



1-1-1998

Media Freedom in Chinese Hong Kong

Richard Cullen

City University of Hong Kong, Hong Kong

Follow this and additional works at: <https://scholarlycommons.pacific.edu/globe>



Part of the [International Law Commons](#)

Recommended Citation

Richard Cullen, *Media Freedom in Chinese Hong Kong*, 11 *TRANSNAT'L LAW* 383 (1998).

Available at: <https://scholarlycommons.pacific.edu/globe/vol11/iss2/3>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in *Global Business & Development Law Journal* by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Media Freedom In Chinese Hong Kong

Richard Cullen*

TABLE OF CONTENTS

I. INTRODUCTION	384
II. BACKGROUND	386
A. <i>The Colonial Era</i>	386
B. <i>The Transitional Period</i>	387
C. <i>Points of Conflict</i>	388
III. OVERVIEW OF THE MEDIA IN HONG KONG	391
IV. THE REGULATORY FRAMEWORK	396
V. THE JUDICIARY AND THE MEDIA	399
A. <i>Introduction</i>	399
B. <i>The Press in Court</i>	402
C. <i>Summary</i>	404
VI. PREVAILING INFLUENCES	405
A. <i>Introduction</i>	405
B. <i>Political and Economic Contingencies</i>	406
VII. CURRENT ISSUES	410
A. <i>Case Studies</i>	410
B. <i>Summary</i>	412

* Visiting Fellow, Faculty of Law, City University of Hong Kong, Hong Kong; Associate Professor, School of Law, Deakin University—Geelong, Australia, D. Jur., Osgoode Hall, Toronto, Canada, LL. B. (Hons), Melbourne, Australia. This paper is based on a paper presented at a Conference on Judicial Independence and the Rule of Law in Hong Kong held at St. Antony's College, Oxford, England on June 12-13, 1998. The paper draws on arguments made in H. L. FU & RICHARD CULLEN'S MEDIA LAW IN THE PRC, especially Chapter 12 (Asia Law & Practice, Hong Kong, 1996), and Richard Cullen's *Freedom of the Press in Hong Kong* (1997) 27 INTERNATIONALES ASIENFORUM 29. I wish to thank Dr. H. L. Fu of the University of Hong Kong, Gren Manuel of the South China Morning Post and Lucia Palpal-Latoc of the Hong Kong Standard for their valuable input. The views expressed are my own.

VIII. THE BUSINESS CLIMATE 413

IX. CONCLUSION 415

I. INTRODUCTION

The former Territory of Hong Kong was acquired by the British in three stages. The first stage involved the acquisition of Hong Kong Island at the conclusion of the First Opium War. This appropriation occurred over 150 years prior to the reversion of Hong Kong to the People’s Republic of China (PRC) on July 1, 1997.¹ Since the mid-nineteenth century, the United Kingdom (UK) has evolved from being an aggressive imperial power into a modern liberal-democratic state. During the same period, China has developed from a vast, degraded imperial state into, comfortably, the largest One Party State the world has ever seen.

Over a year has now passed since the British Territory of Hong Kong became the Hong Kong Special Administrative Region of the People’s Republic of China (HKSAR). This change of sovereignty was unique. Hong Kong became, especially after World War II, a remarkably free society under British guardianship. It also enjoyed extraordinary growth. At the end of that war, Hong Kong’s per capita income was below that of India. Today, it exceeds that of Britain and Australia.² This enclave of freedom and prosperity reverted, in July 1997, to ultimate rule by China which, less than ten years ago, unleashed its own *armed* forces against its own *unarmed* citizens in Tiananmen Square. Not surprisingly, in the run-up to the handover, there was much speculation about what might become of Hong Kong upon the resumption of sovereignty by China. Some commentators foretold political doom and gloom. More than a year after the handover, it is possible to note, fairly conclusively, the inaccuracy of these more extreme predictions. Over the last five decades, Hong Kong has undergone a process of constant change, the likes of which has been seen in few other parts of the world. This process of change was set to continue, whether sovereignty reverted to China or not. That reversion has added a further potent component to Hong Kong’s chemistry of change. In truth, it is still not possible to say just what sort of political entity the new HKSAR is on its way to becoming.³ Nevertheless, it is now possible to identify the sequence of factors shaping Chinese Hong Kong more clearly. In this paper I wish to consider one key aspect of post-1997 life in the remarkable city-state which sits at the mouth of the Pearl River: the operation of the media.

1. See JAN MORRIS, HONG KONG: EPILOGUE TO AN EMPIRE (Penguin, London 1990) (providing a good overview of the history of British Hong Kong).

2. See Richard Cullen and Hua Ling Fu, *Fiscal Reform in China: Implications for Hong Kong*, 19 LOY. L.A. INT’L & COMP. L.J. 389, 392 (1997).

3. The Chinese have a particular sense of history. Chairman Mao Zedong is once said to have replied, when asked what he thought were the effects of the French Revolution, that it was “too early to tell.”

It needs to be noted at the outset that Hong Kong does not now enjoy, nor has it ever enjoyed, full democratic-representative government.⁴ Despite this shortcoming, Hong Kong has enjoyed, and continues to enjoy, social, economic and political freedom the equal of or better than that enjoyed in many near neighbors which have had democratic-representative government sometimes for decades.⁵ A wide variety of circumstances have produced this apparently curious political outcome. These include: Hong Kong's remarkable role as an entrepot to Communist China; extraordinary economic growth (arising largely, from this entrepot function) which has especially benefitted the elite, but which has also benefitted the vast bulk of Hong Kong's population; a lack of strong and widespread "grass roots" demands for democracy; government and business elites who discouraged any growth in such demands; a "way-station" attitude towards Hong Kong formerly maintained by much of the extensive "sojourner" sector of the population; the development of an Anglo-style legal system enjoying a real measure of independence; and, the evolution of one of the most free and extensive media sectors in East Asia.

This article is principally concerned with the last of these influences.⁶ The core questions this article seeks to answer include: How is the media structured? How is it regulated? And, where does it appear to be heading? One important focal point is the way in which the judicial system has shaped freedom of the press in Hong Kong. As it happens, the impact of the judiciary has been comparatively limited to date. The article therefore provides a wider perspective on the issue of media freedom in Hong Kong by considering certain germane political and economic circumstances. In the course of doing so, it spends some time examining media-related business topics.

A wide-range of factors touch on media freedom in Hong Kong. These can be grouped into those which tend to have an immediate or direct impact and those which are less immediate in their impact, though no less important. The more immediate factors include: availability of information from official sources; official censorship or dissemination restrictions; self-censorship; judicial attitudes towards freedom of the press; defamation actions; and, the day-to-day relationship between the media and the judiciary. The less immediate factors include: the ownership of media outlets by non-specialists, commercial owners; increasing Mainland Chinese involvement in HKSAR media outlets; advertising placement policies; the shrinking diversity of media outlets in the HKSAR; censorship "activism"; the relationship of the media with government; the relationship of the media with the market place; and, the relationship of the media with organized crime. A number of these factors overlap,

4. From 1995 until mid-1997, Hong Kong's Legislative Council (LEGCO) was entirely composed, through a mixture of electoral mechanisms, of more or less popularly elected members for the first time in its history. This transitory arrangement is discussed further below. Hong Kong Governments, which exist outside LEGCO, have never been elected.

5. East Asian examples include Japan, Malaysia and Singapore.

6. This paper is concerned with freedom of the press rather than freedom of expression generally. Space considerations mandate this. The term, freedom of the press, is used in its usually accepted rather than literal sense. That is, the term is used to encompass freedom of the media generally and not just freedom of the print media.

and there is no complete demarcation between the two categories. These factors serve to outline the complexity of the issue of media freedom in the HKSAR, however.

The structure of the article is as follows. Part II provides brief background on the political-legal complexion of the HKSAR. Part III examines the broad structure of the media in Hong Kong. Part IV reviews the legal framework for regulating the media in the HKSAR. Part V looks at the way in which the judiciary has had an impact on the operation of the media. Part VI reviews a range of factors, including extra-legal influences, which seem certain to play a continuing role in molding media practice in the HKSAR. Part VII looks at various current practical examples of media related operational challenges in the HKSAR. Part VIII considers media development in the HKSAR from a business perspective. Part IX is the conclusion.

II. BACKGROUND

A. *The Colonial Era*

In 1841, the British arrived in Hong Kong to stay. They brought with them all their usual colonial institutions and practices. The legal elements of British colonialism were established at the outset and then expanded over the following century according to need and developed practice. Some of the key aspects of this structure included: an all powerful executive style government advised principally by a professional bureaucracy (and later by wider cross-sections from society); tough laws to curb any serious challenge to government authority;⁷ continued recognition of local laws and local customary law where this could be managed without conflict with the official law; an independent system of courts; and, an independent legal profession.⁸

Over the first hundred years of colonial history, the distinction between rulers and ruled was strongly and sometimes brutally maintained, but certain elements of British colonialism set it apart from, say, Portuguese colonialism in Macau. The professional and comparatively corruption-free bureaucracy was one and the relatively independent legal system was another. Especially since World War Two, the gains from the application of the Rule of Law in Hong Kong has expanded to cover the widest range of citizens.⁹

Many have wondered why Hong Kong did not “decolonize” fully like so many other components in European Empires after the Second World War. The bitter and protracted Civil War in China virtually ruled out any such possibility in the immediate years after 1945. The victory of the Chinese Communist Party (CCP) in

7. A number of these laws remain in place, usually in a softened form.

8. Both the courts and the profession were independent in the sense that they were not obliged to act as instruments of the government as a matter of law but rather, were meant to enjoy independence from any such direct use by government.

9. See Yash Ghai, *Praise Is Not Enough*, SOUTH CHINA MORNING POST, March 22, 1998, at 8.

that war saw the forces of the People's Liberation Army mass at the Hong Kong border in 1949, but they stopped short of invasion. Soon, the Korean War was underway. This development demonstrated to the new PRC Government the advantages of having Hong Kong as a separate enclave on China's southern coastline. When China entered the Korean War with such remarkable effect on the North Korean side, an embargo on the export of strategic goods was placed on the PRC by the Western powers. Although Hong Kong, under British rule, officially enforced the embargo, the PRC was still able to obtain certain materials through Hong Kong.

An unusual symbiosis arose between British Hong Kong and Communist China. One leading Hong Kong political commentator has argued that at some time during the 1950s, an informal understanding was reached between the British and the Chinese about Hong Kong. This understanding was never memorialized in writing and possibly not even into words as such, but its elements were nonetheless clear; China would not interfere with the British Administration provided the British ensured that nothing occurred in Hong Kong which could threaten China's interests. More particularly, Britain was to ensure that there would be no moves towards democracy or free elections, such as might allow politicians with Nationalist sympathies to gain real power in Hong Kong, and nothing would be done to prevent China from maximizing its economic gains in Hong Kong.¹⁰

B. The Transitional Period

The final outcome of the negotiations between Britain and the PRC over the return of Hong Kong, which began in the late 1970s, was the Joint Declaration of Great Britain and Northern Ireland and the People's Republic of China on the Question of Hong Kong (Joint Declaration). The Joint Declaration came into force in May 1985 after being signed in Beijing in December 1984.¹¹

The Joint Declaration is a complex document with three annexes. It lays down the principles which are to govern life in the HKSAR for the fifty years after 1997. It also foreshadowed the drafting of the HKSAR's quasi-Constitution, the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (Basic Law). As a part of the PRC, the HKSAR, ultimately, is subject to the PRC

10. See NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG 4* (Oxford University Press, Hong Kong, 5th ed. 1991). But see STEVE TSANG, *HONG KONG: AN APPOINTMENT WITH CHINA* (I.B. Tauris, London 1997). See also STEVE YUI-SANG TSANG, *DEMOCRACY SHELVED: GREAT BRITAIN, CHINA, AND ATTEMPTS AT CONSTITUTIONAL REFORM IN HONG KONG, 1945-1952* (Oxford University Press, Hong Kong 1988) (providing a comprehensive study of early, still-born, democracy initiatives in post-war Hong Kong).

11. See YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER 35-80* (Hong Kong University Press, Hong Kong 1997) (explaining the negotiation phase of the resumption of sovereignty). This book appears to be the definitive work on the subject. See also Richard Cullen, *Hong Kong Revenue Law—The Present, 1997, and Beyond*, 7 *TAX NOTES INT'L* 1109 (1993) (providing an explanation of developments leading to the commencement of negotiations between Britain and China).

Constitution of 1982, but the Basic Law is meant to be the dominant constitutional instrument in the HKSAR. The Basic Law went through two drafts in 1988 and 1989 before being adopted by the PRC Parliament, The National People's Congress (NPC), in April 1990.¹²

The Basic Law provides, in Article 2, that the HKSAR is to enjoy a "high degree of autonomy." This autonomy is to be derived from the competence over all matters, apart from foreign affairs and defense, conferred on Hong Kong by the Basic Law. Importantly, for our purposes, the continuation of Hong Kong's legal system is guaranteed in the Basic Law.¹³ Although the HKSAR ceased on July 1, 1997 to rely on the Judicial Committee of the Privy Council as the final court of appeal—a new Hong Kong based Court of Final Appeal (CFA) has taken its place, on which one non-Hong Kong jurist will sit.¹⁴

The Basic Law seeks to be reassuring on individual freedoms; it contains, in Chapter 3, wide-ranging guarantees of individual rights.¹⁵ It is broadly recognized by most commentators, however, that the lack full representative-democracy leaves a fundamental weakness in the underpinning of these rights. It is around these two related issues, democratization and individual rights, that the greatest controversies swirled in the prelude to the change of sovereignty in July 1997.

C. Points of Conflict

By the early 1980s, Britain had clearly indicated that it was moving towards accepting the Chinese "One Country—Two Systems" solution for resolving the future of Hong Kong. This formulation was originally developed to secure the reunification of Taiwan with the PRC Mainland. The realization that it was going to be applied to Hong Kong caused major nervousness within the Territory, but within a year or so, the shock had been absorbed and the Hong Kong Chinese, with typical resilience, accepted the reality of change and the need to make the most of it. Still, many strains emerged in Sino-British relations after the Joint Declaration was signed in 1984. The relationship reached its very lowest ebb when the tanks and troops of

12. The Basic Law has been subject to a great deal of scrutiny and much academic debate. See GHAI, *supra* note 11. For further commentary on the constitutional documentation governing the HKSAR, see also Yash Ghai, *The Basic Law: A Comparative Perspective*, in HONG KONG'S BASIC LAW: PROBLEMS AND PROSPECTS 1-21 (Wesley-Smith ed., Faculty of Law, University of Hong Kong 1995); Yash Ghai, *Interpretation of the Basic Law of the Hong Kong Special Administrative Region*, in LAW LECTURES FOR PRACTITIONERS 109-133 (Faculty of Law, University of Hong Kong 1995); and Yash Ghai, *Back to Basics: The Provisional Legislature and the Basic Law*, 25 HONG KONG L.J. 2 (1995).

13. BASIC LAW art. 8.

14. The CFA has had a controversial gestation. Many lawyers and others were aghast when the Hong Kong Government introduced the enabling legislation which provided only for a single external judge to be appointed to the CFA. The CFA has been established using this formula, nevertheless.

15. These protections are examined in great detail in Yash Ghai, *The Hong Kong Bill of Rights Ordinance and the Basic Law of the Hong Kong Special Administrative Region: Complementarities and Conflicts*, 1 J. OF CHINESE & COMP. L. 30 (1995).

the Chinese People's Liberation Army opened fire on Chinese citizens gathered in Tiananmen Square in Beijing on June 4, 1989.

After that event, the Hong Kong Government passed the Bill of Rights Ordinance (BORO) which came into effect on June 8, 1991. The BORO¹⁶ was a component in the post-Tiananmen strategy devised by the British to restore stability and confidence in Hong Kong. The BORO is based squarely on the International Covenant on Civil and Political Rights of 1966 (ICCPR)¹⁷ and embodies the ICCPR guarantees with some modifications, especially with regard to democratic voting rights—a reflection of Hong Kong's attenuated democratic processes. Despite the fact that the same provisions which occur in the BORO are largely incorporated into the Basic Law (again using the ICCPR as a base source), the PRC Government responded vehemently to the introduction of the BORO in Hong Kong. Nevertheless, the BORO survived the change of sovereignty largely intact.

Even more controversial than the BORO was the final manifestation of British determination to introduce greater democratization in Hong Kong. There is no space here to review the historical development of Hong Kong's legislature, the Legislative Council (LEGCO), in detail, but certain points need to be highlighted.¹⁸ The first fully popularly elected members of LEGCO took their seats after the lively 1991 elections. The popularly elected members comprised one-third of LEGCO. At that time, the rest of LEGCO was made up of members either: (a) appointed by the Governor of Hong Kong; or (b) elected from mostly professional "functional constituencies" with very limited franchises. LEGCO was, and remains, a purely legislative chamber somewhat like Congress in the United States of America (USA).¹⁹ In Hong Kong, unlike the USA where the President is elected, the Head of Government is entirely unelected.²⁰ The Government of Hong Kong, or the Executive Council (EXCO), exists independently of LEGCO. LEGCO does exercise significant fiscal and other controls over EXCO but, ultimately, LEGCO cannot

16. For further detailed discussion of the BORO, see the relevant articles and book by Ghai, *supra* notes 11, 12, and 15. See also Johannes Chan, M. M., *Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence*, 47 INT'L & COMP. L. Q. 306 (1998); Andrew Byrnes & Johannes Chan, M. M., *Recent Case Law Developments* 2 (3) BILL OF RIGHTS BULLETIN 1 (1993); Andrew Byrnes & Johannes Chan, M. M., *Editorial and Right to Freedom of Expression* 4 (1) BILL OF RIGHTS BULLETIN 1, 51 (1996); and RICHARD CULLEN, *Bills of Rights: Canada Leads, Hong Kong Follows?* in CANADA-HONG KONG: HUMAN RIGHTS AND PRIVACY LAW ISSUES 34 (Angus & Chan eds., Joint Centre for Asia Pacific Studies, Toronto 1994).

17. The ICCPR was adopted by the United Nations General assembly in 1966. The UK ratified the ICCPR with respect to the UK and its dependent territories in 1976. The PRC has never signed the ICCPR, although it has indicated that it intends to do so. The PRC was amenable to using the ICCPR as the basis for drafting the individual rights guarantees in the Basic Law.

18. Detailed background is given in MINERS, *supra* note 10.

19. The government initiates the introduction of most laws into LEGCO, however, bills from individual members are allowed, under Article 74 of the Basic Law, but their introduction requires official approval in many cases (depending on the subject matter of the proposed law).

20. Until July 1, 1997, the Head of the Government was known as the Governor. From July 1, 1997, the title changed to the Chief Executive (CE).

bring down a Hong Kong Government in the way that the House of Commons can bring down a British Government, for example.²¹

The 1991 increase in democracy was agreed upon by the UK and China. Both parties to the Joint Declaration regarded this increase as compatible with the Basic Law. Following those elections, the British appointed a new Governor of Hong Kong in 1992, Mr. Christopher Patten. The newly appointed Governor announced in October 1992 that he proposed certain changes to further enhance democratization in Hong Kong. The Patten scheme broadly involved: retaining the existing directly elected members; increasing the number of functional constituencies; widening their franchise dramatically; lowering the voting age to eighteen; and using an electoral college scheme for the balance of LEGCO members.²² These proposed changes were announced to Beijing and to the people of Hong Kong at about the same time. The PRC reaction was immediate and fiercely hostile. The scheme was seen as a British plot to introduce significant political change in Hong Kong unilaterally prior to the handover. The most vehement opposition was to the widening of the functional constituency franchise from around 190,000 to 2.7 million²³ and to the electoral college voting system in that the members of the relevant electoral college all had to be popularly elected themselves.

Months of negotiation ensued to try and resolve the conflict. Negotiation proved fruitless. The PRC Government asserted that if Governor Patten, now labelled a scoundrel for a thousand-years by some PRC spokesmen, went ahead with his scheme for the LEGCO elections due in 1995, then China would scrap the 1995 LEGCO on July 1, 1997 and install a Provisional appointed LEGCO (PROVLEGCO) pending the holding of new elections based, essentially, on the 1991 make-up of LEGCO. The negotiations were eventually abandoned. The Patten scheme was implemented in time for the 1995 LEGCO elections after considerable debate within Hong Kong. True to their promise, the PRC Government, on July 1, 1997, installed the new PROVLEGCO, which met across the border in Shenzhen to prepare legislative amendments to the BORO and other laws prior to July 1, 1997.

Neither side has come out of Hong Kong's "democratization adventure" entirely blemish-free. Without doubt, once the PRC's initial outrage subsided, it saw a major opportunity in the row. The PRC Government claimed a clear pretext to abolish the 1995 LEGCO because it was said to contravene the Basic Law. In doing so, they saw a chance to rid LEGCO, at least for a time, of a clutch of troublesome Democrats who had been branded as "subversive" from time to time in the rhetoric of the change-over. The strict constitutional arguments used by the PRC Government in this

21. LEGCO can initiate impeachment of the CE under Article 73(9) of the Basic Law. The process of impeachment is quite protracted.

22. See *The Governor's Speech*, 1992 SOUTH CHINA MORNING POST SPECIAL SUPPLEMENT, October 8, 1992.

23. See HONG KONG: THE SHAPE OF THINGS TO COME, THE ECONOMIST, June 8, 1993, at 28.

exercise were especially weak and ultimately shown to be wrong.²⁴ However, the political arguments, which the Chinese always mixed with the strict constitutional arguments, were not entirely devoid of merit. Arguably, the Patten scheme exploited the letter and vagueness of the Basic Law.²⁵

The PROVLEGCO ceased to operate in April 1998 prior to elections for a new partly democratic LEGCO held in May 1998. The 1998 LEGCO elections basically followed the 1991 LEGCO model though a system of proportional representation was adopted for the popularly elected members.

III. OVERVIEW OF THE MEDIA IN HONG KONG

Hong Kong is a major media centre in East Asia. Hong Kong's claim to this title rests on the vibrancy of its locally focused media and the large number of regional media operations located in its midst. Hong Kong enjoys probably the highest per capita concentration of newspapers anywhere in the world. In 1993, there were 77 registered papers and 619 registered periodicals serving 6.3 million people. Many daily papers, which devote themselves to horses or starlets exclusively, hardly qualify as newspapers, but the extent of newspaper publishing is still remarkable.²⁶ By mid-1997, there were still close to 20 true, general newspapers published daily.²⁷ Nowadays, in many Western cities of comparable size there are only a handful of daily newspapers left. There are also two broadcast TV stations in Hong Kong, which use two separate channels each to broadcast multi-lingually, satellite TV services, an interactive TV service, and an extensive cable TV network plus, a wide range of radio broadcasters. Hong Kong is also a major user of the Internet.

Various factors help to explain this phenomenon. Pre-eminently, expression has historically been less regulated in Hong Kong than virtually anywhere else in East Asia. Second, the press has served as a sort of surrogate "parliament-in-print." Hong Kong has only recently acquired its attenuated form of democratic governance. It has, however, an abundance of wealthy persons keen to express their views. The relative ease of getting a licence to publish and the density of population, which makes circulation fairly straightforward, have made it comparatively easy to go into print. Also, there is no licensing system for reporters in Hong Kong. The local population has provided an eager market. Moreover, Hong Kong has been able to

24. See Yash Ghai, *Back to Basics: The Provisional Legislature and the Basic Law*, 25 HONG KONG L.J. 2 (1995).

25. That is, in accordance with certain Common Law traditions, the Patten scheme generally kept within the letter of the Basic Law but paid less heed to the spirit of the Basic Law. This point is developed further in Lin Feng, *Electoral Reform in Hong Kong: A Comment* 3 (2) ASIA PACIFIC L. REV. 73 (1994).

26. See Michel Bonnin, *The Press in Hong Kong-Flourishing but Under Threat*, 1 CHINA PERSPECTIVES 48, September 1995; see also, Perry Keller, *Freedom of the Press in Hong Kong: Liberal Values and Sovereign Interests* 27 TEX. INT'L L.J. 371 (1992).

27. See GODDARD ET AL., HONG KONG JOURNALISTS ASSOCIATION ANNUAL REPORT 1997 at §6 How Will the Local Media Accommodate Change ¶ 5 (Hong Kong Journalists Association, Hong Kong 1997) [hereinafter HKJAAR97].

establish itself as the base for many publications circulating through the Chinese Diaspora of over 50 million people.²⁸

Regional print-media operations have been drawn to Hong Kong because of the freedom to publish and also for other reasons. First, there is Hong Kong's location. It is both ideally placed for "China watching" and is well located to cover all of East Asia and beyond. Within approximately six hours flying time from Hong Kong lives fifty-percent of the world's population. Second, this part of the globe contains a higher proportion of what, until recently, were the fastest growing economies in the world than any other. Third, Hong Kong has excellent infrastructure including high quality communication links. The same factors have also helped make Hong Kong one of the hubs for Asia's electronic media and home to one of Asia's largest film industries.

The Hong Kong press has fairly recently been described as, ". . . *the only Chinese language press [until the recent liberalization of political activity in Taiwan] that could justifiably be described as free.*"²⁹ In particular, its influence beyond Hong Kong is very strong, especially amongst the overseas Chinese who number over fifty million.³⁰

The media in Hong Kong can be divided into several broad groups.³¹ The most obvious division is between the English language media, both press and broadcast, and the Chinese language media. Generally speaking, the Hong Kong-focused English language press remains reasonably robust although signs of increased self-censorship have emerged over the last several years. The two principal outlets are the daily newspapers, the *South China Morning Post* and the *Hong Kong Standard*. There are also the Hong Kong edition of the *China Daily*, the PRC Mainland's English language flagship. There are also some English language Hong Kong weeklies, most of which provide light reading. The major regional English language periodical is the *Far Eastern Economic Review*. Other regional English language publications include the *Asian Wall Street Journal* and the *International Herald Tribune*. In April 1997, the *South China Morning Post* appointed a Chinese Consultant to assist the editor. The consultant, Feng Xiliang, was a founding editor of Beijing's official English Language newspaper, the *China Daily*. Prior to joining the *South China Morning Post*, he worked for *Window* magazine, a now-defunct, English language, pro-Beijing weekly.

It is argued that self-censorship is more established within the English language electronic media than within the English language press.³² Perhaps the most

28. See A. Lin Neumann, *Freedom Under the Dragon*, THE COMMITTEE TO PROTECT JOURNALISTS NEWSLETTER, 1997, 1. "Chinese Diaspora" is defined as the dispersal by immigration over many generations of Chinese throughout the world.

29. Bonnin, *supra* note 26.

30. See *id.*

31. See Joseph Man Chan & Chin-Chuan Lee, *Shifting Journalistic Paradigms: Editorial Stance and Political Transition in Hong Kong*, 117 CHINA Q. 98 (1989).

32. See Bonnin, *supra* note 26.

notorious example involved the dropping of the BBC international television service from STAR TV soon after Rupert Murdoch acquired control of STAR TV. The removal of the BBC was designed to improve corporate relations with China.³³ In 1993, TVB, one of Hong Kong's two terrestrial television broadcasters decided not to broadcast a documentary on Chairman Mao's private life. Also, ATV, the second Hong Kong broadcaster, dropped a scheduled documentary on the 1989 Tiananmen bloodshed.³⁴

Within the Chinese press, further broad divisions are apparent. First, there are the pro-Beijing papers, the most well-known of which are *Wen Wei Bao* and *Ta Kung Pao*. After June 4, 1989, several pro-Beijing papers were strongly critical of events in the PRC. Disciplinary measures soon followed; journalists and editors found themselves without jobs, and measures to avoid any further incorrect reporting were introduced.³⁵ A further broad division within the Chinese press is between those papers that are largely politically independent and those which are essentially non-political. It was noted, in 1990, that Beijing classified the Hong Kong press in the following way: papers that were politically neutral but friendly; papers that might be pro-Taiwan but could be co-opted; and, papers that needed to be isolated and attacked.³⁶ More recently, papers have been divided into four categories: China owned; friendly; neutral; and, hostile.³⁷

In 1994, Xi Yang, a twelve-year veteran reporter for *Ming Pao*, a leading Hong Kong daily paper, was jailed for stealing state secrets while in the PRC. This remains probably the single most worrisome indicator of what the future may hold for the Hong Kong press and its personnel.³⁸ A more pervasive form of pressure comes from Hong Kong-based PRC institutions directing their advertising towards preferred papers in Hong Kong. Some self-censorship is now a fact of life for a number of Hong Kong papers. However, the degree of self-censorship may have moderated since July 1997.³⁹ It seems the press erred on the side of caution in the lead up to the change of sovereignty. The "hands off" approach by Beijing since the change-over

33. Rupert Murdoch's relations with China have been back in the headlines more recently. See *infra* Part VII.

34. See Weixian Liang, *Mass Media, Media Law and the Freedom of the Press in CHUANBOFA XINLUN (MEDIA LAW IN HONG KONG)* (Weixian Liang & Wenmin Chen eds., Commercial Press, Hong Kong 1995) (in Chinese).

35. See Bonnin, *supra* note 25; see also Chin-Chuan Lee & Joseph Man Chan, *Thunder of Tiananmen: The Hong Kong Press in China's Orbit*, in VOICES OF CHINA: THE INTERPLAY OF POLITICS AND JOURNALISM (Chin-Chuan Lee ed., Guilford Press, 1990).

36. See ALLISON LIU JERNOW, *DON'T FORCE US TO LIE: THE STRUGGLE OF CHINESE JOURNALISTS IN THE REFORM ERA 75-91* (School of Law, University of Maryland, 1994).

37. See HKJAAR97, *supra* note 27, at § 1, How Will the Local Media Accommodate Change? ¶ 2.

38. Xi Yang was released on parole and returned to Hong Kong in January, 1997. At the time he was arrested, *Ming Pao*, took a strongly independent line in its reporting about the Mainland. The protests against his arrest were most strong. By the time of his release, the paper was thanking Beijing for its "leniency." See HKJAAR97, *supra* note 27, at § 1. The Hazard of Mainland Reporting ¶ 7.

39. See Jean-Philippe Beja, *The Goose's Golden Eggs Lose Their Shine*, 15 CHINA PERSPECTIVES 4 (Jan. 1998).

and some limited signs of increasing official liberalization on the PRC Mainland have seen the "brakes come off" to some degree.⁴⁰

Certain Chinese language papers have deliberately adjusted to suit the changing times. The *Sing Tao Daily*, founded by Aw Boon Haw, the inventor of the muscle liniment Tiger Balm, is a case in point. The *Sing Tao Daily* had a stance which showed a leaning towards Taiwan after 1949. It has now dropped this pro-Taiwan tilt. Moreover its sister English language paper, the *Hong Kong Standard*, once briefly published in a PRC edition, now demonstrates a markedly pro-HKSAR Government slant in some of its reporting and editorializing. *Ming Pao* also used to take a more stridently independent line. The *Asian Wall Street Journal* argued that the paper had softened its stance in the lead-up to the handover both in its editorials and in its opinion columns, a charge which *Ming Pao* rejected.⁴¹

Many of the problems facing the Hong Kong-Chinese press are attributable to economic forces. Competition is unrelentingly fierce and recent newsstand price wars have been especially savage resulting in the culling of several publications. Prior to the handover, the English language *Eastern Express*, run by the Oriental Press Group, and *Sing Tao Evening News*, a paper that had been published for some 58 years, both folded.⁴² More significantly, a quality analytical monthly, *The Nineties*, has recently had to close down in Hong Kong (and Taiwan).⁴³

As 1997 drew closer, the ownership of Hong Kong's media began to change. The new owners tended to be international entrepreneurs entering the China market and pro-China business people who saw the usefulness of the media as a component in "business diplomacy." This phenomenon has continued since the handover. Most recently, the HKSAR's number two broadcast television operator, ATV, has been the subject of a controversial take-over bid which includes PRC Mainland interests. The prospect of Mainland interests controlling this operator which is only one of two such operators in the HKSAR is something which many find alarming. What is most concerning was the lack of information revealed about the likely ultimate ownership of ATV when the purchase was being negotiated.⁴⁴

In the midst of this high pressure publishing world, new papers continue to emerge. Most notably in recent times, *Pinguo Ribao (Apple Daily)* was launched by Hong Kong tycoon, Jimmy Lai, a PRC immigrant to British Hong Kong. The *Apple*

40. Neumann, *supra* note 28, at 9 (quoting Philip Bowring, former editor of the *Far Eastern Economic Review*, in the *International Herald Tribune*).

41. See HKJAAR97, *supra* note 27, at § 1, How Will the Local Media Accommodate Change? ¶ 4.

42. The demise of the English language *Eastern Express* prior to the handover seems explicable in economic terms. It was a major loss maker for its owners, the Oriental Press Group, who have recently experienced huge decreases in profits. The same explanation applies to the closure of *Sing Tao Evening News*. See HKJAAR97, *supra* note 27, at § 3, Declining Standard of Courage ¶ 5.

43. See Kevin Kwong, *Political Monthly Runs Out of Steam*, SUNDAY MORNING POST, April 5, 1998 (Agenda), at 3.

44. See Glenn Schloss & Simon Beck, *Complex Plot in ATV Stake Saga*, SOUTH CHINA MORNING POST, May 4, 1998, at 17.

Daily thrives on sensational, but fairly thorough, coverage and a notably independent stance—especially with respect to the PRC. The *Apple Daily* was launched in June 1995. Within two years it had become the second most popular Chinese language daily after the *Oriental Daily News*.⁴⁵ Through the post-handover period it has been locked in mortal combat with a number of rivals, principally the *Oriental Daily News*. This combat has led to some high-profile court appearances. After the *Oriental Daily News* lost one battle with the *Apple Daily* in court, the newspaper heaped scorn on the judiciary from its pages and set about following one judge of the High Court around the clock. Several executives and a former chief editor of the paper were subsequently charged with contempt of court. The former chief editor was sentenced to four months in jail and the group was heavily fined.⁴⁶ It is perhaps a measure of the standing of the *Apple Daily* that it is apparently routinely seized by PRC officials on the border between the HKSAR and the PRC Mainland at Shenzhen.⁴⁷

It appears that during the pre-handover period, the Hong Kong Government decided to shelve proposed changes to Hong Kong broadcasting legislation fearing that it would take too long to negotiate their implementation with the PRC.⁴⁸ Hong Kong's public broadcasting authority, Radio Television Hong Kong (RTHK), was also embroiled in controversy prior to the handover. RTHK runs a number of English language and Chinese language radio stations. RTHK also produces regular television programmes which are shown on commercial television in both English and Chinese. Under British rule, RTHK developed into a government-funded yet still independent broadcaster modelled on the BBC. That is, it provided a mixture of news, entertainment, analysis and largely unfettered criticism together with public service type broadcasts on behalf of the police and the like. The British floated the idea of privatizing RTHK prior to the handover. This idea was strongly criticized by Beijing. RTHK in government hands was seen by Beijing as providing an important mouthpiece for the HKSAR Government. If RTHK were in private hands, it might become a source of yet more strident criticism. As events transpired, nothing came of the privatization plans. RTHK has long been the subject of criticism in the pro-Beijing Hong Kong press for such misdeeds as "deviating from objective and neutral principles."⁴⁹ RTHK continues to broadcast after the handover as it did before, but it recently has been the subject of yet another controversial attack on its independence. This attack and the response are discussed in Part VII.

45. See HKJAAR97, *supra* note 27, at § 3, *Apple Daily—Still the Upstart* ¶ 1.

46. See Charlotte Parsons, *Four-Month Term for Editor Wins Broad Approval*, SOUTH CHINA MORNING POST, July 1, 1998, at 2. This case is discussed further in Part V.

47. The confiscation may not indicate that the papers have been withdrawn from circulation. It is quite plausible that they are resold; the scarcity caused by the regular confiscation would tend to improve their market price in Shenzhen.

48. See LIU JERNOW, *supra* note 36 (providing background for this problem).

49. HKJAAR97, *supra* note 27, at § 1, RHTK's Independence ¶ 3.

IV. THE REGULATORY FRAMEWORK

In all jurisdictions, neither freedom of expression nor freedom of the press are absolute. The rights of the state, the community, or sometimes minorities within the state, are often found to be in conflict with individual rights to publish or broadcast. Hong Kong is no exception in this regard. Although the basic principles underpinning freedom of the press do apply in Hong Kong, a range of statutory instruments and the Common Law serve to restrict and limit this freedom.⁵⁰ In the first place, media outlets whether print or electronic based, need to be licensed in Hong Kong. For publications in print, the relevant ordinance is the Registration of Local Newspapers Ordinance (1951).⁵¹ For the electronic media, important ordinances include the: Television Ordinance (1964);⁵² Broadcasting Authority Ordinance (1987);⁵³ and, Telecommunication Ordinance (1963).⁵⁴ The Television Ordinance contains powerful provisions which allow the HKSAR Government to: set standards; demand, by seeking a court order, to see materials prior to broadcasting; and, prohibit, by seeking a court order, the broadcasting of some materials.⁵⁵ These content control decisions can be based on a broad range of factors including the: effect of a given broadcast on law and order in Hong Kong; likelihood of a given broadcast to incite hatred against any group based on race, color, sex, religion, nationality or ethnicity; and, likelihood of a given broadcast to gravely damage public health or morals.⁵⁶

The Telecommunication Ordinance contains provisions which allow the government to order that certain messages be banned from transmission or that those messages be intercepted if it is in the public interest. The Telecommunication Ordinance also makes it an offense to communicate false messages. The government may seek a court order to prohibit certain offensive broadcasts under the Telecommunication Ordinance.

Under the Film Censorship Ordinance (1988),⁵⁷ the Film Censorship Authority enjoys wide-ranging powers, including the power to censor films for cinema or television distribution on grounds of moral offensiveness or social divisiveness.⁵⁸ Additionally, the Immigration Ordinance (1972)⁵⁹ allows the government to deport

50. A review of media regulation in Hong Kong (in Chinese) can be found in CHUANBOFA XINLUN (MEDIA LAW IN HONG KONG) (Weixian Liang & Wenmin Chen eds., Commercial Press, Hong Kong 1995)(in Chinese).

51. LAWS OF HONG KONG, Cap. 268.

52. *Id.* at Cap. 52.

53. *Id.* at Cap. 391.

54. *Id.* at Cap. 106.

55. See PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 385 (Longman 2d ed., Hong Kong 1994) (summarizing the relevant provisions (prior to recent amendment) of the television ordinance).

56. See LAWS OF HONG KONG, Cap. 52, Part VI.

57. *Id.* at Cap. 392.

58. *Id.* at Part III.

59. *Id.* at Cap.115.

persons when it is conducive to the public good or for reasons based on Hong Kong's relations with other jurisdictions.

A wide range of more general measures also apply to control expression in the media in Hong Kong. First, Hong Kong has no real Freedom of Information ("FOI") law. However, it does have an administrative access to information system in place, but it is of limited effect compared to the fully developed FOI in the USA.⁶⁰ The result is that government can control information flows simply by "sitting" on information in many cases. Second, there are what have been described as excessive restrictions on reporting of proceedings in court in Hong Kong.⁶¹ Third, Hong Kong is subject to a localized version of the Official Secrets Act (1989) (UK) which prohibits damaging disclosure of any information obtained while in service by government servants related to national security or international relations.⁶² Fourth, both the Public Order Ordinance (1967)⁶³ and the Crimes Ordinance (1971)⁶⁴ criminalize, often in sweeping terms, a wide range of political activities in certain circumstances. The activities which the Public Order Ordinance regulates or prohibits include: running quasi-military organizations; wearing uniforms in connection with political objects; displaying flags and banners; meetings, processions and gatherings; riots and unlawful assemblies; bomb hoaxes; carrying offensive weapons in a public place; and, entering prohibited areas. The Crimes Ordinance outlaws, *inter alia*: treason; sedition; incitement to mutiny; unlawful oaths; and, piracy.⁶⁵

In late 1996, it was proposed that the Crimes Ordinance be amended to add the crime of "subversion" to this list. Article 23 of the Basic Law stipulates that Hong Kong should outlaw subversion. Subversion is a specific criminal offense under PRC criminal law as is sedition. Subversion is not a charge commonly brought in the PRC Mainland. It tends to be used for what are considered grave offenses. A PRC court also can impose the death sentence for subversion, but not for sedition.⁶⁶ The proposed amendment caused heated debate. The Patten Government supported the amendment with a view to having an input into the drafting of the definition of this new crime. The proposed amendment stressed the need for force to be a factor for any "subversive" activity to be criminally subversive. As it turned out, the 1995 LEGCO did not agree to the proposed amendment. In fact, there is no need to create a new crime of subversion to comply with Article 23. Although the crime of subversion, unlike sedition, is not known to the Common Law, the Common Law is

60. See HONG KONG BAR ASSOCIATION ANNUAL STATEMENT 1995/96 68 (Hong Kong Bar Association, Hong Kong (1996); HKJAAR97, *supra* note 27, at § 2, Access to Information ¶¶ 1-4.

61. See WESLEY-SMITH, *supra* note 55, at 384; see also HKJAAR97, *supra* note 27, at § 2, Greater Judicial Accountability ¶ 3.

62. See WESLEY-SMITH, *supra* note 55, at 379.

63. LAWS OF HONG KONG, Cap. 245.

64. *Id.* at Cap. 200.

65. See WESLEY-SMITH, *supra* note 55, at 395-404 (discussing these provisions).

66. See H. L. FU & RICHARD CULLEN, MEDIA LAW IN THE PRC ch. 7 (Asia Law & Practice, Hong Kong 1996).

still more than adequately equipped to punish any subversive activity.⁶⁷ The topic was too hot to be dealt with by the PROVLEGCO. The HKSAR Government is proposing to introduce a new amendment to LEGCO specifically criminalizing subversion in due course.⁶⁸ There is also a serious question as to the compatibility of Article 23 with Articles 27 and 39 of the Basic Law which guarantee, inter alia, freedom of speech, the press and publication in the HKSAR.⁶⁹

To the extent that the media are involved in reporting any of these criminalized activities, there is a risk that they may also be subject to control where the authorities consider media reporting to be furthering outlawed activities. The government was granted an injunction in the *Spycatcher* case in 1987, on the grounds of protecting national security and preventing a breach of confidence and a breach of fiduciary duty.⁷⁰

Further restrictions apply under the Prevention of Bribery Ordinance (1971)⁷¹ and related Hong Kong anti-corruption ordinances. Also, under the Emergency Regulations Ordinance (1922),⁷² the government is granted the power to make any regulations which appear to be necessary to maintain public order, suppress rebellion, and maintain essential services provided it is established that a public emergency exists.⁷³ Additionally, the Police Force Ordinance (1922)⁷⁴ has extensive search and seizure provisions. These were used in October 1989 to seize news videotapes from Hong Kong television stations. In 1995, the Hong Kong Government provided, in Part 12 of the Interpretation and General Clauses Ordinance (1966),⁷⁵ that, henceforward, any seizure of (widely defined) "journalistic materials" would require an order from a judge.

Another major ordinance affecting the media is the Control of Obscene and Indecent Articles Ordinance (1987).⁷⁶ This ordinance replaced earlier legislation, but it is hardly less problematic. The difficulty of drawing a line between acceptable materials and unacceptable materials in this area is notorious as so much depends on the eye of the objective beholder. The Post Office Ordinance (1926)⁷⁷ is also relevant since it prohibits the posting of obscene or indecent materials. Moreover, in 1962 the

67. See H. L. Fu & Richard Cullen, *Subversion and Article 23 of the Basic Law* (paper presented to Conference on trends in Contemporary Constitutional Law, jointly organized by the Faculty of Law, University of Hong Kong, People's University, Beijing and the Chinese Law Programme, Chinese University of Hong Kong) (Dec. 13-14, 1996).

68. See Sin-mi Hon May, *Subversion Law 'Will Not Be Rushed,'* SOUTH CHINA MORNING POST, June 30, 1998, at 1.

69. See GHAI, *supra* note 11, at 420-423.

70. Her Majesty's Attorney General v. South China Morning Post, Limited, Civil Appeal No. 114 (C.A. 1987).

71. LAWS OF HONG KONG, Cap. 201.

72. *Id.* at Cap. 241.

73. For further discussion, see WESLEY-SMITH, *supra* note 55, at 397-398.

74. LAWS OF HONG KONG, Cap. 232.

75. *Id.* at Cap. 1.

76. *Id.* at Cap. 390.

77. *Id.* at Cap. 98.

Common Law appears to have created the offense of "conspiracy to corrupt public morals."⁷⁸

The restrictions outlined above are largely in the public law domain. The media in Hong Kong is also subject to private law actions seeking redress for defamation, although such actions in Hong Kong have been comparatively lacking in impact compared to jurisdictions like Australia, England or Wales.⁷⁹ Hong Kong still retains an action for criminal defamation in the Defamation Ordinance (1887).⁸⁰ All media operators also are subject to Hong Kong laws related to advertising and copyright.

Finally, it should be noted that the HKSAR has one of the widest ranges of reverse-onus, criminalizing statutes in the Common Law World. It is estimated that there are over 300 reverse-onus provisions in Hong Kong Ordinances.⁸¹ Many of the ordinances mentioned above have such provisions. They also occur in other ordinances, such as the Societies Ordinance (1949).⁸² These reverse-onus provisions do not usually have a direct impact on the media; rather, they are aimed at suspected criminals. They are indicative of the underlying view in Hong Kong that when balancing the interests of society against those of the individual, there is greater concern for the society than in many Western societies. This, in turn, appears to have influenced the approach of the courts in Hong Kong when they had to rule on the issue of freedom of the press. The Public Order Ordinance and the Societies Ordinance were amended by the Patten Government to make them less blatantly intrusive on civil liberties. These amendments were reversed by the PROVLEGCO in its first sitting on July 1, 1997.⁸³

V. THE JUDICIARY AND THE MEDIA

A. Introduction

The general approach of the judiciary in Hong Kong towards its role in mediating the relationship between government and citizens is one of restraint. This is not to say that the judiciary is "tame" or ineffective. However, a comparative review of the Hong Kong judiciary's approach applied in cases brought under the BORO, shows a distinct difference to the approach of senior courts when applying new Bills of Rights in, for example, Canada and New Zealand.⁸⁴ In Hong Kong, the

78. *Shaw v. Director of Public Prosecutors*, 1961 App. Case 220.

79. The Law Reform Commission of Hong Kong is in the process of recommending the creation of two new civil offenses related to invasions of privacy. The proposal will be opened up to public discussion shortly. See Gren Manuel, *Press May be Liable for Privacy Invasion*, SOUTH CHINA MORNING POST, May 18, 1998, at 3.

80. LAWS OF HONG KONG, Cap. 21, § 5.

81. See Johannes Chan, M.M., *The Legal System in THE OTHER HONG KONG REPORT 1992 15-37* (Joseph Cheng & Paul Kwong eds., Chinese University Press, 1992).

82. LAWS OF HONG KONG, Cap. 151.

83. See Richard Cullen, *Legal change in Chinese Hong Kong*, 71 (10) L. INST. J. 56 (1997).

84. See James Allan & Richard Cullen, *A Bill of Rights Odyssey for Australia: The Sirens are Calling* 19 U. QUEENSLAND L.J. 171 (1997).

courts have generally shown a marked deference to the government and to the legislature.⁸⁵ Despite this comparative lack of activism, there has been much litigation based on the BORO, most of it focussed on criminal law and administrative law.⁸⁶

The first major BORO case, *R v Sin Yau-ming*⁸⁷ in 1991, suggested that Hong Kong courts may have been set, in contrast to past practice, to follow a more activist approach when applying the BORO.⁸⁸ The Court of Appeal in that case noted that it was no longer guided by the ordinary canons of construction of Statutes nor bound by the usual traditions of Common Law training. The Court adopted a two-stage test to determine whether there was an infringement of a right. In doing so, it accepted the test established in the seminal Canadian case of 1986, *R v Oakes*.⁸⁹ In that case, the Supreme Court of Canada said that under the Charter of Rights and Freedoms 1982 (Charter), one had to inquire if a right had been infringed and ask if that infringement was, nevertheless, a restriction which was “demonstrably justified in a free and democratic society.”⁹⁰ It has been argued that it is less than clear that the BORO lends itself to this interpretation. The BORO lacks the clear wording which occurs in the Charter on which the *Oakes* decision was based. The Court of Appeal noted, however, that similar tests emerged in the USA and in the European Union in the absence of the sort of express wording found in the Charter.⁹¹

This two-stage test was subsequently criticized in the Judicial Committee of the Privy Council (JCPC) in 1993. In *Attorney-General v Lee Kwong-kut*,⁹² Lord Woolf, speaking for the JCPC, cast doubt on the appropriateness of the two-stage test. He argued that it might be appropriate to use a test such as this in cases involving real difficulty, but usually the correct position could be established without resort to such a complex test. When establishing the correct position, one would still need to consider the rights of an individual in the context of the rights of society as a whole but without the need to resort to an *Oakes* type analytical blueprint. Lord Woolf also noted that, although foreign precedents may be generally relevant, the Hong Kong context would need to be considered to resolve their specific relevance in a particular case. He also urged caution and re-iterated the advisability of showing due deference to the legislative arm of government. He was worried that the BORO might, unless

85. See Yash Ghai, *Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights*, 60 MOD. L. REV. 459 (1997) (detailing the Hong Kong judiciary's approach to BORO litigation); see also Johannes M. M. Chan, *Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence*, 47 INT'L & COMP. L. Q. 306 (1998).

86. See Johannes M. M. Chan, *The Hong Kong Bill of Rights, 1991-95: A Statistical Overview*, in HONG KONG'S BILL OF RIGHTS: TWO YEARS BEFORE 1997 (Johannes M. M. Chan & George Edwards eds., Faculty of Law, University of Hong Kong, 1995).

87. HONG KONG PUBLIC LAW REPORTS 88 (1991).

88. See Chan, *supra* note 85, at 308.

89. Her Majesty the Queen v. Oakes [1986] 1 S.C.R. 103 (1986).

90. Pursuant to Section 1 of the Charter.

91. See Ghai, *supra* note 85, at 467. The Court of Appeal in Hong Kong also affirmed the entrenched and overriding status of the BORO until June 30, 1997 in *Sin Yau-ming*. *Id.*

92. 3 Hong Kong Public Law Reports 72 (1993).

it was applied with circumspection, foster excessive litigation causing the BORO to be brought into disrepute. This assertion has been strongly criticized as being both damaging to Hong Kong jurisprudence and internally inconsistent. Lord Woolf, it is said, recognized the need for a balancing of interests between the individual and society, but his dismissal of the two-stage test removed a method for trying to achieve this balance without suggesting a proper replacement.⁹³

In 1995, in *R v Town Planning Board, ex parte Kwan Kong Co Ltd*,⁹⁴ Waung J. perhaps took the approach of the JCPC to its logical conclusion. In that case he concluded that the BORO had no special status and, therefore, it ought to be applied with restraint. Moreover, the use of foreign authorities should be avoided. This interpretation, which questioned the authority of *Sin Yau-ming's* case, has been described as bold and startling.⁹⁵

A number of commentators have powerful reservations about the use of Bills of Rights as platforms for judicial activism. In Canada, there is strong criticism of the way in which the Charter has been applied.⁹⁶ These reproaches raise a number of points including the: undemocratic nature of the judiciary; lack of competence and-or training of judges to deal with matters best left to the broad political process; and, lack of general resources enjoyed by courts to deal with complex social, economic and political questions. These are serious concerns. Certainly criminal defendants have benefitted from the Charter in Canada. But, the Charter has also tended to increase divisions within society in some respects and it has generated a vast increase in litigation. Within a few years of its inception, it was described as "a dripping roast for lawyers."⁹⁷

However, the HKSAR is in quite a different political position in comparison to Canada. The HKSAR enjoys a distinct sort of freedom – one without real democracy. It is for this reason that undue deference by the Hong Kong judiciary towards the executive and towards the legislature raises special concerns. In the HKSAR, freedom is something of a "two-legged stool." The judiciary and a free press provide two legs but the third, democracy, is at best only half a leg. In Canada, a fully-developed liberal-democratic polity, all three legs are in fairly good shape. An overactive judiciary in such a political environment as Canada can prove a real danger insofar as it cramps the style of popularly elected government for the benefit of special interests. In Hong Kong, a judiciary or press lacking real independence has to be a cause for serious concern. That said, it must be remembered that, to adapt a tired cliché, Hong Kong has a Common Law system with local characteristics.

93. See Ghai, *supra* note 85, at 469.

94. 5 Hong Kong Public Law Reports 261 (1995).

95. See Ghai, *supra* note 85, at 471.

96. See MICHAEL MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* (Thompson Educational Publishing, Inc., Toronto 1989); See also JOEL BAKAN, *JUST WORDS: CONSTITUTIONAL RIGHTS AND SOCIAL WRONGS* (University of Toronto Press, Toronto 1997); see also Allan & Cullen, *supra* note 84.

97. See MANDEL, *supra* note 96.

Chinese cultural practices and values are influential in the judicial system and seem set to remain so. On the positive side, this factor acts as a brake on the excesses of rampant individualism and its legal manifestation—expanding, grossly opportunistic litigation. The negative input arises principally from the authoritarianism inherent in Chinese political thinking, which too often can place due process in jeopardy.

B. The Press in Court

A somewhat notorious pre-handover case concerning press freedom in Hong Kong related to the book, "Spycatcher." This book revealed certain details about the operation of Britain's espionage services. The Hong Kong Government at the behest of the British Government sought, in 1987, to suppress the publication of this book in Hong Kong on the grounds of broad national security. An injunction was granted on the grounds of protecting national security and preventing a breach of confidence and a breach of fiduciary duty.⁹⁸

In 1995, a practice of the Hong Kong Correctional Services Department, which related to press freedom, was taken to court. The Department was in the habit of removing excessive newspaper sections devoted to horse racing before distributing to inmates of Hong Kong prisons. The purpose of this censorship, apparently, was to discourage illegal betting on horse races in prisons. In *Chim Shing Chung v Commissioner of Correctional Services*,⁹⁹ the High Court declared that the practice infringed upon the right of inmates to receive information under Article 16(2) of the BORO. In the Court of Appeal the decision was overturned.¹⁰⁰ The court found that the reservation in Part 3 of the BORO applied. This reservation makes members of the armed forces and persons detained in penal establishments subject to certain restrictions notwithstanding the general protections in the BORO. The court also noted that the infringement of liberties involved was justifiable in this case even without the reservation.

In 1995, in *Cheung Ng Sheong Steven v Eastweek Publisher Ltd*,¹⁰¹ the Court of Appeal endorsed the importance of maintaining a free press when it found that jury awards of damages in defamation actions were more than usually subject to review on appeal. The court was concerned that such awards could sometimes be excessive in a given case - and their very size could produce a chilling effect on expressions of opinion in the press. Unlike in the USA, Hong Kong does not make celebrities or those who enter public life subject to a rule which says that, when they are engaged in (widely defined) public activities, they can only sue in defamation where they can

98. See Her Majesty's Attorney General v. South China Morning Post, Limited, Civil Appeal No. 114 (C.A. 1987). An attempt to suppress the same book in the courts in Australia failed.

99. 5 Hong Kong Public Law Reports 570 (1995).

100. See 6 Hong Kong Public Law Reports 313 (1996).

101. 5 Hong Kong Public Law Reports 428 (1995).

prove both actual damage and actual malice with convincing clarity.¹⁰² In 1996, an attempt to make a move towards this direction in Hong Kong¹⁰³ was overturned by the Court of Appeal.¹⁰⁴

One of the most significant cases related to freedom of the press involved a leading, quality daily newspaper, *Ming Pao*. The newspaper was in the course of investigating an alleged cartel organized to depress the price at government land auctions. Reporters from the newspaper who attended the government land auction were interviewed by investigators from the Independent Commission Against Corruption (ICAC). The following day, the newspaper published articles reporting that the ICAC had spoken to *Ming Pao* reporters and that an investigation of possible fixed-bidding was underway. The publisher and senior editorial staff of the newspaper were charged with breaching Section 30 of the Prevention of Bribery Ordinance for disclosing details of a suspected offense under that Ordinance. Section 30 is designed to allow the ICAC to maintain secrecy during investigations so that suspects are not "tipped off," especially through stories in the media.

The magistrate at first instance found that there was no case to answer. He said that there could only be a Section 30 offense where there was a particular suspect or an allegation of bribery against a specified person, and neither had been shown to exist in this case. He also found that Section 30 was inconsistent with Article 16 of the BORO, which protects freedom of expression. The Attorney-General appealed. In 1996, in *Ming Pao Newspapers v Attorney-General*,¹⁰⁵ the Court of Appeal overruled the magistrate. The court found that the restriction in Section 30 was applicable to these facts, and that it was not struck down by the BORO. The restriction served the purpose of enhancing the fight against corruption and protecting the rights of any person being investigated prior to their being charged.

The defendants appealed to the JCPC. In *Ming Pao Newspapers v Attorney General*,¹⁰⁶ the JCPC found for the newspaper, but not based on the application of the BORO. The Court found that the magistrate's interpretation of Section 30 was correct. That is, that Section 30 could not take effect until some specific person was the subject of an investigation. In this case there was no evidence that, when the articles were published, the ICAC had progressed beyond commencing a general investigation. No specific suspects had been identified. For the JCPC, this decided the matter, but the argument based on the BORO was subject to some further comments. The court stressed the importance of the right of freedom of expression and the need to limit any restrictions on that freedom to a minimum. Moreover, any

102. See *New York Times v. O'Sullivan*, 376 US 254 (1964); see also H. L. Fu & Richard Cullen, *Defamation Law in the People's Republic of China*, 11 *TRANSNAT'L LAW*. 1 (1998).

103. See *Hong Kong Polytechnic University v. Next Magazine Publishing Ltd.*, HA, H.C.A. No. 3238, 1997 HK.L.R.D. 102, 103-110 (Digested in *CURRENT LAW HONG KONG* ¶ 275, 1997) (Sweet & Maxwell Asia, Hong Kong 1991).

104. See *id.* at ¶ 271.

105. 5 *Hong Kong Public Law Reports* 13 (1995).

106. 6 *Hong Kong Public Law Reports* 103 (1996).

such restrictions had to be proportional to the ends being sought. The JCPC then applied this test to Section 30 and concluded that it did not offend the BORO. The court emphasized, once again, that local Hong Kong conditions had to be taken into account and Section 30 did not seem to exceed what could be considered reasonable. It was a provision which was acceptable as a means to enhance the effectiveness of investigations into corruption. The findings of the JCPC with respect to the BORO in this case have been strongly criticized for failing to explain the evidence on which these claims were based.¹⁰⁷

The Oriental Press Group Ltd., a related company, certain executives, and a former chief editor of the *Oriental Daily News*, Wong Yeung-ng, were recently charged with contempt of court. The case, *Secretary for Justice v Oriental Press Group Ltd and Others*, was heard in mid-1998.¹⁰⁸ The charges arose out of a dispute between the *Oriental Daily News* and the *Apple Daily*. The *Oriental Daily News* was refused leave to take a legal dispute with the *Apple Daily* further by a judge of the High Court. The *Oriental Daily News* subsequently subjected the judge to round-the-clock surveillance. The newspaper also published a series of attacks on the judiciary and on a particular tribunal which relied, inter alia, on conspicuous racial slurs. The diatribes were as vicious as they were relentless.¹⁰⁹ The defendants argued at their trial that the contempt action, if successful, would be exceedingly harmful to press freedom.¹¹⁰ The High Court convicted Mr. Wong and sentenced him to four months imprisonment for “scandalizing the court.” The Oriental Press Group Ltd. was fined approximately US\$650,000 and the other defendants also suffered an adverse costs award.¹¹¹ Mr. Wong’s sentence is reckoned to be the longest modern term of imprisonment imposed on a media person for contempt in the Common Law World.¹¹²

C. Summary

The judiciary in Hong Kong, although very much within the Common Law tradition, has certain characteristics which set it apart. First, there is the local context. Hong Kong is an overwhelmingly Chinese society. Chinese values, not surprisingly, dominate. Indeed, in many ways, Hong Kong retains more tradition in this regard than the PRC Mainland, where countless campaigns against “feudal superstition” have taken their toll on some practices. The Chinese tradition on individual rights, established over several millennia, is that those rights are always circumscribed

107. See Ghai, *supra* note 85.

108. 2 Hong Kong Cases 627 (1998).

109. See *id.* at 629-631.

110. See Charlotte Parsons, *Free Press ‘Hangs in the Balance,’* SOUTH CHINA MORNING POST, May 18, 1998, at 3.

111. See [1998] 2 Hong Kong Cases 627, 681-686 (1998).

112. Parsons, *supra* note 46. This report also claims that Mr. Wong is only the fourth person ever to be jailed for such an offense in the Common Law World. *Id.* The press freedom aspect of this case is discussed further below.

significantly by the interests of society—and the state.¹¹³ A concomitant of this view is the adherence to a fundamentally authoritarian political culture over the same period. Until comparatively recent times, there has been a total absence of any democratic experience in any Chinese polity. Next, the judiciary in Hong Kong remains bound to a Common Law tradition, which has faded significantly elsewhere, not to become involved in public debate.¹¹⁴ Third, Hong Kong is now the HKSAR, a highly privileged enclave within the largest One Party State in the world. The potential difficulties and sensitivities which this arrangement creates are clear to everyone in the HKSAR, including judges.

The judiciary's approach to protecting individual rights immediately after the introduction of the BORO showed signs of activism. Since then, activism has been in retreat. We seem now to have reached a position where, when one alleges an infringement of a right, there is a strong possibility the court will assume legislative validity unless "unreasonableness" can be demonstrated. This is virtually an inversion of the rule used for Charter interpretation in Canada; a rule which the judiciary in Hong Kong initially embraced. It would seem that freedom of the press questions are subject to the same approach—they enjoy no special status.

Perhaps, it is not surprising the judiciary seems to have taken one step forward and two steps backward in its approach to protecting individual rights. The factors pushing the court in this direction are significant. Many commentators in other jurisdictions, like Canada, would applaud such judicial restraint. In Hong Kong, where so much reliance is placed on the courts and the press to preserve the HKSAR's widely enjoyed freedoms, this impulse to restraint is a cause for real and continuing concern.

VI. PREVAILING INFLUENCES

A. Introduction

Part V documented the role of the judiciary in relation to the issue of freedom of the press in Hong Kong. That role, so far, has been rather limited especially in comparison with the position in the USA, for example, where the Supreme Court has played a pivotal role in shaping this fundamental concept through its interpretation of the First Amendment of the Bill of Rights. A range of other factors have played an important part in the development of the media in Hong Kong. The interaction of these influences is bound to continue. This Part attempts to identify these influences. Some are directly related to the media and some are wider in their impact.

113. Stanley Lubman, *Studying Contemporary Chinese Law, Limits, Possibilities and Strategy*, 39 AM. J. COMP. L. 293 (1991).

114. See Ghai, *supra* note 85, at 479.

B. Political and Economic Contingencies

It is now almost a year since the change of sovereignty. It is clear that the general political position in the HKSAR is markedly less anxious than many had predicted. A “hands off” approach is being applied by Beijing. The most striking changes have been economic and these have resulted from the Asian financial tempest rather than from the handover. The media in the HKSAR has carried on as before. The HKSAR Government comes under consistent attack and the reporting of Mainland politics remains the same. That is, although the mainstream press tends to tread lightly in some areas, for example by avoiding personal attacks on high profile Mainland figures, policy analysis seems to be as direct as ever. What might be termed the cross-border political climate has proved to be less problematic than many had expected.¹¹⁵

Within the PRC Mainland, there are signs that the death of the former Paramount Leader, Deng Xiaoping, has ushered in some easing of the political atmosphere in China. Mainstream political dissidents are being controlled as closely as ever but academic and intellectual discussion is now more open.¹¹⁶ High profile dissidents, Wei Jingsheng and Wang Dan have been allowed to leave for the USA. It was recently reported that President Jiang Zemin is examining how some level of real political reform might be encouraged—within the context of the One Party State.¹¹⁷ It has even been mooted that there could be an official easing of media censorship in China.¹¹⁸ It would be wrong to place too much stress on these harbingers of possible change. However, it is equally clear that the absence of moves towards a more “hard-line” approach is positive for the political well being of the HKSAR. Any shift to a hard-line pattern in the PRC Mainland would bode ill for freedom of the press in the HKSAR.

Reporters know the highly dangerous zones.¹¹⁹ Writing about the HKSAR and its governance from within Hong Kong seems subject to little impediment.¹²⁰ Writing about the PRC Mainland and its governance is more problematic, especially from

115. See Beja, *supra* note 39.

116. See Willy Wo-Lap Lam, *The Beida Barometer*, SOUTH CHINA MORNING POST, April 29, 1998, at 17; see also Willy Wo-Lap Lam, *Liberals Urge Work on Deng Thought*, SOUTH CHINA MORNING POST, April 25, 1998, at 9.

117. See Willy Wo-Lap Lam, *Jiang to Highlight Political Reform*, SOUTH CHINA MORNING POST, May 18, 1998, at 1.

118. See Willy Wo-Lap Lam, *New Press Law May Ease Censorship*, SOUTH CHINA MORNING POST, April 25, 1998, at 9.

119. See HKJAAR97, *supra* note 27, at § 4, Assimilation of Self Censorship ¶ 2. A pre-handover survey by the Chinese University of Hong Kong made it clear that, although individual reporters do not seem to see themselves as constrained by these zones, they do see their colleagues as so constrained (the so-called “third-party effect”). *Id.* The survey revealed that 50% of (colleague) reporters experienced hesitation in criticizing the Chinese Government. Almost 37% were said to experience hesitation in criticizing large corporations in Hong Kong. *Id.*

120. See *id.* Less than 6% were said to feel any hesitation in criticizing the Hong Kong Government. *Id.* However, it needs to be remembered that this survey was conducted prior to the handover. *Id.*

within the PRC Mainland. One notorious example of pre-handover self-censorship at the *South China Morning Post* involved the axing of a cartoonist who specialized in, inter alia, biting personal attacks on senior PRC leaders.¹²¹ Advocating the overthrow of the Mainland system of governance or independence for Taiwan, Tibet, or Hong Kong are high on the list.¹²² Revealing state secrets and any reporting on national security or military related topics are high on the list as well. Reporting in Chinese generally is more risky than reporting in English. Reporting from *within* the PRC Mainland rather than from the HKSAR also increases the risk and it would seem that Mainland citizens and former citizens are more likely to be badly treated within the Mainland than those who are not.¹²³ For example, the *Ming Pao* reporter Xi Yang, who was jailed several years ago for revealing state secrets, was reporting from the Mainland.¹²⁴ In 1994, Gao Yu was sentenced in China to six years in prison for her work which was published in the generally pro-Beijing, Hong Kong monthly magazine, *Mirror*.¹²⁵

There is no doubt that self-censorship is practised by the Hong Kong media. There is also no doubt that self-censorship is practised in Western media outlets.¹²⁶ Sensitivity towards attacking large corporations, particularly if they are big advertisers, is one zone of practice. Many media outlets take overt political positions during election periods in the West which influences reporting as well as editorializing. The question is not whether self-censorship exists, rather, it is to what extent self-censorship exists, what are its specific effects, and is it recognized. In the case of Hong Kong, it is still possible to provide some meaningful answers to these questions. The threat of arrest and possible punishment within the PRC Mainland for reporters operating from there on behalf of the Hong Kong media certainly has had a chilling effect on some reporting,¹²⁷ but the continuing diversity of the Hong Kong newspaper segment of the media, especially, has thus far provided a significant check

121. The cartoon strip, entitled, *The World of Lily Wong*, by Larry Feign was taken over by the *Independent* newspaper in London. It was offered world-wide. No newspaper in Hong Kong took up the offer.

122. See FU & CULLEN, *supra* note 66, at 138ff (describing the so-called distinction between "reporting" and "advocacy," which was regularly drawn prior to the handover by PRC officials like Lu Ping, former head of the Hong Kong Macau Affairs Office in Beijing, has been comprehensively criticized as a distinction without a difference). The official line from the Mainland is that, whilst reporting of sensitive matters (such as Tibet separatism) may be permissible, advocacy would not be. The distinction was drawn in *Dennis v. United States*, 341 U.S. 494 (1951), and then abandoned six years later as unjust and unworkable in *Yates v. United States*, 354 U.S. 298 (1957).

123. A number of these areas of difficulty are set out in more detail in FU & CULLEN, *supra* note 66, at 255-270.

124. See *supra* note 38 and accompanying text.

125. Neumann, *supra* note 28, at 9.

126. See HKJAAR97, *supra* note 27, at § 4, Direct Instruction by Non-Editorial Staff ¶ 1. See also CARL JENSEN, 20 YEARS OF CENSORED NEWS (Turnaround, London 1998).

127. *Ming Pao* reporters felt especially constrained in their writing whilst their colleague, Xi Yang was in jail on the Mainland. See HKJAAR97, *supra* note 27, at § 4, The Terminal Stage of Self-Censorship ¶ 2. After Wang Dan (one of China's most famous dissidents) was released to go into exile in the USA recently foreign reporters who went to visit the home of his parents in Beijing were apparently detained and threatened.

against any wholesale chilling effect.¹²⁸ The market pays very well for bold investigative reporting.

One problem that has arisen since the handover is the comparative lack of access which reporters now find they have to the HKSAR Government. The last British Governor, Chris Patten was a professional politician prior to coming to Hong Kong. During his tenure, he made a major effort to provide increased access to government for the media. That relatively easy access is no longer readily available.¹²⁹

At a day to day level, the relationship between the press and the judiciary has a special dynamic of its own. Some judges welcome reporters into their courts and seem to make an effort to provide quotable material from the bench. Other judges are much less welcoming. This phenomenon is common in many jurisdictions. The interaction between judges and reporters can have a real impact on the transparency and effectiveness of the judicial process. Judges have significant power over the way cases are heard. If they feel the need, they can order a hearing or part thereof, to be held in closed court. It is quite difficult for the press to challenge such decisions due to generally their lack of legal standing. Judges also can hold persons in contempt of court, and the sanctions can be quite severe.¹³⁰ There is no sign that there has been any inordinate increase in the use of either closed court orders or contempt orders since the handover. This area is worth watching as a possible "litmus test" of any general change in attitudes within the judiciary over time.

Overall, a number of commentators feel that politics are less widely reported today than two or three years ago. That is, the mainstream press, especially the Chinese press, seems to have swung towards lifestyle reporting, crime and "man bites dog" stories, and somewhat away from heavier issues. It would be hasty to characterise this as intensified self-censorship, however. This trend is evident in papers throughout the West where a movement towards greater lifestyle reporting has been widely noted.¹³¹ There is also a commonly perceived tendency for rumour and gossip to displace hard news reporting.¹³² Also, Hong Kong now has passed the "magic date." This has removed a focus of much cross-border antagonism, and news resulting therefrom, between the British and the Chinese. The HKSAR now has a much longer-term outlook. It is common to find commentaries looking at where the HKSAR will be in five or ten years time and how it needs to prepare for the future.¹³³

128. In this regard, it has been argued that the *Apple Daily* has played a key role. This paper has enjoyed unprecedented circulation success by taking a fiercely independent stance, especially in its reporting on the Chinese Government. This has both provided a diversity of viewpoints plus the *Apple Daily* benchmark has provided a certain "shelter" for other papers. HKJAAR97, *supra* note 27, at § 3, *Apple Daily-Still the Upstart* ¶ 1.

129. See Neumann, *supra* note 28, at 9. See also Angela Li, *Martin Lee Finds Tung Hard to Meet*, SOUTH CHINA MORNING POST, July 24, 1998, at 6.

130. See David M. Walker, *THE OXFORD COMPANION TO LAW 282* (OXFORD UNIV. PRESS, NEW YORK 1980).

131. See *The News Business*, THE ECONOMIST, July 4, 1998, at 17.

132. See *The Press in the Spin Cycle*, THE ECONOMIST, June 20, 1998, at 47; see also Simon Beck, *US Press Under Fire*, SUNDAY MORNING POST, July 12, 1998, at 9; see also *New Labour, Old Story*, THE ECONOMIST, July 11, 1998, at 62.

133. See Sonny Lo, *Looking Beyond 2007*, SOUTH CHINA MORNING POST, May 14, 1998, at 17.

If you seek heavyweight analysis, it is still widely available. There is, however, somewhat less working over of "heavy" issues in the popular media than hitherto, and certain serious specialist magazines are having difficulty maintaining even bare profitability.¹³⁴

The changes in ownership of media outlets continue to be watched carefully and they continue to give rise to real concerns. The HKSAR is blessed with access to information on a scale that has few equals. Every international paper of any note is sold on its streets and Hong Kong enjoys full access to the international electronic media. It is massively wired into the Internet, and it still has record-breaking numbers of papers per head of population. Finally, the Hong Kong media remains significantly less concentrated than in many Western jurisdictions.

The trend, however, is towards concentration of the print media in Hong Kong.¹³⁵ This is due, primarily, to the demise of various titles, which have fallen victim to price wars and changes in readership trends. There is also a tendency towards changing ownership. Rupert Murdoch sold the highly profitable *South China Morning Post* prior to the handover. He also purchased STARTV from its former local owners. ATV, Hong Kong's second terrestrial television broadcaster, has recently changed hands. A consortium including Mainland interests has gained control of ATV.¹³⁶ *Ming Pao* has changed ownership twice over the last few years. Control of the *Hong Kong Standard*, *Sing Tao Daily* and *Tin Tin Daily* also may pass from Sally Aw Sian. Mingly Corporation, controlled by Cha Chi-ming was negotiating to gain control of Sing Tao Holdings. Mr. Cha is reported to enjoy favour in Beijing.¹³⁷ That deal has now fallen through, although it is understood that negotiations with other parties are continuing.¹³⁸

Two features of these changing ownership patterns warrant scrutiny. First, media ownership is passing, more and more, not to specialist media operators but to people with a general business background involving, inter alia, business with the PRC Mainland. Second, there are now signs that Mainland interests are buying into the Hong Kong media with some vigour. The fact that HKSAR media outlets are increasingly falling into business hands with close links to or homes in the Mainland does not automatically spell erosion of freedom of the press in Hong Kong, but it does indicate an increased potential for such erosion.

134. See Kwong, *supra* note 43, at 3.

135. See HKJAAR97, *supra* note 27, at § 3, Media Developments ¶ 1.

136. It is said the Rupert Murdoch also has some connections with the consortium. See Mukui Munish, *Beijing Group Closes in on ATV*, HONG KONG STANDARD, March 26, 1998, at 1; see also Glenn Schloss, *ATV Buyer Denies Plot by Mainland*, SOUTH CHINA MORNING POST, May 28, 1998, at 5.

137. See Gren Manuel, *Head Start with Beijing*, SOUTH CHINA MORNING POST, May 21, 1998, at 7.

138. See Denise Tsang, *Sing Tao Shares Fall Sharply as Buyout Talks End*, SOUTH CHINA MORNING POST, June 6, 1998, (Business Post) at 2.

VII. CURRENT ISSUES

A. Case Studies

A number of issues related to the media have arisen recently in the HKSAR. Not all of these are linked directly to the question of freedom of the press, but they all, at least touch on this matter. The first of several case studies dealt with in this Part raise direct questions concerning freedom of the press.

In early 1998, Rupert Murdoch apparently decided it would be better if a book publisher which he controls, HarperCollins, were not to publish the Hong Kong memoirs of the last British Governor of Hong Kong, Chris Patten. The proposed book is entitled *East And West*. The claim is that Mr. Murdoch told the publisher to try and tone down comments on China in the then forthcoming book. Ultimately, Mr. Patten was advised to take his book elsewhere. He did so and called, with benefit to his bank balance, on a lawyer en route to an alternative publisher.¹³⁹ The general view is that the Murdoch group likely gained little in China from this episode whilst the British interests of the group suffered.¹⁴⁰

After the handover, a local government body, the Provisional Urban Council (PUC), along with PROVLEGCO, was put in place under Beijing's oversight. The PUC quickly distinguished itself for its clumsy approach on many issues. In early 1998 its poor reputation plummeted to new depths when it attempted some coarse political censorship. Christine Loh, a terminated 1995 LEGCO member, was featured in a film about the handover which was to be shown at the Hong Kong Film Festival in April 1998. The PUC enjoyed ultimate control of the Festival. A sub-committee of the PUC recommended that the film containing the Loh segment not be shown at the festival, as the festival would occur prior to the May 1998 LEGCO elections in which Ms. Loh would be a candidate. By a margin of seventeen votes to sixteen, the PUC itself managed to overturn the sub-committee decision. The crassness of this attempt at censorship for transparent political reasons¹⁴¹ ensured that the PUC generated significant publicity which, in turn, undoubtedly played a part in convincing a majority on the PUC to back away from the initial abuse of power by the sub-committee.¹⁴²

139. See David Wallen, Murdoch 'Trying to Censor Patten Book,' SOUTH CHINA MORNING POST, February 23, 1998, at 3; see also John Dugdale, *Politics by the Book*, SOUTH CHINA MORNING POST, February 28, 1998, at 17.

140. See *Rupert and the Dragon*, THE ECONOMIST, March 7, 1998, at 69.

141. Members of the sub-committee included several potential rivals of Ms. Loh in the then looming May, 1998, LEGCO elections.

142. See Genevieve Ku, *Loh 'Rivals' Lose Festival Film Vote*, SOUTH CHINA MORNING POST, February 4, 1998, at 1; see also *Editorial*, SOUTH CHINA MORNING POST, February 4, 1998, at 14. The PUC has continued to act controversially. A statute crafted in Denmark to commemorate the Tiananmen bloodshed of June 4, 1989, entitled the "Pillar of Shame" has been denied a permanent home in Hong Kong in any of the public areas controlled by the PUC. See Kwai-yan No & Felix Chan, *Pillar of Shame Left in Limbo*, SOUTH CHINA MORNING POST, June 6, 1998, at 1.

Xu Simin, publisher of *Mirror* magazine in Hong Kong, has been a critic of RTHK's independence for some time.¹⁴³ In March 1998, he launched an attack on the broadcaster while attending a session in Beijing of the Chinese People's Political Consultative Conference (CPPCC) of which he is member. Mr. Xu claimed that some RTHK programmes went too far in their criticism of both the Chinese and HKSAR Governments. He was upset that a publicly funded broadcaster should be mounting such attacks. He also complained that RTHK had vilified the CEO of the HKSAR, Tung Chee-hwa.¹⁴⁴ Mr. Xu's attack prompted a hostile reaction within Hong Kong.¹⁴⁵ Many people voiced their support for RTHK. Shortly after Mr. Xu's remarks, Tung Chee-hwa expressed the HKSAR Government's commitment to freedom of speech and freedom of information.¹⁴⁶ At about the same time, Mainland officials made a veiled attack on Mr. Xu. It appears that Beijing was especially sensitive to any attempt being made to add momentum to his attack by launching it from Beijing. The Chairman of the CPPCC, Li Ruihuan, stressed in a statement made shortly after the attack by Mr. Xu that the CPPCC was not a forum to monitor HKSAR politics.¹⁴⁷

In December 1996, high profile Hong Kong politician and democracy activist, Emily Lau, requested certain information from the Hong Kong office of Xinhua, the *New China News Agency*. During the coexistence of British rule in Hong Kong and Communist rule on the Mainland, Xinhua, apart from acting as a newsagency, also served as the Chinese Government's de facto "embassy" in Hong Kong. It is widely believed that Xinhua was, and still is, in the habit of keeping files on various people in Hong Kong, including democracy activists. Ms. Lau was of the view that Xinhua maintained a file on her. She sought access to that file under Hong Kong's recently enacted Personal Data (Privacy) Ordinance (1995).¹⁴⁸ Xinhua, as a potential gatherer of personal data, was subject to the ordinance. It failed to respond within the 40-day time limit as prescribed in the ordinance. Such a failure gives rise to grounds for a possible prosecution under the ordinance. The Secretary for Justice decided not to prosecute Xinhua.¹⁴⁹ The decision caused a furor. Ms. Lau has now launched a private prosecution against the current director of Xinhua, who was not the director when she lodged her original request. She has been given permission by a magistrate

143. See HKJAAR97, *supra* note 27, at § 1, RTHK's Independence ¶ 3.

144. See Chris Yeung, *Broadcaster Stays Open to Debate*, SOUTH CHINA MORNING POST, March 22, 1998, at 9.

145. See Michael Wong & Ceri Williams, *RTHK is a Hong Kong issue Tung assures worried critics*, HONG KONG STANDARD, March 7, 1998, at 1.

146. See *id.*

147. See Linda Choy, *Xu's Attack on RTHK Dismissed*, SOUTH CHINA MORNING POST, March 8, 1998, at 4.

148. See LAWS OF HONG KONG, Cap. 486.

149. See C. K. Lau, *A Split for Justice's Sake*, SOUTH CHINA MORNING POST, March 26, 1998, at 19.

to issue a private summons.¹⁵⁰ Xinhua's director has moved to block the prosecution in the courts.¹⁵¹

In the mean time, the HKSAR Government has moved to bestow what is commonly still known as "Crown privilege" on at least four Mainland bodies operating in the HKSAR, including Xinhua. The HKSAR Government argued that they were only providing the same benefits for these Mainland entities as British Crown entities had enjoyed in Hong Kong. The privilege briefly confers immunity on qualifying bodies from HKSAR laws unless those laws expressly, or by clear implication, apply to the relevant bodies. The PROVLEGCO passed the controversial legislation at the government's behest in early April 1998. The exempting legislation applies retrospectively from July 1, 1997 in cases other than those involving criminal offenses.¹⁵² It does not affect Emily Lau's private prosecution.

Shortly after the Xinhua case, the HKSAR Government found itself in the center of another storm relating to a non-prosecution. Sally Aw Sian, a proprietor of Sing Tao Holdings, is a Hong Kong member of the CPPCC. The CE of the HKSAR is also a former director of Sing Tao Holdings. The ICAC commenced an investigation, prior to the handover, into an alleged manipulation of circulation figures for the *Hong Kong Standard*, the English language paper in the Sing Tao stable. The ICAC, as a result of its investigation, recommended prosecutions against a number of persons associated with the *Hong Kong Standard*, including Ms. Aw. The Secretary for Justice decided not to prosecute Ms. Aw, although the other individuals who were alleged to have conspired with her are being prosecuted. The decision caused uproar.¹⁵³

B. Summary

It needs to be stressed that the exercise of prosecutorial discretion is not a recent phenomenon in Hong Kong. The concern with the last two case studies is not the exercise of this discretion per se, but the circumstances of its exercise.¹⁵⁴ A visitor from Mars to Hong Kong could be forgiven for wondering if media organizations enjoying fairly close relations with the HKSAR Government are more likely than others not enjoying such a relationship, to benefit from the exercise of a discretion not to prosecute.

The earlier case studies raise different issues. Those instances involving clear attempts to restrict the freedom of expression of RTHK, ex-Governor Patten and

150. See Audrey Parwani, *Xinhua to Face Court*, SOUTH CHINA MORNING POST, May 1, 1998, at 1.

151. See Cliff Buddle & Gren Manuel, *Xinhua Tries to Halt Privacy Case*, SOUTH CHINA MORNING POST, May 21, 1998, 2.

152. See Gren Manuel & Angela Li, *Mainland Bodies Win Transferred Privileges*, SOUTH CHINA MORNING POST, April 8, at 1.

153. See *Tung constrained*, THE ECONOMIST, March 28, 1998, at 25.

154. See Tim Hamlett, *To prosecute or not to prosecute*, SUNDAY MORNING POST, Sept. 8, 1998 (Agenda), at 20.

Christine Loh are worrisome because they signal how constant the threats to fundamental freedoms are. In Hong Kong, such attacks are doubly worrisome because of the shaky foundations supporting the HKSAR's generally free society. Until the absence of full democratic government is remedied, Hong Kong will have to remain especially watchful about every possible attack on press freedom. That said, freedom of the press cannot be absolute. Lines do have to be drawn. There was widespread agreement in Hong Kong that the sanctions imposed by the High Court in the *Oriental Daily News* contempt case outlined were appropriate.¹⁵⁵

VIII. THE BUSINESS CLIMATE

When we consider the media in Hong Kong from a business perspective, some very clear trends are apparent. Some of these have been intimated above. In particular, the pattern of ownership of media outlets has changed over the last decade, and this process looks set to continue. The rate of ownership change has accelerated significantly with various major outlets changing hands, including: the *South China Morning Post*, *Ming Pao*, STAR TV and, most recently, ATV. It is also likely that control of the Sing Tao Holdings will soon pass from Sally Aw Sian.¹⁵⁶

In the case of STAR TV, the last ownership change placed it in the News Corporation stable. Previously, STAR TV was owned by a Hong Kong conglomerate. However, this transfer of a media outlet from the general business sector to a specialist media group is the exception. Hong Kong media outlets have mostly left the hands of media-specialist owners and have been acquired by general business groups. These groups almost always have major business interests in China. In some cases, such as with ATV, PRC Mainland business interests have been the buyers. Also, it is believed that there exists cross-border interest in the Sing Tao Holdings stake, which is on the market.

Apart from these changing ownership patterns, the media in Hong Kong has seen a significant thinning of ranks, particularly amongst the print media. Fierce daily newsstand price wars have erupted and weaker papers have succumbed to cut-throat competition.¹⁵⁷ The end of Hong Kong's separation from China and the gradual opening up of the PRC Mainland to direct media coverage, unimaginable two decades ago, has also culled the ranks of specialist "China-watching" publications.¹⁵⁸

Within the electronic media, the last few years have seen some reduction in the number of specialist regional operators based in Hong Kong.¹⁵⁹ Once again, this seems to show evidence of the market at work. The competition in specialist regional

155. See Parsons, *supra* note 46.

156. See *supra* Parts III and VI.

157. See HKJAAR97, *supra* note 27, at § 3.

158. See Kwong, *supra* note 43.

159. See Glenn Schloss, *Channel Plunges Into More Real-Life Drama*, SOUTH CHINA MORNING POST, July 8, 1998, at 4.

broadcasting is becoming fierce. Next, Hong Kong remains a comparatively expensive base. The Hong Kong Dollar (HKD) is still pegged to the US Dollar. Over the last year, the HKD has appreciated by close to twenty-percent against the currency of its main regional rival, Singapore. It is true that Hong Kong asset prices have tumbled by forty to fifty percent over the same period, but rents are taking longer to adjust.

Hong Kong also has some serious regulatory problems when it comes to the electronic media.¹⁶⁰ Prior to the handover, legislation was drafted to amend laws regulating the electronic media. The former Hong Kong Government failed to follow through with these reforms, reportedly because it was too difficult to negotiate an agreement on the proposed reforms with China during the highly-charged period when the Patten LEGCO reforms were being implemented.¹⁶¹ Hong Kong is now well behind other jurisdictions in legislating to deal with the very rapid technological changes occurring in electronic broadcasting, including digital broadcasting, with its ability to fit ten TV channels where once there were two.¹⁶²

Cross-border politics can and do affect the commercial welfare of media groups in Hong Kong. One of the more notorious cases was the attempt by Jimmy Lai's Next media group to list itself on the Hong Kong stock exchange. The Next Group's publications include two of Hong Kong's most successful Chinese print editions, the *Apple Daily* and the weekly *Next* magazine. The listing looked apt to achieve a marked success. Sun Hung Kai International, a leading Hong Kong investment bank, was lined up as the underwriter. Then, on the eve of the listing, Sun Hung Kai International advised, it was withdrawing from the listing process. No replacement could be found, and the listing never proceeded. Publications of the Next Group have always taken a highly independent and critical stance on PRC politics.¹⁶³ It is widely believed that the failure to list the Next Group was the result of pressure applied from Beijing.¹⁶⁴ Prior to this listing attempt, Jimmy Lai had severed his links with the "Giordano" casual clothing empire he had built. Giordano retail stores encountered trouble on the PRC Mainland, following certain stories appearing in the *Apple Daily*. The aim of Jimmy Lai's severance was to reduce the threat to Giordano's commercial success. Another pressure point area is advertising. Newspapers, or other media outlets which are on Beijing's "hostile" list, are most unlikely to find their pages filled with advertising from enterprises with close PRC Mainland links.¹⁶⁵

One aspect of the operation of the media in Hong Kong, which is well recognized though less often widely discussed, is the involvement of organized

160. See Glenn Schloss, *New TV Laws Urged to Lift Confidence*, SOUTH CHINA MORNING POST, July 13, 1998, at 4.

161. See *id.*

162. See Glenn Schloss, *TV Chiefs 'Fail to Get the Picture'*, SOUTH CHINA MORNING POST, July 26, 1998, at 2.

163. See *supra* Part III.

164. See Neumann, *supra* note 28, at 5.

165. HKJAAR97, *supra* note 27, at § 4, Direct Commercial Pressures ¶ 4.

crime. Triad links to film production and also within television broadcasting appear to be a fact of life in Hong Kong.¹⁶⁶ The fortunes which have launched certain Hong Kong media forays are widely believed to have been derived from less than savoury commercial activity.

Despite the continuing pressures of competition, the Asian economic meltdown and other burdens, Hong Kong continues to thrive as a media hub. Singapore and Malaysia are still significantly less important in this regard.¹⁶⁷ Close to 200 media organizations have offices in Hong Kong, and virtually all the major international press groups, major international electronic media groups and many international publishers retain bases in the HKSAR.¹⁶⁸ More than a year after the handover, Hong Kong is still the principal location of choice if you are in the media business, and you have an interest in East Asia.¹⁶⁹

IX. CONCLUSION

Predictions about the future of the HKSAR still vary greatly. Despite this dissension, several propositions are clear. First, few, if any, have ever made their fortune betting against Hong Kong. Second, Hong Kong has coped and thrived on unprecedented levels of continuous change throughout the last fifty years. Third, Hong Kong is still undergoing a *process* of change rather than a sudden switch. In an important sense, July 1, 1997, the date of "handover," was no more than yet another instance of major change of a kind that has been affecting Hong Kong for decades. In other words, it is hard to think of a people better equipped to cope and make the most of the recent change of sovereignty than the Hong Kong Chinese.

Will the HKSAR largely retain the ethos and freedoms of British-ruled Hong Kong? The Basic Law says it will, as do the fundamental values driving Hong Kong. This is not to deny the importance of the Chinese cultural underpinnings in Hong Kong. The lack of both legalistic and democratic propensities in Chinese political history have been widely noted,¹⁷⁰ but so has Chinese pragmatism.¹⁷¹ In the case of Hong Kong, local experience plus comparisons with political life across the border have categorically proved the worth of certain aspects of key Western values

166. See Glenn Schloss, *ATV Executive Receives Threat Over Sackings*, SOUTH CHINA MORNING POST, July 25, 1998, at 4.

167. See Garry Rodan, *Asia and the International Press: The Political Significance of Expanding Markets, DEMOCRATIZATION AND THE MEDIA* 125, 144 (Vicky Randall ed., Frank Cass, London 1998).

168. See *id.*

169. East Asia is used to encompass those parts of Asia *not* including South Asia (India, Pakistan, Sri Lanka and related smaller states) Central Asia (the former Republics of the old Soviet Union) Russian Asia and the Middle East.

170. See Stanley Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategies* 39 AM. J. COMP. L. 293 (1991) (explaining the long history of State circumscription of rights in China).

171. See MICHAEL HARRIS BOND, *BEYOND THE CHINESE FACE* ch. 8 (Oxford University Press, Hong Kong 1991).

such as the Rule of Law.¹⁷² A central problem is that the absence of a fully representative democracy means that the crucial accountability factor, which such a system of government brings, is absent. Ordinary, Hong Kong people are prone to reflect that reforming Governor Patten was sent one or two decades too late.

The other dominant reason for the prevailing uncertainty in Hong Kong is that two significantly different political-legal cultures now have to learn to live with one-another across the HKSAR-Mainland border. It is beyond dispute that the new sovereign power in Hong Kong is a different entity from the last. China and Britain have vastly different general and legal cultures. China still has many millions of desperately poor citizens. It is a One Party State with a recent history of frightening and bloody repression of its own citizens. China suffers from many problems, not least of all, massive corruption. But China also is engaged in an unprecedented period of change. It is more prosperous now than at any time in the last two hundred years. This era of change has seen a decisive move away from extreme versions of the Rule of One Man. However, this era has experienced only the most tentative steps towards any comprehensive commitment to the Rule of Law as it is understood in Western democracies and in Hong Kong.

Two of the key safeguards of Hong Kong's remarkable mix of commercial and political freedom are the independent judiciary and freedom of the press. Hong Kong must be especially vigilant to ensure that these safeguards are not undermined. A fully democratic government is not in prospect under the Basic Law, as it currently stands, until 2007 at the earliest.¹⁷³ The possibility of amending the Basic Law in order to introduce a fast-track to a fully democratic LEGCO is a matter of wide debate following the May 1998 LEGCO elections where a record turn-out of voters returned many pro-democracy activists to LEGCO.¹⁷⁴ Presently, however, this is no more than a topic of political debate.

The Hong Kong judiciary has demonstrated, more than one year into the new era, that it remains independent. But its deference to the executive and to the legislature also continues. This deference is rooted in British judicial tradition. Chinese cultural attitudes to the role of law within society have tended to reinforce this hesitancy with respect to judicial activism. Today, this deference is also driven by a reasonable recognition of the new political reality: the HKSAR is governed, ultimately, by China. The Hong Kong judiciary is now in the process of finding its role within this new actuality. The judiciary is a key agent in maintaining Hong Kong's freedoms.

172. See Hsin-chi Kuan, *Support for the Rule of Law in Hong Kong*, 27 HONG KONG L.J. 187 (1997). In 1995, a survey on the attitudes of the Hong Kong Chinese on the Rule of Law was conducted. *Id.* This detailed survey revealed some ambivalence on certain aspects of this concept. *Id.* For example, Hong Kong citizens seem less sure about defending rights-based concepts of the Rule of Law. *Id.* But they were more forthright in seeing the crucial value of maintaining equality before the law and ensuring that due process applies.

173. See Simon Macklin, *Call for Clear Definition of Xinhua's Role*, SOUTH CHINA MORNING POST, April 29, 1998, at 2.

174. See Susan Lannin, *Direct Elections in 2000: Lee*, HONG KONG STANDARD, May 26, 1998, First SAR Elections, at 1.

Most Hong Kong people want the judiciary to exercise prudence. They are worried and constantly watchful though, lest this prudence slide into passivity.

This review has demonstrated that there are very real concerns, especially with respect to maintaining press freedom. These concerns arise from a variety of sources, including: changes in media ownership; declining numbers of outlets; the extent of self-censorship; judicial deference; overt attacks on freedom of the press; apparent lack of government even-handedness; lack of access to official information; and the attitude of government on the issue of freedom of the press. Despite these concerns, it is also clear that, more than a year after the handover, the press in Hong Kong remains one of the freest and most informative in East Asia. Moreover, the HKSAR is still the premier choice of international media operators seeking a base in East Asia.

One abiding concern has recently been in the spotlight. This apprehension can perhaps best be put in the form of a question: how much of a threat to media freedom in Hong Kong is the media itself? One side of this concern is the menace of self-censorship. Another side, even more difficult to deal with, is what might be termed media recklessness. Although most people in Hong Kong supported the recent decision of the High Court in the *Oriental Daily News* case to jail the former editor of that paper for contempt, the wider implications of the decision still give cause for anxiety. The precedent of the HKSAR Government using the might of the law to punish the press is now established.¹⁷⁵ The case giving rise to this outcome was not one involving any sort of attack on China, but one involving a deliberate and direct attack on the judiciary of the HKSAR. A clear lack of self-restraint was involved. All media operators must feel at least somewhat more nervous. In Singapore, the employment of the offense of "contempt of court by way of scandalizing the judiciary" had a clear chilling effect on the operation of the media.¹⁷⁶ One practical step which might be taken in Hong Kong to minimize the risk of further use of this precedent would be for the media to develop an institutionalized form of self-restraint along the lines of a Press Council, which could hear complaints and decide on the merits of those complaints.

In summary, with a fast-changing China, the HKSAR looks set to remain a comparatively wealthy, and highly educated enclave with strong traditions in law, politics, and social interaction drawn from the Anglo-Common Law world blended into Hong Kong's dominant Chinese tradition. The more one reflects on the future of the HKSAR within the PRC, the more one is struck by the fact that, as in the past, Hong Kong's destiny will rest, ultimately, more on the decisions of the Hong Kong Chinese than anyone else. That is, the remarkable triumphs of Hong Kong over the last 50 years, especially, are fundamentally a testament to the energy, intelligence and resourcefulness of the Hong Kong Chinese. This is not to underestimate the crucial

175. Tim Hamlett, *Legal Dinosaur Roused From Welcome Slumber*, SUNDAY MORNING POST, July 5, 1998, (Agenda) at 16.

176. Rodan, *supra* note 167, at 131-134.

British institutional contributions, but it is clear where the principal explanation for Hong Kong's success lies. The political culture in Hong Kong has yet to adapt to the new political reality. Hong Kong "regionalism" is in the earliest stages of development, and so far it is most notable for its feebleness. This will change. It is inconceivable that HKSAR will not develop its own special identity within the PRC. As this process gathers pace, a heavy burden will rest on Hong Kong's political, business, judicial, intellectual and civil service elites, especially, to ensure that the HKSAR retains and builds on its remarkable substructure of political and social tolerance and exceptional commercial energy. Nowhere will this burden be greater than in maintaining freedom of the press. Perhaps the greatest political hazard for Hong Kong is that the HKSAR elites could take Hong Kong's significant political achievements—and especially its vibrant and free media—for granted. This danger is heightened by the unprecedented level of financial and economic turmoil which has beset the region over the last year. Faltering economies can rapidly fall victim to social disruption and, in turn, to exhortations for increased controls on the media—in the interests of maintaining social stability. While the East Asian financial tempest continues, everyone concerned about maintaining media freedom in the HKSAR will need to be more vigilant than usual.