

## Freedom of the Press in Hong Kong\*

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### 1.0 Introduction

The change of sovereignty on July 1, 1997, when over 150 years of British rule will end, is having effects on many aspects of life in Hong Kong. The change of sovereignty will occur pursuant to the Joint Declaration of the Government of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Joint Declaration) concluded in 1984. The Joint Declaration embodies the principles meant to guide the manner in which Hong Kong will be run for the 50 years after 1997 when it becomes part of the People's Republic of China (PRC). It is based on the Chinese doctrine of "One Country, Two Systems". In brief, this doctrine says that, although Hong Kong will become part of China (One Country) it will retain a high degree of autonomy so as to maintain its current political economy (Two Systems).<sup>1</sup> The principal constitutional document arising out of the changeover is the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law)*.

Although the documentation with respect to the changeover speaks of Hong Kong being granted a "high degree of autonomy", this does not mean that Hong Kong has a charter to determine its own political and economic direction in the future. This is a special sort of autonomy. It is autonomy to preserve, not autonomy to change or experiment. Hong Kong's post-1997 version of autonomy means that Hong Kong cannot, for example, decide to adopt socialism as the object of its political organization. The other side of this irony is that the still more than nominally socialist PRC has committed

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1 The background to and the process of evolving the formula for Hong Kong's reversion to PRC sovereignty are both explained in, Cullen, Richard, *Hong Kong Revenue Law: The Present, 1997 and Beyond* (1993) 7 Tax Notes International, 1109-1135, at 1109-1118.

itself to the preservation of a dazzling example of capitalism within the borders of China.<sup>2</sup>

One area where there has been widespread discussion about the impact of the change of sovereignty is on the operation of the media in what will become the Hong Kong Special Administrative Region of the People's Republic of China (HKSAR). There is no doubt that the impact already has been felt.<sup>3</sup> The full extent of this impact in Hong Kong, already a major media centre in East Asia, will become clear over time. Hong Kong's claim to the title of major media centre 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 some 6 million people. Many daily papers devote themselves to horses or starlets exclusively so hardly qualify as newspapers<sup>4</sup> but the extent of newspaper publishing is still little short of astonishing. Various factors help explain this phenomenon. Pre-eminently, expression has historically been less regulated in Hong Kong than virtually anywhere else in East Asia. Secondly, the press has served as a sort of surrogate "parliament-in-print". Hong Kong has only recently acquired an attenuated form of democratic government. 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 making circulation fairly straight forward have made it easy to go into print. The local population, in their turn, have provided an eager market.

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 around six hours flying time from Hong Kong live some 50% of the World's population.

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- 2 For further comment on the fundamental political documentation for post-1997 Hong Kong see, Ghai, Yash, *The Basic Law: A Comparative Perspective* (in Wesley-Smith (ed)) *Hong Kong's Basic Law: Problems and Prospects* (Faculty of Law, University of Hong Kong, 1990) 1; and Ghai, Yash, *Interpretation of the Basic Law in Law Lectures for Practitioners 1995* (Faculty of Law, University of Hong Kong, 1995). Article 5 of the *Basic Law*, Hong Kong's post 1997 Constitution, (see further, below) in fact states that the socialist system and policies shall not be practised in Hong Kong. Moreover, Articles 3(3) and 3(5) of the Joint Declaration stress the requirement that Hong Kong's legal, social and economic systems be maintained after 1997.
  - 3 Bonnin, Michel, *The Press in Hong Kong-Flourishing but Under Threat* (1995) 1 (September) *China Perspectives*, 48. See, also, Keller, Perry, *Freedom of the Press in Hong Kong: Liberal Values and Sovereign Interests* (1992) 27 *Texas International Law Journal*, 371.
  - 4 Bonnin, *Ibid.*

Secondly, this part of globe contains more of the fastest growing economies in the World than any other. Thirdly, Hong Kong has excellent infrastructure including high quality communication links. The same factors have also helped make Hong Kong one of the hubs for Asian broadcasting by the electronic media and home to Asia's second largest film industry, after India.

The consequence of all this Hong Kong based media activity is that a range of media players located in Hong Kong have the closest interest in understanding the likely impact of the change of sovereignty on media freedom. Those segments of media, both print and electronic, serving the local population are the most keenly interested; Hong Kong is their market so they cannot relocate. Existing regional print and electronic media outlets are concerned about how their reporting, especially of activities in the PRC and in the HKSAR will be affected. Finally, as East Asia continues its rapid development, would be new entrants to this vast media market are wondering where to locate. Apart from those working in or with the media, the issue of press freedom in Hong Kong is also of concern to many others including: the residents of Hong Kong; China and Hong Kong "watchers"; international rights activists and scholars; and media commentators.

In the next Part of this article, some fundamental propositions concerning the related concepts of freedom of expression and freedom of the press are discussed. This review forms a backdrop to the following discussion. Part 3 presents an overview of the operation of the media in Hong Kong. Part 4 reviews some likely areas in which freedom of the press will be affected by the change of sovereignty. Part 5 is the conclusion.

## **2.0 Freedom of the Press: A Conceptual Outline**

### **2.1 Introduction**

Freedom of individual expression and freedom of expression for the press (freedom of the press) are clearly similar concepts, so much so that some consider no real difference exists between the two. The better view is, however, that there are differences between these concepts and, indeed, they sometimes find themselves in opposition. The purpose of this Part is to establish what freedom of the press means today in the World at large. It draws on the development of the theory and practice of maintaining freedom of press in the West and particularly in the United States of America (USA) where these topics have been most extensively discussed.<sup>5</sup>

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5 In the USA there have been more cases and more commentary and more issues have been considered in depth than elsewhere. One commentator has explained the contribution from the USA in these terms: "American thinking on the freedom of speech is relevant to the rest of the

During the 20th century there has been considerable refinement of what is understood by the terms freedom of expression and freedom of the press in the context of the wider ongoing debate about the need to protect individual rights. Particularly since the Second World War, there has been constant attention paid to finding mechanisms to protect what are described as basic or fundamental rights. The appalling abuses of individual rights during that War on a scale never before recorded has energized this search for protection ever since, although much ground work had been done prior to that period. In 1946, at the first meeting of the United Nations (UN) after the Second World War, the concept of freedom of expression was identified as a touchstone of all individual rights. The *Universal Declaration on Human Rights* of 1948 (UDHR) by the UN stipulates, inter alia, that individuals are to enjoy rights to freedom of thought, conscience and religion, opinion and expression.<sup>6</sup> The UDHR was just that, a declaration only, but the early UN debates and the UDHR underline the key importance of protecting freedom of expression. Although the UDHR binds the PRC, the UDHR does not impose obligations on parties so bound. Rather, it urges parties to promote, respect and observe those rights set out in the UDHR. These rights to free expression are also stipulated in the *International Covenant on Civil and Political Rights* of 1966 (ICCPR). Although the PRC is not a party to the ICCPR, the *Constitution of the People's Republic of China* of 1982 (the *Constitution of the PRC*) stipulates that freedom of expression and freedom of the press are protected.<sup>7</sup>

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world because our experience in wrestling with free speech conflicts and communications policy is unusually rich. American society may not have the best answers, but it has thought about the problems more." Smolla, R.A., quoted in Barendt, Eric, *Importing United States Free Speech Jurisprudence?* in (Campbell and Sadurski (eds)) *Freedom of Communication* (Dartmouth, Aldershot, 1994), 57, 72. Some of the discussion below relates to cases involving the broadcast media. The term "press" has both a specific meaning (newspapers and periodicals) and a more general meaning (all media involved in the public distribution of information). The case law and commentary in the USA typically uses the term press in the second sense. This is the sense which the term press has come to have where it is used in the First Amendment of the Constitution of the USA. When the First Amendment was ratified in 1791 the printed word was the sole means of mass communication over any distance, of course.

6 See, Articles 18 and 19 of the UDHR. See, also, Eide, Asbjorn; Alfredsson, Gudmundur; Melander, Goran; Rehof, Lars Adam; Rosas, Allan; and Swinehart, Theresa (eds) *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press, Oslo, 1992).

7 Article 35 of the *Constitution of the PRC* provides, inter alia, that citizens of the PRC enjoy freedom of speech and freedom of the press. Article 51 of the *Constitution of the PRC* stipulates, however, that the exercise by citizens of their constitutional rights must not infringe upon the interests of the state and society, inter alia.

Unfortunately, that protection is currently (and has been since the current Constitution was adopted in 1982) little more than symbolic.<sup>8</sup>

The ICCPR does, however, apply in Hong Kong, and is (largely) embodied in statutory form in Hong Kong's *Bill of Rights Ordinance* 1991 (BORO). The ICCPR is also incorporated into the *Basic Law* both by reference and by repetition of many of the ICCPR rights in the *Basic Law* itself. The *Basic Law* is the principal constitutional document governing the HKSAR.<sup>9</sup> Both the BORO and the *Basic Law* are discussed further below.

## 2.2 Freedom of Expression

Various commentators have elaborated specific reasons why freedom of expression is important. The following list summarises what are generally regarded as the most important reasons.<sup>10</sup> Freedom of expression is both intrinsically and instrumentally valuable because:

- It promotes the discovery of truth. It is argued that freedom of expression is necessary to provide a constant testing of conventional wisdom or accepted truth. Flawed "truths" are eliminated as better explanations arise in the market place of ideas. This justification has two elements. First, it is argued that there is an intrinsic good in seeking the truth.

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8 It is worth noting that the Chinese view that the content of such rights (at an individual level) is heavily circumscribed by the interests of society is *not* a post-1949 (PRC) phenomenon. It is an approach embedded in historical Chinese political practice. See, Lubman, Stanley, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy* (1991) 39 *American Journal of Comparative Law*, 293, 324-328. See, also, Jenner, W.J.F., *The Tyranny of History* (Penguin, London, 1994) Chapter 7.

9 For further commentary on the *Basic Law* and its impact on the HKSAR, see: Ghai, op.cit note 2 and Cullen, Richard, *Capitalism with Chinese Characteristics: Hong Kong - Past, Present and Future* (in Haberle (ed)) (1995) 43 *Jahrbuch des Öffentlichen Rechts der Gegenwart* (F.C.B. Mohr (Paul Siebeck), Tübingen, 1995) 709, 716-718. For detailed discussion of the respective rights protected by the *Basic Law*, the ICCPR and the BORO and their relationship with one another, see Ghai, Yash, *The Hong Kong Bill of Rights Ordinance and the Basic Law of the Hong Kong Special Administrative Region: Complementarities and Conflicts* (1995) 1 *Journal of Chinese and Comparative Law*, 30.

10 This list draws on a number of sources including: the judgment of Brandeis J in *Whitney v California* (1927) 274 US 357, 372; Zelezny, John, *Communications Law: Liberties, Restraints and the Modern Media* (Wadsworth, Belmont, 1993); Emerson, Thomas I., *Towards a General Theory of the First Amendment* (1963) 72 *Yale Law Journal*, 877; Meiklejohn, Alexander, *The First Amendment is an Absolute* (1961) *Supreme Court Review*, 245; Powe, Lucas A., *Or of the [Broadcast] Press* (1976) 55 *Texas Law Review*, 39; Fiss, Owen, *Building a Free Press* (1995) 20 *Yale Journal of International Law*, 187; and Boyle, Kevin, *The Right to Freedom of Expression*, paper presented at Hong Kong's Bill of Rights Conference, Faculty of Law, University of Hong Kong, June 20-22, 1991.

Secondly, it is argued that seeking the truth is good for teleological or consequential reasons, also. That is, the seeking of truth will produce an improved society.

- It promotes political participation. This justification addresses the need for individuals in a society to be well informed in order for them to participate effectively in the public affairs of that society. This informed participation is regarded as necessary for the effective operation of government.
- It helps maintain social stability. This justification relates to the benefits arising from a free exchange of information in ensuring social stability. Through a free exchange of information, society's problems, it is said, will be more quickly and accurately identified and responses can be crafted accordingly.
- It provides a "safety valve". This justification is closely related to the previous justification. Here the argument is that freedom of expression guarantees mean that "steam" can be let off. Individuals or groups in society are less likely to repress their concerns and, in doing so, possibly develop tendencies towards later violent expression of those concerns.
- It enhances self-fulfilment. This justification refers to the natural or ethical right (and desire) which, it is said, individuals have to improve themselves and the key role which self-expression plays in that process of development.
- It provides a crucial check on government. This justification relates to the way that freedom of expression is argued to be pivotal in ensuring the accountability of government. Free expression guarantees mean that a government's behaviour can be openly and effectively criticized.

### **2.3 Freedom of the Press**

The justifications just outlined are powerful arguments in favour of maintaining freedom of expression generally. Some of them apply, in particular, to the justification for protecting freedom of the press.

Protecting freedom of the press is clearly important for maintaining the market place in which ideas are exchanged, thus enhancing the operation of society. Similarly, it provides a forum in which ideas for improving society generally can be argued. The press also serves as a principal mechanism for providing commentary and criticism of government performance. In fact, it is sometimes referred to as the fourth arm of govern-

ment, after the three principal arms of government, namely the Executive, the Legislature and the Judiciary.

There has been ongoing dispute about the differences, in principle, between the concepts of freedom of the press and freedom of expression and their significance.<sup>11</sup> As a matter of practice, we can readily identify differences, however. In the USA, for example, the press enjoys special privileges with respect to expression which individuals do not enjoy. These privileges include an immunity from some defamation actions.<sup>12</sup> The press also is protected from certain impositions such as, for example, being ordered to provide a right of reply.<sup>13</sup> Finally, freedom of expression is necessary to fulfil the "safety value" and self-fulfilment functions mentioned above. Freedom of the Press can assist in achieving these ends. But it is not necessary in the same way as freedom of expression.

## 2.4 Freedom of the Press in Practice

So far freedom of press (and freedom of expression) have been discussed in fairly general terms. In the real world, the worthy rationale outlined above for freedom of the press is severely tested. An unregulated private press is likely to abuse its freedom, it has been argued, by excluding points of view, misrepresenting information, avoiding public issues and playing to the fears and biases of the population. These problems are exacerbated when press ownership is concentrated in a few hands.<sup>14</sup>

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- 11 For discussion of this issue, see: Nimmer, Melville B., *Is Freedom of the Press a Redundancy – What Does it Add to Freedom of Speech* (1975) 26 *Hastings Law Journal*, 639; Lange, David, *The Speech and Press Clauses* (1975) 23 *UCLA Law Review*, 77; Kaus, Robert M., *The Constitution, the Press and the Rest of Us* (1978) November, *Washington Monthly*, 51-52; Schiffrin, Steven, *Defamatory Non-Media Speech and First Amendment Methodology* (1978) 25 *USC Law Review*, 923; Haiman, Franklin Saul, *Speech and Law in a Free Society* (University of Chicago Press, Chicago, 1981); Marshall, Geoffrey, *Press Freedom and Free Speech Theory* (1992) *Public Law*, 40; and Barendt, op. cit. note 5.
  - 12 Schauer, Frederick, *Social Foundations of the Law of Defamation: A Comparative Analysis* in (Barendt (ed)) *Media Law* (Dartmouth, Aldershot, 1993) 264.
  - 13 See, for example: *Columbia Broadcasting System v Democratic National Committee* (1973) 412 US 94 where the Supreme Court denied the public interest supported any right to have paid political announcements broadcast; and *Miami Herald Publishing Co. v Tornillo* (1974) 94 SC 2831 where the Supreme Court held that a state "right of reply" statute violated the freedom of the press protection in the Bill of Rights. See, also, however, *Columbia Broadcasting System v Federal Communication Commission* (1981) 453 US 367, where the Supreme Court upheld an affirmative right of reasonable access to broadcasting stations for candidates for federal office.
  - 14 Bollinger, Lee C., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media* (1976) 75 *Michigan Law Review*, 1. A recent example of such press behaviour involved the 1992 General Election in the United Kingdom, (the UK). A

Professor Barendt, in a recent comparative review of the approach to freedom of expression issues in the USA and in the European Union (and especially in Germany), summarizes the achievements and drawbacks of the American approach as follows.

Achievements:

- severe restrictions on press silencing and on prior restraint practices;
- restrictions on the scope for defamation actions to silence the press; and
- protection of speakers from hostile audiences.

Drawbacks:

- no limits on the wealthy using their economic power to influence electoral politics;
- hostility to legislation aimed at equalizing expression opportunities;
- hostility to regulation of content (for example, hostility to anti-hate-speech laws); and
- seriously enfeebled regulation of content on the broadcast media.<sup>15</sup>

Some commentators go so far as to say that, functionally, the processes of control in the West of the media are comparable with those which used prevail in Communist Eastern Europe.<sup>16</sup> This overstates the position; the fact that such commentators can freely make such claims establishes this. The general thrust of this comparative observation is sound, however. The "free press" in the West is free only according to a definition of "free" shaped by numbers of deforming influences.

Now that we have considered the fundamental principles underpinning the concept of freedom of the press and have considered some general problems related to the application of those principles, we can proceed to review freedom of the press in Hong Kong.

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new study has estimated that deliberate distortion of Labour Party policy by the Conservative Party supporting "Sun" newspaper in the UK may have helped gain the Conservative Party 23 more seats in the House of Commons than the Conservative would otherwise have won. See, *Wot won it?* The Economist, November 4, 1995, 62. See, also, Fiss, op.cit. note 10, 190.

15 Barendt, op. cit. note 5, 69-72. See, also: Bollinger, Lee C., *Images of a Free Press* (University of Chicago Press, Chicago, 1991); and Gibbons, Thomas, *Regulating the Media* (Sweet and Maxwell, London, 1991).

16 Pilger, John, *Distant Voices* (Vintage, London, 1992) 11-12.



### 3.0 Freedom of the Press in Hong Kong

#### 3.1 An Overview of the Hong Kong Media

The Hong Kong press has 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."<sup>17</sup> In particular, its influence beyond Hong Kong, and especially amongst the overseas Chinese, who number perhaps 60 million, is very strong.<sup>18</sup>

The media in Hong Kong can be divided into several broad groups.<sup>19</sup> The most obvious division is between the English language media (both press and broadcast) and the Chinese media. In the lead-up to 1997, the Hong Kong focused English language press remains reasonably robust although signs of some self-censorship are evident. The two principal outlets are the daily newspapers, the South China Morning Post and the Hong Kong Standard. The major regional periodical in English is the Far Eastern Economic Review. Other regional publishers in English include the Asian Wall Street Journal and the International Herald Tribune. Self-censorship is more established within the English language electronic media than within the press.<sup>20</sup> Rupert Murdoch dropped the BBC international television service from STARTV in order to improve relations with China. In 1993, TVB (one of Hong Kong's two terrestrial television broadcasters operating principally in English) decided not to broadcast a documentary on Chairman Mao's private life and ATV (the second Hong Kong, mainly English television broadcaster) dropped a scheduled documentary on the 1989 Tiananmen bloodshed.<sup>21</sup> Hong Kong also has a public broadcasting authority, Radio Television Hong Kong (RTHK). RTHK runs a number of English language and Chinese language radio stations. RTHK also produces regular television programmes which are shown on commercial television (both English and Chinese). As 1997 has drawn closer, there is

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17 Bonnin, op cit. note 3.

18 Ibid.

19 See, for further discussion of these divisions, Chan, Joseph Man and Lee, Chin-Chuan, *Shifting Journalistic Paradigms: Editorial Stance and Political Transition in Hong Kong*, (1989) 117 China Quarterly, 98.

20 Bonnin, op.cit. note 3. The recent demise of the English language Eastern Express newspaper seems explicable in economic terms. It was a major loss-maker for its owners, the Oriental Press Group, who recently have experienced huge decreases in profits. See, *Not a Good Year*, Window, August 16, 1996, 60.

21 Chan, Joseph Man, Lee Chin-Chuan and Lee Paul, Siu-nam, *Fight Against the Odds: Hong Kong Journalists in Transition* in (Lee (ed)), *Media's China, China's Media* (Westview Press, Boulder, 1994).

evidence of self-censorship at RTHK.<sup>22</sup> RTHK remains a government broadcasting unit. Proposals to privatise RTHK have been strongly criticised by the PRC. The PRC see RTHK as a useful mouthpiece which should be retained for use by the HKSAR government. China also believes that a privatized RTHK would be another source of criticism of the PRC.<sup>23</sup>

Within the Chinese press, further broad divisions are apparent. First, there are the explicitly pro-China papers. The most well-known are *Wen Wei Po* and *Ta Kung Pao*. After June 1989, several of these 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.<sup>24</sup> Former staff of these papers have been involved in the establishment of new periodicals critical of China. These periodicals face a most uncertain future after July 1997.<sup>25</sup>

The case of Xi Yang is instructive. Xi Yang was a reporter for *Ming Pao*, a leading independent Hong Kong Chinese daily. The jailing of Xi Yang for 12 years for stealing state secrets in the PRC in 1994 has been one of the most worrying single indicators of what the future may hold for the Hong Kong Chinese press and its personnel. The state secrets involved (advance economic information) could not conceivably justify such a drastic punishment in any developed liberal state. (Xi Yang was released by the PRC government in early 1997 on strict parole conditions.) A more pervasive form of pressure on the Hong Kong media comes from Hong Kong based PRC institutions directing their advertising towards preferred papers in Hong Kong. Self-censorship is now a fact of life for *Ming Pao*.<sup>26</sup> Changes at another leading independent Chinese paper, *Sing Tao Daily*, founded by Aw Boon Haw, the inventor of "Tiger Balm", also suggest that the Chinese press is adjusting to the change of sovereignty. *Sing Tao Daily* took a strong, pro-Taiwan position after 1949. It has now dropped its strong pro-Taiwan editorial line.<sup>27</sup>

The Hong Kong press suffers many ups and downs as a result of economic forces. The competition is unrelentingly fierce and recent price wars

22 Liu Jemow, Allison, *Don't Force Us to Lie: The Struggle of Chinese Journalists in The Reform Era* (School of Law, University of Maryland, Maryland, 1994) Chapter 5.

23 Ibid.

24 See: Bonnin, op. cit. note 3; Liu, *ibid.*; and Lee, Chin-Chuan and Chan, Joseph Man, *Thunder of Tiananmen: The Hong Kong Press in China's Orbit*, in (Lee (ed)) *Voices of China: The Interplay of Politics and Journalism* (Guilford Press, New York, 1990).

25 Liu, *ibid.*

26 Bonnin, op.cit. note 3.

27 *Ibid.* *Sing Tao's* English stable-mate, the *Hong Kong Standard*, enjoyed a short period of simultaneous publication in China but this did not last long. "Tiger Balm" is a mentholated cure-all which is still widely popular and which made a fortune for its inventor.

have been especially savage (and have culled several publications). As 1997 draws closer, the ownership of Hong Kong's media is also changing.<sup>28</sup> The new owners tend to be international entrepreneurs entering the China market and pro-China business people who see the usefulness of the media as a component in "business diplomacy".<sup>29</sup> In the midst this high pressure world, new papers continue to emerge, most notably in recent times, *Pinguo Ribao* (Apple Daily), launched by Hong Kong casual clothing tycoon, Jimmy Lai. The Apple Daily thrives on sensational but fairly thorough coverage and an almost eccentrically independent stance - especially with respect to the PRC.

The rise in self-censorship within the Hong Kong based media is hardly surprising. The government in Hong Kong is also increasingly sensitive to possible reactions from the PRC. This has led to self-censorship to a greater extent than before in government publications and pronouncements and more cautious media-related decision making. It seems the government has decided to shelve its report on changes to Hong Kong broadcasting legislation fearing that it would take too long to negotiate the implementation of changes with the PRC.<sup>30</sup> As one commentator has noted, the overall mood in the media as the changeover approaches is one of apprehension.<sup>31</sup>

### 3.2 Regulation of the Media in Hong Kong

A thorough review of media regulation in Hong Kong would require a book. This Section only summarizes the main features of media regulation in Hong Kong. The purpose here is to sketch the principal aspects of media regulation and to consider how Hong Kong has developed and maintained press freedom.

The reasons why both freedom of expression and its close relation, freedom of the press, are so highly valued were explained in Part 2. The majority of commentators are in agreement that these freedoms are fundamental to preserving the best balance between the rights of the individual and those of the state. In all jurisdictions, neither freedom of expression

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28 Fung, Anthony Y.H. and Lee, Chin-Chuan, *Hong Kong's Changing Media Ownership: Uncertainty and Dilemma*, (1994) 53 *Gazette*, 127.

29 *Ibid.*

30 Wong, Flora, *Leung says Broadcast Bill has not been fixed*, *Hong Kong Standard*, May 27, 1995, 1.

31 Liang, Weixian; *Mass Media Law and the Freedom of the Press* in (Liang and Chen (eds)) *Chuanbofa Xinlun (Media Law in Hong Kong)* (Commercial Press, Hong Kong, 1995) (in Chinese). See, also, Bonnin Michel, *China Can Say No and Does....to its "Troublemakers"* (1996) 8 (November) *China Perspectives*, 4.

nor freedom of the press are absolute. The rights of the state, or the community or, sometimes, minorities within the state, are often found to be in conflict with individual rights to proselytize, publish or broadcast. Hong Kong is no exception in this regard. Although the basic principles underpinning freedom of the press explained earlier do apply in Hong Kong, a range of statutory instruments (and the Common Law) serve to restrict and limit freedom of the press.<sup>32</sup> 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*<sup>33</sup>. For the electronic media, the relevant Ordinances include: the *Television Ordinance (TVO)*,<sup>34</sup> the *Broadcasting Authority Ordinance*,<sup>35</sup> and the *Telecommunication Ordinance*.<sup>36</sup>

The TVO contains powerful provisions which allow the Hong Kong Government: to set standards; to demand (by seeking a court order) to see materials prior to broadcasting; and to prohibit (by seeking a court order) the broadcasting of some materials.<sup>37</sup> These content control decisions can be based on a range of factors including: the effect of a given broadcast on law and order in Hong Kong; the likelihood of a given broadcast to incite hatred against any group based on race, colour, sex, religion, nationality or ethnicity; and the likelihood of a given broadcast to gravely damage public health or morals.<sup>38</sup> 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 offence to communicate false messages. The government may seek a court order to ban certain offensive broadcasts under the *Telecommunication Ordinance*, too. Under the *Film Censorship Ordinance*,<sup>39</sup> the Film Censorship Authority enjoys wide ranging powers, including the power to censor films for cinema or television distribution on grounds of moral offensiveness and social divisiveness.<sup>40</sup>

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32 An excellent review of media regulation in Hong Kong (in Chinese) can be found in Liang and Chen, *ibid.*

33 Cap 268, Laws of Hong Kong.

34 Cap 52, Laws of Hong Kong.

35 Cap 391, Laws of Hong Kong.

36 Cap 106, Laws of Hong Kong.

37 The relevant provisions (prior to recent amendment) of the TVO are summarized in Wesley-Smith, Peter, *Constitutional and Administrative Law in Hong Kong* (Longman, Hong Kong, 1994) 385.

38 Cap 52, Part VI.

39 Cap 392, Laws of Hong Kong.

40 *Ibid.*, Part III.

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. It does have an administrative access to information system in place but it is of limited effect compared to a fully developed FOI law such as applies in the USA, for example.<sup>41</sup> The result is that government can control information flows simply by "sitting" on information in many cases. Secondly, there are what have been described as excessive restrictions on reporting of proceedings in court in Hong Kong.<sup>42</sup> Thirdly, Hong Kong is subject to the *Official Secrets Act* 1989 (UK) (OSA 1989) which prohibits damaging disclosure of any information related to national security or international relations obtained whilst in service by government servants.<sup>43</sup>

Fourth, both the *Public Order Ordinance*<sup>44</sup> and the *Criminal Ordinance*<sup>45</sup> criminalize, often in sweeping terms, a wide range of political activities in certain circumstances. The *Public Order Ordinance* regulates or prohibits: 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, amongst other things. The *Criminal Ordinance* outlaws, inter alia, treason, sedition, incitement to mutiny, unlawful oaths and piracy.<sup>46</sup> In late 1996, it was proposed that the *Criminal Ordinance* be amended, amongst other reasons, to add the crime of "subversion" to this list. Article 23 of the *Basic Law* stipulates that Hong Kong should outlaw subversion. The amendment stresses the need for force to be a factor for any "subversive" activity to be criminally subversive.<sup>47</sup>

41 *Hong Kong Bar Association Annual Statement 1995/96* (Hong Kong Bar Association, Hong Kong, 1996) 68.

42 Wesley-Smith, op. cit. note 37, 381-383.

43 Ibid, 379. The OSA 1989 was applied in Hong Kong by Order in Council in 1992. It lapses with the charge of sovereignty but will be replaced. It is not clear, yet, what its replacement will be. Some commentators have expressed fears its replacement may be modelled on the state secrets laws of the PRC. See Liu, op.cit. note 22.

44 Cap 245, Laws of Hong Kong.

45 Cap 200, Laws of Hong Kong.

46 These provisions are discussed in Wesley-Smith, op. cit. note 37, 395-404.

47 See: Yeung, Chris and Fung, Wai-Kong, *New subversion laws provoke China*, South China Morning Post, November 27, 1996, 1; Ho, Philip and So, Cecilia, *Beijing fury at subversion bill*, Hong Kong Standard, November 27, 1991, 1; and *Comparison between existing and proposed provisions*, Hong Kong Standard, November 27, 1996, 2. Some commentators see this move by the pre-changeover Hong Kong government as an initiative to comply with article 23 of the *Basic Law* using more moderate wording than might apply to any anti-subversion law passed after July 1, 1997. Yeung, Chris, *Patten move carefully calculated*, South China Morning Post, November 27, 1996, 5.

To the extent that the media are involved in reporting any of the activities regulated by the *Public Order Ordinance* or the *Criminal Ordinance* there is a risk that they may also be subject to control where the authorities consider media reporting may be furthering outlawed activities. Thus, the Hong Kong courts granted the government its requested injunction in the "Spycatcher" case in 1987.<sup>48</sup> The South China Morning Post was prevented from publishing extracts from the novel Spycatcher on the grounds of protecting national security and preventing a breach of confidence and a breach of fiduciary duty.

Fifth, further restrictions apply under the *Prevention of Bribery Ordinance*<sup>49</sup> and related Hong Kong anti-corruption Ordinances (the most important recent case in this area is discussed shortly). Sixth, under the *Emergency Regulations Ordinance*<sup>50</sup> the Governor in Council is granted the power to make such regulations as appear to be necessary to maintain public order, suppress rebellion and maintain essential services provided it is established that a public emergency exists.<sup>51</sup> Seventh, the *Police Force Ordinance*<sup>52</sup> has extensive search and seizure provisions. These were used in October 1989 to seize news videotapes from Hong Kong television stations.<sup>53</sup> Eighth, under the *Immigration Ordinance*<sup>54</sup> the government may issue a deportation order where it is conducive to the public good or where, for political reasons, Hong Kong's relationship with another country is affected or to protect the security of Hong Kong.

Another major Ordinance affecting the media is the *Control of Obscene and Indecent Articles Ordinance*<sup>55</sup> This Ordinance replaced earlier legislation but it is hardly less problematic in its application. 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 beholder.<sup>56</sup> The *Post Office Ordinance*<sup>57</sup> is also relevant as it prohibits the posting of obscene or indecent materials. Moreover, the Common Law, in 1962, appeared to create the offence of a "conspiracy to corrupt public morals".<sup>58</sup>

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48 *Attorney-General (UK) v South China Morning Post* (1987) Court of Appeal, Civil Appeal No 114 of 1987.

49 Cap 201, Laws of Hong Kong.

50 Cap 241, Laws of Hong Kong.

51 For further discussion, see Wesley-Smith, *op. cit.* note 37, 397-398.

52 Cap 232, Laws of Hong Kong.

53 Liu, *op.cit.* note 22.

54 Cap 115, Laws of Hong Kong.

55 Cap 390, Laws of Hong Kong.

56 Robertson, Geoffrey, *Obscenity* (Weidenfeld and Nicolson, London, 1979).

57 Cap 98, Laws of Hong Kong.

58 *Shaw v DPP* [1962] AC 220. The control of obscene and indecent materials is discussed in some detail in Wesley-Smith, *op. cit.* note 37, 386-394.

The restrictions outlined above are largely in the public law domain. The media in Hong Kong is subject to private law actions seeking redress for defamation, of course, although such actions in Hong Kong have been comparatively lacking in impact compared to jurisdictions like Australia and the UK. All media operators also are subject to Hong Kong laws related to advertising and copyright.

Finally, it should be noted that Hong Kong 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.<sup>59</sup> Numbers of the Ordinances mentioned above have such provisions. They also occur in other Ordinances such as the *Societies Ordinance*<sup>60</sup>. These reverse-onus provisions do not usually have a direct impact on the media; 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 former than in many Western societies.<sup>61</sup> This is, in turn, appears to have influenced the approach of the courts in Hong Kong, when they have had to decide press freedom questions.

### 3.3 The Bill of Rights and the Basic Law

The *Bill of Rights Ordinance* (BORO)<sup>62</sup> was introduced in Hong Kong with effect from mid-1991 partly as a morale boosting measure in the wake of the events of June 1989 in China. As noted above, it is based on the ICCPR. It contains a number of provisions relevant to the issue of freedom of the press in Hong Kong. It appears likely that it will be amended with the change of sovereignty. The talk is now less that it will be repealed, however.<sup>63</sup> The *Basic Law* is, effectively, Hong Kong's post-1997 Constitution.<sup>64</sup> It, too, contains a number of provisions relevant to freedom of the press in Hong Kong.

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59 Chan, Johannes M. M., *The Legal System* (in Cheng and Kwong (eds)) *The Other Hong Kong Report 1992* (Chinese University Press, Hong Kong, 1992) Chapter 2.

60. Cap 151, Laws of Hong Kong.

61 See, further, Cullen, Richard, *Bills of Rights: Canada Leads, Hong Kong Follows?* in (Angus and Chan (eds)) *Canada-Hong Kong: Human Rights and Privacy Law Issues* (Joint Centre for Asia Pacific Studies, Toronto, 1994) 34.

62 Ordinance 59 of 1991, Laws of Hong Kong.

63 The BORO is discussed in: Ghai, op.cit. note 9; Swede, Richard, *One Territory-Three System? The Hong Kong Bill of Rights* (1995) 44 *International and Comparative Law Quarterly* 358; Allan James, *Hong Kong's Future and the Uncertainty Principle* (1992) *Anglo-American Law Review*, 372; and Cullen, op.cit. note 61.

64 For background on the *Basic Law*, see articles cited at note 2 and note 9.

Article 16 of the BORO says that everyone is to have the right to freedom of expression, which includes the freedom to seek, receive and import information in all forms and through any media. This freedom is qualified by article 16(3) which allows for restrictions provided by law and necessary for the protection of reputations and to protect national security, public order and public health and morals. It is widely recognized in developed liberal states that the application of any restrictions such as those outlined in article 16(3) are subject to a requirement that they be no more restrictive than necessary in the sense of being indispensable. Such restricting laws must also be clear, accessible and fair.<sup>65</sup> Article 27 of the *Basic Law* provides that Hong Kong residents shall have freedom of speech, of the press and of publication. Article 23 of the *Basic Law* requires that the HKSAR pass laws to control sedition, subversion and theft of state secrets, inter alia.<sup>66</sup> The wording of the guarantee of freedom of expression in the *Basic Law* is more abrupt and arguably more narrow in its effect than article 16 of the BORO.<sup>67</sup> Professor Ghai has argued strongly, though, that there are no general and no specific incompatibilities between the BORO and the *Basic Law*.<sup>68</sup> Essentially, these provisions in the BORO and the *Basic Law* codify the general principles underpinning the right of freedom of expression and freedom of the press explained in Part 2.

Thus far, there has been little litigation using the BORO in defence of freedom of the press.<sup>69</sup> What case law there is on the BORO generally, and on freedom of the press in particular, suggests that the judiciary in Hong Kong has a narrow, non-interventionist view of its role in applying the BORO. That is, the courts in Hong Kong (and the Privy Council in London) have been reluctant to invoke the BORO to strike down other laws or to counter executive action except in the more exceptional cases.<sup>70</sup> Moreover, the very cautious views of some senior members of the Hong Kong Judiciary on the worthiness of the BORO are on record.<sup>71</sup>

65 Ghai, Yash, *Freedom of Expression* in (Wacks (ed)) *Human Rights in Hong Kong* (Oxford University Press, Hong Kong, 1992) Chapter 11.

66 See, further, note 47 and accompanying text.

67 Wesley-Smith, *op. cit.* note 37, 380.

68 Ghai, *op. cit.* note 9.

69 The *Basic Law* is not, of course, operational until after 30 June 1996.

70 See, Byrnes, Andrew and Chan, Johannes, M. M., *Recent Case Law Developments* (1993) 2(3) Bill of Rights Bulletin, 1 where the approach of the Privy Council with respect to the BORO is described as conservative rather than purposive. In this respect, the Privy Council has followed the approach of the Hong Kong courts closely. See, also, Cullen, *op. cit.* note 61, where the contrasting approach of the Supreme Court in Canada is examined. The Privy Council will cease to be a court of last resort for Hong Kong after July 1, 1997. It will be replaced by the Court of Final Appeal which is to be established under the *Basic Law*.

71 The then Chief Justice of Hong Kong, Sir Ti Liang Yang, inadvertently, through a publicised indiscreet dinner table conversation made some of his personal views known on this issue in



With respect to the specific issue of press freedom, one case has been taken all the way to the Privy Council. This case involved the newspaper *Ming Pao* and several of its personnel. They were charged with breaching a provision of the *Prevention of Bribery Ordinance* in 1994. Their defences based on article 16 of the BORO were not established according to both the Hong Kong Court of Appeal and the Privy Council. In both courts it was felt that the relevant statutory provisions were reasonable restrictions on press freedom in the public interest.<sup>72</sup>

#### 4.0 The Change of Sovereignty

##### 4.1 Areas of Sensitivity

It is not a matter of great mystery as to what areas are most sensitive in terms of news reporting with PRC authorities. It is less clear what the rules are with respect to defining the boundaries of these areas.

First and foremost on the sensitivity list, based on the comments of Lu Ping, Director of the Hong Kong and Macau Affairs Office, is advocacy of acts which could be considered subversive or seditious. Lu Ping has said that the people of Hong Kong can disagree with and criticise mainland policies and may express opposition to the mainland government but if the press begins to advocate activities deemed to be subversive this is another matter. He also pointed to the laws banning seditious activities currently applying in Hong Kong.<sup>73</sup> The obvious problem with this announcement (and similar ones) is that just when "reporting" (allowed) becomes "advoc-

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late 1995. He feels that the BORO may have undermined the Territory's legal system. See: Fung, Wai-Kong and Won, Louis, *Top Judge "backs China stand"*, South China Morning Post, November 13, 1995, 1; Yeung, Chris, *Sparks fly as Chief Justice states case*, South China Morning Post, November 18, 1995, 1; and *Statement of Chief Justice*, South China Morning Post, November 18, 1995, 6. These remarks by the Chief Justice were made in the context of the debate over a proposal supported by China to amend the BORO with effect from 1997 purportedly to reduce its effects. Shortly after the Chief Justice's views were revealed, they were reinforced by another judge of the Hong Kong Court of Appeal, Mr Justice Liu, who said the BORO had had an adverse impact on the Territory's legal and judicial systems and that it was good for criminals. See Law, Connie, *Top Judge condemns rights bill*, South China Morning Post, November 14, 1995, 2. Sir Ti Liang Yang has now resigned as Chief Justice. He declared himself a candidate for the position of Chief Executive Officer (CEO) of the HKSAR. The CEO will be head of the HKSAR government. He was unsuccessful in his bid to become CEO.

72 See, *Ming Pao Newspapers v Attorney General* (1996) 6 HKPLR 103 and commentary in Byrnes, Andrew and Chan, Johannes M.M. (eds) *Editorial and Right to Freedom of Expression* (1996) 4(1) Bill of Rights Bulletin, 1 and 51. The appeal by *Ming Pao* and its staff to the Privy Council succeeded on other more technical grounds.

73 Yeung Chris, *Lu clarifies position on press freedom*, South China Morning Post, June 6, 1996, 1.

cacy" (not allowed) is far from clear. Clearly writing (or broadcasting) expressed opinions in favour of Hong Kong independence or independence for Taiwan or Tibet are squarely within this post-1997 proscribed area. Reporting on any such advocacy, most likely in the case of Taiwan, remains problematic but not specifically identified as similarly not acceptable. In general, the territorial integrity of the PRC is a goal strongly sought and widely shared in China and, also, in Taiwan. This visceral belief in maintaining the integrity of the motherland is more than simply a policy of the Chinese Communist Party (CCP). It is an article of faith for the CCP. But it also is an article of faith for many ordinary Chinese.<sup>74</sup> A related sensitivity relates to reporting on ethnic groups in China, of which there are many. Any reporting which deals with tensions amongst the minorities presents real difficulties. Lu Ping's concern is, of course, not new. In *Dennis v US*,<sup>75</sup> in 1951, the Supreme Court of the USA drew a distinction between *discussion* and *advocacy* of violent overthrow of government. It held that the discussion of Marxism as an academic issue in the Universities was not criminal but advocacy, that is, to plan or set in motion illegal acts against the government, was. *Dennis* was not followed in the USA precisely because the distinction drawn between discussion (reporting in Lu Ping's words) and advocacy is a distinction without a difference. Later cases in the USA found that the *Dennis* formulation punished expression regardless of the likelihood of the result advocated.

Perhaps next in the hierarchy of sensitivities comes the governing structure of the PRC. This includes the CCP, the government and the political leaders. Attacking corruption, incompetence and abuse of power is tolerated, indeed, encouraged to a degree in the PRC but attacking the very structure itself, whether through criticism of the fundamental systems of governance or criticisms of the senior political elite still provokes harsh and sometimes brutal responses.<sup>76</sup> Any discussion of topics related to national security in the PRC or to the PRC military involves dealing with further highly sensitive areas. Related to this zone of concern is the general matter of state secrets. State secrets are so widely defined as to sweep all sorts of otherwise prosaic materials into this vague category. Then there is the issue of essentially non-political, sensitive information; usually sensi-

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74 Anyone in any doubt about the power of this sentiment only needs to reflect on the recent angry reaction across Hong Kong, Taiwan, overseas Chinese communities and the PRC to Japanese activity on the disputed Diaoyu Islands in the East China Sea. See, Palpal-latoc, Lucia and Wong, Vivian, *Envoy warns Diaoyu protesters*, Hong Kong Standard, September 6, 1996 1.

75 (1951) 341 US 494.

76 Fu H.L. and Cullen, Richard, *Media Law in the PRC* (Asia Law and Practice, Hong Kong, 1996) Chapter 2.

tive economic information. Such information often, if not usually, will be a state secret as well as an economic secret meaning that the penalties which may apply for any breach of the rules can be particularly severe.<sup>77</sup> The case of Xi Yang discussed above shows how drastic can be the consequences. Individual rights issues are another area of real sensitivity which can become especially so according to the shifting winds of international politics.

At a more day to day level, media operators and personnel commenting on matters in the PRC need to be cognisant of controls applying in a range of other areas including: defamatory reporting; copyright infringement; advertising content; obscene or indecent materials; religious or feudal materials; and materials dealing with superstitious practices. Additionally, there are controls on the reporting of crime and any excessive depictions of violence or publications in any way sanctioning criminal behaviour.<sup>78</sup>

The PRC government is a nervous government. It has the task of managing what at times seems unmanageable; the World's largest every nation. And a nation which despite major strides, remains tragically deprived (and unstable) in many regions. It is a government in a nation which has no institutional methods of achieving broad changes of government peacefully. Several millenia of recorded Chinese history testify to this political reality. The political-economy of the PRC is also permeated by massive problems of corruption. And the entire country is under constant scrutiny from not always understanding let alone friendly outsiders. These political realities do not excuse the vague and moody list of sensitivities noted above. They do help us understand their existence and intensity, however.

## 4.2 Language of Expression

It is not surprising to discover that the English language Hong Kong press, though not immune from self-censorship, remains comparatively more forthright in expressing views on controversial topics. The Hong Kong Chinese press write in the far more accessible Chinese script. It is these papers which "travel" into China constantly either with visitors or through smuggling. It is amongst the Hong Kong Chinese press that techniques of self-censorship are most well developed because the need is greater. The broadcast media in both languages has found it necessary to become more watchful than before. Their signals can be directly received by over 50 million Chinese on the mainland for one thing. It is the owners of the Chi-

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77 *Ibid.*, Chapter 6.

78 *Ibid.*, Chapters 8, 9, 10 and 11.

nese print and electronic media who also harbour the strongest desire to break into the mainland market.<sup>79</sup>

### 4.3 Location of Activity

Foreign reporters and news agencies are subject to strict regulation in the PRC.<sup>80</sup> Breaches of the stringent registration requirements and exceeding authorized permission to report can and do result in expulsions and banning orders for foreign reporters.<sup>81</sup> Following the change of sovereignty, the HKSAR will remain a separate, highly prosperous enclave within the PRC with its own legal system and history of press freedom. Writing about the PRC from Hong Kong will be subject to greater risks and challenges than was the case under British rule, however.

There have always been restrictions placed by the British on political activities in Hong Kong including those manifested in the media. These have been designed to stem the growth, inter alia, of both left-wing forces (especially during the Cultural Revolution in China)<sup>82</sup> and nationalist political forces from Taiwan. Indeed, one leading commentator argues that the British and the Chinese have had an unspoken agreement on such matters since the 1950s.<sup>83</sup> The array of controlling laws summarized above is partly a product, of this unspoken agreement. Many are concerned that these laws may be applied with significantly more vigour in Hong Kong after July 1997.<sup>84</sup>

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79 Liu, op.cit. note 22.

80 See: State Council, *Foreign Reporters and Foreign Branch News Agencies Management Regulations* (19 January, 1990); and Central Propaganda Department and Hong Kong and Macau Affairs Office *Matters Concerning Reporters From Hong Kong and Macau in Covering News On the Mainland* (18 September, 1989). More recently, the relaying of economic information about China by foreign reporters has been made subject to additional controls. See, New China News Agency, *Administration of the Release of Economic Information Inside China by Foreign News Agencies and Their Subordinate Information Organizations* (15 April 1996). See also, Fu and Cullen, op.cit. note 76, Chapter 5.

81 Liu, op.cit. note 22.

82 The Great Proletarian Cultural Revolution lasted for approximately 10 years in China. It was launched by Chairman Mao Zedong in 1966 and was most intense until 1969. It has aptly been described as one of the most tragic episodes in human history. See, further, Chen, Albert, Hung-ye, *An Introduction to the Legal System of the PRC* (Butterworths, Singapore, 1992) Chapter 3.

83 Miners, Norman, *The Government and Politics of Hong Kong* (Oxford University Press, Hong Kong, 1991) 6.

84 Liu, op.cit. note 22.

#### 4.4 Nationality of Media Personnel

Those who do fall foul of PRC authorities in media related (and other) cases are most likely to receive more severe punishment if they are PRC citizens or have recently been PRC citizens. The change of sovereignty means that, notwithstanding the uncertainties surrounding the HKSAR residency rules, Hong Kong Chinese will much more readily be classifiable as PRC citizens whether reporting from the mainland or from Hong Kong.<sup>85</sup> Media personnel may need to make some careful decisions on declaring their "nationality" where they hold multiple travel documents. Declaring oneself as Canadian, for example, should provide consular protection in China. But this same declaration will have implications for that person's residence status in Hong Kong. There is not space to canvass the complexities of the residency rules affecting Chinese and non-Chinese residents and former residents of Hong Kong. In brief, China has agreed to a compromise to overcome difficulties related to the strictness of the *Nationality Law* 1980 of the PRC. Persons residing in Hong Kong, including those who are Chinese, who hold multiple travel documents may continue to do so without breaching the *Nationality Law* provided they leave and enter the HKSAR and the PRC using HKSAR or PRC travel documents (and provided they do not claim any consular protection from their "offshore state" whilst in the HKSAR or the PRC). The relevant provisions of the *Basic Law* governing residency matters are to be found, principally, in article 24. The *Basic Law* provisions provide only a framework, however. A decision of the Standing Committee of the National People's Congress, in May 1996, has clarified their significance to some degree.<sup>86</sup> The essence of this decision is the compromise described above.<sup>87</sup>

#### 5.0 Conclusion

Hong Kong, despite some severe statutory and administrative provisions potentially threatening free expression, has enjoyed a remarkable level of press freedom. This has helped give rise to a very high density of local publications. Moreover, regional print and broadcast operators have found Hong Kong a particularly good place to locate. The press freedom enjoyed

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85 Ibid.

86 Standing Committee of National People's Congress, *Decision Concerning the Interpretation of the Implementation of the Chinese Nationality Law in Hong Kong* (23 May 1996).

87 For further discussion see: Ghai, Yash, *Nationality and the Right of Abode* (1996) 26 Hong Kong Law Journal, 155; and Finder, Susan, *The Status of Hong Kong Compatriots Under Chinese Law* (1996) 26 Hong Kong Law Journal, 234.

in Hong Kong combines with its pivotal geographical location and excellent travel, communication and general facilities to make it especially attractive to such operators. Although the courts have not been overly keen to support press freedom come what may, this has not been a serious problem for the media so far.

The change of sovereignty means Hong Kong will become part of the PRC. There is little question that the long list of sensitivities related to things like the legitimacy of structures of governance in the PRC, national security, state secrets, economic secrets, human rights and the territorial integrity of China will all need to be more carefully borne in mind by media personnel and operators in the HKSAR. This caution applies particularly to the Hong Kong Chinese media and to Chinese citizens (or former Chinese citizens) involved in reporting for the Hong Kong media, especially from the mainland itself. As the changeover date approaches, the media in Hong Kong and particularly media personnel are apprehensive. Given the track record of the PRC on press freedom they are right to be. Moreover, Hong Kong already has an array of powerful laws for controlling expression. They have not often been used to suppress expression in more recent times but there is concern that their use may increase significantly after July 1997.

The HKSAR will exist as a separate, highly prosperous enclave within the PRC, however. Both the formal documentation such as the *Basic Law* and reinforcing economic and political factors indicate that this will be so. The PRC has vast investments in Hong Kong and has used Hong Kong as a window on the world and, over the last decade plus, as its principal source of capital. Trade with and through Hong Kong is huge. Remittances to the PRC from mainlanders prospering in Hong Kong are increasingly significant. The PRC knows that the eyes of the world will be upon China as never before with respect to this unique political experiment. The PRC wants to make the process of Hong Kong's transition as successful as possible. Apart from the array of economic benefits which will flow from Hong Kong's continued prosperity, there is the further deep ambition of China to show the World - and especially Taiwan - that the HKSAR can be absorbed into the PRC smoothly and successfully.

These political and economic factors cannot *guarantee* continued stability and prosperity for Hong Kong. They combine with the formal documentation to remind us that few have ever made their fortune betting against Hong Kong, however. Of course, even if stability and prosperity are sought and maintained this does not mean that freedom of the press will not suffer. Singapore, often held up as a model society in the PRC, has combined exceptional prosperity for its citizens with an authoritarian -

democratic structure. Nevertheless, freedom of the press is a concept that enjoys significant momentum in Hong Kong. The Hong Kong's media's current practice of self-censorship on sensitive issues may not necessarily be the "thin of the wedge". These adjustments could prove to be no more than adequate insurance. Certainly, it is far too early to write-off press freedom in Hong Kong. There is no doubt that maintenance of reasonable freedom of the press will be seen as a key test of the success of the changeover.<sup>88</sup> Hong Kong knows this, China knows this and the World knows this. The sensitivity of the issue of press freedom explains both the vulnerability of freedom of the press in the HKSAR and its strongest guarantee of continuity.

The Hong Kong Chinese are the principal explanatory factor behind the remarkable achievements of Hong Kong. Hong Kong residents have created an open and comparatively very free society that has seen per capita gross domestic product rise from below that of India to more than that of Australia inside two generations. The Hong Kong Chinese also will be responsible, to a very significant degree, for the Hong Kong that evolves after July 1997. The influence of the PRC clearly will be far greater after the transfer. But the formidable resources of Hong Kong, both material and human, will remain the main shaping influence on the HKSAR. The people of the HKSAR, and especially the privileged sectors of society in business, in government, in the professions, in the academies of learning and in the media will bear the principal responsibility for ensuring the success of the HKSAR. They also will share responsibility for crucially influencing the level of press freedom which will prevail in the HKSAR.

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88 As was noted above, press freedom is never absolute. What is reasonable press freedom is a matter of debate, obviously. The point is that press freedom is not a "have it" or "not have it" issue. The extent of press freedom applying in a given jurisdiction is the product of a balancing of interests. Provided this balancing calculation is not distorted by abuse of power, it should, usually, produce a reasonable outcome.

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