ARTICLES

THE IMPERFECT LEGACY: DEFECTS IN THE BRITISH LEGAL SYSTEM IN COLONIAL HONG KONG

MING K. CHAN*

1. INTRODUCTION

As Hong Kong's sovereignty retrocession on July 1, 1997 is only about one hundred days away, it is useful at this final hour of the British sunset regime to review and reflect upon the legacy of a century and a half of British colonial rule. A much celebrated British "gift" to Hong Kong has been the rule of law, including a British-style common law system with an independent and impartial judiciary supposedly delivering fair and equal justice to all. In democratic societies, a basic requirement for public confidence in the legal system is that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[1] Ideally, this principle should be the hallmark of the common law system in

---

* Professor of History at the University of Hong Kong and Executive Coordinator of the Hong Kong Documentary Archives, Hoover Institution, Stanford University; former Julien and Virginia Cornell Professor at Swarthmore College, 1993-94; previous visiting professorships at UCLA, Duke, and Stanford; author of numerous books and articles on Chinese history and China-Hong Kong relations; and general editor of a multivolume series, HONG KONG BECOMING CHINA: THE TRANSITION TO 1997, of which seven titles have been published. I am most grateful to my University of Hong Kong colleagues, Professors Albert Chen, Berry Hsu, and Norman Miners for their very helpful suggestions on factual references, conceptual clarification, and matters of interpretation. Additionally, the able service rendered by my research assistants Chi-Keung Kung and Roy Chi-Kwong Man at different stages of preparation of this Article is deeply appreciated.

[1] *Ex parte* McCarthy, 1 K.B. 256, 259 (1924) (Lord Hewart, C.J.).

Hong Kong under British administration.

To most people in Hong Kong, the preservation of the existing legal system is of crucial importance to the high degree of autonomy the post-colonial Hong Kong Special Administrative Region ("S.A.R.") is supposed to enjoy under Chinese sovereignty according to the "One Country, Two Systems" formula.[2] However, this widely shared perception is flawed for one simple reason: the legal system in Hong Kong today has its own serious defects. It is not only alien in origin[3] and markedly different from the legal system in the People's Republic of China ("P.R.C."), but also defective and inadequate. This Article argues that extensive reform of the British-established common law system is necessary to meet the requirements of contemporary Hong Kong as a complex international community and to lay a more solid foundation for the future Hong Kong S.A.R. under P.R.C. sovereignty. Section 2 looks at the institutional defects in the basic composition of the common law system in Hong Kong. Section 3 explores the various improper actions of the various colonial authorities. Section 4 discusses the misdeeds within the judiciary itself — the body of individuals charged with upholding the rule of law. Finally, section 5 concludes by speculating about the ultimate effects of this tarnished common law heritage and proposes steps necessary to assure the future success of the rule of law in post-1997 Hong Kong.

2. INSTITUTIONAL DEFECTS

Although many observers feel that the general structure and institutional composition of Hong Kong's legal system are basically sound and smooth functioning,[4] a major flaw has been universal use of the English language. Until very recently all court proceedings in both civil and criminal cases in Hong Kong

---

[2] *See generally* David J. Clark, *The Basic Law: One Document, Two Systems*, *in* THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY? 21-25 (Ming K. Chan & David J. Clark eds., 1991) [hereinafter BLUEPRINT FOR STABILITY?] (discussing the impact of China's repressive system on Hong Kong's "One Country Two Systems" formula).

[3] The system is "alien in origin" to both traditional Chinese customary law and the Qing code adopted when Hong Kong first came under British rule.

[4] *See* Clark, *supra* note 2, at 25 (quoting Hong Kong governor Sir David Wilson's comments on the soundness of Hong Kong's legal system).

were conducted in English. Although English is nominally an official language, it is not the mother tongue nor the language of everyday usage for the overwhelming majority of the local populace.[5] At present, residents must speak English to be eligible for jury service.[6] This language qualification significantly affects the composition of the Hong Kong jury, and creates tension with contemporary ideas about the role of trial by jury. Thus, those Hong Kong Chinese who appear on the "List of Common Jurors" are likely to be better educated, middle class businessmen or professionals with sufficient knowledge of English to understand court proceedings.[7] Consequently, the jury in Hong Kong is not representative of the society it purportedly serves. Any failure to reform the jury franchise would create the risk that the jury system could lose legitimacy among the public, even jeopardizing its continued existence under a different sovereign with a Leninist-Stalinist legal system and legal culture.

A parallel concern is the delayed and inadequate progress of bilingual (English and Chinese) codification, with more than 200 laws originally passed in English still lacking official Chinese translations.[8] Part of the problem of this "justice in the English language" stems from the personnel in the legal system. The institutions of justice are still dominated by expatriates at the senior ranks in both the Legal Department (including the Attorney General's Chamber)and the judiciary where the government's personnel localization efforts have yielded only limited results.[9] This failure is partly attributable to a lack of conscientious effort in the recruitment and training of legal personnel. True localization of the common law would require long term and far-sighted reform which could strengthen the rule of law by making the entire legal system more attuned to the

---

[5] *See* Cliff Buddle, *Rapid Changes "Threaten Justice"*, S. CHINA MORNING POST, Jan. 14, 1997, at 1 [hereinafter Buddle, *Rapid Changes*] (emphasizing "the ability to speak Chinese" as a necessity to the practice of law). In actuality, most residents of Hong Kong speak Cantonese in their everyday lives.

[6] *See* PETER DUFT, ET AL., JURIES: A HONG KONG PERSPECTIVE 53 (1992).

[7] *See id.* at 54. Of the 143,798 names on the 1987 "List of Common Jurors," two-thirds of them are Chinese and the remainder are mainly European, Australian and North American. *See id.* at 56.

[8] *See* Buddle, *Rapid Changes*, *supra* note 5, at 1 (discussing the problems attendant to delay in the translation process).

[9] *See id.*

demographic and socio-cultural realities as well as the rising democratic and human rights consciousness of the local Chinese populace. This much needed Sinification would help to consolidate the common law culture and institutions for the S.A.R.[10]

Despite repeated promises of rapid and full-scale localization of senior legal personnel on both the judicial bench and in the Legal Department[11] this still remains an empty slogan of the sunset colonial regime. Even now locals fill less than half of the senior posts in the Legal Department and only fifty-one percent of the judiciary.[12] Thus, it is not surprising that the local lawyers' organizations strongly rejected former Governor David Wilson's attempted explanation of the delayed localization process.[13] In his speech to the International Bar Association on September 30, 1991, the Governor acknowledged that "most of Hong Kong's judges and magistrates are expatriates, despite considerable efforts to encourage localization."[14] He maintained that this was because of qualified local lawyers' unwillingness to forsake lucrative private practice for public legal service.[15] However, a major factor has been the government's own repeated patterns of discrimination against local legal officials and magistrates/judges in promotion and terms of remuneration favoring expatriates.[16] Another crucial factor is the tarnished reputation of the official legal establishment itself which has rendered the bench or the Legal Department Chambers an unattractive career prospect for many of Hong Kong's legal talents.[17]

---

[10] Examples of recent advocates for reform and education of the legal profession are abundant. *See, e.g.*, Anthony Dicks, *Will the Laws Converge?*, *in* THE CHALLENGE BEYOND 1997 – THE HONG KONG LECTURE (University of Hong Kong, Center of Asian Studies Series No. 4, Siu-lun Wong ed., forthcoming 1997).

[11] *See Making Justice Seem a Good Career Move*, S. CHINA MORNING POST, Oct. 8, 1991, at 26 [hereinafter *Career Move*] (discussing attempts to recruit local lawyers to serve in the judiciary).

[12] *See* Buddle, *Rapid Changes*, *supra* note 5, at 1.

[13] *See Career Move*, *supra* note 11, at 26 (noting the "angry response" from the local bar association).

[14] *Id.*

[15] *See id.* (discussing Wilson's remark regarding "the enormous earning power" of the territory's most talented lawyers).

[16] *See Career Move*, *supra* note 11, at 26 (explaining that efforts to attract local judges and magistrates have been "turned down flat").

[17] *See Career Move*, *supra* note 11, at 26 (stating that a "number of scandals" and challenges to landmark decisions have caused disillusionment with the

The use of Chinese in legal proceedings with Chinese proficient lawyers, judges, and juries will also promote greater efficiency and perhaps help reduce the high cost of legal services in Hong Kong. Translation between Chinese and English currently consumes considerable time and effort in cases involving non-English speakers.[18] To the extent that the high cost of legal services decreases access to the legal system and thus infringes on the notion of "equal justice to all," the use of Chinese in the legal system would enhance the delivery of justice, especially to those who cannot afford the high cost associated with overcoming language barriers. In terms of monetary expenditures, time consumption, and professional manpower efforts, the divergence of legal language and common language poses serious concerns.

There are, however, considerable difficulties in achieving a genuinely fair and equitable bilingual legal system for post-colonial Hong Kong. In the most recent ceremonial opening of the new legal year under British rule on January 13, 1997, legal leaders warned against rushing to make the legal system more bilingual before the hand-over. Chairman of the Bar Gladys Li has noted that the use of English and Chinese versions of the same laws could lead to two streams of jurisprudence — each based in a different language.[19] She cautioned that "the common law should not be eroded by the use of Chinese and the problems caused by bilingual legislation."[20] She added that "[n]o one will thank us if in the rush to beat the deadline of July 1, we damage the fabric of our legal system."[21]

Law Society President Christopher Chan asserted, "[t]he fear held by many is that a wholesale swing towards the use of the Chinese language throughout all our courts will eventually lead to the abandonment of the common law system."[22]

The head of the judiciary, Acting Chief Justice Noel Power, agreed that the creation of a bilingual system is a formidable task but said, "[w]e have no doubt that our measured and pragmatic

---

judiciary).

[18] *See Crisis in the Courts*, S. CHINA MORNING POST, May 19, 1991, at 1 (discussing lawyers' discomfort with the present translation problems).

[19] *See* Buddle, *Rapid Changes*, *supra* note 5, at 1.

[20] Neil Western, *Localization Rush "Fraught With Danger"*, HONG KONG STANDARD, Jan. 14, 1997, at 1.

[21] Buddle, *Rapid Changes*, *supra* note 5, at 1.

[22] *Id.*

approach will succeed."[23] Yet, "[i]t must be done so that it does not, in any way, derogate from the capability of the courts to apply the common law."[24]

There is no doubt that the language discrepancy is a serious challenge in Hong Kong's uneasy transition to Chinese sovereignty. The open acknowledgment of past inadequacies and future obstacles, however, represents a commitment to address and resolve this long existing institutional defect in the common law heritage the British will leave behind. As British legal scholar Roger Cotterrell commented, "more fundamental still for the future of the Common Law system may be the issue of language. As Chinese replaces English as the language of Hong Kong law, the difficulty of maintaining this legal system within an international Common Law family must surely become acute."[25]

The British legal legacy in Hong Kong also harbors rulings reflecting dangerous examples of an undemocratic colonial polity that set unhealthy precedents for the future of the S.A.R. Concerns of this nature encompass the thick piles of discriminatory legislation (mostly racially based, anti-Chinese law passed by an appointed, unrepresentative legislature) and draconian, biased (anti-Chinese and anti-grassroots) court rulings which do not provide good examples of decency and fairness.[26]

Another defect in the rule of law is the inadequate separation of power between the executive branch and the judiciary under the colonial polity. Until the 1950s, administrative officers in the British regime served as magistrates trying cases in the police court.[27] Some of these officers specialized in law and subsequently became judges.[28] For example, in the 1930s, Attorney General

---

[23] *Id.*

[24] *Id.*

[25] Roger B. M. Cotterrell, *Foreword* to BERRY FONG-CHUNG HSU, THE COMMON LAW SYSTEM IN CHINESE CONTEXT: HONG KONG IN TRANSITION viii (1992).

[26] *See generally* Peter Wesley-Smith, *Anti-Chinese Legislation in Hong Kong*, *in* PRECARIOUS BALANCE: HONG KONG BETWEEN CHINA AND BRITAIN, 1842-1992 (Ming K. Chan ed., 1994) (discussing various examples of official anti-Chinese activity).

[27] *See generally* HONG KONG GOVERNMENT PRINTER, HONG KONG COLONIAL SECRETARIAT CIVIL SERVICE LIST (1934) (citing many British administrative officers working as police magistrates).

[28] *See generally id.* (providing numerous examples of police magistrates following this career path).

Kemp went on to become the Chief Justice.[29] More recently, Denys Roberts moved from Attorney General to Chief Secretary and then became Chief Justice until he retired in early 1988.[30] There are many magistrates today who began their careers in the legal department and went on to become judges such as Justice Nazareth.[31] All such cross-over of executive branch personnel into the judiciary does not enhance or create any perception of the impartiality of the legal system.

The executive and legislative branches also reflect rather weak separations of power with inadequate checks and balances. Until 1985, when indirectly elected seats were first introduced into the Legislative Council ("Legco"), the colonial administration had been able to pass legislation through a compliant legislature comprised entirely of appointed members (with government officials enjoying a majority until 1976).[32] Thus, the colonial regime often operated technically within the law, as it had always been able to change the law through the appointed legislature. As such the executive branch could always claim a valid basis for any action that it wished to take. Moreover, when the administration did not wish to seek the approval of Legco, it could resort to the Emergency Regulations Ordinance of 1922.[33] Emergency

---

[29] *See id.* at 339-40 (providing a biographical sketch of Joseph Harsford Kemp). From 1904 to 1908, Kemp occasionally acted in the capacity of a Police Magistrate. From 1914 to 1930 he held the post of Attorney General. Finally, from 1930 until his retirement in September 1933, he served as Chief Justice. *See id.*

[30] *See* WHO'S WHO IN HONG KONG 333 (Kevin Sinclair ed., 1984) (documenting Denys Roberts' career).

[31] *See id.* at 287 (listing Mr. Paul Nazarath as a Law Draftsman in the Legal Department as of 1984). By 1988, Mr. Nazarath had ascended to the post of High Court Judge. *See* WHO'S WHO IN HONG KONG 296 (Kevin Sinclair ed., 4th ed. 1988). Most recently, Mr. Nazareth has served concurrently as a Justice of Appeal and Vice President of the Court of Appeal. *See* HONG KONG GOVERNMENT PRINTER, HONG KONG JUDICIARY 1994-1995 24 (1996) [hereinafter HONG KONG JUDICIARY]. In addition, research has revealed that 38% of all post-World War II Hong Kong judges have served in the Legal Department's criminal justice division. *See* Peter Wesley-Smith, *The Judiciary, in* INTRODUCTION TO THE HONG KONG CRIMINAL JUSTICE SYSTEM 27, 31 (Mark S. Gaylord & Harold Traver eds., 1994).

[32] *See* NORMAN MINERS, HONG KONG UNDER IMPERIAL RULE, 1912-1941 58-76 (1987) (discussing the generally acquiescent action of the Legislative Council).

[33] *See* PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 157, 230 (1987) (discussing the "Henry VIII clause" of

Regulations were not subject to disallowance or other checks in London.[34] The Hong Kong government used this power freely until 1972.[35] These regulations were so draconian as to allow imprisonment without trial and many other breaches of commonly accepted human rights.[36] Yet, any such acts were considered perfectly legal, and the courts dutifully enforced the regulations.[37] Because the Emergency Power Ordinance still remains in the statute book, though all the regulations had been repealed by 1985,[38] the serious risk remains that the S.A.R. government may apply it in the same fashion as the colonial government.[39]

3. QUESTIONABLE LEGAL ADMINISTRATION

Besides institutional flaws and historical breaches, one can also consider the colonial regime's own illegal official acts. Examples include film censorship without proper legal authority,[40] character assassination,[41] as well as extra-legal maneuvers to undermine or obstruct the course of justice.[42] These actions all represent

---

the Emergency Regulations ordinance); W. S. Clarke, *Freedom of Movement*, *in* CIVIL LIBERTIES IN HONG KONG 321, 336 (Raymond Wacks ed., 1988) (noting the emergency restrictions in freedom of internal movement).

[34] *See* Wesley-Smith, *supra* note 33, at 157 (noting that because any enactment contrary to an emergency regulation is invalid, no rule contrary to the regulation can have effect). However, if the decision that "an occasion of . . . public danger has arisen," such that the Governor may use the emergency ordinance, was not made in good faith, the courts may intervene." *Id.* at 157.

[35] *See id.* (noting that the government used the ordinance during the civil disorder of 1967).

[36] *See, e.g.*, Ada Yuen, *Detainees Deprived of Basic Rights*, S. CHINA MORNING POST, Nov. 18, 1994, at 5 (discussing the inhumane treatment of prisoners detained for lengthy periods of time without trial).

[37] *See Sinister Secrets of the House on the Hill*, S. CHINA MORNING POST, Sept. 16, 1994, at 27.

[38] *See* Johannes Chan, *A Bill of Rights for Hong Kong?*, *in* CIVIL LIBERTIES IN HONG KONG, *supra* note 33, at 72, 82.

[39] *See Harsh Provision that Infringe Freedom*, S. CHINA MORNING POST, June 25, 1994, at 18.

[40] Before the Hong Kong government's enactment of an ordinance on film censorship in 1988, its film censorship had been without proper legal authority. *See* MICHAEL C. DAVIS, CONSTITUTIONAL CONFRONTATION IN HONG KONG: ISSUES AND IMPLICATIONS OF THE BASIC LAW, 93-95, 108 (1990).

[41] The regime's pressure tactics targeted pressure groups and politicians. *See* ROBERT ADLEY, ALL CHANGE HONG KONG 68-71 (1984).

[42] A prime example of London's executive interference with the Hong Kong legal process is the Chinese government aircraft case in 1950. Under

executive branch attempts to take politically expedient or administrative short cuts amounting to a gross travesty of the rule of law and obstructing all pursuits of true justice.

In more recent years, through critical junctures in Hong Kong's transition to Chinese sovereignty, a string of dubious decisions, gross deficiency, and serious internal misdeeds have punctuated the colonial regime's own record in legal administration. This deplorable condition has become particularly pronounced since Attorney General Jeremy Matthews took office in January 1988 as head of the Hong Kong Legal Department. The following scenarios represent a selection of recent situations illustrating some of the serious problems in legal administration. These cases raise doubts about the executive branch's own regard for the rule of law as well as the integrity and independence of the judiciary.

3.1. Politically Motivated Prosecutions

In the aftermath of the June 4, 1989 Tiananmen Square events when China-Hong Kong relations sharply deteriorated, the British attempted to appease Beijing by bringing forth several politically motivated prosecutions. For example, prosecutors brought a case against several protesters outside a P.R.C. National Day reception in late September 1989,[43] and a case against political activists for using a loudhailer[44] without permits.[45]

In the first case the Hong Kong government failed to produce adequate evidence to sustain its case thereby compelling dismissal

---

pressure from the United States, officials in London coerced authorities in Hong Kong to keep military aircraft from falling into the hands of the Communist regime in Beijing. *See* James T. H. Tang, *World War to Cold War: Hong Kong's Future and Anglo-Chinese Interactions 1941-55*, *in* PRECARIOUS BALANCE, *supra* note 26, at 107, 120-21.

[43] *See* Corrina Tai, *Four Appear Over National Day Protests*, S. CHINA MORNING POST, Oct. 3, 1989, at 3.

[44] "Loudhailer" is a colloquial word denoting various types of portable voice amplification equipment.

[45] *See* Rita Gomez, *Loudhailer Prosecution Criticised*, S. CHINA MORNING POST, July 21, 1990, at 1 (noting that Legislative Councillor Martin Lee Chu-ming criticized the decision to prosecute saying "[a] lot of people use loudhailers without a permit. Why has the Attorney-General picked on the liberals?").

of the charges.[46] However in an attempt to gather evidence against the student protesters, the police raided Hong Kong's two television stations and seized raw video footage of the demonstration outside the P.R.C. National Day celebration.[47] This highly questionable preemptive action by the police provoked strong local and international outcries and raised public doubts about the executive arm's respect for freedom of the press.[48] The government's subsequent legal retreat seemed necessary to save itself from greater blunder and further international embarrassment. Additionally, after the protesters were arrested but before the case went to trial, William Ehrman, Political Advisor to the Hong Kong government, wrote to the New China News Agency (the P.R.C.'s local official representative) containing assurances the Hong Kong government had no intention of allowing Hong Kong to become a "base of subversion" against P.R.C. authorities.[49] This letter specifically mentioned the police actions taken against local protesters as a concrete example of such official British stance.[50]

In the other case the prosecution won a conviction of the five loudhailer defendants who were each fined HK$500.[51] In their successful appeal, the Chief Justice ruled that because of a general policy of not prosecuting persons who used noise amplifying equipment the Crown could not suddenly, without notice, change

---

[46] *See* Daphne Cheng, *April 5th Action Group to Sue for Damages*, S. CHINA MORNING POST, Dec. 19, 1989, at 1 (quoting human rights expert Dr. Nihal Jauwickram saying that the case was "dangerously close to representing political persecution").

[47] *See Demand for Review on TV Seizure*, S. CHINA MORNING POST, Oct. 5, 1989, at 1 [hereinafter *Demand for Review*] (reporting that pro-democracy groups believed the tapes were seized to help police identify individual protestors for purposes of further persecution); Corrina Tai, *Defence Seeks Video Tapes of April Fifth Procession*, S. CHINA MORNING POST, Nov. 24, 1989, at 3 (reporting that the defense counsel in the criminal case sought to obtain these tapes for evidentiary purposes).

[48] *See Demand For Review*, *supra* note 47, at 1 (noting that an association of journalists had "demanded a full explanation of the incident").

[49] *See Britain Tells Hong Kong to Explain Letter Leak*, S. CHINA MORNING POST, Oct. 29, 1989, at 1.

[50] The letter was leaked to the press and provoked a storm of heavy criticism against the colonial government. *See* Cheng, *supra* note 46, at 1 (noting the public response to the letter).

[51] *See* The King v. Li Wing Tat, [1990] Mag. App. 1286, 1288 (H.K. 1991).

its policy and enforce the law.[52] It seemed that in these two cases the judicial bench served as an effective check to the politically questionable decision of the Legal Department. As the Attorney General is an ex officio member of the Executive Council, his claim of being non-political in his legal decisions is either naive or deliberately misleading. Few in the local community accept his claim.

3.2. Prosecutions Timed to Send a Message

A second scenario involves the more recent colonial decision to prosecute several protesters who staged a sit-in the reception area inside the Japanese Consulate-General in Hong Kong on October 9, 1996, amidst the "Protect the Diaoyu Islands" movement protesting Japanese infringement on Chinese sovereignty over these islands.[53] The particular timing of the government's announcement of prosecution raised disturbing questions regarding the possible political considerations behind the decision to prosecute.

The Commissioner of the Police announced this prosecution on November 26, 1996, on the same day Hong Kong Governor Christopher Patten arrived in Tokyo on an official visit to Japan.[54] Among the October 9, 1996 protesters charged were two Legco members, Albert C.Y. Ho and Kin-shing Tsang, both members of the Democratic Party.[55] It should be noted that Tsang and several of his fellow October 9 protesters were also actively involved in the November 15, 1996 protest against the P.R.C.'s undemocratic selection of the first S.A.R. chief executive.[56] To some observers, the prosecution of the protestors'

---

[52] *See id.* at 1290.

[53] *See* Stella Lee & No Kwai-Yan, *Diaoyu Activists to Be Charged*, S. CHINA MORNING POST, Nov. 27, 1996, at 1.

[54] *See id.* (reporting, on November 27, 1996, that the police were "working on some procedures" of appropriate response against several individuals). In most of such cases against demonstrators, it is the Legal Department's responsibility to bring forth the prosecution, definitely not through an announcement by the head of police. *See* Interview with Albert H. Y. Chen, Dean of the University of Hong Kong School of Law, in Hong Kong (Mar. 5, 1997).

[55] *See id.*

[56] *See* Chris Yeung, *Candidates in First Big Test*, S. CHINA MORNING POST, Nov. 15, 1996, at 1 (noting that "various groups of activists" were preparing to protest against the selection process).

October 9 behavior might have seemed intended to serve to deter similar activities at other S.A.R.-related events.

On November 26, 1996, the colonial regime also tabled for Legco enactment an amendment to the Crimes Ordinance.[57] This amendment represents an effort to preempt the Basic Law's Article 23 promise that "[t]he Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, [or] subversion against the Central People's Government."[58] While this British attempt to define "subversion and sedition" only in terms of physical action (while protecting the pure advocacy for such actions as free speech) had been denounced by the P.R.C. as preempting the S.A.R.'s own law-making prerogatives, the very timing of the prosecution of Ho, Tsang and associates might have created an unfortunate public perception of the colonial regime's realpolitik calculations behind legal action to appease Tokyo and Beijing.[59]

3.3. Administrative Disregard of Judicial Orders

Instead of full compliance with court orders, the executive branch has displayed highhanded and inappropriate responses in an attempt to obstruct and even reverse the causes of justice. This is perhaps most evident in the case of habeas corpus application by Vietnamese boat people against illegal detention in November

---

[57] *See* Cheuk-Fei Man, *Hong Kong Government's Clumsy Handling of Charges Against Anti-Japanese Protestors*, HONG KONG ECON. J., Nov. 28, 1996, at 26.

[58] Zhonghua Renmin Gongheguo Xianggang Tebie Xingzheng Qu Jiben Fa [The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China], Apr. 4, 1990, ZHONGHUA RENMIN GONGHEGUO FALÜ FAGUI (Huoye) 1-4-0-I-1, art. 23, *translated in* [Special Zones and Cities] China Laws for Foreign Bus. (CCH) ¶ 100-010 (1990) [hereinafter Basic Law].

[59] *See* Man, *supra* note 57, at 21 (raising questions about the possible motivations behind this series of actions).

Article 23 was included in the Basic Law only after the June 4, 1989 events in Tiananmen Square. *See* Ming K. Chan, *Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90*, *in* BLUEPRINT FOR STABILITY?, *supra* note 2, at 21-25 (discussing the final stages of Basic Law drafting in late 1989 and early 1990); David J. Clark, *The Basic Law: One Document, Two Systems*, *in* BLUEPRINT FOR STABILITY?, *supra* note 2, at 41-42 (exploring the implications of Article 23).

1990.[60] In this case Justice Sears ruled that the detention of 111 Vietnamese boat people for eighteen months was illegal and granted habeas corpus to release them.[61] Notwithstanding the explicit warning from Justice Sears, officials of the Immigration Department rearrested the applicants right at the doorstep of the court building only minutes after they were set free by the court.[62] Despite strong condemnation by the press and international organizations of such defiance of court order, the Director of Immigration still defended the legality of the original detention of these boat people who were on their way to Japan through Hong Kong waters.[63]

3.4. Ethically Questionable Conduct of Legal Department Personnel

The professional conduct and personal behavior of some senior officials in the Legal Department raises serious doubts in the public mind about the competence, decency, and discipline of the legal arm of the colonial regime. An example of such misconduct is the case of Warwick Reid, Deputy Crown Prosecutor, who absconded to Manila after an investigation revealed that he had taken bribes for declining to prosecute certain cases.[64] Reid was finally caught in Manila and brought to trial in Hong Kong.[65] In the intervening period, investigators implicated another member of the Legal Department who loaned his passport to Reid for his escape.[66] Still another colleague of Reid saw him at large in Manila yet failed to inform the Legal Department.[67] They were all senior expatriate legal officers.[68]

---

[60] *See In re* Pham Van Ngo and 110 Others, [1990] Hc Mp No 3005 (H.K. 1990).

[61] *See id.*

[62] *See id.*

[63] *See id.*

[64] *See* Corrina Tai, *Reid Pleads Guilty to Corruption Charge*, S. CHINA MORNING POST, June 21, 1990, at 1.

[65] *See* Rita Gomez, *Lawyer Charged With Aiding Reid's Escape*, S. CHINA MORNING POST, June 21, 1990, at 1.

[66] *See id.*

[67] *See* Emily Lau, *Lawyers in the Dock*, FAR EASTERN ECON. REV., June 28, 1990, at 18-19.

[68] *See* Gomez, *supra* note 65, at 1.

A further example concerned Christopher Harris, Senior Crown Counsel and second in charge of the Legal Department's vice unit, who was convicted of soliciting an underage girl for unlawful sex.[69] In this and other cases, the Legal Department exhibited a reluctance to prosecute criminals within its own ranks. The prosecution and trial of Christopher Harris were made possible only after public pressure compelled Attorney General Jeremy Matthews to reverse his earlier decision not to prosecute.[70] The Attorney General's initial decision allowed Harris to resign from the Department, and afterward to enter private practice in Hong Kong, which Harris did in May 1989.[71] These cases raised serious doubts not only about the immoral and illegal personal conduct of Harris while serving as a senior legal officer, but it has also exposed the double standard resulting from internal protection among the expatriate top brass in the Legal Department. More critically, these cases highlight the sheer legal incompetence and poor judgment of the Attorney General as the chief legal advisor of the colonial regime and the titular head of the local bar.

3.5. Improper Procedure in Appointing Magistrates

The Attorney General also failed to advise the colonial administration concerning fundamental issues of lawful procedure related to judicial appointment. This failure lead to a crisis in April 1991. It came to light that sixty of Hong Kong's sixty-one magistrates had been unlawfully appointed, thereby raising serious questions about the validity of their past rulings.[72] The original

---

[69] *See* Jon Marsh, *Emotional Hour that Left a Man Devastated*, S. CHINA MORNING POST, Feb. 20, 1990, at 6.

[70] *See* Lindy Course, *Bar Society Memo Questions A-G's Standing*, S. CHINA MORNING POST, Feb. 22, 1990, at 1 [hereinafter Course, *Bar Society Memo Questions*] (reporting that Mr. Mathews did not reveal the circumstances of Mr. Harris' case until the chairman of the Bar inquired about the rumors surrounding the "sudden departure").

[71] *See id.*

[72] *See* Lindy Course, et al., *Courts in Muddle After Ruling on Magistrates*, S. CHINA MORNING POST, Apr. 23, 1991, at 1 (reporting on the questionable validity of rulings made by magistrates not properly appointed).

Scholar David J. Clark discovered this fact and published it in a 1989 article in the HONG KONG LAW JOURNAL. *See* David J. Clark, *Are All Appointments of Magistrates Since January 1984 Invalid?*, 19 HONG KONG L.J. 330, 333 (1989).

Dr. Clark had personally informed the legal department of this discovery,

Letters Patent empowered only the Governor to appoint magistrates and judges in Hong Kong.[73] In actuality, all but one of the colony's magistrates had been dubiously appointed by the Chief Justice since January 1984.[74] Despite contrary pronouncement by the Court of Appeal, the government amended the Letters Patent to validate retroactively all of these appointments and make the power to delegate explicit.[75] In effect this Amendment was a vote of no-confidence in the Court of Appeal decision contending that the power to delegate was implied.[76] The plaintiffs in this case are presently appealing to Hong Kong's highest court, the Judicial Committee of the Privy Council in London.[77] Furthermore, the retrospective Amendment, which is a highly undesirable and potentially dangerous attempt to manipulate legal institutions, will set an unhealthy precedent for the post-colonial S.A.R. Ramroding this amendment through at breakneck speed while the appeal of the original case was still in progress evidences the executive branch's low regard for the spirit of legal fair play and independence of the judiciary from administrative interference.

3.6. Scope of the Problem

These cases may be only the tip of an iceberg of colonial legal maladministration. Some of the blame has often been attributed to the questionable judgment, leadership and character of Attorney General Matthews. In fact, since early 1990 there have been open calls for Mr. Matthews' resignation as a necessary step to repair the damage inflicted on the legal system due to his administrative and legal incompetence, sheer lack of leadership and

---

but in a characteristically arrogant bureaucratic reaction, no action was taken until after the court verdict was handed down in late April 1991. *See* Lindy Course, *Defendants Freed on Ruling "Face Re-Arrest"*, S. CHINA MORNING POST, April 24, 1991, at 1.

[73] *See* Clark, *supra* note 72, at 331.

[74] *See Crisis in Legal Department*, S. CHINA MORNING POST, May 9, 1991, at 1.

[75] *See* Jennifer Cooke, *Changes Fail to Halt Privy Council Bid*, S. CHINA MORNING POST, May 22, 1991, at 3.

[76] *See* Cynthia Chan, *Magistrates "Validly Appointed" — Court of Appeal Finds Governor's Power Delegable*, S. CHINA MORNING POST, May 15, 1991, at 7 (providing an analysis of the Court of Appeal decision).

[77] *See* Cooke, *supra* note 75, at 3.

sordid personal affairs.[78] The fact that he still holds the top legal position in the colonial regime is itself testimony to the lack of full accountability in the government.

4. PROBLEMS ON THE BENCH

The Legal Department is not alone in harboring questionable senior personnel with serious misdeeds among its ranks. The judicial bench has also had its fair share of dubious characters engaging in indiscreet conduct. The following notorious cases of four resigned or retired Court of Appeal Justices and High Court Judges provide merely a small sampling of the many recent scandals affecting the bench.

4.1. Questionable Resignations

In January 1987, Justice Miles Jackson-Lipkin resigned in face of reports that he falsified his date of birth, his British *Who's Who* entry, and his military service records.[79] In November 1988, Judge Patrick O'Dea resigned under pressure after he was found reading a novel while presiding a trial.[80]

In September 1987, Judge Denis Barker terminated the well-publicized Carrian case halfway through the trial, thereby acquitting the six defendants.[81] The case had been Hong Kong's longest commercial fraud trial, consuming more than sixty-four weeks and forty million dollars of public funding.[82] The questionable wisdom of this seemingly bizarre move has cast a dark shadow over the judiciary. Judge Barker escaped calls for an explanation by resigning soon after the incident, and died shortly thereafter.[83]

---

[78] *See, e.g.*, Course, *Bar Society Memo Questions*, *supra* note 70, at 1.

[79] *See* Vicky Wong, *Quest for an Answer to a Question of Law*, S. China Morning Post, Feb. 28, 1988, at 8.

[80] *See* HSU, *supra* note 25, at 64.

[81] *See* Lindy Course, *Carrian Ruling May Be Queried*, S. CHINA MORNING POST, Sept. 17, 1987, at 1.

[82] *See Carrian Ruling Puts Jury System on Trail*, S. CHINA MORNING POST, Sept. 17, 1987, at 18.

[83] *See* Wong, *supra* note 79, at 8. In March 1988, six months after this acquittal ruling, the new Chief Justice T. L. Yang admitted that it could take up to two years to repair the damage done to the credibility of the judiciary by the ruling. Yang's candor in his first week in office reflected the fact that the legacy he had inherited was so tarnished that he had little choice but to

On September 3, 1996, Judge Brian Caird withdrew from the Aaron Nattrass case[84] on medical grounds and retracted his earlier allegations of being improperly pressured by two fellow judges.[85] Although the internal judicial inquiry headed by Acting Chief Justice Noel Power found no pressure had been applied, observers criticized the inquiry as a massive "cover-up" staged by the judiciary, leaving a host of questions unanswered.[86]

4.2. Ethically Questionable Conduct of the Judiciary

4.2.1. Chief Justice T. L. Yang's Public Statements

The peril and predicament of Hong Kong's legal system at this critical juncture of its transition is illustrated by even more serious areas of dubious judiciary conduct at the highest level. Indeed, when the new Chief Justice, T. L. Yang, took office in March 1988, he openly acknowledged the tarnished legacy and impaired credibility of the judiciary which would take considerable time

---

acknowledge the seriousness and address the implications of this questionable verdict. Though insistent that an error of judgment should not automatically force a judge to resign, Yang believed the judiciary ought to be more conscious of its reputation and credibility. *See Chief Justice Wise to Clear the Judicial Air*, S. CHINA MORNING POST, Mar. 22, 1988, at 20.

[84] Aaron Nattrass was a New Zealander charged with fraud and deception.

[85] *See* Cliff Buddle, *Inquiry into "Pressure on Judge" Claims*, S. CHINA MORNING POST, Aug. 24, 1996, at 1 (discussing reports of pressure applied to Judge Caird to step down from the trial); Magdalen Chow, *Crown Asks Judge Caird to Withdraw from Trial*, S. CHINA MORNING POST, Aug. 28, 1996, at 1 (discussing the controversy created by this pressure).

[86] *See* Cliff Buddle & Magdalen Chow, *Second Judge Urged Nattrass Trial*, S. CHINA MORNING POST, Sept. 6, 1996, at 3 (citing law lecturer Nihal Jayawickrama as claiming that the Judiciary's actions were a "cover-up" in light of the investigation's failure to produce any evidence); Cliff Buddle, *Inquiry into Caird Should Cover Two Other Judges, Patten Told*, S. CHINA MORNING POST, Sept. 26, 1996, at 3 (discussing the possibility that Judge Caird may have been singled out as a scapegoat and suggesting that a *real* judicial inquiry would be expanded to investigate other judges).

Governor Chris Patten announced his intention to set up a judicial tribunal to investigate Judge Caird for possible impeachment and removal. However, in December 1996, Caird took early retirement on the grounds of ill health which the Governor approved. As such the tribunal was never set up. *See* Charlotte Parsons, *Caird "Forced to Quit for Telling Truth"*, S. CHINA MORNING POST, Jan. 4, 1997, at 3 (discussing Caird's retirement for medical reasons and noting that this would preclude any further official investigation).

and effort to repair.[87] He stressed the need for the judiciary to be more conscious of its public reputation and that it should be "open to scrutiny and yet beyond reproach."[88] Yet in the case of the illegal appointment of magistrates, it was the Chief Justice himself[89] who actually appointed them.[90] Rather than upholding a much needed system of checks and balances in a supposedly accountable system under the rule of law, the illegal appointment of magistrates made a farce of the supposed separation of powers.[91]

4.2.2. The Chief Justice's Actions to the Contrary

In the controversy over the Sino-British Joint Liaison Group's ("JLG") agreement regarding the composition of Hong Kong's Court of Final Appeal,[92] the stance of then Chief Justice T.L. Yang provoked considerable criticism from the legal profession and the Hong Kong public.[93] In essence, the JLG's 1991 agreement would restrict the number of overseas jurists who could be appointed to the five-member Court of Final Appeal to only one, even though the provisions in the Joint Declaration and the Basic Law contained no such restriction.[94] The Hong Kong public regarded this Beijing-London deal, which completely failed to take account of public interest and sentiment, as a great disappointment that would undermine the rule of law after 1997.[95] Public opinion favors greater flexibility in the appointment of overseas jurists to the Court of Final Appeal in order to provide more

---

[87] *See Public Confidence: Lifeblood of Judiciary*, S. CHINA MORNING POST, Nov. 16, 1988, at 9 [hereinafter *Public Confidence*].

[88] *Id.*

[89] The Chief Justice is also the chairman of the Judicial Service Commission which advises on these judicial appointments.

[90] *See* discussion, *supra* section 3.5.

[91] *See Public Confidence*, *supra* note 87, at 9.

[92] The Court of Final Appeal was supposed to replace the Privy Council's Judicial Committee in London as the final and highest judiciary authority for Hong Kong legal cases. It was scheduled to come into existence in 1993, ahead of the 1997 sovereignty retrocession. *See Why the Final Court is a Disappointment*, S. CHINA MORNING POST, Sept. 28, 1991, at 14.

[93] *See id.*

[94] *See* Margaret Ng, *Hong Kong Has Been Cheated Over the Rule of Law After 1997*, S. CHINA MORNING POST, Oct. 1, 1991, at 5.

[95] *See id.*

experience and entrenchment.[96]

The councils of the Hong Kong Bar Association and the Hong Kong Law Society jointly condemned this agreement as a "recipe for disaster" and the JLG's action as "indefensible."[97] In fact, a majority of Legislative Council members, who will have to approve legislation empowering the establishment of the Court of Final Appeal, rejected this agreement in a motion debate.[98] As such, it was both premature and inappropriate for the head of the judiciary to issue a public statement endorsing this controversial JLG model as "workable and acceptable"[99] immediately after its announcement by the government. It is highly undesirable for the Chief Justice to involve himself directly in political maneuvers and play the role of an appeasing diplomat supporting a highly problematic deal between the executive branches of Hong Kong's current and future sovereign regimes.[100]

---

[96] *See* Shirley Yam, *Plea to Hurd on HK Affairs*, S. CHINA MORNING POST, Oct. 30, 1991, at 7 ("Legislators have rejected the agreement . . . on the ground that it restricts the court's flexibility in inviting overseas judges.").

[97] *See Final Appeal Court "Recipe for Disaster"*, S. CHINA MORNING POST, Oct. 14, 1991, at 1 [hereinafter *Recipe for Disaster*].

[98] In their in-house meeting on October 25, 1991, thirty-eight Legco members supported, two opposed and five abstained from a motion calling for greater flexibility in the Court's composition. *See* Doreen Cheung, *Call to Reconsider Court Agreement*, S. CHINA MORNING POST, Oct. 26, 1991, at 4 (providing details of the vote); Fanny Wong, *"Go it Alone" Call on Court: Legislators Vow No Compromise in Row on Deal*, S. CHINA MORNING POST, Nov. 1, 1991, at 1 (suggesting that flexibility "concerning the composition and powers of the Court" is consistent with the Joint Declaration and Basic Law).

[99] *Recipe for Disaster*, *supra* note 97, at 1 (citing the Chief Justice's comments).

[100] The conflict over the final composition of the Court escalated to a constitutional crisis between the Legco and the colonial administration harboring serious implications for Sino-British relations and for the S.A.R. legal system. This controversy over the Court of Final Appeal's composition on which both the P.R.C. and British authorities refused to retreat is another example of the many causes of deep reservation among the people of Hong Kong about the continued functioning of the common law system in post-1997 Hong Kong. *See "No Surrender" Impasse Over Appeal Court Deal With China*, S. CHINA MORNING POST, Nov. 1, 1991, at 26.

The final resolution of this Court of Final Appeal issue came in June 1996, when both London and Beijing agreed to defer the establishment of the court until July 1, 1997. The obvious implication of this agreement is that by then it would be a task for the S.A.R. alone. On July 26, 1995, the Hong Kong government finally managed to pass a bill in the Legco to establish the Court of Final Appeal. *See* GOVERNMENT INFORMATION SERVICES, HONG KONG 1996 29, 33 (1996).

4.3. Improper Judicial Commentary on Human Rights Issues

The enactment of a less protective Hong Kong Bill of Rights in the Spring of 1991, after a long delay and with a one year freeze on six existing laws, represented British efforts to boost local confidence during the aftermath of the Tiananmen Square Incident. The Beijing authorities launched instant criticism of this already weakened Bill of Rights contending that it would have adverse effects on the Basic Law.[101]

In 1995, in the context of this ongoing political controversy, Chief Justice T. L. Yang interposed his personal opinion on the Bill of Rights' unsettling impact on the legal system.[102] Specifically, the Chief Justice cited concerns arising from potential conflicts between the Basic Law's commands regarding transition and the resurrection of six local ordinances before their amendment by the 1991 Bill of Rights.[103] The damage was done not

---

[101] *See* Dorothy Lai, *Activists Rattled by Police Action*, S. CHINA MORNING POST, June 6, 1991, at 1 (discussing human rights activists' reaction to this criticism by Beijing authorities). This alarmed the Hong Kong public as further evidence reflecting Beijing's rather low regard for the safeguard of civil liberties in accordance with the International Covenant on Civil and Political Rights to which the P.R.C. is not a signatory. *See Lee Fails in Bid to Stop Freeze of Bill*, S. CHINA MORNING POST, June 7, 1991, at 6 (stating concerns that enactment of the bill may not effectively protect the "rights and freedoms of Hong Kong people after 1997").

More recently, a new international controversy has arisen over the P.R.C.'s S.A.R. Preparatory Committee Legal Sub-group's call for the "restoration" of several major ordinances to their more draconian pre-Bill of Rights-amended, versions after July 1, 1997. Specifically, this would mean the resurrection of the pre-1995 version of the Public Order Ordinance with very tight police control over public demonstration and assembly, and the pre-1992 Societies Ordinance banning foreign links with local political organizations as well as the toning down or outright deletion of some provisions of the Bill of Rights for contravening the Basic Law according to Beijing's interpretation. This has drawn criticism from local legal bodies, the pro-democracy lobby and human rights groups as well as the U.S. and U.K. governments as undermining the civil liberty and social freedoms for the people in Hong Kong S.A.R. *See, e.g.*, Simon Beck, *U.S. Appeal on Bill of Rights*, S. CHINA MORNING POST, Jan. 23, 1997, at 4 (quoting U.S. spokesman Nicholas Burns as expressing concerns regarding "attempts to weaken civil liberties and basic freedoms in Hong Kong").

[102] *See* Berry Hsu, *Judicial Development of Hong Kong on the Eve of 1 July 1997*, *in* THE HONG KONG READER: PASSAGE TO CHINESE SOVEREIGNTY 65, 82 & n.76 (Ming K. Chan & Gerard A. Postiglione eds. 1996).

[103] *See* Chris Yeung, *Sparks Fly as Chief Justice States Case*, S. CHINA MORNING POST, Nov. 18, 1995, at 1 (providing details of Yang's expressed

simply because Yang expressed doubts about the overriding effect of the Bill of Rights in a "private" conversation as overheard by a Deputy Director of the Hong Kong Branch of the New China News Agency (the P.R.C.'s de facto consulate).[104] The most alarming aspect is that Yang apparently violated judicial independence by bowing to executive pressure and submitting a report explaining his views to Chief Secretary Chan on this issue.[105]

4.4. Scope of the Problem

The above instances provide only a few of the more recent examples of dubious conduct or impropriety on the part of senior legal officials who did little to enhance public confidence in the British-style legal system and, by extension, the rule of law itself. If the court system is regarded by the populace as the last resort for fairness and justice, then the Legal Department together with the police force must be the front line of public protection for upholding law and order. Thus, the tarnished image and serious misdeeds of those in positions of authority, responsibility, and public trust while supposedly only involving private misconduct nevertheless reflects negatively on the institutions they represent and the public functions they were entrusted to discharge. In a sense, as public officials there is very little room for a private persona consisting of illegal and unethical behavior. It is indeed tragic that these high legal and judicial officials who are called upon to be a personification of the institutions of justice have proven to be smaller than the offices they held. In addition to widespread headlines regarding the "crisis of legal personnel scandals" is the realization that most of these cases involved expatriate, non-Chinese legal personnel, thus adding to the public perception, perhaps not fully informed, of the double standard in the legal system. A greater effort in localization and bilingualism in legal processes may reduce part of the stigma, but a better and more vigorous system of recruitment and appointment to both the Legal Department and Judicial Branch will be indispensable to any successful future legal system in the S.A.R.

---

concerns).

[104] *See id.*

[105] *See* Hsu, *supra* note 102, at 82.

5. CONCLUSION: THE UNCERTAIN LEGAL PROSPECT FOR POST-COLONIAL HONG KONG

The sordid record of legal irregularities and disorderly legal administration completely undermines any argument for the full and intact preservation of the existing legal system as handed down by the colonial regime without fundamental reform. Despite British claims that they brought the blessings of the rule of law to Hong Kong, as in many other colonies, the British have in fact created a legal system emphasizing law and order while neglecting the personal liberties and individual rights associated with the common law tradition. Hong Kong's legal system reflects a concentration rather than separation of powers and non-accountability rather than checks and balances. When coupled with a non-representative administration, this creates a formidable problem of legitimacy for the legal system as part of the political and constitutional superstructure.

Widespread public concern about the Basic Law's potential negative effects on the S.A.R. legal system should not obstruct a more critical assessment of the existing legal institutions, procedures, and personnel under British rule. As set forth in the 1984 Sino-British Joint Declaration and the Basic Law, an independent and impartial judiciary will provide an indispensable safeguard for civil liberties and human rights, as well as provide a forum to regulate economic behavior and public conduct according to the rule of law.[106] With the P.R.C.'s own dubious legal record, it is imperative that the British provide a sound foundation, both institutional and societal, during the transitional years to assure the continuation of common law justice in post-1997 Hong Kong.

Historically, a lack of public trust was the main reason for the failure of the common law system in many other former British colonies. There is a real danger of repetition of such failure not only because of external pressure but also stemming from internal decay. The British colonial regime has done little to build confidence in the common law system in Hong Kong. The readiness of the local Chinese populace to accept common law notions is not sufficient to guarantee the success of the common law as the foundation for a future of legal justice and the protec-

---

[106] *See generally* BLUEPRINT FOR "STABILITY?", *supra* note 2 (providing analysis of the Basic Law's provisions on human rights and civil liberties, principles that could be enforced by a properly functioning rule of law).

tion of citizens' rights.

Therefore, if the common law system folds after 1997, the fault will lie not with the Hong Kong people, or traditional Chinese authoritarian culture, as much as with the British colonial administration's failure to strengthen the legal system in Hong Kong. Moreover, the government has not provided the populace with a better understanding of the existing common law system and the active role they need to perform in maintaining it and holding it truly accountable. This is not only an indictment of the legal system, but of the political and educational systems as well. In this sense, the colonial regime has failed to adequately prepare and empower the Hong Kong people for their future.

The long separation of colonial bureaucratic polity from the Chinese society in Hong Kong has also had implications for the common law system and its grafting onto Chinese culture. The insulation of the expatriate-dominated Legal Department is certain to aggravate rather than alleviate this problem. Given the deeply rooted decay within the Legal Department and the uncertain fate of the common law system after 1997, the attitudes of the people toward the common law are a critically important element for local autonomy following the resumption of Chinese sovereignty. At this critical juncture, the Hong Kong people should further reflect on their own views of the common law system inherited from the colonial government.

While the P.R.C.'s own legal system and record of justice is far from reassuring, the colonial legacy leaves far too many blemishes to provide a shining example or a perfect foundation for the further development of the rule of law in the S.A.R. The rule of law is definitely a prominent British legacy in Hong Kong, and is rightly viewed as such by popular perception.[107] However, one can never forget the serious lapses and significant gaps in the common law system as practiced by the colonial regime. Many efforts are still crucial to effective reform of the defects and inadequacies of the legal system so that it can live up to its own avowed objective. The official government report on the Hong Kong Judiciary aptly articulates the proper goals and rationales of

---

[107] In a Hong Kong Policy Viewers' poll published in October 1996, more than 90% of 560 respondents stated that maintaining judicial independence and safeguarding Hong Kong's autonomy should be the top priority of the future S.A.R. chief executive. *See Rule of Law, Autonomy Top Post-97 List, Survey Shows*, S. CHINA MORNING POST, Oct. 28, 1996, at 5.

these reform efforts: [i]f the people of Hong Kong are to have confidence in their judicial system, the courts must be seen to be capable of dispensing justice independently, within a reasonable period of time and in a language which the vast majority of people can understand.[108]

In retrospect, many factors have contributed to Hong Kong's remarkable development and success as an economically prosperous, socially free, and increasingly more democratic polity. A most crucial and indispensable component of this success is undoubtedly the territory's legal system and framework which has provided stability and certainty to support Hong Kong's growth and transformation. Yet, there is the undeniable shadow of past defects in the colonial legal history. In fact, few would dare to argue that the British rule of law has throughout the past one and a half centuries of colonialism been genuinely fair, delivering equal justice to all, Europeans or Chinese. This Article documents the cases of misconduct and impropriety involving legal personnel or malfunctioning of legal institutions. However, the truly fundamental concerns of the Hong Kong S.A.R. populace transcend the remedial measures necessary to improve upon the British endowed legal system. Rather, the crux of the issue is whether the Hong Kong legal system will be able to enjoy the autonomy promised by both the Sino-British Joint Declaration and the Basic Law.[109] In the final analysis, it is only with such autonomy that the rule of law will be able to play its indispensable role in safeguarding freedom, democracy, and the much cherished pluralistic values and way of life that the Hong Kong people have enjoyed. Hopefully, the past blemishes of the British colonial regime's legal system will not become the pretext used by external and internal forces to undermine the rule of law in the S.A.R.

---

[108] HONG KONG JUDICIARY, *supra* note 31, at 18.

[109] For an analysis of the issues and problems in legal institutions in the last years of British rule, which will also be a basic concern for the new S.A.R. administration, see generally Alison Conner, *Legal Institutions in Transitional Hong Kong*, *in* HONG KONG'S REINTEGRATION WITH CHINA: TRANSFORMATION AND CHALLENGE (Ming K. Chan ed., forthcoming 1997).