

The Politics of the Debate over the Court of Final Appeal in Hong Kong

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Before the transfer of Hong Kong's sovereignty from Britain to the People's Republic of China (PRC) on 1 July 1997, the politics of interpreting the Basic Law had already become apparent. This article aims to use the debate over the Court of Final Appeal (COFA), which was set up in July 1997 to replace the Privy Council in Britain as the court of final adjudication in the Hong Kong Special Administrative Region (HKSAR), to analyse how the Basic Law had already been interpreted by PRC officials, their British counterparts and the Hong Kong people.¹ The interpretation of the Basic Law involves many people from both Hong Kong and China. As one legal scholar writes: "In one sense all kinds of people [in the HKSAR] will have to interpret the Basic Law: civil servants and other administrators and lawyers in their day-to-day work, legislators to ensure that their legislation and motions are consistent with it, the State Council [in the PRC], the National People's Congress Standing Committee, even private parties since some provisions affect private acts."² The debate over the COFA may also help towards an understanding of the ongoing interpretation of various provisions of the Basic Law, which serves as the mini-constitution of the HKSAR.

Historical Development of the Debate Over the Court of Final Appeal

The origin of the debate can be traced back to December 1991 when the Legislative Council (LegCo) rejected an agreement reached by Britain and China on the COFA's composition in Hong Kong, mainly on the grounds that the ratio of four local judges to one overseas judge was too rigid.³ According to most Hong Kong lawyers, it was unnecessary to specify the number of overseas judges in the COFA because the British Privy Council did not fix the number of judges on its Judicial Committee.

1. On 22 July 1997, the Chief Executive of the HKSAR, Tung Chee-hwa, appointed 15 judges to serve in the COFA. See *Xingdao ribao* (*Sing Tao Daily*), 23 July 1997, p. 1.

2. Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997), p. 191.

3. The agreement decided the 4 to 1 ratio of local judges to overseas judges. Johannes Chan wrote: "The 4 to 1 ratio restricts the discretion of the Court conferred on it by the Basic Law to decide on the number of overseas judges and is hence in contravention of the Basic Law." See Johannes Chan, "To change or not to change: the crumpling legal system," in Ngaw Mee-kau and Li Si-ming (eds.), *The Other Hong Kong Report 1996* (Hong Kong: The Chinese University Press, 1996), p. 22. The debate over the COFA's composition divided the legal community; see C. K. Lau, *Hong Kong's Colonial Legacy* (Hong Kong: The Chinese University Press, 1997), p. 149. Apart from the rigidity of the agreement, there were other reasons why LegCo rejected it, such as the "violation" of the Basic Law and Sino-British Joint Declaration, the questionable status of the COFA, possible interference from the PRC, the lack of consultation, and the neglect of the interest of Hong Kong people. See Lo Shiu Hing, "The politics of the Court of Final Appeal debate in Hong Kong," *Issues & Studies*, Vol. 29, No. 2 (February 1993), pp. 105–131.

The Bar Association and the Law Society also believed that the COFA's composition and the method of appointing judges to the court should remain flexible.

In March 1995, the Hong Kong government submitted a draft bill to Beijing. However this was criticized by China for failing to incorporate Article 90 of the Basic Law, which states that the Chief Justice of the COFA is a Chinese citizen who is a permanent resident of the HKSAR without the right of abode in any foreign country.⁴ The Hong Kong government under the administration of Governor Christopher Patten then criticized the Chinese side for delay in approving the draft bill. The Chief Secretary of the Hong Kong government, Anson Chan Fang On-sang, hinted that it might have to be tabled to legislators in April 1995 because of the "tight timetable."⁵ Chan implied that the bill should ideally be passed by the LegCo before a new legislature, entirely composed of elected members, was constituted in September 1995.

In response to Chan's remarks, the vice-director of China's New China News Agency in Hong Kong, Zhang Junsheng, warned that any unilateral action by the Hong Kong government on the COFA would violate the Joint Declaration.⁶ At the same time, there was a deadlock in the Sino-British Joint Liaison Group (JLG) which was supervising the implementation of the Joint Declaration initialled in 1984. The Chinese side's leader, Chen Zuo'er, put the blame on the British, complaining that it had taken two years for the draft bill to be finalized since the 1991 agreement.⁷ The British side's representative, Alan Paul, echoed Anson Chan's remarks, saying that the Hong Kong government did not exclude the possibility of unilaterally submitting the draft bill to the LegCo.⁸

As well as this Sino-British procedural dispute, China also had reservations about the draft bill's content.⁹ China asked Britain to specify clearly whether the court's jurisdiction would cover cases concerning breaches of the mainland Chinese constitution. Above all, PRC officials wished to know whether any remedial action would be taken if there was new evidence showing that the court's "incorrect" ruling would have an undesirable impact on Beijing's relations with the HKSAR.¹⁰ They were concerned that the HKSAR courts might interpret the Basic Law in a way that could either undermine the central government's interest or ignore its

4. For Article 90, see *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (Hong Kong: The Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, April 1990) (hereafter *The Basic Law*), pp. 33–34. Article 90 also says the appointment of judges to the COFA requires the approval of LegCo and the reporting of such appointments to China's National People's Congress for record. After the draft bill was submitted to the Chinese side, PRC officials raised 15 questions concerning the draft bill. See *South China Morning Post (SCMP)*, 17 March 1995, p. 1.

5. *SCMP*, 18 March 1995, p. 3.

6. *Ibid.*

7. *Xianggang lianhebao (Hong Kong United Daily News)*, 25 March 1995, p. 1. This remark was also made by Lu Ping; see *Xianggang lianhebao*, 26 March 1995, p. 1.

8. See *SCMP*, 25 March 1995, p. 1.

9. See *Eastern Express (EE)*, 28 February 1995, p. 2.

10. *EE*, 25–26 March 1995, p. 1.

perspective. The PRC insisted that Britain should promise not to table the draft bill to the LegCo without Beijing's endorsement. If the British adopted any unilateral action, the COFA and even the entire Hong Kong legal system, according to the Chinese diplomats, would not be able to straddle 1 July 1997.¹¹ This threat was seen by the JLG's British side as a stalling tactic in the talks on the COFA.

The Sino-British deadlock over the COFA aroused the concern of business people in Hong Kong and a minority of politicians in the United States. Some potential investors, according to Anson Chan, took the "unusual step of ensuring their contracts are not subject to the jurisdiction of local courts."¹² An American Senator, Connie Mack, wrote to Governor Patten and expressed his worry that "the Hong Kong and Beijing governments are moving toward together on a plan that would erode judicial independence and jeopardize Hong Kong's common law system."¹³

The deadlock persisted in May 1995 with the British and Chinese sides both pointing accusing fingers at each other. The LegCo passed a resolution calling for the Hong Kong government to set up the COFA in accordance with the Joint Declaration and the Basic Law.¹⁴ In response, PRC officials criticized the British for toying with taking unilateral action on the COFA, exerting pressure on the Chinese government, deliberately leaking information about the JLG's discussion to the Hong Kong media, and supporting some "pro-British" LegCo members to pass the LegCo's resolution on the COFA.¹⁵ The former British Foreign Secretary, Lord Geoffrey Howe, accused Beijing of dragging its feet on reaching an agreement with Britain on Hong Kong's COFA and urged China to approve the draft bill as soon as possible.¹⁶

At the same time, there were reports that the COFA would encounter a problem in recruiting overseas judges. First, judges of the High Courts of England and Australia, and of the Supreme Court of India are not permitted to sit on the courts of other countries unless they resign or retire.¹⁷ It was suggested that some overseas judges might be reluctant to be included in Hong Kong's COFA for fear of being involved in political dispute, and this cast doubts on the court's credibility. The credibility problem could be overcome if the court were set up and functioned well. However an alternative solution of bringing in retired judges would have the drawback that their knowledge of legal affairs might not be so "updated" as those in office.¹⁸

11. *Dongfang ribao (Oriental Daily)*, 25 March 1995, p. 2.

12. *SCMP*, 17 March 1995, p. 1.

13. *SCMP*, 25 March 1995, p. 4.

14. *Kuai bao (Express Daily)*, 5 May 1995, p. 2.

15. See a useful review article, Chris Yeung, "Waiting for the judgment," *SCMP*, 3 June 1995, p. 16.

16. *EE*, 6–7 May 1995, p. 2.

17. *SCMP*, 6 May 1996, p. 4. But judges of the Australian federal courts and state courts can sit on courts in Commonwealth countries in the Pacific Ocean, like Tonga.

18. Editorial, "Recruiting judges," *SCMP*, 6 May 1996, p. 18. One member of the top policy-making Executive Council, Chang Khen-lee, said: "Retired judges will be less up to

A breakthrough in the Sino-British negotiation on the COFA was eventually made in June 1995. On 3 June, Anson Chan moderated her tone, saying that she hoped the COFA bill could be introduced to LegCo with the PRC's support.¹⁹ Although the deal reached by Britain and China in 1991 aimed to have the COFA in place by 1993 so that it would be fully established by 1997,²⁰ the Hong Kong government now changed its stance and emphasized that "there is now only about two years left [and] so the point of having it established long before 1997 no longer exists."²¹ At the same time, the Chinese vice-premier Qian Qichen told Britain's *Financial Times* that the establishment of the COFA should be postponed until after 1 July 1997, and that the Privy Council in Britain would remain the highest judicial organ of Hong Kong until the termination of British sovereignty. Also, Governor Patten no longer insisted that the COFA should be established before 1997. He said: "What is imperative, whatever one manages to achieve, is that any court set up in Hong Kong should be able to carry out the same role as the Privy Council and that there should be, as far as one can manage it, no rupture in the judicial arrangements." Patten put the blame on the LegCo for rejecting the COFA agreement in 1991, saying that without this "it is almost certainly true we would have a Court of Final Appeal up and running today."²²

The British and the PRC sides of the JLG signed a five-point agreement on the COFA. First, the British side agreed to incorporate the suggestions made by the Preliminary Working Committee – a body set up by China to handle the territory's transitional affairs after Governor Patten put forward his political reform proposals in October 1992 – into the COFA bill.²³ This British concession satisfied the PRC officials who had been alienated by Governor Patten's criticism that the establishment of this working committee was legally and politically unnecessary. Secondly, as a *quid pro quo*, the Chinese side agreed to abandon its demand for legislative provisions on a "post-verdict remedial mechanism" to overturn or veto the Hong Kong court's decision on the provision of the Basic Law.²⁴ Thirdly, the British agreed to amend the draft bill on the COFA, incorporating Article 19 of the Basic Law which states that the COFA "shall have no jurisdiction over acts of state such as defence and foreign affairs."²⁵ Also, the COFA ordinance would not come into operation before 30 June 1997. Fourthly, China agreed to give its support to the legislative procedures of the COFA before the end of July 1995.

footnote continued

date about the legal field. Judges who are yet to retire will be subjected to less influence by the Special Administrative Region government because they have secured a job in their original country." See *SCMP*, 6 May 1996, p. 4.

19. *SCMP*, 3 June 1995, p. 4.

20. *SCMP*, 8 June 1995, p. 1.

21. A spokesman of the Hong Kong government, cited in *SCMP*, 8 June 1995, p. 1.

22. *SCMP*, 9 June 1995, p. 1.

23. *Ming bao (Ming pao)*, 10 June 1995, p. 2. Also see *SCMP*, 10 June 1995, p. 1. For Patten's reform proposals, see *Our Next Five Years: The Agenda for Hong Kong* (Hong Kong: Government Printer, 7 October 1992).

24. *SCMP*, 10 June 1995, p. 1 and also p. 2.

25. *The Basic Law*, p. 12.

Fifthly, the Chief Executive designate (who would be elected in December 1996 and then replace the British Governor after the end of British rule) and the principal officials designate would be, with the participation and assistance of the British and Hong Kong governments, responsible for arranging the formation of the COFA on 1 July 1997. Finally, China agreed that a judicial committee advising the appointment of new judges would not have to include the participation of the Chief Executive once he or she appointed a new Chief Justice.²⁶

The Sino-British consensus led to an attempt by the liberal democrats in the LegCo to initiate a no-confidence motion on the COFA bill, the first time in Hong Kong's political history that the British Governor had to face such a motion. Although it was rejected, by 35 votes to 17,²⁷ it illustrated the fierce opposition of some LegCo members. On 27 July 1995, the Sino-British accord over the COFA was passed into law by 38 LegCo members, with 15 members of the Democratic Party and two independents (Emily Lau Wai-hing and Lee Cheuk-yan) voting against the motion, and three other independents abstaining (Anna Wu Hung-yuk, Christine Loh Kung-wai and Frederick Fung Kin-kee).²⁸ The leader of the Democratic Party, Martin Lee Chu-ming, proposed that the Chief Justice should be empowered to nominate the five judges in the COFA, and that the COFA bill should be amended to allow experienced overseas judges from non-common law jurisdictions, such as those from the Supreme Court in the United States. Meanwhile, the pro-business Liberal Party leader Allen Lee Peng-fei sought to amend the COFA bill by deleting the formula of four locals to one foreign judge; he proposed that the COFA should be composed of a Chief Justice and four judges irrespective of their nationality. All of these amendments were defeated in LegCo.²⁹

26. Editorial, "A deal to support," *SCMP*, 14 June 1995, p. 14. Also see *SCMP*, 10 June 1995, p. 1. This committee was named Judicial Services Commission before 1 July 1997. It is now called Judicial Officers Recommendation Commission. Since 1 July, Sir Joseph Hotung and Miss Eleanor Ling have not been appointed to the commission. Peter Wesley-Smith wrote: "The reason is purely political, as everyone knows. China could be expected to oppose both of them as members." See Wesley-Smith, "The SAR Constitution: law or politics," *Hong Kong Law Journal*, Vol. 27, Part 2 (1997), p. 127. It was reported that Sir Joseph Hotung had donated some money in support of the election campaign of the former LegCo member Emily Lau, whose political views and critical perspectives alienated the PRC officials. The Chief Executive, Tung Chee-hwa, appointed two pro-China politicians to replace Sir Joseph and Eleanor Ling. Of the two pro-China politicians, one is the well-known Chan Wing-kei, the managing director of the Cheung Kong Manufacturing Factory. Chan's pro-Beijing views earned him a position in the 400-member Selection Committee which elected the Chief Executive in December 1996. For Chan's background, see Feng Zi, *Toushi dong jianhua (Looking through Tung Chee-hwa)* (Xianggang choupijiang chubanshe, July 1997), p. 266. With the benefit of hindsight, Anne Cheung was accurate in saying that "the composition of the [Judicial officers Recommendation] Commission may be tainted by the element of executive favouritism instead of adhering to the principle of judicial independence." See Anne S. Y. Cheung, "The legal system: falling apart or forging ahead?" in Stephen Y.L. Cheung and Stephen M.H. Sze (eds.), *The Other Hong Kong Report 1995* (Hong Kong: The Chinese University Press, 1995), p. 19.

27. *SCMP*, 13 July 1995, p. 1.

28. *SCMP*, 27 July 1995, p. 1. For the content of the COFA Ordinance, see *International Legal Materials*, No. 35 (1996), pp. 207–222.

29. *SCMP*, 27 July 1995, p. 5.

The Position of the PRC Government and the Hong Kong Government

From the perspective of the PRC government, reaching a deal with the British on the COFA had a number of advantages. First and foremost, even though the Sino-British agreement in 1991 committed both sides to establishing the COFA before China's resumption of its sovereignty over Hong Kong, Beijing preferred the COFA not to "open for business" until 1 July 1997.³⁰ It regarded the establishment of the COFA as an event which should take place at the time when Hong Kong's sovereignty was formally returned to China.

Meanwhile, the court deal not only ameliorated the tense relationship between Britain and China but also paved the way for more agreements on other outstanding transitional issues. As Chen Ziyang, the deputy director of the Hong Kong and Macau Affairs Office (HKMAO), said, the COFA deal in 1995 was "not the last nor the only agreement" to be struck.³¹ During his visit to Hong Kong in 1995, the former director of the HKMAO, Lu Ping, received a clear message from the local business leaders and officials of some foreign consulates that they were deeply concerned about Hong Kong's rule of law.³² Once the court deal was struck, both local business leaders and foreign investors increased their confidence in Hong Kong's future. As the vice-chairman of the Hong Kong General Chamber of Commerce, James Tien Pei-chun, said: "We hope that the court deal will mark the first step toward greater cooperation between China and Britain on other issues, including Container Terminal 9, 10 and 11, as well as the airport financing."³³ The Japan Bond Research Institute also announced after the COFA deal that China was committed to respect Hong Kong's independence in fiscal and monetary policy. With the benefit of hindsight, it was in the interest of the PRC to reach the COFA agreement with Britain.

Most importantly, China was concerned about the jurisdiction of the COFA. In exchange for the British side's decision to incorporate the Basic Law's provision on the "acts of state" into the COFA bill, the PRC abandoned the demand that the bill should include a "post-verdict remedial mechanism," which had been designed by Beijing to protect its authority vis-à-vis the HKSAR. The Chinese side raised the issue of the "post-verdict remedial mechanism" in May 1995,³⁴ a deliberate tactic to maximize the PRC's bargaining power in the JLG. In fact, even without the "post-verdict remedial mechanism," the mainland National People's Congress (NPC) could play such a function if it has the political will to overturn any decision made by the Hong Kong court on provisions of the Basic Law. According to Article 158 of the Basic Law,

30. Jonathan Dimpleby, *The Last Governor: Chris Patten and the Handover of Hong Kong* (London: Little, Brown and Company, 1997), p. 284.

31. *SCMP*, 13 June 1995, p. 1.

32. *SCMP*, 3 June 1995, p. 16.

33. *SCMP*, 13 June 1995, p. 1. At that time, the PRC and Britain argued about the establishment of the Container Terminals in Hong Kong's Kwai Chung district and the financial arrangements concerning the new airport at Chek Lap Kok.

34. *SCMP*, 5 May 1995, p. 1.

The Standing Committee of the National People's Congress (SCNPC) shall authorize the courts of the HKSAR to interpret on their own ... the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the HKSAR may also interpret other provisions of this Law ... However, if the courts of the Region ... need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region ..., the courts of the Region shall ... seek an interpretation of the relevant provisions from the SCNPC through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region ... shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The SCNPC shall consult its Committee for the Basic Law of the HKSAR before giving an interpretation of this Law.³⁵

Although an expert in constitutional law, Yash Ghai, suggests that the SCNPC should play a passive role in interpreting the Basic Law and that the Committee for the Basic Law should also not interpret the constitution before the HKSAR courts make decisions,³⁶ whether the SCNPC remains passive will be ultimately a political matter. In the event that its members do not favour the interpretation made by the HKSAR courts, the former will have either the temptation or the will to overturn the latter's interpretation. Politically speaking, when the Hong Kong representatives to the NPC have an interpretation of the Basic Law different from that of the HKSAR courts – a scenario that cannot be ignored given the political activeness of some Hong Kong representatives – they could lobby and influence the SCNPC to adopt an active role in interpreting the HKSAR's constitution. In short, the interpretation of the Basic Law is vulnerable to political influence and wishes, although Yash Ghai advocates that it should ideally be “judicialized.”³⁷

What is more, mainland Chinese members of the SCNPC could have a pro-central government perspective when they decide to interpret the Basic Law. During the debate over the COFA in Hong Kong, some mainland legal experts demonstrated such a view of the relations between the HKSAR and China. One member of the Preliminary Working Committee sub-group on constitutional affairs, Xiao Weiyun, said that the COFA should be empowered to hear all cases except for those which

35. *The Basic Law*, p. 54.

36. See Yash Ghai, “Framework to judge law,” *SCMP*, 6 October 1997, p. 21. The committee has 12 members, half from Hong Kong and the rest from the mainland. The problem is that not all the six Hong Kong members are legal experts, such as Wong Po-yan and Raymond Wu. See *Xianggang xinbao (Hong Kong Economic Journal)*, 4 October 1997, p. 3. It remains unclear whether the non-legal experts and the mainland Chinese members will interpret the Basic Law impartially and will consider seriously the opinions of the HKSAR's legal profession. One observer notes: “In the event that the CBL has political appointees, the opportunities for China to coopt pro-China elements into the committee exist. And in case Beijing uses the numerical majority of pro-China members to control the CBL's composition, any decision in the committee will be bound to favour the Chinese government.” See Lo Shiu Hing, *The Politics of Democratization in Hong Kong* (London: Macmillan, 1997), p. 222.

37. See Ghai, “Framework to judge law,” p. 21. Also see Ghai, *Hong Kong's New Constitutional Order*, pp. 214–220.

involve “acts of state” and any “breach of China’s constitution.”³⁸ He did not elaborate on the conditions that might constitute a “breach” of the constitution. However, he said that if the court could not decide whether a case was an “act of state,” it could be referred to the Chief Executive who would then ask the central government in Beijing for clarification. He gave two examples of “acts of state,” one concerning the specific question of whether staff members of the Taiwan government could stay in the HKSAR, and the other regarding court cases that dealt with Taiwan’s official or semi-official agencies in the territory. Xiao’s examples, according to the leader of the pro-Beijing Democratic Alliance for the Betterment of Hong Kong, Tsang Yok-sing, should not be prejudged as “acts of state.”³⁹ For Tsang, “acts of state” could be interpreted by the HKSAR courts – a view more flexible, less pro-centre and more considerate of the HKSAR’s autonomy than Xiao’s. In a nutshell, in the event that the mainland Chinese members of the SCNPC interpret “acts of state” broadly as including not only foreign affairs and defence but also “central–local relations” – a term that is ambiguous and broad enough to embrace numerous issues – then the HKSAR’s autonomy would be necessarily restricted.

Britain and the PRC had different interpretations of the meaning of “acts of state.” For the British side, the common law does not allow for any “post-verdict remedial mechanism,” which runs counter to the principle of *res judicata* (a matter which has been adjudicated upon cannot be re-litigated). In addition, the British publicly disagreed with the mainland Chinese interpretation of “acts of state” as including matters other than foreign affairs and defence, such as central–local relations.⁴⁰ Although it can be argued that “in many ways” the PRC’s definition of “acts of state” “is similar to the common law,”⁴¹ the British side of the JLG did not go so far as the Chinese side in the matters it viewed as falling within the ambit of “acts of state.”

Nevertheless, both sides had a common interest to reach a deal on the COFA before the new LegCo was elected in September 1995. If the COFA bill were postponed to the new LegCo session, it would not be passed easily, as from September onwards there would be more directly elected LegCo members and the appointed legislators would become a thing of the past. As Simon Long put it accurately, “perhaps China and Britain also calculate there is more chance of getting their way in this [1994–95] LegCo – stacked with appointees and representatives of ‘small constituencies vulnerable to manipulation’ – than in the one that will be

38. *EE*, 17 May 1995, p. 2.

39. *Kuai bao*, 23 June 1995, p. 2.

40. Unlike the Chinese, the British had opposing views on the definition of the “acts of state.” See Governor Patten’s remarks reported in *Xianggang lianhebao*, 25 May 1995, p. 2.

41. Ghai argues, for example, that for both the Chinese and British, acts of state refer to “a decision to exercise rights in the name of the state by the central government in foreign affairs”; “possess distinctive features, involving high-level decision making”; and are “not justiciable in the courts.” See Ghai, *Hong Kong’s New Constitutional Order*, p. 297.

elected in September.”⁴² In fact, Governor Patten realized the critical importance of the timing in which the COFA bill should be submitted to LegCo. He revealed his dilemmas, saying that:

London accepts the argument for trying to set up a COFA before 1997. After all, we negotiated the agreement. But London also wants to minimize the number of rows that we have with China. There is still the view – more among diplomats than politicians – that if only we could somehow get on better with China, everything would be easier and Sino-British relations would produce an aura of sunlight in which problems could be solved and trade would be better.

Here in Hong Kong, we feel very strongly that we’ve at least got to have a go at setting up the court, but we are still dealing with a LegCo which we don’t think will vote in very large numbers for the court. So do we press ahead on our own without Chinese agreement? If we do, and there is a row, can we get the bill through the LegCo? What sort of situation is this in which to persuade London that we should go ahead? We have a row with China, and we fall flat on our face in the LegCo.⁴³

Another British consideration was, like the PRC’s, to pave the way for co-operation on other transitional matters. Prior to June 1995, the British insisted that the COFA should be set up at least one year before 1997 to achieve a smooth transition of the judiciary.⁴⁴ But later, when they realized that there would not be time for the COFA to be established before 1997, the alternative of having it established in July 1997 was adopted. This move could be interpreted as pragmatic, for the British had no choice but to accept the reality that it would be better to have an agreement than a situation without any deal. Above all, the COFA deal would unlock the door for the PRC’s endorsement of more transitional affairs in Hong Kong. As Governor Patten stated:

On its own terms, we believe this agreement to be in the best interests of Hong Kong, but having got an agreement, of course we hope that the logjam on other issues can be broken. One of the extremely good things about this agreement is that it has got round the question of the modality for the adaptation of laws.⁴⁵

For the Patten administration, more progress could be made on the adaptation of Hong Kong laws, and on the PRC’s support of the new airport’s financial arrangement. Political and economic circumstances forced Patten and the JLG’s British side to reach an agreement with the Chinese side on the COFA. As a commentator put it, “pragmatism and expediency are becoming ever more common as Hong Kong’s days as a British colony draw to a close.”⁴⁶

42. Simon Long, “A list of people not to trust in the wake of the Court of Final Appeal deal,” *EE*, 14 June 1995, p. 14.

43. Quoted in Dimpleby, *The Last Governor*, p. 276. Dimpleby also revealed the disagreements between Patten and some British government officials, like the President of the Board of Trade Michael Heseltine and the British Ambassador in Beijing Sir Len Appleyard, over the issue of COFA in Hong Kong (see pp. 277–290). However, since the Prime Minister John Major and the Foreign Secretary Douglas Hurd were close friends of Patten, they trusted him and gave the Governor a final say on how Britain should negotiate with the PRC over Hong Kong’s political reform and COFA.

44. *EE*, 8 June 1995.

45. Sally Blyth, “Court of Final Appeal may break logjam,” *EE*, 12 June 1995, p. 1.

46. Louise do Rosario, “A court too far,” *Far Eastern Economic Review*, 22 June 1995, p. 20.

Moreover, as for the PRC authorities, the British side of the JLG hoped to reach the COFA deal in order to boost the confidence of the local business community and foreign investors. Governor Patten reiterated that:

Of course I would have preferred the court to be set up and running earlier. I campaigned hard for that. But since that was not possible, the main objective for a government which cares about the rule of law in Hong Kong was to set up a court with the same jurisdiction, subject to the Basic Law, as the Judicial Committee of the Privy Council; to ensure that there would be no legal vacuum on July 1, 1997; and to ensure that the detailed legislation implementing the COFA was on the statute book as soon as possible, preferably before the end of July this year, *to give international investors and Hong Kong people the confidence about the COFA which they have been seeking. Our agreement does precisely that.*⁴⁷

Apart from boosting the confidence of local and foreign investors, the Patten administration was particularly concerned about its public and international image. Reaching the court deal with China could serve the purpose of projecting an image of a strong British administration with sufficient authority, instead of a weak government which was labelled as a “lame duck” by critics during the governorship of Sir David Wilson, Patten’s predecessor.

The response from local business leaders and the international community to the COFA deal was warm and positive. Prior to the agreement in 1995, the European Union’s representative in Hong Kong said that the COFA issue undermined business confidence in Hong Kong.⁴⁸ In the wake of the deal, 14 leading overseas business groups, including in the United States and Australia, issued a letter appealing to the LegCo for approval of the COFA bill without amendments.⁴⁹ The *Washington Post* said that the agreement was a sign of “encouragement.”⁵⁰ However, not all overseas groups were positive towards the COFA deal. The Alliance of Hong Kong Chinese in the United States wrote a letter to the editor of an English daily in Hong Kong, saying that:

The Chinese definition of “act of state” is very different from the traditional common law definition, which includes only an act of a sovereign state vis-à-vis another sovereign state such as a declaration of war. The PRC government has said it will use this “act of state” loophole, which Beijing and not the Hong Kong government will define, to prohibit the court from exercising jurisdiction over sensitive political matters. According to the Hong Kong Basic Law, the Standing Committee of the National People’s Congress, a rubber-stamp organization under the Chinese Communist Party, will have the final say to its interpretation. In this way, the COFA is really the Court of not so Final Appeal, and Beijing will, in fact, preserve an all-too-effective post-verdict remedial mechanism.⁵¹

47. Chris Patten, “Protecting the law,” *SCMP*, 15 June 1995, p. 19. Emphasis added.

48. *EE*, 9 May 1995, p. 2.

49. *SCMP*, 12 July 1995, p. 2. Also see *Kuai bao*, 12 July 1995, p. 3.

50. Reported in *Kuai bao*, 13 June 1995, p. 2.

51. Letter to the editor, “Independence of judiciary threatened,” *SCMP*, 19 July 1995, p. 16.

The British handled the COFA bill in a way parallel to the situation of initialling the Sino-British Joint Declaration in September 1984: accepting the agreement or having no agreement at all. What the British was telling LegCo in June 1995 was that, to borrow from Frank Ching, “it has no choice but to rubber-stamp the agreement if Hong Kong is to have a COFA.”⁵² As Governor Patten put it clearly, “LegCo members now have a clear choice. They can either vote this week for a bill which will ensure that a proper COFA is set up on July 1, 1997 and that the possibility of a judicial vacuum is avoided. Or they can vote for continuing uncertainty.”⁵³ The Attorney-General Jeremy Matthews made similar remarks:

Members now have a clear choice. Passage of the bill will guarantee the establishment of a proper court on July 1, 1997, with Sino-British cooperation. The alternative of rejecting the bill will leave the establishment of the court to the HKSAR after July 1, 1997, creating damaging and unnecessary uncertainty about the eventual form of the court.⁵⁴

These remarks contradicted Patten’s earlier claim that the LegCo would have an opportunity to determine the acceptability of the COFA deal. Substantially, the LegCo had no choice but to pass it.

Acts of State

One inconsistent position of the British side was its attitude towards “acts of state.” Originally, the British adhered to the common law tradition of defining “acts of state” as foreign affairs and defence.⁵⁵ Later, by yielding to the PRC’s demand that the COFA bill should incorporate Article 19 of the Basic Law – which says that the COFA “shall have no jurisdiction over acts of state such as defence and foreign affairs – the British tacitly admitted that “acts of state” could include matters in addition to foreign affairs and defence. Incorporating Article 19 into the COFA bill, the British side confirmed and entrenched the legal basis for Beijing to interfere with the HKSAR court’s decisions on provisions of the Basic Law. Martin Lee made the following criticisms on “acts of state”:

In the common law, “acts of state” refer only to things such as declaring war or

52. Frank Ching, “Patten accord: A Mixed blessing,” *Far Eastern Economic Review*, 29 June 1995, p. 36.

53. Chris Patten, “Court of Final Appeal: the opening argument,” *SCMP*, 26 July 1995, p. 19. One commentator said that in the handling of the COFA bill, Governor Patten “has shown himself to be just another very ordinary Governor after all. But tongue-in-cheek, he danced around boasting a splendid victory he won for Hong Kong. Jestng in LegCo and looking oh-so-pleased with himself, he definitely looks more like Zhang Junsheng (the NCNA vice-director) of the day.” See Wing Kay Po, “Governor courting failure after Court of Final Appeal,” *EE*, 14 June 1995, p. 15.

54. *SCMP*, 15 June 1995, p. 6.

55. Governor Patten said that “we accept that arguments about the definition of ‘acts of state’ raise important questions about the relationship between the Basic Law and the English common law, which China has pledged to uphold in Hong Kong after 1997.” See Patten, “Protecting the law,” *SCMP*, 15 June 1995, p. 19.

making treaties – and the core principle is that it may never be used by the sovereign against its own citizens ... As the Court will not be set up before 1997, it is likely that China will interpret the jurisdiction over acts of state in such a way that Hong Kong people will never be able to challenge the government. This rips the rule of law into shreds, since the entire basis for the rule of law is that the government is subject to the law just as ordinary citizens are. The SAR government overnight gains a power it never had even under the colonial government: the power to act with impunity.⁵⁶

Although Martin Lee appeared to be quite clear about China's way of interpreting "acts of state," it is uncertain whether the PRC will really interpret it in such a manner as to favour the central government in Beijing.

According to E. C. S. Wade, an act of state is "an act of the executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state unless they are temporarily within the allegiance of the Crown."⁵⁷ Wade's definition appeared to be ambiguous, but it implied that an act of state was "an act of policy carrying out in foreign policy."⁵⁸ More specifically, acts of state are "primarily prerogative acts of policy in the field of external affairs – for example, the declaration of war, the conclusion of a treaty, an annexation of territory, the recognition of a foreign sovereign, state or government."⁵⁹

In *Nissan v. Attorney-General* (1968), it was for the court to decide whether the executive acts in question were really acts of state.⁶⁰ In the HKSAR, it is unclear whether the local courts will take an active role in such a decision. However, it is possible that the HKSAR courts will take a passive role in deciding such issues. Article 19 of the Basic Law states:

The Courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the Courts. Before arriving such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.⁶¹

If the HKSAR courts follow the procedures stated in Article 19, their role

56. Martin Lee, "Courting disaster," *SCMP*, 14 June 1995, p. 19.

57. E.C.S. Wade, "Act of state in English law: its relations with international law," *British Yearbook of International Law*, Vol. 15, No. 98 (1934), p. 103, cited in Brian Thompson, *Constitutional and Administrative Law* (London: Blackstone, 1993), p. 98. Also see Hilaire Barnett, *Constitutional and Administrative Law* (London: Cavendish, 1995), p. 181.

58. Thompson, *Constitutional and Administrative Law*, p. 98.

59. Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law* (London: Penguin, 1994), p. 158. For a similar definition, see Barnett, *Constitutional and Administrative Law*, p. 182.

60. A.W. Bradley and Keith Ewing, *Constitutional and Administrative Law* (Essex: Longman, 1994), p. 330. In this case, the House of Lords held that the Crown could not use the act of state as a justification to argue that the court did not have jurisdiction over a plaintiff's claim that British forces had occupied a hotel in Cyprus.

61. See *The Basic Law*, p. 12. Actually, Article 19 of the final version of the Basic Law is an improvement to the first draft. See Peter Wesley-Smith, *Constitutional and Administrative Law* (Hong Kong: Longman, 1994), p. 106.

may be passive and subordinate to the Chief Executive and the central government in Beijing, which can interpret acts of state broadly if it wishes to do so.

In *Secretary of State for India v. Sahaba*, the Privy Council decided against a widow's claim that her husband's property had been seized by the East Indian Company. The Privy Council held that "transactions of independent states between each other are governed by other laws than those which Municipal Courts administer."⁶² In the event that judges of the HKSAR courts adopt the approach in the *Sahaba* case, the definition and scope of acts of state will be up to the decision of the Chief Executive and the central government in Beijing. At this juncture, whether the Chief Executive is determined to stand up for the autonomy of the HKSAR courts vis-à-vis Beijing will become a political matter.

In the debate over the COFA, both the British authorities and the Hong Kong government avoided acknowledging in public that the PRC might interpret acts of state broadly or arbitrarily. The British stance was that the crux of the problem stemmed not from the COFA bill, but from the Basic Law. Patten publicly defended his position in this way:

Admittedly, the [COFA] bill and the agreement simply repeat the provisions in the Basic Law on "acts of state." This is hardly surprising when even our critics have repeatedly urged us to make the bill compatible with the Basic Law. But the Basic Law does not give either the Hong Kong or the Chinese governments the power to avoid the court's jurisdiction at will. It will be for the courts of the HKSAR to decide what is, or is not, an act of state.⁶³

In the same vein, Matthews contended that "what the court bill does is to repeat what is in the Basic Law as regards 'acts of state,' so there has been no trading away, no giving away of the common law definition of 'acts of state'."⁶⁴

In public, both Governor Patten and Matthews argued that the British did not collaborate with the Chinese on the Basic Law's provision regarding acts of state. They merely put the blame on the Basic Law. As quoted above, Patten openly interpreted the Basic Law as allowing the HKSAR courts "to decide what is, or is not, an act of state." However, what Patten did not reveal was that, according to Article 158 of the Basic Law, the SCNPC "shall authorize the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region."⁶⁵ That the SCNPC has the final power to interpret the Basic Law was played down by Patten.

62. *Ibid.* p. 93.

63. Chris Patten, "Hong Kong's future," letter to the editor, *Economist*, 24 June 1995. For a similar view expressed by Patten, see *Xin bao*, 12 June 1995, p. 2. The Director of the Administration of the Hong Kong government, Richard J.F. Hoare, also wrote a number of letters to respond to public criticisms on the COFA deal. See his letters to the editor of the *SCMP*, 6 July 1995, p. 16; 24 July 1995, p. 18; and 31 July 1995, p. 16.

64. No Kwai-yan and Quinton Chan, "No to backdown over acts of state," *SCMP*, 10 June 1995, p. 3.

65. *The Basic Law*, p. 32.

Most importantly, according to a biographer of Patten, the Governor “later ... came to regret his decision to allow the Chinese to incorporate the ‘acts of state’ clause into the COFA bill – a lapse of judgment which perhaps should be attributable more to the intense and sustained pressure imposed on him by London and Beijing than to any indifference to the potential consequences of his retreat from what had once been an important principle.”⁶⁶ If Patten did feel regretful of his concession to the PRC, this demonstrated that, as a non-legal expert, he had not anticipated the potentially far-reaching consequences of tacitly agreeing with the PRC’s position that acts of state could include matters other than foreign affairs and defence.

The Views of the Hong Kong People

The opinion of the Hongkongers was split among different groups: the top policy-making Executive Council (ExCo); legal experts; liberal democrats and independent legislators; pro-China elite; business people; and ordinary citizens. None of the ExCo members spoke up publicly about the COFA except for Denis Chang Khen-lee, who pointed out that:

There is no legal basis for thinking that all acts of the executive authorities are outside the pale of law. Indeed, Article 35 of the Basic Law provides that Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.⁶⁷

While emphasizing the ability of individual citizens to take court action against the acts of the executive, Chang shared the assumption of the Patten administration that the HKSAR courts would have the jurisdiction to interpret provisions of the Basic Law.

The legal experts’ views of the COFA ranged from conservative to liberal. At the conservative end of the spectrum was Simon Ip Sik-on, who changed his views after the 1991 agreement to become very supportive of the COFA bill, for he believed that the stability of Hong Kong’s legal system could be best maintained by having a COFA rather than no agreement at all.⁶⁸ The president of the Law Society, Roderick Woo Bun, maintained that the debate over the definition of “acts of state” was “technically irrelevant,” because the Basic Law’s provision that the COFA “shall have no jurisdiction over acts of state” could not be altered.⁶⁹

At the liberal end of the spectrum was the chairperson of the Bar Association, Gladys Li Chi-hei. She maintained that there was little

66. Dimbleby, *The Last Governor*, p. 289. This principle was that the British side should neither yield on “acts of state” nor include it in the COFA bill.

67. Denis Chang Khen-lee, “The COFA draft bill and ‘acts of state,’” *Ming bao*, 20 June 1995, p. C6. Cited in Richard Hoare’s letter to the editor, “Passing bill in best interests of Hong Kong,” *SCMP*, 1 July 1995, p. 16.

68. *Kuai bao*, 4 May 1995, pp. 2 and 5.

69. *SCMP*, 25 July 1995, p. 2.

flexibility in the COFA's composition of judges; that the bill did not conform to the Basic Law; that the Chief Justice should not preside over the judicial committee which would select the judges; that the definition of "acts of state" was ambiguous and much broader than its meaning under the common law; and that the judges should be selected independently of the Chief Justice and free from the executive branch's influence.⁷⁰

Between these two extremes, some legal scholars argued that the COFA bill, even if it was passed by LegCo, would not be able to straddle 1997 "as a valid piece of legislation under conditions set out by the Basic Law." Peter Wesley-Smith stressed that the Basic Law stated "laws previously in force in Hong Kong" would be adopted as HKSAR's laws. However, since the COFA Ordinance would not be in force before 1 July 1997, Wesley-Smith argued, it would not be covered by this provision of the Basic Law. This view was rejected by the government's Deputy Solicitor-General, Robert Allcock, who revealed that there were some differences between the Chinese and English versions of the Basic Law, with the former referring to "laws existing" at 1 July 1997 and the latter saying "laws previously in force." Allcock said: "There is no suggestion in the Chinese text that any ordinance enacted before July 1, but not brought into operation, does not carry forward after the transition."⁷¹ Clearly, the crux of the matter was how to interpret the Basic Law's provisions on legislation straddling 1 July 1997.⁷² Even before the formation of the HKSAR, the Basic Law had already been interpreted in varying ways by the Hong Kong elites, British officials and PRC authorities.

The liberal democrats were critical of the COFA agreement reached by Britain and China in 1995. They complained that as long as the COFA would not have the power of interpretation over issues "such as defence and foreign affairs," the SCNPC could interpret these issues broadly and thus favourably to the central government in Beijing. Martin Lee accused

70. *Kuai bao*, 27 June 1995, p. 2. Also see *SCMP*, 7 July 1995, p. 6. Li's opinions on law and politics are a far cry from her father Simon Li Fook-sean, a former judge and a member of the Preparatory Committee which was set up by China to handle Hong Kong's transitional affairs. See Alison Nadel, "Poles apart in the family court," *Sunday Morning Post*, 5 May 1996, p. 2.

71. *EE*, 13 June 1995. LegCo member Simon Ip also implicitly agreed with Allcock's view. Ip remarked: "There is not a problem. First, once the bill is enacted it will be law, even though it will not come into operation or establish the COFA until 1 July 1997. The legislative procedures for the COFA bill will have been completed. It does not require another enactment for it to be effective after the handover. If one does not accept the first point, there is a second: that the Basic Law provisions about the transition of laws are not exclusive, they do not imply laws not yet in force cannot straddle the changeover." See *EE*, 14 June 1995, p. 2.

72. Article 8 says, "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the HKSAR." See *The Basic Law*, p. 7. Article 18 also states that "The laws in force in the HKSAR shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region." *The Basic Law*, p. 11.

Governor Patten as a leader much “weaker” than Governor Wilson because Patten failed to stand up for the interest of Hong Kong concerning the definition of acts of state.⁷³

The liberal democrats rejected the PRC’s interpretation that acts of state would include central–local relations, an ambiguous term allowing considerable room for Beijing to interfere with the decisions of the HKSAR courts. Some members of the Democratic Party, who were also district board members and urban councillors, protested against the Hong Kong government’s attempt to “consult” their opinion on the COFA. Some district board members walked out of the consultative session and asked the Director of Administration, Richard Hoare, to clarify the definition of acts of state.⁷⁴

The liberal democrats were angry about the government’s claim that there would be a “judicial vacuum” after 1 July 1997 if the COFA bill were not approved by LegCo.⁷⁵ For the democrats, the claim was simply a threat used by the Patten administration to lobby for support of the COFA. Last but not least, the liberal democrats were alienated by the government’s ultimatum, which according to Patten gave two choices, namely accepting the Sino-British deal on the COFA or facing the prospect of the “judicial vacuum.”

The liberal-minded and independent LegCo members, like Christine Loh and Emily Lau, criticized the British authorities for allowing the PRC, not the HKSAR, to enjoy the final power of interpreting the Basic Law. Loh wrote in June 1995:

The COFA, if established now, could set precedents on what constitute “acts of state” which might create inconvenience for the Central People’s Government. China will also totally control appointments to the COFA. This is a key victory, since China identifies strongly with controlling the individuals who are appointed to high office.⁷⁶

Loh believed that the legal systems in Hong Kong and China were so different that “one country, two systems” would probably not be feasible.⁷⁷ If Hong Kong and the PRC do have two fundamentally different constitutional traditions and attitudes towards political rights of groups and individuals,⁷⁸ divergent interpretations of the Basic Law between the liberal democrats – who were mostly educated in the Anglo-American system and who accept the Western legal tradition – and PRC officials must persist.

Members of the pro-China elite in Hong Kong tended to be generally

73. See *Ming bao*, 13 June 1995, p. A4.

74. See *Kuai bao*, 16 June 1995, p. 5; and 20 June 1995, p. 3. Also see *EE*, 16 June 1995, p. 2.

75. *Xianggang lianhebao*, 13 June 1996, p. 4.

76. Christine Loh, “Will COFA deal leave Hong Kong happy ever after?” *EE*, 15 June 1995, p. 15.

77. See *Xianggang lianhebao*, 30 June 1995, p. 2.

78. See Michael C. Davis, *Constitutional Confrontation in Hong Kong* (London: Macmillan, 1989). Also see David Clark’s review article, “Taking the Basic Law seriously?” *Asian Journal of Public Administration*, Vol. 12, No. 2 (December 1990), pp. 256–270.

more sympathetic towards and supportive of the PRC's official interpretation of the Basic Law. Occasionally, however, the pro-China elites had their own views independent of the mainland official line. For example, the leader of the Democratic Alliance for the Betterment of Hong Kong, Tsang Yok-sing, defended China's position, asserting that it had already been "flexible" in its attitude towards when the COFA should operate.⁷⁹ Yet, Tsang and Tam Yiu-chung, his vice-chairman, opposed in public the Chinese idea of having the "post-verdict remedial mechanism" to veto the COFA's rulings.⁸⁰ Their views differed from the official line of the Chinese Communist Party.⁸¹ Other pro-China elites, such as the former judge of the Court of Appeal Simon Li Fook-sean, supported the Chinese official line on acts of state. Li said that any change in its definition should "require the centre's approval."⁸² Li's pro-central government view was shared by Tam Yiu-chung, who commented that acts of state should include not only defence and foreign affairs but also "issues under the responsibility of the central government [in Beijing]."⁸³ Interestingly, Simon Li also expressed his personal view on the issue of judicial independence in Hong Kong, saying he regretted that Beijing "did not retain in the Basic Law a common-law provision allowing an appeal against a government decision to deem something an act of state, standard practice under the common law but not under Chinese law."⁸⁴ In general, the pro-China Hong Kong elite had mixed feelings on the PRC's position on the COFA.

The business people, like the pro-China elites, did not want to envisage any instability and uncertainty in Hong Kong's legal system. For example, Liberal Party members initiated a motion in LegCo urging the Hong Kong government to make the composition of judges in the COFA more flexible than the 1991 Sino-British arrangement. However, some members of the Liberal Party did not wish to vote against the COFA bill in 1995 for fear that doing so would undermine business confidence and exacerbate Sino-British relations. Thus, before the vote in the LegCo on 27 July 1995, some Liberal Party members such as James Tien and Henry Tang Ying-yen declared support of the COFA bill and opposition to any amendments.⁸⁵ The Patten administration regarded the Liberal Party's

79. *Xianggang lianhebao*, 9 June 1995, p. 4.

80. *Xianggang lianhebao*, 5 May 1995, p. 2.

81. One commentator concludes that the DAB represents "the Hongkongized version of the CCP." Lo Shiu Hing, "Political parties in a democratizing polity: the role of the 'pro-China' Democratic Alliance for the Betterment of Hong Kong," *Asian Journal of Political Science*, Vol. 4, No. 1 (June 1996), p. 121.

82. See *Ming bao*, 13 June 1995, p. A4. His remarks were in response to Christine Loh's view that "acts of state" should include "only defence and foreign affairs." Li was one of the contenders for the position of the Chief Executive of the HKSAR in December 1996 and he was defeated. Tung Chee-hwa, a shipping tycoon, won the election, and became the Chief Executive-designate. On 1 July 1997, Tung was sworn in as the first Chief Executive of the HKSAR.

83. *Ming bao*, 13 June 1995, p. A4.

84. See "Courting disaster," *Far Eastern Economic Review*, 22 June 1995, p. 5.

85. *Sunday Morning Post*, 23 July 1995, p. 1.

position as crucial to the smooth passage of the COFA bill, although the position of other independent LegCo members was decisive.⁸⁶ Eventually, the Liberal Party sought to amend the COFA bill. Before the deal was reached, the Liberal Party's leader Allen Lee said that establishing the COFA "would be beneficial to both China and Britain."⁸⁷ But only five of the 15 members of the Liberal Party supported his amendment to the bill; most gave the bill unconditional support – a symbol of the Hong Kong business sector's pragmatism and political conservatism.⁸⁸

In the final analysis, the masses generally did not understand the technical issues surrounding the COFA bill. As a result, they were relatively apathetic, leaving the debate to politicians and the legal profession. A survey of 506 citizens conducted by the University of Hong Kong's Social Science Research Centre showed that over half of them did not understand the content of the COFA agreement reached by Britain and China, although 40 per cent agreed the number of overseas judge in the COFA should be restricted to only one.⁸⁹ Martin Lee asserted that the Democratic Party's amendments to the COFA bill were in the interests of the Hong Kong people; nevertheless, the majority of the ordinary people did not really understand and appreciate the significance of these amendments.⁹⁰

Conclusion

The entire debate over the COFA was highly political in the sense that the PRC, the British side of the JLG, the Patten administration and Hong Kong's politicians all struggled for the authority and power to interpret provisions of the Basic Law. Controversies surrounding the COFA's composition and the definition of "acts of state" demonstrated the concern of local politicians and the legal profession about judicial independence and the rule of law in the HKSAR. During the transition period from September 1984 to 30 June 1997, when the Basic Law was not in operation and when there was no authoritative mechanism that could arbitrate any dispute between Britain and the PRC concerning its interpretation, each side had its own interpretation. Nevertheless, both sides sensed the political imperative and economic necessity of reaching a deal on the COFA. Because of the political expediency of reaching the COFA

86. See *EE*, 10–11 June 1995, p. 2. One senior government official said that he expected the Liberal Party to face the pressure from business people and functional constituencies (like business, industrial and commercial groups) to change the party's position on the COFA bill.

87. *Kuai bao*, 17 June 1995, p. 5.

88. Allen Lee himself admitted after the LegCo vote that managing the Liberal Party was "more difficult than anticipated." See *SCMP*, 29 July, 1995, p. 15.

89. *Xianggang lianhebao*, 15 June 1995, p. 2.

90. For Martin Lee's assertion, see his "COFA: the opening arguments," *SCMP*, 26 July 1995, p. 19. In fact, the *South China Morning Post* tended to be quite pro-administration and critical of those who opposed the COFA deal reached by Britain and China. See editorial, "Bill's critics wrong," *SCMP*, 22 July 1995, p. 14; and editorial, "Defining acts of state," *SCMP*, 27 July 1995, p. 16.

agreement, the Hong Kong people were largely excluded from any consultation. That ordinary citizens did not understand the content of the debate over the COFA could be partly attributable to the fact that Britain and the PRC dictated the agreement with cosmetic consultation with politicians and the legislature. The option presented by Britain and China to Hong Kong's politicians and legal profession was either accepting the deal or having no agreement at all. Constrained by the political legacy of his predecessors who reached the 1991 Sino-British arrangement on the COFA, Governor Patten had little choice but to push forward the COFA deal, selling it to Hong Kong's politicians, the legal profession and the foreign community in the name of maintaining the rule of law beyond 1 July 1997. While the COFA was supported by the business community in Hong Kong, Governor Patten and the British side of the JLG failed to push the Chinese diplomats to define "acts of state" in a way that was acceptable to critics of the COFA agreement in 1995.

The COFA debate showed that Hong Kong's political activists had divergent views on the definition of "acts of state" and the acceptability of the COFA agreement. This heterogeneous characteristic of Hong Kong's politicians implied that constitutional interpretation in the HKSAR is going to mean both a crisis and an opportunity. A crisis will sooner or later emerge when PRC officials and mainland legal experts adopt a pro-centre perspective in interpreting the Basic Law, and when some members of the pro-Beijing Hong Kong elite uncritically support such a pro-centre interpretation. Ironically, however, an opportunity will be created when the liberal democrats, independent politicians and some legal experts interpret the Basic Law in such a way as to maximize the HKSAR's autonomy. If so, the politicization of interpreting the HKSAR's Basic Law is destined to be inevitable.