JUDICIAL REVIEW IN THE NEW HONG KONG: PROPHECIES AND PORTENTS

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At midnight before July 1, 1997, amid the requisite pageantry and sentiment, the Union Jack was lowered and Britain's former dependent territory in Hong Kong was formally handed over to the People's Republic of China (PRC). This was done under the intense glare of worldwide publicity generated by a vast throng of media, which covered the events with a combination of nostalgia, curiosity, and apprehension. In terms of Britain's gradual divestment of its empire, this event was unique. Instead of gaining independence after more than 150 years of British control, Hong Kong was restored to its position under Chinese sovereignty.[1] The framework for the handover was provided in the Joint Declaration of December 19, 1984.[2] By Article 3 of the Joint Declaration, the PRC agreed that Hong Kong would form a Special Administrative Region (SAR) and would enjoy a considerable degree of autonomy. In the famous (if enigmatic) slogan of Deng Xiaoping, after 1997 there would be "one country, two systems."

These assurances would be laid down in a Basic Law, to be proclaimed by the National People's Congress (NPC) in Beijing, that would remain in force for fifty years after July 1, 1997. The purpose of the Basic Law was to render the principles contained in the Joint Declaration into practical terms. Drafting the Basic Law took several years of work by a committee composed of representatives from both the PRC and Hong Kong.[3] On April 4, 1990, the Basic Law was adopted by the NPC.[4] It would take effect on the date of the handover.

The Basic Law, the offspring of the treaty process between the PRC and Britain, is a *sui generis* document. It does not fit easily into any known category of constitutional law. It is designed to serve simultaneously as both a national law of the PRC and also the constitution of the HKSAR. The Basic Law was drafted in Chinese, with an official English translation. In case of any discrepancy, the Chinese version prevails.[5] Importantly, it is supposed to ensure continuity and stability. Hong Kong's unique

[1] Though with residual questions still to be answered about Hong Kong's status as a recognizable political entity in its own right: see Roda Mushkat, "Hong Kong as an International Legal Person" (1992) 6 Emory Int'l L. Rev. 105.

[2] For the text, see (1984) 23 I.L.M. 1366.

[3] For accounts of this tortuous process, see Robert Cottrell, *The End of Hong Kong* (London: John Murray, 1993); Steve Shipp, *Hong Kong, China: A Political History of the British Crown Colony's Transfer to Chinese Rule* (Jefferson, NC: McFarland, 1995); and Mark Roberti, *The Fall of Hong Kong: China's Triumph and Britain's Betrayal*, 2nd. ed. (New York: John Wiley, 1996).

[4] The Basic Law is reprinted in (1990) 29 I.L.M. 1511.

[5] Officials in the new SAR were required at the handover to repeat their oath to the new regime in Mandarin. Since these officials customarily speak Cantonese, not Mandarin, some hitches understandably arose, such as when (according to a Canadian television news reporter) a newly installed administrator vowed to be loyal to the "Special Nervous Region."

social, economic, and legal systems, which have bred such remarkable prosperity in the last fifty years of British rule, are supposed to be preserved by the Basic Law for the next half-century. The efforts made in the dying days of British colonial rule to transplant some aspects of democratic self-governance were also, it has been hoped, to be preserved by the Basic Law.[6] Indeed, much of the media coverage on July 1st was concerned with whether the slender shoot of democratic rights and freedoms would likely mature, or even survive, in the new era. Some of the coverage portrayed the outgoing Governor of Hong Kong, Chris Patten, as a heroic figure who frequently battled both PRC officials and the sinologues in his own country's Foreign Office in order to leave behind some (even if it were a short) legacy of democratic participation.[7] The key to sustaining such democratic initiatives lay in the enforcement of the Basic Law by Hong Kong courts after the transfer of sovereignty.

In the aftermath of the handover, the fortunes of Hong Kong have been closely studied, from perspectives both financial and political. This past October's shudders in the Asian currency markets registered dramatically in Hong Kong, where the Hang Seng Index dropped precipitously.[8] Questions arose in that context about whether the PRC government would step in to support the stock market in Hong Kong and preserve it against a sudden crash. Perhaps less noticeable, at least in terms of overseas media analysis, have been the fluctuating fortunes of human rights protection in the new HKSAR. While there have yet to be any significant incidents that test the limits of the new regime's tolerance for mass political dissent, rumblings about the future of constitutionally protected rights have been amplified by early trends found in decisions of the new HKSAR courts.[9] If there were a comparable index for confidence in the Hong Kong courts as a bulwark against legislative violations of the Basic Law, it too would have dipped within months after the handover.

The initial opportunity for a Hong Kong court to interpret the Basic Law as a constitutional document arose at the end of July 1997. The resulting decision has caused alarm among some Hong Kong legal experts. They have raised doubts about whether the judges involved properly gave effect to the Basic Law as a robust constitutional framework, or whether its status as a fundamental legal framework has been subordinated so that it remains subject to PRC laws. In addition, the decision has troubled observers, such as former legislators and current advocates for democracy in Hong Kong, who are anxious about whether, under the new regime, human rights will be vigorously protected by Hong Kong's own courts using their power of judicial review. As argued below, these early pronouncements from the Hong Kong Court of Appeal serve as a harbinger, not a final statement, of the status of the Basic Law. Nevertheless, the judgments in the case point the way to a regime where judicial review will not count for much. The upshot, as suggested below, is that both the rule of law and Hong Kong's autonomy are

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6 For the political developments in Hong Kong after 1990, see Kathleen Cheek-Milby, *A Legislature Comes of Age: Hong Kong's Search for Influence and Identity* (Hong Kong and New York: Oxford University Press, 1995).

7 For the most admiring account of Patten's reforms, see Jonathan Dimbleby, *The Last Governor: Chris Patten and the Handover of Hong Kong* (Toronto: Doubleday Canada, 1997).

8 In one day alone, October 28th, the Hang Seng index plunged 13.7% to 9059.89, representing a drop of about Cdn$38 billion in total market value: see "Taipans left just a little less rich" *The Financial Post* (November 28, 1997) 24.

9 A token of the precautionary attitude was the removal before the handover of the "Pillar of Shame" from Statue Square in central Hong Kong (where potentially thousands of protesters might use it as a rallying point) to a relatively small terrace on the University of Hong Kong campus, where it would be difficult to squeeze together a meeting of even few hundred participants. The statue was erected in 1995 to commemorate the victims of the Tiananmen Square crackdown in 1989.

put in question. The Basic Law then is not so basic as some constitutional visionaries might have hoped.[10] The new HKSAR is founded on a document containing such a degree of ambiguity and qualification that many aspects of Hong Kong life may be altered according to the political decisions of mainland officials.

HONG KONG SPECIAL ADMINISTRATIVE REGION v. *MA WAI KWAN ET AL.*[11]

The central constitutional issue in this case turned on the continuity of Hong Kong's laws, as well as the legality of Hong Kong's Provisional Legislative Council (PLC).[12] The case arose out of criminal proceedings against three individuals accused of the common law crime of conspiracy to pervert the course of public justice.[13] The prosecution alleged that money had been offered to induce one of the accused to maintain a false version of the events surrounding a robbery.

In mid-trial, the presiding judge reserved several questions of law for determination by the Court of Appeal.[14] During the subsequent Court of Appeal hearing, which was conducted with great haste, argument focussed on two primary issues.[15] The first was whether the common law crime of conspiracy to pervert the course of public justice survived the change of sovereignty. Had that crime, even without an overt act of adoption, continued to form part of the laws of the new HKSAR? Secondly, did the original indictment of the three accused still validly permit the criminal proceedings to continue?

The three-member panel of the Court of Appeal unanimously answered both questions in the affirmative. These conclusions contained no surprises: the Court straightforwardly relied on the plain meaning, in both the Chinese and English versions, of several key provisions in the Basic Law (notably Article 8) and the Joint Declaration that provide for the continuation of previous Hong Kong laws without the necessity of formal adoption.[16] Although the accused were indicted before July 1, 1997 and made their first appearance before that date in Hong's Kong Supreme Court (which is re-named under the Basic Law),[17] nevertheless Article

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10 For acute philosophical musings about whether after 1997 Hong Kong's Basic Law would emerge as "foundational," see J. W. Harris, "The Basic Norm and the Basic Law" (1994) 24 H.K.L.J. 207. As Harris notes, "puzzles which have been raised about constitutional devolution and independence" are answered only when it becomes clear in practice which conflicting set of norms is recognized by "local lawyers": *ibid.* at 229.

11 [1997] H.K.L.R.D. 761 (hereinfater "*HKSAR* v. *Ma Wai Kwan*"). The case is classified as Reservation of Question of Law No. 1, 1997, heard July 22 to 24, 1997. Reasons for judgment dated July 29, 1997.

12 For information on the history and composition of the 60-member PLC, see the following website: http://www.legco.gov.hk. The official web site of the new administration in Hong Kong is at http://www.info.gov.hk. The latter source describes the role of the Executive Council, which provides advice to HKSAR's Chief Executive, the industrialist Tung Chee-Hwa.

13 After the individuals were charged, Hong Kong's criminal law was amended to abolish the common law offence of conspiracy: see Crimes (Amendment) Ordinance, c. 200, s. 159E(1). That amendment expressly did not apply to cases where proceedings had already commenced.

14 In accordance with the Criminal Procedure Ordinance, c. 221, s. 81.

15 The reasons of Chief Judge Patrick Chan note that the original lawyers for the accused sought (successfully, as it turned out) to be excused from the case at this point in the trial: see *HKSAR* v. *Ma Wai-Kwan* at 771. Meanwhile, the main responsibility for arguing the constitutional issues on behalf of the accused was assumed, with less than twenty-four hours' notice, by lawyers acting apparently as *amici curiae*.

16 Article 8 provides: "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, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region." Had it been necessary, Justice Gerald Nazareth would have applied the interpretive rule that the Chinese version takes precedence over the English translation: see *HKSAR* v. *Ma Wai Kwan* at 790.

17 The former Supreme Court is now called the High Court (which is comprised of the Court of First Instance and the Court of Appeal): see Article 81 of the Basic Law. The former High Court is re-named the Court of First Instance. Finally, the Court of Final Appeal was created as of July 1, 1997 to take over the functions and jurisdiction of the Privy Council.

160 of the Basic Law, and in particular the reference in that clause to the continuation of "rights and obligations," was interpreted by the Court of Appeal as covering such indictments.[18] Therefore, criminal proceedings against the accused had not lapsed and the indictment should not be quashed, but could still be pursued after the change of sovereignty. Interestingly, the "rights" were not those of the accused, nor were the "obligations" imposed on the government. Rather, as shown in the judgment of Justice Nazareth, the "rights" involved in the instant case belonged to the prosecuting authorities (the right to have the indictment heard by a court), while the obligations rested on the accused (the obligation to be tried on the indictment).[19]

In construing the meaning of the relevant provisions in the Basic Law, all three judges adopted a "plain meaning" or literal approach. None of them at this stage felt the need to resort to other rules of interpretation, such as the rule calling for a "generous" and "purposive" construction when the law in question is a constitution that guarantees certain fundamental rights and freedoms.[20] Only in the judgment of Justice Mortimer can there be found some slight reliance on the principle of a purposive interpretation. Otherwise, the issues regarding continuity of Hong Kong's criminal laws could be settled without elaborate reference to such principles of interpretation.[21] This reluctance to deploy a generous or purposive interpretive approach also recurs in those parts of the appellate judgments which deal with the scope for judicial review of the validity of legislation in the new HKSAR.

What remains most striking about the decision, however, is the use of this case by the three judges as a pretext for addressing the issue of whether HKSAR courts have the jurisdiction to review the conformity of NPC decisions with the Basic Law. On this, the Court decided that, just as the former colonial courts had no power to declare invalid the acts of Britain's government so, after July 1, 1997, the HKSAR courts could not question the validity of NPC acts. Moreover, in a second instance of going out its way to demarcate the boundaries of constitutional power in the new Hong Kong, the Court of Appeal ruled that, despite what the Basic Law might plausibly indicate, the PRC constitution gives mainland legislators complete power over the new HKSAR. Whenever a provision in the Basic Law conflicts with the PRC constitution, the former must give way to the latter.

Whither the concept, then, of two autonomous legal systems? Or of Hong Kong's vaunted "special status" within the overall Chinese governmental structure? Or of the pledge that after the handover all that would change in Hong Kong would be the official flags? From the perspective of constitutional lawyers, the *obiter* comments by the Court of Appeal on the scope for judicial review in the new HKSAR could be viewed as seriously encroaching on Hong Kong's autonomy and the preservation of human rights provided under the Basic Law. For experts such as Professor Yash Ghai of the University of Hong Kong, the decision is ominous and potentially threatening: the very

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[18] Article 160 provides in part: "Documents, certificates, contracts, rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region, provided they do not contravene this law."

[19] See *HKSAR* v. *Ma Wai Kwan* at 790-91.

[20] In Privy Council jurisprudence, this principle of construction is found in *Minister of Home Affairs* v. *Fisher*, [1980] A.C. 319 and *Attorney General of Gambia* v. *Jobe*, [1984] A.C. 689 at 700.

[21] See *HKSAR* v. *Ma Wai Kwan* at 803.

status of the Basic Law as a constitutional docu-ment has been undermined.[22]

To justify his decision regarding the limited power of judicial review, Chief Judge Chan in the Court of Appeal in *HKSAR* v. *Ma Wai-Kwan* pointed to the situation of the courts before the handover. The HKSAR courts could have no more power to declare legislation *ultra vires* than the previous Hong Kong courts enjoyed under British rule. Before July 1, 1997, a Hong Kong court was unable to invalidate a law passed by the Parliament in London. In the words of Chief Judge Chan, "colonial courts" were bound to give effect to legislation passed by the sovereign U.K. Parliament.[23] It is revealing that in adapting this principle to Hong Kong's new status, Chief Judge Chan simply appeared to substitute for "colonial courts" the term "regional courts."[24] Under the PRC constitution, the NPC is the highest branch of state power and, with its Standing Committee, serves as the ultimate legislature for the HKSAR.[25] The decisions and resolutions of the NPC that resulted in the formation in 1990 of the Preparatory Committee, which operated in the period leading up to the handover, are therefore beyond the reach of judicial review. Using its delegated powers, the Preparatory Committee created the PLC in March, 1996 and set up its membership later in December of that year. Similarly, according to the Court of Appeal, the establishment of the appointed PLC (which replaced the partly-elected Legislative Council , or "LegCo" as it was popularly known, that existed under British rule) is shielded from constitutional review. The courts retain scope only to determine certain factual questions about the operations of the NPC, the Preparatory Committee, or the PLC. Again, according to Chief Judge Chan, this jurisdiction is analogous to that exercised by the courts under the former regime.[26] Once the court is satisfied that, for example, the PLC "*was* in fact the body which was set up pursuant to the decisions or resolutions of the NPC and the Preparatory Committee," that is the end of the matter.[27]

This characterization of the HKSAR courts as limited to inquiring into certain legislative facts prefigured how the Court of Appeal would deal with the issue of the legality of the PLC. At the centre of the dispute is whether the PLC amounts to the "first government" or "first legislative council" of the HKSAR. When the Basic Law was adopted in 1990, the intention was that there be a "through train." That is, members of the last Hong Kong LegCo should also (provided they satisfy certain conditions) become members of the first Legislative Council of the HKSAR.[28] The initial term of the first Legislative Council was supposed to be two years, from 1997 to 1999, or the balance of a four-year term for those legislators chosen in the 1995 elections to LegCo. Furthermore, Article 68 of the Basic

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22 See Yash Ghai, "Dark Day for Our Rights," *South China Morning Post* (30 July 1997) 17.

23 Only scant authority for this proposition was cited in Chief Judge Chan's reasons. As Justice Nazareth noted, during oral argument no "direct authority" ever was brought to the court's attention: see *HKSAR* v. *Ma Wai Kwan* at 792. This is perhaps an indication of the extent to which the expedited hearing and process of deliberation in this constitutional case interfered with the aim of producing comprehensive, unassailable judgments.

24 Chief Judge Chan appeared to be more confident in making this simple substitution than Justice Nazareth. The latter declared that the "analogy between NPC and the British 'sovereign' upon further examination may not hold in material respects": see *HKSAR* v. *Ma Wai Kwan* at 794. Unfortunately, Justice Nazareth did not explore his uneasiness on this in any further depth.

25 For background on the NPC and the Standing Committee, see Albert H. Y. Chen, *An Introduction to the Legal System of the People's Republic of China* (Singapore: Butterworths, 1988) ch. 4.

26 See in *HKSAR* v. *Ma Wai-Kwan* at 781.

27 *Ibid.* (emphasis in the original).

28 The metaphor of the "through train" and who might be entitled to ride on it occupied a key place in Sino-British negotiations: see Dimbleby, *supra* note 6 at 95, 204-206, and 317-21. Not only legislators, but judges also were supposed to continue in service: see Peter Wesley-Smith, "Judges and the Through Train" (1995) 25 H.K.L.J. 1.

Law provided that the legislative council for the new SAR is to be an elected body.[29]

In fact, when the PRC appointed the PLC in 1996, there was no through train. Only a few members of the previous LegCo were selected to serve on the PLC. Such prominent, elected members of LegCo as Martin Lee, Emily Lau, and Christine Loh, who also happened to be in the forefront of the struggle for democratic rights and institutions in Hong Kong, were left off the PLC. Under its enabling terms, the PLC received limited powers and a term of office to extend no later than June 30, 1998. It was argued in the Court of Appeal by the lawyers challenging the legality of the PLC that, notwithstanding this restricted mandate, the PLC is *de facto* the first HKSAR government and, therefore, violates the Basic Law.[30]

In rejecting the arguments that the PLC was invalidly constituted, the Court of Appeal accepted the government lawyers' contentions that the PLC is merely an interim body, set up as part of the transitional arrangements in the run-up to elections expected in the spring of 1998. The derailing of the "through train" occurred when the last Governor of Hong Kong, Chris Patten, initiated political reforms in 1994 that revised LegCo in ways repugnant to the PRC. These events were viewed by the Court of Appeal as creating a political environment in which it would be unrealistic to think that the previous LegCo could simply be continued as the new government for the HKSAR. After briefly reviewing the events leading up to the appointment of the PLC, Chief Judge Chan admitted that, while it may have been "unfortunate" that the previous LegCo or some other elected body was not put in place on the resumption of sovereignty, this did not happen, and it is "not the business of the Court to enter into the political arena and to determine what the real reasons were."[31] Again, the Court simply was impressed by the fact that without the PLC, a legal vacuum would have sprung up on July 1, 1997, which would have been "potentially disastrous."

In summary, Chief Judge Chan noted that, strictly speaking, in his view the PLC, despite its title and duties, is not a "legislative council" under Article 68 of the Basic Law. Therefore its creation does not violate the Basic Law. It is only a transitional body and has been validly established. This conclusion is reinforced, according to Chief Judge Chan, because the PRC itself ratified the creation of the PLC and the selection of its members in March, 1997. Again, this express ratification by the "sovereign" government in Beijing removes any doubt about the legality of the PLC. In the words of Chief Judge Chan, the ratification amounts to "a sovereign act which the HKSAR courts cannot challenge."[32]

THE IMPORTANCE OF THE ALTERNATIVE GROUNDS

What might have prompted all three judges in the Court of Appeal to go beyond the main grounds for resolving the nub of the dispute in *HKSAR* v. *Ma Wai Kwan*? Why did they not decline for the present and leave for a later case the resolution of those issues which formed the *obiter* portions of the Court's decision? These are good questions, especially given the lack of adequate notice to

[29] Article 68 further provides: "The ultimate aim is the election of all the members of the Legislative Council by universal suffrage."

[30] It was argued that the Preparatory Committee only had the power to prescribe procedures for establishing the "first" Legislative Council. Its creation of an interim government arguably was outside the Preparatory Committee's powers as provided by Article 168 of the Basic Law as well as the 1994 NPC Decision that set down the Preparatory Committeee's mandate.

[31] *HKSAR* v. *Ma Wai Kwan* at 784.

[32] *Ibid.* at 787.

the team of lawyers that stepped in to represent the accused on the larger constitutional aspects of the case. As Justice Nazareth conceded, this had become "no ordinary case."[33] Perhaps because it was the inaugural decision on methods of interpreting the Basic Law, the Court felt impelled to resolve as early as possible any doubts about the legality of measures which might be adopted by the PLC.[34] It would thus serve the public interest to confirm the legitimacy of the legislative body which had succeeded the now-ousted government. Moreover, if the Court of Appeal erred in this anticipatory, expedited interpretation of the Basic Law, the opportunity would be created for the Court of Final Appeal or, beyond that tribunal, the Standing Committee of the NPC to correct any such error. This appears to be the kind of logic animating the Court.

A second reason for treating the issue as relatively urgent is the limited term of the PLC. This branch of government is intended to remain in place only until the proposed elections in 1998 result in the selection of a new legislative council. Arguably, because of the PLC's brief life span, any questions about its legitimacy should be resolved as quickly as possible.

A third possible explanation has a more cynical cast. One might reasonably presume that the new administration in Hong Kong would have had government lawyers preparing a brief on these issues for some months before the handover.[35] The legality of the PLC had already been doubted by some legal academics, who inquired whether or not, for example, the doctrine of necessity and the fear of a "legal vacuum" could be invoked to justify setting up a legislative organ which appeared to conflict with the provisions in the Basic Law.[36] Having been put on notice that such a challenge might arise, government lawyers would have been poised to press the Court of Appeal to deal immediately with the constitutional questions in their full dimensions. That is to say, the motive might have been to catch opponents of the new PLC somewhat off-guard.[37]

TRADITIONS OF DEFERENCE?

One way of explaining the decision of the Court of Appeal in *HKSAR* v. *Ma Wai Kwan* is to examine the background of judicial deference prior to and within the context of that case. As noted especially in the judgment of Chief Judge Chan, Hong Kong courts after the handover are no stronger in terms of practising judicial review than they were before July 1, 1997. Although Hong Kong courts have in the recent past tested the conformity of Hong Kong ordinances with the Letters Patent, issued in Britain, that provided the powers of the Governor,[38] or after 1991 measured legislation against the Hong Kong

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[33] *Ibid.* at 792.

[34] *Ibid.*

[35] Hong Kong's Solicitor-General, Daniel Fung, one of the counsel who argued the government's case in *HKSAR* v. *Ma Wai Kwan*, stated in a newspaper interview that four special panels of lawyers within the Department of Justice had been set up to deal with prospective litigation involving human rights, permanent residency rights, and government duties laid down by the Basic Law: see May Sin-Mi Hon, "Panels of experts prepared for rise in anti-SAR cases" *South China Morning Post* (19 July 1997) 6. In respect of the second of these types of issues, on October 9, 1997, the Court of First Instance (Keith J.) delivered its judgment in *Cheung Lai Wah* v. *The Director of Immigration* (1997, A.L. Nos. 68, 70, 71, and 73; unreported), which tested, against Articles 22 and 24 of the Basic Law, restrictions passed by the PLC on the right of abode in Hong Kong.

[36] See Yash Ghai, "Back to Basics: The Provisional Legislature and the Basic Law" (1995) 25 H.K.L.J. 2 and Stephen Law Shing-yan, "The Constitutionality of the Provisional Legislature" (1996) 26 H.K.L.J. 152.

[37] For the reaction of Andrew Cheng, a spokesman for the United Front Against the Provisional Legislature, to the decision in *HKSAR* v. *Ma Wai Kwan*, see Linda Choy and Genevieve Ku, "Fears as 'bulwark of Basic Law falls'" *South China Morning Post* (July 30, 1997) 7. Mr. Cheng had been a member of LegCo until it was disbanded on the handover.

[38] See the Court of Appeal judgment in *Lee Miu-ling* v. *Attorney General*, [1996] 1 H.K.C. 124.

Bill of Rights,[39] these precedents did not appear to Justice Nazareth, for example, to authorize a post-handover court to question the validity of NPC actions. To buttress this conclusion, Justice Nazareth pointed to that part of Article 19 of the Basic Law, which provides that "restrictions on [the HKSAR courts'] jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained." In this exception to the courts' powers, Justice Nazareth found justification for continued judicial deference.

Another explanation for the deference exhibited by the Court of Appeal might lie (at least partly) in the training of the judges themselves.[40] All three have been schooled in the British common law tradition. Chief Judge Chan graduated from Hong Kong University and practised in the colony before being appointed to the District Court in 1987. Justice Nazareth was born in Kenya, received his legal education in Bombay, and was originally called to the English Bar. His route to Hong Kong took him from Kenya, where he was a prosecutor, through the British Solomon Islands, where he served as solicitor-general. The other member of the panel, Justice Barry Mortimer, was born in England and educated at Cambridge University. He began his legal career as a prosecutor in England. All three judges, then, have been steeped in the concept of parliamentary sovereignty, according to which the will of the legislators is paramount.[41] In Dicey's analysis of governmental structures in the United Kingdom, Parliament has the power "to make or unmake any law whatever."[42] No law is so fundamental that it cannot be overridden by ordinary parliamentary action. Under a regime which recognizes parliamentary sovereignty, there is no room for judicial review, in the sense that judges have the power to strike down legislation. It is against this background that the judges in *HKSAR* v. *Ma Wai Kwan* would have found it difficult to say of the Basic Law, "we must not forget that it is a constitution we are expounding."[43] Instead, as characterized in the deflationary language of Justice Mortimer, the Basic Law is only "semi-constitutional in nature."[44] Thus are realized those fears of commentators who wondered whether the Basic Law would be understood as a fundamental constitutional document. In particular, they were anxious over the willingness of the Standing Committee of the NPC to recognize that the Basic Law, *qua* constitution, would be viewed as requiring distinctive modes of argument and interpretation.[45] As demonstrated in *HKSAR* v. *Ma Wai Kwan*, not only is this question about constitutional interpretation relevant to mainland officials, but a similar question applies to the Hong Kong judiciary. For, as noted by a Hong Kong lawyer, the "future of the law in Hong Kong rests upon our judges."[46] It would be unfortunate if the concept of parliamentary sovereignty

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[39] Hong Kong Bill of Rights Ordinance, No. 59 (1991). Section 8 of the Bill of Rights Ordinance guarantees various rights and freedoms that mirror those contained in the International Covenant on Civil and Political Rights: see (1976) 6 I.L.M. 368. The Bill of Rights Ordinance was made superior to local law through an amendment to the Letters Patent so that it could not be repealed locally. For an assessment of the early and later trends in judicial interpretation of the Bill of Rights Ordinance, see Dennis Morris, "Interpreting Hong Kong's Bill of Rights: Some Basic Questions" (1994) 15 Statute L. Rev. 126, (1995) 16 Statute L. Rev. 200, and (1996) 17 Statute L. Rev. 128, and Yash Ghai, "Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights" (1997) 60 Mod. L. Rev. 459.

[40] The following biographical information is drawn from the *South China Morning Post* (30 July 1997) 7.

[41] This leaves aside issues about the courts' power under the so-called "unwritten" British constitution.

[42] A. V. Dicey, *The Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at 39.

[43] Compare *McCulloch* v. *Maryland* (1819) 17 U.S. (4 Wheat.) 316.

[44] *HKSAR* v. *Ma Wai Kwan* at 800.

[45] See Michael C. Davis, *Constitutional Confrontation in Hong Kong: Issues and Implications of the Basic Law* (London: Macmillan, 1988).

[46] Raymond Wacks, "Approaching the Bench: The Future of the Judiciary" (1994) 24 H.K.L.J. 1 at 1.

"mesmerised" Hong Kong judges, to the point where they were "unable to think and reason beyond it."[47]

THE RULE OF LAW AND HONG KONG'S AUTONOMY

One of the main reasons underlying Chief Judge Chan's dismissal of the challenge to the validity of the PLC was the fear (perhaps more alarmist than real) of creating a legal gap or vacuum. In his view, without the creation of the PLC, there would have been no government to replace the defunct LegCo. This analysis accords little weight to the claim that it would have been possible for the Preparatory Committee to set up a Legislative Council, as envisioned by the Basic Law, that would have been elected for an initial two-year term, and that would come into existence on July 1, 1997.[48] After all, the authorities had "over three years to make arrangements for the formation of the first elected legislature."[49] As conceded by the government's lawyers, such a transitional body as the PLC was not anticipated in the Basic Law at all. It could be argued that Chief Judge Chan, although he expressly declined to deal with arguments based on a doctrine of "necessity," falls into the trap of reasoning that, since judicially declaring the PLC to be invalidly constituted would cause chaos in the HKSAR's public administration, therefore its creation in the first place must have been necessary to avoid a legal gap.

Another worrisome aspect of the decision in *HKSAR* v. *Ma Wai Kwan* is the extent to which this case, while reaffirming parliamentary sovereignty, whittles away at the rule of law and Hong Kong's political and legal autonomy. Much has been written about the difficulty of finding in the PRC legal system equivalent concepts to those traditionally used in Anglo-American common law, such as "constitution" or "rule of law."[50] In contrast to the latter concept, with its connotations of judicial independence and the requirement that the government is bound to act in accordance with the law, the PRC legal system is characterized by "legal flexibility, lack of procedural regularity and the supremacy of Chinese Communist Party (CCP) policy."[51] It is arguable that the decision in *HKSAR* v. *Ma Wai-Kwan*, by limiting the power of Hong Kong courts to review the validity of laws and their administration by PRC authorities and by failing to preserve Hong Kong's distinctive legal tradition, poses a threat to the rule of law in the HKSAR. Without actually judicially repealing those rights and freedoms protected by the common law, or the individual liberties guaranteed (to a qualified extent) in Hong Kong's Bill of Rights Ordinance, the Court of Appeal's decision places those features of Hong Kong's legal system in jeopardy. The reasons in *HKSAR* v. *Ma Wai Kwan* do not circumscribe the authority of PRC officials to make laws that abrogate individual rights formerly enjoyed by Hong Kong citizens. The likelihood of putting into practice the principle underlying the Basic Law – to

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47 Peter Wesley-Smith, "Judicial Review of Legislation in Hong Kong" (1996) 26 H.K.L.J. 1 at 1.

48 In his reasons, Justice Nazareth refers to the Decision of the NPC on April 4, 1990 (the same day on which the Basic Law was adopted) that refers to the election of a 60-member "first" Legislative Council that shall hold office for an initial term of office of two years": see *HKSAR* v. *Ma Wai Kwan* at 795.

49 Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997) at 276.

50 See, e.g., Ann D. Jordan, "Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region" (1997) 30 Cornell Int'l L. J. 335; Cai Dingjian, "Constitutional Supervision and Interpretation in the People's Republic of China" (1995) 9 J. Chinese L. 218; and Michael C. Davis, "Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis" (1996) 34 Colum. J. Transnational L. 301 at 318.

51 *Ibid.* at 338.

construct "one country, two systems" – looks increasingly remote after such a decision as this from the Court of Appeal. This confirms those doubters who foresaw the precarious future of legal and political rights in the new Hong Kong.[52]

By contrast with this interpretation of the dire effects of *HKSAR* v. *Ma Wai Kwan* on the rule of law, Hong Kong's Solicitor-General, Daniel Fung, has defended the decision as a vindication of the rule of law, indeed, in his words, as "one of Hong Kong's finest hours."[53] Against the decision's critics, Fung argues that, when the Court of Appeal strictly construed the Basic Law as superior to other HKSAR laws, but subordinate to PRC laws, the judges simply followed the law. They resolved this issue with "Hong Kong's customary hallmark of efficiency."[54] His other claim is that, had the challenge to the constitutionality of the PLC succeeded, Hong Kong would have been bereft of all "positive law" whatsoever. Fung's second point echoes the Chief Judge's thinking which, it is pointed out above, requires the court to confer retrospective legitimacy on a dubious institution. Fung's first claim simply fails to recognize the inconsistency between common law notions of the rule of law and the political realities of the contemporary PRC. Indeed, Fung points out as a matter of pride that the Court of Appeal's assessment was "purely from a legal perspective without consideration of the political dimension."[55] From the point of view of democratic commentators in Hong Kong, the issue of whether the rule of law was well-served in *HKSAR* v. *Ma Wai Kwan* demands as much a political as a legal paradigm of understanding.[56]

TAKING THE DISPUTE TO THE COURT OF FINAL APPEAL

The Court of Appeal is not the highest court in the judicial hierarchy of the HKSAR. That position is occupied by the Court of Final Appeal (CFA), established as of July 1, 1997 to succeed the Judicial Committee of the Privy Council, which had been the court of last resort while Hong Kong was a British colony. The CFA, which was originally envisioned as having complete jurisdiction over all cases in the HKSAR, would round out a judiciary separate from PRC's judicial system. It remains possible that the CFA will hear an appeal from the decision of the Court of Appeal in *HKSAR* v. *Ma Wai Kwan* and reach different conclusions on both the pivotal and *obiter* constitutional issues. There are problems, however, with relying on this expectation.

First, the CFA might be denied the authority to hear such an appeal. Despite strenuous negotiations, the CFA Agreement, reached between Britain and the PRC in June 1995, restricts the Court's jurisdiction. The final version of the Agreement exempts from the CFA jurisdiction over "acts of state."[57] This is in line with Article 19 of the Basic Law, which states that HKSAR courts "shall have no jurisdiction over acts of state such as defence and foreign affairs." That same Article indicates that it is not a matter for the CFA (or any HKSAR court) to determine whether a case involves an act of state. Rather, Article 19 requires that:

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[52] See John McDermott, "The 'Rule of Law' in Hong Kong After 1997" (1997) 19 Loyola L.A. Int'l & Comp. L. J. 263.

[53] Daniel Fung, "A win for the rule of law" *South China Morning Post* (1 August 1997) 23.

[54] *Ibid.*

[55] *Ibid.*

[56] For Martin Lee's worries about departures from the rule of law, see Jonathan Braude, "It's time for a little trust, says Martin Lee" *South China Morning Post* (3 August 1997) 11.

[57] The actual establishment of the court was achieved through the Court of Final Appeal Ordinance, No. 79 (1995).

> 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.

This process of certification means that, in key cases where the PRC government might be concerned lest its power be curtailed, the preliminary jurisdictional issue is not for the court to decide. Nor will the decision necessarily be guided by common law precedents on what constitutes an act of state, such as "prerogative" acts of the executive that are immune from judicial inquiry.[58] Conceivably, PRC authorities might interpret "acts of state" very broadly, so as to include, for example, the establishment of the PLC. A certificate simply declaring that a dispute involves an "act of state" will oust the court's jurisdiction, and this declaration cannot itself be challenged in court.

In addition, Article 158 of the Basic Law states that when a HKSAR court (including the CFA) engages in adjudication under the Basic Law concerning either "affairs which are the responsibility of the Central People's Government" or "the relationship between the Central Authorities and the Region," the court must obtain an interpretation of such a provision from the Standing Committee of the NPC in Beijing. This would suggest that the issue of the power of HKSAR courts to engage in judicial review of legislation might itself ultimately fall under Articles 19 or 158, and thus be subject to final determination outside the Hong Kong legal system.[59]

Finally, despite indications in the Joint Declaration and the Basic Law that foreign common law judges might sit on the CFA (and potentially exert considerable influence on the Court's decisions), the CFA Agreement only provides that, in addition to three permanent judges and a Chief Justice, the fifth and final spot can be occupied by either an overseas judge or a local one. Consequently, even if it did hear an appeal from the Court of Appeal's judgment in *HKSAR* v. *Ma Wai Kwan*, the CFA might take no different tack from that of the judges below. Judges are appointed to the CFA by Hong Kong's Chief Executive without the constraint of a genuinely independent judicial service commission. It is to be expected that CFA judges will remain beholden to Hong Kong's "executive-led" government. Moreover, CFA judges will reflect the same British common law background exhibited by the Court of Appeal judges who decided *HKSAR* v. *Ma Wai Kwan*.

In the meantime, what is to be made of the fact that the reasoning regarding the validity of the PLC took the form of merely *obiter* remarks in *HKSAR* v. *Ma Wai Kwan*? As Hong Kong's Solicitor-General has pointed out, the HKSAR government will operate as if the issue had been authoritatively determined.[60] Furthermore, the issue does not seem to have been resurrected in at least one important subsequent case. In October, 1997,

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[58] See Dicey, *supra* note 42 at 424.

[59] The relationship between the CFA and political bodies in the PRC governmental structure is traced in Donna Lee, "Discrepancy Between Theory and Reality: Hong Kong's Court of Final Appeal and the Acts of State Doctrine" (1997) 35 Colum. J. Trans. L. 175. For further analysis of the barriers to judicial review created by Article 158, see Trevor M. Morris, "Some Problems Regarding the Power of Constitutional Interpretation under Article 158 of the Basic Law of the Hong Kong Special Administrative Region" (1991) 21 H.K.L.J. 87.

[60] See Fung, *supra* note 53.

when the Court of First Instance interpreted the right of abode guaranteed by the Basic Law (in relation to thousands of children born on the mainland who wish to settle in Hong Kong), the court did not inquire into the validity of the PLC.[61] At stake in the case was the compatibility with the Basic Law of restrictions on immigration passed by the PLC. In his reasoning, Keith J. appears to assume that the PLC is a competent body. Although the lawyers challenging the regulations vowed at the outset of the case that the validity of the PLC would be disputed, no part of the court's reasoning alludes to that.[62]

CONCLUSION

Conflicts between the PRC legal culture, with its mixed elements of Marxist ideology, Maoist communism, and Confucian traditionalism, and Hong Kong's common law culture, have been expected all along to make it a tricky business for citizens to adjust to the new legal environment of the HKSAR.[63] It will be no less difficult for judges in the new regime to work out the implications of the Basic Law, in terms of the extent to which Hong Kong will be able to preserve its autonomy from the NPC in Beijing. Although Article 19 guarantees "independent judicial power," and only exempts from the otherwise plenary jurisdiction of HKSAR courts "acts of state such as defence and foreign affairs," these words do not guarantee a resilient power of judicial review. The Court of Appeal's decision in *HKSAR* v. *Ma Wai Kwan* highlights the Janus-faced nature of the Basic Law. While it appears on one side to have enshrined hard-won features of Hong Kong's legal system, there is still plenty of room on the other side to interpret the arrangements in the Basic Law as merely "ordinary" political choices which can be altered or reversed by mainland authorities, without undue resistance from the courts. The main virtue of the Basic Law – that its drafting achieved compromises that simultaneously satisfied PRC, Hong Kong, and British interests – will eventually prove the source of loud lament. Its many qualifications continue to haunt those who hailed the Basic Law as Hong Kong's constitutional bulwark against PRC interference in the HKSAR's domestic affairs. After *HKSAR* v. *Ma Wai Kwan*, there are good reasons to doubt whether the Basic Law can preserve sufficient autonomy (either legal or informal) to satisfy the expectations of democratic politicians in Hong Kong.[64]

The consequences of the decision in *HKSAR* v. *Ma Wai Kwan* are neither altogether clear, nor apparently have they immediately inspired widespread loss of confidence in the HKSAR administration. At the same time the case was heard and decided by the Court of Appeal, a poll commissioned by a newspaper indicated that Tung Chee-Wha was more popular in Hong Kong than democratic politicians.[65] That same poll revealed that 69 per cent of respondents were confident that their political freedoms would be maintained. Except with respect to constitutional lawyers, the spectre created by the Court of Appeal's decision regarding limited judicial review under the Basic Law appears to hover only in the background.

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[61] See *Cheung Lai Wah et al.* v. *The Director of Immigration*, *supra* note 35.

[62] For a report on the lawyers' initial strategy, see Cliff Buddle, "Girl, 7, challenges legislature" *South China Morning Post* (2 August 1997) 1.

[63] See the pre-handover jitters portrayed fictionally in Paul Theroux, *Kowloon Tong* (Toronto: McClelland and Stewart, 1997).

[64] For his analysis of legal vs. informal autonomy, see Albert H. Y. Chen, "Some Reflections on Hong Kong's Autonomy" (1994) 24 H.K.L.J. 173 at 175-77.

[65] See May Sin-Mi Hon, "Satisfaction with Tung soars" *South China Morning Post* (3 August 1997) 1, where Tung's performance was approved by 78 per cent of 612 total respondents, putting him ahead of both Martin Lee and Allen Lee.

Much of the legal difficulty lies in the unfortunate drafting contained in the Basic Law. Many intractable problems are due to the incommensurability of the contrasting Chinese and English meanings that attach to such key words. For instance, "judicial independence," as well as such key terms as "constitution" and "judicial review," while they have equivalent Chinese terms, nevertheless have different fundamental or core meanings. The differences are not just a matter of nuance.[66] For his part, Justice Mortimer in *HKSAR* v. *Ma Wai Kwan* expressed confidence that such possible differences in meanings would not hamper or impede the capacity of Hong Kong courts to reach a proper interpretation. In his view, "from time to time, difficult questions of interpretation will arise, but not, it seems to me, from any inherent difficulty arising between the two traditions."[67] One of the lessons of the reasoning and result in *HKSAR* v. *Ma Wai Kwan* is that such confidence would appear to be misplaced.

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[66] See Jordan, *supra* note 50 at 340ff. and Steven L. Chan, "Differences Between British and Chinese Views of Law Forebode Uncertainties for Hong Kong's People After the 1997 Transfer" (1996) 15 U.C.L.A. Pacific Basin L.J. 138.

[67] *HKSAR* v. *Ma Wai Kwan* at 803.