

## COMMENT

### Preserving Academic Freedom in Hong Kong: Lessons from the 'Robert Chung Affair'

Of all the factors that differentiate Hong Kong from the rest of China, one of the most significant is the extent to which Hong Kong still largely enjoys<sup>1</sup> the right to free expression—including a free press, the right to criticize the government, and the freedom of academics to pursue research that may occasionally displease the government. These freedoms depend in part upon formal guarantees in Hong Kong's constitution, but also upon individual courage and institutional protections. In particular, while academic freedom is theoretically protected by specific provisions in the Basic Law,<sup>2</sup> it will thrive only if academics are willing to speak out and university leaders vigorously defend the autonomy of their institutions.

In 1998 I argued that academic freedom was not adequately protected in Hong Kong, largely because there are too many links between the government and the universities and because it would be difficult for individual academics (an increasing percentage of whom are not 'tenured') to assert their rights under the Basic Law.<sup>3</sup> It also appeared that the central government had done its best to 'co-opt' university leaders in the transition period (e.g. by appointing them to the Preparatory Committee and other bodies overseeing Hong Kong's return to China).<sup>4</sup> I thus feared that university administrators would be tempted to embrace academic freedom publicly while quietly taking pains to avoid displeasing the local and central governments. This was particularly worrying because there were signs of increased centralization in our universities,

<sup>1</sup> I say 'largely enjoys' because there have been some worrying developments, such as the recent decision upholding the constitutionality of two Hong Kong ordinances prohibiting desecration of the national and regional flags. The Court of Appeal had struck down the laws (as violating Article 39 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter the 'Basic Law'), which came into force on 1 July 1997). However the Court of Final Appeal upheld the laws, primarily on the ground that they constituted a restriction on the form of expression rather than on content. See *HKSAR v Ng Kung Siu* [1999] 2 HKC 10 (Court of Appeal) and [2000] HKC 117 (Court of Final Appeal). The decision has been criticized as a 'setback for the protection of rights' in Hong Kong. See Raymond Wacks, 'Our Flagging Rights' (2000) 30 Hong Kong Law Journal 1, p 3.

<sup>2</sup> See Basic Law, especially arts 34 and 137.

<sup>3</sup> See Carole Petersen, 'Preserving Institutions of Autonomy in Hong Kong: The Impact of 1997 on Academia and the Legal Profession' (1998) 22 Southern Illinois University Law Journal 337, especially pp 341-9.

<sup>4</sup> For a discussion of this 'co-option' process, see Law Wing-Wah, 'The Accommodation and Resistance to the Decolonisation, Neocolonisation and Recolonisation of Higher Education in Hong Kong', in Mark Bray and W O Lee, eds, *Education and Political Transition: Implications for Hong Kong's Change of Sovereignty* (Comparative Education Research Centre, University of Hong Kong 1997), especially at pp 54-5.

giving more power to central administrators and less autonomy to individual faculties and academics.<sup>5</sup>

In some respects, the 'Robert Chung affair' (as it is now widely known) has demonstrated that academic freedom is still alive and well in Hong Kong. However, in other respects it is disconcerting and further substantiates the argument that academic freedom is under threat. Indeed, a review of the incident (particularly the actions of the Hong Kong government and the Council of the University of Hong Kong) demonstrates that there is an urgent need for institutional reforms—both to protect the freedom of individual academics and to bolster the autonomy of the universities.

On July 7, 2000, Dr Robert Chung, an academic at the University of Hong Kong, published an article claiming that he had been pressured to discontinue a public opinion research project that tracked the declining popularity of Mr Tung Chee-hwa, the Chief Executive of the Hong Kong government. In particular, Dr Chung alleged that:

Last year, more than once, I was given a clear message from Mr. Tung via a special channel that my polling activities were not welcomed. Mr. Tung did not like me polling his popularity or the Government's credibility. I was told that he did not like to see universities involved in such activities and that our polls should stop.<sup>6</sup>

One week later, under pressure to reveal the identity the 'special channel', Dr Chung stated that it was none other than Professor Cheng Yiu-chung, the Vice-Chancellor of the University of Hong Kong. Dr Chung asserted that the Vice-Chancellor had sent a message (via Pro-Vice-Chancellor Professor Wong Siu Lun) that the Chief Executive was unhappy with the opinion polls and that he should stop them.

The strong reaction to Dr Chung's allegations (both at the University itself and in the general community) demonstrates that Hong Kong people do indeed value free expression. The Vice-Chancellor cut short his holiday in England and returned to Hong Kong to face protesting students and hordes of reporters. He later held a press conference in which he denied exerting political pressure on Dr Chung to stop conducting the polls. However, the Vice-Chancellor admitted that a Senior Special Assistant to the Chief Executive, Mr Andrew Lo, had visited him in his office at the University. The Vice-Chancellor stated that the meeting had been scheduled at the request of Mr Lo and that the

<sup>5</sup> See Gerald A Postiglione, 'Hong Kong's Universities Within the Global Academy', in Gerald A Postiglione and James TH Tang, eds, *Hong Kong's Reunion With China: Global Dimensions* (HKU Press 1997).

<sup>6</sup> See Dr Robert Chung, 'Pressure to stop opinion polls not welcome', and the accompanying news report 'Tung tried to warn me off, says pollster', *South China Morning Post*, 7 July 2000, p 1.

primary topic had been Dr Chung's opinion poll research project. He recalled that Mr Lo had raised questions about the project (such as whether the University monitored the polls and who decided on the topics). The Vice-Chancellor also stated that Mr Lo had offered a 'comment'—which was that Mr Lo felt that there was a 'conflict of roles' between Dr Chung's role as a pollster and his role as a 'political commentator', as Dr Chung had once written to the Chief Executive 'giving certain suggestions on political policy'.<sup>7</sup> The Vice-Chancellor admitted that this 'expression of views' by a member of the Chief Executive's office had led him to become concerned about the opinion poll research project<sup>8</sup> and that he later discussed the visit from Mr Lo with his Pro-Vice-Chancellors. However, he insisted that he had never induced Pro-Vice-Chancellor Wong Siu Lun to exert any pressure on Dr Chung.<sup>9</sup>

The Council of the University (which is the University's governing body and includes a majority of external members)<sup>10</sup> exercised its statutory powers to appoint an Independent Investigation Panel (the 'Panel') to investigate and 'ascertain the facts' surrounding the allegations of interference with academic freedom.<sup>11</sup> The Vice-Chancellor was asked, and agreed, to extend his leave until the investigation was completed. The Panel was chaired by Sir Noel Power, former Vice-President (and for a time Acting Chief Justice) of the High Court, and included two independent members, Mr Ronny Wong (a senior barrister and former Chairman of the Bar Association) and Mrs Pamela Chan Wong-shui (the Chief Executive of Hong Kong's Consumer Council).

In an effort to ensure transparency, the Panel held public hearings, which were televised and widely reported on in the press. The proceedings were similar to those of a court hearing. Witnesses could, if they wished, be represented by lawyers and had the right to cross-examine (either in person or through their lawyers) other witnesses. In view of the seriousness of the allegations, the Panel expressly adopted the criminal standard of proof—

<sup>7</sup> Statement by Professor YC Cheng, Vice-Chancellor of the University of Hong Kong, 21 July 2000 (copy on file with the author), p 2. These are the words used by the Vice-Chancellor in his statement to the press. In the hearings, Mr Lo stated that he had only queried 'in the mildest and most polite manner' whether there might be a possibility of a conflict of roles. See Daily Hearing Transcripts of the Independent Investigation Panel (available at <http://jmsc.hku.hk/hkupanel>) at day 33, p 34 of 43. For press reports of the Vice-Chancellor's statement, see Angela Lee and Susan Shiu, 'Tung aide queried pollster role: University head reveals key January meeting', South China Morning Post, 22 July 2000, p 1.

<sup>8</sup> Statement by Professor YC Cheng, note 7 above, p 4. It was subsequently revealed that Mr Lo had also visited Professor Arthur Li, the Vice-Chancellor of the Chinese University of Hong Kong and offered comments on public opinion polls on the government that were conducted by members of that university.

<sup>9</sup> *Ibid*, p 3.

<sup>10</sup> See the University of Hong Kong 1999-2000 Calendar, pp 52-3, para 3 (showing membership of the Council).

<sup>11</sup> See Resolution of the Council of the University of Hong Kong, 25 July 2000 (as quoted at para 7 of the 'Report to the Council of the University of Hong Kong by the Independent Investigation Panel', 26 August 2000 (available on the University of Hong Kong website <http://www.hku.hk/reportip.html>) (hereinafter referred to as the 'Report').

beyond a reasonable doubt. The Panel also adopted, for the purposes of the investigation, a definition of academic freedom, which included the 'unhindered freedom to explore a given subject to the extent that our rational powers of investigation are capable; and the freedom to do so without influence or pressures external to the process'.<sup>12</sup> This definition was put to all of the principal witnesses and none took any exception to it.<sup>13</sup>

The Chief Executive, Mr Tung Chee-hwa, was invited to appear before the panel but declined to do so, claiming that he had to protect the dignity of his office and that he had 'no relevant evidence to give'.<sup>14</sup> However, Mr Lo (the member of the Chief Executive's office who had visited the Vice-Chancellor) did appear. Other witnesses included Dr Chung, the Vice-Chancellor, several Pro-Vice Chancellors and other members of the University. The Vice-Chancellor and Mr Lo were each represented by senior counsel (who extensively cross-examined other witnesses, particularly Dr Chung).

After more than two weeks of hearings, the Panel delivered its Report<sup>15</sup> to the University's Council. The Panel's Report concluded, *inter alia*, that as a result of the meeting between Mr Lo and the Vice-Chancellor, one of the Pro-Vice-Chancellors, Professor Wong Siu-lun (acting at the behest of the Vice-Chancellor) had conveyed a message to Dr Chung that was 'calculated to inhibit his right to academic freedom'.<sup>16</sup> In particular, the Panel decided that two meetings between the Pro-Vice-Chancellor and Dr Chung constituted 'covert attempts to push Dr Chung into discontinuing his polling work'.<sup>17</sup> Perhaps even more damning was the fact that the Panel concluded that both the Vice-Chancellor and Mr Lo had given less than full and accurate testimony about the meeting at which they had initially discussed Dr Chung's research. The Panel stated that 'having considered carefully the evidence of the Vice-Chancellor and Mr Lo and mindful of their demeanor when giving it, we are satisfied that neither witness disclosed the full and truthful extent of what was said in that meeting'.<sup>18</sup> In particular, the Panel found that Mr Lo had failed to explain contradictions in his evidence and that:

<sup>12</sup> Report, note 11 above, para 11.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, para 12. See also Ng Kang-chung and Angela Li, 'Tung snubs poll inquiry', *South China Morning Post*, 2 August 2000, p 1.

<sup>15</sup> Report, note 11 above.

<sup>16</sup> *Ibid.*, para 109.

<sup>17</sup> *Ibid.*, para 105. With respect to the first meeting (on 6 January 1999) all three panel members were satisfied beyond a reasonable doubt that Professor Wong met with Dr Chung at the behest of the Vice-Chancellor and conveyed a message that was calculated to inhibit his right to academic freedom. With respect to the second meeting (on 1 November 1999), all three members were satisfied beyond a reasonable doubt that such a message was conveyed by Professor Wong and a majority of the Panel were satisfied beyond a reasonable doubt that Professor Wong was acting at the behest of the Vice-Chancellor. One member of the panel was only satisfied 'on a balance of probabilities' (the lower, civil standard of proof) that the second meeting was held at the behest of the Vice-Chancellor. *Ibid.*, para 109.

<sup>18</sup> *Ibid.*, para 99.

Mr Lo was a poor and untruthful witness. The panel was left with the clear impression that he was not recalling and recounting what had actually happened at his meeting with the Vice-Chancellor but was giving a sanitized version of that conversation in order to distance himself as far as he could from any suggestion of criticism of the work of Dr Chung.<sup>19</sup>

The Council first met to consider the Report on Friday 1 September. The Vice-Chancellor received the Report that morning, in advance of the Council meeting, and he immediately denounced it. Indeed, the Vice-Chancellor 'cancelled' his leave, returned to active duty, and attempted to attend the Council meeting as a full member (although he was ultimately persuaded to leave the meeting after making his statement). Lawyers for Mr Lo made a submission (which was later withdrawn) asking the Council to delay releasing the Report to the public. The Council had also received a letter, signed by 42 chair professors, stating that they did not think that the facts of the Robert Chung affair substantiated a 'conclusion of deliberate interference of academic freedom' (although it should be noted that this letter was drafted and signed before the signatories would have seen the Report and the letter does not indicate whether the signatories had observed the hearings and heard the evidence).<sup>20</sup> The Council agreed to release the Report immediately to the public but took no further action on it at the 1 September meeting. It was reported that certain Council members had expressed 'reservations' as to whether the Council should formally adopt the Report and that this issue had therefore been deferred to a meeting scheduled for 6 September.

At this stage, many academic staff at the University became concerned that the Council might refuse to formally adopt the Report. They believed that this would cause irreparable damage to the University's reputation, as it would convey the impression that the Council was unwilling to accept a Report because of the unfavourable findings regarding the Vice-Chancellor, a Pro-Vice-Chancellor, and a leading government official. A petition was quickly drafted and circulated by email. The petition was confined to one issue of principle—the Council must not reject the Report of the Independent Panel simply because it did not like its conclusions. Given that the Council had used its statutory powers to delegate to the Panel the responsibility of finding the facts, those findings must be regarded as valid unless and until a party concerned successfully challenged it through the process of judicial review. Within three days, 439 academics, more than half of the academic staff of the University of Hong Kong, had signed this petition. This was an impressive

<sup>19</sup> Ibid, para 36.

<sup>20</sup> Letter dated 26 August 2000, addressed to the University Council and signed by 42 Chair Professors of the University of Hong Kong (copy on file with the author), para 2.

show of unity, particularly as many of the signatories do not have tenure but rather were appointed under contracts, which the University has no legal obligation to renew. Signatories included six of the nine deans of faculties, 14 associate deans, and 26 heads of department or centres within the University. The petition was delivered to Council on 6 September, the date of its resumed meeting.

Although the petition did not call upon the Council to take any particular action beyond adopting the Report, it did demonstrate (albeit indirectly) that the Vice-Chancellor had lost credibility with the majority of his staff, including a majority of the deans. Moreover, by 6 September, certain alumni groups had also sent petitions to Council (some of which directly called for the resignation of the Vice-Chancellor). These rapid developments—all within a few days after the Report was released—demonstrated that it would be impossible for the Vice-Chancellor to continue to lead the University. Shortly before the Council meeting resumed on 6 September, the Vice-Chancellor and Pro-Vice Chancellor Wong offered their resignations (although both continued to dispute the findings of the Panel).<sup>21</sup>

Thus far the story reads like a strong victory for academic freedom—an academic had the courage to speak out; his allegations were upheld by an independent investigation conducted through public hearings; the Report was published and ultimately brought about the resignation of the most powerful member of the University.

But that is not the end of the story. The postscript is that the University Council never did formally adopt that Report. The dual resignations were announced at the start of the Council's resumed meeting, on 6 September. The Chairman of the Council, Mr Yang Ti-liang (an external member) then immediately introduced a series of motions (which were rapidly read and passed) to the effect that the Council would simply 'note' the Report rather than formally adopt it. This course of action was taken over the strong objection of the student members of the Council and the majority of the deans of faculties. Arguing that the motions had been rushed through, without opportunity for debate, the University members managed to re-open the issue and put forward a motion to formally adopt the Report. However, after two hours of debate it was clear that the external members opposed this motion and would defeat it if it came to a vote. The deans decided that it would be disastrous for the University's reputation if Council were to reject a motion to adopt the Report. Thus they reluctantly decided to withdraw the motion.

<sup>21</sup> The Vice-Chancellor resigned from the University. Professor Wong resigned from his position as Pro-Vice-Chancellor but retained his position as a teacher in the University. However, he went on leave for the remainder of the semester.

In essence, the University members of the Council were over ruled by the external members. The question is why? When the Council appointed the Independent Investigation Panel and delegated to it the responsibility of finding the facts, it had implicitly undertaken to respect the Panel's findings. Clearly the Council was in no position to substitute its own judgment for the judgment of the Panel members who had actually heard and considered all the evidence. The suggestion (implied in the statement to the public by Council Chairman Yang Ti-liang following the meeting<sup>22</sup>) that there was some doubt as to the definition of academic freedom would not justify rejecting the Report, as the Panel had adopted an explicit definition of academic freedom, to which none of the parties had objected. Thus, the refusal by the Council's external members to formally adopt the Report has naturally given rise to intense speculation. Rumors have circulated (though denied) that a secret deal was made between the Chairman and the Vice-Chancellor shortly before the meeting—to the effect that the Vice-Chancellor would offer his resignation in exchange for a promise that the Chairman would lobby strongly against any motion to adopt the Report.<sup>23</sup> Others have suggested that Council members feared that the Vice-Chancellor might apply for judicial review if the Report was adopted, thus tying up the University in protracted legal proceedings.

However, we should also consider whether the refusal to formally adopt the Report can be attributed, at least in part, to pressure exerted by the Hong Kong government. To appreciate the strength of that pressure, we must first review the many 'links' between the University and the government. The University of Hong Kong is a public university and depends almost entirely upon the government for funding. Although the official funding body (the University Grants Committee) is supposed to serve as a 'buffer' between the government and the universities, that Committee is actually appointed by the Chief Executive. The Chief Executive also serves as the 'Chancellor' of the University. While this is considered a largely ceremonial role, it does give him certain powers—should he choose to exercise them. Moreover, the Chairman of the University Council (who chaired all the Council meetings on this incident and put forth the motion to simply 'note' the Report) was appointed by the Chief Executive and is also a member of his Executive Council (the closest thing that Hong Kong has to a cabinet). In my view, these factors combine to create an uncomfortably close linkage between the government and the University's governing body.

<sup>22</sup> See Chairman's Statement to the Public, 6 September 2000 (copy on file with the author), para 8b.

<sup>23</sup> See No Kwai-yan, ' "Cultural Revolution" fear', South China Morning Post, 9 September 2000, p 2 (quoting the denial by University Council Chairman Yang Ti-liang that there was any 'under-the-table' deal between him and the former Vice-Chancellor).

Given these ties (and the fact that the underlying allegation in this case was that it was the Chief Executive's disapproval of a research project that led the Vice-Chancellor to try to stop it), the Chief Executive clearly had a duty to refrain from any actions that could be interpreted as an attempt to influence the University Council. Unfortunately, he did quite the opposite. For example, although he had refused to appear before the Panel (insisting that he had no relevant evidence to give<sup>24</sup>) he then made statements in the press commenting on the underlying events. During the Panel hearings, two University witnesses (Professor Cheng Kai-ming and Professor Felice Lieh-mak) testified that the Vice-Chancellor had told them that the Chief Executive had personally met with the Vice-Chancellor and raised three concerns, all of which were 'political' in nature and one of which was Robert Chung's opinion polls. This was a key development in the hearings as their testimony directly contradicted that of the Vice-Chancellor. The very next day (while the hearings were still on-going) the Chief Executive issued a press release denying that he had ever mentioned the opinion poll research project to the Vice Chancellor.<sup>25</sup> Of course, since the Chief Executive declined to appear before the Panel his denial was never subject to cross-examination. It should be noted that had he taken similar actions during a court hearing, the Chief Executive could have been subject to contempt of court.<sup>26</sup>

Similarly, when the Panel's Report became public, the Chief Executive publicly disputed its findings of fact. He did this *before* the University Council had decided whether to formally adopt the Report. In particular, the Chief Executive was quoted in the press as stating that he took 'great exception' to the Panel's finding that his assistant, Mr Lo, had been a poor and untruthful witness, insisting that he had known Mr Lo for many years and that he was an 'honest person'.<sup>27</sup> By making these statements in the press, the Chief Executive made it clear that he was exceedingly displeased by the Report and it is not difficult to see how such statements might bear on the minds of Council members when deliberating whether to formally adopt it. Equally worrying is the fact that shortly before the University Council was scheduled to meet and

<sup>24</sup> See note 14 above.

<sup>25</sup> See Angela Li and Ng Kang-chung, 'Tung "told top don of poll fears"' South China Morning Post, 16 August 2000, p 1.

<sup>26</sup> Professor Albert Chen, Dean of the Law Faculty of the University of Hong Kong, also expressed this view and was quoted (after the Council had completed its consideration of the matter) as stating that '[t]he rule of law implies equality of all persons before the law. So if the Chief Executive wants to give any views on questions which came up during the enquiry, the proper channel for him to do so is to appear as a witness before the panel instead of using the Chief Executive's Office to release a press statement to contradict what appeared in evidence in the course of the hearing.' See Angela Li, 'Tung's comments "similar to contempt"', South China Morning Post, 16 September 2000, p 6.

<sup>27</sup> See Press Release of the Chief Executive, 1 September 2000 (available at <http://www.info.gov.hk/ce/cepr.htm>). See also Chris Yeung, 'University chiefs meddled with polls on Tung, inquiry finds', South China Morning Post, 2 September 2000, p 1.



receive the Panel's Report, the Chief Executive suddenly summoned Mr Yang Ti-liang, Chairman of the University's Council, to a private meeting. We will never know what was actually said at that meeting. An article in the Chinese press reported that the Chief Executive asked the Chairman to 'handle the matter better'.<sup>28</sup> The official explanation was that Mr Tung was not acting as Chief Executive during that meeting but rather was acting in his capacity as the University's Chancellor and simply wanted to express his 'concern' for the institution!<sup>29</sup> Clearly there was a conflict of interest in the Chief Executive's two roles here. It was inappropriate for the Chief Executive to choose this particular moment to play more than a strictly ceremonial role as Chancellor of the University.

In the unlikely event that any doubt remained in the minds of Council members about the Chief Executive's views of the Panel's Report, the press also reported that the Department of Justice had made a submission, on behalf of Mr Lo, urging the Council not to adopt the Panel's Report.<sup>30</sup> This situation arose from another mistake (one that the Secretary for Justice, Ms Elsie Leung, could have avoided). During the public hearings before the Panel, the Justice Department served as the instructing solicitors for Mr Lo and a government lawyer sat at counsel's table throughout the hearings.<sup>31</sup> Of course, it is not uncommon for the Department of Justice to represent a government employee involved in civil proceedings. However, in this particular case (in which the chief allegation was government interference in university autonomy and academic freedom), the Secretary for Justice should have recognized the need for outside solicitors. There would be no objection to the government *paying* for Mr Lo's legal representation (especially as it appears likely that his visit to the Vice-Chancellor was in the course of his employment). However, government lawyers should not have been put in the position of defending him. Once they were assigned to do so they were obligated to do their best for their client, including preparing a submission arguing that the Report was flawed. In so doing the Justice Department once again sent a message that the Hong Kong government did not want that Report adopted.

<sup>28</sup> 'Tung requests "handle the case better"', *Ming Pao*, 2 September 2000.

<sup>29</sup> See Angela Li, 'Tung's "concern" led to meeting', *South China Morning Post*, 3 September 2000, p 4 (quoting the government's Information Co-ordinator Stephen Lam Sui-lung).

<sup>30</sup> See 'Tung aide to lobby against "slurs"', *South China Morning Post*, 5 September 2000, p 1.

<sup>31</sup> See Report, note 11 above, para 13, noting that Mr Lo was 'represented by Mr Alan Hoo, SC, assisted by Mr Johnny Mok and instructed by the Department of Justice'. It was later reported that outside solicitors represented Mr Lo (in lieu of the Department of Justice) at the Council's second meeting to consider the Report (on 6 September). See Angela Li, 'Tung aide points to "defects" in report', *South China Morning Post*, 7 September 2000, p 3. It is not clear why the substitution was made—perhaps the Department of Justice finally recognized that its representation of Mr Lo could be interpreted as government interference in the University's autonomy. In any event, the appointment of outside solicitors for this meeting of Council came too late, as by then it was already public knowledge that government lawyers had been representing Mr Lo and arguing that the Council should not adopt the Report.

The views expressed by the Chief Executive and his government were all the more significant because of the membership of the Council. It is dominated by external members, most of whom are drawn from Hong Kong's conservative business community and may well be loathe to offend the Chief Executive or his government. This is why the Chief Executive and his government should have been extra careful not to express any views on the Report or on the action that the Council should take with regard to it. The failure to refrain from doing so undermined previous assurances that the government would not interfere in the Council's decision. Indeed, public speculation about the government's role became so strong that the Chief Executive's Office found it necessary to issue a statement denying claims that the Chief Executive's Office had contacted non-university members of the Council to lobby against adoption of the Panel's Report.<sup>32</sup>

The Council did, at least, agree that 'further work will be done by the University on the issue of academic freedom'.<sup>33</sup> I thus conclude by considering what steps can be taken to better protect academic freedom and university autonomy.

The first thing that the University should do is to formally endorse the Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education.<sup>34</sup> The University should also treat with great caution any proposals to 'restructure' the University in ways that would reduce the autonomy of faculties and individual academics. Only a few months ago, a proposal was circulated at the University (for general consultation) that suggested that departments and faculties might be merged into a small number of large 'schools', each headed by a full-time administrator who would not be elected (as most deans currently are) but rather appointed by the Vice-Chancellor. Such a structure would make the University far more centralized and significantly less democratic. I argued (at a forum on the proposal) that restructuring along these lines could endanger academic freedom – an issue that apparently had not been expressly considered when the proposal had been drafted.<sup>35</sup> It is my

<sup>32</sup> See Angela Li and Susan Shiu, 'University image "rests on council overhaul"', *South China Morning Post*, 8 September 2000, p 2, quoting the Chief Executive's Office as stating that 'The Government has not contacted council members to interfere with their decision'.

<sup>33</sup> Note 22 above, para 8b.

<sup>34</sup> The University Senate considered the Declaration in 1994 and noted that it was consistent with the University's Mission and Goals. But recent events clearly demonstrate a need to formally adopt it.

<sup>35</sup> After I raised my concerns the management consultants and certain members of the University who were conducting the consultation on the proposal did state that consideration would be given to academic freedom issues in future discussions of the proposal. However, in my view, the potential threat to academic freedom is inherent in any proposal that would consolidate the faculties and transfer powers from elected deans to appointed directors of a small number of large 'schools'.

understanding that this proposal is now 'on hold' and not being actively pursued. (No doubt the Acting Vice-Chancellor has more than enough to do in the aftermath of the Robert Chung affair.) However, there is no guarantee that the proposal will not be revived. In my view, any suggestions for greater centralization (both of academic and budgeting powers) should be viewed with a healthy scepticism and with due regard for the potential impact upon academic freedom—particularly in the political context of Hong Kong, the only place in the People's Republic of China that currently enjoys academic freedom and the right to criticize the government. I also suggest that the central administration should consider returning to individual faculties at least a portion of the money that was 'top-sliced' from faculty budgets to create the very substantial 'discretionary fund' maintained by the former Vice-Chancellor. In times of increasingly tight budgets, certain faculties felt that they could not maintain strength without receiving special grants from this fund. This made it difficult for faculties to express opposition to the Vice-Chancellor on other issues.

Finally, we must consider the governance of the University. It seems clear that the linkages between the Council and the Hong Kong government need to be reduced. The Chief Executive should no longer serve as the University's Chancellor. Nor should any member of his Executive Council serve as Chancellor or as a member of the Council. Moreover, while it is no doubt healthy to have a certain number of external members on the Council, this incident (and the sharp division between the University and external members) raises the question of whether external members should constitute the majority of members. We should also consider how the external members are chosen. The problem is that the interests of the government (and other powerful institutions) will inevitably collide with academic freedom from time to time. When they do, we need to know that our Council members will be willing to stand up for the autonomy of the institution and the freedom of individual academics. This is more likely to occur if a majority of members of the Council clearly understand and appreciate the importance of academic freedom, have no links with government, and are free from considerations of an extraneous nature (such as how their commercial interests might be detrimentally affected if they take decisions that displease the local or central governments).

The simple and inescapable truth is that Hong Kong is now a part of a country that does not generally allow criticism of the government. Although the Basic Law promises that Hong Kong will enjoy that freedom, it would be naive to assume that any law will be sufficient on its own. We also need strong institutional mechanisms to protect academic freedom. Indeed, the most important lesson of the Robert Chung affair is that threats to academic freedom are not confined to explicit laws or policies, which an academic could theoretically

challenge in court as violating the Basic Law or the Bill of Rights.<sup>36</sup> Rather, the most dangerous threats are the covert ones—the private meetings in which a senior academic expresses ‘concern’ to a junior colleague, genuinely believing that she will enjoy a brighter future at the University if she would only pursue less controversial research or steer away from certain ‘political’ topics in the classroom. The University of Hong Kong, and indeed all educational institutions in Hong Kong, must take steps to better protect academics from this kind of pressure. By so doing, Hong Kong’s universities can hopefully avoid declining into the ‘culture of subservience’ that Professor Ying Chan warned against in her submission to the Panel.<sup>37</sup>

The first step in this process is for the University of Hong Kong’s Council to formally accept the findings of the Independent Investigation Panel. The most disappointing thing about the failure of the Council to adopt the Report is that it creates the impression that the Council is unwilling to fully acknowledge the seriousness of the incident or the urgent need for institutional change. This was evident in the public statement given by the Chairman of the Council immediately following the decision to simply ‘note’ the Report rather than adopt it. Mr Yang insisted that ‘[i]t is clearly in the best interests of the University to put this matter *behind* it and to move forward’ (emphasis added).<sup>38</sup> With respect, it is not in the interests of the University to simply put the matter behind it. We can only move forward (in a positive direction) if we face up to the conclusions in the Report and take action to strengthen academic freedom—both the freedom of individual academics and the University’s autonomy from government.

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<sup>36</sup> Section 7(1) of the Bill of Rights Ordinance provides that it binds only the government and all public authorities. However, there is authority for the proposition that the University should be considered a ‘public authority’ for the purposes of s 7(1). See *Hong Kong Polytechnic University v Next Magazine* (1996) 6 HKPLR 117 and *Hong Kong Polytechnic University v Next Magazine* (1996) 7 HKPLR 41, 44-5 (High Court). On appeal, the Court of Appeal assumed, without deciding, that the university was a public authority and reversed the decision on other grounds. However, Litton VP noted in dicta that the conclusion that the university was a public authority ‘seems to me somewhat doubtful’. (1997) 7 HKPLR 286, 291.

<sup>37</sup> For a commentary on this issue, see Sin-ming Shaw, ‘Back to a culture of subservience’, *South China Morning Post*, 27 August 2000, p 11.

<sup>38</sup> Note 22 above, para 6.

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