

Autonomy and Human Rights Concerns in Post-Handover Hong Kong

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Whether dictated by self-interest or as a result of a local strategy of building trust and cultivating good relations with the Central Government, it is commonly accepted that “Beijing has kept a decidedly low profile in Hong Kong.”² A recent study by a new U.S. House of Representatives Task Force concluded, “[t]he Chinese Government appears to be taking seriously [China] President Jiang Zemin’s pledge at the handover that no mainland government officials ‘may or will be allowed to interfere in the affairs which Hong Kong should administer on its own;’” and “[f]ar from being heavy-handed or insensitive, Beijing appears to have absented itself from active involvement in Hong Kong affairs.”³

Yet, it has been suggested that “perhaps the most significant threat to the territory’s autonomy comes from within.”⁴ Thus, for example, while “opinion is divided over the extent to which self-

¹Copyright Roda Mushkat 1998. This chapter draws on the author’s article, *The Future of Hong Kong’s International Legal Personality: Does International Law Matter? A Post-Handover Snapshot*, 22 S. ILL. U. L.J. 275 (1998).

²John Ridding, *Governing with a Light Touch*, FIN. TIMES, December 8, 1997, China Supplement, at iv.

³Quoted in Simon Beck, “*So Far, So Good*” *Transition Verdict*, SUNDAY MORNING POST, Nov. 11, 1997, at 2.

⁴Ridding, *supra* note 2.

censorship⁵ in the media has increased since the handover,"⁶ "elsewhere there have been signs of second-guessing the new sovereign."⁷ Less ambiguity and more concern exists about the self-restrictive approach adopted by Hong Kong Special Administrative Region judges regarding the jurisdictional competence of the Region's courts in a recent decision on the legality of the Provisional Legislature.

⁵Self-censorship is widely perceived to exist, but it remains difficult to find specific instances in which self-censorship killed a story or suppressed an editorial. The pressure appears to remain more subtle, coming not as a direct order to refrain from writing, but as a subjective exercise of special care toward topics of particular sensitivity such as China's leadership dynamics, Taiwan, Tibet, or military activity. . . . Analysts have also noted that many Chinese-language papers that originally criticized the Provisional Legislature changed their position after the body became a reality and now support it. This might represent a form of self-censorship, or it might reflect a pragmatic approach toward unfolding events. U.S. Department of State, *United States-Hong Kong Policy Act Report*, March 31, 1997, at 24.

⁶Ridding, *supra* note 2. See also Philip Bowring, *What's Changing in Hong Kong*, INT'L HERALD TRIB., Aug. 27, 1997, at 10 (stating that "[a]lthough there was an evident increase in media self-censorship in the months leading up to the handover, the situation has not become worse. Indeed, there are signs of greater determination now to exercise old freedoms and test the new limits.").

⁷Ridding, *supra* note 2 (citing as an example the failure of two recent Hollywood productions about Tibet to find distributors in Hong Kong). Reference could also be made to a case of "over-guessing" the new sovereign, involving the attack on Radio Television Hong Kong (RTHK) by a Hong Kong Adviser to China and a long-standing member of the Chinese People Political Consultative Conference (CPPCC), Xu Ximin, who accused the broadcaster of being "a remnant of British rule" in criticizing the SAR government and the Chief Executive under the guise of editorial independence. See Margaret Ng, *Slow Road to Censorship*, S. CHINA MORNING POST, Mar. 6, 1998, at 23 (the author views even more gravely comments by the Chief Executive, Tung Chee-hwa, implying that some concession has to be made on freedom of speech to accommodate the positive presentation of government policies). Ironically, in an apparent reprimand to Xu, Li Ruihuan, the mainland chairman of the CPPCC, emphasized that RTHK was not a matter of concern for the Central Government and that the CPPCC meeting was not a place for discussing the internal affairs of Hong Kong. See *Xu's Attack on RTHK Dismissed*, SUNDAY MORNING POST, March 8, 1998, at 4. See also President Jiang Zemin's call on local deputies to the National People's Congress not to interfere with the affairs of the SAR government, as reported in Linda Choy, *HK Deputies Warned Not to Meddle*, S. CHINA MORNING POST, Mar. 10, 1998, at 1.

As stated (in an obiter dicta) by Chief Judge Patrick Chan: “. . . regional courts have no jurisdiction to query the validity of any legislation or acts passed by the Sovereign [although] courts do have the jurisdiction to examine the existence (as opposed to validity) of the acts of the Sovereign or its delegate.”⁸ These dicta might have been generated by the special political circumstances surrounding the Provisional Legislature and hence be an isolated case. Nonetheless, concerns have been raised regarding the precedential implications of an authoritative ruling for the Special Administrative Region’s high degree of autonomy.⁹

⁸HKSAR v. Ma Wai-Kwan, [1997] H.K.L.R.D. 761, 780, 781 (Ct. App.) (holding inter alia that the setting-up of the Provisional Legislative Council by the Preparatory Committee for the HKSAR was ratified by the National People’s Congress and that such ratification was a sovereign act that the HKSAR could not challenge). The court’s ruling regarding the legality of the Provisional Legislature has been challenged in another case (as part of an appeal by child migrants to be allowed to remain in the HKSAR, after disputed laws forcing them to return to the mainland to comply with immigration procedures were passed by the Provisional Legislature within days of the handover; see *infra* notes 45, 47, 48). In its judgment of May 20, 1998, the Court of Appeal held itself bound by its decision in *Ma Wai-Kwan*. The Chief Judge nonetheless conceded that an “analogy with colonial courts [inability to review acts of the British Parliament] . . . might not have been entirely appropriate”; and that “it may be that in appropriate cases . . . the HKSAR courts do have jurisdiction to examine laws and acts of the NPC which affect the HKSAR for the purpose of, say, determining whether such laws or acts are contrary to or inconsistent with the *Basic Law*.” Chan, Chief Judge of the High Court, further stated that “[his] views on the court’s jurisdiction in the *David Ma* case were expressed in the context of the case and cannot be understood to mean that NPC laws and acts would prevail over the *Basic Law*.” Undoubtedly, as the Chief Judge added, “HKSAR courts have the jurisdiction to judicially review the laws passed and the acts done by the Provisional Legislative Council to see whether it acted within the powers given to it by the Preparatory Committee.” *Cheung Lai Wah v. Director of Immigration*, [1998] 1 H.K.L.R.D. 772, 780 (Ct. App.).

⁹See Linda Choy, *Self-Imposed Limits Could Sacrifice Autonomy*, *Law Academic Warns*, S. CHINA MORNING POST, July 30, 1997, at 7; Editorial, *Provisional Verdict*, S. CHINA MORNING POST, July 30, 1997, at 16; Yash Ghai, *Dark Days for Our Rights*, S. CHINA MORNING POST, July 30, 1997, at 16; Angela Li, *Bar Chief Hits at a “Backward-Looking” Example in Provisional Legislature Case*, S. CHINA MORNING POST, July 30, 1997, at 6. For a sustained critical analysis of the judgment, see Johannes Chan, *The Jurisdiction and Legality of the Provisional Legislative Council*, 27 H.K. L.J. 374 (1997).

In general, although the Region's judges are constrained from exercising jurisdiction "over defence and foreign affairs"—as well as required to obtain an executive certificate on "questions of fact concerning acts of state whenever such questions arise in the adjudication of cases"¹⁰—they must preserve the judicial independence bestowed on them in both the Sino-British *Joint Declaration*¹¹ and the Region's *Basic Law*.¹² Consequently, as elaborated by the former Attorney General of Hong Kong, J. F. Mathews,¹³ Special Administrative Region courts are empowered to "determine whether an act is or is not an act of state." Further, in accordance with the common law,¹⁴ they should construe "act of state" as pertaining to certain acts of the Executive, to be distinguished from an act by a legislative assembly (the National People's Congress). "The courts would not therefore be prohibited from adjudicating on the lawfulness of such a legislative act." Indeed, as Mathews concludes, "[i]f guarantees in the *Basic Law* could be overridden by decisions of the National People's Congress, and the courts of the Hong Kong Special Administrative Region were powerless to question the legality of

¹⁰See Hong Kong Court of Final Appeal Ordinance, LAWS OF HONG KONG Ch. 484, § 4.

¹¹*Joint Declaration*, People's Republic of China—United Kingdom, signed Dec. 19, 1984, Art. 3(3), Annex I, § III.

¹²*The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law)*, adopted on April 4, 1990, by the Seventh National People's Congress of the People's Republic of China at its Third Session, reprinted in 23 INT'L LEGAL MAT'LS 1511 (1990).

¹³J. F. Mathews, *No Sound Legal Basis for Grim Scenario*, S. CHINA MORNING POST, April 18, 1997, at 18.

¹⁴The common law is guaranteed to continue to apply in the HKSAR under both the Sino-British *Joint Declaration*, Annex I, § II, and the *Basic Law*, Art. 8. See also YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 296 (1997) ("... the general references to the 'previous jurisdiction of courts' [*Basic Law*, Art. 19] as well as the continuance of the common law as the fundamental basis of the legal system of the HKSAR should be enough to ensure that the restrictions on the jurisdiction of the courts under the doctrine of the act of state are no more extensive than customarily in the common law. Nor is there any reason for the courts to hold that all acts of the Central Authorities that are carried out in Hong Kong are immune from judicial scrutiny.").

those decisions, this would be a devastating blow to the rule of law and to confidence in Hong Kong's future."¹⁵

Other ("from within") challenges to the territory's autonomy are thought to have been posed by the Region's prosecutorial authorities and its (provisional) legislators. Concerns have been raised in particular over what has been described as "incidents of selective 'non-prosecution',"¹⁶ namely, the decision by the Justice Department not to prosecute Sally Aw, a well-connected publishing tycoon and member of the Chinese People's Political Consultative Conference, despite being named in charges by the Independent Commission Against Corruption (ICAC) as involved (together with senior executives in her company, the *Hong Kong Standard*, a newspaper) in a conspiracy to defraud purchasers of advertising space.¹⁷ The Justice Department's decision followed another contentious decision not to initiate legal proceedings against the Xinhua News Agency, one of China's most important institutions in the territory, for a breach of the Personal Data (Privacy) Ordinance.¹⁸

¹⁵It is fair to note that in the *Ma Wai-Kwan* case, the court held that the establishment of the Provisional Legislative Council was not in breach of the *Basic Law*, since "[the PLC] is, strictly speaking, not a legislative council under art. 68 of the *Basic Law*. It was not a creation of the *Basic Law*. . . only an interim body formed by the Preparation [sic] Committee under the authority and the powers of the NPC pursuant to the 1990 and 1994 NPC Decisions." [1997] H.K.L.R.D. at 776 (Ct. App.) (per Chan, C. J.). See also Cheung Lai Wah v. Director of Immigration, [1998] 1 H.K.L.R.D. 772, 780 (Ct. App.).

¹⁶See NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, THE PROMISE OF DEMOCRATIZATION IN HONG KONG: AUTONOMY AND THE RULE OF LAW, (NDI HONG KONG REPORT #3, May 1, 1998) ("NDI REPORT"). The Report cites these incidents and the lack of adequate public account by the Administration as examples of a "troubling lack of commitment to the rule of law." NDI REPORT, *supra* at 15-16, 18.

¹⁷John Riddley, *Hong Kong Drops Fraud Case Against Top Publisher*, FIN. TIMES, Mar. 19, 1998, at 4.

¹⁸The Agency had failed to respond within the required time (the legal deadline is 40 days; the Agency took 10 months to reply) to a request by Emily Lau, a former legislator and leader of the Frontier Party, for access to any personal files held on her by the Agency. An ill-judged remark by Chief Executive Tung Chee-hwa that the violation by Xinhua was "a technical breach, not a substantial breach" has further fueled concerns over a piecemeal erosion of the rule of law in the SAR. See Editorial, *Letter of the Law*, S. CHINA MORNING POST, Mar. 12, 1998, at 20. See also Yash Ghai, *Praise is Not Enough*, SUNDAY MORNING POST,

An even greater controversy has surrounded the enactment by the Provisional Legislature on the last day of its existence of the Adaptation of Laws (Interpretative Provisions) Ordinance.¹⁹ This ordinance resulted in the transfer of exemption privileges from the “Crown” to the “State.”²⁰ “State” was defined to include the government of the Special Administrative Region and China’s Central Authorities that exercise executive functions and functions for which the Central Government has responsibility under the *Basic Law*. The term also includes subordinate organs of the Central Authorities that exercise executive functions on behalf of the Central Government and do not exercise commercial functions. The government contends that the new law is a mere technical adaptation of colonial law language, designed to reflect Hong Kong’s status as part of China. Critics, however, have argued that—compounded by the loose definition of “State”²¹—a door has been opened to legal immunity for mainland bodies from the application of local law, contrary to the *Basic Law*.²² Further, fears that a two-tier legal system would be created have

Mar. 22, 1998 (pointing out that “the rule of law cannot survive without its practice, as it is demonstrated daily in the processes of government, litigation in the courts, and the observance of the law.”).

¹⁹Ordinance No. 26 of 1998, ORDINANCES OF THE HKSAR.

²⁰The new ordinance repealed Section 66 of the Interpretation and General Clauses Ordinance (Cap 1) which provided that “No Ordinance shall in any manner whatsoever affect the right of or be binding on the Crown unless it is therein expressly provided or unless it appears by necessary implication that the Crown is bound thereby.” (The “Crown” covered both the Hong Kong and the UK governments). The Section has now been replaced with the provision that “(1) No Ordinance (whether enacted before, on or after 1 July 1997) shall in any manner whatsoever affect the right of or be binding on the State unless it is therein expressly provided or unless it appears by necessary implication that the State is bound thereby.”

²¹As noted by one observer, “in sharp contrast to British rule—during which time bodies that could claim Crown immunity were few and well defined—the number of Chinese organizations that might now invoke State immunity are many and ill defined.” Review Editorial, *The Worm Turns. In Hong Kong a New Colonialism*, FAR EASTERN ECON. REV., Apr. 23, 1998, at 86.

²²Article 22 of the *Basic Law* stipulates that “All offices set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region.”

not been assuaged by the Hong Kong administration's statement that "Hong Kong's high degree of autonomy is not undermined" because "it is Hong Kong's legislature that must determine the extent to which it is appropriate for particular ordinances to bind [State organs]."²³

Indeed, as forcefully argued by constitutional law expert Yash Ghai, the new legislation, which is justified as a mere transfer to the new sovereign of privileges enjoyed by the Crown before July 1, 1997, is based on the "mistaken assumption that Hong Kong is a colony of China."²⁴ Ghai explains that while continuity might be one of the operating yardsticks in devising adaptation laws for the Special Administrative Region (for example, regarding the principles and safeguards of the legal system, the market economy, and fiscal and tax policies), regarding the Special Administrative Region/Central Government relationship, "analogies with Hong Kong's relationship with its colonial master are not only inappropriate but strike at the root of [the] Hong Kong constitutional system."²⁵ More specifically,

[n]othing in the *Basic Law* requires the exemption of the Special Administrative Region or national government from the application of laws. On the contrary, the *Basic Law* is concerned to minimise the role of institutions of the central or provincial governments in the Special Administrative Region. They are not to interfere in the internal affairs of the Special Administrative Region; they need the Special Administrative Region's permission before they can be established here; and they have to abide by the laws of the Special Administrative Region (Article 22).²⁶

²³Ian Wingfield, *High Degree of Autonomy is Not Undermined*, S. CHINA MORNING POST, Apr. 15, 1998. Wingfield, the Acting Secretary of Justice, was responding to strong criticisms by the Chairman of the Hong Kong Bar Association, Audrey Eu, S.C., *Government Failing to Face Real Issues*, S. CHINA MORNING POST, Apr. 10, 1998.

²⁴Yash Ghai, *False Analogies*, SUNDAY MORNING POST, Apr. 5, 1998. Ghai also questions the justification of the rule of Crown privilege itself (the origin of which, he says, lies in feudalism, when the monarch was the government) and suggests that "[i]t has no place in a modern state which is committed to the rule of law. Instead, the rule should be all laws bind the government (which needs to be defined narrowly) unless it is expressly and necessarily exempted from it." *Id.*

²⁵*Id.*

²⁶*Id.*

Internal Self-Determination

One Hong Kong administration post-handover act that has aroused intense controversy was the change in the electoral arrangements for the May 1998 election of the first Hong Kong Special Administrative Region Legislative Council. Under the new law,²⁷ modifications include the following:

- Substitution regarding twenty directly elected geographical seats²⁸ of the previous “first-past-the-post”²⁹ system with a form of proportional representation,³⁰ whereby seats are awarded according to the percentages of votes cast for the various political parties
- Restructuring of the functional constituencies, thereby resulting in an effective reduction in the number of those eligible for the thirty seats elected by functional constituencies from 1.15 million to 200,000 voters³¹
- Election of the ten remaining seats by an election committee composed of 800 members³² operating a “block vote system”

The voting arrangements triggered considerable criticism, which portrayed the new system as a “backward step on democra-

²⁷The Legislative Council Ordinance 1997, LAWS OF HONG KONG Ch. 542.

²⁸The 60 members of the first HKSAR LEGCO were elected as follows: 20 returned by geographical constituencies through direct elections; 30 returned by functional constituencies; and 10 returned by an election committee.

²⁹The winning candidate in each district secures the seat.

³⁰A “list voting system” operating under the “largest remainder” formula.

³¹Jim Erickson & Law Siu-Lan, *Mapping the Way Ahead*, ASIaweek, Oct. 17, 1997, at 22, 24. Note that under the previous arrangements the constituencies were very broadly constituted and voting was based on an individual as distinct from a corporate basis.

³²The committee is composed of members from four sectors: industrial, commercial, and financial; the professions; labor, social services, and religious; and members of the Provisional Legislative Council, Hong Kong deputies to the NPC, representatives of Hong Kong members of the NPC Political Consultative Conference, and representatives of district-based organizations. The election committee was formed by subsector elections, except for the ex officio members (members of the Provisional Legislative Council and the HK deputies to the NPC) and the religious subgroup, which nominated its election committee members.

cy." Specifically, critics contended that the democratic base of the electorate had been sharply reduced, thereby giving "overwhelming influence to about 186,000 elite voters, mainly senior business executives." They further claimed that proportional representation will dilute the overall strength of most popular pro-democratic parties in Hong Kong standing for election as fragmented political entities.³³

The Hong Kong administration, through Chief Secretary Anson Chan, has countered that "democracy has not been throttled." Rather, the new rules "will set Hong Kong firmly on the road to universal suffrage envisaged in the *Basic Law*."³⁴ Secretary of Justice Elsie Leung pointed out that "[t]he reduction of the size of the electorate is a result of restoring functional constituencies to their original purpose and nature. They were never intended to be a form of general franchise, but to ensure that certain important sectors within the community that have made significant contributions are duly represented."³⁵ And Secretary for Constitutional Affairs Michael Suen explained that "the proportional representation system which is based on large [geographical] constituencies would be more conducive to continuity of the constituencies and provide more convenience for voters and candidates alike."³⁶ He reiterated that "the election will be open, fair, honest, and acceptable to the public."

Yet, regardless of whether these new arrangements are "only transitional" and "the ultimate aim is the election of all the members of the LEGCO [Legislative Council] by universal suffrage,"³⁷ there appears no justification for a reversal of previous moves (themselves rather "small and belated"³⁸) to expand the voting

³³Robert Stone & Esther Lam, *Stifling Democracy in Hong Kong*, INT'L HERALD TRIB., Sept. 9, 1997, at 10. See also Editorial, *Mixed Hong Kong News*, INT'L HERALD TRIB., Sept. 9, 1997, at 10; Editorial, *Hong Kong's Retreat*, INT'L HERALD TRIB., Oct. 4-5, 1997, at 10.

³⁴Quoted in Chris Yeung & Rodger Lee, *Anson Enters Poll Plan Row*, S. CHINA MORNING POST, Sept. 16, 1997, at 1.

³⁵Elsie Leung, *Freedom of Speech Alive and Well*, S. CHINA MORNING POST, Aug. 29, 1997, at 21.

³⁶SCA *Speaks on Electoral Arrangements*, HKSAR Government Information Services, DAILY INFORMATION BULLETIN, Aug. 12, 1997.

³⁷Leung, *supra* note 35.

³⁸Christine Loh, *Not Far Enough*, FAR EASTERN ECON. REV., Apr. 8, 1993, at 24.

franchise in the territory and broaden democratic initiatives. Nor are contentions that the earlier reforms were “illegal” grounded in any firm basis, given their full conformity with both the Sino-British Joint Declaration and the *Basic Law*.³⁹ Some suggest that democracy in Hong Kong must develop in a gradual manner so as to maintain its social stability and economic vitality. Others say that the pace taken seems “prudent” when compared to democratic experiences of countries such as the United States.⁴⁰ Regardless, it is imperative that strong democratic institutions be allowed to mature in order to create a framework that is consistent with the expectations of the international community⁴¹ regarding the Hong Kong component of the “one country, two systems” approach.

Human Rights Concerns

The importance of protecting of civil liberties and basic freedoms for the preservation of the territory’s international status needs little elaboration. Hence, it was reasonable to expect that moves to “roll back civil rights” in Hong Kong would provoke strong reaction both domestically and abroad. An example is the implementation of the decision of the Standing Committee of the National People’s Congress of February 23, 1997, to repeal or

³⁹See discussion in Mushkat, *supra* note 1, at 148–52. Left aside is the issue of compatibility of functional constituencies and differences among voters’ electoral rights (under the *Basic Law*) with international human rights law. See in this connection GHAI, *supra* note 14, at 226–29

⁴⁰See Michael DeGolyer, *Historical Pointers*, SUNDAY MORNING POST, Sept. 14, 1997, at 10 (contending inter alia that “in some ways, Hong Kong is already democratically ahead of the U.S. For example, according to the U.S. Constitution, no president of the United States may be born outside the U.S.” while “[a]nyone with sufficient residency can be chief executive in Hong Kong”).

⁴¹It is interesting to note the caution issued by China’s Vice-Premier Qian Qichen to the Preparatory Committee that its decision on the voting system must take into account the “concerns of the international community.” Quoted in Danny Gittings, SUNDAY MORNING POST, Sept. 14, 1997, at 10 (the writer observed that heretofore matters of this type would have been considered as China’s internal affairs and any foreign “concern” denounced as “interference”).

amend certain Hong Kong ordinances, including the Bill of Rights Ordinance, the Societies Ordinance, and the Public Order Ordinance.⁴² Post-handover concerns regarding the protection of civil liberties in the Region have followed the modification of the right of abode in Hong Kong of [mainland] Chinese children born to Hong Kong permanent residents.⁴³ The position taken by the Region's government, however, has been that the "legislation did not, in fact, deprive any eligible person of the right of abode in Hong Kong [but merely] provides a mechanism to ensure those who claim to have the relevant right of abode can have their claim properly verified before they seek entry into Hong Kong; [and that] pending determination of such putative status, the applicant remains outside the jurisdiction."⁴⁴ Such a construction of the law has been given judicial approval by the Court of First Instance, which found no incompatibility between the curbs imposed on entry into Hong Kong of persons claiming the right of abode by descent and the *Basic Law* or the Bill of Rights Ordinance.⁴⁵ Nor was the retrospective nature of the legislation regarded as unconstitutional, since, according to the court's interpretation, the relevant right—guaranteed under *Basic Law*

⁴²See Roda Mushkat, *Scrapping Hong Kong Legislation: An International Law Perspective*, 27 H.K. L.J. 12 (1997). See also Yash Ghai, *The Continuity of Laws and Legal Rights and Obligations in the SAR*, 27 H.K. L.J. 136 (1997) (focusing on the misuse, for policy purposes, by the NPCSC of Art. 160 of the *Basic Law* to repeal laws that could not be regarded as contrary to the *Basic Law*).

⁴³Under the Immigration (Amendment) (No. 3) Ordinance 1997—enacted on July 10, 1997, and given retrospective effect to July 1, 1997—a person's status as a permanent resident of the HKSAR in accordance with the Schedule to the Immigration (Amendment) (No. 2) Ordinance 1997 (including a person of Chinese nationality born outside Hong Kong to a parent who is a permanent resident of the HKSAR) can only be established by that person holding a "valid travel document" (i.e., a valid one-way exit permit issued by the Chinese authorities) affixed to which is a valid "Certificate of Entitlement to the Right of Abode in the HKSAR" issued by the Director of Immigration. Thus, mainland Chinese claimants who are already in Hong Kong would not be allowed to apply for and obtain a permanent identity card or an HKSAR passport.

⁴⁴Leung, *supra* note 35.

⁴⁵Cheung Lai Wah v. Director of Immigration, [1997] 3 H.K.C. 64 (dismissing application for judicial review in four test cases). The determination that Ordinance No. 3 is "constitutional" was reaffirmed by the Court of Appeal on April 2, 1998, in Civil Appeal Nos. 203, 216, 217, 218 of 1997, Cheung Lai Wah v. Director of Immigration, [1998] 1 H.K.L.R.D 772 (Ct. App.).

Article 24—had already been “qualified” by another provision therein [Article 22(3)].⁴⁶

It may nonetheless be argued that the court erred in adopting an overly restrictive approach to justify the curtailment of a fundamental right that is enshrined in the Region’s constitution, while at the same time generously interpreting legislation aimed at regulating the influx of immigrants. Specifically, the court appears to have misapplied an article designed to maintain the Region’s autonomy (by disallowing unrestricted entry into the territory) to “sanction a derogation” from the rights of the Region’s residents.⁴⁷ Some further contend that the ruling reflected deference to the government’s judgment about public interest over a right guaranteed in the *Basic Law* and raised concerns regarding the “ability or willingness of Hong Kong courts to ensure respect for the rights established by the *Basic Law*.”⁴⁸ Yet another com-

⁴⁶[1997] 3 H.K.C. at 88. Article 22(4) provides that “[f]or entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People’s Government after consulting the government of the Region.” On appeal, two members of the Court of Appeal (Nazareth, V-P, & Mortimer, V-P) agreed with the trial judge’s conclusion that the retrospective provision in Ordinance No. 3 was valid, while one member (Hon Chan, C.J.) held the retrospective provision invalid since it sought to have the “effect of curtailing or even taking away the right of abode conferred under Article 24(3) of the *Basic Law*.” According to Chief Judge Chan, the provision was also invalid as being contrary to Article 12 of the Covenant on Civil and Political Rights (which prohibits legislation that exposes persons to the possibility of prosecution for conduct that was not criminal at the time of the conduct).

⁴⁷See Eric Cheung, *Undermining Our Rights and Autonomy*, 27 H.K. L.J. 297 (1997).

⁴⁸See NDI REPORT, *supra* note 16, at 13. In a related context, SAR judges have been urged to show more “compassion” [see Editorial, *Legal Compassion*, S. CHINA MORNING POST, May 21, 1998, at 18], after a decision by the Court of Appeal, holding that Article 24(3) of the *Basic Law* (which sets out the categories of persons entitled to the status of “permanent residents of the HKSAR”) “is intended to benefit persons who were born to parents who have already acquired permanent resident status in Hong Kong rather than those who were born to parents who may subsequently acquire permanent resident status at some later stage.” Hence, the words “if the parent had the right of abode in Hong Kong at the time of the birth of the person” (in ¶ 2(c) of Schedule I of the Immigration Ordinance) are not inconsistent with Article 24(3) of the *Basic Law* nor contrary to Article 23(1) of the ICCPR (given that the decision of the

mentator suggested that what is perhaps more worrisome in this context is the government's offer of an out-of-court settlement in the previous cases. "The Government's lifting of the children's removal orders in exchange for their withdrawal of the judicial review applications for their right to stay is seen as a kind of administrative expedience to avoid a potentially disastrous legal challenge, thus casting doubts on the Government's will to uphold the rule of law."⁴⁹

Concluding Remarks

Post-1997 Hong Kong thus appears to be evolving in a manner somewhat inconsistent with expectations that prevailed prior to the handover. China has so far displayed a truly remarkable degree of self-restraint, refraining from any statement or action that might be construed as an infringement on Hong Kong autonomy. By contrast, local decision makers can be said to have departed in several domains from the letter and spirit of international and constitutional legal documents pertaining to the post-1997 configuration. Although the departures have not been radical in nature, there is a discernible trend away from a strict interpretation of the rule of law. These are early days and one is inclined to give the new key figures in various branches of the government, when confronting new challenges, some benefit of the doubt. However, the trend should be closely monitored with a view to establishing whether it is a product of deliberate policy and is becoming firmly entrenched.

permanent resident to split from his children and family is "by his own choice"). *Chan Kam Nga v. Director of Immigration*, [1998] 1 H.K.L.R.D. 752 (Ct. App.).

⁴⁹Fanny Wong, *Let's Prove Wei Wrong on the SAR*, S. CHINA MORNING POST, Nov. 26, 1997, at 29 (observing "signs of some disturbing changes reflecting Hong Kong's adoption of mainland practices and attitudes").