Changing Expectations: How the Rule of Law Fared in the First Decade of the Hong Kong SAR.

By Danny Gittings[1]

It's all too easy to forget the apocalyptic predictions about the future of the rule of law in the Hong Kong Special Administrative Region (HKSAR) that were so common a decade or so ago. Or how many forecast that July 1, 1997 would mark the beginning of the end of Hong Kong's separate legal system.

Take, for instance, then-Democratic Party leader Martin Lee's 1995 prediction that restrictions on the Court of Final Appeal's composition and, especially, on its jurisdiction "rips the rule of law into shreds" and would allow Chinese state-owned companies to flout the law with impunity.[2] That pessimistic forecast, like so many others, has proved far off the mark as the first decade of the HKSAR saw the new court instead successfully establish itself as a guardian of Hong Kong's civil liberties.

Add the gradually diminishing number of controversies about the Hong Kong government's respect for the rule of law as the decade wore on and it's fair to say that the rule of law—at least when considered strictly in terms of respect for judicial independence and the legal process—survived the first 10 years of the HKSAR far better than many had expected.[3]

But real threats did emerge during that decade, especially due to the National People's Congress Standing Committee (NPCSC) repeated use of its power to interpret the Hong Kong Basic Law, the de facto constitution. And changing expectations also played a part in that generally rosy picture, transforming some issues that had been denounced as outrageous affronts to the rule of law during the late 1990s into widely accepted facts of life in the new millennium.

Perhaps the clearest example was the comparative lack of outrage over the October, 2006 trial of five Hong Kong men in a Shenzhen court for the murder, four years earlier, of Hong Kong tycoon Harry Lam in the Luk Yu tea house in Hong Kong's Central business district.[4] In stark contrast to similar cases in the past, few bothered to ask why the accused were standing trial in a mainland court under Chinese law, instead of being sent back to face justice in the jurisdiction where the killing had occurred.

Chilling Precedents

There was none of the controversy that surrounded the "Big Spender" case in 1998, when Hong Kong gangland boss Cheung Tze-keung and several of his followers were arrested and ultimately executed after being tried in a Guangzhou court for kidnappings and other crimes carried out primarily in Hong Kong.

However horrendous Mr. Cheung's crimes, legislators and prominent lawyers warned then that it set a "chilling precedent"[5] for the future of Hong Kong's separate legal system if China could circumvent the restrictions on how national laws should apply in Hong Kong[6] by simply trying suspects caught on the mainland in its own courts rather than return them for trial in Hong Kong.[7] Then-Secretary for Justice Elsie Leung admitted that the controversy over the "Big Spender" case had shaken public confidence in Hong Kong's judicial system. Her 1998 refusal to seek the return of the suspects for trial in Hong Kong was widely portrayed as a black mark for the rule of law in the early years of the HKSAR.[8]

Fast forward almost a decade and what was condemned as a chilling precedent in 1998 is now generally accepted as inevitable. Although the Shenzhen trial of one of Hong Kong's most famous murder cases in recent years was predictably big news in the local media, there was hardly any interest in the jurisdiction issue. Newspaper editorials criticizing China's insistence on trying the Luk Yu tea house case were conspicuous by their absence. So too were the concerned Legislative Council hearings that took place over "Big Spender."[9] All this despite the fact that evidence in this more recent case argued far more strongly in favor of a Hong Kong trial than had been true in 1998.[10]

Much the same can be said of the NPCSC's exercise of its ultimate power of interpretation under Article 158(1) of the Hong Kong Basic Law. That too was widely seen as a chilling precedent when it first occurred at the request of then-Chief Executive Tung Chee Hwa in 1999, to reverse the effects of two Court of Final Appeal judgments which it was feared would open the floodgates to an influx of children born in China. On that occasion, outraged legislators from the democratic camp dressed in black to mourn what they called the "death of the rule of law" in Hong Kong.

But the NPCSC went on to interpret the Hong Kong Basic Law twice more during the first decade of the Hong Kong SAR. In 2004, it intervened to help Mr. Tung resist pressure for rapid moves toward more democracy in the 2007 and 2008 elections for Chief Executive and the Legislative Council respectively. In 2005, it intervened again, at the request of then-acting Chief

Executive Donald Tsang, to confirm that he would initially only serve the remaining two years of the departed Mr. Tung's full term as his successor, rather than begin a full five-year term as clearly stipulated in the Basic Law.

Although outrage over NPCSC interpretations did not disappear, it never again reached the level of 1999.[11] That was true even in 2005 when, unlike on the two previous occasions, the NPCSC's power of interpretation was explicitly used to halt a pending court case.[12] Once again, what had been seen as an outrageous affront to the rule of law in the early years after the 1997 handover was increasingly accepted, nearly a decade later, as a reality that—like it or not—the Hong Kong legal system would have to live with.

Birth of a New Court

Nor were there the same predictions about the death of the rule of law, a prediction which, as we've seen, turned out to have been much overused. The issue that had most exercised Mr. Lee and others back in 1995, an ambiguous definition of the "acts of state" that lie beyond the jurisdiction of the Hong Kong courts,[13] turned out to be a non-issue. During the first decade of the HKSAR, not a single Chinese state-owned enterprise sought to exploit this ambiguity to escape the jurisdiction of local courts, as Mr. Lee and others had feared they would. The only defendant who tried to do this, a Hong Kong businessman jailed for false accounting in connection with his dealings with a Chinese-state owned enterprise, ended up being ushered out of the Court of Appeal by police after the court refused to entertain his argument that the case was covered by the act of state exemption.[14]

It was a similar story when it came to the composition of the Court of Final Appeal—something which generated more controversy than almost any other legal issue in the run-up to July 1, 1997. Throughout much of the 1990s, bitter arguments raged over China's insistence on restricting the number of overseas judges who could be invited to sit on the new court to a maximum of one. That seemed to contravene the more flexible wording of Article 82 of the Hong Kong Basic Law, which specifically referred to the court's right to invite overseas "judges" in the plural. As a result, a first Sino-British agreement providing for such restrictions was rejected by the Legislative Council in 1991, and the legislation enacting a second such agreement only passed after a bitter debate in 1995.

That meant the establishment of the court, which had originally been expected to replace the Judicial Committee of the Privy Council in London as the final court for appeals on Hong Kong cases in the early 1990s, was

delayed until July 1, 1997. This delay was accompanied by dire predictions that the restrictions on the court's ability to invite overseas judges with experience of hearing final appeals elsewhere in the common-law world would render the new court almost still-born.

Once again, such fears proved unfounded. The restrictions on the court's composition have not stopped renowned overseas jurists from being invited to join the court for almost every case it has heard. Several have delivered leading judgments and made a sufficient impact to draw the ire of one prominent pro-China politician, who graphically denounced them as "parachute judges" in 2000.[15] In any history of the first 10 years of the Hong Kong SAR, a special chapter must surely go to the successful establishment of the Court of Final Appeal in the face of such widespread skepticism, and the degree to which it has since cemented its reputation both at home as well as elsewhere in the common law world.

Tensions with Beijing

Where the critics were right is in forecasting that Beijing would have difficulty learning to live with a court that—unlike its counterparts on the mainland—takes seriously the concept of judicial independence. With the benefit of hindsight, it was probably unwise for the court to pick a fight with Beijing in the first case it heard concerning the Basic Law, especially over an issue that was not necessary to decide the case. Its January 1999 declaration in the right of abode case of *Ng Ka Ling v. Director of Immigration*[16] that the court had the power to invalidate actions of the National People's Congress and its Standing Committee if they breached the Hong Kong Basic Law provoked the worst constitutional crisis yet seen in the history of the HKSAR.

In the face of increasingly venomous attacks by Beijing and its local allies, who saw such this as an intolerable attack on the authority of highest sources of constitutional power in China, the court was forced to retreat. Setting aside all the normal rules about the finality of its decisions, the judges took the unprecedented step of elaborating on the subject a month later. Although not formally departing from the substance of its earlier position, that supplementary judgment contained sufficiently deferential language about the supremacy of the National People's Congress and its Standing Committee for Beijing to view it as an apology.[17]

Further damage to the finality of its judgments swiftly followed. The court had also sought to enhance its authority by refusing to refer one of the

substantive issues in the case to the NPCSC before delivering judgment, even though a literal reading of Article 158(3) of the Hong Kong Basic Law would have seemed to require it to do so. But the end result of such defiance was to undermine its authority instead. Arguing that Hong Kong would be unable to cope with the mass influx of mainland migrants that the court's judgment would allegedly bring, Mr. Tung simply asked the NPCSC to intervene after the case was over.

That June, 1999 interpretation not only overruled parts of the court's ruling,[18] but also established the NPCSC's right to interpret any part of the Basic Law at any time, including those provisions which are supposed to fall within Hong Kong's autonomy. A chastened court was, by this time, in no position to resist, accepting that it was bound by NPCSC's unlimited power to interpret the Basic Law in *Lau Kong Yung v. Director of Immigration*[19] six months later. That rapid retreat was memorably described by Professor Jerome Cohen of New York University, a long-standing expert on the Chinese legal system, as the court veering from being "unnecessarily provocative" to the opposite extreme of having "unnecessarily prostrated itself before Beijing" within less than a year.[20]

That impression was reinforced two weeks later when the court ducked another confrontation with Beijing over a localized version of a mainland law criminalizing desecration of the national flag.[21] A lower court had held this law violated the human-rights protections in the Basic Law. But, citing then-Chinese President Jiang Zemin, the Court of Final Appeal took a different view, adopting an expansive view of the permissible restrictions on such civil liberties in the case of *HKSAR v. Ng Kung Siu*.[22]

But predictions that the court's authority had been fatally undermined proved premature. Instead, the judges were simply waiting for tensions with Beijing to cool. By 2001, the court was showing fresh signs of confidence. In *Director of Immigration v. Chong Fung Yuen*,[23] it again ruled in favor of mainlanders seeking the right of abode and refused to apply the NPCSC's earlier interpretation on the grounds that this case involved a different sub-section of the right of abode provisions in the Basic Law.[24] That provoked an angry retort from Beijing. But, in contrast to the events of 1999, no action was taken to overrule the effects of the judgment—so chalking up a much-needed victory for the court.

By 2005, the court was firmly back in its stride, taking an expansive view of civil liberties rather than the restrictions on them. In *Leung Kwok Hung v. HKSAR*, it sided with one of Beijing's most vehement critics in striking out

of the Public Order Ordinance the same reason for restricting freedom of assembly that it had accepted as justification for outlawing desecration of the national flag six years earlier.[25] Far from citing from President Jiang, in *Yeung May Wan v HKSAR*[26] the court defended the right of Falun Gong followers in Hong Kong to protest the oppression he had unleashed against them—even chiding a lower court for taking too long to decide the case.

As a result of cases such as this, few would deny that, after some initial wobbles, the protection of Hong Kong's civil liberties is now in safe hands as far as the Court of Final Appeal is concerned. The court's readiness even to defend the rights of Falun Gong protesters is particularly striking. Banned on the mainland since 1999, the group's continued activities in Hong Kong were one of the most persistent sources of tension with Beijing during the first decade of the HKSAR.

Mixed Track Record

The Falun Gong issue also highlights the gulf between the judiciary's determination to uphold the rule of law and the executive branch of the Hong Kong government's more mixed record on this front during this first decade. From denouncing the Falun Gong as an "evil cult" to barring many of its followers from entering Hong Kong, the government's emphasis was on placating Beijing rather than upholding the group's continued right to exist in Hong Kong under one country, two systems.

The nadir came in 2002, when a provision that would have allowed Hong Kong authorities to ban the Falun Gong was slipped into proposals ostensibly aimed at implementing Article 23 of the Hong Kong Basic Law. Never mind that Article 23, which stipulates specific offences such as treason, subversion, secession and sedition, contains nothing requiring such a ban.[27] Or that the proposal, by allowing any ban imposed on an organization on national-security grounds on the mainland to be replicated against affiliated bodies in Hong Kong,[28] ran the risk of importing the mainland's harsh definitions of national security—and suppression of peaceful protests—into Hong Kong.[29]

Being able to ban Beijing's critics was considered so crucial that the Tung administration refused to back down for nine long months,[30] greatly contributing to the mounting opposition against the Article 23 legislation as a whole. Only after more than half a million people took to the streets on July 1, 2003, in a protest triggered by a combination of concern about the proposed legislation and general dissatisfaction with the Tung administration,

did it finally agree to abandon this particular proposal. By that stage, the government no longer had enough votes in the Legislative Council to pass the National Security (Legislative Provisions) Bill, leaving no choice but to indefinitely postpone efforts to enact Article 23 legislation.

Nor was this an isolated example of the Hong Kong government's questionable commitment to the rule of law during the first decade of the Hong Kong SAR. Ms. Leung, who served as Secretary for Justice from 1997 to 2005, repeatedly caused concern by refusing to prosecute in politically-sensitive cases. As a result, the Hong Kong branch of Xinhua news agency, which had long served as Beijing's main representative office in Hong Kong, went unpunished in 1998 for a breach of the Personal Data (Privacy Ordinance).[31] So too did former Financial Secretary Antony Leung, after he resigned in disgrace in 2003 over his purchase of a Lexus saloon shortly before raising the tax on luxury cars in the annual budget.

None of these decisions caused more concern than another refusal to prosecute in 1998, this time of Sally Aw, the chairman of Sing Tao Publishing Group, over a circulation fraud at the Hong Kong Standard, one of the papers owned by her group. Ms. Aw, a member of the Chinese People's Political Consultative Conference, was friendly with the Tung family. Ms. Leung only made matters worse when she sought to defend her decision two years later, by arguing that prosecuting Ms. Aw could her led to the collapse of her group's newspapers. That left the perception of one law for ordinary people and another law for newspaper owners, and prompted a no-confidence motion against Ms. Leung in the Legislative Council that was only narrowly defeated.

Perhaps most damaging of all was the government's willingness to invite interference in the local legal system by seeking interpretations of the Basic Law from the NPCSC. Although much of the outrage may have died down by 2005, in many respects that year's interpretation was the most troubling of all. For the first time, the Hong Kong government explicitly discarded the common-law principles of interpretation used by the courts, in favor of instead interpreting parts of the Basic Law according to the more flexible principles that apply under the mainland legal system.[32]

That allowed the government to fall in line with Beijing's wishes[33] and overcame the obstacle of giving an initial two-year term to Mr. Tung's successor when Article 46 of the Basic Law clearly stipulated a five-year term. But it did so at the price of raising questions about which legal system the Hong Kong government was now committed to protecting and what

fundamental rights might end up being restricted if the provisions on civil liberties in the Basic Law were now also interpreted according to the mainland's more flexible rules.[34]

Cautious Optimism

Despite all these troubling developments, by the end of the first decade of the HKSAR it was possible to be cautiously optimistic about the Hong Kong's government's commitment to the rule of law. The change in Chief Executive that prompted the row over whether Mr. Tsang should initially serve a two- or five-year term was followed within a few months by Ms. Leung's departure as Secretary for Justice. The appointment of politically low-profile barrister Wong Yan Lung as her successor brought rare praise from the democratic camp, who remembered Mr. Wong's presence on protests against previous NPCSC interpretations, and welcomed his repeated declarations that he hoped there would be no more such interpretations in future.[35]

Since then, controversies over legal issues have been rare. When challenged in the courts over the lack of proper regulation of covert electronic surveillance of criminal suspects, the government—instead of asking the NPCSC to intervene—introduced a bill that, for the first time in Hong Kong's history, ensured that bugging and telephone tapping would be regulated by law.[36] Learning from their mistake in the "Big Spender" case, the government also asked mainland authorities to return the Luk Yu teahouse suspects to stand trial in Hong Kong. However, it then proceeded to defend Beijing's rejection of this request in a telling reminder of where real power lies in determining the fate of its legal system.[37]

From insisting on exercising jurisdiction over crimes committed in Hong Kong to the NPCSC's repeated interpretations of the Basic Law, mainland authorities played a major role in many low points for the rule of law during the decade. Yet credit must also go to Beijing for avoiding the worst excesses that had been the subject of those pre-1997 apocalyptic predictions.

The Chinese state-owned companies whom Mr. Lee and others had feared would use "acts of state" exemption to escape the jurisdiction of the Hong Kong courts would doubtless have been only too happy to try had they been given the green light to do so by Beijing. So too would the People's Liberation Army garrison in Hong Kong, whose legal status was another cause of much pre-handover concern. Instead, in March 2006, the garrison allowed one of its soldiers to be tried and convicted in Tsuen Wan

Magistrates' court after he was caught stealing a key ring at Hong Kong Disneyland.[38]

In a more positive sense, Beijing deserves credit for allowing the 2005 appointment as Secretary for Justice of a friend of the pro-democracy camp and opponent of previous NPCSC interpretations.[39] Such an appointment would have been unthinkable only a few years earlier, when mainland authorities were publicly demanding that the Secretary for Justice and other Hong Kong officials follow their lead in banning the Falun Gong.

But the Chinese leaders that acquiesced in Mr. Tsang's choice as Secretary for Justice, as well as his own replacement of Mr. Tung as Chief Executive earlier in 2005, came from a different generation than those responsible for those earlier denunciations.[40] Just as expectations have changed in Hong Kong over the past decade, it is also possible to see signs of a change in perceptions on the other side of the border.

The lack of reaction to the Court of Final's more recent rulings suggests a recognition that, like it or not, Beijing has learnt to live with the reality of an independent judiciary in Hong Kong. Perhaps, too, at a time when Chinese leaders are increasingly talking about the need to build respect for rule of law on the mainland, they realize that it ill behooves them to undermine the same concept in Hong Kong.

In coming years, the future of Hong Kong's separate legal system will continue to depend as much on events in Beijing as it did during the HKSAR's first decade. But, judging from the events of the past few years, there are good grounds for at least modest optimism.

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[2] Martin Lee, *Courting Disaster* (South China Morning Post, 14 June 1995).

[3] A broader consideration of respect for the rule of law would also need to take into account other factors, especially whether Hong Kong people are allowed to elect their leaders. For an excellent account of the

lack of progress on democratization during the first decade of the HKSAR see Anson Chan, *A Feasible Road to Democracy* (Hong Kong Journal, January 2007, Issue One). Due to lack of space, the HKSAR's track record on democratization during the past 10 years is not discussed in this article.

[4] The five were tried together with three mainland accomplices. At the time of writing, the Shenzhen Intermediate People's Court had not announced verdicts in the case.

[5] See, for instance, Chris Yeung and Billy Wong Wai-yuk, *'Chilling' Big Spender precedent* (South China Morning Post, 28 October 1998).

[6] Under Article 18 and Annex III of the Hong Kong Basic Law, only a few national laws are supposed to apply in Hong Kong. These do not include the Chinese Criminal Law, under which the suspects in both the "Big Spender" case and the Luk Yu tea house killings were tried.

[7] Although there is no formal rendition agreement between Hong Kong and the mainland, Chinese authorities have long used an informal arrangement to return Hong Kong suspects caught on the mainland to stand trial in Hong Kong for crimes committed there. However, in both the "Big Spender" case and the Luk Yu tea house killings, China argued that since preparations for the crimes had been carried out on the mainland it had the right to exercise jurisdiction over the cases instead of returning the suspects to Hong Kong. China has also frequently complained that the lack of a formal rendition agreement means that suspects who flee to Hong Kong after committing crimes on the mainland can not be sent back to stand trial on the mainland.

[8] See, for instance, Steve Tsang, *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong University Press, 2001) at pp. 8 and 69. Similar concerns were also raised about another 1998 case, the trial and execution of Li Yuhui in Shantou for five murders carried out at the Telford Gardens estate in Hong Kong. However this case was complicated by the fact that Mr. Li was from the mainland rather than Hong Kong and China has never yet returned any mainlanders to stand trial in Hong Kong.

[9] Democratic Party legislator James To did raise one question on the case in the Legislative Council.

[10] One of the problems in the "Big Spender" case was that the apparent kidnapping of the sons of two Hong Kong tycoons was never officially reported to the Hong Kong police, so raising doubts about whether there was enough evidence to prosecute the case in Hong Kong. This was not a problem in the Luk Yu tea house case, where the Hong Kong police had ample evidence of the crime, and even supplied some to mainland authorities to assist in the prosecution of the suspects.

[11] For instance, an opinion poll by Ming Pao newspaper in April 2005 found majority public support for an NPCSC interpretation on the term of the Chief Executive's office.

[12]The decision to seek an interpretation followed an application for leave to seek judicial review by two members of the democratic camp challenging an amendment to the Chief Executive Election Ordinance concerning the two year term. The court case was abandoned following the NPCSC interpretation.

[13] Article 19(3) of the Hong Kong Basic Law simply refers to "acts of state *such as* defence and foreign affairs" (italics added), making it clear that the exemption is meant to cover more than simply these two areas, without giving any indication as to what else is also included.

[14] *HKSAR v. Cheung Hung Ngai* [1997] CACC666/1995. The appeal court did not have to decide the issue because it had not been raised during the original trial, but nonetheless expressed "very grave doubts" as to whether the acts of state exemption would apply in such circumstances.

[15] See Ma Lik, *A Judgment Found Wanting* (Hong Kong iMail, 5 December 2000) criticizing the leading judgment given by Lord Nicholls of Birkenhead in *Albert Cheng v Tse Wai Chun Paul* [2001] 1 HKLRD 191, which expanded the permissible scope of defences against a defamation action.

[16] [1999] 1 HKLRD 315

[17] In *Ng Ka Ling v Director of Immigration (No. 2)* [1999] 1 HKLRD 577 the court acknowledged it would be bound by any action of the National People's Congress and its Standing Committee "which is in accordance with the provisions of the Basic Law," but carefully avoided saying anything further about what it would do about actions that breach the Basic Law.

[18] In both *Ng Ka Ling* and the related right of abode case of *Chan Kam Nga v. Director of Immigration* [1999] 1 HKLRD 304.

[19] [1999] 3 HKLRD 778.

[20] See Jerome A. Cohen, *Hong Kong's Basic Law: An American Perspective* (International Symposium to Commemorate the 10th Anniversary of the Promulgation of the HKSAR Basic Law, 1 April 2000). Available at www.info.gov.hk/basic_law/upload/977133808/Cohen.doc.

[21] The National Flag and National Emblem Ordinance (No. 116 of 1997), implementing the Law of the PRC on the National Flag and the Law of the PRC on the National Emblem.

[22] [1999] 3 HKLRD 907. The case revolved around the breadth of the concept of "public order (ordre public)," an imprecise term which is listed in the International Covenant on Civil and Political Rights as a permissible reason for restricting many fundamental rights.

[23] [2001] 2 HKLRD 533.

[24] *Chong Fung Yuen* involved Article 24(2)(1) of the Hong Kong Basic Law, whereas the NPCSC's 1999 interpretation referred to Article 24(2)(3).

[25][2005] 3 HKRLD 164. However the court explained that this case differed from its decision in *Ng Kung Siu* because, while both involved the concept of public order (ordre public), the way that this restriction was stated without elaboration in the Public Order Ordinance gave excessive discretion to an executive official to restrict and ban public protests.

[26] [2005] 2 HKLRD 212

[27] For this reason, the government argued that its legislation was also intended to protect China's "essential interests," even where these went beyond those explicitly stated in Article 23 of the Hong Kong Basic Law.

[28] The ban was not supposed to be automatic, but rather at the discretion of Hong Kong's Secretary for Security. However few doubted the Secretary would decline to follow the mainland's lead in banning any particular organization.

[29] The Hong Kong government argued that it already possessed much broader powers to proscribe any local organization under the Societies Ordinance, but was unable to explain why the new power was needed in that case.

[30] By contrast, the Hong Kong government did make important concessions at an early stage over many other parts of the proposed Article 23 legislation, including greatly narrowing the definition of the crime of sedition, so strengthening suspicions that it was initially under orders from Beijing not to give way on the proscription power.

[31] The news agency failed to require within 40 days, as required under the ordinance, to a request from legislator Emily Lau for any personal data it held on her.

[32] The mainland system lays much more emphasis on the original legislative intent, as recalled by the drafters of the Hong Kong Basic Law. By contrast, the common law approach, as set out by the Court of Final Appeal in *Ng Ka Ling* [1999] and *Chong Fung Yuen* [2001] looks at the language of the Hong Kong Basic Law in the light of its context and purpose, and based on closely-argued past case law.

[33] Even before Mr. Tung's resignation was confirmed, several mainland legal scholars and officials publicly stated that this successor should only serve a two-year term.

[34] Evidently aware of these concerns, Ms. Leung told the author, unprompted, at an April 2005 briefing for foreign correspondents that the Hong Kong government would continue to interpret the human-rights provisions in Chapter III of the Hong Kong Basic Law according to common-law principles.

[35] See, for instance, Michael Ng, *Justice Chief Vows to Avoid Interpretation of the Basic Law* (The Standard, 8 March 2006).

[36] For an excellent analysis of this issue, see Thomas E. Kellogg, *A Flawed Effort? Legislating on Surveillance in Hong Kong* (Hong Kong Journal April 2007, Issue Two).

[37] See, for instance, Secretary for Security's reply to Legislator James To's question on the Luk Yu case in the Legislative Council on November 8, 2006 (Hansard, pp. 1638-40).

[38] *Soldier Fined for Shoplifting at Disneyland* (Associated Press, 19 March 2006). Under the Law of the PRC on Garrisoning the HKSAR, criminal offences committed by members of the garrison while they are off duty can be tried in the Hong Kong courts. However the garrison has the right to decide when its members are acting in the course of their official duties, in which case they are not subject to the jurisdiction of the Hong Kong courts.

[39] Although the Secretary for Justice, like all principal officials, is nominated by the Chief Executive, under Article 15 of the Hong Kong Basic Law the final power of appointment rests with the Central People's Government/

[40] Jiang Zemin, who was widely seen as a strong supporter of Mr. Tung was replaced by Hu Jintao as General Secretary of the Central Committee of the Chinese Communist Party in November 2002, and as Chinese President in March 2003.