of criticism, the Hong Kong media were able to survive through a combination of some self-censorship and alternative strategies for expressing critical views. These included commentaries, use of wire sources, reference to public opinion, and reference to readers' opinions expressed through letters. Newspapers carried articles written directly by Taiwanese officials in most cases rather than interviewing them, and avoided for the most part human interest stories, analyzing instead military strategy, or Sino–American relations. Continuing clashes reflect a pattern of 'cyclical gestures of restraint and assertion' as the Hong Kong media seek to establish a *modus vivendi* with the new sovereign authority.

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**Part I**

**The Hong Kong business  
environment**



# 1 The Hong Kong business environment since 1997<sup>1</sup>

*David Petersen and Elfed Vaughan Roberts*

## **Introduction**

In December 2000 Hong Kong's Financial Secretary Donald Tsang apologized for the inaccuracy of his forecast in relation to the budget deficit for the fiscal year 1999–2000. He had predicted a budget deficit for the year of HK\$36.5 billion. This was then amended to an estimated HK\$1.6 billion in his budget outline given in March 2000. When the correct numbers eventually emerged there was surplus of HK\$10 billion.<sup>2</sup> One might argue that inaccuracy on this scale is somewhat careless when planning for a national economy, but in this instance it perhaps serves to illustrate the speed of Hong Kong's convalescence, given that increases in government revenue were generated from sources directly related to economic recovery.<sup>3</sup> Indeed, up until the international events of 2001, the pace of Hong Kong's revival has been stunning, with the GDP growth for the year 1999–2000 being 10 per cent, allied with a rapid fall in unemployment to just 4.8 per cent.<sup>4</sup>

From gloom and doom there has been a distinct pendulum swing to light and optimism, at least in the case of statements made by the policy-makers. Self-congratulatory comments about the prudence of Hong Kong's dealing with the Asian Crisis are to be found in the titles of the Budget speeches.<sup>5</sup> The purpose of this chapter is to try to answer some crucial and fundamental questions. First, has (or rather had) Hong Kong, having experienced a nasty shock in 1997 with the economic downturn in other Asian countries, by mid-2001 turned the corner to a new and brighter future, or are the most recent impressive economic figures just a transient phenomenon to be overshadowed by more fundamental deficiencies? Second, have any major changes in the economic and business environment, which most agree are necessary, actually taken place or have we just observed what the Americans delightfully refer to as the 'dead cat bounce'?

These two points are the main focus of discussion in Hong Kong itself and are being hotly debated. Historically, at least since the Second World War, the Special Administrative Region (SAR) has been a highly successful economic powerhouse with an attractive business environment. Indeed, its Gross Domestic Product (GDP) has consistently grown at an enviable rate. Its per capita GDP has, apart from the occasional hiccup, been the envy of the developed world and a possible paradigm

for other developing systems to follow (as shown in Table 1.1). Unemployment has always been low, with the demand for labour remaining buoyant. The population generally has seen a huge increase in its standard of living,<sup>6</sup> often cited as a significant explanation for the high level of social stability. The government has adopted a policy of what it describes as positive non-intervention<sup>7</sup> (actually, until the early 1970s it would have been better described as policy of benign neglect, and the renowned entrepreneurial drive of the Hong Kong people was in part due to the fact they depended not on the government but on themselves and their families<sup>8</sup>). The result was a sound capitalist-inclined set of government policies with an independent and powerful Western legal system to back it up.<sup>9</sup> The Hong Kong civil service is, along with Singapore, generally regarded as the most efficient and non-corrupt in Asia with a largely law-abiding population.<sup>10</sup>

Political parties, as they emerged to compete for public office were, and still are, overwhelmingly supportive of the broad capitalist ethic which dominates Hong Kong thinking. Socialism and Marxist parties are almost entirely absent, as the base for any support among the body politic is quite simply not there.<sup>12</sup> Trade unions are not powerful, and in any case such as exist are moderate and accommodating.

The business elite of Hong Kong, now dominated by the Hong Kong Chinese, are classic supporters of an economic system which favours low taxes, minimum interference from the government in the workings of the market and, hardly surprisingly, a system skewed to the making of profit. The Hong Kong business elite has dominated the political system for over 150 years in a remarkably successful way. Even with the introduction of political reforms over the last 30 years or so, it has ensured that at all levels of decision-making its voice is heard loudly and clearly.<sup>13</sup> The Chief Executive was recruited from the business community, the membership of the Executive Council, the highest decision-making centre, has business well represented, and the Legislative Council is so arranged as to ensure business interests will dominate in the last resort.<sup>14</sup>

Constitutionally, the Basic Law is also highly supportive of the continuation of a broadly capitalist system in Hong Kong.<sup>15</sup> Much of that document, which constitutes the 'mini' constitution for Hong Kong, is based on guaranteeing the autonomy

*Table 1.1* Comparative gross domestic product

<i>Economy</i>	<i>GDP 1999 US\$ m</i>	<i>Population 1999 m</i>	<i>GDP per capita 1999 US\$</i>	<i>GDP 1980–90</i>	<i>Growth 1990–99</i>
Japan	4,395,083	126.6	34,716	4.0	1.4
US	8,708,870	272.9	31,912	3.0	3.4
Singapore	84,945	3.2	26,545	6.7	8.0
Hong Kong	158,611	6.8	23,325	6.9	3.9
UK	1,373,612	59.1	23,242	3.2	2.2
China	991,203	1,249.7	793	10.1	10.7

Source: World Bank, 'Selected world development indicators', in *World Development Report 2000/2001*, pp. 278–95.<sup>11</sup>

of Hong Kong's economy from external interference by its sovereign master, the People's Republic of China (PRC). Its other main message is that profit, low taxes, low levels of government intervention, and the freedom to trade with outside entities and indeed, to join economic organizations, are guaranteed. In short, the continuity of the 'Hong Kong way of life' after 1997 is underwritten.

So it is hardly surprising that just before the Asian Crisis of 1997 confidence was high and the optimists ruled the roost.<sup>16</sup> The economic miracle, begun in the early 1950s and based on the famed flexibility of Hong Kong, allowing it rapidly to accommodate changing economic conditions, seemed to provide the magic formula for success. After all, where else could manufacturing, based largely on the cheap and cheerful production of textiles and plastics, decline so quickly with so little fuss, in the face of cheaper competition?<sup>17</sup> Where else could the rapidly emerging service sector respond so quickly and absorb potential unemployed into its ranks?<sup>18</sup> Who else had the huge advantage in the early years to cash in on the new Chinese economy located primarily on its doorstep in Guangdong and the Shenzhen Special Economic Zone? Hong Kong was quick to take advantage of the huge demand for investment, joint ventures and property development in China.<sup>19</sup> It was equally quick to take advantage of China's forays into world trade, rapidly channelling re-exports to and from the mainland. As the PRC developed, so did Hong Kong prosper along with it.

### **The Asian Crisis**

So it was that when on 30 June 1997 Hong Kong's transition from being a British colony to that of a Special Administrative Region of the PRC was completed, there were few who were to predict the events that were to transpire. The Hang Seng Index, a reasonable barometer of perceived economic health, stood at 16,673 in August of 1997 (its highest ever to that date), the per capita GDP for 1997 was US\$25,900 (still the highest level ever), unemployment was 2.2 per cent, and property prices were going through the roof.<sup>20</sup> The GDP growth level of 10 per cent seemed to reflect a prosperous economy within a wider framework of political, legal and social stability.

Business confidence was high, not only in Hong Kong but in the region in general. The upheavals in Thailand, Indonesia, Singapore, Malaysia, and South Korea (as shown in Tables 1.2 and 1.3), the economic stagnation in Japan, and the fears of potential economic banking and economic crises in the PRC all rapidly struck Hong Kong. Business confidence in Hong Kong rapidly evaporated and the optimistic tones soon gave way to deep pessimism. Any structural weaknesses of the SAR, which had been disguised or ignored in the general 'feel good' atmosphere, were quickly revealed. Over the next two years the GDP took a steep dive, declining by 5.8 per cent in 1998 (reversing an average 5 per cent growth over the previous five years), unemployment rose from 2.2 per cent in 1997 to 4.7 per cent in 1998 and 6.2 per cent in 1999, and underemployment rose from 1.2 per cent in 1997 to 3.0 per cent in 1999.<sup>21</sup> Property prices, albeit inflated before the crisis, collapsed.<sup>22</sup>



Table 1.2 Impact of the Asian Crisis on stockmarket valuations

City	Index	1997 pre-crisis high Index	Date	Post crisis Index	Date	% Decrease
Bangkok	SET	848.56	24 Jan. 1997	349.60	9 Jan. 1998	58.8
Hong Kong	Hang Seng	16,673.27	8 Aug. 1997	6,660.42	14 Aug. 1998	60.1
Jakarta	Composite	736.60	4 Jul. 1997	342.97	9 Jan. 1998	53.4
Kuala Lumpur	Composite	1,270.67	28 Feb. 1997	491.60	9 Jan. 1998	61.3
Manila	Composite	3,421.91	31 Jan. 1997	1,518.00	9 Jan. 1998	55.6
Seoul	Composite	791.97	14 Jun. 1997	351.86	13 May 1998	55.6
Shanghai	B	94.13	9 May 1997	44.80	16 Jan. 1998	52.4
Singapore	Straits Times	2,252.46	14 Feb. 1997	1,176.35	9 Jan. 1998	47.8
Taipei	Weighted price	10,116.00	26 Aug. 1997	7,375.14	12 Jan. 1998	27.1

Source: The Asian Wall Street Journal, 1997, 1998.

Table 1.3 Impact of the Asian Crisis on economic growth and currencies

Country	Average annual			GDP growth %			Currency units per US\$					
	1970-96		Actual		Actual		1997		1998		1999	
	1970-96	1996	1996	1997	1998	1999	1997	1998	1999	15 Apr. 1997	12 May 1998	Change (%)
China	9.1	9.6	8.8	7.8	7.1	8.30	8.26	0				
Hong Kong	7.5	5.0	5.0	-5.1	3.0	7.75	7.75	0				
Indonesia	6.8	7.8	4.7	-13.2	0.2	2,408.00	9,350.00	288				
Malaysia	7.4	8.6	7.5	-7.5	5.4	2.51	3.84	53				
Philippines	3.6	5.7	5.2	-0.6	3.3	26.40	39.15	48				
Singapore	8.2	6.9	8.4	0.4	5.4	1.44	1.63	13				
South Korea	8.4	7.1	5.0	-6.7	10.7	894.00	1,388.00	55				
Taiwan	8.3	5.7	6.7	4.6	5.7	27.60	33.32	21				
Thailand	7.5	6.7	-1.7	-10.2	4.2	26.10	38.56	48				

Sources: *Economist* (1998) 'East Asian Economies Survey, 7 March 1998, p. 7. *Far Eastern Economic Review* (1998) 'Prices and trends', 26 March 1998, p. 74. *The Asian Wall Street Journal* (1998), 13 May 1998, p. 24. The Asian Development Bank (2000) *Growth Rates of GDP* [online]. Available from: <http://www.adb.org> [Accessed on February 4, 2001].

The deepening of the crisis in Hong Kong rapidly produced different explanations for the deteriorating situation. Varying interpretations were put forward as to its impact over the longer term, in turn leading to contrasting predictions for the future wellbeing of the economy.

A more conservative group ventured that the problems Hong Kong was experiencing were transient and externally generated, and that the SAR would quickly recover as the economic fundamentals remained sound. They conceded that external forces would bring difficult times but claimed that Hong Kong was well placed to deal with such problems in the longer run. They equally accepted that Hong Kong needed to adapt to the changing economic climate, but stated that such changes should be prudent. The governmental system, so sympathetic to the belief in *laissez-faire*, need only stand firm, and wait for the recession in other parts of Asia to disappear. They pointed to the limited geographical impact of the economic crises, with the USA, the PRC and other major economic players being hardly affected. Consequently no major changes in the economic direction of Hong Kong needed to be contemplated.<sup>23</sup> In short, it was a matter of sit tight, take prudent precautions, take no major initiatives, and all would be well. They felt that the government's intervention in the economy was a mixed blessing, partly beneficial by dealing with the immediate situation arising from the Asian Crisis, but downright dangerous if continued in 'normal' times.

An opposing school argued from a differing perspective. It saw the Asian Crisis as the vehicle by which the internal economic problems of Hong Kong were cruelly exposed, and claimed that here was the opportunity to address some fundamental issues ignored during the boom times.<sup>24</sup> Here, proponents argued, was the opportunity to take a long hard look at the economic and business environment and make the crucial changes necessary to set Hong Kong on the right course for the future.<sup>25</sup> Where could the changes be made and what form might they take? Whereas all agreed that there was room for concern, the means by which the problem could be solved differed, either in content or in emphasis.

One group argued that, first, there was a need to challenge the self-satisfied and mistaken belief that Hong Kong was a pristine '*laissez faire*' economy, certainly in the private sector. Beneath the layers of rhetoric, the SAR was in many ways not a free market. The whole system of business was based on a multitude of comfortable cartels and monopolies in an economy run for, by, and with the business elite.<sup>26</sup> This group rejected the popular perception of Hong Kong as an internally free market (there was no argument over the free port status, freedom of capital flows and investment and the like) and drew attention to the business elite who protected its own interests often at the expense of the economy and the business environment.<sup>27</sup>

Second, they argued that the economy was becoming less competitive and losing its edge over its regional rivals. High operating costs had forced manufacturing to all but disappear from Hong Kong as industry moved to cheaper locations.<sup>28</sup> Hong Kong now depended, to a potentially dangerous degree, on re-exports of goods imported from the PRC. In 1999, re-exports represented 87 per cent of Hong Kong's total exports, with almost 60 per cent of these goods originating in the

PRC.<sup>29</sup> Although a significant proportion of these imported goods were produced by the mainland China operations of Hong Kong firms, there was no guarantee that future trade would not be conducted directly with the destination markets, bypassing Hong Kong and eliminating demand for the logistical and transport services Hong Kong has developed to serve the re-export process.

Tourism, a major revenue earner in Hong Kong, had slumped badly during the Asian Crisis, and despite a major rebound in the number of tourists coming to Hong Kong in 1999 and 2000, the actual revenue received declined.<sup>30</sup> Explanations for the decline in revenue from tourists differ but include the high cost of living in Hong Kong compared to other locations in the region, the fact that the SAR is no longer seen as a shoppers' paradise, bad service, lack of initiatives in providing tourist attractions and, above all, the high levels of pollution affecting the territory; a compendium hard to deal with in the immediate term.

Third, many saw, and still see, the capabilities of the PRC growing at an impressive rate, and having less need for Hong Kong as a banking, insurance and service base.<sup>31</sup> With Hong Kong's reliance upon the wellbeing of the PRC economy and the PRC's increasing determination to modernize, how long could Hong Kong retain the initiative? In particular, the perceived challenge of Shanghai as an alternative centre performing many of the economic and business functions served by Hong Kong was a sobering thought.<sup>32</sup>

Those looking for more radical measures put forward a number of solutions that they felt might put Hong Kong back on its pedestal as a dynamic economic entity. The proposals included reducing the high cost of labour and certainly resisting any wage or salary increases, bringing the cost of commercial rents down to more reasonable levels, and finding a niche in the 'new economy' where Hong Kong could regain an initiative. Added to that were calls for new initiatives to attract tourists, positive action to deal with Hong Kong's rapidly deteriorating environment,<sup>33</sup> and programmes to deal with monopolies and cartels. Also on the agenda were calls for the upgrading of the skills of the general population through retraining and producing more graduates in key areas.<sup>34</sup> Such skilled workers could be supplemented by importing highly qualified professionals, primarily from the mainland, although previous such efforts had been less than successful.<sup>35</sup> One other requirement that was implicit in their thinking was to rekindle the entrepreneurial spirit of the younger generation that had been sadly diminished when compared to some 20 years previously.<sup>36</sup>

## **Government intervention in the economy**

The one crucial area of dispute, as mentioned earlier, was the role that the government might play in the revival of the economy and the business environment. Rapid and systematic intervention over a long period or a quick foray followed by retreat?

Certainly, the government did act quickly and decisively. Between 1997 and 2000 it took a number of steps to intervene in the economy and the business environment to the delight of some and the despair of others. It acted quickly

during the Asian currency crisis to ensure the stability of the Hong Kong dollar and not to be forced off the US/Hong Kong dollar peg.<sup>37</sup> The Financial Secretary, Donald Tsang, managed to withstand pressures to cut the peg and, in a tactical action, severely burnt the fingers of speculators. In a concerted action with the PRC, which also refused to devalue its currency, a beggar-my-neighbour set of devaluations was avoided and stability re-established. As of 2001 the Hong Kong dollar–US dollar peg remains, and will probably continue, as a cornerstone of Hong Kong’s monetary policy.

Another major and unprecedented move by the Hong Kong government was to intervene quickly in the stock market to counter speculative attack.<sup>38</sup> In August 1998, for the first time, the Hong Kong government purchased shares in private stocks, spending US\$15.2 billion to acquire approximately 7 per cent of the value of 33 stocks in the Hang Seng Index.<sup>39</sup> Unlike the protection of the currency peg, there was a more mixed reaction to this intervention.<sup>40</sup> Some saw it as a necessary defensive counterstroke whilst others felt that this was yet another example of unwarranted government interference in the operation of the free market.

Whatever the case, the government, unable to offload its holdings *en masse* back again onto the market, devised the Tracker Fund, an index fund in which the public could buy units.<sup>41</sup> The funds’ market value has risen in line with the recovery in the stock market (the Hang Seng Index rose from 6,660 on 14 August 1998 to an all-time high of 18,302 on 28 March 2000, before ending at 15,095 on 31 December 2000).<sup>42</sup> Not only has the government’s original outlay (US\$15.2 billion) almost been fully recovered through disposal of units in the Tracker Fund and dividends received (US\$13.1 billion), but even the remaining portfolio (US\$19.4 billion) is worth substantially more than that initial investment, giving a nice paper profit for both government and investor.<sup>43</sup> The government, anxious to establish that the intervention was not intended as a permanent and massive involvement, divested itself of over US\$11.6 billion of its holdings in 1999 and 2000, and indicated its intention to sell another US\$12.8 billion in 2001, leaving approximately US\$6.4 billion in holdings with which it hopes to smooth volatility in the market for the time being.<sup>44</sup>

Another form of intervention in the economy was with the introduction of the Mandatory Provident Fund (MPF) that became active in January 2001. Its function was to force employers to make provision for employees in Hong Kong not covered by any other pension funds. Based on a contribution from employer and a levy on the employee, it is run by private enterprises, is geared for the lower paid and is a forced savings scheme backed by legal sanctions against the employer in the case of non-compliance. Once more there were cries of foul by many employers who argued that this would raise business costs even further (but on the other hand the banks and insurance companies were naturally supportive, saying this was a good thing for the economy!).<sup>45</sup>

The government was also active in other areas, including its March 1999 announcement of the Cyber-port project<sup>46</sup> combined with large amounts of financial support to encourage new technology, and IT in particular. It also finalized in November 1999 an agreement to establish a Disney theme park and resort at Penny’s Bay on Lantau Island, committing huge amounts of government subsidies

to the project.<sup>47</sup> Other areas of government decision-making in the economy were the heavy pruning of public housing to be offered for sale, and a reduction of pay for new entrants to the civil service.<sup>48</sup>

When all the above, and many other points of government involvement too numerous to include here, are combined, it is clear that the level of government intervention in the economy aimed at improving the climate of business activity has been considerable over the last two or three years. Whether this trend will continue, and whether it is generally beneficial or not in the long run, remains to be seen.

### **Optimism or pessimism?**

Whereas in 1998 there was a marked pessimism about Hong Kong's business and economic future, the pendulum had swung back by mid-2001 to cautious optimism in many quarters – but that optimism was tempered with a new recognition of the need for change. How much change and in what direction is still a matter of some argument.

Most are agreed that the general political environment is more or less acceptable, at least as far as economic and business matters are concerned. There is no push in the direction of socialism or its variants, and all are agreed that the broad format should remain capitalist. Obviously, some argue for greater government intervention and some for less, but all are agreed that this movement should be within reasonably narrow margins. There is general belief that the civil service remains highly competent, corruption is at a low level, and the government is sympathetic and sensitive to business requirements. No political party or important interest group has a differing perception of these matters.

There is also general consensus that government intervention of one sort or another is not necessarily a bad thing. Indeed, the Financial Secretary has a high standing in Hong Kong, certainly in retrospect, for his firm handling of the Asian Crisis. The dollar peg, firmly supported by the government, provides currency stability and the stock market, apart from high-technology shares, is now over twice the level it hit after the Asian Crisis.<sup>49</sup> There is some debate about the wisdom of the government's direct intervention in the stock market, the Mandatory Provident Fund, and policies relating to housing provision and developers' influence. The general public, whilst still lacking the 'feel good' factor, which is reflected in opinion polls and a slowdown in consumer spending, still affords the system legitimacy within the crucial political arena in which the business environment operates.<sup>50</sup>

There is also an encouraging, if slow, recognition of the need to do something about Hong Kong's deteriorating physical environment. Its long-term significance to the wider business environment has been ignored for far too long. The general health of the population has been adversely affected, tourists from Europe and the USA are discouraged from visiting because of the publicity over the smog, and some major international companies are relocating, in part because of perceived health risks.

Wages and salaries, some argue, are still too high but have slowed down considerably over the last few years. Hong Kong's GDP, as indicated earlier, is up an estimated 10 per cent this year, although it is highly unlikely that the economy can sustain such growth for much longer, with economists predicting a fall to about 2–4 per cent in the coming financial year. Hong Kong still suffers from deflation and from consumers' reluctance to spend on certain items.<sup>51</sup>

Inward direct investment into Hong Kong has remained high at US\$14.7 billion in 1998 and outward flows of investment were even larger at US\$16.9 billion in 1998, with much of those funds destined for the PRC, where Hong Kong retains its status as the largest investor, providing over half the PRC's direct foreign investment.<sup>52</sup> Total exports grew 16.6 per cent in 2000 with a growth of 22 per cent to the mainland, and total trade was up by 19 per cent for the year.<sup>53</sup> Such figures as these make heady reading, and when combined with other contributing political and social factors, seemed to suggest by mid-2001 that good times were here again.

The future looked even rosier when the strong economic performance and potential of Hong Kong's most significant business partner, the PRC, was taken into account.<sup>54</sup> The PRC has, of course, a crucial part to play in the continuing success of the Hong Kong economy and business environment. This symbiotic process has accelerated over the last 23 years to the point where, while Hong Kong performs a valuable role for the PRC, Hong Kong has become enormously dependent on the PRC's continued growth. International business still relies heavily on Hong Kong as a regional base from which to operate in the PRC. Hong Kong attracts capital, which is then channelled into the mainland. Hong Kong is the largest foreign investor in mainland China: it has 157,300 residents working there, and 120,000 firms registered there.<sup>55</sup> The 40,000 Hong Kong firms registered in Guangdong province alone employ over 5 million workers. In return, China is the largest foreign investor in Hong Kong, and there are over 1,800 mainland-backed enterprises registered in Hong Kong. Through its re-export of Chinese-produced goods, Hong Kong has massively increased the scale of its economy, far exceeding the level it could have attained through domestic manufacture. As China grows, so does Hong Kong prosper.

Nevertheless, despite the impressive recovery as outlined previously, a few compelling notes of caution need to be introduced. Internally, the elite in Hong Kong continues to dominate the corridors of power in the Hong Kong administration, and continues to exercise an undue, and potentially damaging, influence on the business environment in order to safeguard its privileged position.<sup>56</sup> The examples cited in this chapter include the government's August 1998 intervention in the stock market for the purchase of 5–10 per cent of the ownership of blue-chip Hong Kong stocks (see note 39), the exemptions granted to allow the launch of Li Ka-shing's internet venture Tom.com (see note 13), the government's acquiescence to the calls of property tycoons to curtail the sale of public flats through the Home Ownership scheme (see note 27), and the government's decision to grant the Cyberport project to Richard Li without public tender (see note 46). The leading critic of competition policy in Hong Kong is the Consumer Council, which has been

calling for competition legislation since 1966, and has regularly issued reports highlighting the lack of competition and the presence of cartels in industries including property, banking, supermarkets, telecommunications, and fuel.<sup>57</sup>

These constraints on competition contribute to Hong Kong's position as one of the most expensive cities in Asia. Hong Kong's rental and salary costs are approximately double those of Singapore, and four times those of China, as shown in Tables 1.4 and 1.5.

Table 1.4 Regional rental cost comparison

<i>City (in Central Business District)</i>	<i>Effective rent As of Dec. 2000 US\$square foot/year</i>	<i>Forecast change From Dec. 2000 to Dec. 2001 (%)</i>
Japan	119.17	0
Hong Kong	78.06	+20
Mumbai	65.33	+15
Taipei	52.20	-5
Seoul	34.61	-10
Singapore	44.05	+15
Sydney	41.65	+10
Beijing	27.77	+20
Shanghai	16.72	+15
Kuala Lumpur	12.35	+15
Bangkok	11.02	+5

Sources: Cushman and Wakefield (2000a) *Office Snapshot Asia Pacific, December 2000*. Cushman and Wakefield (2000b) *Net Effective Occupancy Cost – Asia*.

Table 1.5 Regional salary per month cost comparison

<i>Country</i>	<i>CEO</i>	<i>Controller</i>	<i>Sales director</i>	<i>Sales manager</i>	<i>Accountant</i>	<i>Software developer</i>	<i>Secretary</i>
Japan	18,300	15,909	12,803	8,258	4,527	4,708	1,720
Hong Kong	15,975	11,022	8,454	6,628	3,585	3,774	1,781
Taiwan	13,638	8,565	7,400	5,893	2,573	2,058	1,415
Singapore	11,131	6,667	4,186	3,962	2,290	2,792	1,326
S. Korea	9,800	7,562	4,222	2,993	1,810	2,119	1,494
Australia	8,957	7,071	4,913	3,635	2,540	2,674	1,912
Malaysia	7,127	5,432	2,930	1,945	1,171	864	491
Thailand	5,075	3,475	3,150	1,699	1,147	927	446
China	2,865	2,457	1,822	1,524	708	746	393
India	1,764	1,066	831	651	417	490	176

Source: 'Salaries Survey 2000', in *AsiaWeek*, 17 March 2000.

Note: Salaries in the above table are quoted in US\$ at the following exchange rates: Australia, A\$1.63; China, RMB8.28; Hong Kong, HK\$7.78; India, Rs43.61; Japan, 110 yen; Malaysia, RM3.80; Singapore, S\$1.71; South Korea, 1,134 won; Taiwan, NT\$30.78; Thailand, 37.77 baht.



If not addressed, these cost disadvantages may lead existing firms to relocate elsewhere (typically to Singapore or Shanghai), and may inhibit Hong Kong's famed entrepreneurial spirit from expressing itself in the establishment of successful new firms.

Some of the interventions in the economy by the government are open to criticism. Whereas, as mentioned earlier, the government has genuinely needed to intervene in the economy in certain areas, the nature and extent of that involvement is subject to question. Its protection of the HK\$–US\$ currency peg was both necessary and effective. However, its deal with Disney was not a defensive action required to protect the operation of the Hong Kong economy as we know it; rather, it was a very proactive move by the government, for a murky brew of reasons including the economic benefit, the boost to public confidence, the boost to its own standing, and the desire to keep this prize from its regional rivals.

Other areas that the critics of Hong Kong's business environment highlight include the continuing decline in manufacturing, the over-reliance on re-exports from China, and the failure to develop other sectors in the economy. There is some question as to whether the efforts to move into high-technology innovation, especially when fostered primarily by government initiatives such as the Cyberport, are the best way forward. While the interaction between firms in close proximity can foster productivity and innovation, it is unclear precisely how much interaction will occur between large firms, and whether the small and new firms that would benefit most from such an arrangement could even afford to be present. It is also unlikely that the large firms that will participate (Microsoft, IBM, Oracle) will perform innovative research at the site, given Hong Kong's limited information technology resource base and poor cost competitiveness.

Hong Kong is, of course, hugely reliant upon the external environment to generate growth in its economy, probably more so than any other economic system in the world. Any loss of its competitive edge or any major downturn in the global trading system would have a huge knock-on effect. This is one of the major lessons learnt from the Asian Crisis.

Of all the international actors on the economic stage, the PRC is in the long term the most crucial to Hong Kong. It is not possible in this chapter to go into detail about the economic problems of the PRC, but some critics suggest that difficult times lie ahead in the mainland. Economic growth has been slowing down in the 1990s, with GDP growth being maintained by deficit spending by the central government. The western regions of the country are falling behind, and resources are being diverted away from those with the natural competitive advantage in the coastal regions. State Owned Enterprises remain a black hole down which resources are poured, making the banking system somewhat precarious. China's membership of the World Trade Organization will be a mixed blessing, as there are many sectors, hitherto protected, such as insurance, banking and the stock market, which will increasingly have to face competition from foreign expertise and experience. If the situation were to deteriorate in China, and it is quite possible that it will, then the effects upon Hong Kong would be immediate and harmful.

In the wider external environment, there have been clear signs that the US economy is moving towards recession, a trend exacerbated by the terrorist attacks of 11 September 2001. The US accounts for 24 per cent of all exports from Hong Kong,<sup>58</sup> and any downturn would have marked adverse effects. The PRC is also heavily reliant upon the US export market, and the impact of negative effects there would be multiplied on the re-exports and transportation provision of Hong Kong. Furthermore, a US recession would very likely lead to a global downturn in the world economy, impacting on virtually all of Hong Kong's major markets.

## **Conclusion**

Now we are in a position to provide a cautious response to the questions we posed at the beginning of this chapter.

First, there is no question that Hong Kong has lost its pre-Asian Crisis sense of self-satisfied complacency, and has awakened to the new challenges that it faces. The many good years since the last domestic and global downturns had insulated people from the potential effects of economic cycles and crises. The trauma of corporate failures and redundancies during the Asian Crisis gave Hong Kong the reminder it needed that prosperity is not guaranteed.

Second, somewhat surprisingly given the free-market reputation of Hong Kong, the government has in many ways led the way to recovery from the Asian Crisis. Its actions succeeded in protecting the HK\$–US\$ currency peg, and in revitalizing the Hong Kong stock market. Many may claim that in doing so it has compromised the principles which have led to Hong Kong's success; however, it must be remembered that government remains a minor player in the Hong Kong economy, representing only 8 per cent of GDP.<sup>59</sup> A more serious claim is that its actions have been directed towards the interests of the Hong Kong business elite. The government must take responsibility for allowing its actions to present the appearance of favouritism, particularly to the property tycoons, and in particular to the family of Li Ka-shing. The government should act to introduce competition legislation that will encourage competition and the entry of new players into key segments in the economy. Such competition will undoubtedly reduce business costs, and will improve Hong Kong's competitiveness with its regional rivals.

Internally, there are many grounds for optimism for Hong Kong's future. Political stability remains high, the legal system is sound, the civil service is still efficient, corruption remains low, and the pro-business orientation of government is still supported, by and large, throughout the wider public. GDP is recovering, exports are rising, the budget is back in surplus, currency reserves remain enormous, taxes remain low, unemployment is decreasing, and deflation is on the retreat. It is unfair to suggest that these factors constitute a 'dead cat bounce'. Changes, mostly for the better, are taking place and Hong Kong is highly aware of the dangers of losing its competitive edge – although perhaps it still focuses on rivalry with Singapore rather than with the developing business centres in China, predominantly Shanghai, which constitute the more serious long-term threat.

Externally, however, it is clear that Hong Kong remains, probably more than any other, a hostage to the international global environment. As a trading entity and a service economy increasingly reliant upon China, and with a heavy emphasis on tourism, any downturn in either the PRC, or the wider global arena would have major and immediate adverse effects upon the SAR. No matter what Hong Kong's business environment does to improve, and no matter what it has learnt from the Asian Crisis, that simple fact remains constant. Let us hope that such an eventuality does not occur, but if it does, at least Hong Kong has prepared for it, even if it cannot control it.

## Notes

- 1 This contribution explores Hong Kong's economic recovery up to mid-2001. The strengths highlighted will, it is felt, help Hong Kong to cope with the economic consequences of the terrorist attacks on the United States, but the chapter does not seek to address the implications of those attacks.
- 2 See *AsiaWeek* 12 May 2000 and *South China Morning Post* (SCMP) 1 May 2000. Donald Tsang has experienced difficulty in forecasting in each of the last 4 years:

<i>Year</i>	<i>Estimate (HK\$)</i>	<i>Actual (HK\$)</i>
1996–97	Surplus \$1.6 billion	Surplus \$25.7 billion
1997–98	Surplus \$31.7 billion	Surplus \$86.9 billion
1998–99	Surplus \$10.7 billion	Deficit \$23.2 billion
1999–2000	Deficit \$36.5 billion	Surplus \$10.0 billion

Source: *SCMP*, 9 March, 2000.

In February 2000, Tsang not only repeated his forecast of a deficit for 1999–2000, but also forecast a deficit for 2000–01. Source: *SCMP*, 18 February, 2000.

- 3 The major reasons for the eventual surplus in 1999–2000 include higher revenues due to stamp duty on stock market trading and land sales, and a windfall from the sale of the government's Tracker Fund (its portfolio of blue-chip Hong Kong stocks, described in later sections of this chapter). Source: *SCMP*, 1 May 2000.
- 4 See Hon in *SCMP*, 5 December 2000.
- 5 This self-congratulatory tone is well reflected in the catchy titles of the Budget publications: 1998–99 *Riding Out the Storm, Renewing Hong Kong Strengths*; 1999–2000 *Onward with New Strengths*; 2000–01 *Scaling New Heights*.
- 6 Hong Kong's GDP per capita expressed in US\$ has increased from US\$4,460 in 1979 to US\$23,325 in 1999. Source: World Bank 2000, *Hong Kong, China at a Glance* (online).
- 7 Anson Chan, Chief Secretary of Administration of Hong Kong, has perhaps said this best: 'We have always regarded Adam Smith as one of the founding fathers of Hong Kong'. Source: Chan 2000.
- 8 See Lee 2000.
- 9 See Roberts and Petersen 2000, pp. 3–25.
- 10 Scott 2000, pp. 154–74.
- 11 Hong Kong's population was revised downwards from 6.97 million to 6.76 million on 11 August 2000, as Hong Kong changed to a 'resident population' method from its previous 'extended de facto' method. The government stated that the new method would better measure the residency and mobility patterns of Hong Kong people. The effect of this change is included in the above GDP per capita figure. Source: Hong Kong Government 2000 *Method for Compiling Population Figures Revised* (online).

- 12 Lau 2000, pp. 417–44.
- 13 When leading tycoon Li Ka-shing wished to join the internet bandwagon and float his start up Tom.com on the Growth Enterprise Market (GEM) in 2000, there was never any doubt that he would be given the special exemptions needed for him to do so. Although the regulations called for two years of operating records for firms seeking listing, and although Tom.com had been launched only one month before its public offering, approval was rapidly granted.
- 14 Of the 60 members of the Legislative Council, only 24 members are returned by geographical constituencies through direct elections, while 30 members are appointed by functional constituencies, and six members are appointed by an Election Committee.
- 15 Article 5 of the Basic Law states that the ‘previous capitalist system and way of life shall remain unchanged for 50 years’. The key economic provisions in Articles 105 to 119 support the continuation of capitalism and independence from the economic system of the PRC.
- 16 Cf. Enright, Scott and Dodwell 1997.
- 17 Manufacturing comprised 24 per cent of GDP in 1980, but it fell to 18 per cent of GDP in 1990 and 6 per cent in 1998. At the same time, overall GDP managed to increase almost eightfold from US\$22.3 billion in 1979 to US\$158.6 billion by 1999. Sources: Hong Kong Government, *Hong Kong 1997*, p. 94; Hong Kong Government 2001, *Gross Domestic Product at Current Prices by Economic Activity* (online); World Bank 2000, *Hong Kong, China at a Glance* (online).
- 18 While manufacturing’s percentage of the Hong Kong workforce dropped from 34 per cent in 1983 to 6.9 per cent in 1999, the total workforce expanded 30 per cent from 2,489,000 in 1981 to 3,529,000 in 1999, and the labour participation rate increased from 59.7 per cent of the population in 1981 to 62.1 per cent in 1999. The manufacturing workforce is expected to fall another 20 per cent to only 196,800 by 2005. Sources: Hong Kong Government 1981, 1983, 2000 *Manpower Projection to 2005* (online); 2001 *Labour Force and Labour Force Participation Rate by Sex* (online).
- 19 Hong Kong is the largest external investor in mainland China. By the end of 1999, the cumulative value of Hong Kong’s realized direct investment in China was US\$156 billion, representing 51 per cent of the total. This represents 32 per cent of Hong Kong’s total outward direct investment. Source: Hong Kong Government 2000 *Hong Kong’s Investment in the Mainland* (online).
- 20 See Hong Kong Government 1998 and *SCMP* 1997.
- 21 Hong Kong Government 1999.
- 22 Private rents fell, in many cases, by up to 30 per cent, to the great delight of some residents. Others who had purchased property on the crest of the wave were not quite so happy to have mortgages of up to double the value of their property. Commercial rents also dropped.
- 23 In his 2000–01 budget address, Financial Secretary Donald Tsang stated that:

Above all else, the events of the last two years have reinforced our commitment to some fundamental principles ... We believe that –

  - the economy must be market-led;
  - the Government must stick to its rule of ‘maximum support and minimum intervention’; and
  - the Government must live within its means and manage our public finances prudently.

Source: Hong Kong Government (2001)  
*Budget Speech by the Financial Secretary* (online).
- 24 Byres 2000.
- 25 Hong Kong has reacted in the past to major challenges, and the result has been to benefit the economy as a whole.
- 26 Nowhere was this more obvious than in the banking and property sectors. In the latter sector, a crucial sector of Hong Kong’s economy, land availability could be manipulated: given the shortage of land, the government could speed up or slow down its coming onto the market and thus control supply and demand. Source: Hong Kong Consumer Council 1996, *Competition Policy: The Key to Hong Kong’s Future Economic Success*.
- 27 For example, in January 2001 major property developers (including Li Ka Shing, the chairman of the major property developer Cheung Kong and the richest man in Hong Kong) called on

the government to reduce the number of discounted flats sold under the government's Home Ownership Scheme: within two weeks the Housing Authority announced a reduction of 25 per cent in the number of such flats to be sold. Coincidentally, Cheung Kong had also recently appointed former Housing Authority chairperson Rosanna Wong Yick-ming as a non-executive director. Source: Ng Kang-chung, 2001.

28 See notes 17 and 18 above.

29 Source: Hong Kong Government 2001, *External Trade Statistics* (online).

30 Many of the 'big spenders' no longer come to Hong Kong. The increase in visitors is accounted for by a huge increase in tourists from the PRC, who spend much less. Sources: Hong Kong Government 2001 *Visitor Arrivals by Country/Territory of Residence* (online), and Hong Kong Tourist Association 2000 *Competitive Prices Keep Tourism Receipts Down* (online).

31 While Hong Kong's economy stumbled during the Asian Crisis (as depicted in Table 1.3), China's economic performance continued to grow strongly through the crisis: China's GDP rose an annual average of 8.3 per cent from 1996 to 2000, including an 8 per cent increase in the year 2000. A similar increase is forecast for 2001. Exports rose 30 per cent from 1999 to 2000, resulting in a trade surplus of US\$23.6 billion. Source: *SCMP*, 31 December 2000 'GDP rise ends dip in growth'.

Improvement in the transparency of China's business environment, its impending entry into the WTO, and its boom in English-language study and competence (combined with a perceived steep decline in Hong Kong's standard of English-language ability), suggest that China will have less need for Hong Kong to play its traditional role of middleman for China's trade with the outside world. Source: *The Economist*, 2001.

32 Anyone who has visited Shanghai over the last few years cannot fail to be impressed by its economic dynamism.

33 Hong Kong's worsening air pollution has aroused widespread health concerns over recent years. The Air Pollution Index reached a record of 174 in Central on March 2000, a number 74 per cent greater than the World Health Organization's maximum of 100. Sources: Ho 2000 and *SCMP*, 23 April 2000.

34 The Hong Kong government's 'Manpower Projection to 2005' study conducted in 2000 predicted a 40 per cent increase in the need for professionals from 1999 to 2005, and a 47 per cent increase in the need for semi-professionals. Source: Hong Kong Government 2000, *Manpower Projection to 2005* (online).

35 Hong Kong's attempts to import skilled professionals to support its efforts to become the finance and technology hub of Asia have been hampered by difficulty in overcoming public and union concerns about worsening unemployment, and by the government's inability to attract the skilled foreign professionals it is targeting. Sources: Wong 1999 and Chan 2000.

36 An interesting comparison can be offered in this context. One of the authors teaches on MBA programmes in Hong Kong and in Shanghai. When asked in Hong Kong how many of the students have considered or are considering starting their own business not one hand went up. In Shanghai when the same question was asked over half the hands in the class were raised.

37 See Chapter 3 below.

38 For months Hong Kong had believed itself the victim of a 'double play' that allowed big funds to manipulate interest rates and benefit from short positions in the market, in a coordinated action. It was felt that up to 20 per cent of turnover was short sales. Cf. *SCMP*, 16 August 1998 'Skirmish won: but now for the war'.

39 This investment gave the government approximately a 7 per cent share of the ownership of the blue-chip firms that compose the Hang Seng Index, and included:

HSBC	8.8 per cent
Hutchinson Whampoa	7.9 per cent
China Telecom	4.1 per cent
Hongkong Telecom	8.1 per cent
SHK Properties	8.0 per cent
Hang Seng Bank	5.7 per cent
Cheung Kong	10.3 per cent

Source: Martin, N.A. 1999

- 40 Critics were legion in the ranks of the free-marketeers: Nobel-prize winning economists Milton Friedman and Merton Miller called the intervention a ‘crazy idea’ and a ‘serious blunder’ respectively. Source: Cooper 1998.
- 41 The Hong Kong government has been careful to maintain an ownership position in each of the 33 firms in the Hang Seng Index, making further purchases when the composition of the index changed (when member firms were replaced with new firms). This has allowed the government to establish the ‘Tracker Fund of Hong Kong’ as an index-tracking unit trust which acts as a closed-end investment trust with shares traded like any other company. Each unit consists of the 33 shares that make up the Hang Seng Index. The Chinese name of this Tracker Fund is the ‘Profit Rich Fund’. Source: Callick 1999.
- 42 See Tabokoff 1998 and *SCMP*, 31 December, 2000 ‘Bulls set to make a comeback’.
- 43 As of 31 December 2000, the government’s investment has been very profitable:

	US\$ bn
Investment in August 1998	15.2
Income from disposal and dividends	13.1
Shortfall on original outlay	<u>2.1</u>
Valuation of remaining portfolio	<u>19.4</u>

Source: Hong Kong Monetary Authority 11 January 2001, *Briefing to the Legislative Council Panel on Financial Affairs*.

- 44 Hong Kong Monetary Authority 11 January 2001, *The Exchange Fund: Preliminary Figures for 2000*.
- 45 *SCMP*, 30 November, 2000, ‘MPF changes landscape’.
- 46 Financial Secretary Donald Tsang announced the Cyber-port project in his 4 March speech for the 1999 Budget.
- 47 Hong Kong Disney will be a joint venture in which the government will own 57 per cent and Disney 43 per cent. Sources: Marshall 2000, *SCMP*, 7 November 1999 and Cheng 1999.
- 48 *SCMP*, 9 March 1999 and Cheung 2000.
- 49 The Hang Seng Index stood at 15,913 on 7 February 2001, compared to 6,660 on 14 August 1998, before the government’s intervention in the market. Source: *SCMP*, 7 February 2001.
- 50 Much of the dissatisfaction with the government lies in the question of human freedoms, the pace of democratic reforms, the political relationship with Beijing and the interpretation of the Basic Law.
- 51 Consumer prices fell by 4.0 per cent in 1999 and by 3.7 per cent in 2000. Source: Hong Kong Trade Development Council 2001, *Major Economic Indicators* (online).
- 52 Hong Kong Government 2000, *External Direct Investment Statistics of Hong Kong in 1998* (online).
- 53 Hong Kong Trade Development Council 2001, *Major Economic Indicators* (online).
- 54 As indicated in note 31, China’s GDP growth has been over 8 per cent per annum since 1996 regardless of the Asian Crisis.
- 55 Hong Kong Government 2000, *Hong Kong’s Investment in the Mainland* (online).
- 56 The European Parliament raised these issues in an October 2000 report, stating that ‘a number of tycoons have an undue and dominant influence on Hong Kong’s economy’, giving the example of the family of Li Ka-shing, which controls firms accounting for one-quarter to one-third of the capitalization of the Hong Kong stock market. Source: Snee, 2000.
- 57 Sources: Hong Kong Consumer Council: 1996, *Competition Policy: The Key to Hong Kong’s Future Economic Success*; 1996, *Achieving Competition in the Liberalized Telecommunications Market*; 1996, *How Competitive is the Private Residential Property Market? Report on the Private Residential Property Industry in Hong Kong*; 1995, *Assessing Competition in the Domestic Water Heating & Cooking Fuel Market*; 1994, *Report on the Supermarket Industry in Hong Kong*; 1994, *Evaluation of the Banking Policies and Practices in Hong Kong – Focusing on Their Impacts on Consumers*.
- 58 Hong Kong Government 2001, *Trade by Main Country/Territory (1999)* (online).
- 59 Government consumption expenditure represented only 8 per cent of GDP (at constant 1990 market prices) in 1999. Source: Hong Kong Government 2001, *Gross Domestic Product by Major Expenditure Component* (online).

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## **2 Public opinion and economic intervention in Hong Kong**

An emerging dilemma

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### **Introduction**

Socio-economic and political changes in the last few decades have turned Hong Kong from a politically apathetic to a politically active society. This has created an environment in which social accountability and responsiveness have been increasingly emphasized. Since the onset of the Asian economic crisis in 1997, the government has experienced increasing pressure from the public to deal with their financial hardships and to revive the economy. While some of the public demands are complementary to each other, others are contradictory in nature.

What has caused Hong Kong's socio-political climate to change? What has the government done in dealing with the economic crisis? Has the government's policy been consistent with the majority of public demands? These are the issues pursued in this chapter by examining the changing economic role of the government and by investigating its economic policy and public opinion in the three years after the handover (transfer of sovereignty from Britain to China). This chapter, however, does not examine the viability of the economic policy nor assess its consequences.

The findings of this chapter lead to the conclusion that while the Hong Kong government has gradually become interventionist over the last 30 years, the pace of change has speeded since the handover. Economic policy over the past three years, however, has not addressed the immediate concerns of the people and has not been consistent with their priorities. The findings shed light on the reason why Chief Executive Tung Chee-hwa has consistently received low satisfaction ratings from the public in opinion surveys. Further investigation shows that the Chief Executive has improved very little in meeting public demands in his recent policy address.

### **Changing roles of the Hong Kong government: a historical perspective**

#### ***From laissez-faire to reluctant intervention***

*Laissez-faire* is often considered to be an appropriate term to describe Hong Kong's economic approach in the pre-war period. However, as the government began

to provide public housing in 1954, it departed from the *laissez-faire* approach and moved towards a reactive form of economic intervention. Its involvement in housing provision could have been driven by a sense of social justice, but it has also been argued by some that the housing programme freed up valuable land, previously occupied by squatters, for business development (Keung 1985). Whatever the real reasons, the government became more socially responsive after the war.

In addition to housing provision, government intervention was observed in numerous other areas: (1) in control of land supply and property values (Chen 1980); (2) in subsidies to medical services, regulation of public transport and utility industries, control of rent increases, supervision of the banking industry, control of the supply of many food items through agricultural and fishery policies, and through negotiation with China (Schiffer 1983, pp. 9–30); (3) in influence over the labour market through education as well as through employment legislation and policies (Ng 1982); (4) by controlling labour importation through quotas and levies (Skeldon 1995); and (5) by interfering with the stock and money markets (Fung 1982). These interventions have led some academics to refer to Hong Kong's economic approach as 'intervention by discretion' (Ng 1982) or 'reluctant interference' (Fung 1982).

### ***Positive non-interventionism***

Hong Kong experienced phenomenal economic growth after the war. However, social conditions deteriorated in the 1960s. Crime rates were high and the civil service, especially the police force, was plagued with widespread corruption. This, combined with price inflation and a rising anti-colonial sentiment caused by the Cultural Revolution on the mainland, caused Hong Kong to enter a turbulent period marked by riots and social unrest. In 1971, Sir Murray MacLehose became the Governor of Hong Kong and introduced a number of initiatives to improve Hong Kong's social conditions. He developed a five-year plan for social services and a ten-year plan to improve housing, education, and medical and health services. As a result, public education at the junior secondary level was provided free of charge from 1979 (Chan and Kwok 1998, pp. 114–15). The period during which MacLehose served as Governor, 1971–82, has subsequently been referred to as the 'golden era of social development'. Social expenditure increased by an estimated eight-fold during this period, if all public accounts were considered (Lo 1990, pp. 61–3). MacLehose's social development, either by design or by accident, came just in time to settle some of the rising anti-colonial sentiment.

In addition to social development, MacLehose took some initiatives which had far-reaching consequences. In 1973, a calendar of festive events was introduced to develop and promote Hong Kong's cultural identity and to foster a stronger sense of community among Hong Kong people. In 1974, Chinese was made an official language of Hong Kong. Prior to that, English was the only official language. Also in 1974, MacLehose set up the Independent Commission Against Corruption (ICAC) to stamp out corruption. The image of the Hong Kong government conse-

quently improved. As a result of his initiatives, people became better educated. They had a stronger sense of belonging, and were beginning to consider Hong Kong their permanent home – no longer a ‘borrowed place living on borrowed time’.<sup>1</sup> Although later many sought citizenship in foreign countries when Hong Kong was approaching the handover to Chinese rule, many, nonetheless, returned to live in Hong Kong. The handover completed a process of transformation during which Hong Kong people gradually developed a stronger identity and raised their expectations of the government of Hong Kong.

MacLehose’s initiatives also changed the government’s attitude towards economic intervention. The late Sir Philip Haddon-Cave, Financial Secretary during the MacLehose era, considered the term *laissez-faire* too passive. He preferred to describe Hong Kong’s economic approach as ‘positive non-interventionism’. This, he said,

involves taking the view that, in the greater majority of circumstances it is futile and damaging to the growth rate of the economy for attempts to be made to plan the allocation of resources available to the private sector and to frustrate the operation of market forces which, in an open economy, are difficult enough to predict, let alone to control.

(Haddon-Cave 1980, p. xii)

However, positive non-interventionism was not to be the same as *laissez-faire*.

The socio-economic and socio-political forces operating within modern societies must be quietly accepted ... for the sake of social justice and stability, as well as the efficient allocation of resources, there must be a sense of social responsibility towards those who, for one reason or another, are unable to take advantage of the offered opportunities.

(Haddon-Cave 1980, p. xiii)

In other words, positive non-interventionism would not mean the withdrawal of government intervention. Rather, it would encompass interventionism for reasons of social justice, efficient allocation of resources, and stability.

In 1982, the failure of the Sino–British negotiations to reach an agreement on Hong Kong’s future resulted in widespread panic, causing the Hong Kong dollar to devalue and the Hang Seng (stock market) Index to go down. In 1983, the government linked the Hong Kong dollar to the US dollar to restore exchange rate stability. The linked exchange rate system has since been considered crucial in maintaining Hong Kong’s economic stability (Jao 1996). In 1993, the Hong Kong Monetary Authority was established to oversee the linked exchange rate system as a main part of its functions, signalling on-going intervention in the money market. The Hong Kong government has undoubtedly become interventionist in dealing with political uncertainty and in maintaining economic stability.

### ***The end of executive dominance***

In 1984, Britain and China signed the Sino–British Joint Declaration on the Question of Hong Kong, and the reversion of Hong Kong to China became inevitable (Liu 1997, p. 277). The colonial government tried to move Hong Kong towards representative government before the handover (Miners 1995, p. 115). In 1984, the Hong Kong government put forward a Green Paper, modified in a White Paper at the closing stage of the Sino–British negotiations, which put forward a plan to institute a system of government with authority firmly rooted in Hong Kong. Prior to 1985, all members of the Legislative Council (LegCo) were either officials or appointed by the government. That year, 24 members of LegCo were elected by an electoral college and through functional constituencies. In 1991, geographic direct election was introduced, with 18 of the 60 LegCo members directly-elected from geographic constituencies.<sup>2</sup> In 1995, all LegCo members were elected, although only one-third of them were directly-elected from geographic constituencies.

Disregarding how representative of the people LegCo members were, the political environment in Hong Kong had undoubtedly changed. Traditionally, Hong Kong had been characterized as a ‘no party administrative state’ (Rabushka 1976, pp. 1–3) and ‘an undemocratic executive-led system with enormous power lying in the hands of senior officials’ (Lo 1990, p. 52). The government’s dominance in the LegCo was now undermined by the electoral changes. As elected representatives would have to respond to the needs of their constituencies, their demands might conflict with the wishes of the government. Norman Miners observed that ‘the Legislative Council has changed from a wholly appointed body subservient to the executive into an obstreperous assembly with an elected majority where government proposals are frequently defeated’ (Miners 1994).

### ***Social equity and consensus capitalism***

Whether coincidentally or not, the government began to emphasize social equity in the 1980s while Hong Kong was beginning to experience rapid democratization. The tax system had been modified numerous times in the 1980s and 1990s to make it more equitable. Some of the changes, such as widening tax bands and increasing tax exemptions, were required to accommodate rising inflation rates. Moreover, social spending was increasing in the late 1980s. Financial Secretary Piers Jacobs (1986–90) rationalized the spending increases as ‘the reflection of the aspirations of a developing community’ (Hong Kong Government 1988, p. 21). In the early 1990s, Financial Secretary Hamish MacLeod (1992–95) emphasized the importance of ensuring equity by balancing market forces with government intervention. He preferred to call Hong Kong’s economic approach ‘consensus capitalism’, which emphasizes ‘the need to encourage free enterprise and competition, while promoting equity and assistance for those who need it’. Equity was needed ‘because the community rightly expects a fair deal for everyone, and in particular that raw competition (should) be

tempered by help for those less able to compete' (Hong Kong Government 1995, p. 1). His statements clearly indicate the increased commitment of the government to social justice and equity.

### ***Recent economic policy***

The above analysis indicates that as a result of economic, social and political changes, the Hong Kong government has been expanding its role in dealing with socio-economic problems, to the point where its action has become interventionist rather than passive. The handover and the Asian economic crisis have served as catalysts to speed up the pace of change. The effects of the Asian economic crisis were not severely felt in Hong Kong until the final quarter of 1997. Consequently, the Chief Executive's inaugural policy address in 1997 provides very little evidence of the government's later economic policy, since the economic problems had not yet manifested themselves. The 1997 Policy Address focuses on Hong Kong's reunification with China and on maintaining Hong Kong's economic vitality through improving its business environment. The most debated issue was an initiative to increase construction of housing units by 85,000 a year and to achieve 70 per cent home-ownership by 2007 (Hong Kong Government 1997). Both goals were later found to be unrealistic and unattainable.

In 1998, the government made a significant move to stimulate economic growth by increasing public spending and reducing tax (Hong Kong Government 1998a). Fiscal expansion had never previously been used as a strategy by the Hong Kong government to deal with economic problems, even during the oil crises of the 1970s and the political instability of the 1980s. Former Financial Secretary Piers Jacobs had said

I see no place for deficit financing as a permanent feature of fiscal policy, although I recognize that on occasions it may be inevitable that deficits have to be faced.

(Hong Kong Government 1987, p. 1)

It was also Jacobs' view that 'growth of expenditure has to be within economic expansion in spite of expectation for public services improvement' (Hong Kong Government 1987, p. 2). These guidelines had been consistently followed in theory and in practice by the colonial government up to this point.

In addition to the new expansionary fiscal policy, the government engaged in large-scale stock market manipulation to defend the Hong Kong dollar and the stock market in 1998. Although Financial Secretary Donald Tsang insisted in 1999 that the government had not changed its economic philosophy (Hong Kong Government 1999a, p. 25), his budget practice for that fiscal year spoke to the contrary. The following year, he asserted that the government 'cannot let non-interventionism become an excuse for doing nothing' (Hong Kong Government 2000a, p. 4). In doing so he cited the earlier observation made by Sir Philip Haddon-Cave that

Generally speaking, the Government weighs up carefully the arguments for and against an act of interventionism in any sector of our economy and on the demand or supply side in light of present and future circumstances. The Government then comes to a positive decision as to where the balance of advantage lies.

(Hong Kong Government 2000a, p. 25)

Thus, the Financial Secretary had subtly stated the government's emerging interventionist view. Furthermore, he ruled out expenditure cuts as an option for balancing the budget, observing that

there is an emerging school of thought that cutting down on government spending will cure all fiscal ills, as if the Government has been engaging in profligate spending. Nothing is further from the truth ... Drastic cuts in expenditure in these areas would inevitably affect the level and quality of services to the public, and the ones to suffer most would be those in the low-income bracket. Such an outcome is not acceptable to the Government and I am sure it is unpalatable to Members (of the Legislative Council) and the entire community, not to mention that it would also undermine Hong Kong's long-term interests.

(Hong Kong Government 2000a, p. 203)

The above remark clearly indicates the Financial Secretary's sensitivity to the changing political climate in Hong Kong, in which social responsiveness has assumed a higher priority than before. The budgetary changes have led to fiscal deficits in 1998–99 and 1999–2000.

The government's recent economic policy was even more clearly shown in the Chief Executive's 1998 and 1999 Policy Addresses as well as in subsequent budgets (Hong Kong Government 1998b, 1999a, 1999b, 2000a). Chief Executive Tung Chee-hwa has delivered a grand vision of developing Hong Kong into a world-class, hi-tech, knowledge-based society in his policy addresses. An important part of his strategy is to encourage hi-tech research and development, such as the Cyberport project announced in the 1999–2000 Budget Speech. The hi-tech initiative is one aspect of a policy mix involving changes in tourism, the financial sector, environmental policy, urban redevelopment, and education and training. In order to revive the tourism industry and to raise Hong Kong's international status, the government entered into a joint venture with the Disneyland Corporation to build a theme park on Lantau Island. To further enhance Hong Kong's status as a financial centre, the government strengthened supervision and regulation of the securities and futures exchanges. In addition, the government has taken steps to develop Hong Kong's debt market and to redevelop the older urban areas. Environmental protection is another key policy for fulfilling this vision, starting with the reduction of polluting emissions and preservation of natural habitats. The government has also proposed civil service reforms to make itself more efficient and leaner.



The Chief Executive, however, has provided no concrete solutions to deal with the immediate hardships of people. Although the government has emphasized hi-tech education and retraining to improve employment opportunities, these initiatives have been focused on the younger rather than the middle-aged generation. More middle-aged low-skilled workers will almost certainly become unemployed after China's accession to the World Trade Organization (WTO), as more manufacturing activities will move across the border to take advantage of the lower costs on the mainland. The Chief Executive has offered no concrete plans to protect Hong Kong's declining manufacturing sector, other than emphasizing the importance of developing hi-tech and value-added industries.

The above evidence suggests that the government is focusing on developing Hong Kong for the future, while the immediate concerns of the people may have been neglected. Whether the public subscribe to this grand vision and are willing to sacrifice their immediate needs to it is, therefore, open to question. This matter will be explained in the remaining part of the chapter.

## **Public opinion and government policy**

In order to examine public opinion on the government's economic policies, survey data collected by the Hong Kong Transition Project have been analyzed for the last three years. The following findings were obtained:

### ***Expansionary fiscal policy***

The expansionary fiscal policy proposed in the 1998–99 budget was found to have majority support. In a survey conducted in April 1998, 65 per cent of respondents indicated satisfaction with tax policy, and 48 per cent were satisfied with the level of social (including welfare) expenditure, compared respectively to only 13 per cent and 29 per cent showing dissatisfaction.

The high level of approval of the budget may have contributed to the Financial Secretary's popularity among the people. A large 71 per cent of the respondents were satisfied with the Financial Secretary's performance, compared to only 16 per cent not satisfied. By comparison, the performance of Chief Executive Tung Chee-hwa was considered satisfactory by only 53 per cent of respondents in the same survey, with 36 per cent not satisfied.

In a survey conducted in April 1999, immediately after the delivery of the 1999–2000 budget, respondents were asked to give their opinions on public spending in selected areas. The purpose was to obtain a deeper understanding of their preferences. In addition, respondents were asked to select one policy area as important to them. The responses to these questions are summarized in Table 2.1.

In Table 2.1, the 'Mean score' column indicates the average scores given to the adequacy of government spending in the selected policy areas, with 1 being too little, 5 just right, and 9 too much. A score between 4 and 6 is considered about right, while those above and below are considered too much or too little, respectively.

Table 2.1 Public opinion on the amount of spending on selected policy areas and their relative importance (April 1999)

<i>Policy areas</i>	<i>Most important policy (%)</i>	<i>Mean score</i>	<i>Too little (1-3)(%)</i>	<i>About right (4-6) (%)</i>	<i>Too much (7-9) (%)</i>
Primary and secondary education	22	4.4	29	61	10
Medical services	20	4.6	26	61	12
Subsidized housing	10	4.6	31	53	16
Environmental protection	9	3.7	49	45	6
Social welfare – CSSA	8	5.4	21	48	31
Hi-tech investment	6	4.4	38	44	18
University education	5	4.8	20	62	18
Transport infrastructure	3	5.5	8	66	25
Crime-fighting	2	4.9	16	72	12
Continuing education and job retraining	2	4.7	29	54	18
Civil servants' salaries and running government offices	2	6.3	7	43	50
Food safety and public hygiene	2	4.3	30	63	6
Recreation, culture and other community services	2	4.6	23	68	9

Source: Hong Kong Transition Project 1999 April Survey.

Note: On the amount of spending: 1 = too little, 5 = just right, 9 = too much.

The 'Most important policy' column indicates the per centage of respondents selecting the respective policy area as the most important one.

The results indicate that primary and secondary education (22 per cent) and medical services (20 per cent) were considered by far the most important policy areas. Although the mean scores suggest that government spending in these areas was seen as about right, more than one-quarter of respondents considered the expenditure too little. Subsidized housing and environmental protection, the next areas of importance, were also considered by many to have inadequate expenditure. Spending on environmental protection, in particular, was considered by almost half of the respondents to be insufficient with a mean score of only 3.7. Hi-tech development, an area heavily emphasized by the government in restructuring the Hong Kong economy was, surprisingly, considered by only 6 per cent of respondents as the most important, although 38 per cent considered that government spending in this area was too little.

These survey results are generally consistent with the findings of the historical analysis, which indicate that the government is expected to do more for the people.

Reviving the economy and sustaining the current level of public provision have assumed a higher priority than balancing the budget. The survey results also indicate that, although people considered public spending in major policy areas to be about right, a significant percentage of them felt that the level of spending was inadequate in some important areas.

### ***Stock market intervention***

The government engaged in a massive stock market intervention in August 1998 to defend the Hong Kong dollar and the stock market against speculative attacks. The stock market intervention, unlike the budgetary changes, received only a lukewarm response from the public. In a survey conducted in October 1998, 41 per cent of respondents opposed the suggestion that government should continue to intervene in the stock market, compared to 34 per cent giving support to the suggestion. This lack of support could be attributed to the widespread belief in the business community that non-interventionism is still the best economic strategy for Hong Kong.

The stock market intervention caused some local investors to lose heavily. Further stock market intervention would introduce more uncertainty into a market that was already volatile. Moreover, the government, with its regulatory authority, coercive power, and huge information and financial resources, would have too much of an unfair advantage, it was felt, if it were to continue its stock market manipulation. This negative reaction to the stock market intervention was therefore understandable.

On the other hand, speculative attacks had been blamed for causing the Hong Kong economic crisis, providing justification for the stock market intervention. The survey results reflect divergent views on this issue. Some of those who opposed the stock market intervention may have changed their minds, since speculative attacks subsided soon afterwards and the government gained an unanticipated profit of HK\$21 billion from the intervention, consequently raising its reserves to one trillion Hong Kong dollars for the first time (Hong Kong Government 2000a, p. 20).

### ***A matter of priorities***

Reaction to public spending is one yardstick for measuring the popularity of government economic policy. In some instances, the effort to satisfy popular opinion might not carry an expensive price tag. Reaction to market intervention was another yardstick, but this intervention was an unusual incident unlikely to happen on a regular basis. Therefore, neither case is a sufficient indicator of public opinion on government policy. In the April 1999 survey noted above, respondents were also asked to say whether they believed the government had done enough on a number of policy issues, including economic issues. The results of this are shown in Table 2.2, where the focus is on effort rather than expenditure. Another difference is that this table shows public opinion on specific policy issues rather than general policy areas.

Table 2.2 Public opinion on the degree of government effort on selected policy issues and their relative importance (April 1999)

<i>Policy issues</i>	<i>Most important issue (%)</i>	<i>Mean score</i>	<i>Too little (1-3) (%)</i>	<i>About right (4-6) (%)</i>	<i>Too much (7-9) (%)</i>
Encouraging overseas tourists to visit Hong Kong	15	5.1	17	55	28
Reducing pollution	13	3.6	44	49	7
Making the right policies to encourage economic growth	12	4.0	30	59	11
Improving people's livelihood	12	3.6	41	53	6
Competing for foreign investment and mega-projects	7	4.9	13	61	26
Controlling illegal immigrants	6	4.0	37	50	14
Preventing corruption	6	4.9	16	63	21
Improving civil service performance	5	4.2	25	60	15
Ensuring judicial independence and the rule of law	4	4.0	33	55	13
Improving the quality of workforce	4	3.5	45	49	6
Enhancing Hong Kong's international status	3	4.7	19	61	20
Ensuring criminals get punished	2	4.5	18	64	18
Encouraging mainland tourists to visit Hong Kong	1	5.2	13	57	30
Increasing citizens' participation in policy making	1	3.2	45	50	5
Protecting freedom of the press	1	4.6	19	63	18
Exercising competent leadership and administration	1	3.7	32	59	9

Source: Hong Kong Transition Project 1999 April Survey.

Note: On the degree of effort, 1 = too little, 5 = just right, 9 = too much.

Table 2.2 indicates that attracting overseas tourists to visit Hong Kong, reducing pollution, implementing the right policies to encourage economic growth, and improving the people's livelihood were each considered most important by at least 12 per cent or more of respondents. Of these, encouraging overseas tourist visits attracted 15 per cent of all respondents, whereas only 1 per cent voted for

encouraging tourists from the mainland. More than 40 per cent of respondents considered the government to have done too little in reducing pollution, improving people's livelihood, improving the quality of the workforce, and increasing citizens' participation in policy making. Two of these areas, reducing pollution and improving people's livelihood, rated very highly (13 per cent and 12 per cent respectively) in the overall responses to the 'Most important issues'.

The results also indicate that a number of issues emphasized by the government, such as competing for foreign investment and mega-projects (e.g. the Disneyland theme park), improving the quality of the workforce (e.g. hi-tech education), and enhancing Hong Kong's international status, were not high on people's agenda.

A further study was conducted in October 1999, after the Chief Executive had delivered his 1999 Policy Address. The survey questions focused on emergent policy issues at the time. The results are presented in Table 2.3.

As shown in Table 2.3, the need to reduce unemployment emerged as the most important policy issue, followed by the need to implement education reforms and increase and improve housing supply. The results provide a clear indication that people were most concerned about issues close to their families and livelihood. The government was considered by 60 per cent of the respondents to have done too little in reducing unemployment. Some of the issues emphasized by the government, such as pollution control, medical services reform, and civil service reform, were not considered as important by most of the respondents.

Regarding the survey of public opinion on the Chief Executive's efforts on selected policy issues, the 'Most important issue' column shows unemployment to be the most pressing concern (33 per cent), followed by the need for education reform (15 per cent) and improved housing (12 per cent). This could be attributed to several causes. First, the fact that by October 1999 the public was paying attention to policy issues, whereas in April 1999 public attention had been focused on taxation and expenditure issues. Second, the Chief Executive's lack of emphasis on livelihood issues in the 1999 Policy Address stirred up a lot of debate, which may have sharpened people's focus on these issues. Third, the questions asked in the October survey focused on the Chief Executive, and this may have solicited a more negative response.

As shown in Table 2.4, the Chief Executive has consistently received low satisfaction ratings in opinion surveys. In August 2000, only 32 per cent of the survey respondents considered his performance satisfactory, while 58 per cent considered it unsatisfactory. In comparison, Financial Secretary Donald Tsang and Chief Secretary for Administration Anson Chan received very high satisfaction ratings in the same survey – 78 per cent and 73 per cent of the respondents, respectively, considered their performance satisfactory. The survey results indicate that public dissatisfaction has been centred on the Chief Executive. Table 2.3 suggests that the Chief Executive has a set of priorities quite different from those of the people. This could be the cause of his low satisfaction ratings.

Table 2.3 Public opinion on the Chief Executive's efforts on selected policy issues and their relative importance (October 1999)

<i>Policy issues</i>	<i>Most important issue (%)</i>	<i>Mean score</i>	<i>Too little (1-3) (%)</i>	<i>About right (4-6) (%)</i>	<i>Too much (7-9) (%)</i>
Reducing unemployment	33	2.8	61	32	4
Implementing education reforms	15	3.8	32	49	5
Increasing and improving housing supply	12	4.2	26	51	2
Caring for the elderly	8	3.8	33	51	6
Ensuring judicial independence and rule of law	7	2.9	40	36	5
Reducing pollution	6	3.4	47	39	7
Improving medical services	6	3.6	35	52	9
Meeting with public and holding forums	4	3.5	37	42	6
Implementing civil service reform	3	3.9	27	44	10
Defending rights of Hong Kongers working and investing in the mainland	2	2.7	49	29	9
Improving cross-border travel and cooperation	2	4.1	22	57	15
Preparing to make all Legco seats directly elected	1	2.8	34	36	10
Considering tax reform	1	3.3	28	48	14

Source: Hong Kong Transition Project 1999 October Survey.

Note: On the degree of efforts, 1 = too little, 5 = just right, 9 = too much.

## Conclusion

The evidence in this chapter shows that Hong Kong's economic policy has been becoming more interventionist as a consequence of social, economic and political change. The handover and the Asian economic crisis have increased the pace of these changes. The Chief Executive of Hong Kong has put forward proposals for major improvements in the areas of the financial sector, the tourism industry, hi-tech development, urban redevelopment, environmental protection, and education and training. The purpose behind these plans is to develop Hong Kong into a world-class, knowledge-based city. This grand scheme does not, however, address the immediate concerns of the people, which are to reduce unemployment and

Table 2.4 Satisfaction ratings of Chief Executive Tung Chee-hwa's performance 1998–99 (percentage of respondents)

<i>Survey</i>	<i>Very dissatisfied</i>	<i>Somewhat dissatisfied</i>	<i>Somewhat satisfied</i>	<i>Very satisfied</i>	<i>Don't know</i>
1998 April	8	28	48	5	11
1998 June	13	34	41	5	7
1998 July	12	33	45	4	6
1998 October	9	33	42	4	12
1999 April	8	34	47	3	8
1999 July	13	33	42	4	8
2000 April	17	37	36	2	9
2000 August	19	39	30	2	12

Source: Hong Kong Transition Project surveys.

improve housing supply. Although the Chief Executive promised to increase housing supply in his inaugural speech, this promise was never delivered.

Looking at the survey results, this chapter finds that the majority of the Hong Kong people supported the expansionary fiscal measures introduced by the Financial Secretary, and had mixed feelings about the stock market intervention, but differed significantly from the Chief Executive in their assessment of the priorities for Hong Kong. This might explain why the Chief Executive has received low satisfaction ratings in opinion surveys.

The Chief Executive was under pressure to address people's immediate needs in his 2000 Policy Address. An opinion poll conducted by the University of Hong Kong indicates that 30 per cent of respondents believed that labour and employment issues should have been the main issue in the Policy Address, followed by 22 per cent for economic development, 8 per cent for housing and 7 per cent for social welfare (*South China Morning Post* 2000a). In his 2000 Policy Address (Hong Kong Government 2000b), the Chief Executive indicated that over the next two years \$2.7 billion would be spent to help the poor and another \$400 million to train poorly-educated workers. He also promised to create 15,000 government jobs. These initiatives, accounting for about 0.5 per cent of the next two public budgets, were criticized by trade unionists as inadequate in dealing with current unemployment problems (*South China Morning Post* 2000c). The Policy Address also presented a number of education initiatives and political reforms. In terms of housing, the Chief Executive had already confirmed in mid-2000 that the goal of providing 85,000 new housing units a year had long been scrapped. In the Policy Address, he spoke about selling public rental flats to the poor, and introducing a Home Starter Loan Scheme. The Policy Address provided hardly any new ideas to stimulate economic growth, other than emphasizing the importance of capitalizing on the opportunities opened to Hong Kong through China's imminent WTO accession. The Chief Executive has apparently failed again to address adequately the immediate concerns of the public. Although he warned expressly against

bickering in closing his policy address (*South China Morning Post* 2000b), his failure to offer solutions to people's immediate problems can only invite more criticism and debate.

## Notes

- 1 The phrase 'borrowed place living on borrowed time' was coined by R. Hughes 1976, p. 1.
- 2 LegCo members elected by the electoral college or through functional constituencies are not considered to have been directly elected, since they were not directly elected by the people.

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### 3 Hong Kong and the currency board system

A model for a globalizing world?

*Peter Ferdinand*

#### **Introduction: globalization and financial pressure on the nation-state**

It is often asserted that globalization has restricted the economic freedom of manoeuvre for nation-states. Foreign direct investment has come to play an increasingly important role in developing new economic potential in developing countries, let alone in developed ones.<sup>1</sup> To attract investors, countries should open themselves to international economic flows. Not only does this mean that corporate management should be transparent, but also investors need to be reassured that governments will not pre-empt too much in the way of national resources and that finances will be kept healthy. So government budgets should be relatively restrained. Furthermore, governments should avoid inflation which might erode the value of investments.

For both of these reasons some people have advocated currency boards as institutions that remove a lot of the risk of currency or financial miscalculation. They encourage financial hygiene. Typically they embody four essential characteristics:

- convertibility of the currency at a fixed rate (usually this has been fixed against the US dollar, but in Bosnia it is against the Deutschmark);
- 100 per cent backing of money in circulation with foreign reserves;
- absence of a lender of last resort to bankrupt banks;
- inability of the monetary authorities to finance spending of the government through inflation.<sup>2</sup>

In the 1990s an increasing number of states introduced currency boards to manage their money supply, rather than using a central bank, including Bosnia, Estonia, Lithuania, Bulgaria, Argentina. What was previously regarded as a rather old-fashioned institution for managing a nation's currency has become more attractive.

Some have seen this development as a response to the impact of globalization, which in general supposedly erodes the power of the existing nation-state.<sup>3</sup> Some increasingly see it as the future for states in both the developing and the developed world.<sup>4</sup>

Yet this is not always a response to globalization. Some states – especially new ones – introduced currency boards because they lacked the experience or skilled personnel to manage their money supply. In a world of dramatic currency flows, sometimes manipulated by speculators backed by large resources, the costs of inexperience could be enormous. Relying instead upon a currency board which obeys the rule that money in circulation has to be backed in full by foreign reserves introduces financial discipline into the economy. Because the rule is known to all, including potential investors, and because the currency is backed by a much stronger one, it makes for greater predictability.

Normally currency boards have only been introduced in response to a fundamental crisis – the collapse of a previous state system and the sudden introduction of a very different one, or a dramatic financial or even systemic crisis, e.g. Argentina in 1995. Or it might even be both, as happened to Bulgaria, which first abandoned communism in 1989, but which only introduced a currency board after several years of economic decline and rising inflation.

Currency boards have, therefore, very rarely been the preferred choice of institution for governments. Their very nature has tended to imply a diminution of national sovereignty over the economy. But economists often point out that in themselves currency boards do no more than a responsible, restrained government would do. In the era of globalization, governments should keep a tight control over inflation and they should shun deficit budgets. Yet governments that have been lax in this regard, and populations who have got used to adapting to high inflation, often find it difficult to break out of the spiral of inflation. Some kind of institutional fresh start is needed. That was certainly the explanation for the dramatic introduction of a currency board by Argentina in 1995 following years of high and turbulent inflation, even though it meant tying the Argentinian peso to the ‘gringo’ dollar.

In quite a short time, inflation was dramatically reduced. But then came the question: is there no longer a need for a currency board? Once the cycle of inflation has been broken and, it is hoped, government and the people have learnt the benefits of ‘saner’, self-disciplined financial management, should they go back to the old system of a sovereign central bank? After all, it has been argued, a currency board is very inflexible. It removes a great deal of discretion from macro-economic management and in democratic countries, where the people are supposedly sovereign, their legitimately elected representatives may find themselves compelled to implement policies that are unpopular. Worse, because the currency board is not allowed any latitude in controlling the money supply, it may exacerbate external shocks to the economy. If foreign currency comes into the territory, it *has* to increase the money supply, irrespective of the effect on the domestic economy. If foreign currency leaves, it *has* to decrease it at the same rate.

Thus, at least in the short run, the shocks may well be greater.

### **The case of Hong Kong**

Economists continue to dispute the benefits and disadvantages of currency boards when used as general policy instruments, as well as in particular crises. That is why

the experience of Hong Kong is very important. It has one of the longest-lived currency boards currently in existence. It has had a currency board on and off since the 1930s, but its current form, which includes the peg of the HK dollar fixed against the US dollar at a rate of 7.8:1, has been in place since 1983. Some of the most enthusiastic advocates of currency boards point to the success of Hong Kong as an example for other states. Hanke and Schuler for instance stress that: 'The currency board system, as used in Hong Kong and elsewhere, is a well-proven means of providing a stable, credible, fully convertible currency and of encouraging rapid economic growth.'<sup>5</sup> Since 1983 it has come to be seen as the cornerstone of Hong Kong's macro-economic management. Over time it has evolved, as the Hong Kong Monetary Authority (HKMA) has gained greater experience in making such a system work in a sophisticated market economy.<sup>6</sup> And since 1997 it has become an embodiment of the principle of 'one country, two systems' and of Hong Kong's different arrangements from the mainland, since the People's Republic operates with the more common central banking system.

There is no doubt about the commitment of the Hong Kong authorities to the currency board system. Although it was introduced as a response to a crisis in Hong Kong and therefore it might have been a short-term measure, the authorities there have come to appreciate one other essential virtue of this system: the guarantee that it offers of exchange rate stability. Since the HKMA pegs the HK dollar to the US dollar and it buys and sells US dollars so as to keep that peg secure as its highest priority, it ensures that the exchange rate is as close as possible to being permanently fixed. In practice there has been slight fluctuation in the exchange rate, since the HKMA guarantee of convertibility does not apply to all financial resources in the Special Administrative Region (SAR). It covers only the equivalent of the money deposited in Hong Kong banks (now known as the 'aggregate balance') plus coins in circulation. It does not include the very large sums used for other kinds of international transactions where the resources are not placed in a Hong Kong deposit. For other transactions a foreign exchange market exists – indeed it is deliberately encouraged – and so the HK dollar rate does fluctuate a little around the official convertible rate, but only a little. For an economy that is so heavily dependent upon international trade, that is a major advantage. But the disadvantage is that the authorities place a lower priority on achieving price stability through controls on the money supply. Prices may be pushed sharply upwards or downwards because of sudden flows of foreign currency into and out of Hong Kong. So inflation and deflation may be sharper, especially in a crisis.

### **The challenge of the regional financial crisis**

Normally the debate over currency boards is conducted either at a very theoretical level, or in terms of the isolated experiences of individual economies. The Asian financial crisis, however, provided an opportunity for more systematic comparative analysis. It is crises that provide hard evidence about the robustness of a system, whether it works well or whether, in the most extreme circumstances, it needs replacing. The fact that the Asian crisis was felt severely throughout the region,

and was triggered primarily by actors outside the region, means that it can be used to compare the responses of individual countries within it.

As will be seen from Table 3.1, Hong Kong performed creditably well compared to many of the other dynamic economies of the region. It avoided the catastrophe of Indonesia and the dramatic falls in Thailand, although its macro-economic management is much more open and therefore vulnerable to exogenous forces. On the other hand, it has not done significantly better than Malaysia and, at least over these years, it has not done quite as well as the Philippines. Yet the differences in scale and resource endowment of these much larger countries make comparisons with Hong Kong problematic. There is, however, another economy in the region that is more obviously comparable to Hong Kong: Singapore.

Both are extremely prosperous on a per capita basis. In 1999 Hong Kong's per capita GDP was US\$23,091 and Singapore's was US\$22,216. Both are relatively small in size with populations of 6.84 and 3.89 millions respectively. Both are very open to the outside world. They are therefore especially vulnerable to external factors and actors. Of course they have somewhat different economic structures which complicate comparison. For instance, industry accounts for a higher share of Singapore's economy than it does in Hong Kong – roughly 25 per cent of GDP as compared with 15 per cent. This may be crucial, since some commentators attributed Singapore's economic resilience in this crisis to the sustained export success of its electronics industries.<sup>7</sup> Nevertheless there is one other crucial difference in monetary policy, namely the fact that Hong Kong has retained the peg for its dollar against the US dollar, whilst Singapore values its currency against a basket of other currencies and allows it to fluctuate within limits. This is a crucial difference. Until 1971 Singapore, too, had a currency board, but in that year decided to let its currency float.

So Singapore ought to have had greater flexibility in its response to the crisis, since it was fundamentally an international crisis where various currencies came under intense speculative pressure. It also meant, as Hong Kong discovered only too painfully in 1997, that speculators would be tempted to try to break through the defences of the HKMA so as to make big profits from a devaluation. Yet there has been debate within Singapore in recent years about the merits of introducing a Hong Kong-style currency board.<sup>8</sup> So how well *did* the two economies cope?

Table 3.1 Annual GDP growth rates of selected Pacific Asia economies (in per cent using constant prices)

	1997	1998	1999
Hong Kong	4.94	-5.19	3.05
Indonesia	4.70	-13.20	0.23
South Korea	5.01	-6.69	10.63
Malaysia	7.32	-7.37	5.64
Philippines	5.16	-0.54	3.32
Singapore	8.39	0.40	5.35
Thailand	-0.43	-10.18	3.33

Source: IMF, *International Financial Statistics* (September 2000).

### Comparison of the experience of Hong Kong and Singapore

First, the GDP figures in Table 3.1 suggest that Singapore did indeed cope better with the challenge. In each of the three years in question Singapore's rate of GDP growth was higher than that of Hong Kong and it avoided recession in 1998. Singapore's unemployment rate was also lower than that of Hong Kong. It peaked at 3.5 per cent on average for 1999 as compared with 6.2 per cent. It was also the case that Singapore's rate of inflation was significantly smoother than that of Hong Kong, as can be seen from Figure 3.1.

It might be expected that, at least over the short term, inflation trends would be steeper in Hong Kong because the HKMA has no power to control money flowing into or out of the SAR. Thus money supply within Hong Kong might well fluctuate more sharply over the short term. This did indeed prove to be the case, as can be seen from Figure 3.2.

Two things can be seen from this. The first is the very close relationship between changes in M2 and in M3 in Hong Kong<sup>9</sup> over this period. Both the direction and the magnitude of change were very similar. The second is that, although M1 fluctuated rather more than the other two measures, the direction of trend was usually the same. Thus M2 and M3 tended to smooth out the changes in M1 in Hong Kong.

If we look at comparable figures for Singapore, however, a rather different picture emerges.

Figure 3.3 shows that over this period Singapore's M3 was the most stable element of the money supply. M2 was as stable, except in the aftermath of the financial crisis in 1999. M1 fluctuated much more widely, yet the Singapore

	1997				1998				1999			2000	
Hong Kong	6.2	5.5	6.1	5.5	5.0	4.4	2.8	-0.8	-1.8	-4.0	-5.9	-4.1	-5.1
Singapore	1.7	1.7	2.3	2.3	1.0	-0.3	-0.8	-1.6		0.3	0.5	1.1	0.8

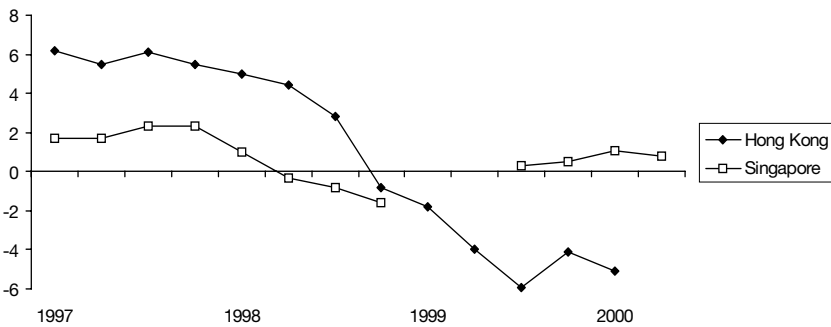


Figure 3.1 Consumer price changes in Hong Kong and Singapore, 1997–2000 (in per cent per quarter year-on year)

Source: IMF, *International Financial Statistics* (various issues).

Note: The method of calculating the consumer price index in Singapore changed at the beginning of 1999, hence the break in the line for the first two quarters.

	1997				1998				1999				2000	
M1	11.3	14.9	8.4	-4.3	-7.3	-17.0	-15.6	-5.0	-0.9	6.9	9.1	13.6	10.1	7.0
M2	12.0	16.3	16.1	9.5	7.2	2.8	7.3	11.7	9.5	10.8	7.8	8.0	8.1	9.9
M3	11.8	16.0	15.8	9.3	6.6	1.8	6.1	10.5	8.6	10.0	7.4	7.6	7.7	9.6

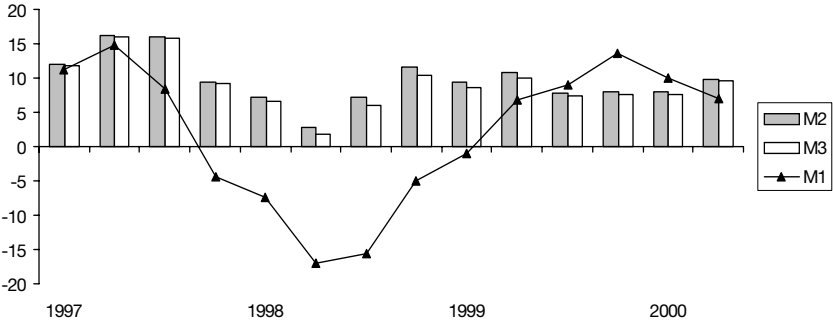


Figure 3.2 Changes in money supply in Hong Kong, 1997–2000 (in per cent per quarter year-on-year)

Source: HKMA *Quarterly Bulletin* (various issues).

	1997				1998				1999				2000	
M1	9.8	6.9	5.5	1.7	-6.5	-11.8	-11.0	-1.0	8.9	18.9	15.4	14.2	10.6	11.6
M2	11.8	10.6	10.2	10.3	9.4	8.1	10.0	30.2	27.4	30.4	28.4	8.5	5.6	2.3
M3	10.9	10.0	9.5	8.3	7.1	5.9	7.4	8.0	6.8	8.5	7.3	7.3	4.9	2.1

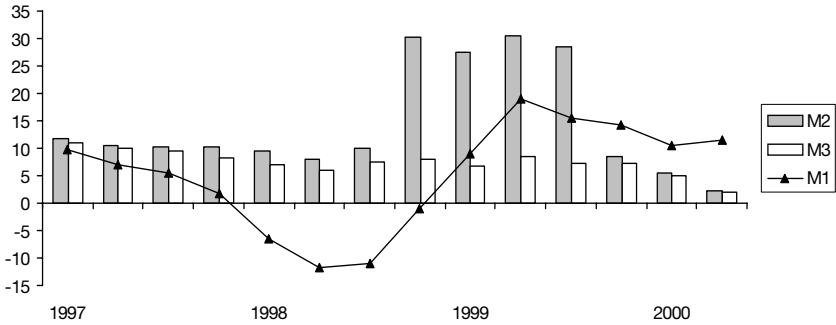


Figure 3.3 Changes in money supply in Singapore, 1997–2000 (in per cent per quarter year-on-year)

Source: *Monetary Authority of Singapore Quarterly Bulletin* (various issues).

authorities were able to control inflation and deflation more successfully, as could be seen in Figure 3.1.

One last point to make is that Hong Kong's money market interest rates followed those in the US much more closely than did those in Singapore, as might be expected, given that the HK dollar is pegged against the US dollar. This can be seen from Figure 3.4. At the same time, average deposit and lending rates in Hong Kong and Singapore moved up and down almost in synchronization throughout this period, with the only difference being that both rates in Hong Kong were roughly two per cent higher than in Singapore. Again, in this respect they were closer to the average in the US both in levels and in trends, with the exception of the first half of the 1998 crisis when all interest rates in Hong Kong and Singapore moved upwards at a time when they did not do so in the US.

To summarize, Hong Kong coped well with the Asian financial crisis, despite the fact that it is the most open economy in the region and very vulnerable to exogenous economic shocks. It coped at least as well as almost every other economy in the region and better than many. It also withstood a brief but very violent speculative attack on its currency in October 1997, which amounted to a financial baptism of fire for the HKMA and the Financial Secretary, Sir Donald Tsang, as the first crisis that they had to face without appealing to the British Treasury or Bank of England, and apparently without any significant advice from Beijing. Thus the currency board system proved its robustness. Yet in terms of most indicators, Singapore did even better. In general it grew more, and when it suffered a decline in GDP in 1998, the fall was less than in Hong Kong. Its inflation rate fluctuated less violently and without the deflation that afflicted Hong Kong.

Despite these differences disruption of a crisis might hit a currency board system worse than a central bank system for economies that are in other respects very similar, since a currency board provides the authorities with fewer mechanisms for

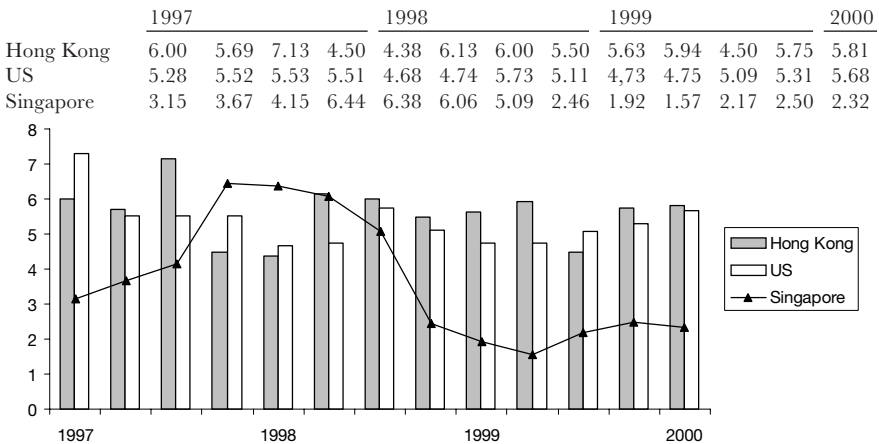


Figure 3.4 Money market interest rates in Hong Kong, Singapore and the US, 1997–2000 (in per cent per quarter year-on-year)

Source: IMF, *International Financial Statistics*, October 2000.



defending the currency and the economy. As Professor Honohan notes: '[A Currency Board] is designed to deliver price and exchange rate stability at the cost of some inflexibility in response to external shocks.'<sup>10</sup> In 1994 Argentina faced a run on its currency and although the government withstood the pressure to devalue by sticking to its currency board principles, GDP contracted by 6 per cent in the next year. However, after that it rapidly recovered. It may be that in the longer term a currency board will deliver higher rates of growth, since it offers greater confidence to international investors and traders. It may be that a currency board is better able to deliver economic rewards in an increasingly globalized economy. If we consider the economic development of Hong Kong and Singapore over a longer period, does that change the picture?

### Development in Hong Kong and Singapore in the 1990s as a whole

During the 1990s Hong Kong did mark one significant achievement by comparison with Singapore. Its foreign exchange reserves swelled to nearly 100 billion US dollars, nearly a quarter more than those of Singapore. As can be seen from Table 3.2, in 1990 Singapore's reserves had been slightly larger. It was in 1997 that Hong Kong overtook Singapore when its reserves grew by 45 per cent.

For most economies the size of foreign reserves is extremely important as a weapon against foreign speculators. Quite conceivably, without the dramatic increase in Hong Kong's reserves in the 1990s, it would not have been able to defeat the speculative attack in 1998, although in a *pure* currency board system, the size of foreign reserves is irrelevant. In that case inflows and outflows of foreign currency are translated automatically into changes in money supply.

Table 3.2 Foreign currency reserves of Hong Kong and Singapore 1990–99 (in billions of US dollars)

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Hong Kong	24.57	28.81	35.17	42.99	49.25	55.40	63.81	92.80	89.65	96.24
Singapore	27.75	34.13	39.89	48.36	58.17	68.70	76.85	71.29	74.93	76.84

Source: IMF, *International Financial Statistics*, Sept. 2000, pp. 230–1, 724–5.

Table 3.3 Cumulative growth in GDP in Hong Kong and Singapore 1970–97 (in per cent calculated from respective indices)

	1970–79	1980–89	1990–97
Hong Kong	92.9	73.5	40.0
Singapore	94.7	74.3	66.7

Source: IMF, *International Financial Statistics Yearbook 1999*, pp. 160–1.

Nevertheless on most other important indicators, Singapore performed better than Hong Kong. Indeed what is striking is that the picture of Singapore outperforming Hong Kong during the period of the Asian financial crisis is repeated throughout the 1990s as well. Table 3.3 presents the figures for cumulative real growth in Hong Kong and Singapore over the past three decades.

These figures show the almost identical performance for the two economies over the period 1970–90. It was only in the 1990s that they began to diverge – the first full decade of the new Hong Kong currency board system. Of course, throughout the period from 1983 Singapore did not always surpass Hong Kong. In the first four full years after the currency board system was introduced, Hong Kong’s economy grew faster, although this might also be partly attributable to the surge in confidence following the agreement between Britain and the People’s Republic of China (PRC) over Hong Kong’s return to Chinese sovereignty. Since 1987, however, Singapore’s economy has consistently grown faster. With the exception of 1992 when growth was almost identical, Singapore’s GDP has grown faster every year.

This performance has been accompanied by similar success in terms of inflation. Singapore’s growth has been achieved with a lower rate of inflation, as can be seen from Figure 3.5. Paradoxically, the fact that Hong Kong has pegged its currency against the US dollar may actually have increased slightly its inflation rate. Schuler, for instance, has suggested that this may have increased Hong Kong’s general inflation rate by 2–4 per cent per year, whilst on occasion it has pushed it up by 5–6 per cent.<sup>11</sup> Although pegging the currency was intended to reassure foreign investors about the stability of the currency, it may also have made inflation slightly worse than it would otherwise have been and than it has been in Singapore.

In part this has been due to the stability of the Singapore dollar’s exchange rate. As measured against IMF Special Drawing Rights (SDRs) rather than the

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Hong Kong	64.3	71.8	78.5	84.3	91.7	100.0	106.3	112.5	115.7	111.1
Singapore	88.0	91.2	93.2	95.4	98.3	100.0	101.4	103.4	103.1	103.2

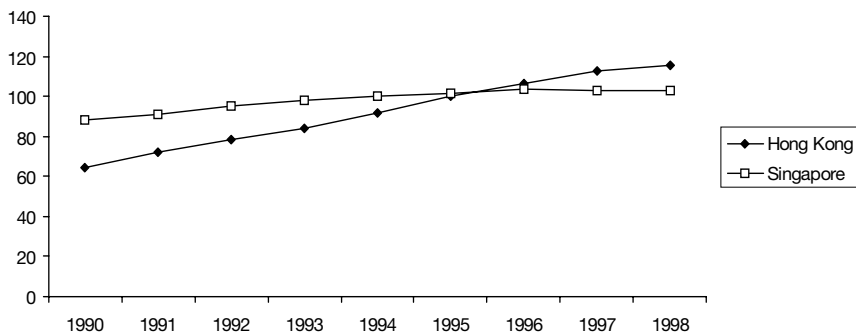


Figure 3.5 Annual average changes in standardized consumer prices in Hong Kong and Singapore, 1990–99 (1995 = 100)

Source: IMF, *International Financial Statistics Yearbook 1999*, pp. 230–1, 724–5.

US dollar, the Singapore dollar has actually fluctuated less than the Hong Kong dollar since 1990. This is for two reasons. First, the Hong Kong exchange rate is allowed to move a little around the 7.8:1 rate against the US dollar. Second, SDRs are calculated against a basket of the five most important international trading currencies where the US dollar only accounts for around 40 per cent. So the US dollar itself fluctuates a little in value against SDRs, and the Hong Kong dollar follows it.

Figure 3.6 shows that M1 fluctuated more sharply in Hong Kong than in Singapore during the 1990s, whilst their M2 performances were more similar, with the exception of the crisis year of 1998. Again this conforms to the more detailed picture of the crisis period since 1997 presented in Figures 3.2 and 3.3. Again, too, it suggests greater success by Singapore in controlling the various dimensions of money supply.

Last, it can be seen from Figure 3.7 that Hong Kong's money market rates throughout the 1990s followed those of the US more closely than did those in Singapore, just as we saw earlier in Figure 3.4 that they did in the period 1997–2000.

This fact no doubt helps to explain the attraction of Hong Kong for investors from the US and elsewhere. With interest rates tied to American ones, they can be confident of less risk of unexpected upsets. On the other hand, Singapore's success in controlling its currency has meant that it has been able to sustain interest rates that are 1–2 per cent less than those in Hong Kong. This lowers the cost of raising domestic capital for economic development, thereby facilitating development.

## **Conclusion**

This article has shown that both during the period of the Asian financial crisis and also during the 1990s in general the Singapore economy outperformed that of Hong Kong. It grew more, its growth curve was smoother, and it had less inflation and less unemployment. Even more strikingly, the 1990s were the first decade when there was a significant growth disparity between the two economies. For the previous twenty years their growth had been almost identical. Yet the 1990s were the first full decade when, according to the head of the HKMA, the currency board system in Hong Kong was working well. And whilst the regional and world trading economies were growing rapidly, thus benefiting both Hong Kong and Singapore as regional trading hubs, Hong Kong in particular profited from the renewed opening of the mainland Chinese economy and the optimism that accompanied its return to Chinese sovereignty. If ever there was a decade when Hong Kong should have done well, the 1990s were it. Yet Singapore still did significantly better. So whilst the advocates of currency boards claim that this system brings better economic results, this chapter suggests caution at the very least.

Of course, there may be no definitive way of determining whether a currency board or central bank system is intrinsically superior. After all, neither the Hong Kong nor the Singaporean economies are typical of their respective types. They

	1992	1993	1994	1995	1996	1997	1998	1999
Hong Kong M1	24.9	20.9	0.1	0.3	15.3	-3.8	-4.6	15.4
Singapore M1	12.7	23.6	2.3	8.3	6.7	1.7	-1.0	14.2
Hong Kong M2	8.5	14.5	11.7	10.6	12.5	8.7	11.2	12.4
Singapore M2	8.9	8.5	14.4	8.5	9.8	10.3	30.2	7.4

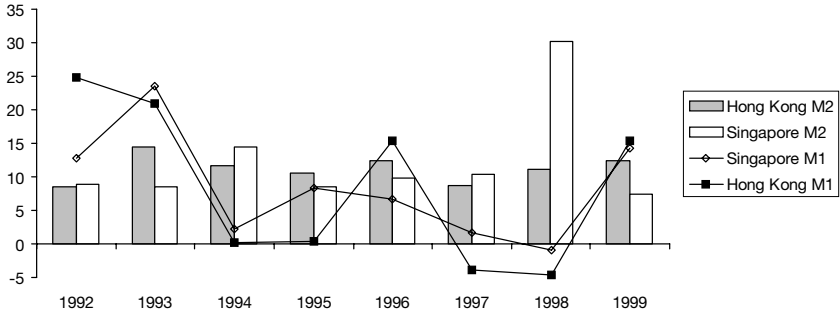


Figure 3.6 Changes in M1 and M2 in Hong Kong and Singapore, 1992–99 (in per cent annual average year-on-year)

Source: IMF, *International Financial Statistics Yearbook 1999*, pp. 230–1, 724–5.

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Hong Kong	11.50	4.63	3.81	4.00	4.0	6.00	5.13	4.40	5.50	5.75
US	8.10	5.70	3.52	3.02	4.2	5.84	5.30	5.46	5.35	4.97
Singapore	6.61	4.76	2.74	2.50	2.5	2.56	2.93	4.35	5.00	2.04

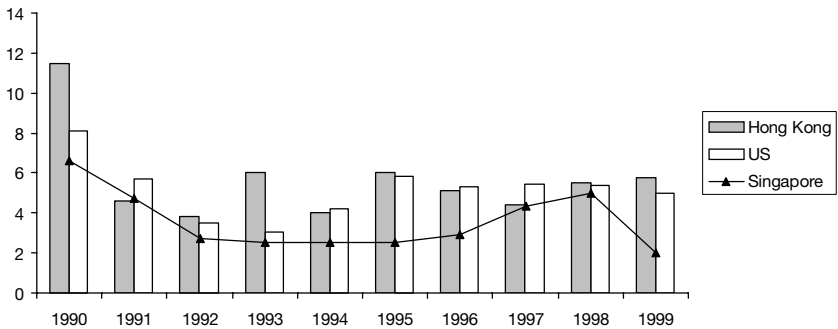


Figure 3.7 Average annual money market interest rates in Hong Kong, Singapore and the US, 1990–99 (in per cent)

Source: IMF, *International Financial Statistics Yearbook 1999*, pp. 230–1, 724–5, 926–7.

are closer to each other in methods of management than most currency boards and central banks. The HKMA concluded after the Asian financial crisis that it needed to intervene more strongly on the HK stock exchange so as to prevent speculators trying to depress share values as a way of increasing pressure for devaluation. It demonstrated that the authorities are not as indifferent to the

international value of the HK dollar as a 'normal' currency board should be. The HKMA has also increased its efforts to supervise the banking system, again something that a 'pure' currency board should not do. Schuler has in fact opined that the HKMA is still 'barely worth calling a currency board'.<sup>12</sup>

On the other hand, the Singapore authorities practise financial and fiscal virtues that central board systems typically do not. The budget is always in surplus, so it is not tempted to print money to cover its obligations. Narrow money supply is always backed 100 per cent by foreign reserves. The Monetary Authority of Singapore has never needed to play the role of lender of last resort. There is no political competition to push up inflation. Thus Singapore displays most of the virtues that a currency board is supposed to bring, without the rigidities. The fact of having a floating exchange rate means that it can respond more flexibly to changes in the currencies of its competitors. And Singapore does not practise the same degree of transparency in managing the country's finances, so that they have much greater latitude for discretion in deciding how to respond to speculative challenges. Indeed one of the paradoxes about the regional financial crisis in 1997–98 was that it was Hong Kong that suffered much the more intense speculative attack in October 1997. Relatively speaking, Singapore was the least affected of all the economies. Yet it should have been Hong Kong, with its currency board system and its transparent financial management, that should have been the more immune.

To some extent the differences between the two systems reflect different views about the best way to ensure financial stability when daily global financial transactions dwarf national economies. Joseph Yam, the head of the HKMA, begins his outline of the workings of the currency board system by defending the link with the US dollar as follows:

In my opinion, the most sturdy small boat cannot realistically ride and float in rough seas for long. It will be tossed around until it cracks and sinks. It is a lot better for it to be welded inseparably onto the biggest ship in sight and sail along in its wake. Sometimes it may be under water or above, but it will not sink.<sup>13</sup>

By contrast one of the defenders of the Singaporean system argues that:

A currency board system with a fixed exchange rate only works if one country is a dependency of another or if the two independent countries are more or less equal ... as in the case of Singapore and Brunei.<sup>14</sup>

Thus there is a basic divergence over the best way of maintaining financial independence. Probably there is no way of deciding which of these two approaches is more 'realistic'.

Beyond that, however, even if it could be shown that Singapore was better able than Hong Kong to cope with the regional financial crisis because of its flexible exchange rate, that would not mean that Hong Kong would necessarily have to change. The currency board is not merely of utilitarian value to Hong Kong. It

also has major symbolic value. There are by now major reasons why the Hong Kong authorities cannot contemplate abandoning the currency board system unless all else fails. Politically, the currency board is an embodiment of the principle of 'one country, two systems'. It would complicate any possible interference in the SAR's economy by the government in Beijing. In addition, the 'peg' has become the core of the government's whole economic policy, ever since it was so successful in cleaning up the swings in inflation of 1983. It has become identified with monetary stability. That very fact means that it is likely to continue to be one of the world's longest-lived currency board systems for years to come. Its experiences will be of particular interest for all other, more recent, such boards. This is the spirit in which Yam, the Chief Executive of the HKMA, described it as a 'modern day Currency Board system'.<sup>15</sup> At the same time, the HKMA will continue to look at the experiences of other boards elsewhere – hence the recent discussion within the HKMA about the merits of 'dollarization' of the Hong Kong financial system, as has partly happened in Argentina.<sup>16</sup> All of this will help to keep up Hong Kong's international profile, especially if currency boards become more numerous, as their advocates expect.

Yet if Singapore continues to grow faster, then the Hong Kong authorities will feel pressure to try to catch up. They are already becoming more interventionist in the economy, agreeing public funds for such projects as a Disney park. And if the currency board in Hong Kong continues to attract the attention of speculators wondering about the will of the authorities to withstand the pain of high domestic interest rates as the price for defending its currency, then the SAR may have to bear the cost. So far Hong Kong has demonstrated a striking readiness to bear the pain of recession since 1997. And it has been doing things to strengthen its defences, e.g. increasing transparency in the operations of the HKMA and reducing the gap between the convertibility rate of the HK dollar and its actual exchange rate. But however ingenious and technically successful the authorities have been in defending the currency so far, other factors may cause the question to re-emerge. If government in the SAR becomes more democratically accountable, will politicians be as ready as the current administration to tolerate economic hardship? And if at some point in the future the business cycles in the US and Hong Kong diverge more than they have done in the 1990s, so that interest rates are forced to move dramatically in the opposite direction from what would be best for Hong Kong, will the government maintain its resolution? Worse, if relations between the PRC and the US become much more antagonistic, would there be the same tolerance in Beijing for a financial system in Hong Kong that is heavily dependent upon US trends? And lastly, even if there is such tolerance, if and when the mainland economy becomes more fully integrated into the world economy, and macro-financial management there becomes more sophisticated, will the need for a quite different financial system in Hong Kong still be recognized?

For all these reasons the question marks over the currency board will not permanently disappear. In the face of all of the challenges, the financial transition has been successful and robust. But it is still not over.

**Notes**

- 1 See, e.g. World Bank (2000) *Entering the 21st Century: World Development Report 1999/2000*. New York: Oxford University Press for the World Bank.
- 2 Kenneth S. Chan and Ngiam Kee Jin (1997) 'A case for a modified currency board system in Singapore', in Board of the Commissioners of Currency Singapore, *Currency Board System: A Stop-Gap Measure or a Necessity?* Singapore: Board of the Commissioners of Currency, p. 76.
- 3 For an argument along these lines, see Emanuel Castells (1997) *The Power of Identity*. Oxford: Blackwell, chap. 5.
- 4 See Hanke, S.H. and Schuler, K. (1994) *Currency Board for Developing Countries: A Handbook*. San Francisco: ICS Press.
- 5 *Ibid.*, p. 97 and *passim*.
- 6 For an outline of the evolution by Joseph Yam, the Head of the Hong Kong Monetary Authority, see Hong Kong Monetary Authority (1998) *Review of Currency Board Arrangements in Hong Kong*. Hong Kong: HKMA, chap. 4, pp. 34–8.
- 7 Dan Biers (ed.) (1998) 'Crash of '97'. Hong Kong, *Far Eastern Economic Review*, p. 151.
- 8 *Currency Board System: A Stop-Gap Measure or a Necessity?* (Singapore: Board of Commissioners of Currency of Singapore, 1997).
- 9 In Hong Kong M1 is the sum of notes and coins in circulation plus customers' demand deposits placed with licensed banks. M2 includes all of these plus customers' savings and time deposits held in licenced banks, as well as negotiable certificates of deposits issued by licenced banks and held by non-authorized institutions. M3 includes all of these plus customer deposits with restricted licence banks (RLBs) and deposit-taking companies (DTCs), plus negotiable certificates of deposits issued by RLBs and DTCs held by non-authorized institutions.  
In Singapore M1 is the currency in active circulation. M2 adds to this savings and other fixed deposits. M3 further adds net deposits with non-bank financial institutions, including (since November 1998) the Post Office Bank.
- 10 *Currency Board System: A Stop-Gap Measure or a Necessity?*, p. 31.
- 11 *Currency Board System: A Stop-Gap Measure or a Necessity?*, p. 127.
- 12 Kurt Schuler, 'The future of currency boards, with special reference to developing countries', in *Currency Board System: A Stop-Gap Measure or a Necessity?*, p. 131.
- 13 *Review of Currency Board Arrangements in Hong Kong*, p. 6.
- 14 Lim Chong Yah, 'The South-East Asian exchange rate crisis and the currency board system', in *Currency Board System: A Stop-gap Measure or a Necessity?*, p. 27.
- 15 *Review of Currency Board Arrangements in Hong Kong*, p. 7.
- 16 *Record of Discussion of the Meeting of the Exchange Fund Advisory Committee Sub-Committee on Currency Board Operations* held on 4 May 2000 (at <http://www.info.gov.hk/hkma /eng/press/2000/20000529e3.htm>).

**Part II**

**Government and politics**





# 4 The Hong Kong Special Administrative Region

## A mid-term assessment

*Brian Hook*

It is evident from the Basic Law (BL)<sup>1</sup> that the early years of the twenty-first century will be crucial to the constitutional and legal formation of the Hong Kong Special Administrative Region (HKSAR). Reflecting the agreement in the 1984 Joint Declaration (JD)<sup>2</sup>, the treaty between Britain (UK) and China (PRC), the BL sets a timetable within which constitutional reform could take place. Such reform, if it were implemented at the earliest legal opportunity, would automatically trigger significant consequential social, political, legal and, indirectly, economic changes. The early years of the new century may therefore be regarded as a mid-term stage in the history of the formation of the HKSAR. As such, it is a time between the end of one stage in Hong Kong's short post-colonial history and the beginning of the transition to another. The purpose of this study is to throw some light on the path currently being taken by the HKSAR and to indicate some of the chief contours of the destination.

The opening years of the new century will therefore be amongst the most formative periods in the history of Hong Kong. There are several conspicuous developments at local, national and international levels to support this assertion. Locally, the most significant is the inexorable passage of the sweet-sour experiences of the honeymoon period following reunification with the PRC. In every marriage, successful or not, sooner or later, in the interests of conjugal bliss, the parties must address and meet the longer-term challenges of the new relationship. That juncture has now arrived in the context of the social, political and legal formation of the HKSAR within the 'one country, two systems' constitutional framework.<sup>3</sup> By happenstance, it coincides with the imminent shift in power and responsibility from an old to a new generation, when the affairs of the union are less in the hands of the original, familiar matchmakers than before.<sup>4</sup> Nationally, the mainland partner has, meanwhile, continued to be constitutionally involved in two other affairs. The first led to a similar but arguably, much simpler union, with the Macau SAR.<sup>5</sup> The second is generating ever more ardour as the relentless, frustrated suitor pursues the elusive hand of the Republic of China (ROC) on Taiwan.<sup>6</sup>

Although the HKSAR is geographically quite distant from the straits that separate the PRC from the ROC, it provides a location where both sides meet and interact. In recent years, mutual economic interests have provided a practical basis for the extensive interface between the two parties. In the early years of this century,

it may be confidently predicted these interests will be given a special initial boost as the PRC and the ROC explore and exploit membership of the World Trade Organization (WTO).<sup>7</sup> Internationally, therefore, these developments may be expected to augment the existing pattern of relationships, with a significantly extended range of global bilateral ties based on the rights derived from, and obligations attached to, membership of the major supra-national trade body.

The method chosen for this study is to review salient issues in the early post-colonial development of the HKSAR from retrocession to its present mid-term stage and, based on the trends noted, to reach some tentative conclusions as to the overall direction in which it is heading. The focus will be on socio-political and legal issues, including the paramount issue of constitutional development, with references, as appropriate, to major political-economic considerations that underpin the system and relate to the material well-being of the people of the HKSAR in its present form. The criteria to be applied in assessing the progress of the region will be those addressed and variously agreed upon in the treaty (the JD), expressed in the principal constitutional document (the BL) and regularly reiterated by state and civic leaders over the years. They encompass the implementation of the concept of 'one country, two systems', the enjoyment of a high degree of autonomy, the practice of Hong Kong people running Hong Kong and the promise of no systemic change for 50 years.

Documentary and other categories of evidence in which those guarantees have appeared, imply that the period into which the HKSAR is presently entering *could*, in certain circumstances, be one of significant constitutional reform. Occasionally, the inference drawn is that it should or even will be so. Adopting the principle of *caveat lector* when approaching documentary evidence, and especially so in the case of legal documents, I have preferred to assert that it should be a *formative* period. Accordingly, the transition that occurs over the next few years will indeed shape the future governance of the HKSAR but the result may not be equivalent to a democratic transformation. The reason for this caveat is that while the factors for rapid constitutional reform clearly exist, as they have at several crucial junctures in the past, the factors supporting the traditional pattern of governance may well once more prove their capacity to endure. Were this to be the case, reform in the direction of democracy may remain more an aspiration than a reality. In other words, the timetable and other relevant provisions in the BL being conditional rather than prescriptive, pragmatic conservatism could be the dominant force in shaping the mid-term transition of the HKSAR.<sup>8</sup> This is an important issue to be addressed in the following sections.

## **Constitutional issues**

Among the subjects to dominate the political agenda in the early years of post-colonial governance, none is more emotive than the issue of the pace and reach of constitutional reform. The outcome, in the respective views of protagonists and antagonists, will do much to shape the future of the HKSAR. The former seek a directly elected representative government based on universal franchise with the

executive authorities properly accountable to the legislature which, they believe, would lead to a more equitable system of governance. The latter fear the impact of greater democracy on levels of taxation and, ultimately, on the attractiveness of the HKSAR to international business.

There is of course little new in their respective perceptions. In the 1980s, a new expanding middle class, together with the then embryonic political organizations, had signalled that change was overdue. The British administration was, however, extremely cautious in promoting constitutional reform. Although there was no longer the threat of transposing elements of China's civil war to Hong Kong through the media of political confrontation and contested elections, the fear of their adverse effect on business confidence remained. The *raison d'être* of Hong Kong had been the promotion of international business. Hong Kong had suffered when it was interrupted. Recovery and relative prosperity were viewed as being linked to policies based on maintaining business confidence which were adopted, in particular, by the former Financial Secretaries Sir J.J. Cowperthwaite and the late Sir Philip Haddon-Cave in the 1960s and the 1970s. This official view, which clearly also coincided with the view of the business community, was reflected in the stages adopted for the development of the three tiers of representative government.<sup>9</sup>

It was an essentially pragmatic conservative view that was not seriously challenged until the announcement of the Patten programme for constitutional reform in 1992.<sup>10</sup> By then, the coalition of protagonists, many of whom had been encouraged if not emboldened by the rapid collapse of the Communist Party of the Soviet Union (CPSU) and its satellite parties of government, was opposed by a coalition of antagonists. That coalition included not only the majority of local business elites and their supporters but also the post-Tiananmen realists among the political leadership of the Communist Party of China (CPC).<sup>11</sup> The latter, whose influence had been brought to bear in the final version of the BL, were intent upon restraining the pace of democratization in Hong Kong, while maximizing its financial and commercial role in the socialist marketization of the mainland economy. Patten and his supporters won the battle over constitutional reform in 1994–95 but, the antagonists would claim, ultimately, lost the war. This occurred when the Provisional Legislative Council (PLC) appointed before the handover proceeded, at the earliest opportunity thereafter, to dismantle all that had been built as part of the reform programme.<sup>12</sup>

It remains to be seen whether the claim to outright victory is entirely justifiable. A thorough dismantling did take place. Indeed, the scope of the operation reached back well beyond the Patten reforms to include key aspects of the Bill of Rights Ordinance (BORO), the Societies Registration Ordinance (SRO) and the Public Order Ordinance (POO). Shortly after, however, in the elections for the first Legislative Council (LegCo) of the HKSAR held in May 1998, following the one-year term of the PLC, the electorate, in unprecedented numbers and under a new electoral system that, arguably, disadvantaged the pro-democracy parties, secured the re-election of almost all of the candidates who, as members, had been removed in 1997.<sup>13</sup> The degree of justification for the claim to have won the war will not be

determined until the outcomes of the elections for the LegCo scheduled for 2000 and 2004 are evident. On each occasion, the electorate will have an opportunity to indicate the extent of its support for constitutional reform.

The importance of these elections for constitutional reform derives mainly from the small window of opportunity provided to adjust the ideological composition of the LegCo. According to the provisions of the BL, in the second term of the Legislature from 2000–04, there will continue to be 60 members: 30 returned by Functional Constituencies (FCs), six by the Election Committee (EC) and 24 by Geographical Constituencies (GCs). Compared to 1998, this represents an increase of four GC members. In the third term, 2004–08, of the 60 members, the number returned by GCs will rise to 30, equalling those returned by the FCs. The EC will cease to return members beyond 2004 but it will continue to elect the Chief Executive (CE) unless the method prescribed for that purpose in Annex 1 of the BL is amended by LegCo with the consent of the incumbent CE, for terms subsequent to 2007.<sup>14</sup>

The first term of the first CE, Mr Tung Chee-hwa, extends to 2002. Accordingly, the selection of the CE for the second term will occur in the first half of 2002 and be preceded by the formation of an 800-member EC whose five-year term of office, save for the first few months, will overlap that of the successful candidate. It was made clear in an authoritative statement by Shiu Sin-por, a senior figure at the interface between local and mainland agencies, that although the method of forming the EC for the LegCo elections in 2000 would follow the text of Annex 1 of the BL which specifically relates to the selection of the CE, because of the need to ensure a large extent of synchronization in office, the same committee should not be used to elect the CE in 2002.<sup>15</sup> Consequently, the administration has been obliged to organize elections to two ECs, the first in 2000, the second in 2002, and elections to the LegCo in 2000 and 2004. Meanwhile, the next District Council elections will take place in 2003. Unless the pro-democracy politicians suffer a significant decline in support in the early stages of this extremely congested electoral process, or the electorate begins to suffer from fatigue to the extent that it reverts to previously low levels of political participation, both of which could be argued from the outcome of the LegCo elections held in September 2000 and discussed below, constitutional reform is likely to remain a major issue throughout the entire period.

### **Socio-political and legal issues**

The main reasons for the dissatisfaction of the advocates of constitutional reform are that the system of governance, in its present form, provides neither for proper representation of the people nor a process in which those directly elected representatives can effectively represent the interests of their constituents. This dissatisfaction goes back to the early days of constitutional reform in the 1980s. Until then, save for the long-standing but limited elections at the municipal council level and, more recently, the creation of District Boards, the British Hong Kong Administration relied heavily on a fairly comprehensive system of consultation in the policy-making process.<sup>16</sup> With the adoption of FCs for the LegCo in the mid-1980s and signs that

direct elections would be introduced as early as 1988, the prospects for a much improved system of representation, together with fully functioning and effective elected representatives appeared, so to speak, to be just around the corner.

That view was not unreasonable. For all of those not privy to the actual detail of the negotiations leading to the JD, that is everybody outside the Executive Council (Exco), the promise of a LegCo constituted by elections, with the executive authorities abiding by the law and accountable to the legislature, appeared to open the way for further and even rapid constitutional advance.<sup>17</sup> This was unsurprising since the other guarantees in the treaty appeared to strike a similar chord. They were: 'the socialist system and socialist policies shall not be practised in the HKSAR'; 'the previous capitalist system and lifestyle shall remain unchanged for 50 years'; the HKSAR shall 'enjoy a high degree of autonomy' and 'be vested with executive legislative and independent judicial power including that of final adjudication', and its government and legislature 'shall be composed of local inhabitants'.<sup>18</sup>

The difficulty came when the process of drafting the BL got underway in the mid-1980s.<sup>19</sup> In the interests of achieving a smooth handover, the British side accepted the logic of convergence with the BL. This was described as the 'through train'. By analogy, it implied that official and unofficial members of the administration and other official and civic elites would not have to alight in 1997. In practice, this caused the British side to shift the process of constitutional reform from what appeared to be a relatively fast track to a distinctly slower track. In the event, it committed the British side to convergence with a BL text which, on the eve of its publication in 1990, incorporated the CPC fear of, and Leninist response to, the democracy movement that had generated the protest leading to the political crisis in China in 1989.

The Patten reforms, their dismantling, and the current dissatisfaction of democratizers, have to be viewed in this light. Having been unwittingly out-manoeuvred in the interim between the JD and the BL, the democratizers became that much keener to take advantage of the small window of opportunity offered by the text of the BL to implement change through the electoral processes in 2000, 2002 and 2004.<sup>20</sup> Contrarians wish substantially to maintain the existing system.<sup>21</sup> The main issue to be resolved is when the ultimate aim of selecting the CE by universal suffrage may be realized. Amendment of the selection method is permitted from the third term in 2007<sup>22</sup> subject to endorsement by a two-thirds majority of LegCo and the consent of the CE. Were Tung Chee-hwa to continue for a second term, any amendment would therefore require his consent. The secondary question of consent is therefore pertinent in the approach to the election process in 2002. The primary question of the two-thirds majority of all the members of LegCo is pertinent for all but the most conservative members of LegCo and it is not surprising that this should become a defining issue for progressive candidates and the electorate.

Support for the proposition of electing the CE by universal suffrage may be linked to the moderate to low perceived levels of support enjoyed by the current incumbent.<sup>23</sup> These are partly due to the dismal performance of parts of the administration perceived in the period following retrocession, for which he was

held responsible, partly due to the downturn in the economy, and partly due to his personal style. Even a successful and internationally admired response by the administration to the Asian regional economic crisis failed noticeably to raise his popularity ratings while those of the Chief Secretary Anson Chan, the Financial Secretary Donald Tsang and the Commissioner for Monetary Affairs Joseph Yam have all risen, in public recognition of their respective contributions. Nevertheless, seen from Beijing, Tung Chee-hwa had done a good job in administering the HKSAR. In the eyes of the Central People's Government (CPG), as the second term approaches, the HKSAR is rapidly recovering from the economic crisis, is clearly more executive-led than it was in the run-up to the retrocession, and, despite the results of the 1998 election, the threatening advance of democracy, measured by its various attributes including the political trends up to and including the 2000 election, has been retarded if not halted.

The most salient evidence of Mr Tung's achievements in restoring and reinforcing the executive-led system during his term of office is to be seen in the functioning of the LegCo since 1998. Under Patten's reforms, it had moved towards institutionalizing a role in the policy-making process through panels and committees and through debates in the chamber. There was also a regular session at which members would have access in the chamber to the CE, the governor. These developments, which were interrupted by the appointment of the PLC, have been superseded. While the LegCo can indeed question and even challenge the legislative programmes of the administration, it does not have the same ability to influence legislation as it did. Under the BL, the ideological composition of LegCo, by virtue of the prescriptive franchises for the EC and the FCs, has become much more conservative than it was. LegCo appears to have been confined perforce to an advisory and consultative function in the law-making process. There has also been a significant disagreement between reformist members of LegCo and the administration over the Rules of Procedure for the chamber. The difference arose from the perception that the interpretation by the administration of the provisions relating to LegCo in the BL, as applied to the Rules of Procedure, imposed constraints on members' actions that were not intended in the text. These constraints restrict members' ability to introduce amendments to bills seeking to give legal force to government policy.

Another example that may be cited in support of the view that Mr Tung has succeeded in reinforcing the executive-led system was the decision to abolish the second tier of representative government at the end of 1999. Although this decision, which officials clearly supported, can be presented as a measure to increase efficiency, save money, and remove duplication, the abolition of the two Municipal Councils (MCs), the Urban Council (Urbco) and the Regional Council (Regco), was contested by many including the Democratic Party (DP) and, until the final vote, by the Democratic Alliance for the Betterment of Hong Kong (DAB). The proposal to abolish the MCs may be traced back to the crises in 1997–98 including the avian flu crisis, which led to food, health and hygiene problems. The abolition of the MCs was accompanied by the re-branding of District Boards (DBs) as District Councils (DCs) but the latter, though having wider responsibilities and better

funding, are not replacements for the MCs whose main functions were resumed by the administration. Moreover, the DCs, unlike the pre-1997 DBs, which were wholly elected and constituted the EC for LegCo, have both elected members and appointed members. Consequently, the abolition of the MCs and the restoration of the practice of membership by appointment in the new DCs, together with the resumption of power by the administration, must be regarded as a significant advance in the executive-led system.

A sign that the advance of democracy had been retarded, if not halted, was the dip in the fortunes of the DP. This was evident in opinion polls and confirmed in the results of the DC elections towards the end of 1999.<sup>24</sup> At the start of the new century, the performance and appeal of the DP appear to have been adversely affected by internal divisions epitomized in the media as differences between ambitious young radicals and the established leadership. On one hand, such differences, insofar as they actually exist, can be linked to the frustrations easily provoked by the requirements and outcomes of the list system of proportional representation. On the other, they can be linked to successive political reverses as the executive-led system was re-asserted, and, consequently, to declining morale.

In contrast, the fortunes of the DAB are rising. This is evident not only in the DC election results but also in the outward appearance of party organization, resources, the level of membership and morale.<sup>25</sup> The DAB is seen as a grass-roots patriotic party nurtured in Hong Kong. Although some DAB members may also be in the CPC, the latter could not count on the former and affiliates such as leftist trade unionists in the Federation of Trades Unions as a source of uncritical support. Moreover, many Cantonese voters regard the DAB as a counter-balance to increasing Shanghaiese influence in the HKSAR.

Among the political reverses experienced by the DP and its allies, including Frontier, the Citizens Party and a number of FC members of LegCo, none was more controversial than the issue of the right of abode (ROA) of mainland children of HKSAR parentage.<sup>26</sup> The case was brought on behalf of a representative group of such children seeking to challenge an HKSAR interpretation of the BL, and local legislation and administrative practice based on that interpretation. The official local and mainland response to the judgment of the Court of Final Appeal (CFA) raised questions far beyond the interests of the parties, including matters related to the rule of law, the independence of the CFA, the degree of autonomy enjoyed by the HKSAR, and the relations between the executive and legislature.

This issue was far more complex and far-reaching than any other occurring after the handover. In retrospect, the controversies surrounding political association, public order, press and media freedom, alleged corruption and cronyism, which had made headlines before this case, appeared significantly less important than the controversy raised by the CFA judgment and its handling by the government. Despite arguments to the contrary, the overturning of the judgment following an approach by the CE to the National People's Congress Standing Committee (NPCSC), when he sought a reinterpretation (in effect a countermanding) of the CFA's interpretation of the BL, appears to have created a precedent for the intrusion of the mainland political-legal procedures into the judicial system of the HKSAR.



It may have had a serious, possibly indelible, effect on the procedures of the CFA and on its prestige. Moreover, it perpetuated the pre-existing and already questionable practice of involving the administration of the Public Security Bureau (PSB) on the mainland in a stage in the exercise of the ROA. Lastly, it epitomized the problems inherent in the relations between the executive and the legislative authorities under the present constitutional arrangements.<sup>27</sup>

The question of media freedom surfaced once again following the Taiwan presidential elections when an interview by the ROC Vice President was carried by an independent media company in the HKSAR. The act of exercising the freedom to carry material by a member of the ROC administration was severely criticized by the deputy head of the CPG Liaison Office in the HKSAR (formerly Xinhua News Agency) and local members of state organs. The basis for the criticism was that such publicity amounted to giving help to political opponents of the CPG. Against this background, the requirement of the HKSAR, under Article 23 of the BL, to enact laws to prohibit any act of treason, secession, sedition and subversion against the CPG, was reasserted and it appeared much less likely that this would not take place early in the term of the 2000–04 LegCo.

The potentially dysfunctional relationship between the executive and legislative authorities had existed since the functional separation of LegCo and Exco members under the Patten administration in 1995. Before then, in recent history, there had always been a substantial Exco presence in the LegCo. It would appear that so long as the DP remains a major force under its veteran leadership and the trend in government policies continues, the constitutional problem caused by the LegCo functioning to some extent as an elected opposition will persist. If the DAB were to emerge as the dominant majority party and the trend in government policies continued, there would probably be the makings of a majority government party in the LegCo. On that basis, a substantial link between Exco and LegCo could possibly be restored. This underlines the importance of the elections in 2000 and 2004 to the electorate, the HKSAR administration and to the CPG. Each has an important stake in their outcomes.

The results of the elections for the 2000–04 LegCo held in September 2000 appeared to confirm the rising popularity of the DAB and the falling popularity of the DP that had been indicated in the November 1999 District Council elections. Although the DP remained the largest single party in the LegCo with 12 seats, its position was weaker by one seat compared to 1998–2000, while the DAB with 11 seats had gained a seat. The significance of the trend is more apparent from the parties' respective share of the popular votes in the GCs. There, the DP's share fell from 42.6 per cent in 1998 to 34.7 per cent while that of the DAB rose from 25.2 per cent to 29.6 per cent. The poll appeared to dash hopes that the high turn-out in bad weather in 1998 signalled a long-term trend. In the GC elections, the voter turn-out amounted to 43.57 per cent, down from 53.29 per cent in 1998. If these trends were to continue, by the time any modest constitutional reform of the kind sought by the DP could take effect, the DAB with a leadership and platform endorsed by the mainland authorities, and with grass-roots support, could have

become the dominant party in LegCo, ushering in a constitutionally functional relationship between the administration and the chamber.

The trend visible in the results of the LegCo elections was noteworthy for three other reasons. First, the DAB appeared not to have been seriously damaged by pre-polling revelations concerning alleged misconduct by the general secretary of the party Cheng Kai-nam. He had been accused of failing to reveal all his business interests and of passing on information acquired in confidence as a legislator to an associate. Despite these issues, which were subsequently to lead to his resignation and a by-election, he was at the time elected under the party list proportional representation procedure. Second, the elections took place shortly after an inquiry into an allegation of an attempt to interfere in the exercise of academic freedom at the University of Hong Kong, of which the CE is Chancellor. It was claimed a Senior Special Advisor to the CE, Andrew Lo Cheung-on had approached the Vice Chancellor in early 1999 concerning the public opinion poll run from one of its departments, which, among other activities, tracked the ratings of the CE. The high-profile inquiry upheld the complaint and led to the resignations of the Vice Chancellor and a pro-Vice Chancellor. Although the findings in no way implicated the CE, given his low ratings, it was expected the outcome would benefit his critics. As the election results indicate, there was no visible upsurge in sentiment beneficial to the DP or its allies. Third, there was a notable absentee from the contestants in this election. Christine Loh, the charismatic founder of the Citizens Party (CP), had announced her decision to withdraw well before the election. In retrospect, her action may be seen as a recognition of the constitutional limitations of the LegCo, a factor that, in the event, may also have been reflected in the low turnout.

### **Political-economic considerations**

Much of what has transpired has reflected the mood of the electorate in the period of recovery from the impact of the regional economic crisis. In the ROA case, the DP was wrong-footed and disadvantaged. In criticizing the method used to overturn the CFA judgment, it appeared to support the unpopular prospect of mass mainland migration into the HKSAR, with all its adverse implications for employment, income differentiation, social services and taxation. In failing fully to comprehend the issues of the rule of law, the case for amending the BL rather than re-interpreting it, and the questionable statistical basis for the numbers quoted in the official estimate of potential immigration, the popular perception of the DP's stance was, arguably, not drawn from all the facts. It appears, however, to have become an important factor in reducing the appeal of the DP to the electorate in 2000.

Although, by the time of the LegCo elections, the Asian regional economic crisis had passed, its consequences were a significant factor in electoral behaviour. The expectation that the issue of the economy would take precedence over the issue of democratization unless the two could be linked in a convincingly positive way was confirmed. Leading members of the business community had not, however, taken for granted that there would be a spontaneous prioritization of economic

considerations by an electorate chastened and, to a degree, re-educated by the experience of the crisis. Pre-empting a protracted campaign from the DP and its allies, conceivably even to be joined by the DAB, for an increase in the number of members of LegCo directly elected by universal franchise from GCs, Sir Gordon Wu and Peter Woo spoke out forcibly for the record in support of the concept and practice of FCs.<sup>28</sup> Sir Gordon Wu, a charismatic member of the business elite, was reported to have drawn attention *inter alia* to the damage that policies previously promoted by the DP and its allies could have inflicted on the business sector had they not been countermanded by the PLC.

It is noteworthy that leading business community figures should have chosen such an early stage in the approach to election campaigning to put their case. Article 68 of the BL envisages gradual and orderly progress in the method of electing the LegCo with the ultimate aim of the election of all members by universal suffrage; Annex II part III to the BL, entitled 'Method for the Formation of the Legislative Council and its voting procedures subsequent to the year 2007' makes an amendment to the existing provisions conditional upon a two-thirds majority of all members and the consent of the CE. These are high hurdles to be jumped. It is a measure of what, in the view of the business community, could be at stake, and of its perception of a popular view of the potential for change as the number of EC members declines, that it should have voiced such concern.

Even so, it is, on balance, difficult at this stage to conceive of a change in the composition of the LegCo that could lead to a voting pattern that would generate a democratizing amendment to Annex II, let alone win the consent of the CE for reform. In the present circumstances, a possible explanation for the outspoken support for FCs is that it was intended for consumption not only internally but also beyond the HKSAR, in both Beijing and abroad. The CPG, in shock after the surprise defeat of the KMT in the presidential election on Taiwan, is being invited, possibly with prior knowledge and consent or even encouragement, to ensure that no such shift in political power could occur in the short term in the HKSAR. The main method to forestall any such trend would be to ensure that the DAB, as the pro-Beijing populist movement in the HKSAR, supported the retention of FCs until, together with support from the LP and the HKPA, it could itself become the reliable party of government.

Looking ahead, however, as business elites must in the post-crisis environment, it is possible to identify the source of a serious widening of the cleavage between business and labour interests. During the crisis, on one hand, many firms were forced to lay off staff or reduce wages or both, to survive while, on the other, the government, for both political and economic reasons committed to the linked exchange rate, intervened to stabilize both the property and the stock markets. In the event, the policies were successful and the economy of the HKSAR recovered. The outcome is, however, that the problems of pre-existing extremes in income differentials have been exacerbated while levels of unemployment have also risen. Moreover, although the Financial Secretary, in his budget in 2000, did not regard the widening of the tax base to ensure a balanced budget as an immediate necessity, such a step is being evaluated and remains a possibility. If that became a reality,

while the HKSAR, of necessity, restructured its economy in response to changing regional and international conditions, increasing pressure would inevitably be put on the two-thirds of the population whose incomes are estimated to be less than HK\$10K per month, not to mention the up to one-fifth who are estimated to receive around HK\$5K per month. Consequently, any widening of the tax base could generate the response of 'no taxation without representation'. This might be regarded as a just and fitting response to the tycoons' advocacy, in defence of FCs, of 'no representation without taxation'. In such circumstances, were the tax base to be widened, calls for democratization would be difficult to resist without risking severe social tensions.

## **Conclusions**

A number of important points are confirmed by this review of salient issues since the handover. First, the HKSAR is entering a crucial period in its post-colonial history. Over the next few years, a series of elections whose outcomes could have far-reaching effects will take place. The outcome of the elections to the LegCo in 2000 reflects the falling fortunes of the DP and the rising fortunes of the DAB. The main reason for the decline of the DP as a political force appears to be internal division. This may be partly due to generational politics, partly due to the frustrating and demoralizing side-effects of the list system of proportional representation for its activists, and partly due to fatigue. The outcome of the elections to the 800-member EC for the selection of the CE is not entirely unpredictable but, at the time of writing, with part of his first term still to run, it is not clear that Tung Chee-hwa will seek a second term. On balance, it would appear that if he so wishes, and if there are no major problems to affect his standing with the CPG, he will seek re-appointment. Arrangements for this eventuality were being made in the summer and early autumn of 2000. In July, leading local businessmen who are expected to play a role in, and benefit from, the restructuring required to enable the PRC successfully to adapt to WTO membership, convened a meeting in Beijing at which they were urged to support the CE. In September, the Chief Secretary Anson Chan was encouraged to lead the civil service in giving more support to him. These measures appeared to have been designed to signal CPG intentions and to seek to reverse the fall in his ratings prior to a nomination for a second term.

Second, although Tung Chee-hwa has not been a popular leader, and has not gone out of his way to court popularity, he has not been universally unpopular. At times in the HKSAR he appears patriarchal, at times paternalistic. Seen from Beijing, the ratings are unjustified as he cannot be held responsible for any of the crises so far encountered in his term. Furthermore, in their view he has done a good job in restoring and reinforcing the executive-led system at the expense of the Patten-inspired role of the legislature, and the aspirations of the pro-democracy parties and their supporters. While some aspects of his administration, such as the method of the award of the cyberport contract exclusively to Pacific Century Cyberworks, the company run by Li Tzar-kuoi, son of Li Ka-shing, may not have

been popular with sections of the business community, other important aspects have met with the approval of what is, on the whole, essentially a conservative business community and are generally welcomed by the civil service.<sup>29</sup> The latter remains a meritocracy and there is no evidence that appointments are being manipulated from afar. Among the senior members of the administration, the term of office of the Chief Secretary Anson Chan was extended to 2002. This effectively ruled out her candidature as the second CE, which would have been a universally popular decision. At the same time, it stabilized the appointments and promotions process in the civil service, which to some extent, had been de-stabilized by the exodus of expatriates and early retirements at and since the handover.

Third, the combination of a decline in the fortunes of the DP and a strengthening executive-led system implies that the prospects for the realization of limited democratic reform permitted under the BL may be waning. The policy of the DAB in this respect is not entirely clear. In practice, as it has the chance to become the dominant party it could eventually promote the cause of universal suffrage. This may be a development strategy. It is clearly the best funded and best organized of all the HKSAR political organizations. It carries no political-historical baggage, unlike its nearest rival which, in present circumstances, cannot enjoy any relations with the CPG. It evidently has productive links with the mainland agencies and could be regarded as a future party of government.

Fourth, the lack of a party of government in the LegCo, and conversely, the absence of directly-elected representatives from the major parties on Exco, a precedent set by the British Hong Kong administration in 1991, have contributed to the continuing dysfunctionality in the constitution. This has been countered by promoting the executive-led system. Consequently, the LegCo can no longer contribute as much to the policy process as it did in the approach to 1997 and it has reverted to an advisory or consultative role in the law-making process. This role is also a consequence of the interpretation of the Rules of Procedure for the chamber whose framework is established by the BL.

Fifth, among the issues to arise since the handover, the most controversial was the ROA case. It led to the NPCSC's overruling of an interpretation of the BL by the CFA following a specific request from the CE. Despite assurances to the contrary, this appeared to set a precedent for future interventions in the judicial HK system.

Sixth, there were objections to an interview by the newly-appointed Democratic People's Party Deputy President of the ROC carried by an independent HK media station. The contention that such practices should be banned as they amounted to giving succour to the enemy was rejected, but engendered a debate about the requirement for the HKSAR to introduce legislation against treason, secession, sedition and subversion, etc. from which it could be construed that such laws would be enacted in the term of the second LegCo. Article 23 of the BL provides that

the HKSAR shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the CPG, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the

Region, and to prohibit political or bodies of the Region from establishing ties with foreign political organizations or bodies.

Seventh, in what appeared to be preliminaries to the election campaign, business tycoons spoke up *inter alia* for the continuation of FCs in the LegCo. The basis for their argument against a LegCo elected by universal suffrage appeared to be 'no representation without taxation' and a continuation of the present economic system. In the approach to the 2000 budget, however, the possibility of widening the tax base to restore levels of revenue had been discussed to the extent that it was considered a likely proposal. In the event, the economic recovery made it unnecessary but the issue is being examined and it is not ruled out for the future. Given the extreme income differentials in the HKSAR and the fact that many firms have recently chosen to cut wages and lay off staff to reduce costs and remain competitive, the imposition of a tax burden on the majority whose incomes are currently too low to attract tax appeared to invite the certain response of 'no taxation without representation'. Such a step could provide a short cut to demands for urgent democratization. If the economy continues its recovery, the question of inadequate revenue resources may not arise again. If, contrary to expectations in the rapidly changing economic conditions it does not, it may be necessary to widen the tax base and to respond to popular demands for more representation.

What can be said of the implications of these points for the successful implementation of the guarantees in the JD? Clearly, there are aspects of governance that differ significantly from the pattern emerging in the approach to the handover. These include the electoral systems, the electoral franchises, the number of levels and the composition of representative government, of which the LegCo is a particular example. The aspirations of the democratizers and all who read more into the text of the JD than was intended by the negotiators have, consequently, been dampened. They have watched as the reforms of the 1990s have been systematically reversed. Since then, political aspects of governance have been eclipsed by economic preoccupations. Throughout the period, however, the guarantees of Hong Kong people running Hong Kong and of the exercise of a high degree of autonomy appear to have remained intact. When the Hong Kong way of life was threatened, and with it the integrity of the Hong Kong system, as in attempts to restrict freedom of expression, senior officials led by Anson Chan have been sure-footed in their responses. For the future much, it would appear, may rest on the qualities of her successor.

It was surprising that the most significant dent in the exercise of a high degree of autonomy was self-inflicted. This occurred when steps were taken to reverse the interpretation of the BL by the CFA in its judgment of the ROA case. In that instance the administration chose the precedent of an intervention by the NPCSC and risked a loss of prestige and independence for the CFA. On balance, while in some aspects of governance the HKSAR has returned to a pre-reform system, it has met and overcome successive crises through self-reliance. There is consequently a greater awareness of the challenges and opportunities that lie ahead. These were addressed by the CE in his annual LegCo address in October 2000.<sup>30</sup> Among

them is the issue of constitutional reform. Having stepped back from the Patten reforms because they were not sanctioned in the BL, the HKSAR is now in a position where it could begin to plan the next step forward, with the authority of the BL. The CE continues to advocate gradualism. The actual extent and pace of the advance will depend heavily not only on the DP and its allies but also, increasingly, on the policies adopted and role played by the DAB, the new force in Hong Kong politics.

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## Notes

- 1 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China adopted on 4 April 1990 by the Seventh National People's Congress of the PRC at its Third Session. The text to which reference is made was published in English by the government printing department in Hong Kong in 1997 with cross-references to the Sino-British Joint Declaration. Chapter 4 articles 43–104 dealing with the political structure should be considered in the context of Annexes 1–3 of the BL.
- 2 The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the question of Hong Kong initialled on 26 September 1984, signed on 19 December 1984 and ratified on 27 May 1985. The text to which reference is made was printed by the Government Printer, Hong Kong (undated). It has marginal notes and numbers, not part of the authentic text, facilitating cross-referencing from the BL.
- 3 Note 1 *ibid.* The question to be resolved concerns the pace and scope of constitutional reform permitted under the BL.
- 4 At the 16th National Party Congress of the CPC, scheduled for 2002, and the following National People's Congress scheduled for 2003.
- 5 The resumption of the exercise of sovereignty over Macau was based on the HKSAR 'one country, two systems' model.
- 6 The Republic of China (ROC) on Taiwan has rejected the overtures from the PRC based on the HKSAR model. The defeat of the ruling Nationalist (KMT) candidate in the presidential election in 2000 by the candidate of the Democratic Progressive Party, Chen Shui-bian, was a portentous event in the political history of China.
- 7 PRC, ROC, HKSAR and MSAR membership of and participation in the WTO together with generational change should, provided that in the meantime there is no escalation in the cross-straits controversy, create opportunities for economic co-operation contributing to the eventual resolution of political problems.
- 8 Note 1 *ibid.* See Annexes 1–3 of the BL.
- 9 'The Development of Representative Government: The Way Forward', Hong Kong Government White Paper, February 1988.
- 10 'Our Next Five Years, the Agenda for Hong Kong', an address by the Governor, The Rt. Hon. Christopher Patten at the opening of the 1992–93 Session of the Legislative Council, 7 October 1992.
- 11 The term 'realists' may be understood here both in its current popular sense and in the philosophical sense as employed by for example Arthur Waley (1939), arguably the best known of all translators from classical Chinese, in *Three Ways of Thought in Ancient China*, London: G.

- Allen and Unwin, which includes extensive quotations from the Chuang-tzu (Zhuangzi) the Mencius and the legalist philosophers.
- 12 Brian Hook (2000) 'Hong Kong under Chinese sovereignty: a preliminary assessment', pp. 95–112, especially pp. 102–5, in Ash, Ferdinand, Hook and Porter (eds), *Hong Kong in Transition, the Handover Years*, London: Macmillan Press.
  - 13 *Ibid.*, pp. 108–10.
  - 14 See note 1.
  - 15 Shiu Sin-por, 'In my view', *South China Morning Post*, Internet Edition, 13 April 2000.
  - 16 Brian Hook (1983) 'The government of Hong Kong: change within tradition', *The China Quarterly* 95, September, pp. 491–511.
  - 17 Annex 1 to the JD.
  - 18 *Ibid.*
  - 19 Brian Hook (1993) 'Political change in Hong Kong', *The China Quarterly* 136, December, pp. 840–63.
  - 20 The 2000–04 term of the Legislative Council is regarded as the key period for progressive elements, including the Democratic Party, Frontier and their allies in this process.
  - 21 The cautious conservative approach was reflected in the views of leaders of the business community in early 2000 who sought to justify the level of business representation on the LegCo by referring to the relatively high level of taxation levied on their sector compared to the relatively low level levied through personal taxation.
  - 22 See note 1. Seen from Beijing it would be an advantage to have an experienced CE in post throughout this period.
  - 23 See note 1. The level of government, business and popular support for the incumbent CE is consequently a sensitive strategic issue.
  - 24 In a 35.82 per cent turn-out of 816,523 voters the DP won 86 seats with 22.05 per cent of the poll, while the DAB won 83 seats with 21.28 per cent of the poll and 148 seats, 37.95 per cent of the poll, were won by non-affiliates. Among the remaining 73 contested seats the Hong Kong Progressive Alliance won 21, the Association for Democracy and People's Livelihood 19, the Liberal Party 15, Civil Force 11 and the 123 Democratic Alliance 7. In addition, 27 NT Rural Committee Chairmen became ex-officio members and 102 seats were reserved for appointees, bringing the total to 519 among 18 DCs. In the 1994 District Board elections the DP won 75 seats and the DAB 37. On that occasion, the DP success rate was 57 per cent, compared to 49.7 per cent in 1999, while the equivalent figures for the DAB were 44.6 per cent and 47.2 per cent. When the refusal by the DP to accept appointed membership is factored into the composition of the DCs, it becomes clear that DP influence at the grass-roots is in decline, a trend that could significantly shape the future of party politics in the HKSAR. (Based on data in the government website, and information in the *South China Morning Post* and the *Xin Bao [Hong Kong Economic Journal]*, 30 November 1999.)
  - 25 Based on data assembled from interviews and other research. See also the reactions of party leaders recorded in the HK media after the DC election. Martin Lee Chu-ming was quoted as saying voters had not shunned the party but the DAB had caught up; Tsang Yok-sing referred to the DAB's new district networks and the results achieved paving the way for the LegCo elections in 2000. *South China Morning Post*, 30 November 1999.
  - 26 *Ng Ka-ling and Others v Director of Immigration* (1999), 1 HKLRD315 of the Court of Final Appeal of the HKSAR on 29 January 1999. See also Albert H.Y. Chen, 'The Court of Final Appeal's Ruling in the "Illegal migrant" children case: a critical commentary on the application of Article 158 of the Basic Law', *Law Working Paper Series, No. 23*, Faculty of Law, The University of Hong Kong, 1999.
  - 27 The executive authorities sought and received the approval of LegCo for a resolution to seek a reinterpretation of the BL under the legal system of the PRC in order to reverse a judgment reached under common law by the CFA. There were legislators who variously doubted the accuracy of the official estimate that the CFA judgment could result, over time, in an influx of 1.67 million people, or who resented the speed at which the resolution was propelled through the chamber, or who advocated amending the BL. Opposition to the policy came from the



- democrats and their allies. They were outnumbered by the pro-government majority in LegCo. On this occasion, however, with unemployment over 5 per cent, the pro-government majority also enjoyed popular support. The principled case presented by the opposition actually alienated some of its supporters and, possibly, affected voting patterns in the elections in 1999 and 2000.
- 28 In the spring of 2000, both were linked to media reports advocating the continuation of business representation in the LegCo through FCs, as long as the bulk of the existing tax burden fell on that sector of the economy. The slogan of 'no representation without taxation' emerged. In the approach to the 2000 budget speech, there had been considerable discussion about the possible necessity of extending the tax base. In the event, the economic recovery for the time being obviated that necessity.
- 29 Objections were raised on the grounds that other companies were not given adequate opportunity to run or participate in a key project in which the investment risk was significantly reduced by the linked development of housing.
- 30 *Serving the Community, Sharing Common Goals*, address by the CE Tung Chee-hwa at the Legislative Council meeting, 11 October 2000.

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# 5 The evolving political culture of the Hong Kong SAR

*Robin Porter*

## **Introduction**

Shortly after taking office in 1997, Hong Kong's new Chief Executive Tung Chee-hwa reaffirmed his commitment to democracy in his much-publicized meeting with President Clinton in Washington. According to Tung, democracy required 'a free press, the rule of law, and political parties that were free to openly debate any issue' (*South China Morning Post* (SCMP), 13 September 1997, 'Clinton told political direction is set but pace of change is not up to Washington'). Two years on, US envoy to Hong Kong, Richard Boucher, expressing disappointment over the reinterpretation of the Basic Law in the right of abode case, expressed the view that there were five pillars supporting Hong Kong's success and which set it apart from some of its neighbours – the rule of law, freedom of speech, an active legislature responsible to voters, its distinct public service, and its separate participation in international organizations. Boucher noted that

frequent exceptions to the Court of Final Appeal's power of final jurisdiction could erode the status and independent authority of the Judiciary, while also raising questions about the ultimate fate of the rule of law.

(*SCMP*, 24 June 1999, 'Departing envoy diplomatic on abode row')

Or, as Martin Lee observed: 'It is the rule of law itself which is at stake'.<sup>1</sup>

Recent developments invite a renewed assessment of the political culture of Hong Kong, in the broad sense, four years after the transfer of sovereignty. In an earlier paper,<sup>2</sup> the author invoked the systematic audit contrived by the political scientist David Beetham and his team for application to the United Kingdom as a useful model on which to build a democratic audit for Hong Kong. The focus on 'democracy', on the two related principles of popular control and political equality, enables a comprehensive view of the political culture as a whole. The practice of these principles, it was suggested, could be tested by the application of a series of thirty indices, expressed in the form of questions, in four groups. Although Beetham himself has since further refined these indices,<sup>3</sup> the original formulation will be retained for this piece to maintain structural consistency. In the chapter that follows therefore, the thirty questions are first repeated.

Moreover, in the earlier piece, an indication was given of the kind of developments which might deserve particular attention in monitoring the state of democracy following the transfer of sovereignty, and of the kind of evidence which might be gathered in establishing a trend. These possible trends were surmised on the basis of a comparison of the commonly perceived differences between political practice on the mainland and in Hong Kong. In the present treatise, these possible trends, identified originally in 1997, have been incorporated under the question in the Beetham framework to which they relate.

Finally, under each question, evidence of significant change is presented through an itemization and brief explanation of important developments.

It should once again be pointed out that the information presented is not new, and that the object is to look at developments in the particular context of the framework offered by the Beetham audit. The events themselves, their causes and their implications, are much more fully explored elsewhere in this book.

## **Political developments under the SAR**

### ***The electoral process***

The first group of indices in the Beetham framework relates to popular control over the legislature: the 'reach' of the electoral process, its inclusiveness, its fairness, its independence.<sup>4</sup>

Six questions are included in this section. The possible trends that follow certain questions were identified at the time of the transfer of sovereignty in July 1997:

- 1 How far is appointment to legislative and governmental office determined by popular election, on the basis of open competition, universal suffrage and secret ballot?

Possible trends identified in 1997:

Changes to electoral law and practice affecting:

- The proportion of legislative and government office holders elected.
- The extension of functional at the expense of geographical constituencies.
- The secrecy of the ballot, and the possible introduction of electronic voting.
- The frequency of elections, and term of office of government.

Actual changes:

- The dismissal of the Legislative Council (LegCo) at midnight on 30 June.
- The creation of the wholly appointed Provisional Legislative Council to replace it until May 1998.
- New arrangements for constituting the LegCo from the May 1998 elections to include:
  - Reduction in the number of seats in the LegCo directly elected under universal franchise.
  - Alterations to the geographical electoral constituency boundaries to reduce the likelihood of the election of candidates opposed to the executive.

- Alterations to the franchise for functional constituencies so as to reduce the scope for success of opponents of the executive.<sup>5</sup>

2 How independent of government and party control are the elections, and procedures of voter registration, how accessible are they to voters, and how free are they from all kinds of abuse?

Possible trends:

- Any developments in the role of the Chinese Communist Party, Xinhua News Agency, and other mainland organizations in influencing the outcome of elections.
- Changes in procedures for voter registration.

Actual changes:

As in the 1995 elections, the Chinese government organ Xinhua News Agency actively supports the Democratic Alliance for the Betterment of Hong Kong in the 1998 elections (and more generally the Hong Kong Patriotic Alliance). Its role is considered to be critical in the separate election of the thirty-six Hong Kong members of the National People's Congress in Beijing (*SCMP*, 1 July 1998, 'Reversal of fortunes wrecks the party').

3 How effective a range of choice and information does the electoral and party system allow the voters, and how far is there fair and equal access for all parties and candidates to the media and other means of communication with them?

Possible trend:

Changes in the degree of access of some parties to the media, either through legislation, influence brought to bear, or self-censorship in the media; any possible reduction in the opportunities of candidates to publicize their platforms.

No obvious change at the time of the 2000 elections.

4 To what extent do the votes of all electors carry equal weight, and how closely does the composition of parliament and the programme of government reflect the choices actually made by the electorate?

Possible trend:

Any expansion or reduction in the degree of responsibility of the executive to the legislature.

Actual changes:

Following the 1995 election and up to the transfer of sovereignty, the executive by convention responds to the will of the elected legislature on most issues, though it is not obliged to do so. The Provisional Legislative Council, from July 1997 to May 1998, is wholly appointed and effectively led by the executive. Since the May 1998 election, the elected legislature has had the scope to challenge government legislation, but with reduced ability to influence outcomes through participation in panels, committees and debates (see Hook, Chapter 4 of this volume).

- 5 How far is there equal effective opportunity to stand for public office, regardless of which social group a person belongs to?

Possible trend:

Any exclusion of certain candidates or parties by virtue of their views.

Actual changes:

Technically, no change. However, in discussions with a US Congressional delegation, member of the Executive Secretary for Constitutional Affairs Michael Suen Ming-yeung is reported in early 1999 as having described the Hong Kong Democrats, the leading group elected on the basis of universal suffrage in the LegCo, as 'an extreme minority' (*SCMP*, 12 January 1999, 'US team misunderstood my views, says Suen').

- 6 What proportion of the electorate actually votes, and how far are the election results accepted by the main political forces in the country?

Possible trend:

Any reduction in the franchise; any trend to rejection of legitimate election results.

Actual changes:

- The proportion of the electorate voting increases from 35 per cent in 1995 to 53 per cent in 1998, but declines to 43.5 per cent in the 2000 LegCo elections.
- No obvious change in the degree of acceptance of election results.

### ***Openness and accountability of government***

The second group of indices looks at the degree of openness and accountability of government: political accountability of the government to the elected legislature, legal accountability to the courts, and financial accountability to the legislature and the courts, as well as the monitoring of government by independent bodies.

A further twelve questions follow:

- 7 How accessible to the public is information about what the government does, and about the effects of its policies, and how independent is it of the government's own information machine?

Possible trend:

Any reduction in the number and variety of sources of published information about the workings of government.

No obvious change.

- 8 How effective and open to scrutiny is the control exercised by elected politicians over non-elected executive personnel, both military and civilian?

Actual changes:

No obvious change in the ability to scrutinize civilian personnel. Military personnel, previously the responsibility of the British government, are now the responsibility of the Chinese government.

- 9 How extensive are the powers of parliament to oversee legislation and public expenditure, and to scrutinize the executive; and how effectively are they exercised in practice?

Possible trend:

Legislated or voluntary change in the scope of elected representatives to oversee legislation, expenditure, and to monitor critically the activity of the executive.

Actual changes:

- No major change to the powers of the LegCo to oversee legislation or public expenditure. The ability of the legislature to scrutinize the executive is diminished by the more secretive style of the current executive. There are claims that relations have been ‘strained’ (*SCMP*, 1 September 1999, ‘Top legal adviser returns’).
- The government interprets the Basic Law to mean that its legislation needs the approval only of LegCo members present and voting. LegCo members believe that legislation must be approved by a majority of all legislators present, including abstainers. The Government view prevails (*SCMP*, 9 July 1998, ‘No friend of LegCo’).
- The government claims that Article 74 of the Basic Law prevents legislators from introducing Private Members’ Bills relating to public expenditure, political structure or the operation of the Government. The LegCo accepts these restrictions on Private Members’ Bills, but the government claims the same Article bans legislators from making any amendments to government bills relating to public expenditure, political structure or the operation of the Government (*SCMP*, 16 July 1999, ‘Officials in “unfair lobbying”’, and 1 September 1999, ‘Top legal adviser returns’).
- An attempt by the Chief Executive to have LegCo members attend ‘emergency meetings’ after their terms in office are due to end in June 2000, and before further elections can be held is said to be in contravention of the Basic Law (*SCMP*, 15 April 1999, ‘Emergency LegCo plan “may break the Basic Law”’).<sup>6</sup>

- 10 How publicly accountable are elected representatives for their private interests and sources of income that may affect the performance of their public office, and the process of election to it?

Possible trend:

The progressive overlap of private and public interests.

No obvious change.

- 11 How far are the courts able to ensure that the executive obeys the rule of law; and how effective are their procedures for ensuring that all public institutions and officials are subject to the rule of law in the performance of their functions?

Actual changes:

The Chinese government organ Xinhua News Agency is not prosecuted despite having breached the Privacy Ordinance, for reasons which are not explained (*Far Eastern Economic Review*, 11 June 1998, pp. 13–14 and *SCMP*, 8 April 1999,

‘Tung named “an enemy of democracy”; Rights group attacks government record’).

- 12 How independent is the judiciary from the executive, and from all forms of interference; and how far is the administration of law subject to effective public scrutiny?

Possible trend:

A loss of independence by the judiciary, manifest in the erosion in practice of their power to ensure that the executive, public officials and institutions obey the rule of law, in the political appointment of judges, in the allocation of cases to certain judges known to be sympathetic to a certain outcome, and in other ways.

Actual changes:

- The government warns that, whereas previously legislation which did not clash with British law could not be challenged for its constitutionality, under the SAR all legislation can be tested in court to see if it complies with the Basic Law. The government may ask the courts to rule on new legislation as it is passed, a process described as being more similar to that obtaining in the United States (*SCMP*, 19 April 1999, ‘Testing laws a “long process”’).
- The ‘right of abode’ case raises definitively the issue of the limits of the independence of the Hong Kong judiciary. The Hong Kong Court of Final Appeal rules in January 1999 that the children of immigrants from China have the right to come to Hong Kong. The executive claims that the ruling is inconsistent with the provisions of the Basic Law, and in May refers the matter to the Standing Committee of the National People’s Congress for re-interpretation (rather than the constitutionally more acceptable amendment of the Basic Law), thereby undermining the authority of the Court of Final Appeal. The decision to do this ‘reduces the concept of Hong Kong people ruling Hong Kong to little more than a mirage’ (*SCMP*, 19 May 1999, Editorial: ‘Questions of law’).<sup>7</sup>

- 13 How readily can a citizen gain access to the courts, ombudsman or tribunals for redress in the event of maladministration or the failure of government or bodies to meet their legal responsibilities; and how effective are the means of redress available?

Actual changes:

No significant change in most respects. However, as a side issue to another matter, the government claims that it now has a monopoly in bringing prosecutions in the SAR, stripping private individuals of the right to initiate proceedings which they previously enjoyed. This claim is opposed unsuccessfully by LegCo (*SCMP*, 26 November 1998, ‘Monopoly on initiating prosecutions rejected’).

- 14 How far are appointments and promotions within public institutions subject to equal opportunities procedures, and how far do conditions of service protect

employees' civil rights?

Possible trend:

The growth of political favouritism in appointments and promotions within public institutions.

No obvious change, although the resignation of Chief Secretary Anson Chan in January 2001 may over the longer term signal change in this respect.

- 15 How systematic and open to public scrutiny are the procedures for government consultation of public opinion and of relevant interests in the formation and implementation of policy and legislation?

Possible trend:

The diminution in practice of public consultation in the formulation of policy and legislation.

No obvious change.

- 16 How accessible are elected politicians to approach by their electors, and how effectively do they represent constituents' interests?

No obvious change.

- 17 How far do the arrangements for government below the level of the central state meet the above criteria of openness, accountability and responsiveness?

Actual changes:

The government in 1999 scraps elected Municipal Councils (the Urban Council and the Regional Council), the oldest continuously elected bodies, throughout the territory. It also restores the principle of appointment in the composition of the District Boards.

- 18 To what extent does sub-central government have the powers to carry out its responsibilities in accordance with the wishes of its own electorate, and without interference from the centre?

Actual changes:

In consequence of the changes described above, sub-central government now enjoys much less autonomy than before.

### ***Rights and liberties***

The third group of questions examines guarantees of civil and political rights and liberties which are crucial to effective popular democratic control over government. There are five questions in this section.

- 19 How clearly does the law define the civil and political rights and liberties of the citizen, and how effectively are they defended?

Possible trends:

- Any diminution in the status of the Bill of Rights in the period immediately following the transfer of sovereignty.



- The use of arguments to do with national security to repeal existing provision and tolerance for demonstrations and other means of protest.

Actual changes:

- The government makes clear its view that in any conflict between the Hong Kong Bill of Rights and the Basic Law, the terms of the Basic Law will prevail (Senior Government Counsel Geoffrey Ma, quoted in *SCMP*, 23 September 1997, 'Courts urged to respect mainland laws').
- Amendments to the Societies Ordinance and the Public Order Ordinance are drawn up to safeguard 'one China' and prepare for implementation of Article 23 of the Basic Law, which requires laws to prevent and punish acts of 'subversion' directed against the Chinese government (noted originally in *SCMP*, 17 May 1997, 'Changes "to protect China"'). Taken forward since the transfer of sovereignty.
- A government spokesman claims that Hong Kong courts must respect mainland laws that affect Hong Kong, a comment described by a Hong Kong judge as setting a 'dangerous precedent' (*SCMP*, 7 March 1998, no title).
- Members designate of the SAR executive offer pointers to the new government's attitude even prior to the transfer of sovereignty. Secretary for Policy Co-ordination designate Michael Suen Ming-yeung makes clear that calling for Tibetan or Taiwanese independence would be banned on grounds of national security. Secretary for Justice designate Elsie Leung Oi-sie says that calling for independence for Hong Kong would also be seen as harmful to national security (both *SCMP*, 17 May 1997, 'Changes to protect China'). A senior Xinhua official attacks people who believe 'anti-China activities' could survive beyond colonial rule (*SCMP*, 7 March 1998, 'Anti-China antics "doomed"').
- In consequence of these and many other warnings, some argue that a culture of self-censorship on political issues is building up. Prior to the transfer of sovereignty, Hong Kong University in late 1996 removes pro-democracy slogans dating from the Tiananmen massacre of 1989 from its walls, despite student opposition (*SCMP*, 26 November 1996, '(Other) Democracy slogans to stay as university holds survey'). In early 1999 a further incident involving the university occurs when a senior adviser to Tung Chee-hwa allegedly approaches it over negative opinion polls conducted by one of its departments, leading to a series of events which result in the resignation of the Vice-Chancellor.
- Further, the Hong Kong government fails to act effectively to protect the rights of Hong Kong citizens seized while on the Chinese mainland for crimes allegedly committed in Hong Kong's jurisdiction, notably in the cases of alleged organized crime boss 'Big Spender' Cheung Tze-keung, and alleged murderer Li Yuhui. Neither does it offer effective help to Hong Kong citizens held in China for crimes allegedly committed on the mainland (*SCMP*, 26 December 1998, 'Tung named "an enemy of democracy"; Rights group attacks government record').

- 20 How equal are citizens in the enjoyment of their civil and political rights and liberties, regardless of social, economic or other status?

Possible trend:

The denial of rights to specific individuals known to be opposed to the policies of the government.

Actual changes:

- In March 1999 the government decides not to prosecute local press tycoon Sally Aw Sian for fraudulently misreporting her newspaper's circulation figures to its considerable advantage (*SCMP*, 12 March 1999, 'Justice Secretary survives vote, despite attacks on competence'). Aw is known to be a strong supporter of the Chinese government.
- The government acts to bring proceedings to send adopted mainland children back to China as the Basic Law denies them the same rights and protection as the children of natural parents (*SCMP*, 22 June 1999, 'Law "does not give rights to adopted four"').
- The government moves to repeal legislation to provide rights and protection at work introduced by the previous LegCo shortly before the transfer of sovereignty, and also declines to introduce a minimum wage law (*SCMP*, 26 July 1997, 'Support for scrapping of union law'; *SCMP*, 23 July 1999, 'Economist rejects minimum wage').

- 21 How well developed are voluntary associations for the advancement and monitoring of citizens' rights, and how free from harassment are they?

Possible trend:

The categorization of voluntary human rights associations as 'political', and in this way the severance of their financial and other ties to similar organizations overseas; or the use of other legal or practical means to proscribe the activities of these organizations.

No obvious change.

- 22 How effective are procedures for informing citizens of their rights, and for educating future citizens in the exercise of them?

Possible trend:

The progressive substitution of mainland Chinese ideas of patriotism and obedience to authority in place of dissemination of information about rights in education and among the citizenry at large.

Actual changes:

The progressive introduction of 'civics' content emphasizing loyalty to the Chinese 'motherland' in schools.

- 23 How free from arbitrary discrimination are the criteria for admission of refugees or immigrants to live within the country (territory), and how readily can those so admitted obtain equal rights of citizenship?

Possible trend:

A tightening up of provision for even temporary acceptance of refugees.

Actual changes:

The intervention of the National People's Congress in Beijing in determining the legal right to remain in Hong Kong of categories of immigrants from China, as noted in the right of abode case, above.<sup>8</sup>

### ***Civil society***

The last group of indices addresses the nature of 'civil society' – the associations through which people independently manage their own affairs. Seven sets of questions look at this aspect of the democratic culture:

- 24 How far is there agreement on nationhood within the established state boundaries, and to what extent does support for political parties cross regional, linguistic, religious or ethnic lines?

Possible trend:

A growing insistence on the diminution of the Hong Kong identity in favour of clearly stated allegiance to the People's Republic of China.

Actual changes:

The identification of certain political parties and groups with the interests of the mainland over those of Hong Kong, notably the Democratic Alliance for the Betterment of Hong Kong, the Patriotic Alliance, and, some would say, the Liberal Party.

- 25 How tolerant are people of divergent beliefs, cultures, ethnicities, life-styles, etc., and how free are the latter from discrimination or disadvantage?

Possible trends:

- A growing intolerance of beliefs, cultural influences, ethnicities and life-styles which would not be tolerated in mainland China, with pressure to support periodic campaigns in China which have some degree of anti-foreign tone to them.
- The progressive introduction of a concept of citizenship based on race and ethnicity.

Actual changes:

Prolonged uncertainty over the status of non-ethnic Chinese long-term residents of Hong Kong who may or may not hold foreign passports. Urging the court to interpret rules on right of abode using the approach that would be used by the Standing Committee of the National People's Congress of China, the government seeks to deport an elderly Pakistani man who has lived in Hong Kong since 1962 (*SCMP*, 11 June 1999, 'Following NPC "will change law system"').

- 26 How strong and independent of government control are the associations of civil liberty, and how accountable are they to their own members?

Possible trend:

Evidence of pressure brought to bear on civil associations which may in some way be considered to be hostile to China.

No obvious change.

- 27 How publicly accountable are economic institutions for their activities, and how effective is their legal regulation in the public interest?

Possible trend:

A diminution in law or in practice of Hong Kong's strict regulation of the activities of economic institutions, and a gradual reduction in their effective accountability.

Actual changes:

No significant change. However, the government seeks to introduce reserve powers to control the stock and futures exchanges in any emergency.

- 28 How pluralistic are the media of communication in terms of ownership and accessibility to different opinions and sections of society; and how effectively do they operate as a balanced forum for political debate?

Possible trends:

- A possible reduction in extent or thoroughness of debate of policy issues in the media.
- The possible intervention by the SAR government in the editorial freedom of the media, possibly preceded by the growth of self-censorship on critical issues by journalists and the owners of media organizations.

Actual changes:

- The pre-emptive dismissal in 1995 by the *South China Morning Post* of its cartoonist Larry Feign, who had been critical of China.
- The attempt by a prominent supporter of the government to eliminate negative reporting of China by RTHK, the government-run radio and television networks.
- The attempt in April 2000, by the Hong Kong Liaison Office of the Chinese government, to insist that there should be no reporting of news about Taiwan by any of the Hong Kong news media is effectively rebuffed by the Chief Secretary, Anson Chan.

- 29 How extensive are literacy and education for citizenship, and how equal are the chances for future citizens to participate in economic, social and political life?

Possible trend:

Evidence of any reduction in the opportunities for citizens to participate fully in economic, social and political life; evidence of changed attitudes towards citizenship consequent on the promulgation in schools of the new Civic Education Curriculum.

Actual changes:

The progressive introduction of civics courses in schools, focusing on China, as noted above.

- 30 To what extent do people have confidence in the ability of the political system to solve the main problems confronting society, and in their own ability to influence it?

Possible trend:

Any indication of a loss of confidence in the political system, evidenced by incidents of protest, whether effective or abortive, a growth in apathy and political fatalism, possibly with a corresponding decline in the territory's economic success, and the incidence of emigration overseas, especially by ethnic Chinese Hong Kong residents with foreign passports.

Actual changes:

- A poll conducted by the *Sunday Morning Post* in June 1998 indicates that 82 per cent are satisfied with the state of political freedom in Hong Kong, 77 per cent satisfied with the state of democracy, and 59 per cent satisfied with the performance of Chief Executive Tung Chee-hwa. Anthony Cheung of City University HK notes that the public takes political freedom to mean the 'right to criticize the Government through channels such as the media and demonstrations' (*SCMP*, 28 June 1998, 'Top marks for democracy, freedom').
- There are continued high turnouts at demonstrations in Hong Kong to mark the 4 June massacre in Tiananmen in 1989; 70,000 attend in 1999 (*SCMP*, 5 June 1999, 'Tiananmen light undimmed').

### **The evolving political culture: trends and prospects**

Although the foregoing account presents no more than a listing of significant political developments in the new Hong Kong SAR, and awaits a systematic examination of evolving practice under all categories using the full rigour of a range of research methodologies and techniques of social investigation (a longer-term project which is in the process of elaboration), it is nonetheless possible in the interim to draw some tentative conclusions as to the most significant areas of change to date.

Of the four broad groups of indices for assessing the political culture of Hong Kong, there have been major and minor pressures for change in three. These are the electoral process, the openness and accountability of government, and rights and liberties.

Changes to electoral arrangements and the manner of constituting the LegCo consequent on the collapse of the 'through train', the arrangements under which it had been tentatively agreed between Britain and China that Hong Kong legislators would remain in office after the handover until the next elections were due, are well-known, and have clearly reduced the extent to which appointment to legislative and government office is determined on the basis of open competition and universal suffrage.

Under openness and accountability, a major question mark hangs over the continued independence of the judiciary following the right of abode case, as well as indications that Chinese government organizations may enjoy some degree of

immunity in reality from Hong Kong law, and the new practice of testing existing and new legislation in court to see if it complies with the Basic Law, placing judges under unwarranted political pressure. Still under accountability, the dismantling of the Municipal Councils, and changes to the District Boards, substantially reduce the degree of accountability at the local level.

On the matter of rights and liberties, the downgrading of the Bill of Rights and the prospective application of Article 23 of the Basic Law on subversion diminish the provision in law for the rights of the citizen, while actual equality in the enjoyment of civil rights has been undermined by moves to restrict rights at work, to withdraw rights from adopted mainland children, and yet to fail, on occasion, to prosecute known friends of the Chinese government.

In all these cases, precedent has been established for a further erosion of the political independence and judicial autonomy of Hong Kong.

However, under the fourth group of indices, concerned with civil society, all the evidence suggests that a sophisticated and robust civil society continues to flourish in Hong Kong four years after the transfer of sovereignty. The SAR continues to be a vibrant multifaceted community characterized by tolerance and a pluralistic media, despite pressures that have been brought to bear, and patterned with a network of strong, independent and vocal civil associations and non-government organizations.

In the long term, it may well be the strength of its civil society, with its numerous connections with like-minded people overseas, that serves as the bulwark Hong Kong undoubtedly needs to protect its unique political culture from critical encroachment by China. For its part, China's commitment to globalization and to WTO membership with all that that may bring, should induce, and we may fervently hope will induce, a growing caution in its treatment of Hong Kong. The link between a stable political culture and commercial prosperity is one that is increasingly perceived on all sides throughout Pacific Asia.

## Notes

- 1 Martin Lee in interview with the author, September 1999.
- 2 See Robin Porter, 'Towards a democratic audit in Hong Kong: some issues and problems', in Ash, Ferdinand, Hook and Porter (eds) (2000) *Hong Kong in Transition: The Handover Years*. In a discussion of systems of democratic audit the author argues that the Beetham audit of democracy in the UK could be usefully applied to an assessment of the political culture of Hong Kong.
- 3 See for example David Beetham (1999) 'Democracy research project design'.
- 4 In this section, the changes recorded are primarily those in electoral arrangements for the Legislative Council as between the 1995 elections under British sovereignty and the 1998 elections under Chinese sovereignty, though it is recognized that practice is unfolding and may be different again for the next LegCo elections.
- 5 The electoral changes are analysed in detail in the *Report on 1998 Legislative Council Elections*, released by Hong Kong Human Rights Monitor in December 1998. See especially part 5. Described overall as 'a regression away from democracy', the changes, it is suggested, are 'arguably unconstitutional in that they are in breach of the Basic Law' (5.07).
- 6 Taken together, these and other procedural changes may be considered to represent a steady process of erosion of the autonomy of Legislative Councillors.

- 7 The 'right of abode' case comes in for particular mention in a the report of the United Nations Human Rights Committee in 1999, which notes that requests for 're-interpretation' of provisions of the Basic Law made by the Hong Kong Government to the Standing Committee of the National People's Congress under Article 158 of the Basic Law could be made in circumstances that 'undermine the right to a fair trial'. See *UN International Covenant on Civil and Political Rights 1999*, 'Concluding observations of the Human Rights Committee': Hong Kong (China), 4 November 1999.
- 8 *Ibid.* On the broad question of rights and liberties, the UN Human Rights Committee, while welcoming the efforts made by the HKSAR to educate civil society about human rights, puts forth a number of subjects of concern. Apart from the 'right of abode' case noted above, it mentions, among other matters, the failure of the electoral procedures for the LegCo to comply with Articles 2, 25 and 26 of the International Covenant on Civil and Political Rights, the abolition of the Municipal Councils, the failure to implement legislation preventing interception of communications, decision-making procedures in deportation cases, the absence of any legislation to counter racial or sexual discrimination, the overbroad definition of treason and sedition used in Hong Kong courts, and what it sees as the threat to freedom of association posed by the Societies Ordinance. See also, for a much more detailed discussion of these and other human rights issues, the Hong Kong Human Rights Monitor 1999, *Submissions to the United Nations Human Rights Committee*.

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## 6 The dynamics of compensatory politics in Hong Kong

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Hong Kong's retrocession to the People's Republic of China (PRC) sovereignty in 1997 has drastically altered the post-colonial political landscape, where the democratic camp has embarked on a challenging odyssey in realpolitik. The pro-democratic activists have negotiated a tight course of retreat, rebound and retrenchment during the first three years of the Special Administrative Region (SAR), with twists and turns in electoral manoeuvres. Initially frozen out of the SAR system due to its opposition to the unelected Provisional Legislative Council (PLC), the democratic camp seemed to have entered into a period of marginalization from the SAR's political life and power structure. However, by seizing opportunities afforded by the Asian economic crisis, the democratic camp facilitated a strategic reorientation during its post-handover retreat.

As revealed in the first SAR Legislative Council (LegCo) elections in May 1998, the democratic camp staged an impressive rebound and reclaimed much of its previous popular support and political mandate. Yet, beset by internal discords over its own class identity and engulfed in conflict over strategies and personnel, the democratic camp soon became divided and declined in public esteem. With discernible erosion of grassroots support, it barely managed to survive the second SAR LegCo elections in September 2000. The new institutional realities and changed rules restricted the political space for the democratic camp, whose internal divisions and operational defects also ushered in a period of retrenchment. Thus it may seem that the democratic camp's revival, based on effective practice of what might be termed 'compensatory politics' has, at least for now, reached its limits.

This chapter will examine the retreat, rebound and retrenchment of the democratic camp in Hong Kong's power realignment during 1997–2000, with particular reference to the dynamics of compensatory politics in the SAR. The term 'compensatory politics' as used here denotes the deliberate efforts, public stance, policy orientations, party platforms and electoral strategies adopted by the key realpolitik players to refocus on socio-economic concerns in order to confront, absorb, mitigate and cope with the possible negative effects of the 1997 China factor; or rather, as has so far been the case, the lack of Beijing's overt direct intervention, in Hong Kong's internal affairs. It is the main argument here that

while socio-economic concerns have been of great significance to the SAR's public discourse and policy debates, they do not fully eclipse the China factor in the popular quest for democracy. Rather, livelihood concerns amidst an economic crisis have reinforced the demands for democratization and added relevance to the democratic camp's articulation of public interests. In other words, attached to and perhaps imposed on top of the pro-democracy vs. non-liberal axis is another, big business vs. grassroots/middle class, axis. Analytically, the combined operation of these two sets of overlapping axes can be a useful perspective through which to appreciate the dynamics of compensatory politics shaping party politics in the SAR.

### **From retreat to rebound: the democratic camp's dual strategies and the 1998 LegCo elections**

With the sole exception of Frederick Fung, head of the Association for Democracy and People's Livelihood (ADPL), the entire bloc of democratic camp LegCo members firmly opposed the PLC as an illegitimate and extra-constitutional organ not provided for in the Basic Law. They boycotted the PRC-appointed SAR Selection Committee which selected Tung Chee-hwa as the SAR Chief Executive and the 60 members of the PLC in December 1996. Rather than compromising their long-held stance on democratization and direct election of the entire legislature and the Chief Executive, the democratic camp LegCo members elected in 1995 won considerable sympathy for their principled opposition to the non-elected PLC. The PLC's rubber stamping of the SAR regime's invalidation of pre-handover civil liberty and labour legislation did nothing to remedy its dubious legality or lack of credibility.<sup>1</sup> The 1998 LegCo elections would vindicate the democratic camp's tactical retreat as Frederick Fung, the only democratic camp politician in the PLC, was defeated in the contest for a directly-elected seat.

The democratic camp's strategic repositioning and platform reorientation during the period of retreat had profound implications. They were undertaken, both as a matter of necessity in order to survive in the hostile SAR political climate, and as a way of taking advantage of opportunities afforded by the economic crisis. The experience of the Democratic Party (DP), the democratic camp flagship with the largest membership and number of seats in the LegCo, and, until late 1999, in the Urban/Regional Councils and District Boards (DB) can be illuminating. In fact, the DP adopted a 'walking on two legs' strategy with a double emphasis on democracy and socio-economic justice. Without abandoning its proven tactic of fighting for full democracy in Hong Kong, the DP leadership subtly modified its previous hostile stance toward the PRC officialdom, from harshly critical to a more moderate but not uncritical tone. No longer burdened with an alleged colonial taint as during the bitter Sino-British discord, the DP leadership, especially teachers' union leader Szeto Wah and DP chairman and prominent barrister Martin Lee, emphasized the fact that they were among the first wave of local leaders in the early 1980s to support the 1997 retrocession, hence their undoubted 'patriotism'. What drove the leadership and Beijing apart was the unyielding insistence of

democratic activists on 'retrocession with democracy' against Beijing's wishes.<sup>2</sup> In other words, the democratic camp refused to be typecast by their opponents as 'anti-China' simply because of their vigorous campaign for full democracy in Hong Kong. They refused to yield the patriotic high ground to the pro-Beijing bloc.

The new focus of the DP's political assault was on the PLC and the SAR regime, which had joined forces to enact the anti-democratic rollback. Crisis mismanagement, from bird flu to the new airport chaos and the economic downturn, provided ammunition for the democratic activists. Since there was little evidence of PRC direct interference in SAR internal affairs, Beijing was often spared attack by the democratic camp. As local confidence in the 'one country, two systems' formula gradually increased, and the 'fear of China' factor receded in importance, the democratic camp's battle cry of democracy as a defence against interference from Beijing's communist dictatorship also declined in popular appeal.<sup>3</sup> Against such a major shift in public sentiment, and utilizing the post-colonial space to remount the patriotic pedestal, the DP leadership rearticulated the relationship between its quest for democracy and the China factor, an issue which has assumed new meaning and relevance since the handover. The new line of 'democracy without direct hostility toward Beijing' changed the DP's stance from confrontational to moderately critical on the still sensitive China factor.

A more profound reorientation of the DP has been the projection of its role as champion of socio-economic justice. This new focus constituted the 'other leg' upon which the DP engineered its remarkable rebound. Both domestic factors and external forces led the DP to enlarge its party platform to highlight livelihood as a popular concern, to compensate for the diminishing appeal of its platform of advocating democracy to protect Hong Kong from Chinese communism. The domestic factors were the nature, composition, and vested interests of the new SAR elites, as well as the new government's policies. These factors, interacting with the devastating Asian economic crisis, provided the objective conditions favourable to galvanizing popular support for the DP's socio-economic crusade.

Both the SAR Exco and the PLC membership reflected the pro-Beijing and pro-business bias of the SAR polity. Their composition as non-elected bodies only deepened their acute lack of public credibility and popular legitimacy. The fact that Tung Chee-hwa, like many figures close to Beijing, came from a big business background with a conservative, non-liberal, anti-democratic agenda further aggravated public distrust of him. The Tung regime has been popularly regarded as lacking sympathy for the basic needs of ordinary people, and pursuing policies to reward his wealthy supporters at the expense of fair play and socio-economic justice.<sup>4</sup> The deepening economic recession created urgent demands for official relief efforts. However, decreasing revenues and budget deficits depleted the regime's deployable resources and seriously challenged Tung's plans for social engineering and economic development. Capitalizing on the mass discontent generated by economic downturn, the DP enlarged its popular appeal as the champion of ordinary people – the middle class. The DP emphasized its role as an indispensable safeguard and effective counter-weight to balance the big business–SAR regime axis.<sup>5</sup> As political activists outside the SAR power structure without direct respon-

sibility in government, the DP leaders did not offer specific proposals on relief measures or detailed policy suggestions to refloat the depressed economy. Rather, the democrats kept their high public profile by being vigilant critics, making the Tung regime responsive to the needs of the masses.

The DP's vital new mission to promote much-needed economic justice for ordinary people, who had already been partially disenfranchised in the SAR polity, gained political momentum and popular support as the economic crisis worsened. The DP leaders skilfully portrayed the class interest issue as a new dimension of their party platform reorientation, making political capital from the urgent relevance of socio-economic justice amidst high unemployment, business failure and wage reduction. The DP's unwavering commitment to democracy could thus be combined and enhanced through integration with its new populist socio-economic crusade. The experience and credibility of DP leaders, such as Szeto Wah and Lau Chin-shek, as effective grassroots champions and mass mobilizers, contributed much to the creation and implementation of the DP's new two-plank platform of 'fight for democracy to obtain socio-economic justice' and 'safeguard socio-economic justice through democratic representation'. The 1998 LegCo elections would vindicate the DP's 'walking on two legs' strategy.

The 24 May 1998 elections for the first SAR LegCo were indeed very remarkable in several aspects.<sup>6</sup> The voter turnout rate for the 20 directly-elected seats (one-third of LegCo total) in the geographical constituencies reached a record-breaking 53.3 per cent (about 1.5 million) of registered voters, an unexpectedly high yield when compared with the 39 per cent for the 1991 and 36 per cent for the 1995 elections. The entire democratic camp received about 65 per cent of the votes in the directly-elected seat contests, similar to their 1991 and 1995 gains.<sup>7</sup> However, due to the new and complex proportional representation (PR) system designed to disadvantage the democratic camp, the directly-elected seats won by pro-democratic candidates actually decreased from 16 to 14. The democratic camp got only five seats in the 30-seat functional constituencies and did not win any of the ten seats in the Election Committee category. A major setback was the rout of the ADPL which failed to retain any of the four seats it won in 1995. This was partly due to the new electoral rules and also because of Frederick Fung's compromised service in the PLC.

In contrast, the pro-Beijing grassroots Democratic Alliance for Betterment of Hong Kong (DAB) took a total of ten seats. It obviously benefited from the electoral system, as its share of popular vote for the directly-elected seats increased to 25.2 per cent from 15.6 per cent in 1995. Its pro-Beijing stance was compensated for by its pro-livelihood platform. The pro-business Liberal Party (LP) kept its ten seats (nine functional seats and an Election Committee seat). However, its chairman, Allen Lee, failed to retain his directly-elected seat, the LP's sole popularly-elected representative.

Despite the fact that the number of LegCo seats won by the democratic camp was down from the 1995 near-majority of 29 to 19 in 1998, the democratic camp mounted an impressive campaign.<sup>8</sup> What characterized this as a democratic camp rebound was the undiminished extent of its popular support

with the similar 65 per cent share of popular vote. This shows the still very strong public preference for the democratic camp, notwithstanding the sovereignty transfer and altered electoral system. The DP's popular vote share actually increased slightly, from 42.3 per cent in 1995 to 42.9 per cent in 1998. The ADPL's significant drop from 9.6 per cent in 1995 to 4 per cent in 1998 represented a rout which signalled the effect of the diminished China factor among the grassroots, once its solid base of support. The four-seat gain and 12.6 per cent share of the new (established 1996) Frontier Group, with two of its winning candidates from trade union backgrounds and another (Emily Lau) with proven middle class appeal, confirmed a fruitful collaboration between the grassroots and middle class and the broader popular appeal of its dual policy of democracy and socio-economic justice. If the directly-elected seat won by grassroots activist Leung Yiu Chung is included, the Frontier's results are even more impressive.

The 1998 electoral victory of the democratic camp vindicated their emphasis on socio-economic issues to preserve their base of popular support, previously derived mainly from effect of the democracy vs. China factor. As the democrats' agenda throughout 1990–97 was dominated by the China factor and democratization in a society enjoying economic prosperity and new opportunities for electoral participation, livelihood issues often became less urgent and of lower priority. Yet socio-economic issues and class interest articulation were not absent in the public debates on democratization of 1987–88 and 1992–94, nor in the 1991 and 1995 LegCo elections. Thus, the democratic camp's remarkable rebound in the 1998 polls did not stem from a superficial, instant reinvention of platforms or an about-face quick turn in strategic orientation. The SAR plutocratic order and the economic recession yielded the space and time for the DP and allies to resurrect and re-emphasize their socio-economic agenda, not as a substitute for but as an organic part of their democratic thrust.

### **Internal discord within the democratic camp, 1998–99**

The return of the democratic camp to LegCo in July 1998 ushered in a new power realignment, partisan polarization, and elite fragmentation in the SAR.<sup>9</sup> Despite a popular vote share similar to that in the 1991 and 1995 elections, the democratic camp occupied only 19 seats in the first SAR LegCo instead of the 29-seat near majority of 1995–97. It was clear that the PR system adopted for the 1998 LegCo election's 20 directly-elected seats would work against the larger parties if they fielded more than one or two candidates in the same directly-elected multiseat geographical constituency. This created problems for the DP as the largest party in the democratic camp, both over the ranking of candidates on the party list and in its relations with other smaller pro-democratic parties. Under the PR system, a political party participating in a direct election is required to put up a list of candidates, and if there is more than one candidate, then the party candidates must be listed in ranking order for a specific geographical constituency. Those candidates ranked at the top of the party list naturally stand a much better chance of being elected than those with a lower ranking. The need for the party leadership

and membership to work out an official party list of candidates to contest direct elections brought into the open factional discords, personality clashes, policy disagreements and rivalries within the DP. Disputes among DP members over the selection of candidates and their rankings on the party lists led to serious conflicts within the DP in early 1998.<sup>10</sup>

Its re-entry into the SAR LegCo supposedly opened new opportunities for the democratic camp to participate directly in the governance process. Yet the severely restrictive access to the executive-led SAR regime's policy-making, and a legislative presence disproportionate to their electoral mandate, soon frustrated some democratic camp activists. Feeling politically disempowered and legislatively crippled, they sought an alternative to the parliamentary forum. At the December 1998 DP congress some 'young turks' proposed a long term walkout from the LegCo and wanted to take their fight into the streets with public protests. As some of them had staged similar direct action in the colonial era, this call for a return to popular mobilization was no empty threat, and would split the DP.<sup>11</sup> This intra-party strife was complicated by the election and immediate resignation of veteran 'street fighter' Lau Chin-shek as DP vice chair.<sup>12</sup>

A crisis within the DP was temporarily averted in January 1999 when party chair Martin Lee and his mainstream supporters reached agreement with the young turks on a joint approach. The DP decided to continue its participation in LegCo as a responsible opposition promoting issues of democracy and socio-economic justice. The DP's grassroots linkages and resources would be re-energized for the 1999 District Board (DB) and the 2000 LegCo elections and to work towards socio-economic commitments.<sup>13</sup> Thus, the new emphasis on livelihood issues and empathy with the grassroots' economic concerns, while crucial to the DP's electoral rebound, also provoked a divisive intra-party struggle for its heart and soul – its real social base, class identity and operational mode.

Frustrations over democratization deadlocks and legislative impotence fostered discords within the DP and among democratic elements. These climaxed in a marginal performance in the November 1999 DB elections, and in their inability to derail the Tung regime's attempt to abolish the Urban and Regional Councils, in order to remove the middle layer of Hong Kong's three-tiered electoral representation. The problems of Lau Chin-shek continued to plague the Party. Lau, placed on the 'inactive member' list, toyed with the idea of withdrawal from the DP in order to found a new labour party. But his Confederation of Trade Unions (CTU) partner Lee Chuek-yan remained unenthusiastic about a labour party, and preferred to retain links with the Frontier, which would not conflict with their union duties.<sup>14</sup> Lau's problem also added fuel to the DP's simmering discord over strategies, class identity and labour policy.

The mixed membership backgrounds of the DP, which was formed by the amalgamation of several groups in 1994, were a root cause of its internal polarization on socio-economic policies and targeted social bases.<sup>15</sup> DP chair Martin Lee has urged the DP to champion middle class aspirations for democracy through electoral and parliamentary participation. The more populist DP elements preferred collective action in the economic crisis when rising unemployment endangered

grassroots livelihood. The PLC's rollback of very late colonial labour legislation, and the under-representation of democratic elements in the SAR LegCo, accelerated the radicalization of the 'young turks'.<sup>16</sup>

In April 1999, CTU secretary-general Lee Chuek-yan (not a DP member) tabled a LegCo motion calling for the enactment of minimum wage legislation, and this immediately lit the fuse that blew open the DP's sharp internal disagreements.<sup>17</sup> The 'young turks' have strongly supported the legal minimum wage, especially amidst the wage freezes and salary reductions of the economic crisis. The DP leadership, mindful of its middle class appeal, harboured strong reservations.<sup>18</sup> After prolonged debate in the DP ranks, an extraordinary general meeting was held on 18 September 1999 to settle this policy discord, with 94 votes supporting and 114 votes opposing DP endorsement of a minimum wage law. Although it was seen as a breakthrough for a Hong Kong political party to settle its internal division through democratic means, the DP did not fully heal its factional wounds.<sup>19</sup> The democratic camp's dual strategies had become a sharp double-edged sword which could harm its own members.

### **The District Board and Urban Council setbacks**

The first DB elections in the SAR were held on 28 November 1999 for 390 of the 519 DB seats. The record 35.82 per cent vote turnout rate was a slight increase over 33.1 per cent in 1994 and 32.5 per cent in 1991.<sup>20</sup> This round of DB elections confirmed the relative strength of the democratic camp and also of the pro-Beijing bloc among the grassroots, both trying to pursue compensatory politics over rice bowl matters.<sup>21</sup> A brief review of the DB election results will illuminate the major shifts in neighbourhood politics at the expense of the democratic camp.<sup>22</sup>

The pro-Beijing DAB fielded the largest number, 176 candidates, of whom 83 were elected. The DP put up 172 candidates, of whom 86 were victorious. The pro-Beijing bloc emerged as the clear winner. A tabulation of total gain of District Board seats and success rates yields the following results: pro-Beijing bloc 99 seats/49.3 per cent; LP 16 seats/45.7 per cent; democratic camp 117 seats/53.4 per cent; independents and others 158 seats/46.1 per cent.<sup>23</sup> While the democratic camp still commands the largest number of elected seats, its previous strength compared to the pro-Beijing and pro-business axes is gone. The DP's once epic electoral success record has been broken. In terms of popular votes, the DP's 1999 share of 24.7 per cent (22.8 per cent in 1994) was only slightly ahead of the DAB's 23.1 per cent (11.8 per cent in 1994).<sup>24</sup> An indication of the DP's residual strength lies in the 95 single-seat DB contests in which DP candidates directly confronted DAB challengers, when the DP won 55 seats with a success rate of 58 per cent.<sup>25</sup> The ADPL managed to return its chairman, Frederick Fung, to a DB seat, an important step in his LegCo rebound.<sup>26</sup>

The very effective candidate/cadre training programmes and the penetrative power of the DAB-FTU local networks paid handsome dividends in the DB polls. The absence of Beijing's direct interference greatly reduced the negative 'China factor' impact of the DAB's patriotic stance. The economic downturn that made



livelihood, unemployment and wage reduction worries priority concerns for the voters also yielded room for the pro-Beijing camp to cultivate grassroots support through local networks for community service and ‘social unionism’, with its abundant human and financial resources.<sup>27</sup> In contrast, the DP operated with extremely meagre coffers and inadequate manpower.<sup>28</sup> More damaging than anticipated was the well-publicized internal strife which projected a public image of the DP as a divided party, unsure of its own class identity and unable to provide any solutions to rice bowl issues. The fiasco over the minimum wage motion and Lau Chin-shek’s unclear status undermined the DP’s effectiveness in drawing on working class support even in an economic downturn. By 1999, the strategy behind the DP’s 1998 rebound was crippled in one of its two legs.<sup>29</sup>

The year 1999 closed with another setback for the democratic camp in its uphill struggle against the anti-democratic counter-reformation. Using the excuse of alleged Urban and Regional Councils’ inefficiency in public hygiene and municipal services, the SAR government decided to abolish the two councils at the end of 1999.<sup>30</sup> On 3 December, a Municipal Services Ordinance was narrowly passed by the LegCo, 31 to 27, to provide for the abolition of the councils.<sup>31</sup> All the DP and other democratic camp LegCo members voted against this ordinance. Yet, supported by the pro-Beijing loyalists, the Tung regime was able to proceed to disenfranchise SAR voters in these middle-tier elected bodies.

### **Prospects beyond the 2000 LegCo elections**

The democratic camp entered the new millennium with deep scars and heavy hearts. In early 2000, the local press was filled with DP stories with a pessimistic tone, from fierce attacks on DP vice chair Yeung Sum by ‘young turks’, to DP intrigues and power plays relating to the planned splitting of the party candidate lists for LegCo elections.<sup>32</sup> The press headlines soon focused on the DP’s difficulties in preparation for the LegCo contest: the funding shortage and the jockeying for selection/nomination/list ranking among prospective candidates.<sup>33</sup> In April and May, press accounts of DP electioneering turned decidedly gloomy, with factional manoeuvres and, in several cases, members exiting from the DP after failing to be chosen for the electoral list.<sup>34</sup> A depressive atmosphere enveloped the democratic camp when Citizens Party founder Christine Loh decided to stand down at the end of LegCo’s term in July, citing ‘legislative impotence’ as her reason.<sup>35</sup> In June, after a year’s delay, Lau Chin-shek had to resign from the DP for his refusal to end his concurrent Frontier ties.<sup>36</sup> Thus it might seem that, exactly three years into the SAR era, the democratic camp was not faring well under the conservative Tung regime. The slow but steady economic upturn might further lessen their socio-economic issue appeal. It was in this summer of shadows and doubts that the democratic activists unfolded their LegCo election campaign.

The second SAR LegCo elections on 10 September 2000, though not drastically altering the partisan legislative alignment, did yield significant indicators for compensatory politics. The overall voter turnout rate at 43.57 per cent for the 24 seats in the five direct-election geographical constituencies was almost 10 per cent

less than that of 1998, but still higher than the pre-handover figures (39 per cent in 1991 and 36 per cent in 1995). While still the largest party retaining 12 of its 13 seats in LegCo, the DP saw its share of popular votes decline from 42.9 per cent in 1998 to only 34.7 per cent. On the other hand, despite the conflict of interests scandal involving vice-chair Gary Cheng, the DAB made clear gains, capturing an impressive 29.7 per cent of the popular vote, up from 25 per cent in 1998. The DAB took a total of 11 seats: seven in direct elections, three functional seats and one election committee seat.<sup>37</sup> Soon after his election victory Cheng resigned his directly-elected seat under pressure, reducing the number of DAB seats to ten.

The public's strong livelihood concerns greatly facilitated the victory of pro-grassroots and labour-linked candidates. For instance, three of the FTU winners were DAB-FTU joint candidates: Tam Yiu-chung and Chan Yuen-han (FTU vice-chairs, retaining their 1998 directly-elected seats), and Chan Kwok-keung (who took the new third labour union functional seat). In the pro-democratic camp, four of the directly-elected winners have strong unionist credentials: Szeto Wah, Lee Cheuk-yan, Lau Chin-shek and independent Leung Yiu-chung. Leung, Lau and Lee are Frontier members. Lau and Lee are both CTU and Frontier. Despite his resignation from the DP, Lau still ran on the DP ticket with James Tu, his 1998 electoral partner in Kowloon-West, and both won easily in 2000. The DP's Cheung Man-kwong, head of the Professional Teachers' Union, again defeated a pro-Beijing candidate to retain his education sector functional seat. The pro-democratic camp also regained an old member, Frederick Fung, who was defeated in 1998 due to his decision to serve on the PLC.<sup>38</sup>

The popular vote distribution figures clearly reflect the latest partisan realignment in the SAR: 61.87 per cent democratic camp, 30.62 per cent pro-Beijing, and 6.65 per cent conservative.<sup>39</sup> While the leftist front kept to its 1998 level, the DAB has rationalized its organization and brought most of the pro-Beijing elements such as the FTU and the HKPA under its banner for the direct election contests. However, the democratic camp's decline, while small, is alarming, and may point to a possible longer term trend. Its failure to make any real gains among the four new seats offered by direct election cannot be a good omen. Perhaps the SAR's deformed polity and twisted electoral design have become repressive institutional restraints rendering the democratic camp's competition with the pro-Beijing bloc in the arena of compensatory politics an uneven contest. A case of note was the popular support received by the DAB-FTU's Chan Yuen-han whose 108,587 votes (47.4 per cent) made her the new direct top vote-getter in the direct elections, edging out the DP's Szeto Wah, who also won easily with 103,863 votes (45.3 per cent) in the same Kowloon-East constituency.<sup>40</sup> This surprisingly strong support for the DAB-FTU, despite the Cheng scandal, revealed a capacity to mobilize on the part of the left-wing grassroots network on the strength of their social service commitment. In one sense, Cheng's electoral win was partly due to the DAB-HKPA joint effort in placing Cho So-yuk, a HKPA 1998 elected LegCo member, as the second ranked candidate (after Cheng) on the DAB's 2000 LegCo election list for Hong Kong Island. In this crisis situation Cho was able to mobilize her very considerable native Fujian network of grassroots supporters to compensate for

Cheng at the polls.<sup>41</sup> Without the Cheng scandal, the DAB–FTU bloc could probably have edged out the DP in both seats gained and vote share.<sup>42</sup>

On the other side, the deep schism within the DP, and the disunited democratic camp's bickering over personnel and socio-economic policies, seriously undermined their popular appeal and grassroots support. The new DP strategy of splitting its candidates among two or three separate party lists in the two larger constituencies of the New Territories did not work as well as originally envisaged. The narrow defeat of DP LegCo veteran Lee Wing-tat was partially compensated for by the surprise victory of DP 1998 loser Albert Chan; both ran, but on separate DP lists in the same New Territories West constituency of six seats. Lee attributed his defeat to over-concentration on high-level LegCo duties at the expense of insufficient local service and grassroots effort among his constituents.<sup>43</sup> If the 2000 LegCo election results offer any real lesson, the success of the DAB–FTU and Frederick Fung's rebound have reaffirmed the importance of systematic local penetration with a clear socio-economic focus to galvanize grassroots support.

With the 1997 China factor fading, and the economic downturn still depressing the life and work of many, the seemingly competing yet compensatory dynamics of political vs. socio-economic electoral mobilization need to be rearticulated. The ascendancy of socio-economic issues should become a significant development in the rising tide of political activism in Hong Kong beyond 1997. Grassroots unrest and intensification of labour militancy over socio-economic concerns in a recession, and over restructuring in the economic crisis, have so far characterized the Hong Kong social scene in the new SAR, whose polity is likely to evolve toward a corporatist state-society mix. Popularly-elected politicians must firmly embrace socio-economic concerns as the bedrock of political activism and of their electoral platforms. The struggle for social justice and against poverty will require the full strength of pro-grassroots political elements in order to reverse the trends of working and middle class marginalization under the SAR plutocracy. In an economic downturn, and confronting a 'tycoon-dominated' political establishment, there should be room for inter-party consensus, even tactical collaboration between the DP (and most of the democratic camp) and the DAB on grassroots livelihood concerns. Cross-party consensus and inter-camp collaboration will be essential on bread and butter issues as well as in rights and entitlements debates. In this reorientation toward socio-economic priorities, the pro-Beijing bloc ought to find common ground for collaboration with the democratic camp despite political differences. Yet it is far from certain that the two sides will see eye to eye on critical issues.

The recent recession has necessitated an interventionist approach by the Tung regime, which has strong paternalist instincts. The official commitment to carry out much-needed reforms in education, public housing, welfare, and the civil service, together with massive infrastructural projects, will force the SAR administration to work with LegCo on a wide range of undertakings, particularly where budget allocations are concerned. Populist patriotic 'class coalition' in the democratic camp will be of decisive importance in this regard as it commands a LegCo majority. The profound impact of such a class-based middle-class/grassroots ad hoc alliance

on the socio-economic front will fundamentally reshape HK politics. This type of coalition in LegCo, based on livelihood issues, is likely to further fragment the already unstable pro-Beijing bloc of leftist mass organs and conservative tycoons.

The socio-economic realities of the SAR will therefore facilitate the emergence of 'compensatory' politics, especially for the democratic camp and the DAB, but also for the pro-business LP and even the Tung regime. Thus, Tung's fourth SAR policy speech of 11 October 2000, with its shifted focus on education, poverty and bureaucratic reform, can be regarded as the regime's belated attempt at compensatory politics to arrest Tung's plummeting popularity, in order to prepare for his second term as SAR Chief Executive.<sup>44</sup> The polity of the SAR, framed by the Basic Law, is already burdened by rigid constitutional restrictions and serious institutional flaws, with too many checks and inadequate balances in its 'hardware'.<sup>45</sup> These structural defects and constraints have rendered the SAR system a very difficult governance mechanism to operate, particularly in the executive-legislative relationship. Perhaps in the 'software' of realpolitik manoeuvres and the articulation of class interests, compensatory politics as it unfolds along the dual axes of tycoon/big business vs. grassroots/middle class, and pro-Beijing conservatism vs. democratic liberalism, could offer more space and time enabling the SAR system to mature.<sup>46</sup> It is to be hoped that the SAR's compensatory politics will open new horizons for the present narrow political landscape, leading to a more enlightened era of fair and open political participation on Chinese soil.

## Notes

- 1 The PLC performance is assessed in James T.H. Tang 1998, pp. 21–5. Also see the near-40 per cent negative (vs. 11 per cent positive) rate of public approval of the PLC according to poll survey in April 1998, reported in *Pop Express* 20, April 1998, pp. 5–6.
- 2 On the democratic activists' sharp disagreement with the PRC and its local supporters over democratization in the Basic Law drafting process, 1985–90, see Chan and Clark (1991), pp. 3–35. Also see interview with Lee and Szeto in *Hong Kong Economic Journal (HKEJ)* 3 July 1999 on their patriotic views.
- 3 According to survey data collected by the Hong Kong Transition Project, 64 per cent of respondents in one poll considered the 1997 retrocession with the new SAR system under PRC sovereignty as the best arrangement for HK. See the paper by project director Michael DeGolyer (DeGolyer 1998). In contrast, in September 1995, 62 per cent of respondents in another poll expressed dissatisfaction with the PRC over Hong Kong transition matters.
- 4 This common public perception was skilfully played up by the democratic camp to become a major campaign issue in the spring of 1998. See Timothy K.Y. Wong 'Issue voting', in Kuan Hsin-chi *et al.* (eds), 1999.
- 5 This author was among the first to suggest this 'safeguard and counter-weight' concept to the democratic camp at an international labour conference organized by DP and Frontier leaders and hosted by the Hong Kong Confederation of Trade Unions in Shatin, Hong Kong, 20 February 1997. The full text of the author's speech is published as 'The labor movement and the China factor in colonial Hong Kong', in *Asian Food Workers* 27(2), April–May 1997, pp. 11–12.
- 6 Unless specified otherwise, all the 24 May 1998 election figures are based on those reported in Chan and Kwok (1999), pp. 47–65, and in the *Hong Kong Economic Daily*, 25 May 1998, A-19.
- 7 On the 1991 election results and analysis, see Ming K. Chan 1993, pp. 229–50. On the 1995 election results and analysis, see Kuan *et al.* (eds) 1996.

- 8 Private conversations with Martin Lee, 5 May 1999, Hong Kong. Lee considered the May 1998 election results for his DP and the democratic camp as a whole to be very successful and better than commonly expected, perhaps with the exception of ADPL–Frederick Fung’s defeat.
- 9 *Ibid.* Lee pointed out that he would not mind seeing the proliferation of a few more pro-democracy parties contesting future elections if the PR system remained unchanged. To Lee, it would be much better for the entire democratic camp to gain more LegCo seats, even if it meant the DP might suffer a slight drop in its own LegCo seats. This point was emphasized in the context of our discussion on the DP internal discord over the dual (DP and Frontier) affiliation of Lau Chin-shek, who had contemplated the idea of resignation from the DP (and the Frontier) to form a new ‘Labor Party’.
- 10 On the DP’s factional discord and internal strife, see Lo Shiu-hing (1999), pp. 635–58.
- 11 The DP’s internal disagreement was widely reported by the press. See *South China Morning Post*, 30 December 1998; *Hong Kong Standard*, 18 December 1998; and *Yazhou Zhouban* (Asiaweek – Chinese edition) 28 December 1998 to 3 January 1999, pp. 20–1.
- 12 Private conversations with Lau Chin-shek, 1–2 May 1999, Hong Kong, and with Martin Lee, 5 May 1999, Hong Kong. On 19 May 1999 the DP leadership announced the ‘freeze’ of Lau’s active membership, but did not expel him or force him to resign from the party.
- 13 On the DP’s reconciliation of internal functions and the new approach ahead, see *South China Morning Post*, 12 January 1999; and *Yazhou Zhouban*, 18–24 January 1999, pp. 14–16. Also private conversations with Martin Lee, 5 May 1999.
- 14 Private meetings with Lau and Lee, 1–2 May 1999 and 3 November 1999.
- 15 See Lo Shiu-hing (1999), pp. 638–9.
- 16 Lo Shiu-hing (1999), p. 642.
- 17 *HKEJ*, 17 April 1999, p. 5.
- 18 *HKEJ*, 17 April 1999, p. 5.
- 19 *Sing Tao Daily* (US West edition), 20 September 1999; *Yazhou Zhouban*, 27 September to 2 October 1999, pp. 29–30.
- 20 The 1999 figure is from *Ta Kung Pao*, 29 November 1999, front page. The 1991 and 1994 figures are from the Hong Kong Government Information Services (1995), p. 34.
- 21 See Frank Ching ‘A small but significant Hong Kong poll’, *Far Eastern Economic Review*, 9 December 1999, p. 15.
- 22 The figures for this and the following sections on the DB polls are based on *Yazhou Zhouban*, 6–12 December 1999, p. 25; *Ta Kung Pao*, 29–30 November 1999, front page; *HKEJ*, 21 October 1999, p. 5.
- 23 These figures come from the surveys and tabulations by the team of Robert Chung’s Public Opinion Program at the Social Science Research Center, University of Hong Kong. See his article in *HKEJ*, 8 December 1999, which verifies the actual seats won and his projections in this DB poll.
- 24 *The World Journal*, 30 November 1999, A-16.
- 25 *The World Journal*, 29 November 1999, A-12, 30 November 1999, A-16; *Yazhou Zhouban*, 6–12 December 1999, p. 25.
- 26 *The World Journal*, 30 November 1999, A-16.
- 27 Private meeting with Tam Yiu-chung, 3 November 1999. Also see the following analysis for the DAB’s victory in the DB election: *HKEJ*, 3, 8 and 11 December 1999; *Tao Kung Pao*, 30 November 1999; *Asiaweek*, 10 December 1999, p. 40; *The World Journal*, 29 November 1999, p. 12; *Yazhou Zhouban*, 6–12 December 1999, p. 26.
- 28 *Yazhou Zhouban*, 6–12 December 1999, p. 26.
- 29 *HKEJ*, 2 and 8 December 1999. Political scientists Lo Shiu-hing in conducting his research project on the HKSAR grassroots politics in autumn 1999, warned of the DP’s coming disaster in the DB polls as early as a month before the polls, in a private memo to the author.
- 30 Private meetings with John C.Y. Leung, Principal Assistant Secretary for Constitutional Affairs in charge of the councils’ abolition, 3 May and 10 November 1999.
- 31 *Ta Kung Pao*, 4 December 1999, front page; *HKEJ*, 3 December 1999, p. 15, 14 October 1999, p. 7.

- 32 For details on the DP's decision to split into two or three party lists for some geographical constituencies such as New Territories East and West but keep a single list for the three urban constituencies, see *HKEJ* (2000), 10 January, p. 7; 20 January, p. 6; 22 January, p. 5; 3 February, p. 8; 8 February, p. 5; 14 February, p. 5; 15 February, p. 11; 18 February, p. 12; and 21 February, p. 8.
- 33 For example, on the same day, 31 March 2000, *HKEJ*, p. 12, and *World Journal*, A-14, both carried stories on the DP's LegCo electoral preparation problems in the directly-elected seats' party list split and in the social work functional constituency.
- 34 See *HKEJ* (2000), 10 April, p. 6; 14 April, p. 16; 27 April, p. 7; 28 April, p. 11; 2 May, p. 6. Also *Sing Tao Daily* (2000), 2 April, A-14; 8 May, A-13–15; and *World Journal* (2000), 10 April, A-10; 13 April, A-12; 9 May, A-15. All report the intra-party conflicts over LegCo election party lists.
- 35 *HKEJ*, 12 April 2000, p. 6; *World Journal*, 12 April 2000, A-14; *Sing Tao Daily*, 12 April 2000, p. 16.
- 36 Private conversation with CTU Chief Executive Elizabeth Tang, 29 June 2000.
- 37 The 2000 electoral figures are based on the reportage in *Ming Pao*, *Sing Tao Daily* and *HKEJ*, 11, 12 and 13 September 2000.
- 38 *Ming Pao* 11 September 2000.
- 39 Figures provided by Dr Suzanne Pepper, 26 October 2000.
- 40 *Ming Pao* 11 September 2000.
- 41 *HKEJ*, 12 April 2000, p. 6. Also see *HKEJ* 1 and 5 April 2000, for reports on this DAB–HKPA dual affiliation for Ms Cho So-yuk, a 1998–2000 LegCo member from the HKPA in an election committee-returned seat.
- 42 Private conversation with Mr Ching Cheong, Hong Kong correspondent for the *Singapore Straits Times*, 6 October 2000.
- 43 *Ming Pao* and *HKEJ*, 12 September 2000.
- 44 *HKEJ*, 12 October 2000.
- 45 Suzanne Pepper, 'Elections, political change, and basic law government: the Hong Kong system in search of a political form', in *The China Quarterly* 162, June 2000.
- 46 See Baum 2000.

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# 7 **Administrative performance and the 2000 LegCo elections**

*Joseph Y. S. Cheng*

## **The emergence of discontent**

According to an official survey released in late July 2000, only one in five Hong Kong residents were happy with the performance of the Hong Kong Special Administrative Region (HKSAR) government. Three-fifths of the respondents were dissatisfied with the government, while the remaining one-fifth had no opinion.<sup>1</sup> With an economic growth rate of over 14 per cent in the first quarter of the year, it is at first sight difficult to explain this record high level of dissatisfaction with the government.

To be fair to the C.H. Tung administration, since 1982 or so, the colonial government had been preoccupied with negotiations with Beijing, and it had lost the political will to push for necessary domestic reforms. The abandonment of the central provident fund in the early 1990s was a significant example. This naturally meant that, after the handover, major reforms were needed in almost every important policy area.

The globalization process and the information technology age have broadened the gap between the rich and poor. The lower socio-economic strata have been suffering from a decline in real incomes because of a surplus of unskilled labour, and middle-class professionals for the first time in their life often encounter the threat of unemployment. Even if they do not, they may have to worry for their children. Many of them also feel the pressure of coping with the challenges of the times. Most Hong Kong people already work very long hours; the drive in recent years to enhance efficiency may well mean a workload too heavy for them. Surveys reveal that many people do not have enough time for their children. The threat of downsizing and the associated deterioration in office politics have contributed to the 'feel bad' factor too.

Despite the talk of economic recovery on the part of the government, many people have not felt its benefits yet, and they tend to blame the government for the lack of strategy to ensure Hong Kong's prosperity in the future. The above-mentioned survey also revealed that 39 per cent of the respondents indicated that they had little confidence that the HKSAR would continue to be prosperous and stable, the highest figure since 1996. At the same time, the Hong Kong Council of



Social Service stated in its annual submission to the Chief Executive that in the past four years the income of the lowest-earning 20 per cent of the population had decreased by 27.7 per cent, while that of the highest-earning 20 per cent had increased by 4.2 per cent. The Council's director, Hui Yin-fat, warned that the worsening income disparity would generate social instability.<sup>2</sup>

The government, however, cannot escape responsibility for not managing its reforms well. Each set of reforms appeared logical and necessary; but each set of reforms also challenged a group of vested interests, for example in the civil service and in the teaching profession. When many reform programmes are implemented simultaneously in many sectors, cumulative grievances may be too much for the government to handle. It also appears that the broad programmes of reform in the civil service, in education, etc. were initially supported by the community, but when it came to concrete policy proposals, resistance gradually grew. In this connection, the officials involved might not have done sufficient preparatory work.

With respect to language tests for teachers, for example, there was obviously inadequate consultation with the teachers concerned as well as with their trade unions, and the teachers did not consider that the officials had a good understanding of the issues. Under such circumstances, officials who did not enjoy the trust and respect of their clients would only find their work all the more difficult. Unfortunately, this has become an increasingly common phenomenon.

### **Problems with the civil service**

In view of the many civil service blunders since the handover, from the handling of the chicken-flu crisis and the chaos at the opening of the new airport at Chek Lap Kok, to the series of public housing construction scandals, many Hong Kong people have been asking where their civil service has gone wrong. The community is aware that it has basically the same civil servants now as before the handover; and so it finds it difficult to understand why their performance has deteriorated so sharply.

To some extent, the deterioration has been exacerbated by a change of mood. Before the handover, Hong Kong people wanted continuity and morale to be maintained in the civil service to ensure a smooth transfer of power. At that time, the community was eager to agree with the former Governor Chris Patten that Hong Kong's civil servants were among the best in the world. But today, people are more inclined to blame them for the HKSAR's problems and to demand punishment for those civil servants who have failed to achieve results.

Instead of focusing on individuals, a review of the entire civil service system is necessary. Changes regularly take place in the United States civil service and the advantage of this is that talented people are constantly recruited from various sectors. In Hong Kong, the civil service is a closed system, where administrative officers are generalists who join the civil service after graduation. As the policy-making process becomes more complicated and demands more expertise, it is doubtful whether a team of generalists can lead competently and generate confidence. Many in the financial sector were not impressed by the senior civil

servants' handling of the Asian financial crisis, and some senior civil servants obviously displayed a lack of competence. It was also suggested that an expert should have been recruited from outside the civil service to head the relatively new Information Technology and Broadcasting Branch.

Despite many similarities, not least of which is their common sense of professionalism, Hong Kong's civil service differs from Japan's in one important way. An administrative officer in Japan is assigned to a ministry and stays there for his entire career. This ensures that administrative officers know their policy areas well, but it also creates close ties between senior civil servants and their clients. There is no need for Hong Kong to imitate Japan in this respect, but the rapid transfer of senior civil servants does not contribute to credibility. Senior civil servants need time to become familiar with their portfolios, and to establish ties with their clients. The departure of expatriates and some senior civil servants shortly before 1997 made transfers more frequent than desirable. Perhaps it should be decided that senior civil servants stay in their posts for at least three years.

Although Hong Kong's civil servants try to remain neutral, this can sometimes be difficult. Their working style normally allows few opportunities for them to interact closely with different sectors of the society. This is appropriate in the United Kingdom because policies are made by the ruling political party. Accountability is assured because political parties must face elections. In Hong Kong, it is difficult to enforce the accountability of the civil service to the public. Senior civil servants are not neutral politically because they make policies. One of the questions raised by the international media in the wake of the air-cargo crisis at Chek Lap Kok was why no senior civil servants accepted responsibility and resigned. They noted that in Japan, South Korea and Taiwan, concerned officials had resigned after serious air traffic accidents. Gradually, Hong Kong people also raised similar questions, and the political parties in the legislature finally passed a no-confidence motion on the chairperson of the Hong Kong Housing Authority, Rosanna Wong Yick-ming, and the head of the Housing Department, Tony Miller, on 28 June 2000 regarding the recent public housing construction scandals.<sup>3</sup> Anticipating the voting outcome, Rosanna Wong had earlier resigned.

## **A ministerial system for Hong Kong?**

Dissatisfaction with the civil service has attracted some discussion on the possible introduction of a ministerial system. Theoretically, if a political party or coalition of political parties can control a majority in the legislature, it can dictate policies to the executive branch of government and can demand to control the appointments of at least some senior civil service positions. This concept of government, however, is against the principle of 'executive-led government' advocated by the Chinese leadership.

Hence the pro-China and pro-HKSAR government political parties, i.e. the Liberal Party, the Democratic Alliance for the Betterment of Hong Kong (DAB) and the Hong Kong Progressive Alliance, as well as the independents of similar political orientation, who together constitute a safe majority in the legislature in

support of the Chief Executive, have no intention of demanding a ministerial system because it is not favoured by C.H. Tung nor by the top civil servants. The pro-democracy political groups are not paying much attention to the issue at this stage because they understand that, without substantial electoral reforms, they will not be in a position to secure a majority of seats in the legislature.

If by a ministerial system, one simply refers to the recruitment of talents from outside the civil service to fill positions at the secretary level, then C.H. Tung has already appointed Elsie Leung as Secretary for Justice, Edgar Cheng as head of the Central Policy Unit, and Dr Yeoh Eng-kiong as Secretary for Health and Welfare. There are precedents for such appointments in the British administration, where appointing a small number of senior civil servants from the private sector is an established practice. The crucial issue is a matter of scale.

At the same time, rumours circulate that the Chief Executive does not trust his senior civil servants and that the community wants the resignation of a few civil servants at the secretary level. Indeed, a vote of no confidence against the Secretary for Justice was defeated only narrowly in March 1999 after intense lobbying by the Chief Executive. Replacing a number of top officials with outsiders might be controversial and damaging to the morale of the civil service. Nonetheless, there has been considerable support for such a move because it would enhance the accountability of the senior civil servants, weed out a small number of them who are incompetent or unpopular in the eyes of the public, improve the image of C.H. Tung as a decisive and strong leader, and ensure that he has his own team in the government instead of inheriting some administrators who were groomed by Chris Patten.

Soon after his election as Chief Executive and his appointment of his future Executive Council, C.H. Tung informed the public that three of the Executive Councillors, Antony Leung, Leung Chun-ying and Tam Yiu-chung, would be given special policy responsibilities in education, housing and services for the elderly, three policy areas which Tung later identified as his priorities in his first policy speech.<sup>4</sup> There was considerable speculation then on the relationship between the three Executive Councillors and the respective policy secretaries, and whether all Executive Councillors would eventually be given policy portfolios covering all the policy branches in the government. Within a year or so of the handover, it had become clear that Executive Councillors had not become super-secretaries; in fact, no more Executive Councillors have been given specific policy portfolios.

The very heavy responsibilities of the three Executive Councillors outside the Council mean that they are in a highly handicapped position to compete with the respective policy secretaries for control of the policy-making processes. Policy secretaries enjoy the full backing of the civil service which controls access to information and other resources essential to policy-making. The three Executive Councillors apparently have to count on their own resources. Indeed, since the handover, Executive Councillors have often been criticized for adopting too low a profile, and for rarely being available to defend government policies. In sum, they are not perceived to be very influential or to have contributed much to the HKSAR government's handling of its many challenges. However, constitutionally, the Chief

Executive can strengthen the role of his Executive Council and transform it into his cabinet, like that of the United States President.

Another option for managing the civil service, which could be introduced at this stage without encountering substantial opposition, would be to offer contracts to top civil servants following the Australian model. The civil servants believe that they are underpaid compared with their counterparts in the private sector. The contract system could offer them substantially higher salaries, while breaking the 'iron rice-bowl'; i.e. contracts might not be renewed. Top civil servants would be given the option to hold on to their tenure or to opt for contracts; therefore, they would not have grounds for complaint. Those who were 55 years of age or above would not lose much by opting for initial contracts of three to five years. Such arrangements, it could be hoped, would change the culture, at least at the top echelons of the civil service, and further justify the gradual implementation of the contract system throughout the civil service. Top civil servants would be more accountable, and the Chief Executive would have a better chance of forming his own team.

In the first days of the millennium, DAB chairman Tsang Yok-sing warned Hong Kong people that the government would gradually fall into the hands of mediocre people in the absence of political reforms. Tsang appealed to the Chief Executive to reform the relationship between the executive and legislative branches of the government, and he proposed that the major parties in the legislature should form a coalition to nominate the candidate for the Chief Executive. At the same time, he advocated a ministerial system involving political parties; i.e. the Chief Executive would recruit his principal officials from the political parties supporting him. Tsang, however, admitted that his proposals could not be implemented in the foreseeable future.<sup>5</sup>

The general speculation was that Tsang's proposal was an attempt to articulate the DAB's frustration generated by its difficult position. The HKSAR government expects the party to support its policy programmes, but the party does not feel that it has been fully consulted or has adequate inputs in the policy-making process. Sometimes support for the government's policies can be quite unpopular and costly in terms of voters' support. The DAB is acutely aware that its criticisms of the government, accompanied by consistent delivery of its votes in support of the Tung administration in the legislature, has been eroding its credibility in the eyes of the electorate. The local political culture expects political parties to assume the role of the opposition constituting part of the checks and balances mechanisms. Political parties therefore dare not identify too closely with the government. The limited role of the pro-democracy groups and the pro-government parties in the political process means that all political parties have serious difficulties in political recruitment.

At the same time, senior government officials increasingly find their position untenable, and have been tempted to leave for more lucrative positions in public sector corporations or in the private sector. Since there is no government party, they have to lobby hard for legislators' support, and they have to bear with severe criticisms in the legislature from opposition as well as pro-government legislators

who are eager to secure media attention. They often feel humiliated, not only because there is no support in the legislature, but also because they have to be polite to most legislators, despite their sometimes unreasonable criticisms, so as to retain their goodwill to facilitate future lobbying efforts. That is why Tsang Yok-sing lamented that talented people in Hong Kong would not find senior positions in the civil service nor seats in the legislature attractive.

It is not likely, however, that the Chinese leadership would allow the political parties to usurp the power of appointing principal officials from the Chief Executive, as this is perceived to be a violation of the principle of an 'executive-led' system of government. While there is considerable frustration on the part of senior government officials and the pro-government political parties, the HKSAR government still enjoys a safe majority support in the legislature and there is no danger of a constitutional or political crisis. So those who hold the power have no incentive to reform.

In theory, the C.H. Tung administration can allow the pro-government political parties to introduce important bills in the legislature, so that they can win credit for supporting the government and can claim to have delivered to the electorate. This is less a challenge to the 'executive-led' system of government because the Chief Executive has full power to control the introduction of bills by members of the legislature. Introducing a contract system for principal government officials might serve to enhance their accountability to the legislature and the public, because the Chief Executive could refuse to renew their contracts or even terminate their contracts early if their performance were unsatisfactory. It would also strengthen the Chief Executive's hand over the senior civil servants. But admittedly these measures would not solve the basic problems in the existing system. Meanwhile, C.H. Tung has clearly stated that he would not consider the adoption of a 'ministerial system' at this stage.

As explained earlier, the relationship between the administration and the legislature has been unsatisfactory, and has resulted in frustration and dissatisfaction among senior civil servants, legislators and the general public. On the eve of the legislative elections in September 2000, some journalists secretly hoped that the two radical candidates, Tsang Kin-shing (Independent, Hong Kong Island) and Leung Kowk-hung (April 5 Action, New Territories East), would win, as they had pledged to shock the legislature with physical action.

It has been suggested that 'the administration has power but no votes, and the parties/legislators have votes but no power'. This is a political myth far from reality. The Chief Executive belongs to no political party, and no legislator has an obligation to support the administration. Tam Yiu-chung, who has been appointed to the Executive Council, is perhaps the only exception. Yet the administration enjoys a safe majority support in the legislature. The administration's supporters in the legislature accept Beijing's policy towards Hong Kong, the 'executive-led' system of government and the Chief Executive's policy programmes. Theoretically, the administration must arrive at an agreement with this loose majority coalition in the legislature, spelling out the privileges and obligations of the latter. It seems,

however, that these legislators have been willing to support the administration without demanding much in return.

DAB chairman Tsang Yok-sing's complaints about the executive–legislature relationship mentioned above are both significant and puzzling. Since the Tung administration cannot function without safe majority support in the legislature, the DAB, together with the Hong Kong Progressive Alliance and the Liberal Party, can almost dictate their policies to the administration and even have a strong say on the appointment of the principal officials. Even if an adequate consensus does not exist among the three parties, DAB alone still carries a lot of weight. If it threatens to withdraw its support for the Tung administration and switch to the opposition, it will certainly manage to extract important concessions. So obviously it is not true that legislators have votes but no power. The truth is that the safe majority in the legislature backing the Tung administration does not have the political will to challenge the 'executive-led' system of government because it does not dare to antagonize Beijing.

### **Preparing public opinion**

The record turnout of 53 per cent of voters in the 1998 legislative elections was probably a pleasant surprise to all.<sup>6</sup> Experts had earlier predicted a voter turnout rate of about 30–35 per cent. Based on past experience, most Hong Kong voters go to vote to fulfil their civic obligation and to choose a critic to monitor the work of the government. Hong Kong people realize that they are not voting for a government, but the legislature forms a most important part of the checks and balances mechanisms in the territory. Despite the fact that the Basic Law provides for a strong executive-led system of government and limits the legislature's powers,<sup>7</sup> the government cannot get new laws passed and cannot get money to implement its policy programmes without the consent of the legislature. These are the two most important powers of all legislatures in democratic countries, and the HKSAR's legislature has such powers at its disposal. A useful function of the legislature is to focus on policy issues. A small, dedicated opposition can effectively influence the government's agenda if it succeeds in securing the community's attention and the support of public opinion.

In the past, many Hong Kong people voted for staunch critics of Beijing and the Hong Kong government. They also supported an acceleration of the pace of democratization. Such values favoured the pro-democracy camp. Today, it seems that the community has been reasonably assured of Beijing's non-interference policy, and it realizes that it will be difficult to push for democratic reforms before 2007. To generate support for electoral reforms, political parties in the territory have to demonstrate that they are ready to govern, and not just limit themselves to the roles of opposition and critics. Yet, in the 1998 election campaign, the community perceived that Hong Kong's political parties had similar platforms in elections. Moreover, they tended to make promises of services rather than present concrete policy proposals. The two major parties in Hong Kong, the Democratic

Party and the DAB, have a considerable number of teachers among their members and some of them have become members of the Legislative Council and District Councils. Obviously, education is an issue of major concern to the public, yet neither party seemed to have a comprehensive policy proposal on education to offer, leaving the concerned public unaware of their stance on the territory's education policy.

Hong Kong people were most concerned with employment and the economy, but they understood that they could not expect much from the political parties in these areas. While the community was unhappy with the performance of the Tung administration, public opinion surveys showed that such dissatisfaction had spread to cover almost all political parties too. Hence some radical candidates perceived an opportunity in exploiting anti-Establishment sentiment and offered themselves as candidates. It appeared that such anti-Establishment sentiment also existed in the normally conservative functional constituencies. Incumbents with long years of service and excellent connections with the government were challenged by candidates who tended to be more critical of the government. Some of these candidates had taken part in the earlier Election Committee elections, and had secured satisfactory levels of support.<sup>8</sup>

In general, the electoral system has been designed to ensure a majority support in the legislature for the executive branch of the government. It was therefore not expected that there would be significant changes in the balance of political forces after the September 2000 elections. Political observers, for example, had predicted the Democratic Party to lose one seat and the DAB to win two more seats before the latter became tainted by the conflict-of-interest scandal of its vice-chairman, Gary Cheng. In the direct elections, because of the proportional representation system based on party slates of candidates, competition was largely focused on the last one or two seats in each constituency. But because of the following factors, there was keener competition in the direct elections. In the first place, the increase in the number of directly-elected seats from 20 to 24 attracted a considerable number of new candidates, including those who wanted to exploit the anti-Establishment sentiment. The Hong Kong Island and New Territories East constituencies were good examples, and radical candidates eroded the support for the Democratic Party to some extent. The abolition of the Municipal Councils led a few of their former members to join the Legislative Council race. The Democratic Party was in a difficult position, with some members departing to contest as independents. In order to maximize the number of seats won, the Democratic Party presented more than one list of candidates in the two New Territories constituencies. It was a test of party loyalty and party organization to arrange optimal electoral support for separate lists of candidates, and there was a danger that a decline in electoral support coupled with bad organization might lead to unexpected losses.

Again, it was not expected that the Liberal Party could win a seat in the direct elections. Two incumbent legislators from the Hong Kong Progressive Alliance contested the direct elections under the banner of other political groups. Paradoxically, while the prospects of the Hong Kong Progressive Alliance as a viable

political party in the legislature are in doubt, its performance was the best among all political parties in the July 2000 Election Committee elections.<sup>9</sup> If the two major political parties in the coalition which provide the majority support in the legislature for the Tung administration could not prove themselves in direct elections, will they support democratic reforms after 2007? After all, the proposed changes to the electoral system then require a two-thirds majority endorsement by the legislature and the consent of the Chief Executive.

### **The legislative elections of September 2000**

It was estimated that about 4.5 million people in Hong Kong would be qualified voters in the 2000 elections: of these, 67 per cent or 3.05 million were registered.<sup>10</sup> The voter turnout rate in the event in the legislative elections in 2000 was 43.6 per cent, 9.7 per cent lower than in the 1998 legislative elections. But it was still higher than the 35.8 per cent in 1995 and the 39 per cent in 1991.<sup>11</sup> It might be that the voter turnout rate was exceptionally high in 1998. Again, the 2000 elections were the first to be held since the handover, there was substantial community resentment against the Provisional Legislative Council, some people may have been put off because souvenirs were offered to voters, and bad weather may have kept people at home in 2000 watching television. These factors may all have contributed to lower voter turnout than in 1998. Most analysts attributed the decline in the voter turnout rate in 2000 to disappointment with the 'powerless' legislature, dissatisfaction with the performance of the political parties and politicians, and the smear campaign tactics in the elections.

The design of the electoral system was such that the major parties were not expected to win or lose more than two seats over their 1998 performance. In the end, the Democratic Party won 13 seats (one less than in 1998), the DAB secured 11 seats (one more than in 1998), the Liberal Party eight, and the Hong Kong Progressive Alliance four, losing two seats and one seat respectively. A number of small political groups also managed to win seats: The Frontier two, the Confederation of Trade Unions two, and one seat each went to the Association for Democracy and People's Livelihood, the Neighbourhood and Workers' Service Centre, the Federation of Trade Unions, the Federation of Hong Kong and Kowloon Labour Unions, and New Century Forum. The remaining 16 seats went to independents.

There were not many new faces returned by the 30 functional constituencies; in fact nine incumbents were re-elected with no challenge. Among incumbents seeking re-election, only Fung Chi-kin (Financial Services) and Edward Ho Sing-tin (Architectural, Surveying and Planning) lost. Keen competition took place in the Medical and Health Services functional constituencies because the departure of the incumbents attracted a number of candidates of comparable strength. At the same time, the DAB worked hard to win more seats in the functional constituencies. Its success was limited as it won only one extra seat in the newly-created District Council functional constituency, but the attempts will likely be repeated in the future as the party will continue to strive to become the largest party in the legislature



and eventually the governing party in the HKSAR. Similarly, in the Election Committee six incumbents were returned out of the ten elected in 1998.

Just before the election, it was revealed that Gary Cheng, a vice-chairman of the DAB, was alleged to have passed on a classified document obtained from the government in his capacity as a legislator to a public-relations firm, and that he might have been involved in cases of conflict of interest while operating two consultancy firms engaged in advising major business corporations on their public-relations strategies. The scandal was a major blow to the DAB, and initial opinion surveys indicated a sharp decline in support for the party. As shown in Table 7.1, however, the DAB in fact did remarkably well in the elections despite the scandal. While the voter turnout rate declined from 53.3 per cent in 1998 to 43.6 per cent in 2000, the number of votes secured by the DAB dropped by only 2 per cent.

The DAB's satisfactory performance reflected the success of its services at the grassroots level. It is the strongest party in terms of financial and manpower resources, and it has deployed its resources effectively to establish an extensive grassroots network of support. Its supporters responded to the party's mobilization because they were grateful for the services it provides, and because they identified with its emphasis on stability and prosperity. Since the handover, its pro-Beijing stand has not been a political liability. Indeed, its close relationship with Beijing and the HKSAR government has enabled it to reward its supporters with honours and important appointments. The decline in the voter turnout rate and the dispersal

*Table 7.1* Votes won by the Democratic Party (DP) and the Democratic Alliance for the Betterment of Hong Kong (DAB) in the 1998 and 2000 legislative elections (by geographical constituencies)

<i>DP</i>	<i>No. of votes won in 1998</i>	<i>No. of votes won in 2000</i>	<i>Comparing the 2000 results with those in 1998 (in no. of votes)</i>	<i>Comparing the 2000 results with those in 1998 (in per cent of votes)</i>
Hong Kong Island	143,843	92,074	-51,769	-36.0
Kowloon West	113,079	73,540	-39,539	-35.0
Kowloon East	145,986	103,863	-42,123	-28.9
New Territories West	147,098	117,733	-29,365	-20.0
New Territories East	84,629	75,213	-9,416	-11.1
<b>Total</b>	<b>634,635</b>	<b>462,423</b>	<b>-172,212</b>	<b>-27.1</b>
<i>DAB</i>				
Hong Kong Island	90,182	72,617	-17,565	-19.5
Kowloon West	44,632	41,942	-2,690	-6.0
Kowloon East	109,296	108,587	-709	-0.6
New Territories West	98,492*	101,629	+ 3,137	+3.2
New Territories East	56,731	66,943	+10,212	+18.0
<b>Total</b>	<b>399,333</b>	<b>391,718</b>	<b>-7,615</b>	<b>-2.0</b>

Source: *Ming Pao* (a Hong Kong Chinese newspaper), 14 September 2000.

Note: \* DAB votes plus rural votes.

of votes among independents also increased the relative weight of the DAB's committed supporters in the vote count.

On the other hand, the Democratic Party lost 27.1 per cent of the votes it won in 1998. Its stance, critical of the Chinese leadership, has been losing its appeal as the community is no longer so worried about interference from Beijing. The local People's Liberation Army garrison is now well received by Hong Kong people.<sup>12</sup> Moreover, its strong advocacy of democracy has been less attractive because most Hong Kong people do not expect major political reforms or further democratization before 2007. The party has also been troubled by internal disagreements. The 'young Turks' criticized the party leadership for concentrating too much on parliamentary work and neglecting the mobilization of the masses. Although their earlier challenges had failed, they were proven correct to some extent this time by the election results. Further, some of them left the party and stood as independents, thus eroding support for the Democratic Party.

The Party's relationship with other pro-democracy groups has not been amicable either. Above all, the party has failed in its policy research, and has not been able to offer constructive policy alternatives to the policy initiatives of the government. The community, especially the well-educated, have gradually lost respect for a party which constantly criticizes the government's policy proposals without offering alternatives.

The Democratic Party's initial response to its electoral setbacks was not well received. Party leaders tended to criticize the voters and the mass media, and to place the blame on the party's lack of resources. They subsequently altered their position and were more willing to engage in self-criticism. A panel was formed to study the causes for the weakening of electoral support for the party. At the same time, some suggested uniting the pro-democracy forces into an opposition alliance, but commentators were not optimistic.<sup>13</sup>

It appeared that Hong Kong people's dissatisfaction with the government had spread to the major political parties, as many independents emerged during the direct elections, and some did reasonably well. The media were particularly interested in the two radical independents, 'the Bull' Tsang Kin-shing and 'Long Hair' Leung Kwok-hung; the considerable support for them (9,896 votes and 18,235 votes respectively) was commonly perceived as an indicator of frustration and disappointment with the legislature. Another sign was the increase in the number of blank votes in the elections. A week before the elections, a group of social workers openly appealed to the voters to cast blank votes to express their frustration; senior government officials and the Electoral Affairs Commission felt it necessary to make a counter-appeal. In the end, there were 8,483 blank votes in the direct elections, an increase of 90 per cent over 1998, and in the functional constituencies there were 950, 749 and 452 blank votes respectively in the Health Services, Education and Social Welfare constituencies.<sup>14</sup>

The C.H. Tung administration now realizes that it will continue to enjoy safe majority support in the legislature, and the Chief Executive indicated soon after the elections that he had no intention of reshuffling the Executive Council. It is true that the balance of forces within the legislature has not been altered, and the

next elections will not be until 2004, but the pressure on the Tung administration in the legislature is expected to increase for the following reasons.

In the first place, the political parties which support the Tung administration are more eager to exert pressure on the government to reward them for their support, and this eagerness has been strengthened by their perception that the Tung administration is vulnerable and unpopular. This pressure will further increase when the election of the next Chief Executive approaches. The Liberal Party will be looking for prestigious and influential appointments to various important statutory bodies and advisory committees. As Liberal Party legislators come mainly from functional constituencies, they will also be pressing for concessions from the government to satisfy their respective constituencies. The Tung administration will find it more difficult to satisfy the demands of the DAB, which is the only political party seriously preparing itself to become the governing party of the future. The DAB is acutely aware of its difficult role in the legislature. It must both criticize the performance of the government to satisfy the electorate, and support the government subsequently in the voting process. The Tung administration will have to consider measures to allow political parties supporting it to play a more active role in the policy-making process, such as allowing them to introduce popular measures in the legislature so that they can claim to have 'delivered' to the electorate, and consulting them over important appointments to statutory bodies and advisory committees. Moreover, in the immediate future, the government may encounter proposals supported by a majority in the legislature to promote employment and to bridge the widening gap between the rich and poor. Some of these proposals may go against the government's philosophy, but legislators from the DAB and the Federation of Trade Unions will find it difficult to toe the government line on these issues.<sup>15</sup>

### **Concluding observations**

The community is looking for leadership to meet the challenges of the new century. In contrast with previous decades, Hong Kong people are now more dependent on their government. There are expectations that government will assume a more significant role in the development of hi-tech industries, in facilitating foreign investment, such as the Disney project, in mitigating the expanding gap between rich and poor, in providing quality education and manpower training programmes to reduce unemployment, and in other areas. While they are much less concerned with interference from Beijing, they are worried about the general deterioration of the territory into an ordinary metropolis within China. This worry reflects and has been exacerbated by the unsatisfactory performance of the HKSAR government. This widening gap between the rising expectations of the government and the perception of its deteriorating performance partly explains the symptoms of political disillusionment as revealed in the recent legislative elections. Above all, it indicates the huge challenge faced by the HKSAR government in the years ahead.

Soon after the legislative elections in September 2000, C.H. Tung indicated that he planned no changes for the Executive Council. A major reshuffle of the

top civil service and the Executive Council would be a strong signal from the Tung administration that it was aware of its troubles and that it was taking serious steps to tackle its problems. Refusal to change conveys the message that the Tung administration apparently feels satisfied that no major changes are needed to improve its performance. This will not help restore the community's confidence in the government. In his first three policy speeches, Tung did not touch on political reform. Moreover, there was little to offer in this area in his fourth policy speech delivered on 11 October 2000.

The HKSAR government has, however, already promised to study electoral reform after the Legislative Council elections in September 2000. It is not expected that it will propose radical change, and hence it is likely that its proposals will attract much domestic and international criticism. Logically, the legislature's electoral system beyond 2007 will have a higher proportion of directly-elected seats, even to the extent that the entire legislature may be elected by universal suffrage. It is difficult to imagine why members returned by functional constituencies will support an increase in directly-elected seats at the expense of functional constituency seats. If the legislature maintains its present size, then which functional constituencies will be abolished, and according to what criteria?

A less controversial way to increase the proportion of directly-elected seats in the review in 2007 would be to expand the size of the legislature to 90 seats, and increase the number of directly-elected seats to 60. Political parties would find it much easier to agree on this, and a two-thirds majority in the legislature to support the change might become possible. If the Tung administration and the legislature could agree on the date and conditions of the next review, then directly-elected members might be able to secure the necessary majority in the legislature to abolish functional constituency seats eventually and have all seats directly-elected. It is clear, though, that this compromise formula would still be perceived by Beijing, the Tung administration and the local business community as too radical.

Since the legislative elections of September 2000, the pro-democracy camp has not even raised the issue of democratization and political reform. The community as a whole has yet to demonstrate its firm commitment to demanding democracy. Under such circumstances, the Tung administration and the business community may hope that the improvement of the economic situation will largely erode Hong Kong people's discontent on this and other matters.

## Notes

- 1 The poll was one of the series carried out every two months by the Home Affairs Department; see *South China Morning Post*, 29 July 2000.
- 2 *Ibid.*, 20 July 2000.
- 3 See all major newspapers in Hong Kong on 29 June 2000.
- 4 For the text of C.H. Tung's first policy speech, see all major newspapers in Hong Kong on 9 October 1997.
- 5 *Ming Pao*, 3 January 2000.
- 6 For a brief analysis of the 1998 legislative elections, see Ma Ngok and Choy Chi-keung (1999) 'The evolution of the electoral system and party politics in Hong Kong', *Issues and Studies* 35(1), January/February, pp. 188–93.

- 7 See Cheng, J.Y.S. (1990) 'The basic law: messages for Hong Kong people', in R.Y.C. Wong and J.Y.S. Cheng (eds) *The Other Hong Kong Report 1990*. Hong Kong: The Chinese University Press, pp. 29–63.
- 8 For an analysis of the Election Committee elections, see all major newspapers in Hong Kong on 10 and 11 July 2000.
- 9 The Hong Kong Progressive Alliance won 64 seats in the Election Committee elections. See *Ming Pao*, 11 July 2000.
- 10 This information is based on interviews and discussions by the author with academics and journalists engaged, respectively, in research and reporting on the September 2000 elections.
- 11 For an analysis of the legislative elections on 10 September, 2000, see all major newspapers in Hong Kong on 11 and 12 September 2000.
- 12 Glenn Schloss and Chow Chung-yan, 'Long march to the community', *South China Morning Post*, 22 September 2000, p. 17.
- 13 *South China Morning Post*, 18 September 2000.
- 14 *Ming Pao*, 12 September 2000.
- 15 *South China Morning Post*, 22 September 2000.

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## 8 Legitimacy and leadership

### Public attitudes in post-British Hong Kong

*Michael E. DeGolyer*

#### **Introduction**

Leadership and legitimacy problems tend to recur in all societies, but they are particularly problematic in transitional societies moving from less free to more free and from traditional forms of society, economy, and government to more modern, or even post-modern forms. The process of dictatorship, where one leader ‘expresses’ the views of the many and suppresses all others, is replaced by democracy, where the views of the many dominate the expressions of the nominal ‘leader’ of the government, who tends increasingly to tell people what they want to hear. Government by opinion poll and sound bite, and increasingly, the more radically participatory democracy on the internet, push aside traditional elites, corporate-dominated media, and other more closed forms of ‘public’ discussion. This chapter is based on a continuing series of surveys conducted regularly since February 1993 by the Hong Kong Transition Project (HKTP) and on interviews and other research ancillary to that long-term project mapping political economic change in Hong Kong. The chapter examines the Special Administrative Region (SAR) government’s changing handling of public opinion since 1997 under Chief Executive Tung Chee-hwa, and effects a contrast with attitudes under the colonial government of Governor Patten before the handover.<sup>1</sup>

#### **Pre- to post-handover: general assessments**

The tumultuous five years prior to the mid-1997 reunification with China under the last Governor, Chris Patten, witnessed a near-fixation with democratizing electoral and governmental reforms, and also with local and international public opinion – mostly about those reforms and the way Beijing and its allies opposed and undercut them.<sup>2</sup> Following the reunion, the first year involved both a vast collective sigh of relief that long-held worries of political chaos, collapse and central government intervention had not materialized, and a growing sense that pre-1997 worries had been mistakenly focused on the underlying structures and trends of politics rather than of economics. By mid-1998 economics, not politics, had become the definitive challenge to Hong Kong’s leadership. Or so it was argued.

The connections between economic difficulties and political leadership, and between leadership and structures, have been slowly developing in Hong Kong people's minds. This is a complex relationship to understand and to describe.<sup>3</sup> It cuts across a number of variables. But before specific variables are explored directly, an overall comparison of assessments of the performance of the post-colonial government with the colonial government might shed some light on broad patterns of public opinion about the effects of the handover.

Asking people to compare prior conditions with subsequent ones is notoriously unreliable. People tend to forget bad times. However, near immediate comparisons do carry some reliability, and thus the HKTP asked people resident in Hong Kong at least a year before 1 July 1997 and continuously resident until July 1998 to compare pre- and post-handover government efforts in several areas, in a survey conducted in July 1998. Table 8.1 is ranked from comparison of the least proportion assessing performance of the present HKSAR Government as 'worse' or 'much worse' to the greatest proportion making that assessment. The SAR government after the first year seems to be credited with performing marginally better with crime and criminals, and a little worse in preventing corruption and controlling pollution. It is criticized by most for doing worse in running the economy, ensuring education quality, protecting freedom of the press and improving livelihood.

Mr Tung's government scored best on housing. His policy address in October 1997 and Mr Tsang's budget of March 1998 made some positive impact, particularly on housing. Yet the pledge to achieve 85,000 built flats per year and stabilize prices seemed to please and dismay nearly equal proportions, depending on whether one already owned a home (and wanted rising values) or hoped to buy one (and wanted lower or stable prices). The resultant split in assessment is comprehensible in terms of interests affected and seems to have little to do with the colonial legacy *per se*. In 2000 and 2001 the housing issue turned on Tung with a vengeance. Housing scandals involving defective piling cost the government not only over HK\$600 million to repair but also the job of Exco member and Housing Authority

*Table 8.1* Compared with the colonial Hong Kong government, how well do you think the HKSAR government has performed (July 1998) (in percentage, unless stated otherwise)

	<i>Much better</i>	<i>Better</i>	<i>Same</i>	<i>Worse</i>	<i>Much worse</i>	<i>Don't know</i>
Punishing criminals	1	9	66	6	1	18
Preventing crime	2	19	63	11	1	5
Preventing corruption	2	17	57	12	1	12
Controlling pollution	1	19	45	17	4	13
Solving housing problems	2	34	23	27	7	7
Improving livelihood	1	20	38	29	6	6
Protecting freedom of the press	1	12	43	32	4	8
Insuring quality of education	1	15	35	32	6	10
Running the economy	1	8	23	47	11	9

head, Rosanna Wong. She became the first high official in Hong Kong to resign under public pressure and threat of a LegCo inquiry in May 2000. In early January 2001 LegCo voted to conduct its own inquiry into housing, despite three other administrative inquests and investigations by the Independent Commission Against Corruption (ICAC).

On pollution and education the SAR government scored poorly against the record of the colonial government. Given the fairly bad record of the colonial government on pollution and education, this may only be attributed to a discernable lack of effort on pollution until the policy address in October 1999, on the 1998 decision to force most schools to teach in Cantonese in 1999, and on other educational reforms proposed and implemented since the handover.

An argument might be made that the Hong Kong government under British colonialism and the SAR government under Chinese sovereignty are mostly the same people. Anson Chan, Chief Secretary under Governor Chris Patten, was still Chief Secretary under Chief Executive C.H. Tung until April 2001. Sir Donald Tsang held the same position as Financial Secretary and Joseph Yam was still heading up the Hong Kong Monetary Authority. Many of the same heads of department, and almost all the personnel except a few hundred British expatriates, remain in government. Yet there has been a clear change in attitude in terms of satisfaction with the general performance of the Hong Kong government pre- and post-handover. Only once, and then for a short period around the 1995 election, following a series of errors by the Hong Kong government and one disaster caused by a huge boulder blocking the one main road artery to the western new territories (traffic was tied up for days, infuriating residents), did the level of dissatisfaction with the colonial government come even close to satisfaction levels. However, since

*Table 8.2* Are you currently satisfied or dissatisfied with the general performance of the Hong Kong government?

	<i>Satisfied</i>	<i>Dissatisfied</i>	<i>Don't know</i>
February 1993	60	31	9
August 1993	57	28	15
February 1994	58	28	14
August 1994	56	30	14
February 1995	43	35	22
September 1995	46	45	9
February 1996	60	26	15
July 1996	67	21	11
February 1997	73	20	7
June 1997	66	27	7
January 1998	51	35	4
April 1998	48	41	12
June 1998	37	56	7
July 1998	42	49	9
October 1998	42	48	10
April 1999	46	43	11
July 1999	40	52	7
November 1999	41	51	8
April 2000	39	53	8



April 1998 dissatisfaction has tended to exceed satisfaction with the general performance of the SAR government, as may be seen in Table 8.2.

The levels of dissatisfaction seem focused on some government members more than others, as seen in Table 8.18 below. However, let us first look at other specific aspects pre- and post-handover.

### **Specific variables across the handover**

The Hong Kong colonial government, according to scholars like Norman Miners and Ian Scott, gained much of its legitimacy from its efficiency, control of corruption, and adherence to the rule of law, resulting in *de facto* if not *de jure* personal freedoms.<sup>4</sup> These are some of the issues the HKTP asked directly about from 1993 to the present, and these answers can be directly compared without the unreliabilities of post-event memories intervening.

#### ***Corruption***

The ending of political supervision of a large portion of the civil service by abolition of the municipal councils at the end of 1999 and changes in the ICAC leadership may have affected concern over corruption (Table 8.3) in the November 1999 survey. The level of 'fairly' and 'very worried', steady at 18 per cent in October 1998 and July 1999, moved up to 26 per cent, and the level of 'not worried' dropped below the majorities registered before. However, by April 2000 levels of 'not worried' went back to the post-handover averages, which are considerably different from pre-handover levels. There was a great deal of anxiety that corruption from China would quickly enter Hong Kong. The SAR government has successfully reassured most people that corruption will not be a problem.

#### ***Political stability***

Between July 1998 and July 1999 the level of 'not worried' about Hong Kong's political stability (Table 8.4) plummeted from a high point of 51 per cent to a low point of 37 per cent. That low level continued little changed through 1999. But the March 2000 Budget address and improvements in economic outlook may have helped increase the 'not worried' to 53 per cent by April 2000. The main issues underlying concerns for political stability are system issues such as unemployment, rule of law, autonomy of Hong Kong, and leadership. These were all damaged between July 1998 and November 1999.

#### ***Personal freedom***

After a dramatic improvement post-handover in worries about personal freedom (Table 8.5), climbing from a low of 37 per cent 'not worried' in August 1994, the month LegCo barely approved the Patten reforms, to highs in the latter half of 1998 of 74 per cent, there seems to have been a slow deterioration across all of

Table 8.3 How worried are you about corruption in Hong Kong?

	<i>Not worried</i>	<i>Slightly worried</i>	<i>Fairly worried</i>	<i>Very worried</i>	<i>Don't know</i>
July 1996	22	26	23	22	6
December 1996	11	25	29	31	4
February 1997	20	31	24	17	7
June 1997	20	28	28	21	3
January 1998	43	25	17	9	6
April 1998	42	24	16	12	7
June 1998	46	24	18	9	4
July 1998	52	20	14	9	4
October 1998	53	23	12	6	6
July 1999	54	22	12	6	6
November 1999	48	21	17	9	6
April 2000	53	20	13	10	4

Table 8.4 How worried are you about Hong Kong's political stability?

	<i>Not worried</i>	<i>Slightly worried</i>	<i>Fairly worried</i>	<i>Very worried</i>	<i>Don't know</i>
November 1991	43	22	14	8	13
February 1993	28	22	23	12	15
August 1993	35	22	17	12	14
February 1994	34	28	18	9	11
August 1994	30	33	20	11	6
February 1995	32	25	25	7	12
September 1995	31	30	16	11	12
February 1996	30	29	18	10	13
July 1996	28	34	18	10	10
December 1996	26	38	22	9	5
February 1997	42	33	13	5	6
June 1997	35	35	16	7	7
January 1998	44	25	17	3	10
April 1998	43	23	15	7	13
June 1998	45	22	20	5	8
July 1998	51	21	13	7	7
October 1998	48	23	12	5	12
April 1999	45	25	14	6	11
July 1999	37	25	17	7	13
November 1999	39	25	18	6	12
April 2000	43	23	15	7	12

1999 continuing into 2000. The ongoing disputes over the rule of law and press freedoms may be affecting sentiments.

### ***The economy***

The prospect of mainland takeover prompted a fairly high level of worry about Hong Kong's economic future right up to the year of handover itself, 1997 (Table 8.6). But fears of Chinese corruption or maladministration and intervention ruining

*Table 8.5* How worried are you about personal freedom in Hong Kong?

	<i>Not worried</i>	<i>Slightly worried</i>	<i>Fairly worried</i>	<i>Very worried</i>	<i>Don't know</i>
November 1991	56	23	11	6	3
February 1993	44	21	20	10	4
August 1993	43	28	16	9	4
February 1994	46	28	16	8	2
August 1994	37	38	14	9	1
February 1995	44	26	18	8	4
September 1995	50	23	12	12	3
February 1996	43	29	16	9	4
July 1996	41	34	15	8	2
December 1996	42	35	12	7	4
February 1997	48	31	14	5	2
June 1997	45	34	13	7	1
January 1998	63	21	11	3	2
April 1998	66	18	11	4	2
June 1998	70	15	9	4	1
July 1998	74	13	9	4	1
October 1998	74	16	6	3	2
April 1999	72	17	7	3	1
July 1999	70	15	9	4	2
November 1999	66	19	9	4	1
April 2000	62	20	10	5	3

*Table 8.6* How worried are you about Hong Kong's economic prospects?

	<i>Not worried</i>	<i>Slightly worried</i>	<i>Fairly worried</i>	<i>Very worried</i>	<i>Don't know</i>
February 1993	37	23	23	10	7
July 1993	42	24	18	7	9
January 1994	49	26	13	7	5
August 1994	40	33	16	8	3
February 1995	44	26	18	6	6
September 1995	42	26	16	10	6
February 1996	39	29	17	8	7
July 1996	42	31	15	7	5
February 1997	52	27	12	5	4
June 1997	53	26	13	5	3
January 1998	28	31	24	13	4
April 1998	28	27	25	17	4
June 1998	20	23	30	27	1
July 1998	29	26	23	19	2
October 1998	30	28	22	16	3
April 1999	33	27	20	16	3
July 1999	30	27	21	19	3
November 1999	32	28	23	14	3
April 2000	35	31	18	14	3

Hong Kong's economy began to disappear when it became clear that the mainland would not interfere in Hong Kong and the government would keep a tight hand on corruption. Worries rose dramatically due to a wholly unexpected source, the collapse of the Thai currency and sustained attacks on Hong Kong's currency and stock market. These culminated in a massive stock market intervention by the Hong Kong government in August 1998, and led to changes in regulations and currency trade rules, and to the tightening up of exchange rules when the stock and futures exchanges merged in 2000.

Worry about Hong Kong's economic prospects does not seem to be a strong reflection of personal concerns over employment, as Table 8.7 shows. While just about half the responses are 'not worried', and nearly three in four 'not' or 'slightly worried', levels of concern for Hong Kong generally are considerably higher, with only 35 per cent 'not worried' about Hong Kong's economic prospects in April 2000 (Table 8.6).

That level of concern about the economy may have rested in part on fears that the poor economy and poor government response would result in social unrest (Table 8.8). There is also the suspicion that working people and the less educated, who once supported Tung more than other groups, may have now changed their views.

There is also evidence that concerns about over-population and pollution have come to the fore as reasons both for dissatisfaction with government performance and for concern for the economic future of Hong Kong. Fully 27 per cent of Hong Kongers said in April 2000 that they are 'very worried' about excessive population, with 49 per cent 'worried' to lesser degrees. Only 23 per cent said they had no worries on this issue and just 1 per cent 'didn't know'. Only concern about pollution outstrips concern over population, and the former continues to rise. In July 1999 35 per cent were 'very worried' about pollution; in April 2000 48 per

*Table 8.7* Are you worried or not worried about your employment situation?

	<i>Not worried</i>	<i>Slightly worried</i>	<i>Fairly worried</i>	<i>Very worried</i>	<i>Don't know</i>
October 1998	53	17	10	17	3
April 1999	54	18	14	13	1
July 1999	50	19	13	17	1
November 1999	52	20	14	14	1
April 2000	51	20	14	13	2

*Table 8.8* Are you worried or not worried about social unrest in Hong Kong?

	<i>Not worried</i>	<i>Slightly worried</i>	<i>Fairly worried</i>	<i>Very worried</i>	<i>Don't know</i>
October 1998	21	27	30	19	3
April 1999	29	32	23	13	2
July 1999	35	29	22	10	3
November 1999	25	31	29	12	3
April 2000	41	29	19	11	1

cent were 'very worried'. In July 1999 only 6 per cent were 'not worried' and in April 2000 5 per cent were 'not worried' about pollution (see endnote 3).

A new category, censorship of news, was added in April 2000. While concern for personal freedom continues to be fairly low, specific worry about news censorship is high, with 18 per cent 'very worried' in April 2000, 21 per cent 'fairly worried', 23 per cent 'slightly worried' and only 28 per cent 'not worried' – 8 per cent 'didn't know'.

Despite the Right of Abode case and the interpretation by the Standing Committee of the National Peoples Congress in June 1999, and despite ongoing controversies over press freedoms sparked by the Cheung Man-ye case (the director of RTHK reassigned to Japan after a Taiwan spokesman defended the 'two-states' approach of Taiwan President Lee Teng-hui) and by proposals for a press council and for a press board to control pornography, a majority of Hong Kong people are currently unconcerned about the rule of law, with 56 per cent 'not worried' in April 2000. This is little changed from the 55 per cent 'not worried' in July 1999, just following the NPC Standing Committee reinterpretation (or clarification) of the Court of Final Appeal Right of Abode ruling of January 1999 (see endnote 3).

There has been a considerable change in the ranking of concerns asked about pre- and post-handover. Pre-handover, political or politically-related concerns dominated. Security/freedom, political stability, corruption and government efficiency, all predominantly political in character, were then major concerns. As will be apparent from Table 8.9, this is no longer the case.

The worries over specific aspects of life in Hong Kong set the basis of public concern. How and whether public leaders, from the executive, legislative, judiciary and civil service alike, respond to these concerns deeply affects public assessment of the quality of leadership.

## **Leadership in Hong Kong**

### ***Tung Chee-hwa***

Hong Kong's is an 'executive-led' system, or at least that is how the Basic Law describes it. However, there has been much complaint that the executive has done precious little leading. While Tung Chee-hwa maintained a fairly acceptable degree of satisfaction with his performance during his first year in office, satisfaction has dropped considerably since July 1999. There seems to be a consistent move toward stronger feelings of dissatisfaction, rising from 8 per cent 'very dissatisfied' in April 1999 to 17 per cent in April 2000 (Table 8.10).

Only 38 per cent express satisfaction with Tung's performance, down from 46 per cent in July 1999. Other evidence also shows that 20 per cent strongly do *not* want him to run for a second term, with 28 per cent 'neutral' or 'don't know' (see endnote 3). This is an even larger proportion than the 17 per cent saying they are 'very dissatisfied' with his performance.

Part of the dissatisfaction with Chief Executive Tung may rest on perceptions of who influences him, and the very clear sense that certain privileged groups

Table 8.9 Of the 'worries' mentioned, which aspect worries you the most?

	<i>Living standards</i>	<i>Security/freedom</i>	<i>Family prospects</i>	<i>HK economic prospects</i>	<i>Political stability</i>	<i>Corruption in HK</i>	<i>Government efficiency</i>	<i>Don't know</i>
February 1993	11	28	13	18	27			3
August 1993	12	29	15	14	26			3
February 1994	11	28	12	19	24			6
August 1994	13	27	11	15	24			10
February 1995	12	25	8	8	23		9	15
September 1995	17	17	11	10	23		9	12
February 1996	14	25	9	9	22		9	12
July 1996	8	19	5	13	16	22	5	10
December 1996	7	13	6	14	16	35	4	5
February 1997	11	17	5	9	15	30	8	7
June 1997	11	14	5	8	15	33	7	6
January 1998	10	7	7	40	9	12	6	9
April 1998	9	5	6	46	6	13	4	10
June 1998	9	4	8	56	5	7	6	6
July 1998	8	4	6	50	7	10	4	10
October 1998	10	4	7	49	7	6	9	10
April 1999	9	3	6	47	7	11	6	12
July 1999	7	3	10	43	6	11	6	15
November 1999	9	5	7	41	8	11	8	9
April 2000	11	6	8	40	16	10		9

*Table 8.10* Are you satisfied or dissatisfied with the performance of Chief Executive Tung?

	<i>Very dissatisfied</i>	<i>Somewhat dissatisfied</i>	<i>Somewhat satisfied</i>	<i>Very satisfied</i>	<i>Don't know</i>
February 1997	5	19	48	5	23
June 1997	5	24	46	4	21
January 1998	3	26	57	3	11
April 1998	8	28	48	5	11
June 1998	13	34	41	5	7
July 1998	12	33	45	4	6
October 1998	9	33	42	4	12
April 1999	8	34	47	3	8
July 1999	13	33	42	4	8
November 1999	14	39	36	3	8
April 2000	17	37	36	2	9

enjoy much greater influence than others. The influence on Tung of six groups were chosen for comparison; local big business leaders, public opinion, top civil servants, political parties, Beijing officials and foreign big business leaders.

People were asked to assess influence on Tung Chee-hwa (Table 8.11) by indicating a number from 1 to 9, with 1 being 'no influence at all', 9 meaning 'a great deal of influence', and 0 being 'don't know'. The mid-point is 5.

The public consider that local tycoons have much more influence than they do on Tung Chee-hwa, as Tables 8.11 and 8.12 demonstrate.

Only one in four thinks Tung listens to the public (scores 6 or above) while 61 per cent think local tycoons have Tung's ear. Local tycoons even outweigh the full-time top civil servants (45 per cent – see Table 8.13) and foreign business leaders (42 per cent – see Table 8.14) in influence.

But the contrast between local political parties and Beijing officials in influencing Tung really says what locals think both of Hong Kong's high degree of autonomy and whether or not Hong Kong functions democratically. Only 30 per cent of respondents score political parties 6 or above (Table 8.15) while 74 per cent score Beijing officials as high, and a third give them the highest influence possible (Table 8.16).

This assessment that the greatest influence on Tung from outside Hong Kong comes from Beijing officials and from inside Hong Kong from local tycoons may lie behind the support given by 3 out of 4 interviewees (75 per cent 'in favour') for direct election of the Chief Executive (5 per cent 'neutral', 13 per cent 'oppose'). Out of the 80 per cent supporting direct election of the Chief Executive or neutral on this matter, 62 per cent of those would like to see direct election for the Chief Executive in 2002 and 25 per cent in 2007, with an overwhelming 87 per cent of those favouring direct election wanting this on or before the date permitted in the Basic Law. Only 9 per cent of the 80 per cent supporting direct election (7 per cent of the total sample) want it later than 2012 (see endnote 3). Overall, two-thirds of people want themselves or their elected representatives consulted by administrators

Table 8.11 Influence on Tung of local big business leaders

Degree of influence	0	1	2	3	4	5	6	7	8	9
per cent	10	4	3	4	4	15	11	22	15	13

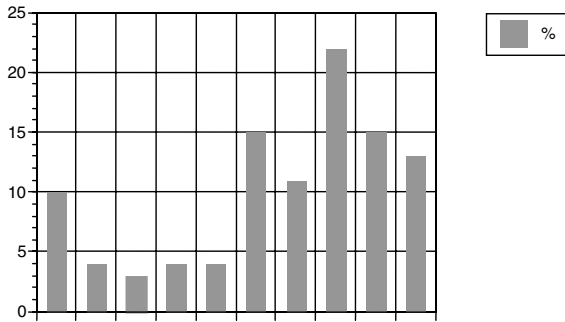


Table 8.12 Influence on Tung of public opinion

Degree of influence	0	1	2	3	4	5	6	7	8	9
per cent	8	8	7	12	14	26	12	8	3	1

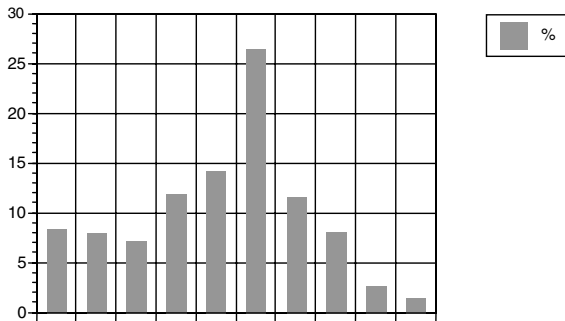


Table 8.13 Influence on Tung of top civil servants

Degree of influence	0	1	2	3	4	5	6	7	8	9
per cent	10	5	3	7	7	23	15	17	9	4

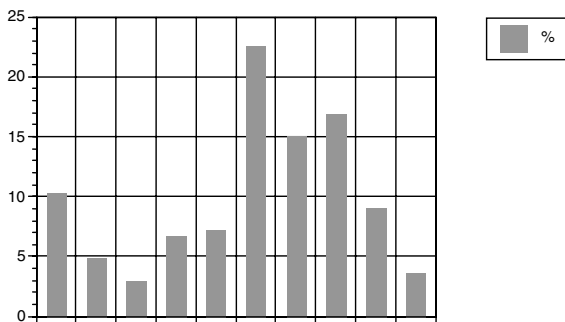




Table 8.14 Influence on Tung of foreign big business leaders

Degree of influence	0	1	2	3	4	5	6	7	8	9
per cent	15	4	3	7	9	21	16	15	7	4

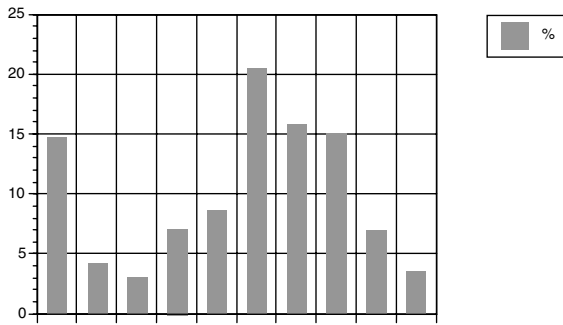


Table 8.15 Influence on Tung of political parties

Degree of influence	0	1	2	3	4	5	6	7	8	9
per cent	12	5	6	9	12	27	16	9	3	2

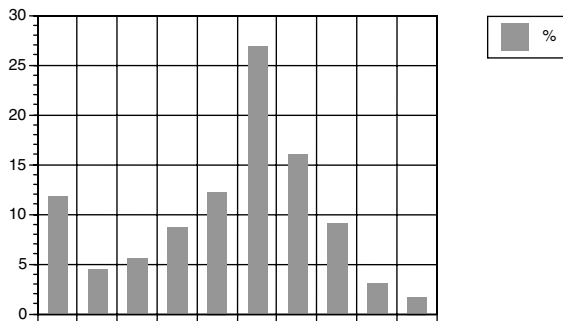
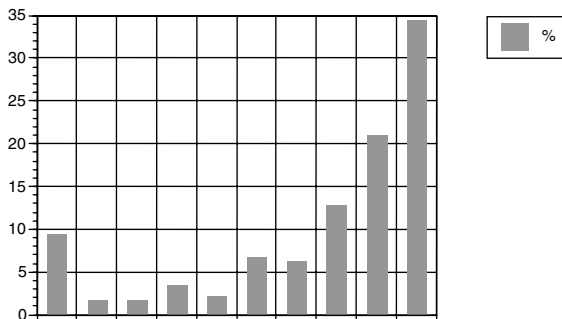


Table 8.16 Influence on Tung of Beijing officials

Degree of influence	0	1	2	3	4	5	6	7	8	9
per cent	10	2	2	4	2	7	6	13	21	34



*Table 8.17* If there is an important issue to be settled which is affecting the livelihood of the Hong Kong people, which is the most appropriate group that the Chief Executive and civil servants should listen to?

	<i>October 1998</i>	<i>April 1999</i>	<i>July 1999</i>	<i>November 1999</i>	<i>April 2000</i>
Directly-elected Legco members	16	16	15	17	15
Functional Constituency Legco members	3	4	2	4	5
Advisors and consultants	19	17	16	13	15
Grassroots activists	7	6	5	7	4
General public	40	43	45	39	46
Political parties and pressure groups	2	2	2	4	2
Chinese government officials	1	–	2	1	1
Don't know	12	12	14	14	12

on important issues. Obviously, most feel these views are not being taken in, as seen above and in Table 8.17.

### ***Top administrators***

Of the top four officials of the SAR government, two were officials under Governor Patten: Anson Chan, Chief Secretary for Administration and Sir Donald Tsang, Financial Secretary. Ms Elsie Leung is Tung Chee-hwa's appointed Secretary for Justice (replacing the old Attorney General position). Tung and Leung, pro-Beijing officials, consistently lead in terms of dissatisfaction, as the chart below Table 8.18 shows. Yet satisfaction with the leaders of China and the Chinese government in their approach to dealing with Hong Kong has soared into positive territory since the handover (Table 8.23 and Figure 8.2).

The Executive Council, the advisory body to the Chief Executive, was not included in the survey because repeated attempts to do so resulted in overwhelmingly 'don't know' responses. Most people are unable to name any member of Exco aside from the main four officials surveyed above. This reflects the leadership weakness of a body comprised mainly of civil servant department heads and a sprinkling of part-time worthies who are, virtually, publicly invisible.

### ***Political parties and leadership***

Hong Kong has developed ten parties (not counting the Chinese Communist and KMT 'hidden' parties which do not campaign under those names). There are also a number of advocacy and concern groups which occasionally run candidates for the District Council and sometimes even for the Legislative Council. The ten parties listed in Table 8.19 all have representatives on the Legislative Council except for the Association for Democracy and People's Livelihood (ADPL), which lost its seats in 1998 but which gained a seat in the September 2000 elections after a respectable showing in the District Council elections of November 1999. Only those interviewees who knew something about the party were retained for 'satisfaction/

Table 8.18 Satisfaction/dissatisfaction with performance of top HKSARG officials

		<i>Dissatisfied</i>	<i>Satisfied</i>	<i>Don't know</i>
April 1998	Tung	36	53	11
	Chan	8	77	15
	Tsang	16	71	14
	Leung	41	31	29
June 1998	Tung	47	46	7
	Chan	19	71	11
	Tsang	38	54	8
	Leung	40	39	21
October 1998	Tung	42	46	12
	Chan	16	70	15
	Tsang	23	64	14
	Leung	29	35	36
April 1999	Tung	42	50	8
	Chan	11	81	8
	Tsang	12	80	8
	Leung	58	24	18
July 1999	Tung	46	46	9
	Chan	14	74	11
	Tsang	14	72	14
	Leung	53	28	19
November 1999	Tung	53	39	8
	Chan	23	67	10
	Tsang	18	70	11
	Leung	59	25	16
April 2000	Tung	54	38	9
	Chan	18	61	10
	Tsang	16	65	9
	Leung	49	28	22

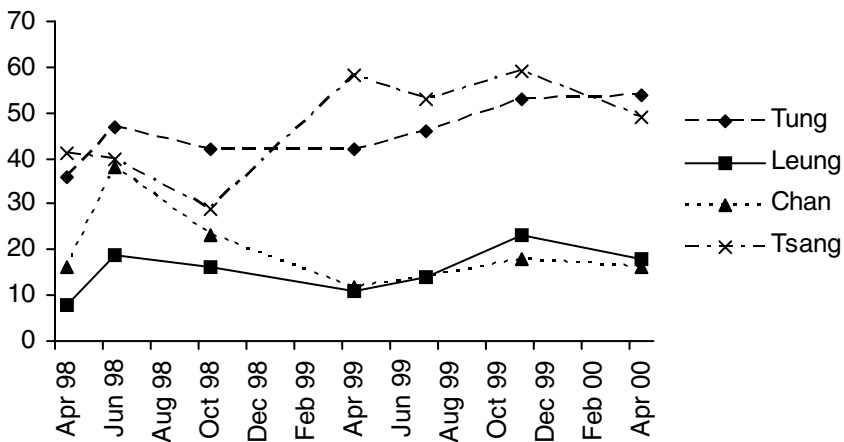


Figure 8.1 Chart of dissatisfaction with top four HKSARG officials

dissatisfaction' ratios. The 'difference' figures show the gap between those 'satisfied' and those 'dissatisfied', and represent the opinions only of the interviewees who knew something about the party and, therefore, had a view. So, for example, the Democratic Party lost ground between the elections in November 1999 and a sample taken in April 2000, with a swing of 18 points from positive to negative. Moreover, its vote proportion in the most recent September 2000 elections dropped from 43 per cent gained in 1998, to 35 per cent.

Neither the SAR government and its leaders nor most of the local parties and their leaders score especially highly in April 2000, with the two smallest parties, the Citizens' Party, which had one LegCo member and the ADPL, with none in the 1998–2000 term, scoring highest in satisfaction. Moreover, this pattern is in contrast with the most recent Hong Kong views of the Chinese government and its leaders in its dealings with Hong Kong (see Table 8.23).

## **Leadership in China**

### ***Pre-handover views of reunion***

The context of public opinion toward the mainland was quite different prior to reunification. Not until the last few months before the resumption of sovereignty did a majority support the reunification of Hong Kong with China (Table 8.20). In fact, the choice labelled 'join China' actually read 'join China under the one country, two systems principle', so even then it wasn't an unconditional open-armed embrace of the communist motherland.

After the reunification on 1 July 1997 the question was rephrased (Table 8.21).

There has been, since the handover, clear support for the reunification as best for Hong Kong. However, feelings about Hong Kong's future as a part of China

*Table 8.19* Satisfaction/dissatisfaction with Hong Kong parties and leaders (April 2000)

	<i>Dissatisfied</i>	<i>Satisfied</i>	<i>Difference</i> +/- April 2000	<i>Difference</i> +/- Nov 1999	<i>% who know</i> <i>about party</i>
Democratic Party					
led by Martin Lee	57	43	-14	+4	75
DAB led by Tsang Yok-sing	51	49	-2	-6	66
LP led by James Tien	56	44	-12	-20	59
Frontier led by Emily Lau	44	56	+12	+30	66
CTU led by Lau Chin-shek	30	70	+40	+42	64
FTU led by Cheng Yiu Tong	39	61	+22	+24	54
HKPA led by Ambrose Lau	65	35	-30	-34	35
Citizens Party led by Christine Loh	31	69	+38	+44	56
HKADPL led by Fredrick Fung	27	73	+46	+42	52
New Century Forum led by Ng Ching-fai	62	38	-24	Not asked	19

*Table 8.20* If you could control history and determine its outcome, which of the following arrangements of Hong Kong after 1997 would you choose?

	<i>Hong Kong independent</i>	<i>British Colony</i>	<i>Commonwealth</i>	<i>Join China</i>	<i>Don't know</i>
February 1993	25	19	8	42	6
August 1993	22	21	9	39	9
February 1994	24	15	10	44	7
August 1994	24	17	11	41	7
February 1995	24	20	7	42	7
August 1995	16	21	9	45	10
February 1996	14	18	12	46	10
July 1996	17	18	9	48	8
December 1996	18	13	12	53	4
February 1997	14	13	8	62	3
June 1997	17	15	10	53	5

*Table 8.21* Do you agree or disagree that the reunification with China under 'one country, two systems' has been the best arrangement for Hong Kong?

	<i>Strongly disagree</i>	<i>Somewhat disagree</i>	<i>No opinion</i>	<i>Somewhat agree</i>	<i>Strongly agree</i>
January 1998	4	16	20	45	16
April 1998	5	13	18	40	24
July 1998	5	13	12	44	25
October 1998	5	11	21	41	22
July 1999	5	15	20	47	12
April 2000	4	14	23	47	13

*Table 8.22* How do you feel about 1997 and Hong Kong's reunion with China? (February and June 1997). Looking back over the first year of reunion, how do you feel about Hong Kong's prospects for the future as part of China? (July 1998). How do you feel currently about Hong Kong's future prospects as a part of China? (April 1999 onwards)

	<i>February 1997</i>	<i>June 1997</i>	<i>July 1998</i>	<i>April 1999</i>	<i>July 1999</i>	<i>November 1999</i>	<i>April 2000</i>
Very optimistic	7	6	6	5	5	4	5
Optimistic	55	54	41	37	35	36	37
Neither	30	32	30	33	33	39	33
Pessimistic	6	6	13	15	14	13	15
Very pessimistic	—	1	4	2	4	4	2
Don't know	2	1	6	7	9	4	7

(Table 8.22) have changed from the dominantly optimistic views in the few months prior to handover to a somewhat more pessimistic and cautious view since.

April 2000 marked the tenth anniversary of the NPC promulgation of the Basic Law, Hong Kong's constitution and the document institutionalizing the practices which the Sino–British Declaration of 1984 pledged to protect to 2047. Other samples taken in April 2000 show fully 27 per cent expressing 'dissatisfaction' with the Basic Law so far in protecting Hong Kong's way of life. A further 26 per cent were 'neutral', with 12 per cent saying 'don't know'. Only 36 per cent said they were 'satisfied' (see endnote 3). This is not a ringing endorsement of the Basic Law. However, blame does not seem to rest on the mainland's conduct or leadership.

*Table 8.23* Are you currently satisfied or dissatisfied with the performance of the PRC government in dealing with Hong Kong affairs?

	<i>Satisfied</i>	<i>Dissatisfied</i>	<i>Don't know</i>
August 1993	25	54	22
February 1994	23	56	21
August 1994	21	63	16
February 1995	20	60	20
September 1995	17	62	22
February 1996	31	49	20
July 1996	27	58	15
June 1997	45	41	14
January 1998	61	22	18
April 1998	67	17	16
June 1998	68	17	15
July 1998	74	11	15
October 1998	67	15	17
April 1999	65	19	16
July 1999	60	25	16
November 1999	57	26	17
April 2000	55	31	13

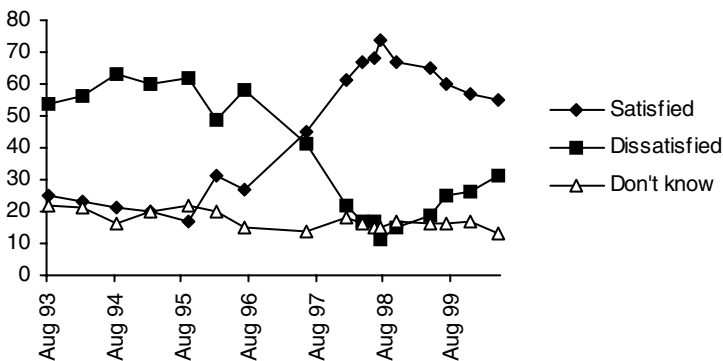


Figure 8.2 Chart of satisfaction with PRC government handling Hong Kong affairs

In fact, these indices are currently more positive: for the Chinese leadership, they are far more positive than the same indices for the Hong Kong government.

### ***China's leaders and government***

If there has been a failure in building support for the Basic Law, it rests in Hong Kong, not Beijing, as Table 8.23 shows.

Opinion changed dramatically between July 1996 (one year prior to handover) to July 1998 (one year after handover). Since a peak of satisfaction by nearly three out of four people, satisfaction has declined but still outweighs dissatisfaction. However, dissatisfaction with Tung and the SAR government may be creeping over into dissatisfaction with China and its government (Table 8.24). Certainly the intervention by China into Hong Kong affairs, and the threats by Chinese leaders to invade or attack Taiwan, have affected people.

Looked at from another perspective, views remain positive toward China's leaders. Satisfaction with President Jiang ranged from 79 per cent in July 1998 (when he and President Clinton visited Hong Kong together on the anniversary of the handover) to 67 per cent in April 2000. Satisfaction with the performance of Premier Zhu Rongji was even higher. Mr Zhu's numbers, especially of those 'very satisfied', are truly remarkable, and despite many troubles, he remains 'satisfactory' to a huge majority. In July 1998 80 per cent were 'satisfied' to a degree (18 per cent 'very satisfied') and in April 2000 77 per cent were 'satisfied' (21 per cent 'very satisfied') (see endnote 3).

*Table 8.24* Are you currently satisfied or dissatisfied with the performance of the PRC government in ruling China?

	<i>Satisfied</i>	<i>Dissatisfied</i>	<i>Don't know</i>
February 1993	35	49	16
August 1993	26	55	19
February 1994	29	53	18
August 1994	24	64	12
February 1995	22	62	16
September 1995	15	62	24
February 1996	30	49	22
July 1996	28	56	16
February 1997	38	45	17
June 1997	34	51	15
January 1998	37	39	24
April 1998	43	34	23
June 1998	44	34	22
July 1998	52	24	24
October 1998	53	24	23
April 1999	49	31	20
July 1999	44	28	27
November 1999	49	31	20
April 2000	38	37	24

The April 2000 survey found that 25 per cent of respondents said they had been paying a ‘great deal of attention’ and 37 per cent ‘some attention’ to the Taiwan elections. Only 30 per cent had paid ‘little attention’ and 8 per cent ‘didn’t know’ anything about the elections. Only 3 per cent ‘strongly supported’ China going to war to regain Taiwan, 9 per cent ‘supported’ and 8 per cent were ‘neutral’ or ‘don’t know’. Four in ten (42 per cent) ‘strongly opposed’ war and another 34 per cent ‘opposed’ war. If Hong Kong were to be attacked in such a war, the number dropped to 2 per cent ‘strong support’ and 8 per cent ‘support’, with 7 per cent ‘neutral’ or ‘don’t know’, 36 per cent ‘opposed’ and 47 per cent were ‘strongly opposed’ to war with Taiwan. Even more significant than their objections to war, Hong Kong people by and large seem to feel that the ‘one country, two systems’ formula simply isn’t suitable for Taiwan. About one in five thought it ‘very unsuitable’ and 31 per cent ‘somewhat unsuitable’, which is a combined 50 per cent rejection. Only 26 per cent considered ‘one country, two systems’ suitable for Taiwan and 24 per cent had ‘no opinion’.

The main reason for rejection of the system for Taiwan seems not to rest in opposition to the mainland government per se, but in the way the Hong Kong leaders, such as Tung Chee-hwa, defer to the most conservative elements locally and among the Beijing factions. The SAR government, which once scored highly in its dealings with the central government, now scores just as poorly as did the Hong Kong government under the colonial regime of the ‘sinner for a thousand years’, Chris Patten ( Table 8.25).

The mainland leaders have tried to stay out of Hong Kong affairs but have been dragged repeatedly into them by initiatives launched by the local government, tycoons, or by groups such as the Heung Yee Kuk, which threatened in January 2001 to take a Court of Final Appeal decision allowing long-term non-indigenous village residents voting rights to the NPC Standing Committee for review, regardless of whether Tung and the government supported such an appeal.

*Table 8.25* Are you currently satisfied or dissatisfied with the performance of the Hong Kong government in dealing with China?

	<i>Satisfied</i>	<i>Dissatisfied</i>	<i>Don't know</i>
February 1995	21	46	33
September 1995	23	48	29
February 1996	30	41	29
July 1996	37	38	25
June 1997	44	41	15
January 1998	44	32	24
July 1998	61	25	14
October 1998	57	26	17
July 1999	43	42	15
November 1999	39	46	15
April 2000	42	43	15



*Table 8.26* Where would you prefer to live if you could choose anywhere?

Hong Kong	45
Mainland China	5
Australia	9
United States	8
European Union	7
Canada	7
Singapore	6
Japan	4
Other	3
United Kingdom	3
New Zealand	2
South East Asia	1
Taiwan	1

### **Leadership, reform and legitimacy**

The bottom line measure of leadership and legitimacy is how many people would prefer to live, if they could, under a different government from their own. Hong Kong signally fails in this ultimate test (Table 8.26).

Fewer than half of the respondents would prefer to live in Hong Kong. Many prefer to live in more democratic, open, and participatory societies like Australia, Canada, the US and the EU. If Hong Kong is to become a world class city, and the leading city in Asia as well as the mainland, its local leadership will have to do better in generating a sense of belonging, of commitment, and of involvement. Most people in Hong Kong do not feel much commitment to the place, perhaps because they do not feel the government has much commitment to them, to their problems, their views, their hopes and worries and future. Perhaps the way to start raising the levels of government legitimacy and building stronger leadership is to develop stronger structures of participation in the decision-making which affects people's lives.

There is a very good basis for the belief that Hong Kong people support democratization, as Table 8.27 (from the November 1999 survey) shows. The types of disputes above the line in the table are standard forms of democratic dispute recognized and practised worldwide in democratic countries. The items below the dividing line, and which receive far less support, are practices which serve to restrict or even nullify the democratically expressed wishes of the majority.

Hong Kong people do not support veto by special interests, either by functional constituency or by 'populist' disruption of representative deliberation and vote. They do not support lawmakers attacking each other, even with harsh words, which may be why there have been surveys showing that Hong Kong people prefer their form of representative democracy over the more raucous version in Taiwan. Hong Kong people have a sense of civility and desire strongly that different views be heard, deliberated, and settled by fair majority vote.

Table 8.27 Do you consider the following types of political disputes acceptable or not acceptable? (November 1999)

	<i>Acceptable</i>	<i>Not acceptable</i>	<i>Don't know</i>
Multiparty competition in elections	76	11	13
Party debates in Legco	78	10	13
Disagreements between Exco and Legco	74	10	16
Arguments between party leaders on TV/radio	70	19	11
Street demonstrations and protests	68	23	10
Exco veto of Legco proposals	48	24	28
Lawmakers' use of harsh words in debate	48	40	12
Business group veto of grassroot proposals	36	39	26
Protests in Legco by non-Legco protestors	25	65	10

The bottom line is that democratic structures and practices are supported, indeed very strongly supported in some cases, such as direct election of the Chief Executive and multiparty elections. In this, Hong Kong people support the same sorts of practices and structures which work well in other similar economically and socially advanced societies. Until the leaders of the Hong Kong government, who currently have attitudes which are more colonial or traditionally authoritarian than those of the leaders of western countries, better reflect Hong Kong's modern aspirations, their legitimacy and public support will remain low. Such low levels of public support for the leaders and the Basic Law, and 'one country, two systems' structures (at least on the Hong Kong side of the border) leave Hong Kong vulnerable to internal disruptions which may prompt mainland interventions 'to restore order' which would destroy Hong Kong's value to the mainland as a window on modernity.

## Notes

- 1 This chapter is based on surveys by the Hong Kong Transition Project. A typical example is the survey of April 2000 which was carried out by telephone interviews using the Hong Kong Baptist University CATI (Computer Aided Telephone Interviewing) lab. Details of the sampling methods may be found on the project website, <http://www.hkbu.edu.hk/~hktp>. The results of a survey of the April 2000 sample size, 704, can be assumed with 95 per cent confidence to be subject to a sampling error of not more than  $\pm 3.6$  per cent. The June 1997 rate was  $\pm 3$  per cent, July 1996 error rate was  $\pm 3.2$  per cent and the December 1996 rate was 5 per cent. Following World Association of Public Opinion Research guidelines, all survey results are rounded off to the nearest whole number to avoid the impression of overprecision. Other surveys by the Hong Kong Transition project in this series used the same methods, with varying contact and completion rates.

N = November 1991: 902; February 1993: 615; August 1993: 609; February 1994: 636; August 1994: 640; February 1995: 647; August 1995: 645; February 1996: 627; July 1996: 928; December 1996: 326; February 1997: 546; June 1997: 1,129; January 1998: 700; April 1998: 852; June 1998: 625; July 1998: 647; October 1998: 811; April 1999: 838; July 1999: 815; November 1999: 813; April 2000: 704. All figures are in percentages unless otherwise stated.

The author recognizes that the methodology employed in this chapter, based on the use of telephone surveys, has both strengths and weaknesses which are not possible to explore within the scope of this piece.

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- 2 Chris Patten (1998) wrote of this in his *East and West*. London: Macmillan. But for a more extensive blow by blow account strongly reflecting Patten's views, see Jonathan Dimbleby (1997) *The Last Governor: Chris Patten and the Handover of Hong Kong*. London: Little, Brown & Co.
- 3 See Michael E. DeGolyer (1999), 'The civil service', in Larry Chuen-ho Chow and Y.K. Fan (eds) *The Other Hong Kong Report 1998*. Hong Kong: Chinese University Press, pp. 73–114.
- 4 Norman Miners (1995) *The Government and Politics of Hong Kong*, 5th edition. Hong Kong: Oxford University Press, and Ian Scott (1989) *Political Change and the Crisis of Legitimacy in Hong Kong*. Hong Kong: Oxford University Press.

**Part III**

**Law and legality**



# 9 The impact of the Chinese criminal law in Hong Kong

*H. L. Fu*

## **Introduction**

The creation of Special Administration Regions (SAR) Hong Kong and Macau under the ‘one country, two systems’ doctrine has fundamentally divided criminal law jurisdiction in the People’s Republic of China (PRC) and calls for a reinterpretation of jurisdictional matters. With Basic Laws (BL) for the Hong Kong SAR and Macau SAR, there are, under a single PRC political sovereignty, three legal sovereignties or jurisdictions. Each jurisdiction has its own laws and legal system supported by its own unique political economy and legal culture. There are now three different sets of criminal laws applicable in three different parts of the PRC, each set of criminal laws governing the behaviour of people within the particular geographic area.

Due to the creation of the SARs, the criminal law of the PRC has now, effectively, become Mainland Criminal Law, Hong Kong Criminal Law and Macau Criminal Law. The PRC Mainland Criminal Law’s coverage is limited to the mainland part of the PRC territory. The people it purports to discipline are the mainland residents of the PRC. PRC Criminal Law, with its socialist nature, applies only in the socialist part of the PRC, i.e. only the mainland and not the SARs.

The PRC is thus a loose-knit legal confederation, regardless of whether or not the terminology is used in Beijing. The PRC does have a constitutional document (the PRC Constitution 1982) which purports to bind all the entities in the PRC – but it has no unitary criminal law covering all jurisdictions. There is no supreme court in China with a supervisory jurisdiction to deal with criminal matters from across the entire (post-1997) PRC. Each of the three jurisdictions, to varying degrees, is free to decide its criminal jurisdiction and criminal law according to its legal tradition and practical necessity (Fu and Cullen 1999).

The purpose of this chapter is to focus on the inter-relationship between the Mainland Criminal Law and Hong Kong Criminal Law in the period of the transition and immediately after the hand-over of sovereignty from Britain to the PRC. The inter-relationship and interplay of these two sets of criminal laws are examined through case studies in the sections that follow. These cases test the application of the ‘one country, two systems’ doctrine and thus the true meaning of autonomy of an SAR from the mainland.

The Mainland Criminal Law has affected and will continue to affect the regime of criminal law in Hong Kong. The reach of Mainland Criminal Law may affect Hong Kong and its residents directly or indirectly. The direct effect stems from the power of the sovereign and reflects the special arrangements of the central government and the SAR government. First, the National People's Congress (NPC) Standing Committee may extend national laws to Hong Kong that may include criminal provisions, and the Hong Kong SAR has a constitutional duty to implement those criminal law provisions in Hong Kong (Ghai 1999). Second, PRC Criminal Law may reach Hong Kong through the Standing Committee's interpretation of Article 23 of the Basic Law, which requires Hong Kong to prohibit some politically sensitive offences, including treason and sedition (Fu 2000).

The indirect effect or reach of the Mainland Criminal Law is of a different nature, reflecting a different dimension of the relations between Hong Kong and other parts of the PRC. It stems from the interactions between two different but equal bodies of criminal laws. The increasing interaction between Hong Kong and the mainland has made the Mainland Criminal Law more relevant.

### **The application of national law in Hong Kong and the flag case**

An example of the direct impact of Mainland Criminal Law upon Hong Kong is through the application of PRC national laws in Hong Kong. Under Article 18 of the Basic Law:

National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to the Basic Law must be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by the Basic Law.

There is provision for criminal punishment in the National Flag Law, a PRC national law which is listed in Annex III of the Basic Law and thus applicable in Hong Kong. Article 19 of the Law provides that:

Whoever desecrates the National Flag of the People's Republic of China by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling upon it shall be investigated for criminal responsibilities according to law; where the offence is relatively minor, he shall be detained for not more than 15 days by the public security organ in reference to the provisions of the Regulations on Administrative Penalties for Public Security.<sup>1</sup>

On the same day that the NPC Standing Committee enacted the National Flag Law, it also passed The Decision of the National People's Congress Standing Committee regarding Punishment of the Crimes of Desecrating the National Flag and National Emblem of the People's Republic of China (the 1990 Decision). The 1990 Decision provided as follows:

The 14th Meeting of the Standing Committee of the 7th National People's Congress has decided to make supplementary provisions to the Criminal Law: Whoever desecrates the National Flag or the National Emblem of the People's Republic of China by publicly and wilfully burning, mutilating, scrawling on, defiling, or trampling upon it shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights.

The 1990 Decision has been repealed and replaced by a slightly differently-worded Article 299 of the Mainland Criminal Law 1997. Neither the 1990 Decision nor Article 299 is applicable in Hong Kong.

In Hong Kong there was no law specifically prohibiting desecration of flags before the transition of sovereignty. To implement the National Flag Law in Hong Kong, the Provisional Legislative Council of Hong Kong enacted the National Flag and National Emblem Ordinance (National Flag Ordinance). There are significant differences between the National Flag Law and the National Flag Ordinance as applied in Hong Kong in many aspects, but the provisions on criminal liabilities are strikingly similar. Section 7 of the National Flag Ordinance provides that:

A person who desecrates the national flag or national emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for three years.

In *HKSAR v. Ng Kung siu and Anor* [2000] 1 HKC 117, the defendants challenged the constitutionality of Section 7 in the Hong Kong courts (Bruce 2000). The Government charged two defendants under this section with desecrating national and regional flags. A magistrate found them guilty. The defendants appealed against the conviction on the basis that this section is inconsistent with freedom of expression as protected by the Basic Law. The Court of Appeal (CA) in a unanimous decision quashed the conviction on the ground that the restriction on freedom was unnecessary. On appeal by the Hong Kong government, the Court of Final Appeal (CFA) upheld, unanimously, the validity of Section 7 and found that the limited restriction on the freedom of expression is necessary, reasonable and proportionate, overruling the decision of the Court of Appeal.

The status of the National Flag Law as an Annex III law and the status of the National Flag Ordinance as SAR legislation implementing Annex III laws were not discussed in the judgements of the courts, but were argued at great length by



counsels for both parties before the CFA. This issue concerns the jurisdiction of Hong Kong courts to review and challenge national legislation. In *Ng Ka Ling and Others v. Director of Immigration* [1999] HKLRD 315, the first right of abode case decided by the CFA, it was held that a court in Hong Kong has the authority to review and declare invalid a national law which is inconsistent with the Basic Law (Chan, Fu and Ghai 2000). But the issue that the CFA was facing in the flag case was whether a Hong Kong court has the authority to review the constitutionality of an Annex III law or an SAR Ordinance enacted to implement an Annex III law.

Counsels for the SAR government argued that, since Annex III laws are part of the Basic Law itself, they cannot be found inconsistent with the Basic Law. For the same reason, because the Hong Kong government has the constitutional obligation to implement an Annex III law through local legislation, such legislation enacted for this purpose cannot be found inconsistent with the Basic Law, if the local legislation is a genuine implementation of that Annex III law.<sup>2</sup> Instead, the court should presume the constitutionality of the local legislation and harmonize the conflicting interests that are equally protected by the Basic Law (in the flag case the interests between the protection of the national flag and freedom of expression).

During litigation in the courts of Hong Kong, this case caused polarization along political lines. Many, including the ‘pro-Beijing’ faction, argued that since the National Flag Law is a law listed in Annex III of the Basic Law, it becomes part of the Basic Law, and is beyond the jurisdiction of Hong Kong courts. Since the National Flag Ordinance implements the National Flag Law as mandated by the Basic Law, it is also beyond the jurisdiction of courts in Hong Kong. The opposing argument was that a court in Hong Kong has the power to review any law enacted by the Hong Kong legislature and to declare it inconsistent with the Basic Law, regardless of the nature of the local legislation.

The CFA decided the case on the grounds of reasonable restriction on freedom of expression, thus disposing of the case without addressing the more fundamental question. In fact, the court chose a middle ground: it implied that it has the power to review the constitutionality of the local National Flag Ordinance, but upheld its constitutionality.

### **Article 23 of the Basic Law and the power of the NPC Standing Committee to interpret**

A possible future ‘constitutional crisis’ in Hong Kong may arise in relation to Article 23 of the Basic Law. Article 23 of the Basic Law has been problematic in Hong Kong both before and since the transition. While the Hong Kong SAR government is duty-bound by Article 23 to prohibit certain political activities endangering China’s state security, it has so far taken little action to introduce legislation defining – or creating – offences of treason, sedition, subversion, secession, and theft of state secrets (Fu 2000). A number of mainland officials and scholars are puzzled and frustrated by the lack of action on the part of the Hong Kong SAR government on this important matter. They are seriously concerned that this lack of action has

encouraged anti-China subversive activities in Hong Kong (*Kwai Bao* 7 March 1998). The advocacy of the 'Two-State Theory' by Taiwan's *de facto* envoy on Radio Television Hong Kong (RTHK), and an interview with pro-independent Taiwan Vice-President, Li Xiulian, by a Hong Kong cable television channel, angered many in Hong Kong and Beijing who alleged that some were using this gap in the Basic Law to promote the independence of Taiwan, thus endangering state security (Kong 1999). In the year 2000 annual session of the NPC, Deputy Chairman of the Legislative Affairs Commission (LAC, a working committee under the NPC Standing Committee) Mr Qiao Xiaoyang, reiterated that the Hong Kong government has the duty to implement Article 23, while conceding that the government may make its own timetable (*Ta Kung Po* 2000). For the central government, local legislation to implement Article 23 is urgently needed to safeguard the interest of the state. As the Hong Kong Government moves cautiously on this matter, allegations have been made that it has failed to fulfil one of its constitutional obligations.

If the Hong Kong SAR government fails to legislate on Article 23, could the NPC Standing Committee give an interpretation on Article 23 to fill the legislative gap? It has become clear after the right of abode controversy that the final authority of the interpretation of the Basic Law rests firmly with the NPC Standing Committee (Chan, Fu and Ghai 2000). In January 1999 when *Ng Ka Ling* [1999] 1 HKLRD 315 was decided, the CFA stressed a number of principles that were to apply to constitutional interpretation in Hong Kong, but it is clear from the first paragraph of Article 158 that the NPC Standing Committee enjoys a unilateral right to interpret the Basic Law.<sup>3</sup>

The strongly-put position of the CFA in *Ng Ka Ling* has been seriously compromised by subsequent initiatives taken by the Hong Kong government to minimize the impact of the judgement. In response to the CFA decision in *Ng Ka Ling*, the State Council requested the NPC Standing Committee to give a legislative interpretation of the relevant articles of the Basic Law, upon the request of the Hong Kong government. The NPC Standing Committee, after consulting the Committee for the Basic Law, gave its interpretation on the relevant articles of the Basic Law on 26 June 1999.<sup>4</sup> In its interpretation, the NPC Standing Committee criticized the CFA for failing to refer the issue to the Standing Committee for interpretation and for failing to interpret the articles in accordance with 'legislative intent'. The NPC Standing Committee then gave a new interpretation of those articles and stated that 'the courts of Hong Kong Special Administrative Region ... shall adhere to this Interpretation'.

In *Lau Kong Yung and Others v. Director of Immigration* (1999) HKCFAR 300, 323 the CFA had another opportunity to clarify the power of the NPC Standing Committee to interpret the Basic Law and the legal status of such interpretation. The CFA held that under Article 67(4) of the PRC Constitution and Article 158(1) of the Basic Law, the NPC Standing Committee has the power to interpret the Basic Law. The power 'is in general and unqualified terms' and 'is not restricted or qualified in any way by art. 158(2) and 158(3) (of the Basic Law)'.

This finding was generally criticized as unnecessarily wide (Ghai 2000). It also raised a number of questions with respect to Article 23 of the Basic Law. For example, how far can the NPC Standing Committee go in interpreting subversion and sedition, before it starts to make criminal laws for Hong Kong, and what are the limits to the general power of legislative interpretation of the Basic Law?

There could be three limitations on legislative interpretation of Article 23. First, interpretation must mean what it says. That is, it needs to be an interpretation – not an amendment. While such a difference is artificial and uncertain in the context of the mainland legal system, it is, substantially and procedurally, crucial to the Basic Law. Although the NPC Standing Committee's power to interpret the Basic Law may be general and without limit, its power to amend the Basic Law is subject to more rigid substantive and procedural conditions (Wen 2000). The NPC Standing Committee cannot amend the Basic Law in the name of interpretation.

Second, in its interpretation of articles of the Basic Law in the right of abode case, the NPC Standing Committee sets limits on its power of interpretation by defining legislative interpretation as seeking the true legislative intent through reviewing legislative history and examining historical documents. If interpretation is to uncover the true legislative intent of a relevant article, the true intention of Article 23 is to protect certain specified state interests according to the principles and rules of common law applying in Hong Kong. One may want to debate what the true legislative intent is, but the power to interpret cannot be 'free-floating'.

Finally, the wording of Article 23 clearly states that Hong Kong will make law to implement the article 'on its own'. How Article 23 is to be implemented is a matter within the exclusive jurisdiction of Hong Kong. While the NPC Standing Committee may interpret whether the Hong Kong government has passed laws to implement Article 23, it would be a violation of Article 23 if the NPC Standing Committee actually gave an interpretation as to how the laws implementing Article 23 should be worded. There may even be no legal duty on the part of the Hong Kong government to consult the central government in relation to Article 23. When Mr Qiao Xiaoyang of the LAC stated during the year 2000 NPC session that it would be 'reasonable and appropriate' for Hong Kong to consult the central government before Hong Kong made laws to implement Article 23 (*Ta Kung Po* 2000), he must have realized that there is no legal duty for Hong Kong to do so.

### **Applying PRC Criminal Law through the territorial principle**

Mainland Criminal Law is applicable to all who commit crimes within the mainland. Under Article 6 of Mainland Criminal Law, a crime is deemed to have taken place in the PRC when 'the criminal act or its consequence takes place within the territory or territorial waters or space of the People's Republic of China'. Preparation for a crime is itself a crime, giving a mainland court criminal jurisdiction. 'Preparation for a crime' is broadly defined as 'the preparation of the instruments or the creation of the conditions for a crime' in Article 22 of the Criminal Law.

While there is no definition of the ‘consequence’ of a crime in criminal law, it is generally understood as including the disposal of stolen goods.

Given the expansive definition of an act and its consequences in Mainland Criminal Law, the claim that the law cannot be applied in Hong Kong or to Hong Kong residents might be termed the ‘pure’ position. The direct reach of PRC Mainland Criminal Law does not include Hong Kong as such, but its indirect reach does. Cross-border crimes may lead to conflict between the two jurisdictions. Situations arise in some instances where both Hong Kong and the mainland may have jurisdiction over the same crime. The case of the ‘Big Spender’ is illustrative of this indirect impact of Mainland Criminal Law in the instance of concurrent jurisdiction.

The ‘Big Spender’, Cheung Tze-keung, and other gang members were tried by the Guangdong Intermediate People’s Court on the mainland on 29 September 1998 for a number of offences, including smuggling explosives and firearms, which took place principally on the mainland, and kidnapping and armed robbery, which took place in Hong Kong (Fu 1998).

Who had the right to exercise primary jurisdiction over the case was fiercely debated in the legal community and in society at large. While many in Hong Kong have hailed the trial as a victory for cross-border liaison against organized crime, others are concerned about the implications of this case and the potential remit of Mainland Criminal Law in Hong Kong. The argument turned on the impact of the Basic Law and the independence of Hong Kong’s legal system. It was argued that, since the kidnapping took place in Hong Kong, Cheung should be tried in Hong Kong to comply with the ‘one country, two systems’ principle and to respect judicial independence in Hong Kong. Many senior members of the legal community shared this view. The concern was that the trial in Guangdong allowed the mainland to intrude into areas which belonged to the autonomy of Hong Kong, depriving the Hong Kong courts of the right to try crimes that took place in Hong Kong. The trial would also have a chilling effect on the autonomy of Hong Kong. The Hong Kong government, however, stood firm in asserting the legality of the Guangdong court’s exercise of jurisdiction and in refusing to request the extradition of Cheung to Hong Kong to face trial.<sup>5</sup>

The Guangdong court, in sentencing Cheung to death, did not make it clear why it had the right to exercise jurisdiction over Cheung’s case. In its judgement, the court stated that it had jurisdiction over the kidnapping because the offence was plotted and prepared on the mainland. But the court refused to use Article 6 of the Criminal Law to justify its jurisdiction. Instead, the court used Article 24 of the Criminal Procedure Law.<sup>6</sup> Since that official position was supported by Professor Gao Mingxuan, the leading authority on criminal law in mainland China, and by many others, it was not openly challenged.

But this position is very problematic. The invocation of a provision in the Criminal Procedure Law cannot be effective in determining jurisdiction because it deals with procedural matters *after* the matter of jurisdiction has been determined. One has to look at the Criminal Law first to determine whether a mainland court has jurisdiction.<sup>7</sup>

While the mainland might have been justified in exercising jurisdiction in the ‘Big Spender’ case, the expansive jurisdiction is potentially dangerous to Hong Kong’s autonomy, and the rights and freedom of Hong Kong residents. The increasing social and economic integration between Hong Kong and the mainland has led to increased cross-border legal interaction and cross-border crimes. Many crimes committed in Hong Kong may have some connection with the mainland, thus rendering the perpetrators potentially subject to mainland jurisdiction. Most importantly, given the difference between the criminal laws of the two jurisdictions, an act committed in Hong Kong, lawful or otherwise, might have produced a ‘consequence’ in the mainland.<sup>8</sup>

### **Mainland Criminal Law and mainland residents in Hong Kong**

Another significant indirect reach of Mainland Criminal Law in Hong Kong is through the punishment of mainland residents who have returned to the mainland after committing a crime in Hong Kong, i.e. the ‘personality principle’ as stated in Article 7 of the Mainland Criminal Law. A rigid personality principle authorises a state to punish its own citizens for violating its criminal law abroad, even if the act is not criminal under the law where the crime was committed. Indeed, it has been the civil law tradition, especially in continental Europe, that extraterritorial jurisdiction is based upon nationality (Gilbert 1991). It is closely related to another civil law practice that states do not extradite their own citizens. Instead, they prosecute them for the crimes committed abroad.

The Mainland Criminal Law is most aggressive in punishing its own residents for violating the law abroad. Article 7 of the law states that the law ‘shall be applicable to any citizen of the People’s Republic of China who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People’s Republic of China’. A distinction is made between a ‘state functionary’ and ‘military personnel’ on one hand, and ordinary citizens on the other. Mainland Criminal Law will follow, without exception, mainland state functionaries and military personnel who commit *any* crimes abroad. But in the case of other ‘PRC citizens’, this rigid personality principle is softened by a possible exemption of one’s criminal liability if the maximum punishment to be imposed is not more than three years’ imprisonment.<sup>9</sup>

What is the meaning of ‘PRC citizens’ within the meaning of the Mainland Criminal Law? In particular, where a mainland resident commits a crime in Hong Kong, can a mainland court assert jurisdiction over the crime? The case of Li Yuhui, coming immediately after the trial of the ‘Big Spender’, brought Hong Kong into a fiercer debate about the role of Mainland Criminal Law in Hong Kong.

Li Yuhui, a fung shui master from the mainland, administered cyanide to five persons in Telford Gardens in July 1998, causing their death, while he was performing a ceremony for them. The fung shui master fled to the mainland, with more than one million Hong Kong dollars stolen from the victims. He was later detained

by mainland authorities. He was tried in the city of Shantou, where he resided, for the multiple homicide and was sentenced to death on 22 March 1999.<sup>10</sup>

The Hong Kong government's position, in its ideal form, was that, given the overriding effect of the Basic Law, most of the 'PRC national laws' are PRC mainland laws only and their applications are limited to the mainland until extended by the NPC Standing Committee. Outside the context of Annex III of the Basic Law, any reference to 'PRC' and 'PRC citizens' in national laws have to be interpreted as 'the mainland of China' and 'PRC citizens residing in the mainland'. In Hong Kong's new constitutional order, Hong Kong is not part of the PRC territory and Hong Kong residents are not PRC residents within the meaning of the PRC Mainland Criminal Law.

This position had little support outside the Hong Kong government. It was criticized as 'unprincipled' because it, allegedly, distorted the literal meaning of those words (Ling 2000). The critics argued that the PRC Mainland Criminal Law is clear. It applies to crimes committed by PRC citizens outside the PRC territory. Since Hong Kong is within PRC territory, Mainland Criminal Law does not, and should not, apply in Hong Kong. A mainland court would not have jurisdiction over the case.

Unfortunately, the mainland court was not helpful in providing guidance on this important jurisdictional matter. In the judgments of the Shantou Intermediate People's Court (the court of first instance) and the Guangdong High People's Court (the appellate court), the issue of competence in jurisdiction was not even mentioned. It appeared, according to the two defence counsels of Li Yuhui, that the courts were able to ignore the issue of personality principle because, allegedly, the cyanide used to kill the victim was bought by Li on the mainland and the plan to administer the poison was also formulated on the mainland, so a connection was thus established with the mainland. In addition, Li brought the stolen money back to the mainland, and the consequence of the offence thus occurred on the mainland.

When examining the debate over the *Li* case in detail, it becomes clear that there is strong disagreement on the application of the current law in relation to the jurisdiction of the Mainland Criminal Law over crimes committed in Hong Kong, but that there is a general consensus as to what the law should be. The solution to these problems is to create *residence-based* rather than *nationality-based* jurisdiction. The PRC citizenry is composed of residents both from the mainland and from the SARs. However, for all practical purposes, what counts is not whether one is a PRC citizen, but what kind of PRC citizen one is. An SAR resident, while being a PRC citizen, is still primarily an SAR resident. He or she, in principle, should have no duty to abide by the Mainland Criminal Law while he or she is not on the mainland. Since the application of Mainland Criminal Law is intended to be limited to the mainland and its residents, 'PRC citizen' within the meaning of Criminal Law ought not to include an SAR resident.

The answer to the question 'who is a resident' is mainly decided by the laws of the region concerned. While the Basic Law, supplemented by Hong Kong's immigration legislation, defines Hong Kong residents with relative clarity, it is uncertain under what circumstances a resident of one region may lose or renounce his or

her residence and obtain a new residence status in another region. The determination of a region's rules of residency is not, of course, centrally co-ordinated. One region's determination of residency may or may not be accepted by other regions, thus throwing the legal effect of these determinations into doubt.

A serious uncertainty is the status of mainland residents in Hong Kong. Under the Basic Law and the immigration law of Hong Kong, a PRC citizen who has resided in Hong Kong for seven years becomes a permanent resident of Hong Kong and enjoys the right of abode. However, the mainland authorities are not willing to allow their residents to become permanent residents of the SARs, even after they have stayed in Hong Kong for seven years. The official position is that mainland state owned enterprises and mainland government departments would transfer their mainland employees stationed in Hong Kong back to the mainland and dismiss whoever obtained permanent residence in Hong Kong. The practice seems to be that one is not able to renounce one's mainland residence without the approval of the authorities.

## **Conclusion**

The Basic Law recognizes and preserves internal differences between Hong Kong and the mainland but lacks an institutional structure to generate positive consensus. The lesson of the first few years seems to be that, without such an institutional structure, legal issues are easily and frequently politicized. The central government and many officials from the mainland seem to have a sovereign complex: every issue concerning Hong Kong is potentially a matter of state sovereignty, thus within the 'One Country' principle, this complex leaves little to the autonomy of Hong Kong. On the other hand, many in Hong Kong still have difficulty in accepting the fact that Hong Kong is now within China, and that it now has a new political master, with a different temper and style. Given the imbalance of political power in mainland/Hong Kong relations, it seems vital for the state sovereign to exercise self-restraint in dealing with Hong Kong and for Hong Kong to be prepared to live with the other system.

## **Notes**

- 1 The Law of People's Republic of China on the National Emblem has a compatible provision.
- 2 Counsels for the Government submitted that: 'If the Hong Kong legislature, acting under Annex III, has enacted a law which applies locally a national law listed in Annex III then it is, by definition, constitutional. In such a case, there is, accordingly, no scope to strike down such local legislation.' Case for the Appellant (FACC 4/99).
- 3 The first paragraph of Article 158 provides: 'The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.'
- 4 The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (26 June 1999).
- 5 The government put forward three reasons. First, it was not proper to request extradition while court proceedings were underway in the mainland, second, the trial was lawful under the

- mainland law, and third, there was no evidence to support a prosecution even if Cheung was extradited back to Hong Kong, Fu (1998).
- 6 Article 24 of the Criminal Procedure Law states: 'A criminal case shall be under the jurisdiction of the People's Court in the place where the crime was committed.'
  - 7 In a recent argument, Professor Gao stated that provisions of jurisdiction in the PRC Mainland Criminal Law concern matters of jurisdiction in relation to a foreign country; they should not be invoked in dealing with an SAR. That may be true, but it does not answer the question why a mainland court asserted jurisdiction in Cheung's case in the first place.
  - 8 One may think of the consequences that might be felt on the mainland if a person made an anti-China speech in Hong Kong which was aired on the mainland.
  - 9 Mainland Criminal Law was amended in 1997, and its extraterritorial application was significantly expanded after the amendment. Before the amendment, its extraterritorial application varied according to the nature of offences committed. Under Article 4 of the Criminal Law 1979, the law applied to a PRC citizen who committed certain specified offences outside PRC territory, including counter-revolution, counterfeiting national currency and valuable securities, corruption, and so on. These acts were punishable according to Criminal Law 1979 regardless of whether they were regarded as crimes under the *lex loci*. Article 5, on the other hand, punished other crimes committed by a PRC citizen abroad but only if the crime was punishable by a minimum sentence of not less than three years' imprisonment and the conduct was a crime under the *lex loci*. Criminal Law 1997 abolished the double criminality requirement and replaced it with a discretionary exemption from criminal liability (Fu 1996).
  - 10 Criminal Judgment of the Shantou Intermediate People's Court of Guangdong province, Criminal Trial of First Instance No. 10 of 1999.

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# 10 Judicial autonomy under Hong Kong's Basic Law

*Peter Wesley-Smith*

## **Background**

### ***Introduction***

The Basic Law (BL) of the Hong Kong Special Administrative Region (HKSAR) attempts to maintain, in uneasy juxtaposition, two distinct and incompatible systems of law and authority. Complete autonomy for the Hong Kong system is not permitted, however, and it has long been recognised that the vesting of the power of interpretation of the Basic Law in the Standing Committee of the National People's Congress (NPC) is one crucial point of contact between the systems and one which provides the mechanism for control from Beijing. The Standing Committee has, since 1 July 1997, exercised the power of interpretation once, in very controversial circumstances. The following questions, among others, have been discussed, often with great vehemence: (1) What is the relationship between legislative decisions of the NPC and the Basic Law as interpreted by the SAR courts? (2) May the Standing Committee properly exercise its power of interpretation over all clauses of the Basic Law or only those which are not within the autonomy of the HKSAR? (3) Must the Standing Committee wait until a question has been referred to it by the courts of Hong Kong? (4) Is it constitutional for the government of the HKSAR to submit a question to the Committee, particularly after it has lost its case before the Court of Final Appeal? (5) How should the courts view the Committee's first exercise of its interpretation power? (6) What are the ramifications of the Hong Kong government's request for an interpretation by the Standing Committee in terms of the rule of law, the independence of the judiciary, and a high degree of autonomy for the territory?<sup>1</sup>

Informing this chapter is the rather obvious fact that, given the *sui generis* nature of the Basic Law and its impossible ambition to marry incongruent systems, there are no easy answers, indeed no answers at all dictated by the law, to constitutional questions on matters such as interpretation. Advocates for any particular point of view are engaged in an enterprise more political than legal, and their sources of authority are more vague and indeterminate than lawyers are normally prepared to admit. This is as true for the courts as for polemicists and sober academic commentators. Nevertheless it may be useful to consider just what 'unconstitutionality' means, a task attempted in the second section of this chapter.

### ***Interpretation of the Basic Law***

It may be appropriate to begin by setting out in its entirety Article 158 of the Basic Law (hereafter 'BL158'):

- (1) The power of interpretation of this Law shall be vested in the Standing Committee of the NPC.
- (2) The Standing Committee of the NPC shall authorize the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.
- (3) The courts of the HKSAR may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgements on the cases, the courts of the Region shall, before making their final judgements which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the NPC through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgements previously rendered shall not be affected.
- (4) The Standing Committee of the NPC shall consult its Committee for the Basic Law of the HKSAR before giving an interpretation of this Law.  
[Paragraph numbers have been added.]

This appears at first glance to vest a general and untrammelled power of interpretation in the Standing Committee, though permitting the courts in Hong Kong to interpret in most cases. It is not a happy arrangement. The Committee is not a judicial body: its members number more than 150, they are not judicially trained, and they do not adjudicate in the manner of courts. The Committee for the Basic Law, which the Standing Committee is obliged to consult, is not a judicial body either. The Hong Kong courts, however, in accordance with the Basic Law, exercise the judicial power of the Region. Further, the mainland legal system is perhaps best described as a socialist one erected on a civilian structure, indeed in the public law area its inspiration is Stalinist,<sup>2</sup> quite antithetical to the common law system in Hong Kong. It was no doubt hoped that the contradictions between the two legal orders would not in practice arise. In 1999, however, they *did* arise, in the process revealing the fatuous nature of the 'one country, two systems' formula.

### ***The right of abode***

The litigation which led to the constitutional crisis of 1999 concerned the right of abode in Hong Kong. The minutiae of the law are complex and, wherever possible, will be avoided here. The Basic Law specifies in BL24 various categories of persons

who possess the right of abode. This being thought too generous, with grievous consequences for orderly government in Hong Kong, the Provisional Legislative Council (PLC) passed legislation in July 1997 limiting the effect of the Basic Law. The issue before the courts, of course, was the validity of these enactments. It is perfectly legitimate for ordinary legislation to implement constitutional provisions and thereby define, supplement, and qualify them, though not to contradict them. Had the PLC gone too far?

### ***The litigation***

Two principal cases came before the Court of Final Appeal (CFA) in January 1999, in which it was decided that certain parts of the immigration ordinances passed in July 1997 were invalid. What caused immediate controversy was the CFA's claim that it could determine the validity of NPC legislation which purported to apply to Hong Kong. Somewhat deferred was the controversy over the court's interpretation of provisions of the Basic Law.

### ***NPC legislation***

In the *David Ma* case the Court of Appeal had in effect ruled that NPC legislation, being an act of the 'sovereign', could not be challenged in or by the Hong Kong courts. This decision relied on jurisprudential notions popular when the judges went to law school but now rather outmoded and in any event inappropriate in relation to a codified constitution. The Chief Judge admitted as much in a later judgement. The matter was addressed by the CFA, Li CJ roundly declaring that the SAR courts had the jurisdiction to declare legislative acts of the NPC or its Standing Committee invalid if they conflicted with the Basic Law. This dictum, not formally necessary in the circumstances of the case, proved politically insensitive: the government of the PRC reacted vehemently and demanded of the Secretary for Justice that the judgement be 'rectified'. In due course the Hong Kong government sought from the CFA a 'clarification' of its remarks on the issue. The court obliged, to the satisfaction of most concerned including the Beijing government, although it did not seem to concede that its earlier views were incorrect.

### ***Reference to the Standing Committee***

In resolving the issues in the right of abode cases the CFA did not find it necessary to seek an interpretation of the Basic Law from the Standing Committee. It decided that a reference to the Committee must occur only when two conditions are satisfied: the provision being interpreted is an 'excluded' provision (concerning affairs which are the responsibility of the Central People's Government or those relevant to the relationship between the central authorities and the region), and its interpretation will affect the judgement. Further, interpretation of an excluded provision need not go to the Standing Committee unless it is the 'predominant' provision in the case. The jurisdiction of the Committee was avoided because the predominant

provision was BL24, which is not an excluded provision, and BL22(4), which *is*, was merely subsidiary.

### ***The result***

In viscerating the legislation which had been rushed into place to stem the expected immigration tide, the CFA's decisions created what the Hong Kong government declared was a social and economic crisis. By figures which were probably more foul than fair, the administration sought to demonstrate that huge influxes of immigrants from mainland China would overwhelm good government and jeopardise social services and economic prosperity. Casting about for ways to overturn the practical result, the chosen remedy was for the government itself to ask the State Council to request of the Standing Committee a reinterpretation of the relevant provisions of the Basic Law. This was duly done and the Committee provided an interpretation which, as anticipated, reversed crucial aspects of the CFA's decision. The practical problem was solved, but a number of legal and constitutional issues remained.

### ***The Interpretation***

Adopted on 26 June 1999, the Interpretation consists of four paragraphs. The preamble, apart from setting out the background to the reference, states that the CFA, in declining to refer to the Standing Committee, had not complied with BL158(3), and that its interpretation is inconsistent with legislative intent. Para 1 provides an alternative interpretation of BL22(4). Para 2, in dealing with BL24(2), states that the legislative intent was reflected in formal opinions of the Preparatory Committee (set up to oversee Hong Kong's transition from colony to SAR), thus incorporating them by reference in the Interpretation. The final paragraph rules that the courts shall adhere to the Interpretation and preserve the right of abode of parties to the CFA decisions under review.

### ***The attitude of the CFA***

In *Lau Kong-yung v. Director of Immigration*,<sup>3</sup> decided on 3 December 1999, the CFA had to determine whether removal orders made against seventeen Chinese mainlanders could be sustained. The Court of Appeal (CA) had decided in favour of the immigrants, but subsequently the Standing Committee's Interpretation had been promulgated. Three issues arose: the power of the Committee to make the Interpretation, the effect of the document, and the date from which it is applicable. The court held that the Standing Committee had the power it claimed, and its ruling bound the SAR courts and was effective from 1 July 1997; the CFA's interpretation of the Interpretation meant that the original scheme in the immigration ordinances of July 1997 was not unconstitutional. The PLC, which had adopted the views of the Preparatory Committee, had been right all along – at least if one accepts that the Standing Committee's views correctly state the true meaning of

the Basic Law. The PLC's only error was in back-dating one of the ordinances, a matter not dealt with in the Interpretation: the CFA's initial condemnation of the retrospective provision as invalid was therefore allowed to stand. Otherwise the capitulation by Hong Kong's highest court was complete.

## **Unconstitutionality**

### ***Narrow-sense and broad-sense constitutionality***

It is commonplace in the British tradition to draw a distinction between what is legal, or constitutional in a narrow sense, and what is constitutional in a broad sense. This is imperfectly captured by distinguishing between 'letter' and 'spirit': if a person or institution acts in accordance with the text of a law the behaviour may be considered 'legal' but it might still offend a broader principle of propriety or good government and thus be regarded as 'unconstitutional'. It is assumed, for example, that the Queen retains her power to refuse assent to a bill which has passed both Houses of Parliament, and no court could or would issue a remedy requiring assent or in any other way challenging her refusal to sign. Other than in extraordinary circumstances, however, the Queen is obliged to assent to bills and would be acting unconstitutionally if she did not. She would be in breach, not of the law (statute or common law), but of a constitutional convention based on long-standing practice backed by normative principle. She cannot exercise independent judgement. Were she to disregard a convention the remedy would be not a legal one through the courts but a political one through public criticism, civil disobedience, and the like.

On this basis one cannot argue that a convention ought to be established, for example to regulate the exercise of the Standing Committee's power to interpret the Basic Law, and then claim that failure to comply with such a convention renders the act unconstitutional. It would be contrary to the rule of law to judge conduct according to future standards. Similarly, one cannot urge 'judicialization' of BL158 through convention and then complain that neglect of the requirements of judicialization is constitutionally improper. But of course these assertions are not made in relation to a constitution which, like the British, is unwritten. Hong Kong has a superior constitutional document and the terminology of 'unconstitutionality' must reflect that profound difference.

### ***Text and inference***

Any act which is contrary to the clear words of the text of a written constitution is obviously unconstitutional (and unlawful). Constitutions, however, commonly contain broad principles which are not immediately apparent to the casual reader; they may be discerned through careful study and judicial exegesis, and when they are determined to exist they are as much part of the constitution as the narrowest prescription. They are implied, or rather, perhaps, inferred. They are necessarily read into the text in order to make sense of the whole document and to further its

ultimate objectives, and they provide a context within which specific provisions may be construed. An example is the doctrine of the separation of powers which, to varying extents, judges in Australia, the United States, Canada, and many other jurisdictions have discovered in their written constitutions, and which can be detected in the Basic Law as well. To take another example, judges have attempted to find an implied bill of rights in the Australian constitution. Any act which is contrary to such implied doctrines is unconstitutional. The broad/narrow terminology is not particularly appropriate here: the act is illegal, in conflict with the codified constitution, and may be condemned as such by the courts. Perhaps distinguishable, though leading to the same result, are extrapolations from specific provisions and institutional frameworks in the constitutional text. The independence of the judiciary is a principle firmly established in most constitutions in common law countries, and with it judges can pronounce upon the legality of arrangements affecting the structure of the courts, the composition of tribunals, specific acts by judicial officers, the relationships of the judiciary inter se and with the executive branch, pay scales and reductions in salary, and so on. The rule of law, despite its fertility and thus in some respects imprecision as a constitutional doctrine, might be employed to similar effect.

Conventions might still become established, but the assumption is that they must normally be rooted in principles which are recognized in the constitutional document; they must grow out of doctrines already in place. The claims referred to above regarding the development of conventions fit within this model. To be valid, however, they must rely, not on conventions to be established in the future, but on doctrines immanent in the Basic Law which are operative in the present. The claims could be adjusted accordingly, though they would then be supported by different arguments; their proponents would have to contend that inferences necessarily made from the constitution are supported by principles which are already in existence and which may thus be resorted to as constitutional standards for governmental action.

### ***Strong-sense and weak-sense constitutionality***

All this seems uncontroversial. But two matters are less so. First, can a further distinction be drawn between acts which are unconstitutional, in the strong sense that judges can strike them down during adjudication, and acts which, while immune from findings of invalidity, can be criticized as undesirable or unwise? One prominent constitutional lawyer has in the current debate answered no, declaring the affirmative to be a nonsense in constitutional affairs.<sup>4</sup> But there must be many occasions when critics can complain of certain acts, for example appointments to the Executive Council, while recognising that they are within the constitution, however broadly the constitution is interpreted. The cry of 'unconstitutionality' might still be raised, though only in the weak sense of contravening general principles but not the constitution itself. The second matter is how far the implied doctrines, or extrapolations from express provisions, can be taken by the courts. Specifically, how are they to be utilized when they encounter conflicting provisions

of the constitution itself? This is merely an illustration of the task confronting anyone who attempts to give an overall meaning to a constitution. It is at the heart, however, of the controversy over the intervention of the Standing Committee in relation to the right of abode.

## **Issues**

### ***The authority of the Standing Committee to issue the Interpretation***

The first question to be examined here is whether the Standing Committee has the authority under the Basic Law to issue an interpretation of any provision on its own initiative and at any time. This is, at least initially, simply a matter of reading the words of BL158. The first paragraph vests the power of interpretation in the Standing Committee. The second paragraph authorises the Hong Kong courts to interpret, 'on their own', provisions within the limits of the SAR's autonomy, and the third requires the courts in certain circumstances to seek an interpretation of provisions outwith that autonomy. No commentator, so far as I am aware, prior to the recent controversy doubted that the Standing Committee's ultimate power of interpretation was unrestricted and could be exercised ad hoc. BL158 was recognized as essential to the interests of the central authorities: it provides the means by which the organs of the state can control the operation of the Basic Law, and it is crucial to the interface between two largely irreconcilable systems. The maintenance of the two separate systems is uncertainly entrusted to the good sense of the Standing Committee in refraining from invoking its jurisdiction other than in extreme circumstances. But the Standing Committee's constitutional power to intervene when the Committee itself believes it necessary to do so was not challenged. It was criticized, indeed deplored at times, but its status as a power within the constitution was generally acknowledged. Thus Yash Ghai, in the second edition of his authoritative book on the Basic Law (1999), wrote that the Standing Committee's interpretative power 'is plenary in that it covers all the provisions of the Basic Law; this power may be exercised in the absence of litigation',<sup>5</sup> and 'there would appear to be no reason to conclude that the NPCSC cannot make an interpretation on provisions which the HKSAR courts are authorized to decide since there is no exclusive grant of the jurisdiction to the latter (the expression "on their own" presumably meaning only that they do not need to refer to the NPCSC)'.<sup>6</sup>

It was only after the government reacted so negatively to the CFA decisions that this approach was reconsidered. The claim was now made that, as a matter of interpretation, the power conferred by paragraph (1) was 'qualified' or restricted by paragraphs (2) and (3), such that in no circumstance could the Standing Committee interpret provisions within the autonomy of the SAR, and only when an interpretation was sought by the courts could the Committee deal with other provisions. These second thoughts were probably prompted not by the sense of the words themselves, read in isolation, but by giving greater prominence than before to the concept of a high degree of autonomy. Autonomy is a theme in the



Basic Law which can legitimately be used to condition or set the parameters of express words. An equally pervasive theme, of course, is sovereignty, from which opposite arguments can be derived and which had previously been thought to be decisive. It is difficult to see how this difference of approach and opinion can be legally resolved. The customary method is to wait for an authoritative ruling by the courts, but the argument from sovereignty denies that on such a question the courts have the last word. If the Standing Committee were to intervene without a reference from the courts, as it has done, that would settle the matter, according to the one interpretation, but according to the other it would be unconstitutional and could be declared so by the courts. If the courts were to take the latter view a genuine crisis would result, one which could be attended to only by political means.

In the author's view it could not have been the intention of the drafters of the Basic Law to raise autonomy above sovereignty such as to make the courts the final arbiters under BL158. The actual intention of the drafters has no special authority when it comes to interpretation of a constitution, but the same intention seems evident in the Basic Law itself, read as a whole, and in the structure of BL158 (it would be odd to grant power and then, in the same provision, immediately retract it). The relationship between sovereignty and autonomy would otherwise be inverted.

The CFA in the *Lau Kong-yung* case<sup>7</sup> had no doubt that the power of the Committee to issue the Interpretation of June 1999 existed: it was conferred by Art 67(4) of the Chinese Constitution, was reproduced in BL158(1) as well, and was not qualified by the rest of BL158. Although, in a book published after that case, Ghai is critical of reliance on the Chinese constitution,<sup>8</sup> and argues that the Committee's powers should be narrower when interpreting the Basic Law than when operating within the mainland system,<sup>9</sup> he accepts that the Committee need not await a reference from the Hong Kong courts.<sup>10</sup> He nevertheless refers to the 'spirit' of BL158 as indicating that only 'judicial references' should be considered by the Committee.<sup>11</sup>

### ***The authority of the government of Hong Kong to request an interpretation from the Standing Committee***

The next question which arises is whether it is constitutional for the Hong Kong government to request a reference to the Standing Committee. The assumption of both the government and its critics has been that a specific provision of the Basic Law must be located which authorises any particular executive act. The government seized on BL48(2) (the Chief Executive's responsibility for implementation of the Basic Law), which was bound to be attacked. But it is a strange notion of executive power that ties it so closely to the constitutional text. The executive authorities have the power to govern, which means to take in their own discretion whatever executive action, not contrary to law, they deem necessary in order to carry out their mandate of administering the territory in accordance with policy. The Basic Law does not expressly prohibit what the government did. To find such a prohibition requires a very large measure of implication. In federal systems it is

routine, in relation to governments given express rather than residual powers, to ask for a specific constitutional mandate to authorise particular acts. Such an approach is not appropriate for the Basic Law, and might even be thought to conflict with the theme of a high degree of autonomy.

The CFA has not commented on this issue. Ghai regards the court as implicitly approving the conduct of the Chief Executive and opening the way to future references. 'Does it therefore endorse the position of the Department of Justice that there are no legal limits, and that the reference can be made "before, during or after" a court decision? Surely this could never have been the "true legislative" intent.'<sup>12</sup> Ghai's objection is that judicial interpretations can be by-passed by the executive arm of government through a biased process guaranteeing a result, thus threatening arrangements for internal governance and autonomy.

These consequences can scarcely have been intended by those who drafted article 158 and the general scheme of the Basic Law. In fact, they do so much violence to the Basic Law scheme that they establish a strong case for the argument that the government's action is unconstitutional.<sup>13</sup>

The difficulty with this argument is that the same objections can be made whenever the Standing Committee exercises its power on its own initiative, an exercise already conceded to be within the constitution. Here the appropriate response is to point out the undesirability of 'executive reference' to the Committee while recognising that it is not strictly in conflict with the Basic Law.

### ***The rule of law***

Three doctrines have been commonly put forward as condemning the government's position: the rule of law, judicial independence, and a high degree of autonomy. Each is found in the Basic Law. Can they provide principles by which the reference to the Standing Committee can be declared not merely regrettable, but unlawful?

The claim that the rule of law was infringed by the government's request has been commonly made, often with great passion though without identifying specific meanings of the doctrine. Yet in one sense, the government can be seen as having engaged in the process of discovering the true law. Positivists assume that the law is what the courts say it is, but under the Basic Law, at least if the Standing Committee's power of ad hoc interpretation is allowed, the law is what the Committee says it is. This defence in terms of the rule of law is not likely to satisfy the critics, whose principal objection is that the Standing Committee is not a judicial body but a legislative and executive one which works in camera, without taking submissions from interested parties, and without issuing reasoned interpretations in the manner of the courts. The Committee's previous record in relation to Hong Kong has not been notable for restrained, impartial interpretation and application of the law as an objective set of standards. This is indeed one of the most troubling aspects of the Basic Law. The problem is that reposing the final power of interpretation in the Standing Committee is expressly stipulated by the Basic Law itself. It

is the constitution, the highest form of law in the SAR, which clearly establishes the power. And if the constitution so decrees, that is the law, and obedience to the law, itself an aspect of the rule of law as a constitutional doctrine, cannot be characterized as defying the constitution. The government, in seeking an interpretation from the Standing Committee, has merely mobilized the law. We may protest that it is an unsatisfactory law, and that it would be preferable if the government did not rely on it, but we cannot deny its constitutional validity.

Theorists of the rule of law assert, rightly, that if the doctrine means merely that one should obey the law it would be thin and impoverished, even redundant. But their concern is to elaborate principles to guide legislators and the drafters of constitutions and to supply standards for criticism, not to set up rules which override legislative and constitutional provisions. The rule of law is aspirational, not some kind of divine or natural law superior in constitutional force to imperfect human law. Lon Fuller's 'morality of law' probably represents the zenith of liberal attempts to work out principles externally derived and injected into a legal system, but other than in extreme situations, such as during the Nazi period in Germany, Fuller does not suggest that his desiderata form extra-constitutional precepts standing above a written constitution. Perhaps the closest ally of those who decry the government's action as unconstitutional is Ronald Dworkin, who gives great prominence to tradition, political morality, shared understandings, 'institutional fit', principles and attitudes and such, in his theory of constitutional interpretation. Even he would, I think, concede that the 'enactment force' of BL158(1) cannot be dissipated by the exhortations of the rule of law.

### ***The independence of the judiciary***

The argument that judicial independence is severely compromised by reference to the Standing Committee is not an easy one to establish. The decisions of the CFA stand and the rights of parties are not taken away; judges are accustomed to being overruled, and even if the CFA has no judicial overlord it would respect any *statutory* change to the law it pronounced. Lord Asquith proclaimed that the House of Lords was always right only because no one could say it was wrong, but the Basic Law authorizes the Standing Committee to say that the CFA was 'wrong', even if its judgements are universally admired.

### ***Autonomy***

As mentioned above, autonomy is confronted by sovereignty as a principle of the Basic Law. It is not apparent to me how autonomy is better served by constitutional amendment than by interpretation on the request of the Hong Kong government or that such a request, as opposed to ad hoc intervention by the Standing Committee, subverts the high degree of autonomy the SAR enjoys. It is obvious that autonomy would be best served if the Committee had no interpretative jurisdiction or never exercised it, but the Basic Law has itself granted the jurisdiction. The argument from autonomy speaks to desirability, not constitutionality.

### **Concluding remarks: the political nature of public law**

There are many unattractive aspects of the reinterpretation episode. The government put its best arguments to the courts at all levels and lost, whereupon it took executive action to have the law reinterpreted. It appealed to a political body whose decision to supplant the persuasively reasoned interpretation of the highest Hong Kong court was entirely predictable. It refuses to limit in advance its freedom to do it all again on another occasion when the courts rule against its interests. Its campaign to win public support was disingenuous if not downright dishonest. It gives the impression that its will is not to be thwarted by mere judges and that its commitment to the rule of law is half-hearted. And if there were to be frequent resort to the same procedure there would be great pressure on the courts to second-guess the Standing Committee, in practice by accepting whatever submissions are made by counsel for the government, to the significant detriment of the rule of law and judicial independence. Nevertheless, on the single question of whether the government's first request for a reinterpretation violated the constitution, the constitutional propriety of its action is entirely defensible. This is a matter on which the CFA has concluded that the Committee has not acted unconstitutionally in the strong sense and (as discussed above) by implication that neither has the Hong Kong government.

It might nevertheless be maintained that resort to the Committee was in breach of the general principles of the rule of law, though not leading to constitutional invalidity. The relative autonomy of the legal from the political order, the formal nature of legal reasoning, equal access to the system, and the impartial administration of the law have all been compromised to some extent, and this must be regrettable even to die-hard supporters of the government. In a paper delivered at a Central Policy Unit seminar in May 1999 the author of this chapter stated that it would be legitimate to ask for the Standing Committee's intervention in two situations: first, where, in the opinion of the observer, it could be said that the courts had erred. Many lawyers accept, for example, that the CFA was mistaken in its 'predominant provision' test in relation to BL158(3). In my view that justified an approach to the Committee to 'correct' a misinterpretation of the Basic Law and to permit the Committee to pronounce upon the meaning of BL22(4). Second, the Committee's jurisdiction could be properly invoked where the consensus of informed opinion on the mainland is, as a matter of law and not merely of administrative or political convenience, contrary to that of the courts on a matter of constitutional interpretation. This reflects the hybrid nature of the Basic Law as indicated in this present piece and elsewhere in this book. Such consensus apparently existed in relation to one issue in connection with BL24(2). However, where the CFA's decisions on other issues were not seriously contested, reference to the Standing Committee would have been improper. As the author indicated in his paper,

For the government to seek an interpretation from the SC in these circumstances would have the appearance of a further 'appeal', which would

not be consistent with the government's duty to abide by the law, would involve asking the SC to reach through interpretation a result which is contrary to the agreed law, and would surely damage the authority and standing of the Hong Kong courts.

The test which the author thus proposed – which never purported to be anything more than an explanation of his own approach to a complex situation – has been criticized as unworkable, but still seems appropriate on an occasion of potential crisis. In permitting a political decision by the mainland authorities, it jeopardizes the rule of law. The common law itself, however, whose pragmatism has usually been recognized as a strength, incorporates departures from the rule of law at times: the act of state doctrine is an obvious example, as is also the argument from 'necessity' which has been urged on the Hong Kong courts in relation to the validity of the PLC. The law, and academic discussants, must ultimately recognize and reflect the political context in which the legal system operates, and judicious compromise, however disturbing, must on occasion be tolerated.

The right of abode controversy has been heavily imbued with politics, and not only by lawyers writing to the press, testifying before LegCo panels, signing petitions, and marching in the streets. The Court of Appeal, in the reasoning it used to sustain the constitutionality of the PLC, had exercised a purely political choice; the CFA did likewise, though disagreeing with the lower court's logic. On this question no other option existed. In its comments on the relationship between the National People's Congress and the Basic Law the CFA was staking out the high ground or, to change the metaphor, testing the waters. Once the central authorities had reacted so strongly, the court's unprecedented 'clarification' of its position – in a manner which strictly defied the rule of law – was an obviously political act designed to mollify the Chinese government. On fundamental constitutional questions the judiciary cannot do as Mr Justice Godfrey advised in a letter to the press, which was to ignore the 'political fallout'.<sup>14</sup> The judicial process is never perfectly objective or completely constrained by pre-existing law, and judges are necessarily influenced by all kinds of extra-legal factors, of which 'political reality' is perhaps the most significant.

The author does not advocate abandoning the law's pretension to autonomy, nor does he denigrate the value of the rule of law. The principal contention is, rather, that the Basic Law, with all its imperfections, must be made to work, and it cannot be made to work if judges and lawyers close their eyes to 'political fallout' and, in the process, deny the constitution's character as a compromise between incompatible systems of law. It would, however, be a cause for dismay if resort to the Standing Committee became routine, for that would surely substantiate the critics' worst fears: that the values of the separate Hong Kong system, and a fundamental premise of the Basic Law, will be gradually eroded. Reference to the Standing Committee on one occasion has not had that result. It is the local administration's duty to defend the legal system it inherited and it must resist any impulse to ask again for the intervention of government agencies in Beijing.

It may well be that the reinterpretation episode undermined the authority of the CFA – as claimed, somewhat surprisingly, by a Hong Kong silk (Queen's Counsel under the colonial system) who had strongly supported the government's decision to go to the Standing Committee<sup>15</sup> – and that autonomy has been compromised by the CFA's acceptance of the Committee's power to interpret all parts of the Basic Law.<sup>16</sup> In the author's view, however, the constitutional crisis of 1999 simply revealed in stark form what the SAR constitution has provided for since its promulgation in April 1990. It was always naive to expect the Beijing regime to permit bold judicial activism on matters affecting sovereignty and autonomy.

## Notes

- 1 Some of these questions are addressed, and a detailed account of the controversy is presented, in Peter Wesley-Smith (1999), 'Hong Kong's first post-1997 constitutional crisis', *Lawasia* 7 24. For documents and discussion see J.M.M. Chan, H.L. Fu, and Y. Ghai (eds) (2000), *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong: Hong Kong University Press.
- 2 Ghai, 'The NPC interpretation and its consequences', in Chan, Fu and Ghai (2000), p. 209.
- 3 FACV Nos 10 and 11 of 1999; reproduced in Chan, Fu and Ghai (2000), p. 487.
- 4 See Wesley-Smith (1999), p. 49, note 114.
- 5 Ghai (1999), *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, 2nd edn, Hong Kong: Hong Kong University Press, p. 198.
- 6 *Ibid.*, p. 203.
- 7 Note 3 above.
- 8 Ghai, 'The NPC interpretation' (2000), pp. 203–4, 210.
- 9 *Ibid.*, p. 204.
- 10 Ghai, 'Litigating the Basic Law: jurisdiction, interpretation and procedure', in Chan, Fu and Ghai (2000), pp. 36, 50. Compare 'The NPC interpretation' (note 2 above), p. 210, where Ghai notes that counsel's argument to the contrary was consistent with a high degree of autonomy for the HKSAR.
- 11 *Ibid.*, p. 205.
- 12 *Ibid.*, p. 212.
- 13 *Ibid.*, p. 206. See also Ghai's remarks at a meeting of a LegCo panel in June 1999, quoted in Wesley-Smith (1999), p. 51, note 127.
- 14 Reproduced in Chan, Fu, and Ghai (2000), p. 403.
- 15 Cliff Buddle, 'Judges accused of causing constitutional crisis and undermining SAR autonomy', *South China Morning Post*, 6 December 1999.
- 16 *Ibid.* See also the article by Jerome Cohen in *Sunday Morning Post*, 2 April 2000.

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# 11 Can courts in Hong Kong examine the constitutionality of the legislative conduct of the PRC?

*Laifan Lin and Mingkang Gu*

## **Introduction**

Hans Kelsen said that a constitution is a norm built on a foundation of ‘basic norms’. It serves as the basis for constituting all other concrete laws.<sup>1</sup> One of the important features of the constitution is that it is the ‘ultimate (or highest) norm’ within the order of legal norms. In other words, in a given legal system, in order to determine, or interpret, the concrete contents of lower norms, one can find nothing higher or more authoritative than the constitution. Furthermore, if we look at the internal features of various norms, a constitution is usually described in a way that is simpler and more abstract. Its generality summarizes the basic principles and concepts of political structures and of legal values. In their concrete application, they are highly complicated, but they undoubtedly exist in any modern society which lays claim to democracy and the rule of law.

Many people may not completely understand those principles and concepts. For this reason, in some particular social-historical periods, their somewhat abstract formulation in a constitution may well stimulate wider debates than do other legal norms. German constitutional theory gives us a word for the often contentious nature of constitutional norms: *Verfassungsstreitigkeit* ‘constitutional dispute’, which has been imported into Japan and other countries.<sup>2</sup> This indicates that constitutional disputes are legal phenomena that are widely recognized. The Basic Law of Hong Kong Special Administrative Region (HKSAR) of the People’s Republic of China (PRC) is not recognized as a constitutional law. Rather, it is a constitutional document that contains internal structures and features rather like those of a constitution.<sup>3</sup> Because of this, it may provoke many disputes. For the purpose of this chapter, we refer to those disputes as the ‘debate about the Basic Law’.

Since Hong Kong’s return to the sovereignty of China, there have been continuous and heated debates about the contents of several provisions of the Basic Law. The debates about the Basic Law contain several special features.

First, these heated debates are conducted at various levels, between participants which include the Hong Kong Government, the legislature, judicial organs, the mass media and legal professional organizations, and sometimes even between the Central Authorities and the HKSAR.



Second, these heated debates have both depth and breadth. The courts of the HKSAR are heavily involved, and the conclusions and reasons for their judgements have become, in turn, a new focus of debate.<sup>4</sup>

Third, these heated debates have become repetitious, i.e. similar arguments are recycled again and again.

This chapter proposes to discuss one major issue arising from debates on the Basic Law after the handover of Hong Kong: the issue of constitutional judicial review by the courts of the HKSAR. It is intended to discuss the theory of norms lying behind this issue and the authors will attempt, through analysis and discussion, to determine the concrete contents of the Basic Law. It is worth mentioning that neither the common law theory nor Chinese constitutional theory has ever given a satisfactory or conclusive explanation of this issue. Therefore, on most occasions, the authors of this chapter will have to adopt a comparative research approach in order to examine these two issues from more than one angle.

## **The power of constitutional judicial review by the courts of the HKSAR**

### ***The background of the power of constitutional judicial review***

Currently in Hong Kong, many people use the term ‘power of constitutional judicial review’ to describe the judicial review of the courts of HKSAR.<sup>5</sup> The purpose of judicial review is to examine whether the legislative conduct of the legislature or administrative conduct of the executive violates the Basic Law.<sup>6</sup> However, before using this terminology, we must identify one issue: whether courts in the HKSAR have the so-called ‘power of constitutional judicial review’. Here, the ‘constitution’ refers to the Basic Law. Strictly speaking, as one view clearly indicates, the Basic Law is not a constitution. Thus, there is no basis for courts of the HKSAR to talk about the power of constitutional judicial review.<sup>7</sup> This view seems to take away the firewood from under the cauldron (*fu di chou xin*). Yet this is a narrow literal view of the word ‘constitution’. In fact, the word could be understood not merely to cover a document which calls itself a ‘constitution’, but also as a reference to some type of ‘constitutional document’. As mentioned before, the Basic Law is a national constitutional document. If we accept the word ‘constitution’ at this level, we have no difficulty in concluding that there is a need to discuss whether the courts of HKSAR have the power of constitutional judicial review.<sup>8</sup>

The first scholar to put forward the idea that the courts of the HKSAR have the power of constitutional judicial review was Professor Chen Hongyi. In his article entitled ‘The Exercise of Constitutional Judicial Review by the Courts of the HKSAR’, he particularly recounted the history, legal basis, and operation of constitutional judicial review in Hong Kong. He has given his positive support to the development of this kind of system.<sup>9</sup>

According to Chen, while there is no constitutional judicial review in the United Kingdom, the situation in Hong Kong is different. During the colonial period, Hong Kong had, since 1991 and after the amendment of Article 7 of the Royal Instructions and the adoption of the Hong Kong Bill of Rights, the opportunity to exercise the power of constitutional judicial review, which had always been latent in the judicial power. This meant that the courts of the HKSAR could, based on the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Hong Kong Bill of Rights (HKBR), examine the legislation of the Hong Kong legislature. Since China resumed sovereignty over Hong Kong, even though the Basic Law does not expressly confer the power of constitutional judicial review on the courts of the HKSAR, many of its provisions can be interpreted so as to give the Hong Kong courts such a power. Furthermore, in practice, the Hong Kong courts have not only acknowledged the existence of this power, but also in two important cases have examined and overruled several pieces of enactment of the Provisional Legislature.

Chen's ideas, especially his theory of the latent power of constitutional judicial review, can enlighten our thinking. However, his theory needs to be further developed, because the actual practice of constitutional review exercised by the Hong Kong courts has developed recently.

According to public law theory, some powers are inherent in certain systems, and some mechanisms become important elements of those systems. Before the adoption of the Basic Law, there was no perfect constitutional judicial review system under the Hong Kong common law, but there was an effective judicial review system. Hidden within this system lay a mechanism of constitutional judicial review; i.e. the courts would examine, from the viewpoint of constitutional norms, the reasonableness or propriety of other laws and regulations. Following judicial practice, this kind of mechanism can be developed into a system of constitutional judicial review. Therefore, it is fair to say that both the normative basis and constitutional practice are equally important. As everyone knows, the express provisions of the Constitution did not provide the system of constitutional judicial review in the USA; rather, it was the historical product of constitutional practice and political struggle. Similarly, in Australia, the current Constitution does not expressly provide for 'judicial review that has constitutional effect', but in reality, the Federal Court exercises the power of constitutional judicial review.<sup>10</sup>

### ***The normative basis of the power of constitutional judicial review***

Under the common law system, constitutional and judicial practice plays an important role in forming the system of constitutional judicial review. This is, however, not to say that people can ignore the normative constitutional basis for this kind of system. When we study the provisions of the Basic Law in order to work out the basis for the power of constitutional judicial review exercised by the Hong Kong courts, we can not only prove the existence of this power, but also identify its content.

As Chen said in his article:

The Basic Law not only retains the original judicial power and jurisdiction of the Hong Kong courts (Article 19), but also retains the original common law of Hong Kong (Articles 8 and 18). Furthermore, it gives the power of interpreting the Basic Law to the Hong Kong courts (Article 158) and provides that any laws made by the legislature shall not contradict the Basic Law (Article 11). All these provisions could be taken as the legal basis for Hong Kong exercising the power of constitutional judicial review.<sup>11</sup>

In the *Ng Ka Ling* case, the Court of Final Appeal (CFA) specially discussed, in detail, the legal basis of ‘the power of judicial jurisdiction’. First, the Hong Kong courts have the power to examine whether any laws made by the Hong Kong Legislature or the Hong Kong Government comply with the Basic Law. The judgment did not emphasize this issue: it may be that the Court felt the Basic Law had clearly addressed it.<sup>12</sup> Second, the Hong Kong courts have ‘jurisdiction, subject to the provisions of the Basic Law, to examine whether any legislative acts of the National People’s Congress (NPC) or its Standing Committee (NPCSC) are consistent with the Basic Law, and the duty to declare such acts invalid if found to be inconsistent’ with it.<sup>13</sup> The judgment in the *Ng Ka Ling* case mainly discussed this issue, which had never been dealt with by the judges in Hong Kong before 1 July 1997.<sup>14</sup>

In order to support its second point, the CFA cited Articles 57, 58 and 31 of the Constitutional Law of the PRC and further stated, ‘It is for the courts of the Region to determine questions of inconsistency and invalidity when they arise’.<sup>15</sup> This was so because the Hong Kong courts are authorized to exercise independent judicial power under the principle of ‘a high degree of autonomy’.<sup>16</sup> In addition, Article 159(4) of the Basic Law provides that no amendment thereto shall contravene established basic policies.

It should be admitted that the idea put forward by the CFA is somewhat creative, but there is a logical problem in organizing the legal provisions (of Chinese Constitutional Law and the Basic Law) cited by the CFA within a reasonable structure. In fact the legal provisions cited by the CFA in the judgment are not only given a farfetched interpretation, but are also redundant.

According to our understanding, the provisions of the Basic Law that could serve as the basic norms for the power of constitutional judicial review should be logically put into the following order:

- (1) Article 11 states that the Basic Law is the highest law in Hong Kong and that legislation in Hong Kong shall not contravene the Basic Law;
- (2) Article 39(1) states that ‘the provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labor conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR’. Article 39(2) states, ‘the rights and freedoms enjoyed by Hong Kong

residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of Article 39(1)';

- (3) Article 8 states, 'the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained';
- (4) Article 18(1) states that the original common law system in Hong Kong shall be maintained;
- (5) Article 19(2) states that the courts in Hong Kong 'shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained';
- (6) Article 19(1) states that the HKSAR shall 'be vested with independent judicial power, including that of final adjudication';
- (7) Article 80 provides for the constitutional status and powers of Hong Kong courts;
- (8) Article 158(2)(3) states that the Hong Kong courts have the power to interpret the Basic Law;
- (9) Article 84 states that the Hong Kong courts 'shall' (i.e. must) apply the laws in the HKSAR as prescribed in Article 18, but can also refer to precedents from other common law areas.

### ***The object of constitutional judicial review***

In summary, we find that the Hong Kong courts do have the power of constitutional judicial review. The question then is whether the Hong Kong courts can exercise this power to examine legislative acts made by the NPC or the NPCSC. In order to consider this, we need to discuss the object of exercising judicial review. Ideally, in order to answer whether the Hong Kong courts have this kind of power, we have to discover the objective norms which constitute the basis for the existing Chinese Constitutional Law and the Basic Law. However, as this is a separate and complex topic, it will not be dealt with in this chapter.

In the case of *HKSAR v. Ma Wai Kwan David*, decided in July 1997 (hereinafter called the *Ma Wai Kwan* case), the Court of Appeal (within the High Court) discussed the issue of whether the Hong Kong courts have the power to examine the legislative acts of the NPC. Mr Feng Huajian, the then Law Officer of the Department of Justice, representing the Hong Kong Government argued this issue before the court. He said that before the handover of Hong Kong, the Hong Kong courts had the power to examine whether any legislation of the Hong Kong legislature complied with constitutional norms such as the Royal Patent. Therefore, the Hong Kong courts would have this power after the handover. However, as local courts came within China's sovereignty, the Hong Kong courts had no power to examine any legislative conduct of the NPC and the NPCSC. This was so because, before the handover, the Hong Kong courts did not have the power to examine whether any law passed by the Parliament of the UK complied with the constitutional documents of the UK, including the Royal Patent that was specially made for Hong Kong for colonial purposes. For this reason, Article 19(2) of the Basic Law

expressly maintains ‘the restrictions on jurisdiction imposed by the legal system and principles previously in force in Hong Kong’.<sup>17</sup>

Judges such as Chen Zaokai essentially adopted this argument and held that, because the legislative activity of the NPC fitted into the category of sovereignty, the Hong Kong courts had no power to check the legality of these legislative acts. However, this judgement did not deny, at all, the power of constitutional judicial review exercised by the Hong Kong courts to examine whether such acts violate the constitutional documents.

In the *Ng Ka Ling* case, the CFA clearly rejected the holding of the Court of Appeal and pointed out that even though the so-called ‘original legal systems and principles’ under Article 19(2) of the Basic Law contain some limitation to the constitutional judicial jurisdiction exercised by the Hong Kong courts, ‘this provision cannot insert the limitation into the new system because the limitation is provided under the order system that was purely associated with the legislation of the UK Parliament’. This was based on the situation that Hong Kong at that time was under the colonial system and, ‘in line with the common law, the Parliament of the UK was the highest authority to make law for Hong Kong, the Hong Kong courts having no power to question this authority’.<sup>18</sup>

As mentioned before, the CFA discussed and proved in detail the reasons why the Hong Kong courts have the power to review the constitutionality of the legislative acts of the NPC and the NPCSC. In order to support its conclusion, the judgement put forward the following theories.

First, under the Chinese Constitution (Articles 57 and 58), the NPC is the highest organ of state power, its permanent body is the NPCSC, and they both exercise the legislative powers of the state. Thus their acts are acts of the sovereign. The jurisdiction of the Region’s courts to examine their acts to ensure consistency with the Basic Law is derived from the sovereign in that, pursuant to Article 31 of the Chinese Constitution, the NPC has enacted the Basic Law for the Region. The Basic Law is a national law and is the constitution of the Region.

Second, like other constitutions, it distributes and delimits powers, as well as providing for fundamental rights and freedoms. As it is a constitutional document, any other laws that are inconsistent with the Basic Law are of no effect and are invalid.

Third, under the Basic Law, the courts of the Region have independent judicial power within the high degree of autonomy conferred on the Region. It is for the courts of the Region to determine questions of inconsistency and invalidity when they arise. It is therefore for the courts of the Region to determine whether an act of the NPC or the NPCSC is inconsistent with the Basic Law, subject, of course, to the provisions of the Basic Law itself.

Fourth, the Basic Law was enacted to implement China’s basic policies regarding Hong Kong, which were to remain unchanged for 50 years as declared and elaborated in the Joint Declaration. Article 159(4) of the Basic Law provides that no amendment thereto shall contravene the established basic policies. The jurisdiction to enforce and interpret the Basic Law necessarily entails the jurisdiction, stated

above, over acts of the NPC and the NPCSC to ensure their consistency with the Basic Law.<sup>19</sup>

In actual fact, some aspects of the foregoing arguments are quite illogical. Furthermore, it would appear that the CFA was trying to put together the common elements of Chinese Constitutional Law and comparative law. It also failed to discuss several very important issues which should not be ignored when the Hong Kong courts try to assert the power to review the constitutionality of the legislative acts of the NPC and the NPCSC. These issues are as follows:

- (1) China operates under the system of the NPC. Under the current constitutional structure, the NPC is the highest authority. Because of this status, it is questionable whether its legislative acts could be treated as the subject matter of any constitutional judicial review.
- (2) Under the current constitutional structure within China, there is no system whereby judicial organs can exercise the power of constitutional judicial review.
- (3) Hong Kong is a Special Administrative Region of China. As they are local judicial organs within China, whether the Hong Kong courts can have the power of constitutional judicial review to examine the legislative conduct of the NPC and the NPCSC is debatable.<sup>20</sup>
- (4) Assuming that the Hong Kong courts have such a power, in theory the exercising of such power may well be limited and those concrete limitations need to be addressed.

The judgement of the CFA failed to touch on these four key issues. Thus, there exist some theoretical flaws, and the judgement itself was heavily criticized by four famous mainland jurists.<sup>21</sup> Their critique discussed these four key issues. After this, attention in Hong Kong started to focus on the points of the judgement and the critique of the four jurists.

‘One country, two systems’ is a policy that has never been practised before. The issue of whether Hong Kong courts have the power to examine the legislative acts of the NPC or NPCSC is a complicated constitutional question. If the discussion is based only on existing Hong Kong common law, or based on UK common law when the UK has no written constitution or any system of constitutional judicial review, or if it is based on Chinese constitutional law theory, it is impossible to reach any conclusion. In order to resolve this problem, it is proposed to look at the Chinese constitutional structure and the legal structure under the Basic Law, and at the same time to take into consideration, at a certain level, constitutional structure and constitutional theory in other countries. Four key issues stand out, which are addressed below.

First, in China under the existing constitutional structure, the NPC is the highest authority of the state. However, this kind of constitutional system is essentially political, determined by the nature of a socialist country.<sup>22</sup> According to the principle of ‘one country, two systems’, this political system is not applicable to the HKSAR. However, according to Chinese Constitutional Law, the NPC is not only the highest

authority, but also the national legislature. As the highest legislature, however, it is possible to discuss the theoretical and practical issue of whether the legislative conduct of the NPC and the NPCSC complies with Chinese Constitutional Law and other constitutional documents. Also, according to Articles 62 and 67, there should be some system to supervise the implementation of the Constitutional Law.<sup>23</sup> This indicates that under the current Chinese constitutional structure, it is possible for the legislative conduct of the NPC and the NPCSC to be the subject matter of constitutional judicial review or supervision within China.

Second, under the current Chinese constitutional system, even though there exists a limited judicial review system, there exists no judicial review system to check on unconstitutional legislation. In line with Articles 2, 19, 80 and 84 of the Basic Law, the HKSAR has a high degree of autonomy and enjoys an independent power of adjudication and final adjudication. The Hong Kong courts can refer to precedents from other jurisdictions when they adjudicate cases. Even though Hong Kong is part of China, it has its own independent legal jurisdiction based on the different legal systems. Taking into consideration Hong Kong's common law system before handover and the legal tradition in other common law jurisdictions, it is not difficult to say that the Hong Kong courts have the power of constitutional judicial review.

Third, after the handover, Hong Kong became a local administrative district that 'comes directly under the Central People's Government'.<sup>24</sup> Because it has its own legal system, the Hong Kong courts may not necessarily be local courts of China. Otherwise, Hong Kong would not be allowed to maintain its own legal system, judicial system and the independent power of adjudication and final adjudication.<sup>25</sup>

However, from the viewpoint of the source of power within the constitutional structure, we should not overlook the relationship between the NPC and the Hong Kong courts. The power of the latter is given by the NPC. This relationship further indicates that on the one hand, the Chief Executive of the HKSAR has the power to appoint judges in line with the Basic Law.<sup>26</sup> Furthermore, when appointing or dismissing judges to the CFA and the chief judge of the High Court, the Chief Executive should obtain the consent of the Legislature and report to the NPCSC for recording purposes.<sup>27</sup> The power to appoint the Chief Executive belongs to the Central Government.<sup>28</sup> On the other hand, in line with the existing Chinese constitutional system, the Central Government is created by the NPC and should be responsible to and supervised by the NPC.<sup>29</sup> At the same time, if the NPC is not in session, the Central Government should be responsible to and report to the NPCSC.<sup>30</sup>

For these reasons, the Hong Kong courts should not have the power to be above the NPC and the NPCSC, for they could only be treated as local courts of China. This relationship does not mean that the Hong Kong courts should not have power to examine the legislative conduct of the NPC and the NPCSC. Within the current Chinese legal field, there is a broad misunderstanding of foreign constitutional law. People erroneously believe that only the highest court, not a local court, has the power of constitutional judicial review. In fact, in the USA the US Supreme Court, together with Federal District Courts, has the power to examine legislative

Acts of Congress. Japan is a unified country, and basically copies US constitutional judicial review practice. In Japan, local courts have the power to examine whether the legislation of the National Diet conflicts with Constitutional Law.<sup>31</sup>

Fourth, on the subject of constitutional judicial review, most countries provide for certain limitations when courts examine the conduct of state organs (including legislative and administrative organs). The Hong Kong courts should have the same limitations. As to the details of such limitations, there is a need to wait for more research and practice. Here, we put forward only two important limitations.

#### *The act of state*

Article 19(3) of the Basic Law states very clearly that the Hong Kong courts shall have no jurisdiction to examine acts of state concerning matters such as national defence and foreign affairs. This constitutes a first important limitation to the power of constitutional jurisdiction exercised by the Hong Kong courts. This was also recognized by the CFA in the *Ng Ka Ling* case.<sup>32</sup>

Certainly the term 'act of state' is a controversial concept. In different countries, the term has been used differently. For example, in the UK the term 'act of state' is used in a legal way, while in the USA an 'act of state' would be seen as a political matter. In Germany the term is *Regierungsakt*, and the concept is similar in Japan.<sup>33</sup> In China, the concept of act of state (*Guojia Xingwei*) is an imported term. It was first used when China promulgated the Administrative Procedure Law in April 1989.<sup>34</sup> Since Chinese scholars cannot presently give a clear definition of the act of state, it will be important to define this term in the near future. Furthermore, it is worth noting that Article 19(3) of the Basic Law in fact does not completely exclude the possibility for Hong Kong courts to consider acts of state when they adjudicate cases.<sup>35</sup> This leaves a subtle space to the Hong Kong courts to examine cases that contain issues of acts of state. While we believe, therefore, that Article 19(3) of the Basic Law does not give the Hong Kong courts the power to review the legality of acts of state (i.e. whether acts of state comply with the Basic Law) since acts of state are not the subject matter of constitutional judicial review, the Hong Kong courts could consider whether there exist such acts of state.

#### *The limited power to interpret the Basic Law*

The power of constitutional judicial review is closely related to the power of interpretation of constitutional documents. When Hong Kong courts exercise the power of constitutional judicial review, they must interpret the Basic Law. However, in line with Article 158 of the Basic Law, there should be certain limits when they interpret the Basic Law. Generally speaking, Hong Kong courts can interpret on their own the provisions of the Basic Law which are within the autonomy of the Region.<sup>36</sup> They can also interpret other provisions which are outside the autonomy of the Region. These provisions concern affairs which are the responsibility of the Central People's Government, or concern the relationship between the Central Authorities and the Region.<sup>37</sup> However, in the latter situation, if such an interpre-



tation will affect judgements on cases, the courts of the Region shall, before making their final judgements, which cannot be appealed, seek an interpretation of the relevant provisions from the NPCSC through the CFA. Furthermore, when the NPCSC makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the NPCSC.<sup>38</sup> Thus, the power of constitutional judicial review exercised by the Hong Kong courts, in some situations, will be limited and bounded by the interpretation of the Basic Law by the NPCSC.

Article 158(1) states, ‘the power of interpretation of the Basic Law shall be vested in the NPCSC’. This provision is generally deemed a provision of principle.<sup>39</sup> This provision raises a question: if the NPCSC interprets provisions which are related to affairs within the autonomy of the Region, should the Hong Kong courts treat this conduct as the subject-matter of constitutional judicial review? This problem needs further research. In our view, if the Hong Kong courts do so, there could be a situation where the NPCSC and the Hong Kong courts give conflicting interpretations of the very same provision. Between these two interpretations, which one should prevail? This raises another issue: between the NPCSC and the Hong Kong courts, how is power allocated to interpret the Basic Law? In order to answer this question, there is a need to interpret Article 158 itself. According to Article 158(3), the power of constitutional judicial review exercised by the Hong Kong courts will be limited by the interpretation of the NPCSC. Logically speaking, there is no sufficient legal basis for the Hong Kong courts to treat an interpretation of the NPCSC (concerning provisions relating to affairs within the autonomy of the Region) as the subject matter of constitutional judicial review.

In addition, in line with Article 67(1) and (4), the NPCSC has the power to interpret not only the Chinese Constitutional Law, but also the general laws. However, it is reasonable to infer that the Hong Kong courts could exercise the power of constitutional judicial review if they need to decide whether the interpretations of the Constitutional Law and other general laws given by the NPC and the NPCSC conflict with the Basic Law.

### ***Approaches to deciding constitutional violation***

It is almost a commonplace that there are three approaches to constitutional judicial review. The first is the American style – concrete judicial review. The second is the German style – abstract judicial review. The third is the French style. In practice, only the first two styles have a substantial nature.

American-style judicial review refers to a situation where, when a court adjudicates a concrete case, it will also examine whether the law applied in the case complies with the constitution. The judgement on the constitutional issue is applicable only to the case adjudicated. This is usually called ‘individual effect’. Even though the judgement itself will bind the lower courts and will be respected by other state organs such as the legislature, the court will not directly make an announcement to abolish the whole law or part of law that violates the constitution. Only the legislature can decide whether to amend it or abolish it later on.<sup>40</sup>

The German style is quite different. In order to exercise constitutional judicial review, the constitutional court has been established to examine whether a particular law conflicts with the Constitutional Law of Germany. Its judgement has a general effect on that particular law.

Constitutional judicial review in Hong Kong is accomplished through the judicial review that is a part of the common law system. The review itself obviously takes the manner of concrete and collateral review. From a comparative law viewpoint, the Hong Kong courts should adopt the method of individual effect to conduct a constitutional judicial review.

It is worth considering whether the Hong Kong courts have adopted a proper view in their judgement that a particular law conflicts with constitutional documents. In the *Ng Ka Ling* case, the CFA showed its clear attitude by announcing that many provisions of the Immigration Ordinance or Rules were invalid and, furthermore, that those provisions should be taken out from the Ordinance or Rules.<sup>41</sup> Having done that, the Hong Kong courts deviated from their common law tradition and effectively adopted the German pattern to give a general effect to their judgement.

The American and the German styles of constitutional judicial review are based on different operational methods and internal natures. Theoretically speaking, concrete review is accomplished through the examination of a concrete case. Thus, the effect of the judgement will be to have individual effect, i.e. the judgement affects only the particular law within a case. In other words, the law itself is still valid until it is repealed by the legislature. Contrarily, if the German abstract examination method is followed, the judgement has a general effect towards a particular law, i.e. the courts through their judgements invalidate a particular law; this will possibly lead to a situation of 'abusing judicial power' or 'judicial arbitrariness'.

It is more important to note that, in the *Ng Ka Ling* case, the CFA took the opportunity to state clearly that the Hong Kong courts have the power to examine whether the legislative acts of the NPC and the NPCSC comply with the Basic Law. It continued

what has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People's Congress or its Standing Committee (which we shall refer to simply as 'acts') are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found. It is right that we should take this opportunity of stating so unequivocally.<sup>42</sup>

From the viewpoint of the mainland, this may lead to the possibility that the Hong Kong courts exercise their judicial power to interfere excessively with the legislative power of the NPC and the NPCSC. This may cause a serious encroachment on Chinese laws. This may be the real reason why the four famous legal scholars strongly opposed and criticized the judgement of the CFA.<sup>43</sup>

***Residual problems***

Through this analysis, it is not difficult to see that the Hong Kong courts, since the handover, have been trying to establish a system of constitutional judicial review, which would have great significance in a modern society with the rule of law through the traditional judicial review system. This is also very significant in terms of securing the implementation of the Basic Law, maintaining the constitutional government structure in Hong Kong, protecting the basic rights of Hong Kong residents and establishing the new legal order under the Basic Law.

However, since the traditional British common law has no constitutional law in its written form, and has no actual system of constitutional judicial review, it is somewhat difficult for Hong Kong courts to establish the system of constitutional judicial review through their traditional judicial review mechanism. This is because it is very hard to find much experience from its judicial practice.

For these reasons, we believe that the following three issues deserve attention if the Hong Kong courts want to operate an effective system of constitutional judicial review.

*The normative basis of constitutional judicial review*

Before the handover, the Letters Patent and the Royal Instructions,<sup>44</sup> the Hong Kong Ordinance of Human Rights (HKOHR) and the ICCPR constituted the normative basis for the Hong Kong courts to exercise constitutional judicial review.<sup>45</sup> This normative basis has influenced the activities of constitutional judicial review since the handover. In February 1997, the NPC adopted the Decisions on Handling the Original Laws of Hong Kong in accordance with Article 165 of the Basic Law,<sup>46</sup> and – in relation to the HKOHR – announced that Article 2(3) concerning the interpretation and purpose of application, Article 3 concerning the influence of previous ordinances and Article 4 concerning the interpretation of the ordinances thereafter, are in contradiction with the Basic Law. Therefore, the HKOHR is not adopted as the law of Hong Kong and is no longer the normative basis for Hong Kong courts to exercise constitutional judicial review.

In spite of this, many judges are used to treating the ICCPR as the normative basis when they exercise constitutional judicial review. The most typical case can be seen in April 1999 when the Court of Appeal gave its judgement regarding a national flag desecration case. In its judgement, the Court held that some provisions of the Ordinance on the National Flag and National Emblem (ONFNE) limited freedom of speech, therefore violated Article 39 of the Basic Law and Article 19 of the ICCPR, and were invalid.<sup>47</sup>

Article 39 of the Basic Law states that the provisions of the ICCPR and other international covenants as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. The language clearly indicates that Article 39 is not a substantial law to protect human rights; rather, the protection of human rights shall be achieved through other provisions of the Basic Law or the concrete laws adopted by the legislature in Hong Kong. The judge, however, actually treated Article 19 of the ICCPR as a substantial law to examine the

ONFNE. This indicates that the judgement in fact deviated from the provisions of the Basic Law that are more substantial, and failed to use a direct provision as the legal basis.<sup>48</sup>

This leads to two other points. The first is that, in line with the Hong Kong common law and Article 39 of the Basic Law, the ICCPR originally applied to Hong Kong indirectly. In other words, the application of the ICCPR in Hong Kong must be achieved through the Basic Law or other laws of Hong Kong. The Court of Appeal, however, violated the Basic Law by applying the ICCPR directly.

The second point is that the consequence of this direct application is that it inevitably ignores the Basic Law and other Hong Kong laws, and therefore renders meaningless the substantive law concerning protection of human rights. The same conclusion will be reached if we look at this issue based on the spirit of Western constitutionalism and the principle of rule of law.

The Basic Law is the legal document that has the nature of a constitution. When a judge exercises the power of constitutional judicial review in order to see whether a particular law violates the Basic Law, he or she must logically apply the most proper provisions of the Basic Law and treat them as the normative basis for a judgement. In the case of *HKSAR v. Ng Kung Siu and Another*, the Court of Appeal could have used Article 27 of the Basic Law as the direct legal support to examine the propriety of the ONFNE. Certainly, the Court could absorb the relevant spirit and legal theory of the ICCPR and the HKOHR by interpreting the relevant idea of freedom of speech within Article 27. Only by doing so could the Court successfully indicate the normative basis of its constitutional judicial review, and develop and enrich the contents of relevant provisions of the Basic Law.

#### *The establishment of theory and practice for a system of constitutional judicial review*

Since the Hong Kong courts cannot find much practical experience of constitutional judicial review within the original common law, it is recommended that they learn from or copy the system of constitutional judicial review from another common law country, the USA.<sup>49</sup>

However, the Basic Law must be the normative basis for the Hong Kong courts to exercise constitutional judicial review. Any interpretation of the Basic Law should be based on the recognition of and respect for the values, systems and integrity that are associated with the two legal systems.<sup>50</sup> It will be a major project for the Hong Kong judges and other professionals to know and understand Chinese laws, especially the theory and practice of Chinese Constitutional Law.

#### *Judicial activism*

Courts may exercise the power of constitutional judicial review in two different ways. The first is judicial activism, when courts will take the initiative to examine the constitutionality of a legal document (the first level), and then actively decide whether the legal document is unconstitutional (the second level). The second is

judicial self-restraint, when courts will not take the initiative to examine the constitutionality of a legal document or, even though the first level has been reached, they will be reluctant to decide the unconstitutionality of the legal document. So far, Hong Kong courts have tended to judicial activism in exercising the power of constitutional judicial review.

In recent times, judicial activism has in many countries served to check the executive/administrative power in order to maintain the checks and balances of constitutional government. In Hong Kong, in line with the preordained constitutional government structure under the Basic Law, the power of the legislature has been improved. There is, however, still the structure under which the executive takes the leading role. In the circumstances of Hong Kong, therefore, judicial activism becomes very significant.

It is equally important to note that judicial activism will inevitably involve courts in the formation of public policy. For this reason, the judiciary may well become involved in the complicated political struggles of modern life, and sometimes the independence of the judiciary will be jeopardized.

## **Conclusion**

Since the handover, the debate about the Basic Law, and especially over the right of abode case, has shown clearly that the Hong Kong legal system is not a completely self-sufficient or sealed system. Through the interpretation of the Basic Law by the NPCSC, some elements of Chinese law are able to seep into the Hong Kong common law. In some special situations, the implementation of the Basic Law in Hong Kong relies on the operation of the Chinese legal system (for example, legislative interpretation by the NPCSC). In fact, this indicates that the Hong Kong legal system has two statutory influences: one is Western common law,<sup>51</sup> the other is Chinese law. The first has existed for a long time, but the second is new and stems from the Basic Law. This gives the Hong Kong legal system a special character and a chance to attain a new vitality. Since the two different legal systems come together within the Hong Kong legal system, there will inevitably be situations where the two legal systems collide and confront each other. This may be the real issue behind the debate about the Basic Law.

## **Notes**

- 1 This is actually a 'fictions norm', a term used by Hans Kelsen when he tried to offer a basis of a concept called proper positive norm from the sense of regulatory logic. It is not intended to describe the positive norms created through legislation. It is a concept that is presumed based on an idea that 'because it is proper, it is proper' which belongs to the pure interpretation of legal norms. Later, Hans Kelsen, based on his own theory of different levels of legal norms, pointed out that a constitution is a fundamental or basic norm within the order of state laws. Hans Kelsen 1949, pp. 115–16.
- 2 See the term 'constitutional disputes' in Takeuchi, Machuo and Shiono 1990, p. 376.
- 3 See Xiao Weiyun 1990, pp. 109–10.

- 4 A similar debate could be found in the USA when the Supreme Court of the USA decided the case of *Roe v. Wade* in 1973. See Fang Liufang, 'Issues of legal interpretation in the case of *Roe v. Wade*, (Luoyi Panli Zhong de Falu Jieshi Wenti) in Liang Zhiping 1998, p. 269.
- 5 In the mainland, the term 'judicial review' (sifa fuhe) has also been used. Examples can be seen in Dong Likun, Liu Xiaolin, Zeng Hongwen and Li Wei 1992, starting p. 122. In addition, for the relationship between judicial review and constitutional judicial review, see Chen Hongyi and Chen Wenmin 1999, pp. 117–20.
- 6 It should be noted that the Court of Final Appeal (CFA) has used the term 'constitutional jurisdiction' in the case of *Ng Ka Ling and Others v. Director of Immigration* [1999] 1 HKC 291 (hereinafter Ng Ka Ling case). Later on, the CFA use another term called 'the power of judicial jurisdiction under the constitution' in order to say that the Basic Law is the Constitution of Hong Kong and is equal to the constitutions in other countries. Therefore, the use of term is controversial.
- 7 Not many scholars in Hong Kong hold this view. See, for example, Mo Shijian, 'Civil law ideas overturn common law ideas', *The Economic Daily* (Hong Kong), 27 May 1999.
- 8 It is worth mentioning that in Japan, the American type of constitutional judicial review system has been adopted. Most scholars also refer to 'constitutional judicial review' as 'constitutional litigation' which is popular in countries like Germany. The authors borrow this concept and use 'the Basic Law litigation' to describe the lawsuits under the Basic Law and constitutional judicial review activities of the courts of HKSAR. In addition, the Head of the Department of Justice, Alise Leung, used the concept of 'litigation of constitutional system' which is, comparatively, more arguable than the concept of 'the Basic Law litigation'.
- 9 See Chen Hongyi 1998.
- 10 Anthony Mason, pp. 1–28.
- 11 Chen Hongyi 1998.
- 12 The Court relied on Article 19(1) and the Article 80 of the Basic Law.
- 13 *Ng Ka Ling and Others v. Director of Immigration* [1999] 1 HKC 291, 323.
- 14 Before 1 July 1997, the power of final adjudication was controlled by the Privy Council in UK. For detailed information, see Peter Wesley-Smith 1995, pp. 138–40.
- 15 The judgement did not point out which provision of the Basic Law, but the authors infer that it is Article 11.
- 16 The Basic Law, Articles 2, 19 and 85.
- 17 See [1997] 2 Hong Kong Cases 315, 351.
- 18 *Ng Ka Ling and Others v. Director of Immigration* [1999] 1 HKC 291.
- 19 The English text is available at [http://www.info.gov.hk/basic-law/english/facv\\_14\\_16\\_98.htm](http://www.info.gov.hk/basic-law/english/facv_14_16_98.htm).
- 20 In China, many constitutional scholars have misunderstood the system of constitutional judicial review in foreign countries, such as in the USA. See below.
- 21 See *The People's Daily* (China), 8 February 1999.
- 22 Xu Chongde 1996, p. 135.
- 23 However, based on the basic principle of the NPC system, the power of constitutional judicial review belongs to the NPC and the NPCSC.
- 24 The Basic Law, Article 12.
- 25 It is a misunderstanding simply to hold that Hong Kong's courts are China's local courts. Certainly, this kind of misunderstanding is based on the situation in China, where the judicial system is effectively subordinate to the system of administration. This situation has been criticized even in the mainland.
- 26 The Basic Law, Articles 88 and 89.
- 27 The Basic Law, Article 90.
- 28 The Basic Law, Article 45(1).
- 29 The Chinese Constitutional Law, Article 3(3).
- 30 The Chinese Constitutional Law, Article 92.
- 31 On Chinese misunderstanding of constitutional judicial review see, for example, Professor Xu Chongde 1996, p. 66, and *The People's Daily* (China), 8 February 1999, p. 4. On Japan, article 81 of the Japanese Constitutional Law provides that the highest court can rule whether laws, rules,

- orders, or decisions comply with the Constitutional Law. In theory and in practice in Japan, since the end of World War II, local courts on different levels are deemed to have this power in line with the internal requirement of the judicial review system American style.
- 32 *Ng Ka Ling and Others v. Director of Immigration* [1999] 1 HKC 291.
- 33 For comparative research on the act of state, see Hu Jinguang 1998, p. 57.
- 34 Article 12 of the Administrative Procedure Law states that the people's courts at different levels cannot adjudicate the act of state, such as defence or foreign affairs.
- 35 Article 19(3) of the Basic Law provides, 'the courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defense and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government'.
- 36 The Basic Law, Article 158(2).
- 37 The Basic Law, Article 158(3).
- 38 The Basic Law, Article 158(3).
- 39 This point will be further discussed later in the chapter.
- 40 In *Marbury v. Madison*, 5 US. (1 Cranch) 137 (1803), the Chief Justice Marshall pointed out that the legislative conduct should be void if it conflicts with the Constitution. Until 1930, there were two opposite theories in the USA. One was the general effect of the judgement; the other was the individual effect of the judgement. The theory of general effect was predominant at first, but was replaced by the theory of individual effect.
- 41 *Ng Ka Ling and Others v. Director of Immigration* [1999] 1 HKC 291.
- 42 *Ng Ka Ling and Others v. Director of Immigration* [1999] I HKC 291.
- 43 The four famous scholars believe that the CFA is trying to place itself above the NPC and the NPCSC. Professor Shao Tianren pointed out: 'The judgement of the CFA tries to convince people of the theory that the power of the CFA is from sovereignty and thus it can announce the nullity of legislative conduct of the highest authority. The CAP is trying to turn Hong Kong into an independent political body.' He also points out that this is actually a ridiculous theory. See *The People's Daily* (China), 8 February 1999, p. 4.
- 44 'The Queen, in exercise of her prerogative, has promulgated two documents which together set up the institutions of government in Hong Kong and endow them with certain rights, duties and powers.' For detailed information, see Peter Wesley-Smith 1995, pp. 42–6.
- 45 For detailed information, see Chen Hongyi, note 9.
- 46 *Guanyu Genju Zhonghuarenmingongheguo Xianggang Tebiexingzhengqu Jibenfa di 160 tiao Chuli Xianggang Yuanyou Falu de Jueding*.
- 47 *HKSAR v. Ng King Siu and Another* [1999] HKC 783.
- 48 For example, Article 27 of the Basic Law.
- 49 Courts in many countries have actively absorbed the theory and practice of constitutional judicial review from the USA. Since World War II, Japan, Australia, Canada, India, Nigeria and the Philippines have been influenced in this way by American practice. See Chester James Antieau 1982, pp. 127–8.
- 50 See Peter Wesley-Smith's article, 'It is applicable to ask for interpretation by the NPCSC', in *Mingpao* (Hong Kong), 17 May 1999, the Forum edition.
- 51 The Hong Kong legal system has long followed the tradition of British common law. The mode of expression is also imported from the UK. The Basic Law maintains and even expands the scope for this influence. Article 84 of the Basic Law states that the courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions. Here, 'other common law jurisdictions' refers to, in addition to the UK, the USA, Australia and other common law countries.

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**Part IV**

# **Journalism and the media**



# 12 Hong Kong press freedom in transition

*Heike Holbig*

## **Introduction**

In an ideal system of democracy, public opinion is often assigned the role of ‘watchdog’. Manifesting itself through a free press, public opinion keeps a constant watch on government, serving as a corrective to abuse of state power, and safeguarding the rights of the individual. Again in an ideal world, the press may be seen to serve as a mirror for society, enabling it to reflect upon itself. The ‘public’ (in the sense meant by Habermas) becomes a relevant, or even critical, entity only by relying on the press as a foil. To understand the process of transition in press freedom in Hong Kong since the handover, it seems helpful to highlight the role of public opinion and the press in Hong Kong against their role in the People’s Republic of China (PRC).

When the Communist Party came to power in China, public opinion was subjected to the Party’s propaganda line. Following the Soviet model, the media were expected to work as ‘cogs and screws’ in the Party’s revolutionary machine. The press was, at least nominally, assigned the role of watchdog, but this function was heavily circumscribed by the rules and limits set by the Party. In parallel with economic liberalization after 1979, observers have judged the media to have been gradually liberalized, too, with an increase in the number of print media, a broader coverage of topics and a more critical stance towards social and political problems. However, with the propaganda apparatus still defining the problems which are ‘licensed’ for public criticism, and controlling the scope and manner of the articulation of public criticism, public opinion in China remains highly constrained. As the Party is upholding its control over information and public comment, society relies on informal channels of communication, such as the oral circulation of ‘rumours’, or the clandestine import and exchange of foreign newspapers and other reports from foreign media. While these channels, at least to some degree, compensate for the lack of information in the official media, they do not allow the society to reflect upon itself. Public opinion in China thus can be said to be substantially ‘blind’.

Looking at the role of public opinion and of the press in Hong Kong during colonial times, we find a different picture. Traditionally, public opinion in Hong Kong could be said to serve to legitimize British colonial rule in the face of pressure

from China. On the one hand, in the context of rivalry between Communist and Nationalist forces after 1949, British administrators made sure they established a legal framework which prevented local media from 'rocking the boat' and provoking diplomatic confrontations with China. On the other hand, it was apparent that the British administration was sometimes extravagantly attentive to public opinion in order to fine-tune its administration and forestall popular discontent, allowing the media to play a significant, though mainly negative, watchdog role.

After 1984, when the Joint Declaration was signed, the situation changed. With the handover to Chinese rule drawing closer, public opinion became an important player. Since Hong Kong citizens were not directly involved in the Sino-British negotiations, the role of the press as a compensatory political forum was heightened. Press freedom was now regarded as valuable in itself. Press freedom was now characterized in popular myth as an attribute of the 'magnanimity of the [British] liberal-democratic tradition' (Chan and Lee 1991). This trend was reinforced by heightened attention from the international community – overseas Chinese, foreign media representatives, politicians, academics, and China watchers. In their eyes, press freedom became the litmus test for Hong Kong's autonomy after the handover. The negotiating parties, in turn, felt the pressure to live up to this ideal, and the 'battery of draconian laws' which had threatened freedom of expression until then was, at least partially, revised in the years up to 1997 (Leung 1999 gives a detailed list of the legal changes before the handover).

Hong Kong's press clearly continued to play a watchdog role during the years prior to the handover, barking loudly both at the Chinese and British negotiating teams. At the same time, the press began to act as a mirror, reflecting public opinion. The Hong Kong public found itself confronted by heightened attention from local and international observers, who regarded a free press as a crucial factor in Hong Kong's continued democracy and autonomy.

Since the handover, the Hong Kong media have been monitored closely by local and foreign observers. The development of press freedom has been measured against legal provisions and economic pressure as well as the personal and institutional intimidation of journalists and editors, with optimistic and pessimistic accounts balancing each other. It may be more revealing, however, to trace the role of the Hong Kong media as a mirror. In particular, the question arises of whether, during the process of transition from British colony to Special Administrative Region (SAR) of the PRC, the media have been able to consolidate or even advance their role as a 'mirror' of public opinion or whether, under the impact of the Communist Party's monopoly on information and public articulation, they have gradually been 'blinded'.

In order to consider this, this chapter will look at the discourse on press freedom itself as a clue to the self-perception of public opinion and its change over time. It will highlight three debates on press freedom which have been carried on by the Hong Kong media since 1997, selected by their prominence in media coverage. The debate about self-censorship, the debate over Radio Television Hong Kong (RTHK) editorial independence, and the debate on the subject of media ethics, will be analyzed with regard to the participants and arguments presented, the scope of

the controversy, and the conclusions to be drawn for Hong Kong's press freedom and autonomy as a whole. The paper does not aim to present a comprehensive analysis of the media's coverage during the whole period, but rather attempts to catch some of the crucial moments of the transition process.

### **The debate about self-censorship**

The topic of self-censorship by the Hong Kong media was discussed long before the handover, at least since the early 1990s. In their classic book *Mass Media and Political Transition*, published in 1991, Joseph Man Chan and Chin-chuan Lee found that following the cooling of the passions surrounding the Tiananmen crackdown, political activists and the press at large came under increasing public pressure to refrain from agitating against China and gradually to reach an accommodation with the future master. 'Anticipatory fear of the Chinese and, to a lesser degree, the colonial regime taking offence at their criticism and punishing them now or later' were seen as inspiring a growing degree of self-censorship among the Hong Kong media. A survey based on interviews with journalists from various media organizations conducted by the authors in 1990 revealed 'that self-censorship has haunted Hong Kong journalists'. When asked to evaluate the statement 'most journalists are apprehensive about criticizing the Chinese government now', 51 per cent of the interviewees agreed. Interestingly, the number of positive answers shrank by half when the interviewees were asked whether they themselves were apprehensive about criticizing the Chinese government (Chan and Lee 1991).

This finding points to a characteristic of the debate about self-censorship which has been confirmed by similar surveys conducted in later years. On the one hand, when journalists were asked whether they themselves hesitated to criticize China, only a few would agree, and the numbers were even lower when they were asked whether they had actually experienced political pressure from the Chinese government to change news treatment (HKJA 1997). On the other hand, the public suspicion that self-censorship had affected Hong Kong's media grew steadily during those years. According to polls held in 1994–95, nearly two-thirds of the Hong Kong public thought that most journalists had become increasingly apprehensive in their work (summary of findings in Knight 1997).

The suspicion of self-censorship was aggravated by the echo it found in international circles. The imminent threats to press freedom in Hong Kong posed by future Chinese rule and the increasing indications of self-censorship were discussed widely by foreign experts and international newspapers alike (Bonnin 1995);<sup>1</sup> the website *Dateline Hong Kong* edited by Alan Knight of the Hong Kong Foreign Correspondents Club in early 1997 became a lively forum for debating the degree of self-censorship in Hong Kong (Knight 1997). A pattern of argumentation was established which held that it was mainly the Chinese language press which was showing increasing signs of accommodation towards China – by cutting out politically sensitive topics, shifting critical opinions from front to back pages, or by choosing politically correct rhetoric. The English language press, on the contrary,

was found to have remained quite forthright in its news coverage and largely unaffected by self-censorship (Bonnin 1995; Cullen 1997; *CMA* 1–15 August 1998).

In an interview three weeks before the handover, Jonathan Fenby, editor of the *South China Morning Post* (*SCMP*), the leader among Hong Kong's English language dailies, asserted that self-censorship was not present in his paper.

This whole self-censorship thing, I understand it entirely as a journalist. Bring in the term 'censorship' and you have a nice sexy word. ... I would say that we are either applying self-censorship or applying political bias. ... The paper has a responsibility to be accurate and reflect different points of view. That is not self-censorship.

(Fenby 1997)

For many Chinese-language papers too, for example the *Apple Daily* (*Ping Kuo Jih Pao*) launched in 1995, distancing the paper from the omnipresent suspicion of self-censorship seemed to have become part of the daily newspaper business. Demonstrating to the readership that one's own newspaper continued to have editorial independence and credibility thus became a crucial market sales strategy. While Chinese language publications were found to be under more intense pressure and therefore were more ready to make concessions to Hong Kong's future rulers, the English language press, claiming the attention of an international audience, had a much easier time rejecting the suspicion of self-censorship.

The climax of the debate was reached in June 1997 when the Hong Kong Journalists Association and ARTICLE 19, the International Centre Against Censorship based in London, jointly published their annual report on freedom of expression in Hong Kong. Whereas in past reports the authors had simply documented individual cases in order to illustrate what they saw as a steady rise in self-censorship, in the year of the handover they aimed at elaborating a systematic framework to 'identify, label and examine the tools of informal repression by which China seeks to exert pressure on the media, and which are designed to induce self-censorship' (HKJA and ARTICLE 19 1997). For the first time, they gave a formal definition of the term self-censorship, which they described as

the action of individuals or organizations, whether deliberate or routinised and subconscious, in moderating or altering or stifling the expression of their views or the disclosure of information because of a fear – whether real or perceived – of repercussions by China and its various agents and authorities.

(HKJA and ARTICLE 19 1997)

Using this wide definition, the report identified three broad categories of self-censorship, each of which comprised particular forms of repression. These are summarized in Table 12.1.

For each of the forms listed, the report gave individual examples from past experience, although, as the authors admitted, it was difficult to provide irrefutable evidence for this 'inherently secretive, deceitful, shameful and sometimes oblivious

Table 12.1 Forms of self-censorship of the media as found by the Hong Kong Journalists Association on the eve of the handover

<i>Category one: direct and indirect external pressures on media organisations</i>	
Direct threats	Rare, danger of backfiring if publicly exposed
Direct commercial pressures	Channelling advertisement income to China-friendly media, blacklisting anti-China media
Indirect pressure on business	Exerting pressure on media owners with business interests in China, especially on those with a diverse range of business interests
Other indirect pressures: sticks and carrots	Discretionary handling of access to information for mainland news coverage
<i>Category two: pressure within media organisations</i>	
Direct intervention by non-editorial staff	Media owners and senior management staff acting as the 'real censors'
Dissemination of written guidelines	Guidelines for the coverage of sensitive issues; rare, danger of leaking, loss of credibility
Removal of high-risk contributors	Axing critical columnists, dropping critical columns
<i>Category three: Individual self-censorship</i>	
Assimilation of self-censorship	Accommodating behaviour, especially of mainland correspondents, encouraged by fear of arrest
Opting out	Leaving the profession, 'terminal stage of self-censorship'

Source: Summary of HKJA 1997, pp.50–7.

and unintentional' phenomenon (HKJA and ARTICLE 19 1997). Impressive as the long list is, most of the cases listed give anecdotal evidence at best, making it hard for the reader to discern suspicion from fact. Although the conceptual framework of self-censorship established here presents a detailed projection of the possible mechanisms involved, it seems to fall short of providing unequivocal evidence of this phenomenon. Also, the question of blame arises, just as in corruption, when it is hard to know whether the alleged fault lies with the repressor (the one who bribes) or with the repressed (the one who takes the bribe). Another problem is that 'soft' politico-psychological motives for self-censorship are mixed up with 'hard' economic interests, thus interweaving subtle political manoeuvres and business instincts into a single pattern of media behaviour. As the above-mentioned cases of the *South China Morning Post* and *Apple Daily* suggest, economic pressure caused some publishers to distance themselves resolutely from suspicion of self-censorship as a means, among others, of boosting sales in a difficult market.

Not surprisingly, the debate about self-censorship faded immediately after the handover. While the next Hong Kong Journalists Association's annual report published a year later still included a section on self-censorship, stating that it 'has not miraculously disappeared [yet] seems to have abated a little' (HKJA and ARTICLE 19 1998), the annual report for the year 1999 simply states that 'self-



ensorship is still a threat to media freedom, but probably no more than we reported in our 1998 publication' (HKJA and ARTICLE 19 1999). Those who had expressed the fear of a dramatic erosion of Hong Kong press freedom are happy – though they also seem a little disappointed – to have been proven wrong. In the wake of the Asian financial crisis, political pressures have translated into economic pressures. The real concern has shifted from self-censorship to business survival.

Summing up the debate, one finds a high degree of unity among the participants. Hong Kong people and foreigners, academic experts, media representatives and the general public alike have agreed that self-censorship was an omnipresent threat for the Hong Kong media. Yet a significant thread of schizophrenia seems to have run through the whole debate. Self-censorship was what one perceived of others, but not of oneself. In the end, the participants seemed glad to leave the psychological convulsions of self-censorship behind them and return to the realities of daily business.

### **The debate about RTHK editorial independence**

The Hong Kong media found itself in a strange situation after the handover. While everybody held their breath in anticipation of a crackdown on press freedom, no such crackdown occurred, and the threat that Beijing would put an end to press freedom in the SAR failed to materialize. In this atmosphere, a critical remark by a member of the PRC's Chinese People's Political Consultative Conference (CPPCC), Xu Simin, on the editorial independence of Radio Television Hong Kong (RTHK) in March 1998 sparked a highly controversial debate about press freedom in Hong Kong. The six-week long debate, which involved a broad range of participants, revealed strong public support for the station's independence.

On 4 March, Xu Simin gave a speech to the CPPCC session held in Beijing, during which he criticized RTHK as a publicly-funded broadcaster which notoriously ran anti-government programmes. Describing RTHK as a 'remnant of British rule' he blamed the station for using its editorial independence as a pretext to attack the SAR government and the Chief Executive, thus misusing taxpayers' money. Xu revealed that he had complained about RTHK several times to Tung Chee-hwa and asked him to solve this problem. Tung allegedly replied with the ambiguous statement 'Slowly, slowly' (*man man lai*) and stated, 'While freedom of speech is important, expressing the government stand in a positive way is equally important' (*SCMP* 5 March 1998; *Ta Kung Pao* 5 March 1998).

It was not so much the criticism *per se* that caused a public outcry in Hong Kong – RTHK had been the object of repeated attacks before (HKJA and ARTICLE 19 1997, 1998) – but the fact that the criticism was uttered in Beijing. In the eyes of Hong Kong media representatives, Xu Simin's attack was an open invitation for China to interfere with SAR affairs and thus marked 'the beginning of the end of press freedom' in Hong Kong (RTHK 5 March 1998).

Many stood up in defence of RTHK editorial independence; first of all, among other RTHK staff, Cheung Man-ye, who had held the post of Director of Broadcasting since 1986. In various public statements, she said that she refused 'to turn

the station into a one-sided propaganda institution' for the SAR government, and would not allow RTHK's role as an independent public broadcaster to be compromised (*SCMP* 4, 20 March 1998; *Hsin Pao* 3 April 1998).

Among the Hong Kong dailies, the *South China Morning Post* proved to be the staunchest voice in defence of RTHK editorial independence. In numerous editorials, commentaries and opinion articles, the paper not only documented the ongoing debate in detail but also took an active stance in promoting the need for an independent broadcaster to serve the interests of Hong Kong's pluralistic society. While it was true that there was quite often tension between public broadcasters and the governments which channelled public money into financing them (the tensions between BBC and Whitehall were mentioned as a comparison), these strains were signs of a healthy society. Repeatedly, the paper urged the SAR government to express its unequivocal support for upholding the independence and freedom of the media in Hong Kong (*SCMP* 5–7, 9, 20, 31 March 1998).

At the same time, however, the *SCMP* provided a platform for critics of RTHK. It printed a letter to the editor which blamed RTHK for using its independence to transmit its bias against the government and to 'brainwash' the public. While this would be tolerable for private or foreign-funded agencies, the argument went, the fact that RTHK was government-funded and its staff members were civil servants obliged the broadcaster to remain politically unbiased. Of course, the *SCMP* was careful to balance this view by printing another letter asserting that tourism had slumped because of fears abroad about Hong Kong's stability and warning that 'if Hong Kong cannot accept a variety of voices, this is a step backward' (*SCMP* 9 March 1998).

Less outspoken than the English language daily, yet also presenting a broad range of views, was the Chinese-language press. *The Hong Kong Economic Journal* (*Hsin Pao*), the *Sing Tao Daily* (*Sing Tao Jih Pao*) and the market leader *Apple Daily* (*Ping Kuo Jih Pao*) cited proponents of RTHK editorial independence alongside more critical voices. They typically followed a more 'balanced', differentiated style of argumentation. For example, they would acknowledge that Xu Simin, too, enjoyed freedom of expression and therefore was free to voice his criticisms, but suggested that his stance did not reflect the government position. In general, the balance between 'pros and cons' in these papers seemed clearly tilted towards supporting RTHK editorial independence in particular and Hong Kong press freedom in general (*Hsin Pao* 5–7 March and 3 April 1998; *Sing Tao Jih Pao* 6 March 1998; *Ping Kuo Jih Pao* 7 March 1998).

As was to be expected, the two left-wing Hong Kong newspapers, *Wen Wei Pao* and *Ta Kung Pao*, expressed a different attitude. Not only did they hesitate to participate in the debate, but when they did later on, they confined themselves to repeating Xu Simin's attack in a fiercer tone. Thus, *Wen Wei Pao* in late March and early April lashed out twice at RTHK, attacking it as biased in favour of the Democratic Party while not giving sufficient airtime to other political parties, let alone the government. RTHK was also ridiculed as being 'the mouthpiece of BBC', and for not realizing that the days of colonial rule were over (*Ta Kung Pao* 5 March 1998; *Wen Wei Pao* 26 March and 8 April 1998).

Other participants involved in the debate were the various journalist associations, among them the Hong Kong Journalists Association, which petitioned Tung Chee-hwa to take a clear and positive stance on the issue of press freedom. The Foreign Correspondents Club expressed its concern about RTHK editorial independence which it saw as a 'litmus test for Hong Kong's future'. Members of the Legislative Council, which held its own debate on the matter in late March, as well as representatives of various political parties, trade unions and professional associations in Hong Kong, voiced their views. While some of them sided with Xu Simin's position, the majority defended the need for an independent public broadcaster (*SCMP* 4–7, 31 March 1998; RTHK 5, 8 March 1998; *Hsin Pao* 5, 6 March 1998).

Confronted with this massive public outcry, representatives of both the Hong Kong and Beijing governments felt the need to express their commitment to the cause of press freedom. While Tung Chee-hwa was still on vacation, Administrative Secretary Anson Chan explained to the public that she regretted Xu Simin's remark on RTHK because it gave a false impression of Beijing interfering with the SAR's autonomy. She indicated that Hong Kong representatives in the PRC's National People's Congress and the CPPCC had a special responsibility to uphold the principle of 'one country, two systems' and should therefore refrain from comments like this. Chan asserted that press freedom was valued and respected in the SAR community (RTHK 5 March 1998). When Tung reappeared two days later, he reinforced the view that RTHK's independence was not under threat, and expressed his hope that the broadcaster would 'continue to play the role of watchdog over government policies' (*SCMP* 7 March 1998).

Meanwhile, PRC officials too distanced themselves from Xu Simin's criticism. Li Ruihuan, head of the CPPCC, was credited with saying that discussion of Hong Kong matters in the CPPCC, if handled improperly, would undermine the implementation of the 'one country, two systems' policy; Jiang Zemin personally stated that Beijing had no intention of intervening in the SAR's affairs. The same stance, of explicit non-interference, was reiterated by representatives of the Beijing Foreign Ministry and the Xinhua branch in Hong Kong (*Hsin Pao* 6 March 1998; RTHK 9 March 1998; *SCMP* 7 March 1998; Lo 1998; HKJA and ARTICLE 19 1998).

These public commitments made by Hong Kong and PRC officials seem to reveal a clear determination by the Chinese as well as the SAR governments to honour Hong Kong's autonomy. While it would be unrealistic to suppose that this determination results from a sincere belief in the value of press freedom, it seems fair to suggest that the PRC has a true interest in upholding the ideal of free speech in Hong Kong. Conscious of the fact that respect for press freedom is regarded by local and international observers as a crucial test for legitimate rule in the SAR, the leadership knows that only by maintaining this image will it be able to demonstrate to Hong Kong people, to the world, and especially to Taiwan, that the 'one country, two systems' policy is functioning reasonably well. In general, this instrumental consideration seems to be one of the strongest factors in safeguarding press freedom in Hong Kong, at least as long as international attention continues to focus on this issue (Lo 1998).

Yet this optimistic interpretation has to be qualified by a postscript to the 1998 debate on RTHK independence. As if to fulfil the prophecy in Tung Chee-hwa's purported 'Slowly, slowly' comment, the RTHK Director of Broadcasting, Cheung Man-ye, was unexpectedly transferred to a post in Japan in October 1999. Although all participants, including Ms Cheung herself, were quick to assure the public that this move was in her own interest and absolutely did not reflect any political motive, it sent a shockwave through Hong Kong's media community and sparked a renewed debate on 'the beginning of the end of press freedom' (RTHK Radio 3 on 19 October 1999).<sup>2</sup> Many interpreted the transfer of Ms Cheung, who was hailed in the press as a 'spirited defender of the freedom of the airways' (*SCMP* 20 October 1999), as a punishment for her unswervingly independent stance.

In particular, Cheung's 'exile' to Japan was associated with an event in July 1999 when the RTHK gave airtime to Taiwan's unofficial representative in Hong Kong, Cheng An-kuo. In an interview with RTHK, Cheng had given an explanation of Taiwan President Lee Teng-hui's assertion a week before that Taiwan should deal with China on a 'special state-to-state' basis, an assertion which had caused a diplomatic crisis between the neighbours across the Taiwan Straits. In this tense atmosphere, the programme provoked an agitated public scolding by the Chinese government, which attacked not only Cheng An-kuo but also RTHK for disseminating 'splittism' and thus contravening Hong Kong's constitution (*SCMP* 7 August and 20 October 1999; RTHK 8 August 1999; *Ming Pao* 20 August 1999).

This official criticism recalled the instructions on this issue given repeatedly by PRC officials since 1996. In a now classic statement in autumn of that year, Lu Ping, at the time director of the Hong Kong and Macau Affairs Office in Hong Kong, warned

After 1997, it will not be possible for you to advocate two Chinas, or one China and one Taiwan, or Hong Kong independence or Taiwan independence or Tibet independence. The press will not be allowed to do so. It is different from press freedom.

(cited in HKJA and ARTICLE 19 1997)

Most recently, the continuation of this specific taboo concerning media coverage of Taiwan affairs was reconfirmed in April 2000. In the context of presidential elections in Taiwan, Wang Fengchao, deputy director of the Central Government's liaison office in Hong Kong, warned that Hong Kong media should not 'advocate Taiwanese independence or report views different from those held in Beijing on the matter'. This time, the alleged cause of the warning was an interview with Annette Lu, Taiwan's vice-president elect, which had been broadcast by Hong Kong's Cable Television (*SCMP* 13 April 2000).

Media reactions to what are widely regarded as politically motivated actions have been ambivalent. On the one hand, the Hong Kong media, especially the local English language press, have demonstrated a resolute attitude in warding off official attacks and defending press freedom. This was obvious in the case of Cheung Man-ye's transfer as well as in the case of Wang Fengchao's warning, both of

which caused storms of indignation and stimulated official declarations of belief in a free press. On the other hand, one can find evidence that most media have indeed been quite careful in their coverage of Taiwan affairs not to provoke Beijing, choosing politically correct rhetoric or subtly arranging different opinions, thus trying to give a 'balanced' view on the matter (*SCMP* 13–15, 17–19 April 2000; *Ping Kuo Jih Pao* 6 May 2000; *Hsin Pao* 20 April 2000; and see Anne Cheung's contribution to this volume).<sup>3</sup>

These reactions indicate that press freedom in Hong Kong, although flourishing in general, remains circumscribed by the specific taboo concerning coverage of Taiwan. This taboo seems to confirm what has been outlined above as Beijing's instrumental approach to press freedom in Hong Kong: paradoxically, the strategic goal of demonstrating that the 'one country, two systems' policy does work, which was found to be helpful in upholding the ideal of a free press, can only be achieved when the press refrains from speaking against this policy. Here, the 'fault line' of Hong Kong's autonomy becomes very clear. One will have to wait and see whether the future will bring more taboos of this type for Hong Kong's media.

### **The debate about media ethics**

Complaints about deteriorating professional and ethical standards in the press, especially the leading newspapers, have been heard in Hong Kong for several years. Concern about increasing sensationalism, over-emphasis of sex and crime at the expense of serious news reporting, and the media's intrusion into people's privacy has been expressed not only by the public, but also by various journalists' associations in the SAR. These developments have been attributed to the trend of over-commercialization, a problem that is said to have started with the launch of *Apple Daily* in 1995, which upset the balance of Hong Kong's media market. Price wars fought between the market leaders *Oriental Daily News*, *Apple Daily* and *The Sun* (launched in March 1999), as well as the not-to-be underestimated Asian financial crisis which has haunted Hong Kong's economy since 1997, brought the profit margins for the whole press to very low levels. These factors have caused the media to resort to sensationalism to boost their market share.

In October 1998, the *Apple Daily* published a front-page apology for the stories it had splashed about the sexual exploits of a certain Mr Chan. Public opinion polls conducted by the Hong Kong Journalists Association in late 1998 and early 1999 revealed growing public discontent with the rapid decline of media ethics. Attempting to tackle this problem, the HKJA proposed the creation of a so-called media ethics forum to act as a pressure group and centre for education on media topics. One stated goal of this proposal was to pre-empt any attempt at government interference in this area (Chan *et al.* 1996; HKJA and ARTICLE 19 1997, 1998, 1999; *SCMP* 13 October 1997 and 12, 23–24 November 1998).

In this atmosphere, a controversial debate was sparked in August 1999 when a special subcommittee on privacy set up by the SAR's Law Reform Commission presented a proposal to establish a Press Council for the Protection of Privacy. Under this proposal, privacy issues involving the media would be removed from

the jurisdiction of Hong Kong's courts and instead be placed in the hands of an independent statutory council with broad enforcement powers. These powers would include the right to draw up a Privacy Code, to receive and investigate complaints, to demand publication of apologies or retractions, and to punish breaches of the code. Also, the proposed press council would have the power to impose fines of up to HK\$1 million. According to Raymond Wacks, law professor and head of the commission that drafted the 200-page recommendation, a statutory press council 'with teeth' was needed since self-regulation by the media obviously did not work. The public was given until the end of November 1999 to comment on the proposal (*SCMP* 31 August and 3, 10–11 September 1999; *IHT* 10 September 1999; *AWSJ* 21 September 1999).

As in previous cases, the *South China Morning Post* took the lead in the debate (coverage in *SCMP* 31 August; 3, 10, 11, 20, 24–26, 30 September; 6, 13 October; 5, 18, 19, 27 November; 1, 6, 14 December 1999; 18, 28 February 2000). Among prominent figures to express a view in the paper was Legislator Margaret Ng, who protested vociferously against the establishment of what she felt would become a 'press tribunal' and an 'unmitigated disaster for Hong Kong'. Comparing the recent proposal to a similar proposal which was made in Britain in 1992, but rejected by the UK government for the reason that statutory controls might open the way to censorship of the press, she argued that the danger was even higher in Hong Kong. This was due to the fact that the democratic structures of the SAR were very fragile and there existed no effective checks and balances in the political system. Therefore, a free press was one of the few safeguards of citizens' rights and of a free Hong Kong society. The logic of the Law Reform Commission's report pitting the right to privacy against press freedom was very dangerous, she felt, as ordinary citizens' rights needed protection much more against intrusion by the government and the police. The establishment of a statutory council to control and tame the press would be all the more detrimental to the protection of individuals' rights (*SCMP* 3 September 1999).

The opposite view was presented a few days later in the same paper by Albert Cheng, a prominent talk-show host from Commercial Radio who had been seriously injured in an attack in August 1998 (*RTHK* 3, 19 August 1998). Given what he saw as an apparent deterioration of media ethics and continuous intrusions into the privacy of ordinary citizens who had no effective channel to seek legal redress, Mr Cheng – speaking of himself as a 'stern supporter of press freedom' – wrote of the need for a press council to monitor the media. While in Western democracies there was normally a clear distinction between quality papers and downmarket tabloids, allowing the reader to gain a clear idea of what to make of their respective contents, this distinction was blurred in Hong Kong as broadsheets with tabloid contents had become the mainstay of the local press. In this situation, to rely on media practitioners for self-regulation would be the same as to 'rely on pimps to clear their vice establishments, or traffickers to give up their drugs'. Instead, a press council should be established which would include members of the public, industry practitioners and opinion representatives, such as legislative councillors. The Chief Executive and his government, however, should refrain from directly

or indirectly appointing the members as envisaged by the Law Reform Commission, Cheng said (*SCMP* 11 September 1999).

In various editorials, the *SCMP* pointed to potential dangers if the Chief Executive were given the right to appoint the members of such a press council. If statutory powers were transferred to this body, it could gradually take on an active censorship role. Another commentator pondered the ‘puzzling dichotomy between the clamour for some sort of control over newspaper excesses, and the popularity of the mass-circulation press’. A real change could be expected only when the press realized that sales were falling due to declining standards of coverage (as had been the case with the British newspaper market after the death of Lady Diana) (*SCMP* 26 September and 1 December 1999; *Dongxiang* September 1999).

Confronted by the threat of the proposed press council, journalists’ associations and media organizations combined their efforts. The Hong Kong Journalists Association, the Hong Kong News Executives Association, the Hong Kong Federation of Journalists and the Hong Kong Press Photographers Association made a joint declaration opposing the establishment of a statutory press council and proposed instead to install efficient mechanisms of self-regulation. In late September the so-called Newspaper Society, including representatives of ten Hong Kong newspapers, but not of the three leading papers,<sup>4</sup> presented to the public an alternative proposal for an independent press council. The proposed body would safeguard press freedom, enhance credibility and journalistic ethics and handle privacy intrusion cases, but it would have neither a statutory framework nor the power to impose penalties (*SCMP* 24 September 1999).

This proposal seemed to find broad consent from all participants, including Tung Chee-hwa, Anson Chan and Raymond Wacks, who agreed that the establishment of a self-regulatory body would probably be the best solution and should at least be given a try. In November, the Law Reform Commission’s proposal for a press council was rejected by the Legislative Council, which found that ‘an independent press is far more important than the problem of sex and violence’ (*SCMP* 18 November 1999). Instead, the Councillors called on the press to establish an effective system of self-regulation (*SCMP* 30 September; 5, 19 November; 1 December 1999).

A new round of controversy was sparked in late November, however. With the implementation of a self-regulatory system firmly on their agenda, the various journalists’ associations which until then had acted in concert, now found themselves split over the need for a non-statutory monitoring body. While the Hong Kong Federation of Journalists and the News Executives Association clung to the proposal of the Newspaper Society, the Hong Kong Journalists Association and the Hong Kong Press Photographers Association declared that they preferred internal regulatory mechanisms for the press and would not join such a body. The Newspaper Society’s proposal was further watered down when the three leading newspapers, *Apple Daily*, *Oriental Daily News*, and *The Sun*, declared that they would not join such a body either (*SCMP* 18 and 27 November; 14 December 1999; 18 February 2000).

Following this split, some of those involved went down different roads. In June that year, the Hong Kong Journalists Association was prepared only for a ‘lowest

common denominator' compromise, presenting a common 'journalists' code of professional ethics'. A few days later, the Hong Kong News Executives Association, the Hong Kong Federation of Journalists and 11 newspapers together set up a non-statutory press council. The three market leaders, unimpressed by these actions, stood by their earlier decision not to join either of these efforts (*SCMP* 18, 28 February 2000; HKJA 1999).

Thus the public debate over media ethics has not yet come to an end and may continue well into the future. That there continues to be so much discussion on this topic with so few tangible results should not necessarily be seen as a negative sign. Rather, the ongoing debate can be seen as reflecting a substantial process of the formation of public opinion on a complex matter involving numerous legal, political and cultural aspects. Also, while earlier debates were sparked by concern that China would interfere with SAR freedoms, the debate about media ethics has for the first time focused on subject matter pertaining mainly to Hong Kong's media per se. In this sense, the public reflection of the media on dilemmas and ambivalences, and sometimes on vulgarities and trivialities, could be interpreted as a healthy sign of the press becoming more embedded in the daily life of Hong Kong society.

## **Conclusion**

This analysis of three main debates on press freedom in Hong Kong which occurred during the first three years of transition after 1997 gives reason for tempered optimism. In general, the media do not give the impression of having been 'blinded' since the handover. On the contrary, the wide range of participants and of different views involved, the quality and substance of the arguments, and the transparency and scope of the controversies have reflected an unabated culture of vibrant public debate carried on by the local media up to the present. In general, press freedom has not only been taken as constitutionally granted but has also been actively fought for through various struggles. The political self-censorship of the media, fear of which had been extremely wide-spread on the eve of the handover, has not materialized. In the wake of the Asian financial crisis, economic pressures prevailed over political pressures in shaping the behaviour of journalists and media agents.

As the most recent episode in the debate about RTHK editorial independence has shown, however, a caveat has to be made concerning the taboo surrounding advocacy of 'splittism'. While in most other fields the critical editorial stance of at least some Hong Kong newspapers has been upheld, the repeated warnings by PRC officials against disseminating views opposing the policy of 'one country, two systems' seem effectively to circumscribe press freedom, at least in some respects, in the SAR. Until now, the Chinese government has relied mainly on verbal threats and – if the mainstream interpretation of Cheung Man-ye's transfer to Japan is true – on the control of some media personnel. Should this taboo find its way into the SAR's legal framework – for example through a future amendment of the 'secession' article of the Basic Law (BL Art. 23), as many fear, – freedom of expression in Hong Kong could indeed be threatened in the longer run. It is this kind of



change to the constitutional ‘ground rules’ which seems to pose a real danger to press freedom in Hong Kong. Until now, however, China has, except for the specific taboo on the advocacy of ‘splittism’, refrained from interfering with the media’s autonomy. This attitude seems to be due to Beijing’s instrumentalist view, Beijing being eager to demonstrate that the ‘one country, two systems’ formula is indeed working in Hong Kong.

Left largely to its own devices, Hong Kong’s press can be seen to have gone some way towards emancipating itself during the three years since the handover. While in 1997 the debate over self-censorship was seen in terms of potential threats of Chinese ‘repression’, it has since increasingly been discussed in its own right, its complexity has been recognized. The shift of the media’s focus from high political discourse to more down-to-earth matters, from agitating against China to pondering the internal affairs of the SAR, which has been deplored by some as a dangerous sign of gradual ‘depoliticization’ and ‘introspection’ in the media, could equally be welcomed as a healthy sign that Hong Kong society is getting to know itself.

Yet it can be doubted whether this process would have begun without the active presence of the English language press in Hong Kong. As the various debates about press freedom have revealed, the *South China Morning Post* has played a crucial role in stimulating and leading a critical public discourse on relevant subjects. Of course, the direct impact of this English language daily on the local public should not be overestimated – traditionally, its Hong Kong readership is restricted to highly-educated members of the middle-class. The fact, however, that the paper enjoys a high international reputation and is read widely outside Hong Kong is also a factor in safeguarding press freedom in the SAR, at least as long as the PRC and Hong Kong governments feel that the image of a free press should be upheld for the sake of demonstrating the success of the ‘one country, two systems’ policy.

## Notes

- 1 International newspapers such as *AWStj*, *IHT*, and *Financial Times* carried various articles on press freedom and self-censorship of Hong Kong’s media before and after the handover.
- 2 Repercussions of the debate, which cannot be covered in detail here, were felt well into the next year, with the *South China Morning Post* again taking the most active part in defence of press freedom; see for example, *SCMP* 20–22, 24–28 October, 11 December 1999, 12 February 2000, 3 March 2000.
- 3 My thanks go to Ming K. Chan for bringing this example to my attention.
- 4 Newspapers represented are: *SCMP*, *Sing Tao Daily News*, *Hong Kong Standard*, *Tin Tin Daily News*, *Ming Pao*, *Hong Kong Daily News*, *Wen Wei Pao*, *Ta Kung Pao*, *Hong Kong Commercial Daily* and *China Daily*; not represented are *The Oriental Daily News*, *Apple Daily* and *The Sun*; cf. *SCMP* 24 September 1999.

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- Wen Wei Pao*, various.

# 13 Hong Kong press coverage of China–Taiwan cross-straits tension

*Anne S. Y. Cheung*

Notwithstanding the publicity, the formal nature and apparent legality of the PRC government's commitments to 'one country, two systems', Hong Kong remains wary. This concern is not ungrounded, for the People's Republic of China (PRC) is an authoritarian Communist regime and is known for its intolerance towards dissenting voices. One way to tell whether Beijing is respecting its commitments to the basic rights and freedoms is to see how the media in Hong Kong has been treated since transition.<sup>1</sup> Respect for or control of the press stands as a good proxy for the sincerity of the PRC government in these matters and for its tolerance for dissenting voices in Hong Kong (Oksenburg 1997, p. 93).

How much freedom has the Hong Kong press enjoyed? This may best be answered by examining how the Hong Kong media covered a taboo area, the issue of Taiwan's independence. Even before 1997, the PRC leaders reminded the Hong Kong media repeatedly not to 'advocate' the independence of Taiwan (Hong Kong Journalists Association (HKJA) 1996, 1997). However, they left the exact meaning of 'advocating' undefined.

On 7 July 1999, Lee Teng-hui, then the Republic of China's president,<sup>2</sup> announced the 'state-to-state' theory as the basis for Taipei's new policy toward the mainland, implying that Taiwan was an independent separate state. Initially, the Hong Kong media tried to cover the events within the boundaries of the ambiguous rule of 'no advocacy'. Yet conflict could not be avoided when one radio station gave airtime to Taipei's representative in Hong Kong at the end of July, during which he reiterated the view of President Lee. Quickly, the PRC in Hong Kong condemned the station.

The crisis between Beijing and Taipei mounted further in March 2000, when a candidate from the pro-independence Democratic Progressive Party won the presidential election in Taiwan. Hong Kong Cable Television interviewed Annette Lu, then Vice-President elect of the Taipei regime, and known to be a die-hard advocate of Taiwan's independence. Official criticism from the PRC followed, sparking immediate media protests in Hong Kong.

The cross-straits crisis thus exposed the fragility of Hong Kong press freedom. Significantly, it also illustrated the volatility of a situation in which ruler and subjects are in dispute over the boundaries of this freedom. Drawing on present literature on power and strategy (Schelling 1981; Hirschman 1970; Scott 1985:

Lee 2000), this chapter proposes that the fight to protect press freedom in Hong Kong is both a strategic contest and a guerrilla war. It further argues that the Hong Kong media is developing alternative voices to get across its message regardless of its apparent practice of downplaying and sidelining reportage on Taiwan issues.

### **A framework for analysis: no fixed rules and the tactic of strategic ambiguity**

In Schelling's study of conflict, he identifies a situation where the parties cannot negotiate explicitly and have to rely on a process of tacit bargaining and manoeuvre (Schelling 1981). He argues that under these conditions, the parties will watch and interpret each other's behaviour. Since each is aware that his actions are being interpreted and anticipated, each move becomes a signalling gesture to the other, and each move is a search for and contention over the rules, limits and boundaries of the game. It is exactly this position of tacit bargaining that the Hong Kong media found itself in after the transition.

The Western-trained Hong Kong press is bound to disagree with the Communist Beijing Government on the interpretation and practice of press freedom. Yet, lacking economic and political clout, it can only react with fear and condemnation. At the same time, while Beijing finds it hard to trust the 'rowdy press' (C.K. Lau 1997, p. 151) of Hong Kong, it is also eager to woo Taiwan into reunification by proving the success of the 'one country, two systems' formula (Chan 1997). Under these constraints, both sides resort to the strategy of 'calculated ambiguity',<sup>3</sup> where both will learn and contend over the boundaries governing press freedom without giving press freedom a fixed content.

Beijing would prefer the Hong Kong media to 'behave', so that it would not have to resort to high-handed measures. Before the 1997 retrocession, the PRC leaders reassured Hong Kong that it would enjoy press freedom but warned the Hong Kong media to keep clear of the 'three nos' zone.<sup>4</sup> One of these is that the media should not 'advocate' the independence of Taiwan or the 'two Chinas' policy.<sup>5</sup> However, the distinction between 'advocating' and 'objective reporting' was left deliberately unclear by Beijing.

The matter is further complicated by legal regulation. Article 23 of the Basic Law stipulates that the Hong Kong SAR shall enact laws on its own to prohibit any act of secession and subversion against the Central People's Government. The difficulty is that these are alien concepts to Hong Kong's common law system.<sup>6</sup> Though the Hong Kong SAR legislature has not enacted law in this area, journalists are worried that their daily duty of reporting might be considered to be subversion of the PRC government (HKJA 1995–2000).

Political decrees from Beijing and the uncertainty over legal sanctions against the press triggered a gradual shift of journalistic practices as Hong Kong entered China's orbit (Chan and Lee 1991). One obvious consequence was the dwindling of the pro-Kuomintang press in Hong Kong. In colonial days, the Hong Kong press was characterized as a typical model of 'party–press parallelism' (Chan and

Lee 1991, p.10), where newspapers fell neatly into the categories of pro-Communist, pro-Kuomintang or neutral. However, as 1997 approached, there was a narrowing of the perceptible ideological spectrum (Chan *et al.* 1998). The growing encroachment of pro-Beijing forces and heightened sensitivity about the political situation led most pro-Taiwan media either to close or to switch allegiance.<sup>7</sup>

The Hong Kong press was left with no option but to develop its own *modus vivendi* for survival. One phenomenon that is believed to have been prevalent in the transition period is the practice of self-censorship, an anticipatory mechanism to avoid punishment or to curry favour (Lee *et al.* 1998, p. 5). Statistical surveys reveal that 20 per cent of Hong Kong journalists admitted that they practised self-censorship because of concern about Beijing's reaction, while 50 per cent perceived that their colleagues did so (Lee *et al.* 1998). Perhaps this is understandable since the Hong Kong media is not in a position to negotiate. It naturally seeks to minimize the chances of direct and symbolic confrontation with authority. As Cohen said, 'self-imposed restraints are to be preferred to constraints imposed by others' (1963, p. 15). More important for the present discussion, self-censorship may be more than a defensive mechanism for press survival. By limiting its voice, the press may have gained breathing space for others to speak.

Much has been written on how the weak can survive in a situation of marked inequality of bargaining power. Hirschman (1970), in his study of the powerless in a captive condition, concludes that one effective way is to alternate the use of voices and silences. Scott, in his study of the 'weapons of the weak' (1985, xvi), observes that the suppressed will take advantage of ambiguous relations, and fight daily, maintaining a low profile because the subordinate classes cannot afford the luxury of open confrontation and fully realize that direct confrontation would only be suicidal. Some strategies that Scott mentions are feigned ignorance and false compliance.

This study of its newspapers will confirm that the Hong Kong press has practised self-censorship, but that it has also developed alternative strategies for expressing dissent and critical views. The tactics adopted by the Hong Kong media to cover the Taiwan issue involved three prongs that spread across the spectrum of silence and voices. In sum, the press toed a very cautious line and avoided head-on confrontation with the mainland. However, this did not mean that the press succumbed and became a mouthpiece for the ruling authority. The press pushed back on other fronts, relying heavily on alternative voices. If confrontation were inevitable, the press would stand up and fight vehemently, and rally support from the public or from the international stage.

The coverage of the Taiwan issue has thus been a litmus test of both Beijing's tolerance and the Hong Kong media's political wit.

## **Methodology**

To find out how the media handled the conflict, this study analyzes the newspaper coverage of the cross-straits tension in the summer of 1999, and traces the media response after the Lu incident of spring 2000. It focuses on press coverage between

9 July 1999 and 10 October 1999, a time of great animosity between mainland China and Taiwan. The news content and reporting style of four Hong Kong newspapers were analyzed and compared with the *New York Times* and the *China Times* of Taiwan. The four Hong Kong newspapers examined were the *South China Morning Post* (the *Post*), the *Hong Kong Economic Journal* (*HKEJ*), *Ming Pao Daily News* (*Ming Pao*) and the *Apple Daily*. Only the *Post* is an English language daily.

These four were chosen as all of them are, or were once, known for their critical anti-PRC viewpoints, but have more recently faced accusations that they have exercised self-censorship. The *Post* and the *HKEJ* have faced allegations that they have axed their popular but anti-Beijing contributors. The *Post* fired its famous anti-establishment cartoonist, Larry Feign, in 1995,<sup>8</sup> and refused to renew the contract of its liberal chief editor, Jonathan Fenby in 1999.<sup>9</sup> The *HKEJ* cancelled the column of a famous political commentator, Lee Yee, before the handover.<sup>10</sup> The two other newspapers are also believed to have softened their stance after being punished by Beijing. *Ming Pao* has faced criticism that it diluted its editorial line after its reporter, Xi Yang, was imprisoned in Beijing (*Asian Wall Street Journal*, 22 April 1997, 'A Hong Kong newspaper softens its voice'). *Apple Daily* was punished by the PRC through economic sanctions after its owner insulted the PRC's then Premier Li Peng by calling him a 'turtle egg'.<sup>11</sup> The background of these newspapers is particularly relevant to enable the present analysis to examine how they perceive potential conflict, and how they position themselves in this battle.

To distil the intention and motivation behind each newspaper, this study uses both quantitative and qualitative analysis.<sup>12</sup> As observed by Gans, every news story has its own 'para-ideology' (Gans 1979, p. 41), by which he refers to the assumptions, values and beliefs of journalists and news organizations. Hence, the focus of our study is to plot the hidden constraints and messages in the newspapers.

### **The 'state-to-state' theory, summer 1999**

The first real test of the extent of the Hong Kong media's bravery and the new sovereign's degree of tolerance came in the summer of 1999. On 9 July, during an interview with German radio station Deutsch Welle, President Lee Teng-hui in Taipei announced unexpectedly that he would treat contacts with the PRC as 'state-to state', implying that Taiwan would no longer abide by the 'one China' formula.

Owing to the media's love of conflict and its need for melodrama, the incident was widely reported internationally. The Hong Kong media dutifully covered the issue, but it came under severe attack for being a 'collaborator' in the PRC's propaganda war by broadcasting PRC military news and verbal intimidation against Taiwan (*HKEJ*, 12 August 1999). It was also accused of 'willingly succumbing to the 'spin control' of the ruling authorities in Beijing. Had the Hong Kong press surrendered and given up its role of neutral observer and social critic in society? Had it assumed a docile position to avoid political trouble?

## A period of caution and self-censorship

Despite the diligent and extensive coverage that each Hong Kong newspaper had devoted to the cross-straits issue (see Table 13.1), none of them treated this news as worthy of the front page when the ‘state-to-state theory’ was first announced.<sup>13</sup> Only *Ming Pao* gave a direct extract of Lee Teng-hui’s interview (*Ming Pao*, 11 July 1999, “‘Liang guo lun’ zhai you’/‘An extract of the “two-states” theory’). None of the editorials in the four Hong Kong newspapers discussed the ‘state-to-state theory’ following the breaking of the news.

By contrast, the *New York Times* put the news on the front page (*New York Times*, 13 July 1999, ‘Taiwan president implies his island is sovereign state’). As expected, Taipei’s *China Times* gave wider coverage and provided a full transcript of President Lee’s interview with *Deutsch Welle* (11 July 1999 “‘De guo zhi yin” zhuan fong, Li zhong tung de quan wen’/‘The complete script of the interview by “Voices of Germany” with President Li’).

The *China Times* was also quick to establish its editorial stance (*China Times*, 12 July 1999, “‘Liang an liang guo” qu shao, tan pan chao ma zeng duo’/“‘Two shores two countries” increasing bargaining chip in negotiations”).

It is a well known convention that the location, size, number and nature of news items chosen for inclusion reflect the importance the newspaper management attaches to the event to which the items relate (Cohen 1963, p. 119). It is unlikely that the Hong Kong newspapers lacked awareness of the importance of Lee’s statement. More plausibly, the newspapers were not certain how they should treat the issue and sought a compromise solution. In covering the issue on a less prominent page, the Hong Kong newspapers had fulfilled their professional duty in reporting a newsworthy piece of information, yet were able to buy time to observe the reaction of the Beijing authority.

It is fair to note that the editorial positions taken, the slant of the news reports, and the tone of commentary in all the samples studied were conciliatory. Clearly,

Table 13.1 Number of newspaper items on cross-straits tensions (9 July to 11 October 1999) in different newspapers according to the type of content

Newspapers	News	Commentary	Editorial	Letters	Total
<i>New York Times</i> (US)	26 (50%)	15 (29%)	3 (6%)	8 (15%)	52
<i>China Times</i> (Taiwan)	545 (89%)	51 (8%)	17 (3%)		613
<i>Apple Daily</i>	222 (65%)	111 (33%)		8 (2%)	341
<i>Ming Pao</i>	389 (88%)	42 (9%)	12 (3%)		443
<i>Hong Kong Economic Journal</i>	198 (51%)	173 (45%)	17 (4%)		388
<i>South China Morning Post</i>	233 (79%)	29 (10%)	16 (5%)	18 (6%)	296

Compiled by the author. Sources as indicated.

the outbreak of war would be disastrous for mainland China, Taiwan, and Hong Kong, and would strain Beijing–Washington and Taipei–Washington relations. In fact, the press in this period was carrying out the ‘classic triad function of a diplomat’ (Cohen 1963, p. 22) by reporting information that represented different interests and by ‘negotiating’. The *New York Times* was playing the role of a mediator, asking the PRC not to resort to military threats and advising Taiwan not to further provoke the PRC (*New York Times*, 15 July 1999 ‘The volatile issue of Taiwan; 14 August 1999 ‘A worsening crisis over Taiwan’). The *China Times* also played the role of a conciliator in this period, eager to portray Taiwan not as a trouble-maker, and endeavoured to strengthen Taiwan’s position by referring to Lee Teng-hui’s statement as a ‘special state-to-state’ theory (*China Times*, 12 July 1999, “‘Liang an liang guo’ qu shao, tan pan chao ma zeng duo’/“‘Two shores two countries’” increasing bargaining chip in negotiations’; 26 July 1999 ‘Yin ying guo jixin ju de ji dian wu shi jian yi’/‘Some practical suggestions based on new international dynamic’).

Near the end of July 1999, when Beijing threatened to use force to halt any action towards independence by Taipei, the Hong Kong papers argued against the use of force by weighing the loss (*HKEJ*, 26 July 1999, ‘Lee Teng-hui de zheng zhi sui zhi he Taiwan de qian tu’/‘Political calculation of Lee Teng-hui and Taiwan’s future’; 9 September 1999, ‘Dui Tai yi sui chuang yi, you he dai ti wu xia’/‘Be creative with Taiwan, replace war with peace’), by appealing to national sentiments,<sup>14</sup> and even by mocking the PRC’s ability to do so (the *Post*, 13 August 1999, ‘Reality check’). But they did not condemn the PRC’s use of force per se. Nor did they analyze or explore Taiwan’s perspective. At most, their logic was based on common sense, that military might could never win over the hearts of future subjects, and force would only generate bitter resentment.

Moreover there were certain features that were noticeably absent in the Hong Kong coverage. While reporters of the Taiwan paper *China Times* interviewed and reported the comments of PRC scholars, American politicians, and Taipei officials, none of the Hong Kong newspapers appeared to have conducted any interviews with the Taipei authorities or anyone who might have sympathy with Taiwan. Instead, the Hong Kong newspapers provided articles written directly by the individuals concerned. For example, *Ming Pao* carried an extract of President Lee’s speech (*Ming Pao*, 11 July 1999, “‘Liang guo lun’ zhai you’/‘An extract of the “two-states” theory’). *Apple Daily* also printed a letter by Cheng An-guo, Taipei’s representative in Hong Kong, who was attacked by Beijing after publicly reiterating President Lee’s position (*Apple Daily*, 5 October 1999, ‘Taiwan gan xie xiang Gang guan xin’/‘Taiwan thanks Hong Kong for its concern’). But Hong Kong reporters would not become ‘directly’ involved in amplifying Taiwan’s message, nor in ‘directing’ opinion through specific questions as in an interview.

The other noticeable feature in the Hong Kong news samples was the absence of reports that conveyed a personal touch or which reflected the opinion of common people. Only the *HKEJ* and the *Post* covered the Taiwan issue from a human perspective. The *HKEJ* did a two-part series on Fujian and Xiamen (*HKEJ*, 25 August 1999, ‘Tai hai ji chang ju shi xia fang Fujian’/‘A visit to Fujian under the cross-straits tension’; and 26 August 1999, ‘Fong Xiamen da xue tai yan suo lun



liang an guan xi’/‘A visit to the Xiamen University Taiwan Research Institute on cross-straits relations’), two of the PRC’s coastal provinces near Taiwan, emphasizing the economic link between Taiwan and the Chinese mainland. Of an entirely different style was a piece by a freelance writer on Taiwan people’s feelings towards war as expressed in their poems on buses (*HKEJ*, 11 August 1999, ‘Ru guo you le zhan zheng, ni hui dan shi ma?’/‘If there were war, will you still read poems?’). The *Post* carried a story on the life of Matsu island, a small Taipei-controlled island just three miles off the mainland China coast, taken from the wire service (the *Post*, 15 August 1999, ‘Islet calm as war storm threatens’) and a story by its staff reporter on Fujian (the *Post*, 19 September 1999, ‘Anxious Fujian reassures Taiwan it’s business as usual’).

By comparison, the *New York Times* was keen to discover the perspective of commoners. Its reporters interviewed a cross-section of the Taiwan populace including a commoner, a politician, and a businessman (*New York Times*, 9 August 1999, ‘New goal in Taiwan: to be left alone’). There were two stories of how the popular Taiwan singer, Ah Mei, had conquered audiences in mainland China (*New York Times*, 6 August 1999, ‘What crisis? A Taiwan temptress seduces China,’ and 31 August 1999, ‘Siamese twins’) which emphasized the commonness in the two societies across the straits. When there were possible signs of military confrontation, the *New York Times* did a story on the life of ordinary people on the island of Matsu (*New York Times*, 14 August 1999, ‘In eye of China–Taiwan storm, an island is calm’). These stories allowed the readers to have a glimpse of the personal aspect of Taiwan, of how the people in Taiwan thought about the issue, and of what was on their minds.

Finally, there was also a noticeable absence in the Hong Kong papers of serious discussion about whether Taiwan was indeed an independent ‘state’. Most articles in Hong Kong newspapers were analyses of the crisis from the perspective of military strategy, or involved considerations about Lee Teng-hui’s hidden motives, or the cross-straits politics of Beijing–Taipei, and Sino–American relations. Very few refuted the basic premise or questioned whether the mainland’s insistent assertion that Taiwan was a renegade province was reasonable. When Lee Teng-hui first announced his theory however, the *HKEJ* printed an article under the provocative title ‘Taiwan is originally an independent nation, Wang’s visit is unlikely to succeed’ (*HKEJ*, 12 July 1999, ‘Taiwan yu shi du li guo, Wang gong zhi xing nan you cheng’),<sup>15</sup> where the writer explored the issue from the perspective of Taiwan. Another rare piece and the only article in the sample that defended Taiwan was written by Ling You Shi, also published in the *HKEJ*. She asserted that Taiwan had the right to claim independence based on the Kantian philosophy of ‘dignity’ (*HKEJ*, 7 August 1999, ‘Liang guo lun’ nan bu nan wei Taiwan dan lai zhen zheng de jun yan?’/‘Can the “two-states theory” bring genuine dignity to Taiwan?’).

### **Into the war zone: the Hong Kong media attacked**

Despite the Hong Kong media’s conscious attempt to be a neutral arbiter, it was caught up in the heat of the conflict. While many criticized the Hong Kong media

for being a mouthpiece of Beijing, the pro-Beijing group saw the Hong Kong media as collaborating with Taipei. The trigger came on 17 July when Radio Television Hong Kong (RTHK), a Hong Kong government-owned radio station, gave airtime to Cheng An-kuo, the Taipei envoy in Hong Kong,<sup>16</sup> who reiterated Lee Teng-hui's 'two states' stance.

*Ming Pao* (14 July 1999, 'Cheng An-guo: Liang ge zhong guo yi ge tong yi'/'Cheng An-guo: two Chinas can be united'), the *HKEJ* (17 July 1999, 'Tung Jiang Hua ping Lee Teng-hui "Liang guo lun" bu zhi'/'Tung Chee-Hwa criticized Lee Teng Hui's "two-states theory" as unwise'),<sup>17</sup> and the *Post* (18 July 1999, 'Rivals "just like Germany"') gave Cheng's statements relatively little coverage, probably without realizing that there might be serious implications. However, in early August, both RTHK and Cheng were 'blasted' by Hong Kong's pro-Beijing elites for providing a platform for secessionist views in open opposition to the PRC.<sup>18</sup> It was then that the Hong Kong media realized the sensitivity and seriousness of the issue. The incident placed in sharp focus the interpretation of Article 23 of the Basic Law, and the difference between 'advocating' and 'reporting', Hong Kong members of the National People's Congress Standing Committee hinted at speeding up the drafting process of legislation prohibiting subversion and secession as required under Article 23 (the *Post*, 11 August 1999, 'RTHK warned over "splittist" broadcasts'; *Ming Pao*, 6 August 1999, 'Cheng An-guo yan lun zai cheng zhong shi zhi de'/'Cheng An-guo's speech became the target again').<sup>19</sup> The statement of Tsang Hin-chi was especially threatening to the Hong Kong media. He vowed to report this issue to Beijing and warned both Cheng and RTHK to behave themselves (*Ming Pao*, 11 August 1999, 'Zeng Xian-zhi shang jing tou shu Cheng An-guo'/'Tsang Hin-chi decides to complain about Cheng An-guo to Beijing'). In effect, his message to RTHK amounted to asking the media to exercise self-censorship.

More alarmingly in August, Qian Qichen, the PRC Vice-Premier, who had referred to the parameters of Hong Kong's press freedom before the transition,<sup>20</sup> warned once again that Hong Kong should neither support nor promote the 'two-states theory'. He did not mention Cheng, nor RTHK, nor clarify what he meant by 'promoting' the 'two-states theory' (the *Post*, 20 August 1999, 'Qian instructs media not to back calls for Taiwan split').

## **The media fights back**

How did the Hong Kong media respond when it was directly involved in the cross-straits tension and became the target of attack by Beijing officials?

The editors of the *Post* and the *HKEJ* came out fighting. They articulated the importance of press freedom for Hong Kong. The *Post* rebutted Tsang's call for 'self-control,' condemning it as 'wrong, and unacceptable' (the *Post*, 12 August 1999, 'Preserving freedom'). After the Vice-Premier's warning, the *Post* pointed out that Beijing's attitude would be detrimental to Hong Kong's international image and render the model of 'one country, two systems' an empty phrase. The *HKEJ* issued two editorials following the Vice-Premier's remarks, and took the opportunity to elaborate the difference between 'advocating' and 'reporting' (*HKEJ*, 20 August

1999, ‘Chung yang you zhi shi, mei ti zhen men ban?’/‘Central has instructions, what should the media do?’). It further invoked the legal protection of the Basic Law and the International Covenant of Civil and Political Rights to defend press freedom and argued that the media did not need any political policing (*HKEJ*, 26 August 1999, ‘Fa zhi yi jing shou sun, zi you you lin wei xian’/‘Rule of law has already been damaged, and freedom is now being threatened’). The noted commentator, Lee Yee, in *Apple Daily* also relied on legal protection (*Apple Daily*, 23 August 1999, ‘Bu ying wen ta’/‘You should not have asked him’). He argued that as long as the media had not violated any legal regulations, the media was entitled to its freedom. Only *Ming Pao* chose to insist on its role as an observer and downplayed the entire issue of press freedom (*Ming Pao*, 20 August 1999, ‘Bao chi ke zhi mian zhi xian gang jie ru liang an dou zheng’/‘Keep restraint, don’t let Hong Kong be involved in the cross-straits conflict’). In its editorial, the paper saw itself as a mediator between Qian and Cheng. It considered that the Hong Kong media was only innocently and accidentally involved. Nowhere was freedom of the press mentioned.

None of the Hong Kong newspapers adopted a mocking tone with respect to the mainland’s effort to rein in the press. The *China Times* in Taiwan by contrast emphasized the political pressures faced by Cheng, and made fun of pro-Beijing officials in Hong Kong for flushing the formula of ‘one country two systems’ down the drain (*China Times*, 21 August 1999, ‘Wu tu de ai guo zhe’/‘The foolish patriots’).

The tone of the Hong Kong papers was firmer, and the editorial stance was clearer, when the media was directly under attack than they had been in the mainland China–Taiwan crisis. In asserting its rights on a local issue, the press was fighting to resist any shrinking of the boundaries of press freedom.

### **The use of alternative voices**

As well as striking a clear pose in defence of press freedom, the press was also advancing on other fronts. In stark contrast to the alleged trend of self-censorship mentioned earlier in this chapter, the Hong Kong press let other robust and daring voices test the boundaries of press freedom. C.C. Lee has pointed out that media organizations often have ‘ritual strategies’ to meet ‘extraordinary political pressure and to uphold their own legitimacy’ (2000). He defines such rituals as ‘key routines and conventions – ranging from determination and interpretation of facts, attribution of sources, credit and blame, to choice of narrative forms’ (2000). The ‘weapons’ and ‘ritual strategies’ the press resorted to in this case were commentaries, wire sources, public opinion, and readers’ opinions.

In his study of Taiwan’s media under martial law before 1984, C.C. Lee points out that the Taiwan media relied heavily on quality commentary to educate its citizenry (1993). He also saw a similar pattern being adopted by the Hong Kong media, noting that ‘the columns remain lively and excruciatingly critical of the PRC authorities in contrast to their timid editorial counterpart’ (2000). The advantage of using commentary, as opposed to editorials, was that the newspaper could let different opinions be voiced, yet keep a slight distance away from them.

The present study of the cross-straits crisis shows that in the *HKEJ* this commentary amounted to 45 per cent of its news coverage. *Ming Pao* also provided a forum for different opinions, notably that of Tu Yiu-ming, a liberal scholar at Hong Kong Baptist University. The other newspaper that relied heavily on commentary was *Apple Daily*, with high-calibre contributors including political analysts Lee Yee, Dung Qiao and Lo Feng. It also published articles by the émigré Xu Jiatur, <sup>21</sup> formerly the PRC's top-ranking official in Hong Kong. In addition, *Apple Daily* carried translations of statements by foreign politicians and scholars on important issues. <sup>22</sup>

Other than the voices of political commentators, Hong Kong newspapers also provided a forum for other voices. The *Post* used wire news heavily. On the Taiwan issue, 56 per cent of its factual news stories were from the wire. <sup>23</sup> This allowed readers to know about a sensitive issue yet decreased the risk of a staff reporter getting into trouble with the authorities.

In addition to the informed opinion given by commentators, newspapers also provided a forum to the public in the form of letters to the editor columns. Readers were often ferocious and blunt in their opinions. A short letter in the *Apple Daily* summarized the issue succinctly: 'If not two states, how can we talk about unification?' (*Apple Daily*, 30 July 1999, 'Ru fei liang guo he yan tung yi'). Letters in the *Post* characterized unification as 'forced marriage' (the *Post*, 28 July 1999, 'Forced marriage would be bad for Taiwan'), told the PRC to stop 'bullying' Taiwan (the *Post*, 19 July 1999, 'China must call a halt to bullying tactics'), and argued it was 'human rights' for Taiwan to become independent (the *Post*, 10 August 1999, 'Taiwanese struggle a matter of human rights'). Overseas Taiwan students wrote to the *Post*, protesting the PRC's attitude and arguing that, based on Taiwan's history, Taiwan was no longer Chinese territory (the *Post*, 7 August 1999, 'Hands off our independent republic').

The *Post* also made use of the letters column to let RTHK defend its position after the radio station was criticized by pro-Beijing Hong Kong elites (the *Post*, 1 September 1999, 'Open forum for Taiwan remarks', and 9 August 1999, 'Openly debating issue not act of advocacy'). Hence, the letters to the editor columns provided a forum for people to vent anger, to share their opinions, and also to let the authority know the views of the masses. Regrettably, only *Apple Daily* and the *Post* provide space for letters to the editor. <sup>24</sup>

There was also a growing tendency to rely on the anonymous masses. In July, the *HKEJ* published the results of a Taiwan survey on its front page, showing that more than 40 per cent of the populace supported Taiwan's independence and more than 50 per cent supported Lee Teng-hui's 'two-states theory' (*HKEJ*, 19 July 1999, 'Xiu fang zhe yu si cheng zhen cheng Tai du'/'Over forty per cent of the respondents support Taiwan independence'). A similar survey was reported by the *Post* (the *Post*, 14 July 1999, 'President backed in poll'). *Ming Pao* (*Ming Pao*, 23 July 1999, 'Yu ban shi min: Gang gu ying zhong li'/'Over half of our citizens: Hong Kong government should remain neutral') and *Apple Daily* (*Apple Daily*, 23 July 1999, 'Tiao cha xian shi liang guo lun bu xiu huan yin, shi min pu bian fan dui wu li gong Tai'/'Survey shows two states theory is not welcome, citizens

generally oppose using force against Taiwan') introduced another dimension to the crisis by including Hong Kong people's opinion. They covered the survey results, revealing that over 60 per cent of Hong Kong people disagreed with Lee Teng-hui on his 'two-states theory', while over 80 per cent objected to China using force against Taiwan. In reporting the issue, Hong Kong newspapers became a conduit to pass on the opinions and feelings of the Taiwan and Hong Kong people to Beijing authorities.

From this discussion, the dual nature of self-censorship becomes apparent. The use of indirect voices and toned down coverage are forms of self-censorship in news coverage; breathing space is created for alternative voices. The newspapers are essentially trying to shift the risk of retaliation to individual writers and to the anonymous but powerful public. Moreover, *Ming Pao* is gradually abdicating its role as a critical media leader, whereas the *HKEJ* and the *Post* have maintained their roles as opinion-leaders by providing a critical voice. It is generally believed that the *Post* is in a more advantageous position as an English language newspaper. The Beijing authorities appear to be more willing to let it have its independence and, in general, the English language press has been bolder in criticizing the ruling authorities (E. Lau 1986).

### **Recent developments**

The guerrilla tactics of the Hong Kong media reviewed here have been for much of the time neither organized nor co-ordinated. They have simply emerged as responses to the environment in which the media found itself after transition. However, at other times, the media sector has been forced to organize itself in the fight. The controversy caused by the cross-straits tension has not ended. On 29 March 2000, Cable TV of Hong Kong interviewed the Vice-President elect of Taiwan, Annette Lu, who referred to mainland China as a 'remote relative and a close neighbour'. This might be seen as an act of bravery for Cable TV after the trouble that RTHK had faced. The status of Cable TV as a privately-owned media organization did not exempt it from attack by Chinese officials.

On 12 April 2000, Wang Fengchao, the deputy director of the PRC's Hong Kong SAR Liaison Office, warned Hong Kong's media not to 'advocate' or 'disseminate' pro-Taiwan independence views. He also called for speedier legislation on anti-subversion activities, putting into practice Article 23 of the Basic Law (the *Post*, 13 April 2000, 'Media warned on Taiwan reports'). It was widely understood that Wang was the messenger of the Beijing authorities. The Bar Association, university students, human rights activists, and local journalists reacted quickly to Wang's remark. The Hong Kong Journalists Association organized a signature campaign to protest against any restriction on freedom of expression (the *Post*, 13 April 2000, 'Anger erupts over censorship call'). On the same day as Wang's comments, the acting Chief Executive of Hong Kong, Anson Chan, reassured Hong Kong that the Basic Law allowed the press to 'comment and report on all matters of current interest' (HKJA 2000, p. 6).

International support also poured in. The Taiwan Journalists Association expressed shock at how quickly Hong Kong press freedom was being curtailed (*Ming Pao*, 15 April 2000, ‘Tai ji xian: mei xiang guan zhi zheme kuan’/‘Taiwan Journalists Association: never thought that control would be this quick’). The US State Department (CNN Internet, 24 April 2000, ‘One country, one system’) and the British Foreign Office also expressed their concerns (*Ming Pao*, 16 April 2000, ‘Chen Fang An San: Zheng fu yen jie she hui qi kang wei xin wen xi you’/‘Anson Chan: the government, the media profession and the entire society defend press freedom’).

After this display of strong protest and international concern, there were signs that Beijing was willing to soften its stance. Wang’s remarks were regarded by the Beijing authorities as ‘appropriate’ but treated as his ‘personal view’ and ‘a piece of advice’ for Hong Kong (the *Post*, 15 April 2000 ‘Press warning appropriate, says Beijing’). The Hong Kong government took this as a reconciliatory gesture and toned down its stance. Five days after Wang’s warning, the Chief Executive, Tung Chee-hwa, pledged to uphold press freedom but warned against Taiwan’s independence, even though he refused to express his views on how the media should handle news on Taiwan (the *Post*, 18 April 2000, ‘Press freedom is safe, says Tung’).

Six months later, another storm blew up. On 27 October 2000, President Jiang Zemin lost his temper and furiously scolded Hong Kong journalists for raising ‘simplistic and naive questions’ during a photo session with Tung Chee-hwa in Beijing.<sup>25</sup> This harsh and surprise attack came after a Hong Kong Cable TV reporter asked Jiang whether his support for Tung to seek a second term to be the Chief Executive of the Hong Kong SAR would amount to ‘an imperial order’ (the *Post*, 28 October 2000, ‘Jiang attacks “naive” media’).<sup>26</sup> Jiang was so angry that he rose from his chair, walked towards the reporter, and gave Hong Kong journalists at the scene a four-minute lecture, comparing Hong Kong journalists unfavourably with CBS star reporter Mike Wallace, and warning the Hong Kong media that it would be responsible for any inaccurate report of his message.

Journalists, legislators and academics all stood up to defend the press, retorting that it was legitimate for Hong Kong reporters to raise the question and the public to know the issue (the *Post*, 28 October 2000, ‘Journalists “don’t need Jiang lesson”’).<sup>27</sup> Press freedom in Hong Kong was once again held in suspense.

## **Conclusion**

The Hong Kong media is facing a situation fraught with ambiguity and uncertainty. In its struggle to preserve press freedom, the law is unreliable, political utterances are ambiguous, and even the forms of retaliation are not known in advance. Since the transition, the Beijing government has been tough with words but restrained in its actions. The question for the local media becomes where to draw the line between not ‘provoking’ Beijing and not surrendering too much press freedom. The fight for press freedom reflects newsmakers’ understandings of both the news processes and political processes (Tuchman 1978).

Up to now, the two sides have engaged in cyclical gestures of restraint and assertion as the rules of the game continue to evolve. The media must be 'timid yet bold', 'free yet restrained', 'reluctantly succumbing but breathlessly fighting against impossible odds' (Chan and Lee 1991, p. 1). This is in fact simply the art of survival as a new social contract emerges.

## Notes

- 1 This chapter uses press freedom and media freedom as interchangeable concepts, whereas 'press' mainly refers to newspaper reporting.
- 2 To avoid confusion and to facilitate delineation between the two states, this chapter refers to the People's Republic of China as the PRC, mainland China or the Beijing regime, whereas the terms Taiwan and Taipei regime are used for Republic of China.
- 3 The term was used to describe the PRC, Taiwan and American relations before the announcement of the state-to-state theory. Under the original formula of strategic ambiguity, each party would have its own interpretation of 'one China', without stating its content and without challenging the others. In this way, the Beijing government managed to re-enter the world stage after 1972, and Taiwan could extend its economic and cultural links globally, while the US could establish ties with Beijing but give protection to Taiwan.
- 4 Namely, the media should not 'advocate' the independence of Tibet, nor advocate the concept of 'two Chinas', nor the break-up of China. The media should not 'attack' Chinese leaders in words or writing. Moreover, the media should not engage in any activity that is subversive of the rule of the Chinese Communist Party. The then Foreign Minister, Qian Qichen, explained that the media could 'put forward criticism but not rumours or lies' nor political attacks on Chinese leaders, during an interview with the *Asian Wall Street Journal* in October 1996. See Hong Kong Journalists Association (HKJA) 1997, p. 4.
- 5 In May 1996, the former Director of the Hong Kong and Macau Affairs Office, Lu Ping warned against the 'advocacy of two Chinas' in an interview with CNN. When the reporter asked what would happen if someone wrote that Hong Kong or Taiwan hoped for independence, Lu Ping replied, 'It is not allowed, definitely not allowed' (HKJA 1996, Appendix).
- 6 Despite the vagueness of the above terms, most Hong Kong people know that the famous Chinese dissidents Wang Dan and Wei Jingshen were sentenced to imprisonment for 'subverting' the Chinese government after they openly opposed the government.
- 7 For instance, the *Hong Kong Times* funded by Taiwan's ruling party ended its 43-year run in 1993. The *Wah Kiu Yat Pao*, a pro-Taiwanese newspaper, ended its publication in 1995. The *Sing Tao Daily*, which once vowed loyalty to Taiwan, has shifted its allegiance entirely. Sally Aw, the owner of *Sing Tao* till 1999, ironically has become a member of the Chinese People's Political Consultative Committee of the Mainland Government.
- 8 Feign was immediately fired after he drew a cartoon making fun of Li Peng, China's then Premier, as a 'fascist murderous dog' (Feign 1995, pp. 116–17).
- 9 Allegedly, one major reason was that Feign freely allowed staff to describe the suppression of the Beijing Student Movement in 1989 as a massacre (*New York Times*, 31 July 1999, 'A free-spoken editor won't be back').
- 10 Both the Commentary Editor, Man Cheuk-fei, and the former Chief Editor, George Shen, denied that Lee's resignation was motivated by the politics or position of the newspaper. Man Cheuk-fei, the Commentary Editor of *HKEJ*, personal communication, 12 July 1999. George Shen, former Chief Editor, personal communication, 2 March 2000.
- 11 The shops of Jimmy Lai, owner of *Apple Daily*, in Beijing were closed down. To this day, reporters from the *Apple Daily* are denied official permits for news reporting on the mainland. Mainland-based institutions will not advertise in Lai's newspaper. After these incidents, the *Apple Daily* tried to steer away from politically sensitive issues. Lai even declared that his paper 'would no longer be anti-Communist' (Lee 1997, p. 131) but Beijing has shown no signs of reconciliation.

- 12 This includes news stories, commentary, features, editorials and letters from readers, but not news on the business pages or in cultural supplements. Reports on the Taiwan earthquake were not counted, unless they were explicitly linked to the tensions. This study surveyed both printed and Internet versions of each newspaper, and efforts have been made to ensure that there were no discrepancies between the two versions. The *New York Times* stories were taken from the database Lexis, Academic Universe, which contained every story in the *Times*. The stories from the *China Times* were taken from the special Internet issue on the cross-strait tension. The number of stories from the *China Times* was exceedingly large compared with the other samples as the Internet version was a combination of both the *China Times* and the *China Times Evening News*. The Internet version did not contain readers' letters. The Internet version contained materials from the printed version, though the printed edition might contain more stories on an issue (information obtained from Chang Yi-wei, Chief Editor of *China Times*. Personal communication from Chia-Da Han. Taipei, 14 April 2000). The *HKEJ* stories were based entirely on printed edition. Stories from *Ming Pao* were taken from the database Newsy.net, which were the same as the printed version. Other than the commentary, stories from *Apple Daily* were from its own web site. Data about its commentaries were collected from the printed version. Stories from the *South China Morning Post* were taken from the database Lexis, Academic Universe, with missing editions supplemented by hard copies.
- 13 Since President Lee's interview took place on Saturday Hong Kong time and the *HKEJ* does not have a Sunday edition, the earliest available date for it to report on this issue was Monday, 12 July. The *HKEJ* printed the story on the fifth page of its paper (*HKEJ*, 12 July 1999, 'Zhong guo Tai ban ping ji Li Teng-hui yan lun'/'China Taiwan office criticize Lee Teng Hui's speech'). The *Post* printed it on page 6 (*SCMP*, 11 July 1999, 'Lee redefines mainland ties as "nation-tonation"'). The *Apple Daily* put it in its Cross-Straits section (*Apple Daily*, 11 July 1999 'Tang Shu-bei ze Li Teng-hui gao yi Zhong yi Tai'/'Tang Shu-Bei criticizes Lee Teng-hui for creating one China one Taiwan'). *Ming Pao* had three articles on 11 July 1999 on President Lee's speech and all of them were on A12, the China page.
- 14 This was most noticeable after Taiwan's disastrous earthquake in September. See the editorials in *Ming Pao*, *HKEJ*, and *SCMP* on 22 September 1999.
- 15 Wang is the mainland's top negotiator in Taiwan and he initially planned to visit Taiwan in March 2000.
- 16 Though the RTHK is a government-owned station, it is modelled after the BBC with the goal of providing a critical and neutral voice, free from commercial pressure. RTHK has been a thorn in the side of pro-Chinese officials for some time. It is widely believed that in standing up and defending the neutral role of the station against government pressure, its director, Cheung Man Yee, lost her job in October 1999. At the end of October, Cheung, Director of Broadcasting, was transferred to a trade post in Tokyo after serving 13 years with RTHK and with just two more years to go before her retirement (*SCMP*, 20 October 1999, 'RTHK boss moved to trade post').
- 17 The *HKEJ* covered the issue mainly in the context of how Tung Chee-hwa, Hong Kong Chief Executive, responded to President Lee's 'two-states theory'. The RTHK interview was mentioned, but mainly as a side issue.
- 18 Cheng and RTHK were criticized by Wong Rudeng, Assistant Director of the New China News Agency in Hong Kong shortly afterwards (*SCMP*, 7 August 1999, 'RTHK blasted by Xinhua chief for Taiwan broadcast').
- 19 Members who expressed this view included Ma Li and Tsang Hin-chi. For Ma's comments, see *Ming Pao*, 6 August 1999, 'Cheng An-guo yan lun zai cheng zhong shi zhi de'/'Cheng An-guo's speech becomes the target again'. For Tsang's comments, see the *SCMP*, 11 August, 1999, 'RTHK warned over "splittist" broadcasts'.
- 20 See supra note 4.
- 21 Xu Jiatur, 'Dui Tai dong wu bu shi xiong xia' (*Apple Daily*, 23 August 1999, 'It's not a threat to use force against Taiwan').
- 22 Examples include Jonathan Mirsky, the former editor of the Far Eastern section of the London *Times*, Mark Lagon, member of the US Council for Foreign Relations, and the academic Christopher Lingle.



- 23 Seventy-two news articles were directly from the wire and 32 items were news items from wire services edited by the staff of the *Post*.
- 24 The *HKEJ* has a column 'Voices from Readers' on some Saturdays.
- 25 For an extract of a transcript of President Jiang's comments, see *SCMP*, 28 October 2000, 'I am so angry. It isn't good for you guys to act like this'.
- 26 The election of the Chief Executive by an 800-member electoral college will take place in 2002. For procedural details, see Annex I of the Hong Kong SAR Basic Law.
- 27 Legislators who defended the press included the Chairman of the Democratic Party, Martin Lee and Frontier member, Emily Lau. For Lee and Lau's comments, see *SCMP*, 28 October 2000, 'Lawmakers, media reject Jiang's rebuke'. Academics included Lau Siu-kai and Tu Yiu-ming. For Lau's comments, see *Ming Pao*, 28 October 2000, 'Jiang: zhi chi lian ren bu deng tong qin dian'/'Jiang: support is different from imperial order'. For Tu's comments, see *World Journal*, 28 October 2000, 'Xue zhe: chuan mei cho puo huang di de xin yi'/'Scholar: media pierce the emperor's new clothes'.

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# Conclusion

In a final policy address to the Legislative Council, on 10 October 2001, the first Chief Executive Tung Chee-hwa spoke about the challenges facing the SAR. In particular he highlighted a slowdown in major export markets, an accelerated economic downturn, a rise in unemployment, and an increase in the fiscal deficit: the prospect was for a delayed recovery, made all the more difficult to achieve by the impact on the global economy of the terrorist attacks of 11 September.

Yet for a highly sophisticated and populous society which has over the past few years experienced an unprecedented transition in sovereignty, it would perhaps be niggardly to dwell excessively on difficulties which have been exacerbated by events outside the Government's control. Although the record of the SAR administration has been mixed, the experience of Hong Kong under the formula 'one country, two systems' has on the whole so far been benign, despite the emergence of certain underlying trends which may be more worrying in the longer term. It has been the purpose of this book to explore this experience, and these trends, to see what light they may shed both on Hong Kong's future prospects and on the nature of 'one country, two systems' as an approach to the re-unification of Greater China.

The section relating to the Hong Kong economy and business environment identifies the roots of Hong Kong's economic vulnerability and limited options, and discerns a growing need for Government to intervene, foreshadowing the Chief Executive's recent remarks. Yet surveys show that public opinion has been dissatisfied with the extent and nature of intervention on unemployment, housing and economic growth – views echoed in criticism of the Chief Executive's most recent policy address. On the other hand, there is approbation for the handling of the Asian financial crisis, with the currency link to the US dollar seen by financial observers at least as a touchstone of 'one country, two systems'.

In the section on Hong Kong's political life, there is praise for the continued existence of democracy in Hong Kong, albeit in somewhat truncated form, and of healthy institutions of civil society, but also evidence of the erosion of openness and accountability, and of some rights and liberties. Several contributors note rising dissatisfaction with the performance of the Government and civil service. The decline of the Democrats is closely observed and explained partly in terms of the gerrymandering of electoral processes by the Tung administration. The Democratic Alliance for the Betterment of Hong Kong is seen as the dark horse

of Hong Kong politics, with its popularity on the rise as its commitment to Government policy is seen to shift. In the political sphere, 'one country, two systems' has embraced both continuity and change, a broad continuation of most political institutions but with some adjustment to enable China to curtail the prospects for success of its most vocal critics.

It is in the area of law that issues are raised which go to the heart of 'one country, two systems'. Here several prominent legal experts examine, through a range of significant cases which have occurred since the handover, the impact of Chinese criminal law on Hong Kong, the extent and limits of Hong Kong's continued judicial autonomy, and the scope for constitutional judicial review. With the two legal approaches in conflict, judicial autonomy damaged, and Chinese law 'seeping into' Hong Kong law, all three experts conclude that in an unprecedented situation of divided jurisdiction it is the political circumstances, the political context, which will in the broad sense ultimately determine legal outcomes. It may be here that the fiction of 'one country, two systems' breaks down most significantly.

In the matter of press freedom, the record of achievement under 'one country, two systems' is to date more optimistic. Despite 'cyclical gestures of restraint and assertion', the Hong Kong media has survived a series of issues which have tested its independence, including the Taiwan Straits crisis of 1999–2000, perhaps the most difficult of all. In achieving this it has embraced alternative strategies and alternative sources of news and comment to get its message across. The one issue on which there could be no challenge was the overarching policy of 'one country, two systems', the discussion of which remains completely taboo.

Taken as a whole, therefore, it may be concluded that 'one country, two systems' has worked so far for Hong Kong as a mechanism to ensure a stable transition to Chinese sovereignty, and some would say to Chinese rule. As the contributions on the law have shown, in the last resort sovereignty means just that. Hong Kong is now a part of China, and will enjoy its future autonomy and separate pattern of life on sufferance. Against this, as suggested in the introduction, it must strive to avoid introspection, and to promote itself as a unique international city.

Finally, what implications may be drawn from the Hong Kong experience for the outstanding question of Taiwan? From the point of view of the mainland, what it sees as the successful implementation of the doctrine of 'one country, two systems' ought to have great appeal to Taiwan as a means of resolving their longstanding separation from China. It is not within the scope of this enquiry to argue the case for any particular type of agreement one way or the other, yet several points may still be made.

The first is that by the late twentieth century the continuing status of Hong Kong as a British colony in consequence of nineteenth-century wars was recognized by all parties as a clear anachronism in urgent need of resolution. In the circumstances, the 'one country, two systems' formula was probably the best arrangement Hong Kong could hope to achieve. The second is that the character of Hong Kong's experience of 'one country, two systems' is to a degree bound to be different from what might be expected in Taiwan, because the nature of Hong Kong's political, economic and social life is markedly different from that in Taiwan –

some might say much more directly influenced by foreign attitudes and practice because of the presence of the British, and later the large international community connected to its trading and financial role. Finally, if as widely acknowledged it is true that politics is 'nine-tenths geography', it must be anticipated that Taiwan, heavily armed and separated by sea from the mainland, would be in a different relationship with the mainland even under 'one country, two systems' compared to Hong Kong, geographically attached, and with no means of self-defence.

Therefore while the experience of Hong Kong under 'one country, two systems' is important for the detail it reveals of the 'pressure points' that emerge under such an arrangement, how these tensions and conflicts in approach would be handled by Taiwan would depend upon local circumstances. For its part Hong Kong, pragmatic, flexible and as full of ingenuity as ever, has probably fared as well as could have been expected.

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