

Print Request: LEXSEE

Time of Request: September 20, 2003 04:06 PM EDT

Number of Lines: 647

Job Number: 1862:0:14403653

Client ID/Project Name:

Research Information:

Lexsee 32 New ENG. L Rev. 751

Send to: KABANO, MICHEL
CASE WESTERN RESERVE UNIVERSITY
11075 EAST BLVD
CLEVELAND, OHIO 44106-5409

LEXSEE 32 New ENG. L Rev. 751

Copyright (c) 1998 New England School of Law
New England Law Review

Spring, 1998

32 New Eng.L. Rev. 751

LENGTH: 12232 words

ARTICLE: Applicability of the "One Country, Two Systems" Hong Kong Model to Taiwan: Will Hong Kong's Post-Reversion Autonomy, Accountability, and Human Rights Record Discourage Taiwan's Reunification with the People's Republic of China?

George E. Edwards *

* Associate Professor of Law, Indiana University School of Law — Indianapolis; Director, Program in International Human Rights Law; Associate Director, Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong (former); Law Lecturer (adjunct), Faculty of Law, City University of Hong Kong (former); Law Lecturer, Law Society of Hong Kong (former).

J.D. Harvard (1986).

The author would like to thank his research assistants — Mr. Scott Goodroad, Ms. Toma Guha and Mr. Aklilu Tedla — for their assistance on this project.

The author would also like to thank Professor Che-Fu Lee, of the Catholic University, who read an earlier draft of this Article, and made comments, following my presentation of the Article at a Conference entitled Bridging the Taiwan Strait: Problems and Prospects for China's Reunification or Taiwan's Independence, held at the New England School of Law, Boston, Massachusetts, U.S.A., on October 17, 1997.

SUMMARY:

... China has promised that Hong Kong, until 2047, "shall enjoy a high degree of autonomy." ... This rubric was formulated in a nine-point proposal for peaceful reunification of Taiwan and the Mainland, announced on 30 September 1981, by the Chairman of the Chinese National People's Congress (NPC), Ye Jianying. ... * After the country is reunified, Taiwan can enjoy a high degree of autonomy as a special administrative region, and it can retain its armed forces. ... Thanks to the introduction of the basic principles of 'peaceful reunification' and 'one country, two systems' as well as other policies, significant headway has been made in the relations between the two sides of the Taiwan Straits. ... We will continue to resolutely advance the Motherland's peaceful reunification according to this idea to ensure Macao's smooth return and to finally solve the Taiwan issue. ... Except for a handful of people who stubbornly cling to the position of 'independence of Taiwan,' all parties and personages of all circles in Taiwan are welcome to exchange views with us on relations between the two sides and on peaceful reunification. ...

TEXT-1:

[*751] I. INTRODUCTION

On July 1, 1997, Hong Kong, which for the previous 156 years had been under the administration of the United Kingdom, became a Special Administrative Region of the People's Republic of China. There was great cause for celebration in Beijing, as China's leaders proclaimed the long-awaited reunification of Hong Kong with the Motherland. The reunion followed a "One Country, Two Systems" model, under which it became incontrovertible that Hong Kong was an inalienable part of [*752] China. China has promised that for fifty years Hong Kong will maintain its own pre-existing social, economic, and legal systems and will not be required to adopt those of the Mainland. China has promised that Hong Kong, until 2047, "shall enjoy a high degree of autonomy." n1

Since 1949, when a bloody civil war resulted in the Nationalists fleeing the Mainland bound for Taiwan, leaving the Communists to rule Mainland China, Beijing has wished for a Taiwanese reunification. For at least the last twenty years, Beijing has held firmly to the notion that the "One Country, Two Systems" model, which had been originally designed with Taiwan in mind, would in fact be used to resolve the Taiwan question. Following Hong Kong's 1997 return, China has reaffirmed its belief that the "One Country, Two Systems" model, as "successfully" applied to Hong Kong, is appropriate for Taiwan. China believes that the Hong Kong "success" should convince Taiwan (which has long rejected the model as inappropriate to Taiwan) to embrace the model, which would serve as a blueprint for the Taiwan reunion.

Is the Hong Kong model a "success" — now — approximately 100 days after the change of sovereignty? n2 Beijing trumpets an affirmative: it contends that the model has worked and is even surpassing expectations. China boasts a smooth Hong Kong transition, which China theorizes should engender confidence in Taiwan. Hong Kong, on the other hand, would argue that the "One Country, Two Systems" model began to collapse even before the reversion; and it has failed miserably since July 1, 1997. Since the change of sovereignty, human rights protections [*753] in Hong Kong have eroded; its "high degree of autonomy" has been illusory; its "local" government has lost its accountability to Hong Kong people; and democracy in Hong Kong has regressed. From Hong Kong's perspective, there is not "One Country, Two Systems," but perhaps "One Country, One and One-Half Systems" (with emphasis on the "One Country"). The Mainland's authoritarian, non-democratic system is creeping across the border, diluting Hong Kong's more liberal system that China promised would remain intact.

Though Taiwan has not embraced the "One Country, Two Systems" model, it has not ruled out a reunification, under modified terms. Therefore, Taiwan is closely studying the Hong Kong reversion, assessing carefully the experiment's "success" or lack thereof, particularly as the definition of "success" differs, based on one's perspective. Does the Hong Kong model, as applied, remain inappropriate to Taiwan? What lessons are to be learned from Hong Kong's perception that the model has failed? Should Taiwan harbour skepticism? Should Taiwan distrust the PRC's ability or willingness to honour any Taiwan bargain?

Part II of this paper will define the "One Country, Two Systems" model. n3 Part III will address Taiwan's arguments that significant differences exist between Hong Kong and Taiwan to render the "One Country, Two Systems" model inapplicable to Taiwan. n4 Part IV will focus on the PRC's contention that the "One Country, Two Systems" model as applied to Hong Kong has been a "success." n5 Part V will discuss how the "One Country, Two Systems" model as applied to Hong Kong has failed from a Hong Kong perspective. n6 Part VI concludes that the "One Country, Two Systems" model as applied to Hong Kong will prove inadequate for Taiwan. n7 Taiwan's history, geography, and political realities render the model unsuitable for Taiwan.

Post-reversion Hong Kong demonstrates a low level of meaningful autonomy, which is contrary to what China promised in the official transition instruments. The new China-imposed constitution of Hong Kong grants autonomy with one hand, and takes it back with the other. Furthermore, the current Hong Kong government's executive and legislative branches have virtually no responsibility to account to the people of Hong Kong. The Chief Executive and the Provisional Legislature Council were selected by the Chinese government and not elected or [*754] even selected by Hong Kong people. The May 1998 first post-reversion Legislative Council elections will not result in representation of Hong Kong people because gerrymandering and other strategies will dilute the strength of the popular pro-democracy candidates.

During this early reversion period, where hopes should have been that human rights and democracy would champion and proliferate, these principles have been thrust into retrograde mode. Flags of caution should be raised in Taiwan, for which independence and sovereignty might be in order. Does Taiwan wish to trade independence for broken autonomy promises?

II. WHAT IS THE "ONE COUNTRY, TWO SYSTEMS" MODEL — FROM WHERE DID IT COME?

A. *Birth of "One Country, Two Systems" — Taiwan*

The concept of "One Country, Two Systems," which originated as a model for the prospective reunification of Taiwan and the Mainland, incorporates the notion that upon reunification, the two entities would re-combine as one nation. Taiwan would be permitted to maintain its political and economic systems and would not be required to adopt those of China. This rubric was formulated in a nine-point proposal for peaceful reunification of Taiwan and the Mainland, announced on 30 September 1981, by the Chairman of the Chinese National People's Congress (NPC), Ye Jianying. n8 In January of the following year, Deng Xiaoping announced that the basic idea underlying Ye's policy was "one country, two systems," and the phrase was coined. n9

The basic principles incorporated into the model for Taiwan were:

- * After the country is reunified, Taiwan can enjoy a high degree of autonomy as a special administrative region, and it can retain its armed forces. The Central Government will not interfere with local affairs on Taiwan.
- * Taiwan's current socio-economic system will remain unchanged; so will its way of life and its economic and cultural relations with foreign countries. n10

[*755] In 1982, China enacted a new Constitution, which provided for the creation, as was needed, within China of special administrative regions that had economic and political systems different from that in other parts of China. n11 Between 1982 and 1984, Deng further embraced Ye's plan and expounded that as a special administrative region Taiwan would: "exercise independent jurisdiction and the right of final judgment"; be permitted to keep its military, with neither PRC troops nor administrative personnel there; "administer its own political parties, government and armed forces"; and have the status of a local government without complete autonomy and with the PRC as the sole representative of Taiwan internationally. n12

In 1993, the NPC issued a White Paper on Taiwan and Reunification, which re-states the "One Country, Two Systems" model for Taiwan's reunification. n13 This model was reaffirmed by PRC President Jiang Zemin in 1996. n14 On July 1, 1997, upon the establishment of the Hong Kong Special Administrative Region, n15 Chinese leaders again proclaimed their desire to see Taiwan revert under a "One Country, Two Systems" model.

The "One Country, Two Systems" model, as a proposed framework for the reversion of Taiwan (and Hong Kong and Macau) was recently reaffirmed in the September 1997 Report of PRC President Jiang Zemin at the 15th Party Congress, at which he declared:

The concept of "one country, two systems" is an important component [*756] of Deng Xiaoping theory. The basic idea is that on the premise of national reunification, the main part of China will stick to the socialist system while Taiwan, Hong Kong and Macao will retain the current capitalist system and way of life for a long time to come. This concept is the basic policy for promoting the great cause of the peaceful reunification of the Motherland, because it not only embodies the principled position of achieving national reunification and safeguarding state sovereignty, but also takes into full consideration the past and the present of Taiwan, Hong Kong and Macao, and embodies a high degree of flexibility. The adoption of the policy of "one country, two systems" is in the interest of the reunification of the Motherland and the rejuvenation of the Chinese nation and conducive to world peace and development. n16

B. *Extension of "One Country, Two Systems" to Hong Kong*

In 1982, Margaret Thatcher, then English Prime Minister, met in Beijing and agreed with Chinese Leader Deng Xiaoping to enter into negotiations on the reversion of Hong Kong. n17 The "One Country, Two Systems" model, which had been created for the Taiwan reunification and incorporated into the 1982 Constitution of China, was to be applied to Hong Kong. n18

In 1984, China and the United Kingdom signed the Joint Declaration on the Question of Hong Kong, a treaty ratified in 1985 by both parties and registered with the United Nations. n19 This treaty provided for the transfer of sovereignty over Hong Kong from the United Kingdom to China, as of July 1, 1997. Pursuant to the Joint Declaration, China was obligated to establish the Hong Kong Special Administrative Region (HKSAR). n20 According to the Joint Declaration, the HKSAR shall enjoy a "high degree of autonomy"; n21 the "laws previously in force in Hong Kong (i.e., the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained"; n22 and [*757] the HKSAR government "shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong." n23 Furthermore, the International Covenant on Civil and Political Rights (ICCPR), n24 "as applied to Hong Kong shall remain in force." n25 Pursuant to the Joint Declaration, those protections were to become enshrined in Hong Kong's "mini-constitution," which China was slated to draft and enact. n26 That mini-constitution, known as the Basic Law, was promulgated by decree of the President of the People's Republic of China several years after the Joint Declaration, on April 4, 1990. n27 The Basic Law has been in force in Hong Kong since July 1, 1997.

III. DIFFERENCES BETWEEN HONG KONG AND TAIWAN THAT RENDER THE HONG KONG "ONE COUNTRY, TWO SYSTEMS" MODEL INAPPLICABLE TO TAIWAN

The People's Republic of China has wholeheartedly supported the "One Country, Two Systems" model for reunification of Hong Kong, Macau, and Taiwan. n28 However, though open to the general concept of reunification, Taiwan has long rejected the "One Country, Two Systems" model as inappropriate for Taiwan. Taiwan cites numerous reasons for the inapplicability of that model to Taiwan. Reasons for rejecting the model include actual and perceived differences in the history, geography, and political systems of Hong Kong and Taiwan. Taiwan deems differences in the following areas

highly relevant to its conclusion: (a) sovereignty status and aspirations; (b) political systems; and (c) the ability to negotiate in the reversion process. Finally, in light of and despite these differences, Taiwan has expressed a need to monitor the "One Country, Two Systems" model as applied to Hong Kong to help set the tone for any prospective reunification of Taiwan and the Mainland.

[*758] A. *Sovereignty*

Taiwan contends that historical sovereignty differences between Hong Kong and Taiwan militate against the "One Country, Two Systems" model being applicable to Taiwan, and argues that the model may be more readily applicable to Hong Kong. Taiwan adopts a practical perspective. Hong Kong never realistically had hopes of becoming a sovereign state. For approximately 150 years until 1997, Hong Kong was a Crown Colony of the United Kingdom. Any attempt by Hong Kong to assert a claim for self-determination was abruptly quashed by both the United Kingdom and China, each of which selfishly endeavored to enjoy their respective periods of control over Hong Kong.

The reversion of Hong Kong to China was inevitable; and Hong Kong people, upon realizing this — certainly after the Joint Declaration was signed in 1984 — resigned themselves to the transfer. As a matter of necessity, some model for the governance of Hong Kong had to be constructed because it was clear that Hong Kong could not convert to China's system. A system that would at least purport to allow Hong Kong to maintain some of its governance, integrity, and lifestyle had to be created and implemented.

The "One Country, Two Systems" model for Hong Kong was expedient, as it initially helped to quash fears that when authoritarian China reclaimed Hong Kong in 1997, China would attempt to shape the democratic, capitalist, free territory into its own socialist image. However, those fears were allayed by reassurances that Hong Kong would remain basically unchanged for fifty years following the change of sovereignty.

Taiwan, on the other hand, since its 1949 break from the Mainland, has existed functionally as an independent, sovereign state. It possesses virtually all of the chief characteristics of a state: it has a well-defined territory, a population, a government, and a capacity to enter into relations with other states. Thus, as Taiwan would argue, not only does Taiwan have the political will of its people to sustain its sovereignty, but also it believes it has international law on its side.

B. *Political Systems*

Taiwan would argue that Hong Kong is more suited for the "One Country, Two Systems" Hong Kong model because Hong Kong has existed under the virtual control of the United Kingdom for the last 150 years, with democracy only beginning to be phased in during the 1980s. Hong Kong never enjoyed home rule, never fought for it (unlike Taiwan), and, realistically, will never achieve it.

It has been more than one decade since martial law was lifted and [*759] democracy was introduced in Taiwan. Taiwan has, for approximately a decade, maintained a hearty and vigorous democracy, culminating in full democratic elections of its President in 1996. Taiwan will never settle for anything less than full democracy.

C. *Ability to Participate Effectively in Reunification Negotiations*

Unfortunately, Hong Kong was never strongly positioned to contribute effectively, or to provide meaningful input to, the negotiations surrounding its reversion. The details were hashed out at the negotiation tables by the United Kingdom and China. n29 Hong Kong's lack of leverage is rooted in the 1800s when Hong Kong became a spoil of war after the United Kingdom defeated China in the Opium Wars and China consequently relinquished Hong Kong to the British. Hong Kong was under the administration of the United Kingdom until July 1, 1997.

Taiwan, on the other hand, broke away from the PRC in 1949 following a bloody civil war, and obtained and still maintains a high level of independence. The Taiwanese government itself, rather than a third party, is postured to negotiate with the PRC. Taiwan's power to effectively and forcefully negotiate reunification with China is challenged only by the amount of leverage Taiwan maintains. Thus, the issue regarding Taiwan is the quantum of leverage Taiwan possesses. However, the issue regarding Hong Kong has always been whether Hong Kong had any leverage at all — which it has not.

Taiwan's historical strength, at least from a Taiwanese perspective, coupled with additional factors, n30 renders it a more suitable candidate for full independence at best, but not the "One Country, Two Systems" model.

D. *Taiwan Monitors Hong Kong — Despite and in Light of Differences*

Though Taiwan highlights the above-mentioned differences between Taiwan and Hong Kong, and Taiwan maintains that those differences render the Hong Kong model inapplicable to Taiwan, Taiwan has still closely monitored Hong Kong's change of sovereignty. In fact, Taiwan's Mainland Affairs Council, which charts Taiwan's policies [*760] towards

China, has been vocal regarding China's policies and practices towards Hong Kong:

In order to maintain the interests and well-being of Hong Kong people after the transfer, we find it necessary to monitor closely Mainland China's implementation of "one country, two systems" in Hong Kong. Britain's last Hong Kong governor, Christopher Patten, in an October 1996 report, listed several barometers to gauge Mainland China's governance. They included a legislative branch functioning independently from Beijing's pressure, a group of professional and trustworthy government employees, the Hong Kong SAR government's full power to make its budget, full membership in international economic organizations, participation of democracy advocates in government operations, the freedoms of expression, the press, and assembly, and the SAR government's autonomy in areas prescribed under the Sino-British Joint Declaration and Basic Law. The Republic of China's government will watch closely whether Mainland China's commitment to Hong Kong can be fulfilled, as a reference for our plans in exchanges between the three places. n31

Thus, Taiwan, which has not ruled out a reunion with the Mainland, is using the Hong Kong reversion as an opportunity to test the commitments of the Mainland.

IV. THE PRC CONTENDS THAT THE "ONE COUNTRY, TWO SYSTEMS" HONG KONG MODEL HAS BEEN A "SUCCESS"

China has long lobbied for the return of Taiwan under a "One Country, Two Systems" model, like that in place in Hong Kong, and has consistently argued that the model has been a resounding success in Hong Kong. Moments after the lowering of the Union Jack at the Convention Centre in Hong Kong in the earliest hours of July 1, 1997, Chinese leaders heralded the Hong Kong experiment as being satisfactorily achieved. China has repeatedly proclaimed that success and its continued firm desire that the model be applied to Taiwan.

Chinese President Jiang Zemin, at the United Nations in New York in September 1997, declared:

As a hallmark of the great success of the concept of 'one country, two systems,' Hong Kong's return to the Motherland constitutes a crucial step taken by the Chinese people in the great cause of the reunification of the Motherland. Since Hong Kong's return, the policies of 'one country, two systems,' 'Hong Kong people administering Hong Kong,' [*761] and a high degree of autonomy have been implemented conscientiously, and Hong Kong has maintained its prosperity and stability. Facts will prove that the government of the [Hong Kong Special Administrative Region] HKSAR and our compatriots in Hong Kong will surely be able to administer Hong Kong well in accordance with the Basic Law of the HKSAR. n32

Though President Jiang Zemin recognized that difficult but not insurmountable hurdles remain to be overcome in Taiwan/PRC relations, n33 he expressed his hopes that the Hong Kong experiment would have a positive impact on Taiwan, and would help foster reunification, and continued:

Thanks to the introduction of the basic principles of 'peaceful reunification' and 'one country, two systems' as well as other policies, significant headway has been made in the relations between the two sides of the Taiwan Straits. The smooth return of Hong Kong and the maintenance of its long-term prosperity and stability will undoubtedly create favourable conditions for the settlement of the Taiwan question. n34

Also at the United Nations in New York, Chinese State Council Vice-Premier and Foreign Minister Qian Qichen delivered a speech on September 24, 1997 in which he proclaimed the success of Hong Kong:

On 1st July this year, China resumed exercising its sovereignty over Hong Kong, washing away our national humiliation of one and a half centuries and opening up a new chapter of the process of the Motherland's peaceful reunification. Looking back at the last two months and more, Hong Kong has maintained social stability and economic prosperity, and people of Hong Kong, Chinese people, and people around the world have been pleased to see this. n35

Qian Qichen continued by suggesting that Hong Kong's success would pave the way for the return of Macau and Taiwan: [*762] Deng Xiaoping's idea of 'one country, two systems' has become reality in Hong Kong. The significance of this is extremely profound. We will continue to resolutely advance the Motherland's peaceful reunification according to this idea to ensure Macao's smooth return and to finally solve the Taiwan issue. n36

At the opening ceremony of the World Bank/International Monetary Fund Annual Conference held in Hong Kong in September 1997, Chinese Premier Li Peng noted:

Now [that] you are in Hong Kong, you can see with your own eyes that the Chinese government's basic policies of 'one country, two systems,' 'Hong Kong people administering Hong Kong,' and a high degree of autonomy, have been carried out in earnest . . . and the SAR Government headed by Mr. Tung Chee-hwa is operating normally and effectively in accordance with the Basic Law. n37

The PRC's persistence regarding the applicability of the "One Country, Two Systems" model to Taiwan is unrelenting. Taiwan, however, remains unconvinced that the "One Country, Two Systems" model will work for it. Furthermore, it is far

from clear that the "One Country, Two Systems" model, as applied in Hong Kong, is a success.

V. HOW THE "ONE COUNTRY, TWO SYSTEMS" MODEL HAS FAILED FROM A HONG KONG PERSPECTIVE

China's assertion, that the "One Country, Two Systems" model has been successful in Hong Kong, has been overwhelmingly denounced by Hong Kong human rights groups and individuals; but it has been applauded by Hong Kong government officials who were appointed by, and now serve at the pleasure of Beijing. Supporters of the new regime, including Mr. Tung Chee-hwa (the new HKSAR Chief Executive), have contended that "everything remains unchanged" in Hong [*763] Kong such as lifestyle and human rights protections. n38 Critics have argued that Hong Kong's promise of a "high degree of autonomy" has not materialized, that the new Hong Kong regime is not accountable to its own people, n39 and that the human rights of Hong Kong people have been seriously jeopardized, and eroded.

A. *Autonomy — Promises Regarding Autonomy — Basic Law, Articles 2 and 12*

China has made several promises regarding Hong Kong Special Administrative Region autonomy and independence. China has fulfilled none of those promises. Those broken promises are found in articles 2 and 12 of the Basic Law.

Article 2 of the Basic Law of the HKSAR provides:

The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of [the Basic] Law. n40

[*764] Article 12 of the *Basic Law* of the HKSAR provides:

the [HKSAR] shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government. n41

1. **Promise #1 — "High Degree of Autonomy"**

The first autonomy promise made in Article 2 is that the HKSAR has been authorized by the NPC to exercise a "high degree of autonomy," which implies that China will not attempt to quash that autonomy should the HKSAR choose to exercise it. n42 Article 2 does not mandate that the HKSAR exercise a "high degree of autonomy"; the Article only permits it. n43 Thus, the HKSAR may opt to exercise its authorized autonomy, or it may opt not to exercise it. However, when Article 2 is coupled with Article 12, it appears that Hong Kong's "high degree of autonomy" is mandatory and, therefore, settled. Article 12 goes further and provides that the HKSAR "shall enjoy a high degree of autonomy."

Whichever view one takes — permissive or mandatory — several Basic Law provisions explicitly limit Hong Kong's autonomy. Furthermore, it appears that the HKSAR government may not be fully exercising the remaining autonomy it may be authorized to exercise. The failure to exercise this autonomy may take the form of undue deference to the PRC by the Hong Kong government. Finally, the autonomy granted to the HKSAR is at times taken back by the Basic Law itself.

For example, the Basic Law authorizes "autonomy" regarding the HKSAR regional flag and emblem. n44 Article 10 provides that the HKSAR "may also use a regional flag and regional emblem." n45 The Article then prescribes for the HKSAR precisely what the flag and emblem shall be: the flag "is a red flag with a bauhinia highlighted by five star-tipped stamens." n46 The regional emblem "is a bauhinia in the centre highlighted by five star-tipped stamens and encircled by the [*765] words 'Hong Kong Special Administrative Region of the People's Republic of China' in Chinese and 'HONG KONG' in English." n47 This is an example of how the PRC, via the Basic Law, grants autonomy with one hand and takes it away with the other. n48

Another example of the lack of a high degree of Hong Kong autonomy also concerns flags. October 10 is Taiwan's National Day (known as "Double Tenth") and is a celebration that commemorates Taiwan's founding. On October 10, 1997, people in Hong Kong attempted to celebrate Double Tenth by hanging Taiwanese flags in public. Hong Kong Chief Executive Tung ordered Hong Kong police to remove the Taiwanese flags that had been flown around the region. Mr. Tung's justification for the Taiwanese flag removal in part invoked a long-held Beijing principle that there exists only one China, that Taiwan is only a renegade province of that one China, and that recognition of Taiwan in any other fashion will not be tolerated. n49

2. **Promise #2 — More About "High Degree of Autonomy"**

Under the Basic Law, the PRC, which promulgated the HKSAR mini-constitution, is a micro-manager. n50 Again, though the Basic Law [*766] grants the HKSAR a "high degree of autonomy," in reality, the Basic Law, in the next breath, outlines with a high degree of specificity how the HKSAR is to "autonomously" carry out its policies. n51 For example, the Basic Law is based on the notion that the Mainland socialist system shall be separately practiced on the Mainland,

while the capitalist system is to be practiced in the HKSAR. Professor Yash Ghai points out that capitalism is generally a rather flexible system that has at its center a limited base of rules and principles. n52 Professor Ghai observes: A government required to preserve capitalism would enjoy great flexibility in deciding social, economic and political policies and the institutions to adopt and execute them; in brief it would be bestowed with a high degree of autonomy. But the Basic Law goes on to prescribe many of the details of the capitalist system that Hong Kong must preserve; and thus erodes the autonomy that the HKSAR might otherwise have enjoyed. n53 Again, Hong Kong possesses less autonomy than was apparent at first glance.

3. Promise #3 — "Executive and Legislative Power"

The third promise of Article 2 is that the HKSAR possesses executive and legislative power. n54 However, this power is not absolute and is subject to constraints outlined in the Basic Law. The executive and legislative power is not as "independent" as, for example, the judiciary power purports to be. n55 The "high degree of autonomy" of the executive and legislative branches of government is somewhat illusory if, in fact, "high degree of autonomy" was intended to relate directly to legislative and executive powers, n56 as there are numerous, broad constraints [*767] on their policy-making abilities and activities. For example, the Chief Executive is appointed by Beijing n57 and is accountable to both Beijing and the HKSAR. n58 The Chief Executive, who is required to implement directives issued by the Central People's Government, n59 is further constrained by the Basic Law to act only "in accordance with" the Basic Law, n60 which is a law that was promulgated by the PRC. Neither the Chief Executive nor the Legislative Council may modify Beijing directives or the Basic Law; only the PRC possesses that power. n61

Laws enacted by the HKSAR Legislative Council must be reported to the Standing Committee of the NPC "for the record." n62 If the Standing Committee: after consulting the Committee for the Basic Law of the [HKSAR] under it, considers that any law enacted by the legislature of the Region is not in conformity . . . the Standing Committee may return the law in question but shall not amend it. Any law returned by the Standing Committee of the National People's Congress shall immediately be invalidated. n63

What autonomy exists in the Legislative Council if any law it passes may be struck down by the NPC at any time? n64 Furthermore, the Chief Executive and all of the Provisional Legislative Council members were selected by Beijing and are considered by some Hong Kong people to be mere puppets of Beijing policy.

B. *Accountability — Promises Regarding Accountability*

Since the executive and legislative branches do not exercise a high degree of autonomy, they are also not accountable to the people of Hong Kong. "Accountability" can be defined as the extent to which Hong Kong government officials are selected by, responsible to, and answerable to the people of Hong Kong. Neither the Chief Executive [*768] nor the Provisional Legislative Council were elected by, are responsible to, or are answerable to the people of Hong Kong. n65 Furthermore, the first post-reversion Legislative Council elections, which are scheduled to occur in May 1998, will not result in a Legislative Council that is representative of the people of Hong Kong. The number of eligible voters in functional constituencies has decreased from more than 2.7 million in the last pre-reversion Legislative Council elections (1995), and is down to fewer than 200,000 voters in the first post-reversion elections (1998). This diminished number, combined with manipulation to dilute the return strength of democratic or pro-democracy candidates, exacerbates the non-accountability. The high degree of non-accountability of the current HKSAR government, and of the prospective Legislative Council to be elected in May 1998, is discussed below. n66

C. *Human Rights Threats*

Since July 1, 1997, Hong Kong people have been subject to numerous threats of human rights abuses. These abuses violate the international instruments applicable to Hong Kong and local human rights legislation. The two primary abuses discussed below involve the Hong Kong government violating international human rights law and Hong Kong Special Administrative Region law by authorizing deportation of children who qualify for permanent residency or right of abode in Hong Kong, and by instituting Legislative Council election laws that violate free and fair election norms, as follows: n67

[*769] 1. **Legislation Authorizing Removal from Hong Kong of Children With Permanent Residency/Right of Abode in Hong Kong**

The Basic Law, article 24, expressly delineates which persons are granted the status of "permanent resident" of Hong Kong with "right of abode" in Hong Kong. n68 Included in that category are any children of Chinese nationality born outside of Hong Kong, so long as at least one of the child's parents is a Hong Kong permanent resident (irrespective of

where the permanent resident parent was born). Though the Basic Law went into effect on July 1, 1997, many children who satisfied the Basic Law's permanent resident test were denied their permanent residency rights.

Thousands of families are split apart, and separated by the border between Mainland China and Hong Kong. Usually, one or both parents live in Hong Kong, and one or more of their Mainland-born children live on the Mainland. The family splits arose in various ways, but they were often formed when a Hong Kong permanent resident (usually a male) would travel to the Mainland, and then marry a Mainland woman, start a family, and await permission from authorities to allow his family to join him in Hong Kong. A quota system has long been in place, whereby it at times takes years for the Mainland Chinese government to grant permission for family reunification in Hong Kong. n69 Currently, there are about 66,000 children on the Mainland waiting to be reunited with their families in Hong Kong. As of July 1, 1997, pursuant to article 24 of the Basic Law, all of those children qualified as permanent residents of Hong Kong, with right of abode in the Hong Kong SAR.

Up until 1997, many split families grew impatient often after years of waiting, and smuggled their children across the border into Hong Kong. There are approximately 1500 of those children, all of whom have at least one parent who is a Hong Kong permanent resident and all of whom entered Hong Kong before July 1, 1997. Because the children entered and remained in Hong Kong illegally, the children were not entitled to educational or public health benefits, even though they resided in Hong Kong and were slated to attain the status of permanent resident with the right of abode when the Basic Law came into effect on July 1, 1997.

On and shortly after July 1, 1997, hundreds of the 1500 Mainlandborn [*770] children presented themselves to the Hong Kong Immigration Department and requested the issuance of Hong Kong Identity Cards to signify that the children are permanent residents with the right of abode. n70 The parents believed that since, as of July 1, 1997, the Basic Law provided that the children were permanent residents, the children would be entitled to the Identity Cards. The Immigration Department acknowledged that the children indeed fell into the category of permanent resident, but nevertheless refused to issue the Identity Cards.

Within one week after the change of sovereignty, the Provisional Legislative Council enacted an amendment to the Immigration Ordinance, n71 which empowered the HKSAR government to deport the 1500 children, even though they qualified as permanent residents. n72 The children would be required to return to the Mainland and obtain a certificate of entitlement, which could only be issued to them if they reside outside of Hong Kong. Human rights groups and activists, as well as numerous Hong Kong solicitors and barristers, protested vigorously against the legislation and the deportation threat to the children. The acts of the Hong Kong Government raised the issue not only of whether the children should be deported to the Mainland, but also it raised the issue of the inviolability of the Basic Law itself — the mini-constitution that was to govern the people of Hong Kong until 2047.

The Basic Law defines "permanent resident." n73 All sides, including the Provisional Legislature and the Immigration Department, agree that the children fall within that definition, and possess the right of abode in Hong Kong. A fundamental principle associated with the holder of the right of abode is that the government cannot deport that person for any reason. n74 If the Hong Kong courts were to uphold the Immigration Department's ruling and then refuse to overturn the legislation, then not only would there be a gross violation of Article 24 of the Basic Law, but also there would be a credible threat to the integrity of the remaining articles of the Basic Law. That threat would send a sign to Hong [*771] Kong people and to the rest of the world that the "rights" contained in the mini-constitution are worthless in the eyes of the law in that the Provisional Legislative Council can annul those rights with the stroke of a pen after rushing to pass a bill with three hearings in one Council sitting without adequate or appropriate consultation of the Hong Kong people.

The case of *Cheung Lai Wah* arrived at the Court of First Instance, with a host of counsel representing the children. n75 The Court rejected the challenge to the immigration law and upheld the legislation and the validity of the Provisional Legislative Council, which is the body that enacted the law. n76 The Court ruled that the government would not violate the Basic Law by deporting the children back to the Mainland. n77 Though the case is on appeal, with a stay in place so that deportations are temporarily suspended, the children remain faced with the threat of separation from their families and removal across the border.

Not only is *Cheung Lai Wah* being watched closely by the litigants, their lawyers, and human rights organizations, but also it is being watched by the United Nations. The case has been brought to the attention of the United Nations Committee on the Rights of the Child, which is charged with monitoring implementation of the Convention on the Rights of the Child in all territories in which the Convention applies. n78 The Children's Convention applies in Hong Kong by virtue of

the United Kingdom ratifying it and extending it to Hong Kong and by China's obligation to enforce the Convention. The United Nation's Committee on the Rights of the Child has urged the government to implement a fair and open mechanism to speed up reunions of families that straddle the Hong Kong SAR/Mainland border. The Hong Kong government has claimed that it retains the final power to determine which of the United Nations recommendations it accepts, and that it is not ignoring the United Nations, but that the recommendations can only be adopted when resources permit. n79

[*772] 2. **Elections — Right to Free and Fair Elections, Void of Gerrymandering and Vote-rigging**

Article 68 of the Basic Law provides guidelines for elections to the HKSAR Legislative Council, as follows: The Legislative Council of the [HKSAR] shall be constituted by election.

The method for forming the Legislative Council shall be specified in the light of the actual situation in the [HKSAR] and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: 'Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures. n80

Annex II (Methods for Legislative Council Formation) provides an electorate formula for the first Legislative Council of the Hong Kong SAR. This formula, which is not dissimilar to that used in the 1995 Legislative Council elections, provides that the Legislative Council "shall be composed of 60 members, with 20 members returned by geographical constituencies through direct elections, 10 members returned by an election committee, and 30 members returned by functional constituencies." n81

Thus, the Basic Law does not promise immediate universal suffrage; universal suffrage is only the "ultimate aim." The goal of universal suffrage is in accord with both Article 25 of the International Covenant on Civil and Political Rights (ICCPR), which applies to Hong Kong by virtue of having been ratified by the United Kingdom and extended to protect Hong Kong people in 1976, n82 and with Article 21 of the Hong [*773] Kong Bill of Rights, which reads as follows: Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions -

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) to have access, on general terms of equality, to public service in Hong Kong. n83

Extensive debates elsewhere have taken place regarding the issue of whether the Hong Kong electoral system, as provided in the Basic Law and before the change of sovereignty, violates Article 25 of the ICCPR or Article 21 of the Bill of Rights. There are also debates on whether and how the ICCPR and the Bill of Rights still apply in Hong Kong. Further debate has been held on whether the Provisional Legislative Council is a validly constituted body that has power to legislate on behalf of Hong Kong, given that the PLC was selected by the Central Chinese Government, rather than elected by the Hong Kong people, and is therefore not representative of Hong Kong people.

I set those debates aside for now and suggest that, irrespective of what electoral system is in place in Hong Kong, that system must be democratic, fair, open, and honest. Also, in the Hong Kong context, it must at the very least be a step in the direction of universal suffrage and not a step backwards. If the election fails those tests, it constitutes a human rights abuse. n84

In September 1997, the Beijing-selected Provisional Legislative Council enacted an electoral law that will govern the elections for the first Legislative Council of the HKSAR. n85 The elections are scheduled [*774] for May 24, 1998, at approximately the time that Chief Executive Tung promised they would be held. The May 1998 elections, though they may be in accord with the literal language of Annex II of the Basic Law, violate the spirit of the Basic Law, the Hong Kong Bill of Rights, and the ICCPR.

The new electoral laws call for sixty Legislative Council members to be elected in May 1998. Of the 60 elected members, 20 will be elected by geographical constituencies, 30 will be elected by functional constituencies, and 10 will be elected by electoral committee representatives. The new system is a hybrid of the following schemes: "proportional representation," "single-vote, multi-seat" and "corporate voting."

The negative effects of the new scheme include:

. *The new scheme reduces the franchise.* The new electoral law dramatically reduces the franchise in the thirty functional constituency seats from over two million (2.7 million voters in 1995) voters to under 200,000 (approximately 180,000). This restricts democracy by making fewer people eligible to cast a ballot. Now, during the infancy of the new Hong Kong, is a time when the aim is "universal suffrage,"ⁿ⁸⁶ and even Chief Executive Tung states that as the goal. However, decreasing the voting pool by such a monumental percentage is retrograde, rather than progressive towards attainment of the universal suffrage goal.

. *The new scheme fails to reflect the will of Hong Kong people.* The new scheme does not reflect the will of the people of Hong Kong. As has been the case in most major decisions affecting the destiny of Hong Kong, Hong Kong people had no effective voice in the electoral law-making process. The new electoral law was proposed by the Chief Executive who was selected (not elected) by the PRC government in Beijing. The new electoral law was enacted by a sixty-person Provisional Legislative Council that was selected (not elected) by the PRC government in Beijing. The Provisional Legislative Council replaced the sixty-person Legislative Council that was elected in 1995 by a voting pool of more than 2.7 million, and that was abolished on July 1, 1997 to make room for the Beijing selected (non-elected) Provisional Legislative Council. It is no surprise that the new electoral law would perpetuate the incumbency of the sixty hand-picked Provisional Legislative Council members by diluting the return strength of their popular, democratic opponents.

. *The new scheme reinstates corporate voting.* The scheme reinstates "corporate voting," whereby corporations, not individuals, vote in the functional constituencies.

[*775] . *The new scheme introduces a "single-vote, multi-seat" system.* The scheme introduces a hybrid "single vote, multi seat" system to force popular democrats to stand against one another in five districts.

. *The new scheme introduces a "Proportional Representation List System."* The scheme introduces a confusing proportional representation list system. Proportional systems are used in some Western societies — but in a democratic way. Such a system is usually intended to increase representation of the underdog — or the smaller, less powerful parties. The system in this case is being used to increase the power of the overly influential pro-China lobby in Hong Kong.

. *The new scheme dilutes popular pro-democracy candidates.* The new scheme makes the electoral process and results more easily controllable by Beijing and less accessible to the more popular democratic candidates, who received more than one million votes in 1995. Those democrats, who were ousted from office on July 1, 1997, had defeated many of the Provisional Legislative Council members. Those Provisional Legislative Council members now hold seats not because they were elected (which they were not), but because they were appointed by Beijing.

. *The new scheme ensures control of the process by the PRC.* The scheme guarantees that the Democratic Party and other pro-democracy candidates, which typically receive the largest number of popular votes, will have the fewest seats in the first Legislative Council. The field has been further tilted in the direction of China, which will in turn decrease Hong Kong's autonomy and accountability for its governmental officials.

The new scheme, with its gerrymandering, is a retrograde step from Mr. Tung's ten year goal of universal suffrage by the year 2007. Even if the goal is realized ten years from now, the delay in universal suffrage will set Hong Kong even further back in the long run. Ten years is already one-fifth of the way towards the expiration of the Basic Law in 2047. If it is as difficult as Mr. Tung makes it seem to install a full democracy, ten years is not enough time. The year 2047 — which is when both the Joint Declaration and the Basic Law expire — will creep even closer; but, will Hong Kong be any closer to democracy and human rights by then?

VI. CONCLUSION

The "One Country, Two Systems" model, as applied to Hong Kong, would only be suitable for Taiwan if Taiwan were to abandon control over its own destiny. Taiwan would lose its governing integrity and would have no hopes for sovereignty. The Hong Kong model is not applicable to Taiwan because of the distinct differences between Hong [*776] Kong and Taiwan — both historically and geopolitically. If Taiwan is to reunify with China, it must do so under a different model — perhaps under a model that does not compromise the democracy and autonomy that Taiwan holds so dear.

Hong Kong possesses a low level of meaningful autonomy, which is contrary to what was promised in the Joint Declaration. The Basic Law grants autonomy with one hand and takes it back with the other. Neither the Chief Executive of the HKSAR, nor the Provisional Legislative Council, is accountable to the people of Hong Kong. Those governmental branches appear to be accountable only to the entity that selected them — the PRC. The PRC has breached its promises of autonomy and accountability, along with the promise of continued human rights protection and democracy. Hong Kong people have been the victim of a bait and switch flim flam. The world community has been similarly fooled.

Taiwan should heed the words of former Hong Kong Legislative Council member Martin Lee, the leader of the Hong Kong Democratic Party, who was ousted on July 1, 1997 when the Beijing-selected Provisional Legislative Council claimed the seats of the Legislative Council members who had been freely elected by Hong Kong people in 1995. Mr. Lee said, in the course of comments about the 1998 electoral scheme, "Hong Kong is slowly being molded into a society in which the public has no effective voice in government." n87 Though China promised Hong Kong people much more than an effective voice in government, China has failed to deliver even that.

[*777] APPENDIX I

Statement of Jiang Zemin: Excerpt on the Question of Hong Kong n88

The growth of the splitting tendency on the Taiwan Island and the interference of certain foreign anti-China forces have stood in the way of peaceful reunification as big obstacles, which of course have met with determined opposition from the Chinese people including our compatriots in Taiwan. We shall adhere to the basic principles of 'peaceful reunification' and 'one country, two systems' and the eight-point proposal on developing relations between the two sides and promoting the peaceful reunification of the Motherland. We shall stick to the principle that there is only one China and oppose splitting, the 'independence of Taiwan,' the attempt to create 'two Chinas' or 'one China, one Taiwan' and any interference by foreign forces. We shall not allow any forces whatsoever to change Taiwan's status as part of China in any way. We shall work for peaceful reunification, but we shall not undertake to renounce the use of force. This is not directed against our compatriots in Taiwan, but against the interference of foreign forces with China's reunification and against the schemes to bring about the 'independence of Taiwan.' . . . We place our hopes on our compatriots in Taiwan who are endowed with the glorious tradition of patriotism. Except for a handful of people who stubbornly cling to the position of 'independence of Taiwan,' all parties and personages of all circles in Taiwan are welcome to exchange views with us on relations between the two sides and on peaceful reunification. Now we should like to renew our solemn appeal: as the first step, the two sides of the straits can hold negotiations and reach agreement on 'officially ending the state of hostility between the two sides in accordance with the principle that there is only one China.' On this basis, the two sides can undertake jointly to safeguard China's sovereignty and territorial integrity and map out plans for the future development of their relations. We hope that the Taiwan authorities will earnestly respond to our suggestions and proposals and enter into political negotiations with us at an early date. On the premise that there is only one China, we are prepared to talk about any matter. All opinions and proposals can be put forward as long as they are in [*778] the interest of reunification. The question of the reunification of the Motherland should be solved by us Chinese on both sides of the Taiwan Straits. Taiwan's future hinges on the reunification of the Motherland, and split is no way out. With full determination, we are capable of finding a final solution to the Taiwan question. No matter how many difficulties and obstacles are in store for us, the complete reunification of the Motherland and the all-round rejuvenation of the Chinese nation will certainly come true, for all the Chinese on both sides and living elsewhere will proceed from the fundamental interests of the Chinese nation and go forward hand in hand.

APPENDIX II

Regional Flag and Regional Emblem Ordinance, Ordinance No. 117 of 1997

Schedule 4: Conditions for Flying the Regional Flag at Half Staff

Flying regional flag at half staff:

1. The regional flag must be lowered to half staff as a token of mourning when the following persons pass away —

(a) President of the People's Republic of China, Chairman of the Standing Committee of the National People's Congress, Premier of the State Council and Chairman of the Central Military Commission.

(b) Chairman of The National Committee of the Chinese People's Political Consultative Conference.

(c) People who have made outstanding contributions to the People's Republic of China as the Central People's Government advises the Chief Executive.

(d) Persons who have made outstanding contributions to world peace or the cause of human progress as the Central People's Government advises the Chief Executive.

(e) Persons whom the Chief Executive considers have made outstanding contributions to the Hong Kong Special Administrative Region or for whom he considers it appropriate to do so.

2. The regional flag may be flown at half staff as a token of mourning when the Central People's Government advises the Chief Executive that unfortunate events causing especially serious casualties occur or serious natural calamities have caused heavy casualties.

3. The regional flag may be flown at half staff as a token of mourning if the Chief Executive considers it is appropriate when

unfortunate events causing especially serious casualties occur or serious natural calamities have caused heavy casualties.

FOOTNOTES:

n1 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., U.N.T.S. No. 26, *reprinted in* PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK 45 (Andrew Byrnes & Johannes Chan eds., Hong Kong, Butterworths 1994), *also reprinted in* YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 513 (Hong Kong Univ. Press 1997) [hereinafter Joint Declaration]. The Joint Declaration was signed by both parties in Beijing on December 19, 1984, and it entered into force on March 27, 1985, upon exchange of instruments and ratification.

n2 There has been much discussion and debate over whether Hong Kong's reunion with China should be referred to as a "change of sovereignty" (which is the British position, as the United Kingdom claimed sovereignty over Hong Kong for 150 years), or whether it should be referred to as "resumption of the exercise of sovereignty" (which is the Chinese position, as the PRC claims that it never lost sovereignty over Hong Kong, but just did not exercise that sovereignty for approximately 150 years). The author of this paper does not take sides on this issue. "Change of sovereignty," "reversion," "reunion" and similar terms are used herein interchangeably to refer to the occurrence neutrally.

n3 *See infra* notes 8-27 and accompanying text.

n4 *See infra* notes 28-31 and accompanying text.

n5 *See infra* notes 32-37 and accompanying text.

n6 *See infra* notes 38-86 and accompanying text.

n7 *See infra* note 87 and accompanying text.

n8 *See Chairman Ye Jianying's Elaborations on Policy Concerning Return of Taiwan to the Motherland and Peaceful Unification*, BEIJING REV., Oct. 5, 1981, at 10 (*cited and translated in* Zhengyuan Fu, *China's Perception of the Taiwan Issue*, 1 UCLA J. INT'L & FOREIGN AFF. 321, 327 (1997)); *see also* Sean Cooney, *Why Taiwan is not Hong Kong: A Review of the PRC's "One Country, Two Systems" Model for Reunification with Taiwan*, 6 PAC. RIM L. & POL'Y J. 497, 502 (1997).

n9 *See* Cooney, *supra* note 8, at 502-03.

n10 *Id.* (footnote omitted).

n11 PEOPLE'S REPUBLIC OF CHINA CONST. of 1982, *amended by* PEOPLE'S REPUBLIC OF CHINA CONST. Art. 31 (1993) *reprinted in* PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK (Andrew Byrnes & Johannes Chan eds., Hong Kong, Butterworths 1994) ("The State may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions.").

n12 Cooney, *supra* note 8, at 502-03.

n13 *See id.* The White Paper sets out four basic principles related to Taiwan: (1) there is only one China, and Taiwan is a part of it. All models other than the One Country, Two Systems model are unacceptable; (2) socialist and capitalist societies can co-exist within one China, such that Taiwan's "current socio-economic systems, its way of life as well as economic and cultural ties with foreign countries can remain unchanged"; (3) after reunification, Taiwan would have a high degree of autonomy, and will operate "its own party, political, military, economic and financial affairs"; and (4) economic and other links between Taiwan and the Mainland would be expanded, and negotiations for reunification would commence rapidly. *Id.* (footnotes omitted).

n14 *Id.*

n15 *See infra* notes 20-27 and accompanying text.

n16 *Full Text of Jiang Zemin's Report at 15th Party Congress*, XINHUA NEWS AGENCY, Sept. 21, 1997, *available in* 1997 WL 11201040; Jiang Zemin's Report to the 15th Party Congress (visited Feb. 14, 1998) <<http://www.geocities.com/wallstreet/8038/>> *see also infra* notes 33-34, and Appendix I.

n17 See YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 45 (Hong Kong Univ. Press 1997).

n18 See generally *id.*

n19 See Joint Declaration, *supra* note 1.

n20 See *id.* Preamble; Annex I, § I.

n21 See *id.* Preamble.

n22 See *id.* Annex 1, § II.

n23 See *id.* Annex I, § XIII.

n24 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

n25 See Joint Declaration, *supra* note 1, Annex I, § XIII.

n26 See *id.* § I.

n27 See *id.*; see also The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Decree of the President of the People's Republic of China, No. 26 (Apr. 4, 1990), reprinted in PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK 83 (Andrew Byrnes & Johannes Chan eds., Hong Kong, Butterworths 1994), also reprinted in YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 534 (Hong Kong Univ. Press 1997) [hereinafter BASIC LAW].

n28 See generally *supra* notes 1-27 and accompanying text.

n29 See GHAI, *supra* note 17, at 46 n.5.

n30 Arguments have been made that Hong Kong has had a weaker bargaining position not only because of its lack of sovereignty and political independence, but also because, unlike Taiwan, Hong Kong depends on China for food and water; Hong Kong is smaller in size and population than Taiwan; Hong Kong is contiguous to China and hence more vulnerable to attack than Taiwan; and Hong Kong has no army, unlike Taiwan.

n31 Mainland Affairs Council, *Hong Kong After 1997: The Republic of China Government's Policy and Position June 1997, Paragraph C — The government's attitude toward "one country, two systems."* (visited Oct. 14, 1997) <<http://gio.gov.tw/-info/mainland/e978html>>.

n32 XINHUA NEWS AGENCY, *supra* note 16. President Jiang continued, regarding Macau: Macao will return to the embrace of the Motherland in 1999, another great event of the Chinese nation. All preparations for Macao's return are being made in an energetic and orderly fashion. Macau's smooth transition and smooth transfer of government can certainly be secured and its long-term development and stability maintained. *Id.*

n33 Attached hereto as Appendix I is a further excerpt from President Jiang's September 21, 1997, United Nations statement, in which he outlined difficulties faced in relations between Taiwan and Mainland China. See also *supra* note 16.

n34 Appendix I.

n35 Chinese Foreign Minister Qian Qichen, Address to the United Nations (Sept. 26, 1997) (transcript available from British Broadcasting Corporation).

n36 *Id.* Qian Qichen continued: Taiwan is an inseparable part of Chinese territory and the Taiwan issue is completely China's internal affair. Any countries' attempt to use the Taiwan issue to apply pressure on China, or even to advocate 'two Chinas' or 'one China, one Taiwan' runs completely against the purpose and principle of the UN Charter and relevant resolutions of the United Nations, and is absolutely unacceptable to the Chinese people and all countries standing for justice. *Id.*

n37 See Chris Yeung, *Staying the same as change kicks in*, S. CHINA MORNING POST, Sept. 27, 1997, at 19 (quoting

Premier Li). Premier Li continued: "If there has been any change, it is change in the hearts and minds of the people of Hong Kong. Their hearts and minds are now closer to China." Chris Yeung, *Tung Given Thumbsup as Beijing Vows Not to Meddle*, S. CHINA MORNING POST, Sept. 23, 1997, at 1, available in 1997 WL 13264746.

n38 See, e.g., Edward A. Gargan, *Change in Hong Kong is Slow But Sure*, N. Y. TIMES, Oct. 9, 1997, at A10 (quoting Mr. Tung: "There has been no change in the life style to which we are accustomed. . . . It is deeply in China's interest that Hong Kong should continue to work well under the 'one country, two systems' concept.").

n39 See Cheung Lai Wah et al. v. The Director of Immigration, High Court of Hong Kong, Court of First Instance, 3 HKC 64 (1997) (appealed at 1 HKC 717 (1998)). The Court of First Instance, in this post-reversion case involving the threatened deportation of Hong Kong permanent resident children, stated that the new immigration law "may be an example of the derogation from Hong Kong's high degree of autonomy," but it was "expressly sanctioned" by Article 22 of the Basic Law. *Id.* Thus, the "high degree of autonomy" granted by the Basic Law is illusory. See Cliff Buddle, *Autonomy Curb Legal, Says Judge*, S. CHINA MORNING POST, Oct. 10, 1997, at 4. The Court ruled that Article 22 of the Beijing-promulgated Basic Law provides that the Central People's Government has control over the quantity of Mainland Chinese who may enter Hong Kong and settle there. Any grievances over the new legislation should be directed at Article 22 and not at the HKSAR Immigration Amendment Ordinance.

n40 BASIC LAW, *supra* note 27. Article 20 of the Basic Law is complemented by, inter alia, Article 16 (HKSAR "shall be vested with executive power") and Article 17 (HKSAR "shall be vested with legislative power"), and Articles 19 and 85 (HKSAR "shall be vested with independent judicial power"). See *Basic Law, Chapter II: Relationship Between the Central Authorities and the Hong Kong Special Administrative Region* (visited Jan. 26, 1998) <<http://www.info.gov.hk/info/bas-law2.html>>.

n41 BASIC LAW, *supra* note 27.

n42 See BASIC LAW, *supra* note 27, Art. 2.

n43 See, e.g., *id.* Art. 20, which provides that the HKSAR "may enjoy other powers granted to it by" Chinese authorities (emphasis added). Compare Art. 20 with the numerous articles that use mandatory ("shall") language. For example, Art. 23 requires that the HKSAR "shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets." BASIC LAW, *supra* note 27, Art. 23.

n44 See BASIC LAW, *supra* note 27, Art. 16; see also, GHAI, *supra* note 17, at 139.

n45 BASIC LAW, *supra* note 27, Art. 10.

n46 *Id.*

n47 *Id.*

n48 The phenomenon of simultaneous granting and stripping away of autonomy is compounded in the case of the flag and emblem by legislation enacted on the first day of the HKSAR, July 1, 1997, by the Provisional Legislative Council. Among the first pieces of legislation passed by the Provisional Legislative Council was the Regional Flag and Regional Emblem Ordinance of 1997, which provides specifications for the regional flag and emblem, arrangement of the display of the flag and emblem, and conditions for flying the regional flag at half mast. See Hong Kong, Regional Flag and Regional Emblem Ordinance 117 (July 1, 1997). On the one hand, Hong Kong was given the autonomy to fly its "own" flag, but, at the same time, the PRC explicitly mandates what the flag should look like, how it should be displayed, and when it should be flown at half mast.

Attached hereto as Appendix II is Schedule 4 of the Regional Flag and Regional Emblem Ordinance, which prescribes the Conditions for Flying the Regional Flag at Half Staff. It is notable that the flag is not ordered to be flown at half mast on the occasion of mourning for any HKSAR individual or official, whereas the Ordinance lists several Mainland Chinese officials for whom "the regional flag must be lowered to half staff as a token of mourning" when those individuals pass away.

n49 For discussions of the Taiwanese flag removal, see generally Ng Kang Chung, *Display Flouted "One Country" Principle and Broke Law, Say Officials; Outrage as Police Tear Down Flags*, S. CHINA MORNING POST, Oct. 11, 1997, at 1, and Andy Ho, *Liberty at Half Mast*, S. CHINA MORNING POST, Oct. 14, 1997, at 19.

For a discussion by Chinese President Jiang Zemin of the "one China policy," see *infra* Appendix I.

n50 See BASIC LAW, *supra* note 27.

n51 See *id.*

n52 See GHAI, *supra* note 17, at 138-42.

n53 *Id.* at 139.

n54 See BASIC LAW, *supra* note 27, Art. 2.

n55 Article 2 authorizes the HKSAR to "exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power." The adjective "independent" modifies "judicial" power and not "executive" and "legislative" power, which suggests that although there is no requirement that the executive and legislative branches be "independent," there is such a requirement regarding the judiciary. A full discussion of independence of the judiciary is beyond the scope of this article.

n56 The two phrases are connected by a conjunctive "and" which is read as "enjoy a high degree of autonomy" *and* "enjoy . . . executive, legislative, and . . . judicial power." It does not read, for example, "enjoy high degree of autonomy *in carrying out* executive, legislative, and . . . judicial power." That is, there is no indication in the text that "autonomy" was intended to refer to executive, legislative, or judicial power.

n57 See BASIC LAW, *supra* note 27, Art. 45.

n58 See *id.* Art. 43.

n59 See *id.* Art. 43.

n60 *Id.* Art. 16.

n61 See *id.* Art. 159 ("The power of amendment of this Law shall be vested in the National People's Congress" of the PRC).

n62 *Id.* Art. 17.

n63 *Id.*

n64 The lack of autonomy is compounded in the case of the Provisional Legislative Council, which was sworn in on July 1, 1997, to serve as an "interim" legislative body until the first elections. The Provisional Legislature was "selected" by Beijing, rather than elected by the people of Hong Kong. There are few signs that the Provisional Legislature is anything more than a body that is rubber-stamping Beijing approved directives.

n65 Art. 43 of the Basic Law provides that the Chief Executive shall be accountable to both the Hong Kong SAR and to the Central People's Government. However, if there should be a conflict between loyalties, it is presumed that accountability to the CPG would trump.

n66 See *generally infra* notes 68-86 and accompanying text. It should be noted that from as far back as the 1980s negotiation of the Joint Declaration, no major part of the plan for reincorporation of Hong Kong was formulated by a body of decisionmakers who were selected by, responsible to, or answerable to the people of Hong Kong. However, that is no reason to deny Hong Kong people meaningful franchise now, in light of, *inter alia*, PRC promises in the Joint Declaration and the Basic Law, and obligations to Hong Kong people under international human rights treaties, such as the International Covenant on Civil and Political Rights.

n67 For a discussion of other actions of the Hong Kong Special Administrative Region government that are contrary to international human rights law and domestic law, see generally, e.g., *The Promise of Democratization in Hong Kong Autonomy and the Rule of Law* (NDI Hong Kong Report #3, May 1, 1998).

n68 BASIC LAW, *supra* note 27, Art. 24.

n69 It has been alleged that at times Chinese authorities responsible for the queue solicited bribes, and relegated those unable or unwilling to pay the bribes to positions of lowest priority in the queue.

n70 Article 24 provides that all permanent residents shall be qualified to obtain permanent identity cards which state their right of abode.

n71 Immigration (Amendment) (No. 5) Bill 1997.

n72 See Cecelia So, *PLC Votes to Return Smuggled Children*, HONG KONG STANDARD, July 10, 1997, available in WL 11821086. The Bill was passed 45–6 after three readings in one Provisional Legislative Council sitting. See *id.*

n73 BASIC LAW, *supra* note 27, Art. 24.

n74 We must bear in mind that international law principles related to deportation of persons with the right of abode most readily apply in cases in which a person is threatened with removal to another country. In this case, the children are to be deported from one part of China (the HKSAR) to another part of China (the Mainland).

n75 See Cheung Lai Wah et al. v. The Director of Immigration, High Court of Hong Kong, Court of First Instance, 3 HKC 64 (1997) (appealed at 1 HKC 717 (1998)). For a discussion of the *Cheung Lai Wah* case, see generally *The Promise of Democratization in Hong Kong Autonomy and the Rule of Law* (NDI Hong Kong Report #3, May 1, 1998).

n76 See *Cheung Lai Wah*, 3 HKC at 64.

n77 See *id.*

n78 See U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc A/44/736 (1989).

n79 See Cynthia Wan, *Abode Denial Breaches UN Resolutions, Say Activists*, HONG KONG STANDARD, Sept. 25, 1997 (quoting Peter Wong Hing-hong, Acting Senior Assistant Solicitor-General). The case has been brought to the attention of other United Nations human rights bodies, such as the Human Rights Committee, who have refrained thus far from taking action. See, e.g. *Submission of Society for Community Organisation to the Human Rights Committee on the Question of Split Families and the Deportation from Hong Kong of Permanent Resident Children* (Geneva, July 1997).

n80 BASIC LAW, *supra* note 27, Art. 68.

n81 *Id.* Annex II, *Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region*, art. 6 (Adopted at the Third Session of the Seventh National People's Congress on April 4, 1990), reprinted in PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK 117 (Andrew Byrnes & Johannes Chan eds., Hong Kong: Butterworths 1993).

n82 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

n83 The Hong Kong Bill of Rights is contained in Section 8 of the Hong Kong Bill of Rights Ordinance (Chapter 383 of the Laws of Hong Kong). For a full discussion of the right to vote in Hong Kong, see Simon Young, *The Meaning of the Right to Vote in Hong Kong*, 42 MCGILL L.J. 650–729 (arguing that the meaning of Hong Kong's right to vote is informed by two purposes: the protection of all other human rights and the achievement of self-government); see also Gladys Li, *The Right to Vote and to be Elected: "Through the Looking-Glass"*, in GEORGE EDWARDS & JOHANNES CHAN, HONG KONG'S BILL OF RIGHTS: TWO YEARS BEFORE 1997, at 109–23 (Hong Kong 1995).

n84 See GHAI, *supra* note 17.

n85 For a critique of the new electoral scheme, see the National Democratic Institute for International Affairs, *The Promise of Democratization in Hong Kong: The New Election Framework*, Oct. 23, 1997, at 24 (NDI Hong Kong Report #2) ("Elections in Hong Kong [in 1998] will fail to meet international standards.").

n86 BASIC LAW, *supra* note 27, Art. 68 ("[The] aim is the election of all the members of the Legislative Council by universal suffrage.").

n87 Martin Lee, *The Slow Squeeze on Hong Kong*, S. CHINA MORNING POST, Sept. 12, 1997, at A25.

n88 Jiang Zemin is President of the People's Republic of China. The full transcript of his statement can be found at: *Full Text of Jiang Zemin's Report at 15th Party Congress*, XINHUA NEWS AGENCY, Sept. 21, 1997, available in 1997 WL 11201040; Jiang Zemin's Report to the 15th Party Congress (visited Feb. 14, 1998) <<http://www.geocities.com/wallstreet/8038/jiang.htm>>

***** Print Completed *****

Time of Request: September 20, 2003 04:06 PM EDT

Print Number: 1862:0:14403653

Number of Lines: 647

Number of Pages: 16

Send To: KABANO, MICHEL
CASE WESTERN RESERVE UNIVERSITY
11075 EAST BLVD
CLEVELAND, OHIO 44106-5409