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The "Rule of Law" in Hong Kong After 1997

JOHN McDERMOTT *

I. INTRODUCTION

On July 1, 1997, jurisdiction over Hong Kong will pass from Great Britain, which has ruled Hong Kong for over 150 years, to the People's Republic of China (PRC). As that date approaches, anxiety over Hong Kong's future as a financial and legal center increases. In an effort to ameliorate this growing anxiety, Daniel Fung, the first Chinese Solicitor General of Hong Kong,¹ embarked on a month-long speaking tour in the United States. On February 8, 1996, he stopped at Loyola Law School, where he was the featured speaker at a conference organized by Loyola Marymount University's Center for Asian Business.

Although Hong Kong has never been a democracy, it has enjoyed a legal system as reliable as any other democratic system in the world. Indeed, Mr. Fung considers Hong Kong's legal system to be "Britain's greatest and most treasured legacy to Hong Kong."² When the colony is transferred back to the PRC's jurisdiction in a few months, a crucial question concerns the future

* Professor of Law, Loyola Law School. I was asked to respond to Daniel Fung's speech. This Article summarizes the concerns expressed in my response. The views expressed in this Article are not necessarily the views of Loyola Law School, Loyola Marymount University, or any other sponsors of the conference held on February 8, 1996 at Loyola Law School in Los Angeles.

1. Mr. Fung, as Solicitor General of Hong Kong is responsible for "overseeing the legal policy of the Hong Kong government" until it becomes a part of the PRC later this year. Mr. Fung spent 18 years in private practice before becoming solicitor general in 1994. He was the first Hong Kong Chinese to hold the position. See Brian Cummings, *Hong Kong Will Preserve Its Legal Heritage*, CHI. DAILY L. BULL., Feb. 7, 1996, at 3. It is unclear whether he will continue to serve as Solicitor General after July 1, 1997.

2. *Id.*

of the legal system and the continuation of the rule of law in Hong Kong.

The PRC has promised Hong Kong "a high degree of autonomy" after it recovers the colony this year.³ Optimists expect the present legal structure to continue operating, resulting in the continuation of the enormous economic benefits associated with a stable and independent legal system in Hong Kong. Pessimists assume that Hong Kong law will resemble law elsewhere in the PRC—always open to manipulation for political reasons or special interests. Mr. Fung is cautiously optimistic;⁴ I am pessimistic, but hopeful the optimists turn out to be right.⁵

II. BACKGROUND

Under the Treaty of Nanking,⁶ which officially ended the Opium War between Great Britain and China, China ceded the island of Hong Kong to Great Britain in perpetuity.⁷ In 1860, China also ceded the Kowloon Peninsula to Great Britain in perpetuity.⁸ The Kowloon Peninsula, which today is an integral part of Hong Kong, is part of the Chinese mainland, approximately one mile from the island of Hong Kong. Great

3. 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, Dec. 19, 1984, U.K.-P.R.C., 23 I.L.M. 1371, 1371 [hereinafter Joint Declaration].

4. In Hong Kong, the phrase "cautious optimism" seems to mirror the famous Hong Kong motto, "Hope for the best, prepare for the worst." Henry J. Reske, *Experts Fear Hong Kong Legal System in Peril: Despite Predictions, Law Society President Believes Reversion to Chinese Rule Will Not Erode Freedoms*, A.B.A. J., Jan. 1996, at 33 (quoting Roderick B. Woo, president of the Law Society of Hong Kong).

5. For a prediction as to Hong Kong's economic future, see John H. Henderson, *The Reintegration of Hong Kong Into the People's Republic of China: What it Means to Hong Kong's Future Prosperity*, 28 VAND. J. TRANSNAT'L L. 503 (1995) (concluding that "although the future prosperity of Hong Kong is bright, Hong Kong has already reached its peak as a leading economic and financial center.").

For a discussion of the potential impact of the PRC takeover of Hong Kong on U.S. business interests, see A.R. Yee, *Hong Kong and China in 1997: An Examination of Possible Legal and Economic Implications for United States Businesses*, 36 SANTA CLARA L. REV. 595 (1996).

6. Treaty Between China and Great Britain, Aug. 29, 1842, China-Gr. Brit., 93 Consol. T.S. 465.

7. See *id.*

8. Convention of Friendship, Oct. 24, 1860, China-Gr. Brit., 123 Consol. T.S. 71.

Britain acquired the final component of present-day Hong Kong in 1898 when it persuaded China to lease to it the New Territories for ninety-nine years.⁹ Today, the New Territories, which are adjacent to the Kowloon peninsula and also part of the Chinese mainland, are primarily industrial and residential areas for most Hong Kong factory workers. Thus, contrary to a popular misconception, Great Britain was not obligated to return all of Hong Kong to the PRC in 1997, but only the New Territories.¹⁰

The New Territories have become such an important part of present-day Hong Kong, however, that all parties realized the impracticality of treating it independently. Indeed, the PRC refused to enter into any negotiations regarding any part of present-day Hong Kong unless it was treated as a single territory.¹¹ Thus, the expiration of the New Territories lease in 1997 may be viewed as the functional equivalent of the termination of British interests in all of Hong Kong.

III. THE JOINT DECLARATION

In the early 1980s, in anticipation of the upcoming expiration of the New Territories lease, Great Britain began negotiations with the PRC over the fate of Hong Kong. These negotiations reached fruition on September 26, 1984 when the United Kingdom and the PRC approved the Joint Declaration of the Government of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Joint Declaration),¹² which provides that the United Kingdom will relinquish sovereign control over Hong Kong on June 30, 1997 at midnight.¹³ The Joint Declaration also provides that the PRC's

9. See Convention Respecting an Extension of Hong Kong Territory, June 9, 1898, China-Gr. Brit., 186 Consol. T.S. 310 [hereinafter Convention of 1898].

10. For a discussion of all of these agreements, see PETER WESLEY-SMITH, *UNEQUAL TREATY 1898-1997* (1980).

11. See John H. Henderson, *The Reintegration of Hong Kong into the People's Republic of China: What It Means to Hong Kong's Future Prosperity*, 28 VAND. J. TRANSNAT'L L. 503, 509 (1995). The New Territories are also Hong Kong's sole source of drinking water. See *id.* at 509 n. 25. The PRC threatened to discontinue Hong Kong's water supply, a threat the British believed to be quite credible. See *id.*

12. Joint Declaration, *supra* note 3.

13. See *id.*, para. 1, at 1371.

National People's Congress will enact the Basic Law for implementation purposes.¹⁴

Mr. Fung, like his colleagues in Hong Kong and Great Britain, views the Joint Declaration as an international agreement that is binding on the PRC.¹⁵ The PRC, on the other hand, views it as a "domestic agreement" that it can unilaterally override.¹⁶ Further, the PRC may consider the Joint Declaration to be binding only during the transitional period from 1984, when the Joint Declaration was signed, to June 30, 1997, when sovereignty is returned to the PRC and the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law)¹⁷ takes effect as the law of Hong Kong.¹⁸

14. See *id.*, para. 3(12), at 1372. Other important major provisions of the Joint Declaration include:

1. In 1997, Hong Kong will become a Special Administrative Region of the People's Republic of China and will enjoy a "high degree of autonomy," except in matters pertaining to foreign affairs and defense.
2. Hong Kong will have separate executive, legislative, and judicial branches, and each branch will be composed of Hong Kong residents.
3. The PRC will appoint Hong Kong's chief executive after elections or consultation in Hong Kong.
4. Hong Kong will maintain capitalistic economic and trade systems for fifty years after 1997.
5. The existing social and economic system will remain unchanged. The law will protect freedom of speech, movement, press, assembly, and religion, as well as private property rights.
6. Hong Kong may use the name "Hong Kong, China" in international organizations and trade agreements.
7. The PRC's defense force stationed in Hong Kong will not interfere with the internal affairs of Hong Kong.

See Henderson, *supra* note 11, at 511-12.

15. See, Daniel Fung, Speech at Loyola Marymount University's Center for Asian Business' Conference (Feb. 8, 1996) [hereinafter Speech by Daniel Fung]. The British Governor of Hong Kong, Chris Patten, "doubts" that the PRC will "renege on its promises," but if it does, the British government has threatened to bring it "to the attention of the international community." Wyng Chow, *Capitalism Will Survive in Hong Kong, Lawyer Says: Basic Law Key to China's Commitment*, VANCOUVER SUN, May 24, 1996, at DI available in 1996 WL 5008695.

16. See Henderson, *supra* note 5, at 519; see also Agnes J. Bundy, *The Reunification of China with Hong Kong and Its Implications for Taiwan: An Analysis of the "One Country, Two Systems" Model*, 19 CAL. W. INT'L L.J. 271, 273-74 (1989).

17. Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990), reprinted in 29 I.L.M. 1519 (1990) [hereinafter Basic Law].

18. See Henderson, *supra* note 11, at 519.

The Joint Declaration is a vaguely worded agreement between Britain and the PRC on the basic policies the PRC will follow in governing Hong Kong after July 1, 1997.¹⁹ Even the optimistic admit that the Joint Declaration "leaves much to the imagination."²⁰ Even if it is viewed as an international agreement, it seems unlikely that it could ever be enforced in a meaningful way.

IV. THE BASIC LAW

Unlike the Joint Declaration, which is a bilateral quasi-treaty, the Basic Law is a pure Chinese document. The National People's Congress of the PRC created the committee that drafted the Basic Law.²¹ The majority of Committee members were from the PRC. The National People's Congress formally adopted the Basic Law in 1990.

The Basic Law is often referred to as "Hong Kong's constitution,"²² although it is not incorporated into the PRC's constitution and cannot be considered the supreme law of the land, even if such a law existed in the PRC.²³ Thus, a subsequent act of the National People's Congress could annul the Basic Law, if the PRC deemed such an act necessary.²⁴ In essence, the Basic Law guarantees that the "laws previously in force in Hong Kong . . . shall be maintained."²⁵

19. See Alysha Webb, *Promises: A Primer on the Joint Declaration and the Hong Kong SAR Basic Law*, ASIAN WALL ST. J., Dec. 2, 1996, at S15, available in 1996 WL-WSJA 12479537.

20. *Id.*

21. At the time, Mr. Fung was a barrister in Hong Kong and was a member of the drafting committee. See Cummings, *supra* note 1.

22. Many commentators have said that the Basic Law confers more specific rights and freedoms on Hong Kong residents that the U.S. Constitution affords its residents. Some of the rights enumerated in the Basic Law include freedom of emigration, freedom of travel, and the right to confidential legal advice. See Chow, *supra* note 15. Other commentators have noted the Basic Law's vagueness. "We haven't a clue as to what it means," says Professor Michael DeGolyer, Director of the Hong Kong Transition Project, a multi-university research project. See Webb, *supra* note 19.

23. Henderson, *supra* note 11, at 529.

24. See *id.*

25. Basic Law, *supra* note 17, art. 8 reprinted in 29 I.L.M. 1519, 1521 (1990); see also Joint Declaration, *supra* note 3, para. 3(3), at 1371.

Articles 4 and 5 contain the key elements of the Basic Law. Article 5 provides that the PRC's socialist system shall not be practiced in Hong Kong and that the existing capitalist system shall remain unchanged for fifty years.²⁶ Here, I share some of Mr. Fung's optimism that the PRC will keep its promise—not only because it is in the PRC's interest, but also because the socialist system once so dominant in the PRC is rapidly converting into a capitalist system in everything but name!

The promise in article 4 covering the rule of law, however, worries me and causes me to be more pessimistic than Mr. Fung. Article 4 of the basic law provides: "The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law."²⁷ Adequate safeguarding of these rights and freedoms in accordance with the law requires two things: (1) laws that guarantee these rights and freedoms, and (2) an independent and professional judiciary and bar that enforce the laws against the government—both the Hong Kong and the PRC governments. I am afraid that beyond 1997, neither requirement will be met.²⁸

V. THE RULE OF LAW IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION

Mr. Fung has made a strong and impassioned argument in a sincere attempt to reassure us, and perhaps himself, that the rule of law, which has existed in Hong Kong for one hundred years under "British rule," will continue for at least another fifty years under "Chinese rule."²⁹ I use the terms "British rule" and "Chinese rule" to stress a sometimes overlooked point: Hong

26. Basic Law, *supra* note 17, art. 5, reprinted in 29 I.L.M. 1519, 1521 (1990).

27. *Id.* art. 4.

28. See Anna Han, *Hong Kong's Basic Law: The Path to 1997, Paved with Pitfalls*, 16 HASTINGS INT'L & COMP. L. REV. 321, 325-35 (1993). Han discusses concerns with veto power under article 17, national laws under article 18, jurisdiction under article 19, and treason and sedition under article 23, in addition to concerns with the economic provisions of the Basic Law. See *id.*

29. See Speech by Daniel Fung, *supra* note 13.

Kong was not a democracy under British rule;³⁰ nor will it be a democracy under Chinese rule. The people of Hong Kong did not choose the current chief executive, Governor Chris Patten; a foreign sovereign, without the advice and consent of any democratically elected Hong Kong political entity, appointed him. A distant, if not foreign, sovereign, without the advice and consent of any democratically elected Hong Kong political entity will also choose the next chief executive. Thus, the rule of law in Hong Kong has existed for the past one hundred years not because the people of Hong Kong chose it, but because a foreign sovereign chose it for them. Similarly, the rule of law will exist in Hong Kong for another fifty years or more not because the people of Hong Kong choose it, but because the PRC government decides to allow them to have it — for the PRC's benefit and on the PRC's terms.

Mr. Fung's optimism appears to be based on two factors: (1) the PRC has promised to maintain the rule of law in Hong Kong, and (2) the PRC may be trusted to keep its promise, partly because the government filed a record of its promise with the

30. The British government has been called a "benevolent dictator" regarding its governance of the Crown Colony of Hong Kong. Henderson, *supra* note 5, at 514. Until very recently, the British government decided what was "in the best interests of Hong Kong," and the Chinese residents of the territory had little or no voice in the government that "represented" them. *Id.*

Prior to 1982, the Urban Council was the only publicly elected governmental body in Hong Kong and the right to vote was held only by those who met certain educational, financial, or occupational qualifications. As a result, only 34,381 residents of Hong Kong were registered to vote in 1981 and only 6,195 actually voted in the 1981 elections, a minute fraction of the potential electorate of 440,000.

NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 118-25 (4th ed. 1986); see also Henderson, *supra* note 5, at 520.

But when the British realized they had no choice but to relinquish control of Hong Kong to the PRC, they decided to introduce democracy to the Hong Kong Chinese. The British portrayal of themselves, as the promoters of democracy in Hong Kong has been called "a distortion of the very nature of the British rule:"

The astonishing truth of the failure of the Hong Kong Chinese to develop a significant pro-democracy or pro-independence movement, while other British colonies obtained independence long ago, testifies to the success of the British laws in accomplishing the goal of continued colonial rule over this land of six million inhabitants.

Richard Klein, *Law and Racism in an Asian Setting: An Analysis of the British Rule of Hong Kong*, 18 HASTINGS INT'L & COMP. L. REV. 223, 255 (1995).

United Nations. I am less certain than Mr. Fung that Great Britain and the PRC mutually agree on what the PRC has promised and far less certain that the PRC will in fact keep its promise. Given the PRC's continuing threat to invade Taiwan, it seems unlikely that either world opinion or a U.N. resolution will be very effective in forcing the PRC to keep its promise.

A. The PRC's Promise

1. Changes in Hong Kong's Laws

a. Reinstatement of Old Colonial Laws and Changes to the Hong Kong Bill of Rights

The PRC will almost certainly reinstate the recently repealed colonial laws that governed Hong Kong during British rule. Some of these provisions, such as the Emergency Regulations Ordinance, date back to 1949, when the Communists took power in China, and 1967, when pro-Communist riots took place in Hong Kong.³¹ These laws provide wide-ranging emergency powers of detention and censorship, although many have never been used.³² The Hong Kong government repealed many of these laws after the introduction of the Hong Kong Bill of Rights in 1991. It has also promised to repeal other laws that the PRC may abuse after it regains control of Hong Kong in 1997.³³ Furthermore, the Hong Kong government is planning to introduce new regulations to safeguard freedom of the press.³⁴

The PRC has indicated, however, that it will re-enact many of these laws upon the return of Hong Kong and neighboring territories to the PRC in 1997. The legal affairs sub-group of the PRC's Preliminary Working Committee (PWC) is the advisory body to the Chinese government on Hong Kong's change of sovereignty in 1997. The PWC is planning to repeal or restrict Hong Kong's Bill of Rights, which incorporates provisions of several U.N. conventions on human rights and which Mr. Fung

31. See *Fearing Abuse by Chinese, Hong Kong Eases Stiff Laws*, DES MOINES REG., June 24, 1995, at 11, available in LEXIS, NEWS library, Curnws File.

32. See *id.*

33. See *id.*

34. See *id.*

himself helped draft, and reinstate laws that limit civil rights. It is believed that the PWC's proposals are carved in stone because the Hong Kong Committee endorsed them. The existence of the PWC is not publicly acknowledged. It is supposedly led by Chinese President Jiang Zemin, and it includes Prime Minister Li Peng and Foreign Minister Qian Qichen, as well as the two senior officials directly responsible for Hong Kong affairs.

Under the PWC's proposals, the Hong Kong Bill of Rights will not preempt other legislation with which it conflicts. Old colonial laws, for example, allowing censorship of television, banning organizations from associating with overseas political organizations, and requiring groups of more than thirty people to apply for a permit to hold a public gathering, will be restored.³⁵

British officials contend that any changes to the Hong Kong Bill of Rights will contravene the Joint Declaration. The fact that the colonial laws were repealed long after the Joint Declaration, however, weakens their position. The PRC may argue, with much force, that it is only obligated to preserve laws that were in place in Hong Kong in 1984, not laws Great Britain magnanimously approved after it agreed to relinquish control of Hong Kong. The PRC's position, according to Foreign Ministry spokesman Shen Guofang, is that the enactment of the Hong Kong Bill of Rights and the repeal of the colonial laws "violated the principles agreed by China and Britain that laws in Hong Kong should remain basically unchanged and important issues during the transitional period should be settled through bilateral consultations."³⁶

To make matters worse, a Foreign Office clerical error in early 1993 "has forced the Hong Kong government to seek the revalidation of more than two hundred laws passed in the colony to avoid legal challenge [in] the courts."³⁷ One of Governor Patten's first constitutional changes, relinquishment of his position as president of the Legislative Council in favor of an elected

35. See Stephen Vines, *China to Return Colonial Law in Hong Kong in '97: Leaders Worry About Losing Control*, VANCOUVER SUN, Nov. 8, 1995, at A1.

36. See Xu Yang, *China Reserves Right to Review Hong Kong Laws*, CHINA DAILY, Oct. 25, 1995, at 23.

37. See Graham Hutchings, *International: Reform Laws for Hong Kong Must Be Re-validated*, DAILY TELEGRAPH (London), Mar. 25, 1995, at 19, available in 1995 WL 7992889.

successor, required amendments to the Letters Patent and the Royal Instructions, which Great Britain uses to govern Hong Kong.³⁸ The Privy Council considered the amendments in December 1992, and the Queen approved them.³⁹ Due to the clerical error, however, the amendments were published as an official government document in Hong Kong before the Queen signed them.⁴⁰ This error opened to legal challenge the appointment of Sir John Swaine as President of Legco in early 1993 and all the laws passed during his term of office.⁴¹ The Hong Kong government initially said it regarded all laws passed as valid, but later relented, and agreed to republish the relevant changes.⁴² This incident may create another basis for the PRC to disclaim any obligation to enforce them.

b. Hong Kong's Laws and the Basic Law

In 1996, the Hong Kong government attempted to add treason and subversion to its Official Secrets Act to make the Act compatible with the Basic Law and eligible for treatment as a post-transfer local law.⁴³ The PRC government reacted angrily, accusing Great Britain of using "blackmail" to force the PRC to accept its proposed changes.⁴⁴ The PRC once again vowed to eliminate "any obstructions that hinder implementation of Hong Kong's Basic Law."⁴⁵ A Foreign Ministry spokesman reiterated that any Hong Kong laws the PRC views as violating the Basic Law "will not be adopted as the law of the Hong Kong Special Administrative Region," and added that "any obstruction stirred up before the year 1997 which sabotages or blocks the realization of the Basic Law will be removed."⁴⁶

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See China Says Britain Using "Blackmail" Over Hong Kong Subversion Law*, BBC Summary of World Broadcasts, July 13, 1996, available in LEXIS, NEWS Library, Curnws File.

44. *See id.*

45. *Id.*

46. *Id.*

The Joint Declaration provides, in part, that "[r]ights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike . . . will be ensured by law. . . ."⁴⁷ Article 27 of the Basic Law makes the same guarantees.⁴⁸ While these provisions seems to give the residents of the Hong Kong the freedom of expression and the right to demonstrate peacefully, Article 23 of the Basic Law, may take those rights away. It provides that the SAR "shall enact laws of its own to prohibit any act of *treason, secession, sedition, subversion* against the Central People's Government"⁴⁹

The crucial question is how the terms *treason, secession, sedition, subversion* will be defined ... and by whom - the British or the Chinese? The recent trial in Beijing of Wang Dan, a Chinese graduate student, strikingly demonstrates the conflicting views in Hong Kong and on the Mainland of what constitutes treason, secession, sedition, and subversion. The Mainland court sentenced Wang to 11 years in jail, while in Hong Kong, over 3,000 people turned out to protest Mr. Wang's sentence, and the current Legislative Council passed a motion urging his release.⁵⁰

The "Chinese view" has been explained by Chinese Foreign Minister Qian Qichen, who, in an interview with *The Asian Wall Street Journal*, indicated that the media would be allowed to criticize the Chinese government, but would *not* be allowed to "put forward personal attacks on the Chinese leaders."⁵¹ In a country governed by men—not by laws—it will be hard to do the one without the other. Other Chinese officials have taken a harsher stand, indicating, for example, that Hong Kong newspapers will not be allowed to support independence for Tibet or Taiwan, and

47. Joint Declaration, *supra* note 3, para. 3(5), at 1371.

48. Basic Law, *supra* note 17, art. 27, *reprinted in* 29 I.L.M. 1519, 1525 (1990).

49. *Id.* art 23, *reprinted in* 29 I.L.M. 1519, 1525 (emphasis added). The PRC allegedly insisted on including these provisions in the Basic Law as a result of the demonstrations against the 1989 Tiananmen Square "incident," which have been held annually in Hong Kong since 1989. Stephen Vines, *Hong Kong Subversion Law Infuriates China*, INDEPENDENT (London), Nov. 27, 1996, at 6, *available in* 1996 WL 13509686.

50. *See* Webb, *supra* note 19.

51. *Id.*

that the annual Hong Kong demonstrations commemorating the anniversary of Tiananmen Square will be banned.⁵²

In an attempt to provide prevent the Chinese "hard line" approach to "political speech" from "spill[ing] over into Hong Kong" in July, the British⁵³ are introducing "a new law on subversion that seeks to guarantee freedom of expression in the territory after 1997."⁵⁴ The new law, which amends the existing Hong Kong Crimes Ordinance,⁵⁵ provides that acts of subversion and secession require that those committing them resort to *force* to achieve the political changes they advocate. "The mere expression of criticism as such does not constitute any of the new offenses [covered by the amendments]. In all cases, some form of force or violence [is required]."⁵⁶

The Chinese consider the adoption of these amendments a violation of the "basic Agreement" and have suggested that the U.K. "would be held responsible for its actions."⁵⁷ Beijing insists that its hand-picked Hong Kong's legislature must enact laws prohibiting subversion and secession after - not before the transfer of sovereignty.⁵⁸ Therefore it seems clear that these new amendments will "expire at the same time as the pre-handover legislature."⁵⁹

52. See Graham Hutchings, *Hong Kong Subversion Law Risks China Row*, DAILY TELEGRAPH (London), Nov. 27, 1996, at 14, available in 1996 WL 3996255.

53. Britain's human rights record in Hong Kong is not without blemish. In a 1995 report the United Nations Human Rights Committee called for stronger law protecting women from discrimination and violence and better treatment of the Vietnamese refugees then in Hong Kong detention camps. It also was critical of the fact that only one third of the 60-seat Hong Kong legislature are directly elected and indicated that the remaining 40 seats give "undue weight to the views of the business community." *U.N. Human Rights Body Says HK Not Up To Scratch*, FAR EAST REUTER ECONOMIC NEWS, Nov. 3, 1995.

54. Hutchings, *supra* note 52.

55. Ironically, the colony has had "fairly draconian laws" preventing sedition and treason against the British government during its 150 year rule. Vines, *supra* note 49.

56. See Hutchings, *supra* note 52 (quoting Peter Lai, Secretary for Security for the Hong Kong government).

57. Vines, *supra* note 49.

58. See Hutchings, *supra* note 54.

59. Hutchings, *supra* note 49. "Cynics interpret the British action as London's attempt to create the appearance of having done its best to protect Hong Kong, in the full knowledge that none of its actions are likely to survive more than weeks following China's resumption of sovereignty on 1 July." Vines, *supra* note 49.

China's foreign minister, Qian Qichen, recently warned Hong Kong that freedom of the press has limits. While repeating promises that Hong Kong's freedoms will be protected after the July 1, 1997, handover, with freedom of the press safeguarded by law, Qian cautioned there are no legal protection for rumors and personal attacks. He also stressed that Hong Kong must pass new laws banning subversion, treason, and others acts, including stealing state secrets. Democracy and human rights activists in Hong Kong rightly fear such laws will be used to restrict their freedoms of speech, press and assembly.⁶⁰

The Mainland government is already exerting pressure on Chinese dissidents living in Hong Kong. It was reported that Yiu Yung Chin, who had been jailed for a year in China after taking part in the 1989 protests in Shanghai and had fled to Hong Kong for safety, was harassed by Chinese agents at his home. He subsequently sought refuge in the U.S. British officials in Hong Kong immediately begin to try to find homes abroad for the eighty or so Chinese dissidents living in Hong Kong.⁶¹

2. The Judicial System

There seems to be little doubt that an "independent judiciary" is indispensable for maintaining the *rule of law* that has exists in Hong Kong under British governance. There also seems to be no more doubt among many in Hong Kong, as well as in the West, that the "rule" of law is essential to the economic success of the HKSAR. Some commentators state that the ability to have contracts enforced in court and to challenge the government or anybody else—including close relatives of Mainland politicians—in court is crucial to maintaining a healthy businesses environment.⁶² If Beijing believed this, it might be more likely to preserve the British legal system, at least for the next 50 years as it has promised to do. But why should the PRC government believe that an independent judiciary and the rule of law are that

60. *China Lays Down Law on Hong Kong's Media*, REC. N. N.J., NOV. 3, 1996, at A07, available in 1996 WL 6116149.

61. See *Urgent Search*, FAR E. ECON. REV., Aug. 8, 1996, at 12, available in 1996 WL-FEER 10569556.

62. See Webb, *supra* note 19.

important; it has one of the fastest growing economies in the world *without either!*

a. The Court of Final Appeal

A Court of Final Appeal (CFA) will be established to replace Britain's Privy Council as guarantor of Hong Kong's separate legal system.⁶³ "Civil libertarians are counting on the court to protect Hong Kong's freedoms, [while] the business community expects it to guarantee the commercial laws that make Hong Kong a safe international financial center."⁶⁴

According to the Hong Kong government, the court will have "precisely the same function and jurisdiction as the Judicial Committee of the Privy Council,"⁶⁵ which is currently the final appellate body—but it may not! After months of hard bargaining, Great Britain finally conceded and agreed to exempt "acts of state" from the court's powers. Thus, the court will have no power to adjudicate matters involving "acts of state."⁶⁶ While the jurisdiction of the Privy Council is similarly restricted in Great Britain and other common law jurisdictions, acts of state are defined narrowly, and the judges themselves define it.⁶⁷ In Hong Kong, the doctrine may be more broadly defined, and more importantly, the PRC-appointed chief executive may define it.

The Basic Law provides that the courts shall obtain a certificate from the chief executive on questions of fact concerning acts of state and that this certificate shall be binding on the courts.⁶⁸ The Hong Kong government asserts that the certificate relates to facts, not the interpretation of an act of state.⁶⁹ It points out that it is similar to the common law principle that a certificate issued by the executive in respect of acts of state is conclusive as to

63. As Solicitor General, Mr. Fung will help oversee the necessary creation of a Hong Kong Court of Final Appeals. See Cummings, *supra* note 1.

64. *Britain, China Agree to Save Hong Kong's Legal System*, ARIZ. REPUBLIC, June 10, 1995, at A22.

65. Geoffrey M. Lewis, Letter, *Fears for Rule of Law in Hong Kong*, TIMES (London), July 13, 1995, available in 1995 WL 7682071.

66. See *id.*

67. See *id.*

68. See J.F. Mathews, Letter, *Hong Kong Rule of Law*, TIMES (London), July 25, 1995, available in 1995 WL 7686246.

69. See *id.*

the facts stated in it.⁷⁰ The distinction between law and fact, however, is elusive—American courts and legal scholars cannot agree on it. It seems unlikely that a PRC-appointed chief executive, especially one with only business experience, will fully appreciate the difference.

One of Great Britain's most respected constitutional scholars, Professor Sir William Wade, believes that fears regarding the acts of state exemptions are unfounded because the Joint Declaration requires future Hong Kong courts to follow English common law precedent.⁷¹ He notes "that the Crown has probably not claimed acts of state in Great Britain as a defense since 1970."⁷² Sir William adds:

The law of Acts of State is a well-known branch of English law in which it is quite clear that what is or is not an Act of State is decided by the court. That law is intended to continue (in Hong Kong courts). So there is no possibility of the Chinese being able to say that whatever they like to call an Act of State is an Act of State and so withdraw it from the jurisdiction of the CFA.⁷³

The Hong Kong government has asserted that the act of state exemption may not be used to usurp court authority over events on home territory.⁷⁴ As an example, it contends that the PRC could not claim that the closure of a Taiwanese business in Hong Kong would be immune from judicial scrutiny as an act of state.⁷⁵ Such a position is extremely naive!

Although I do not doubt Sir William's understanding of how British courts would interpret the acts of state doctrine, it is not certain that the PRC-appointed chief executive would interpret the acts of state doctrine the same way as Sir William. Indeed, Tam Yiu Chung, a pro-China legislator, told his fellow Hong Kong legislators that China's National People's Congress would decide what falls within CFA jurisdiction.⁷⁶

70. *See id.*

71. *See* Robin Fitzsimons, *Is Hong Kong Facing a Legal Sell-out?*, *TIMES* (London), Aug. 1, 1995, available in 1995 WL 7687409.

72. *Id.*

73. *Id.*

74. *See id.*

75. *See id.*

76. *See id.*

I am not alone in my concern. Sir Percy Cradock, Great Britain's former ambassador in Beijing, describes the acts of state provision as "dangerously broad."⁷⁷ Justice Michael Kirby, executive chairman of the International Commission of Jurists and President of the New South Wales Court of Appeal, agrees that "any reference to an Act of State exemption in a society such as the People's Republic of China is fraught with danger."⁷⁸ A U.S. lawyer in Hong Kong has described it as creating "a loophole through which you can drive a truck."⁷⁹ University of Virginia law professor A.E. "Dick" Howard, who has taught in Hong Kong, adds that the idea of "separation of powers" may well be "incomprehensible and possibly unacceptable" under Chinese rule.⁸⁰

It appears most likely that any case involving the powers of the post-1997 Hong Kong government will concern Hong Kong's relationship with the PRC's central authorities. If an act of state was claimed, it could easily be viewed as a question of fact on which the CFA must obtain a certificate from the chief executive. Such a certificate would be binding on the Court, implying that the Chief Executive will have a means of limiting the CFA's jurisdiction simply by requiring consultation with the PRC.⁸¹

Currently, British soldiers stationed in Hong Kong are subject to the local jurisdiction of Hong Kong civilian courts for non-military offenses, just like U.S. soldiers stationed in Japan are subject to Japanese civil law.⁸² This will change when jurisdiction is transferred to the PRC in 1997. The PRC government has announced that Chinese soldiers based in Hong Kong will not be subject to local laws.⁸³ This announcement appears to be another instance where the PRC government is flouting the Basic Law, which stipulates that "members of the garrison shall abide by laws

77. *See id.*

78. *Id.*

79. Peter Stein, *Hong Kong Legal Regime Thrown into Doubt*, WALL ST. J. (Eur.), Apr. 10, 1995, at 2, available in 1995 WL-WSJE 2147744.

80. Reske, *supra* note 4, at 33.

81. *See* Geoffrey Lewis, Letter, *Hong Kong Rule of Law*, TIMES (London), Aug. 14, 1995, available in 1995 WL 7690169.

82. *See* Jonathan Mirsky, *China to Exempt Its Garrison in Hong Kong from Local Law*, TIMES (London), Sept. 12, 1996, available in 1996 WL 6518566.

83. *See id.*

of the Hong Kong Special Administrative Region."⁸⁴ When members of a pro-Peking political group told a Chinese spokesperson that this statement violated the Basic Law, the spokesperson responded that regardless of what the Basic Law provides, "it would be very difficult for the People's Liberation Army to give its soldiers to the local courts."⁸⁵

Realistically, a law affecting the powers of Hong Kong's post-1997 government will not be left to the judges of the new court.⁸⁶ An application in proceedings before the Privy Council to judicially review an act of the post-1997 government is not likely to have the same chance of success as it would have had before 1997.⁸⁷ These concerns belie Mr. Fung's claim that the CFA will continue the rule of law in Hong Kong.⁸⁸

The Joint Declaration provides that three of the four permanent Hong Kong judges on the CFA may be of any nationality.⁸⁹ Only the Chief Justice must be of Chinese descent from Hong Kong.⁹⁰ Mr. Fung believes that a majority of non-Chinese justices will be appointed to serve on the CFA, apparently referring to the British subjects now serving as judges in Hong Kong under appointment by the Crown, thereby reflecting "the character of Hong Kong now as an international community."⁹¹ I can only point out that the provision would also permit the appointment of judges from Mainland China.

Under the Joint Declaration, the CFA should have been able to invite more than one judge from other common law jurisdictions to join it, according to the nature of the appeals that it decided.⁹² Great Britain was forced to agree, however, to include only one external judge on the five-member court, outraging lawyers and legislators.⁹³

84. *Id.*

85. *Id.*

86. See Lewis, *supra* note 65.

87. See *id.*

88. See Speech by Daniel Fung, *supra* note 13.

89. See Barrie Wiggham, Letter to the Editor, *No Legal Vacuum in Hong Kong*, WASH. POST, Aug. 14, 1995, at A16.

90. See *id.*

91. Cummings, *supra* note 1.

92. See *id.*

93. See Fitzsimons, *supra* note 71.

Finally, the British conceded an important point on timing. The new court will not officially form until July 1, 1997, when British rule ends and Beijing takes over. Of course, had the CFA been established last year, as the British wanted,⁹⁴ the U.K., acting through the present governor of Hong Kong, would have made the judicial appointments, undoubtedly mainly from the present Hong Kong judiciary. China's rejection of this proposal is strong evidence that it has other plans for who it will appoint to the CFA and it undoubtedly wanted to avoid the embarrassment of removing the British appointees and replacing them with less qualified jurists.⁹⁵

Thus, it will begin to operate only at the moment of transition, with no experience or record under the British. If the court begins to operate earlier, it may develop both an expertise and a body of judicial precedent on important issues, like the scope of the acts of state doctrine, while still under British control. This precedent subsequently could apply after 1997. Perhaps this is why Beijing insisted on delay of implementation until it took control of Hong Kong and its courts.

The Solicitor General dismisses this view by pointing out that a "landslide" thirty-eight to seventeen vote in the Hong Kong legislative council approved the Court of Final Appeal agreement.⁹⁶ He fails to mention that Legco originally refused to ratify the provisions and that Legco later ratified it only after Great Britain said that the agreement could not be amended.⁹⁷ He also does not mention that almost all the directly elected Legco members voted against the CFA Bill and in favor of amendments that they argued would protect Hong Kong's freedoms.⁹⁸

94. One of the reasons was that the British wanted the CFA established and operating last year was that the British Privy Council, which has been the "court of last resort" for Hong Kong decisions had a large backlog and wanted to stop hearing Hong Kong appeals sometime last year, as soon as the Hong Kong CFA had been established. See Webb, *supra* note 19.

95. See *id.*

96. Wiggham, *supra* note 89.

97. See Fitzsimons, *supra* note 71.

98. See Britain, China Agree to Save Hong Kong's Legal System, *supra* note 64.

b. The Lower Courts

The concern over the CFA should not overlook the staffing of the lower courts in Hong Kong after July 1. These appointees are viewed by some as "the true test of judicial independence."⁹⁹ Will these judges be selected on the basis of their legal qualifications or their political allegiance to Beijing? If we couldn't have guessed before the selection of the Chief Executive, the answer must be obvious now.¹⁰⁰ Even an internationally respected appellate can not undo the harm cause by a politically motivated trial court.

3. The Independence of the Bar

In addition to an independent judiciary, the "rule of law" needs a free and independent Bar to survive. With a system modeled after the respected British system and with many of the members of the Bar educated and trained in the Inns of Court in London, Hong Kong has had a strong and independent Bar.¹⁰¹ But recent developments restricting the practice of law on the Mainland do not bode well for the Hong Kong Bar.

The practice of law on the Mainland is presently under the joint control of the Lawyers' Society and the Ministry of Justice and the vast majority of Mainland law firms actually operate as "state-owned units."¹⁰² A new "lawyers' law" proposed last year would have allowed lawyers with three years experience to set up their own law firms and would have transferred the authority to administer qualifying examinations and to discipline lawyers from the Ministry of Justice to the Lawyers' Society.¹⁰³ Local lawyers viewed these proposals "as important steps in building up the legal profession in China" by creating a more independent Bar.¹⁰⁴ But the Law Committee of the National People's Committee Standing

99. See Webb, *supra* note 19

100. Article 88 of the Basic Law says that Hong Kong SAR judges "shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors." Basic Law, *supra* note 17, art. 88, reprinted in 29 I.L.M. 1519, 1534 (1990). But who will appoint the "recommenders?" The answer is clear: Beijing!

101. See Daniel Kwan, *Lawyers' Law Takes Step Back on Reform*, S. CHINA MORNING POST, May 15, 1996, at 8.

102. See *id.*

103. See *id.*

104. *Id.*

Committee eliminated both provisions. Xue Ju, director of the Law Committee, was quoted as saying the provisions were removed because "China still lacked experience in these matters."¹⁰⁵ But the real reason undoubtedly is Beijing's fear that it would be unable to control a truly independent Bar. There is no reason, given that Beijing announced its intention to restrict personal freedoms of its Honk Kong citizens that it will tolerate a free and independent Bar in Hong Kong anymore than it will on the Mainland.

If what has happened in Beijing is any indication, client confidentiality may also be in jeopardy. Last September, Beijing demanded quarterly reports on information usually considered confidential, for example, client lists, locations of projects under consideration, affiliations with Chinese law firms, business reference lists, and the value of deals in negotiation.¹⁰⁶ Foreign lawyers objected strenuously, calling these new requirements "a gross breach of confidentiality," but the Justice Ministry insists it intends to enforce the regulation.¹⁰⁷

4. The Post-handover Legislature

Annex I of the Joint Declaration provides that the HKSAR legislature "shall be constituted by elections."¹⁰⁸ To implement this provision, the Chinese National People's Congress passed a resolution providing that the first post-handover Legislative Council was to be comprised of sixty members, twenty of whom were to be directly elected by "geographical constituencies," thirty selected by "functional constituencies," and the remaining ten appointed by an election committee.¹⁰⁹ Beijing, however, has already reneged again. It announced that it will initially replace Hong Kong's current, democratically elected legislature, with a

105. *Id.* New regulations from the Ministry of Justice also forbid foreign firms from hiring Chinese lawyers, and may require them to terminate those already on staff. Matt Forney, *Outside the Law: Reform Reversals Hit Foreign Law Firms in China*, FAR E. ECON. REV., Jan. 2, 1997, at 18, available in 1997 WL-FEER 2009632.

106. See *China Wants Lawyers' Confidential Info*, DOW JONES INT'L NEWS SERV., Sept. 18, 1996, at 22:54:00.

107. Forney, *supra* note 105.

108. Joint Declaration, *supra* note 3, annex 1, at 1373.

109. Annex II of the Basic Law guarantees that subsequent legislatures will be "increasingly democratic." Basic Law, *supra* note 17, annex II reprinted in 29 I.L.M. 1519, 1547 (1990); see also Webb, *supra* note 19

"Provisional Legislature," which like the HKSAR chief executive, will be chosen by a Selection Committee established by Beijing.¹¹⁰

In fact, the Selection Committee essentially voted itself into office, taking fifty-one of the seats, while giving the remaining nine seats to "pro-China figures" who were not members of the committee.¹¹¹ Martin Lee, chairman of Hong Kong's Democratic Party, immediately threatened to challenge the constitutionality of the Provisional Legislature by asking a Hong Kong court to declare the interim congress illegal and to prevent it from meeting.¹¹² Great Britain proposes to try a different approach. It wants the World Court to decide whether Beijing violated the 1984 Basic Agreement by ignoring the provision that requires the new Hong Kong legislature to be "elected."¹¹³

Predictably, the PRC refused to submit the dispute to the World Court's jurisdiction, labeling it an "internal affair," and describing Britain's attempt "to play any international card" as "futile."¹¹⁴

B. The Likelihood That the PRC Will Keep Its Promises

Although one may only speculate whether the PRC will honor its promise, it has already broken its promises concerning the CFA. Senior Chinese officials have openly threatened that the PRC will abolish both Hong Kong's Bill of Rights and its common law system.¹¹⁵ Some expect new laws on treason, the press, and taxation, as well as electoral laws that guarantee all future legislatures will be filled with PRC functionaries.¹¹⁶ Furthermore, actions speak louder than words! The PRC's respect for the rule of law today serves as the best evidence of how the PRC will honor its commitments to Hong Kong.

110. Beijing has now promised that elections will take place sometime in 1998. See Webb, *supra* note 19.

111. See Kevin Platt, *Hong Kong Enters a Legal Quagmire: Whose Legislature, Courts, and Police Rule?*, CHRISTIAN SCI. MONITOR, Dec. 23, 1996, at 7, available in 1996 WL 5046370.

112. See *id.*

113. See *id.*

114. *Id.*

115. See Martin C.M. Lee, *Why China Needs Hong Kong's Legal System*, WALL ST. J. (Asian), Jan. 3, 1995, at 6, available in 1995 WL-WSJA 2131203.

116. See *id.*

Last year, the Chinese naval police arrested two Hong Kong seamen suspected of smuggling while they were within Hong Kong's territorial waters.¹¹⁷ The PRC government's willingness to ignore Hong Kong's sovereignty while still under British jurisdiction is strong evidence that the PRC will ignore the "one country-two systems" slogan. Even if the PRC does not formally repeal Hong Kong's laws, Chinese authorities who do not understand or respect such laws will undermine their effectiveness.

The absence of the rule of law in the PRC affects not only smugglers, but also businessmen. Without the rule of law doctrine, when Chinese business transactions go sour, businessmen may expect financial losses without any legal recourse at best, and imprisonment in a Chinese jail at worst, as several recent incidents demonstrate.

The Hong Kong Bill of Rights guarantees freedom of speech, but it is generally believed that the PRC government will not tolerate criticism in Hong Kong any more than it does at home. The case of Hong Kong entrepreneur and publisher Jimmy Lai is evidence of the PRC's lack of tolerance. Last year, shortly after he criticized Chinese Premier Li Peng in his magazine, the Chinese government closed down the Beijing branch of his clothing store.¹¹⁸

For foreign businessmen, the fact that over the past three years, at least fifteen Hong Kong and overseas Chinese businessmen, including one California businessman that I know personally, have been arrested and held hostage in China due to business ventures that went sour should be most distressing.¹¹⁹ Perhaps the case of James Peng, former managing director of Shenzhen Champaign Industrial Company (Champaign), is the most notorious.¹²⁰

In July 1993, Champaign's directors challenged its shareholders for control of the company.¹²¹ A Hong Kong court's ruling kept Champaign under the control of its main shareholder, a

117. See Stein, *supra* note 79.

118. See Lee, *supra* note 115.

119. See *id.*

120. See Lina Shen-Peng, *Rule of Law Must Prevail in China*, ASIA WALL ST. J., Nov. 9, 1994 (describing the author's husband's arrest and incarceration).

121. See Stein, *supra* note 79.

Hong Kong company.¹²² Nevertheless, Shenzhen government officials ignored the court's ruling and allowed Champaign's directors to appropriate the Hong Kong shareholder's entire interest in the company, about seventy-five million dollars, without any compensation.¹²³

Mr. James Peng, an Australian citizen, was treated like the two Hong Kong crewmen. According to Mr. Peng's wife and friends, in October 1993, Chinese public security officers detained Mr. Peng while he was visiting Macao, which, like Hong Kong, is not yet subject to Chinese jurisdiction.¹²⁴ He was held without charge for more than one year.¹²⁵ Eventually, Mr. Peng was tried for corruption, but the judge ordered the prosecutors to establish a better case against him before proceeding.¹²⁶ At last report, he was still in a Chinese jail.¹²⁷

It is possible that the slowness of the Hong Kong judicial system will frustrate the Chinese judicial system, which generally practices swift justice, at least if the prosecution of George Tan is typical. In 1979, Mr. Tan acquired a Hong Kong company.¹²⁸ With loans from several prominent Malaysian banks, Bumiputra Malaysia Finance Limited and its parent Bank Bumiputra Malaysia Bhd., Mr. Tan created a billion dollar empire, which included a travel company, a taxi fleet, and about sixty ships.¹²⁹ When Hong Kong's property market became depressed in 1982, the company was unable to repay its loans.¹³⁰ Within one year, the company went bankrupt, with estimated net debts of about \$1

122. *See id.*

123. *See id.*

124. *See id.* Macao is scheduled to be returned to the Chinese in 1998. *See* Paul Fife, *One Country, Two Systems- Mark II: From Hong Kong to Macao*, 12 INT'L REL 25 (1995).

125. *See* Stein, *supra* note 79.

126. *Id.*

127. *See id.*

128. *See* Erik Guyot, *Tan Case Ends, But Questions Remain*, ASIAN WALL ST., Sept. 23, 1996, at 3, available in 1996 WL-WSJA 12474087.

129. *See id.*

130. *See id.*

billion.¹³¹ In July 1993, an auditor investigating the bank loans to Tan's company was murdered in a hotel room.¹³²

Tan was first prosecuted in Hong Kong on fraud charges in 1987, but was acquitted after highly controversial case.¹³³ Mr. Tan's lawyers allegedly outmaneuvered government prosecutors in several subsequent cases.¹³⁴ He remained free on bail until September 1996, when he plead guilty to conspiring with three executives from the Malaysian banks to defraud the banks of \$238 million.¹³⁵ During the thirteen years that Mr. Tan was free on bail, he continued to engage in a number of questionable transactions.¹³⁶ For example, as recently as 1992, he helped arrange a \$500 million purchase of an office building by a mysterious Chinese-backed consortium.¹³⁷

While the Hong Kong government eventually won the case against Mr. Tan, the government is still pursuing a four-year old investigation of the Allied Group companies in connection with serious violations of stock exchange rules.¹³⁸ In another case, it took the government four years to complete an investigation into one of Hong Kong's largest takeovers of a listed company.¹³⁹

Mr. Tan's eventual guilty plea is evidence that Hong Kong's legal system can uncover fraud and corruption in Hong Kong's laissez-faire business world.¹⁴⁰ Its ability to do so after July 1997, especially if one of the principals is a highly-placed Chinese official or his son and daughter, remains to be seen; however, it seems unlikely.¹⁴¹

In reaction to the threat that the impending transfer of jurisdiction will disrupt commercial law, businessmen are drafting

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.*

141. *See* Erik Guyot, *Hong Kong Legal System Is Under Scrutiny, And More Test Cases Await*, WALL ST. J. (Asian), Sept. 23, 1996 at 3.

agreements to avoid the jurisdiction of Hong Kong courts.¹⁴² Many Hong Kong-listed companies have relocated, at least on paper.¹⁴³ "More than half of the 529 companies listed on the Hong Kong Stock Exchange at the end of 1994 had their legal domiciles in Bermuda or the British West Indies."¹⁴⁴ In addition to the benefit of favorable tax laws, they may be seeking to avoid any uncertainty following the transfer.¹⁴⁵

Hong Kong-based Regent Fund Management Limited, for example, may move out of Hong Kong before 1997, possibly to Singapore or Kuala Lumpur.¹⁴⁶ According to Managing Director Peter Everington, one big reason for leaving is "uncertainty over the prospects for law and order."¹⁴⁷ Referring to the importance of personal connections rather than enforceable legal rights in the PRC, Mr. Everington noted that the "rule of law in China is based on advocacy, while here [in Hong Kong] it is based on the judicial system."¹⁴⁸

The possibility of foreign businesses moving their regional operations elsewhere appears to have some lawyers also making preparations to move.¹⁴⁹ In 1995, applications from Hong Kong lawyers for permission to practice law in Singapore rose to 216, compared with 86 for all of 1994.¹⁵⁰ As a result, Singapore announced that it would tighten procedures for licensing Hong Kong lawyers to practice in Singapore.¹⁵¹

As further evidence of the lack of confidence in the future of Hong Kong's judicial system, the Arbitration Law Reform Subcommittee, comprised of the Hong Kong International Arbitration Centre (HKIAC) and the Hong Kong Branch of the Chartered Institute of Arbitrators, has proposed amending the existing Hong Kong Arbitration Ordinance to reduce the role of

142. See Stein, *supra* note 79.

143. See *id.*

144. *Id.*

145. See *id.*

146. See *id.*

147. *Id.*

148. *Id.*

149. See *id.*

150. See *id.*

151. See *id.*

the Hong Kong courts.¹⁵² The subcommittee suggests that the HKIAC, rather than the Hong Kong High Court, should be authorized to appoint arbitrators if the parties are unwilling or unable.¹⁵³ It proposes allowing arbitrators to order interim measures of protection and security for costs and limiting the interim measures that the High Court may grant.¹⁵⁴ Finally, the subcommittee recommends repealing the High Court's power to order discovery, and instead, giving arbitrators the authority to order discovery, to grant extensions of time for commencing arbitration proceedings, and to dismiss a claim for want of prosecution.¹⁵⁵ It also proposes giving arbitrators the power to determine their own jurisdiction in both domestic and international arbitrations,¹⁵⁶ thereby further restricting the role of post-1997 Hong Kong courts in the supervision of arbitrations in Hong Kong.¹⁵⁷

VI. SINGAPORE AS A MODEL FOR THE "NEW" HONG KONG

Many Asians see Singapore as "a role model for China, Vietnam, and other rapidly industrializing countries of the region."¹⁵⁸ Many, if not most, businessmen in Hong Kong and in the West would welcome a Singapore-like legal system in Hong Kong because it is based on the belief that restraints on individual freedoms are sometimes necessary for economic success.¹⁵⁹ Singapore's strict laws, especially against corruption, are

152. See *Reformation of Hong Kong Arbitration Ordinance Initiated on Island*, MEALEY'S INT'L ARB. REP., June 1996, at 19.

153. See *id.*

154. See *id.*

155. See *id.*

156. See *id.*

157. There is some evidence that the "unsettled state" of Hong Kong's legal system after July 1 is already having "an adverse impact on Hong Kong business." Specifically, Hong Kong companies that would have previously included arbitration clauses in their contracts providing for arbitration in Hong Kong are now providing for arbitration in foreign venues. See *Hong Kong Arbitration Threatened by Approaching Chinese Sovereignty*, 7 WORLD ARB. & MEDIATION REP. 82 (1996).

158. Steve Raymer, *Laying Down the Law in Singapore, Tough Policies, Beautiful Country*, SUN (Baltimore), Aug. 27, 1995, at 1M, available in LEXIS, NEWS Library, Curnws File.

159. See *id.*

considered an important economic asset.¹⁶⁰ Bribery, kickbacks, and other forms of corruption are uncommon in Singapore.¹⁶¹ Foreign businessmen know that Singapore courts, which are also based on the British model, will treat them honestly and fairly.¹⁶²

Others have a different view of Singapore and its legal system. Some have called Singapore a "police state" with an "inflexible legal code," noting that the fine for buying, selling, or chewing gum is \$500 and the fine for failing to flush a public toilet is \$100.¹⁶³ "Remote-control cameras photograph speeders, red-light runners, and forgetful flushers. Lawbreakers sometimes find their pictures prominently displayed in the unanimously pro-government newspapers."¹⁶⁴

More serious concern is expressed, usually by foreigners, about freedom of speech and the press. It is generally acknowledged that open criticism of the government may result in imprisonment. The government even blacks out television news programs that are critical of the government.¹⁶⁵

Many Singapore businessmen claim to like Singapore's strict rules,¹⁶⁶ which are said to make business fast and efficient.¹⁶⁷ Hong Kong businessmen may agree, secretly hoping for such a system in Hong Kong—a system that is fair and impartial to businessmen but tough on common criminals. Hong Kong businessmen forget two important distinctions, however, between Singapore and the PRC. First, business deals that go sour for the Chinese company are often viewed as economic crimes and the foreign businessman is generally treated like a common criminal. Second, nearly all businesses in Singapore are privately owned, allowing the government to be a neutral arbiter of disputes between them. In contrast, the Chinese government, directly or indirectly through

160. *See id.*

161. *See id.*

162. *See id.*

163. Veronica Chia, Editorial, *Singapore: A Nation of Laws*, PORTLAND OREGONIAN, May 29, 1995, at B06, available in 1995 WL 3604368; Raymer, *supra* note 158.

164. Raymer, *supra* note 158.

165. *See* Chia, *supra* note 163.

166. Singapore businessmen, of course, would not openly express disagreement with government policies. Freedom of speech and press are as popular with the Singapore government as they are with the Beijing government.

167. *See* Raymer, *supra* note 158.

the involvement of sons and daughters of government leaders in the private sector, is involved in most major business ventures. The government cannot be expected to be a neutral arbiter of disputes in which they have a stake.

Unlike their Singapore counterparts, Chinese courts steadfastly refuse to enforce foreign judgments. Notwithstanding claims that foreign arbitration awards are routinely enforced in China, there is growing evidence that large awards cannot be effectively enforced. For example, Ross Engineering, a U.S. company, won a \$6.6 million arbitration award against a state-owned former joint venture partner, but has been unable to enforce it.¹⁶⁸ The U.S. Secretary of Commerce intervened on behalf of Ross Engineering and asked Foreign Trade Minister Wu Yi if the award could be collected.¹⁶⁹ She allegedly smiled and said no.¹⁷⁰

VII. CONCLUSION

If the PRC government continues to have no respect for the rule of law, not to mention the lack of respect for the sovereign territories of Hong Kong and Macao, how likely is it that it will respect the rule of law and the quasi-independence of those territories after they revert back to the PRC's control? Thus, I am skeptical that the Basic Law, based on the idealistic but unworkable principle of "one country, two systems," will accomplish what it purports to promise. The Basic Law guarantees freedoms and rights found in Western democracies. Similarly, article 35 of the PRC Constitution guarantees Chinese citizens freedom of speech, press, assembly, association, procession and demonstration.¹⁷¹ Nevertheless, the events in Tiananmen Square made it clear that these guarantees are only hollow

168. See Lee, *supra* note 115.

169. See *id.*

170. See *id.*

171. Villanova law professor Joseph Dellapenna predicts that "criminal law and police enforcement will be the first to undergo changes." Reske, *supra* note 4, at 33. He also contends that "demonstrations will be suppressed and dissidents will disappear." *Id.* University of Virginia law professor A.E. "Dick" Howard, who has taught in Hong Kong, adds that "[t]here will be erosion" of freedoms in Hong Kong and freedom of the press and freedom of speech "will be early casualties." *Id.*

promises. I am sure that the PRC's promises with respect to the rule of law in Hong Kong will turn out to be equally hollow.

VIII. POSTSCRIPT

When I prepared this article as a response to Mr. Fung's speech at Loyola law School early last year, I conceded that no one really knew what would happen to Hong Kong and its "rule of law" on July 1, 1997. I suggested that we were all *speculating*; some like Mr. Fung were optimistic, other, like me, were pessimistic. Only time would tell.

But much time has passed since then; the turnover is now only months away. I think it is fair to say that *everything* that has happened since then indicates that my "pessimistic view" is far more likely to be the correct prediction than Mr. Fung's. The Mainland's crack down on dissidents at home and its threat to prevent anti-government demonstrations in Hong Kong may be the best evidence that "free speech" will be tolerated no more in Hong Kong than it is on the Mainland.

We also know who the Chief Executive of the SAR will be.¹⁷² While there can be little doubt that Mr. Tung Chee Hwa is an astute and successful businessman; it is equally clear that he sees no value in maintaining a Western legal system and is prepared to follow directions coming from Beijing.¹⁷³ There is only one piece remaining to complete the puzzle—the selection of judges for the CFA and the lower courts. Mr. Fung was optimistic that a good number of the CFA judges would be foreigners; that seems

172. It will *not* be that Retired Hong Kong Chief Justice Tang Ti-liang unsuccessfully competed for the chief-executive post. It is much more likely that a retired jurist would have had a commitment to the "rule of law" that Mr. Tung Chee Hwa, a "shipping magnate," will.

173. Mr. Hwa showed his "true colors" in January when he selected a 15-member Executive Council "dominated by leading pro-China professionals." Although most have substantial business or government experience, they have been characterized as "a team of professionals largely from the pro-China camp," by Lau Siu-kai, a professor at the Chinese University of Hong Kong. Erik Guyot, *Hong Kong Cabinet of Pro-China Aides Selected by Tung*, WALL ST. J., Jan. 27, 1997, available in 1997 WL-WSJ 2407083. Notably absent from the Executive Committee were representatives of the Hong Kong Democratic Party led by firebrand Martin Lee. When asked why no Democrats were on the Executive Council, Mr. Tung replied that both he and the other appointees were "very democratic," prompting Mr. Lee to observe that "If Mr. Tung is a democrat, no one in this world would be [considered a] conservative." *Tung: I Am Very Democratic*, S. CHINA MORNING POST, Jan. 26, 1997, at 4, available in 1997 WL 2252393.

"beyond the pale" now. All one can hope for is that they will be Hong Kong Chinese, selected for their judicial experience on the British-style Hong Kong courts - and the fierce sense of judicial independence that goes with it.

Perhaps I will be proven wrong this time but the appointment of pro-Beijing businessmen and politicians to the Selection Committee that chose the Chief executive and the HKSAR's first legislature,¹⁷⁴ means it is unlikely that judicial selections will be based more on competence than allegiance to the Mainland government.

What may be most disturbing is the fact that the West, or at least the United States, seems resigned to this result and will do little if anything to prevent the PRC from imposing its version of the "rule of law" on Hong Kong.¹⁷⁵

174. Hutchings, *supra* note 37.

175. At a press conference in late January, President Clinton acknowledged that his "engagement" policy in dealing with the PRC had had little effect in improving the PRC's human rights record. Additional comments indicated that Mr. Clinton was resigned to the probability that the Mainland will crack down on civil liberties when it resumes control of Hong Kong later this year. While he urged Beijing to "respect" human rights in Hong Kong, he ruled out retaliation by the U.S. if the PRC did not do so. See Norman Kempster, *From Clinton, a Caution on Hong Kong, but No Threat Asia: President Urges China to Respect Human Rights After July Hand-over*, L.A. TIMES, Jan. 29, 1997, at A4.