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Introduction

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Introduction

*Hungdah Chiu**

I. HISTORICAL BACKGROUND

Great Britain annexed the island of Hong Kong under the 1842 Treaty of Nanking¹ after it defeated China in the Opium War of 1839-42. Controversies arising from attempts to open Canton (Guangdong) to foreign trade resulted in an Anglo-French expedition against Peking in 1858. The 1860 Treaty of Peking² ending this conflict forced China to cede the Kowloon Peninsula, facing the island of Hong Kong, to Great Britain. In 1898, Great Britain, taking advantage of China's weakness, forced China to "lease" a much larger area north of the Kowloon Peninsula which later became known as the "New Territories."³ The "lease" convention, which made no provision for payment of rent, contained the following stipulation:

It is at the same time agreed that within the city of Kowloon the Chinese officials now stationed there shall continue to exercise jurisdiction, except so far as may be inconsistent with the military requirements for the defence of Hong Kong. Within the remainder of the newly-leased territory Great Britain shall have sole jurisdiction. Chinese officials and people shall be allowed as heretofore to use the road from Kowloon to Hsinan.⁴

Despite this provision, no Chinese government since Ch'ing (Qing in pinyin) has sent officials to administer the City of Kowloon, which is actually only a small enclave in Kowloon. However, when the British Hong Kong government attempted to exercise governmental functions there, it was occasionally denounced by the Chinese authorities.⁵

The three treaties through which Great Britain established its rule

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¹ Treaty of Nanking, Aug. 29, 1842, Great Britain-China, art. III, 50 British & Foreign State Papers (Gr. Brit.) 389; 93 Parry's T.S. 465, 467.

² Convention of Friendship, Oct. 24, 1860, Great Britain-China, art. VI, 50 British & Foreign State Papers (Gr. Brit.) 10; 123 Parry's T.S. 71, 73-74.

³ Convention for the Extension of Hong Kong Territory, June 9, 1898, Great Britain-China, reprinted in 1 HERTSLET'S CHINA TREATIES 130 (3d ed. 1908); 186 Parry's T.S. 310.

⁴ 1 HERTSLET'S CHINA TREATIES, *supra* note 3, at 130; 186 Parry's T.S. 310.

⁵ See, e.g., *China Protests Against British Attempt to Demolish Premises in Kowloon City*, New

over Hong Kong were considered by the Chinese Nationalist Party as "unequal treaties." One of the major goals of the Nationalist Revolution was to abrogate the "unequal treaties" and to recover Chinese territories lost to foreign countries.⁶

II. CHINESE POLICY TOWARD THE HONG KONG QUESTION

During the Second World War, when Great Britain was negotiating with the Republic of China ("ROC") government for the termination of British extraterritorial and other special rights in China, the Chinese government demanded the termination of the 1898 "lease" of the so-called "New Territories." The British government refused. In order not to delay the abrogation of British extraterritorial and other special rights in China, the Chinese side finally agreed to drop the issue of the Kowloon leased territories, but it made clear that it reserved the right to reopen negotiations in the future. Therefore, the Sino-British Treaty on the Abrogation of British Extraterritorial and Other Special Rights signed on January 11, 1943,⁷ did not deal with the 1898 lease. Later, through U.S. mediation, the ROC proposed designation of Hong Kong and the Kowloon Peninsula, previously ceded to Great Britain, as a free port if Great Britain agreed to return Hong Kong, Kowloon and the "New Territories" to China. Great Britain did not respond to this proposal.⁸

In late 1949, Communist forces defeated the ROC government and the latter moved to Taiwan. On January 5-6, 1950, Great Britain withdrew its recognition of the ROC (Nationalist) government, and the ROC has not subsequently been in a position to negotiate the Hong Kong question with Great Britain.

Despite its nationalistic, revolutionary, and anti-imperialist policy, the People's Republic of China ("PRC") has an important stake in maintaining Hong Kong's prosperity since it acquires a substantial amount of foreign exchange through its trade with Hong Kong. Moreover, Hong Kong provides an outlet for Chinese political dissidents and serves to reduce the political tension at home and indirect contacts with Taiwan such as mail and trade. For these reasons, although the PRC has considered Hong Kong as Chinese territory to be recovered, there had been no attempt to implement that goal until 1982. An editorial in the authorita-

China News Agency-English (Peking), Jan. 17, 1963, reprinted in 1 J. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW, A DOCUMENTARY STUDY* 377 (1974).

⁶ Chiu, *Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties*, in *CHINA'S PRACTICE OF INTERNATIONAL LAW* 239, 248-56 (J. Cohen ed. 1972).

⁷ MINISTRY OF FOREIGN AFFAIRS, *TREATIES BETWEEN THE REPUBLIC OF CHINA AND FOREIGN STATES 1927-1957*, at 589-602 (Republic of China 1958).

⁸ *THE FUTURE OF HONG KONG: TOWARD 1997 AND BEYOND* 4 (H. Chiu, Y.C. Jao, and Y. L. Wu eds. 1987).

tive *People's Daily (Renmin Ribao)* of March 8, 1963, explained the PRC's policy toward Hong Kong as follows:

At the time the People's Republic of China was inaugurated, our government declared that it would examine the treaties concluded by previous Chinese governments with foreign governments, treaties that had been left over by history, and would recognize, abrogate, revise, or renegotiate them according to their respective contents.

....

As a matter of fact, many of these treaties concluded in the past either have lost their validity, or have been abrogated or have been replaced by new ones. With regard to the outstanding issues, which are a legacy from the past, we have always held that, when conditions are ripe, they should be settled peacefully through negotiations and that, pending a settlement, the status quo should be maintained. Within this category are the questions of Hong Kong, Kowloon, and Macao and the questions of all those boundaries which have not been formally delimited by the parties concerned in each case.⁹

The same editorial also pointed out that "there is no need for the Chinese people to prove their courage and staunchness in combating imperialism by making a show of force on the question of Hong Kong."¹⁰

Although, until recently, the PRC was willing to maintain the status quo of Hong Kong, it made clear that it would not tolerate Hong Kong becoming an independent state. In 1964 the Soviet-sponsored World Youth Forum adopted a resolution putting Hong Kong and Macao on a par with Timor Island, Papua, Oman, Aden, and South Arabia and demanded "independence" for these places in accordance with the 1960 United Nations Declaration on the Granting of Independence to Colonial Countries and People. The PRC delegates strongly protested the adoption of such a resolution.¹¹

After its entry into the United Nations, when the PRC found that the General Assembly's Special Committee on Colonialism included Hong Kong and Macao in its list of colonial territories, the PRC sent a letter to the Committee's Chairman on March 10, 1972, stating that:

Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the questions

⁹ *A Comment on the Statement of the Communist Party of the U.S.A.*, *People's Daily (Renmin Ribao)*, Mar. 8, 1963, at 1 (editorial), reprinted in 1 J. COHEN & H. CHIU, *supra* note 5, at 380.

¹⁰ *Id.*

¹¹ *Declaration on the Granting of Independence to Colonial Countries and People*, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960), reprinted in I. BROWNIE, *BASIC DOCUMENTS IN INTERNATIONAL LAW* 298 (3d ed. 1983). The operative part of this Declaration reads: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *Id.* at 300.

of Hong Kong and Macao is entirely within China's sovereign right and does not at all fall under the ordinary category of colonial territories.

Consequently, they should not be included in the list of colonial territories covered by the declaration on the granting of independence to colonial countries and people.

With regard to the questions of Hong Kong and Macao, the Chinese government has consistently held that they should be settled in an appropriate way when conditions are ripe. The United Nations has no right to discuss these questions.¹²

III. SINO-BRITISH NEGOTIATIONS ON THE QUESTION OF HONG KONG

In September 1982 Margaret Thatcher, the British Prime Minister, visited the PRC and raised the subject of Hong Kong with both Premier Zhao Ziyang and Chairman of the Military Affairs Commission Deng Xiaoping. According to well-informed sources, Deng told Mrs. Thatcher that when China recovers sovereignty, the British flag and the British governor would have to go, and China would take steps to ensure Hong Kong's prosperity. Thatcher emphasized the importance of continuing Hong Kong's links with the United Kingdom if the territory was to be preserved as a bustling commercial and financial center, but she left open the possibility that something could be worked out to satisfy China's demand that the United Kingdom recognize Chinese sovereignty over Hong Kong. At the end of Thatcher's visit, a joint communique was issued stating that both countries "agreed to enter talks through diplomatic channels following the visit, with the common aim of maintaining the stability and prosperity of Hong Kong."¹³

During the two years of hard and sometimes frustrating negotiations, land values and stock prices plunged and the Hong Kong dollar lost at least 50% of its value. Many individuals began making plans to emigrate to foreign countries and some companies began making plans to seek fortunes abroad.¹⁴

On September 26, 1984, the United Kingdom and the PRC initialed the Joint Declaration on the Question of Hong Kong. The Joint Declaration was formally signed on December 19, 1984 and the instruments of ratification were exchanged on May 27, 1985.¹⁵

The Joint Declaration contains more than 8,000 words and is, per-

¹² *Khrushchev Group Turns World Youth Forum Into Anti-China Forum*, New China News Agency-English (Moscow), Sept. 25, 1964, reprinted in 1 J. COHEN & H. CHIU, *supra* note 5, at 381.

¹³ *Hong Kong Is Chinese Territory*, People's Daily, Aug. 20, 1967, at 2 (letter cited in commentary), reprinted in J. COHEN & H. CHIU, *supra* note 5, at 384.

¹⁴ F. CHING, *HONG KONG AND CHINA: FOR BETTER OR FOR WORSE* 12 (1985).

¹⁵ *Id.* at 5.

haps, the second longest international agreement ever concluded by the PRC.¹⁶ It spelled out in detail the PRC's policy toward Hong Kong, the post-1997 Hong Kong regime, and its international relations. The highlights of the Joint Declaration are as follows:

1. After 1997, Hong Kong will become a Special Administrative Region of the PRC under article 31 of the PRC Constitution.¹⁷ It will enjoy a "high degree of autonomy" except in foreign and defense affairs.
2. Hong Kong will be vested with executive, legislative, and independent judicial power, including that of final adjudication.
3. Hong Kong's chief executive will be appointed by the PRC after elections or consultation in Hong Kong. The government of Hong Kong will be composed of local people.
4. Hong Kong shall maintain the capitalist economic and trade systems for fifty years after 1997.
5. The existing social and economic system will remain unchanged. Freedom of speech, movement, the press, assembly, strike, and religion and other freedoms will be protected by law. Similarly, private property rights will be protected.
6. Apart from displaying the national flag and national emblem of the PRC, Hong Kong may use a regional flag and emblem of its own.¹⁸
7. Hong Kong may participate in relevant international organizations and international trade agreements. It may establish official and semi-official economic and trade missions in foreign countries, using the name "Hong Kong, China" to maintain and develop relations and conclude and implement agreements with states, regions, and relevant international organizations in appropriate fields.
8. The PRC defense force stationed in Hong Kong shall not inter-

¹⁶ 45 FACTS ON FILE, May 15, 1985, at 412-43 (No. 2323). For the text of the Declaration and related documents, see 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 Future of Hong Kong, Sept. 26, 1984, Great Britain-China, 1984 Gr. Brit. T.S. No. 20 (Cmd. 9352), *reprinted in* 23 I.L.M. 1366 [hereinafter Joint Declaration].

¹⁷ The longest P.R.C. treaty is the 1962 boundary treaty with Mongolia. Boundary Treaty of 1962, Dec. 26, 1962, China-Mongolia, 1962 Zhongguo Renmin Gongheguo Tiaoyue Ji (People's Republic of China) 117. See also CHIU & JOHNSTON, AGREEMENTS OF THE PEOPLE'S REPUBLIC OF CHINA, 1949-1967: A CALENDAR.

¹⁸ Article 31 provides: "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 the specific conditions." XIANFA (Constitution) art. 31 (People's Republic of China) [hereinafter P.R.C. CONST.]. In line with this, article 62(13) of the Constitution provides the National People's Congress with the power "to decide on the establishment of special administrative regions and the systems to be instituted there." *Id.* art. 62(13).

ferre in the internal affairs in Hong Kong and the expenditures for these military forces shall be borne by the PRC's Central People's government.

9. The PRC's National People's Congress will enact a Basic Law to implement the Joint Declaration.

The public reaction in Hong Kong was generally favorable, as observed by Frank Ching:

Most people who took part in public discussions found the agreement much more detailed, and more reassuring, than they had expected. One feature of the Joint Declaration, however, that many Hong Kong residents are unhappy about is its reference to the stationing of Chinese troops in Hong Kong. Several Chinese leaders had said troops would not be sent, and some Hong Kong residents see China's reversal on this issue as a sign that it may also renege on other commitments.

Missing from the Joint Declaration is a statement as to whether China will conscript Hong Kong youths to serve in the armed forces. The British pressed for [such] a declaration, and the Chinese said their policy was not to draft men from Hong Kong. But they refused to incorporate such a pledge in the Joint Declaration. Taken as a whole, however, the agreement—in all its detail and the care with which it was negotiated—signaled China's desire to reassure Hong Kong residents of its intention to abide by it.¹⁹

Internationally, the agreement was well received by the United States, Japan, Southeast Asian countries and Western European countries,²⁰ all of whom have a stake in the continuation of the stability and prosperity of Hong Kong—the third largest financial center of the world—in the post-1997 period.

IV. ECONOMIC CONSEQUENCES OF RETURNING HONG KONG TO CHINA IN 1997

After the announcement of the Joint Declaration, the financial and real estate markets in Hong Kong gradually recovered and, at least on the surface, the city began to thrive again. But as to whether this phenomenon will continue until 1997 and beyond, there is, of course, no simple answer. One should not question the PRC's intention and sincerity in regard to maintaining Hong Kong's prosperity in the post-1997 period, because there is no reason and no benefit for the PRC in seeing

¹⁹ F. CHING, *supra* note 14, at 41. For a more dubious observation, see Crossette, *Hong Kong Sees the Future: Will It Work?*, N.Y. Times, Sept. 27, 1984, at A1, A12; D. Lee, *Hong Kong Residents Cautiously Optimistic*, Wash. Post, Sept. 27, 1984, at A23.

²⁰ See, e.g., *Accord Welcomed by Shultz*, N.Y. Times, Sept. 27, 1984, at A12. For a report of the reaction of Japan and Singapore, see FOREIGN BROADCAST INFORMATION SERVICE (CHINA), Oct. 2, 1984, at G3, G4-5.

Hong Kong collapse or wither away after assuming control of the territory. However, good intentions and sincerity alone do not necessarily guarantee the prosperity of Hong Kong before or after 1997. A thorough analysis of all factors relating to the future of Hong Kong would have to cover political, economic, social and legal aspects of the question.

The purpose of this topical issue of the *Case Western Reserve Journal of International Law* is primarily to analyze some important legal problems involved in this question. However, legal problems cannot be meaningfully analyzed and understood without having some knowledge of the background of the economic aspects of the Hong Kong question. This is especially true for a place like Hong Kong which is a leading commercial and financial center of the world. Therefore, the first Article included in this collection, written by Yuan-li Wu and Y.C. Jao, deals with the economic consequences of the transfer. After summarizing the financial crisis and the crisis of confidence which occurred during the 1982-84 Sino-British negotiations, the Article explains the reasons for Hong Kong's economic recovery soon after the announcement of the Hong Kong Joint Declaration. According to the authors, the Joint Declaration was greeted with relief by the Hong Kong people, though not enthusiasm, because they realized that the alternative, a unilateral "solution" proclaimed by the PRC would be even worse. Moreover, the Chinese promise of a high degree of autonomy for Hong Kong and the preservation of its existing socio-economic system and life style seems, at least on paper, reasonable. Furthermore, the Joint Declaration also legitimizes British rule from 1984 to 1997, and given that in Hong Kong the typical pay-back period for investment is about five to eight years, the Joint Declaration insures a period during which orderly planning for the future—including exit as an ultimate alternative—can be made.

Despite this economic recovery, many firms are preparing for the worst. They have followed what may be called a strategy of "precautionary relocation or diversification" in several ways: (a) removal of the registered head office from Hong Kong to a foreign country, especially a tax haven; (b) establishment of branches or offices in foreign countries, or acquisition of foreign firms in whole or in part; (c) sale of the firm's equity to a foreign firm or formation of a joint venture with a foreign firm in Hong Kong; and (d) transfer of liquid assets abroad, leaving only money balances enough for transaction purposes in Hong Kong. Along with capital flight and the relocations of business, large numbers of entrepreneurs, managers, professionals and technicians have begun to emigrate from Hong Kong. Therefore, the authors observe that despite the recent recovery in the economy, a deep-seated uncertainty over the long-term future still remains; therefore, there is no justification for projecting the recent short-term upsurge into the more distant future.

With respect to the PRC's policy during the transition period, Wu

and Jao observe that it has been busy on two counts: bolstering Hong Kong whenever really necessary in order to preserve Hong Kong's economic prospects and making sure that in the future Hong Kong will actually be governed by a pliable and obedient administration without the interference of potentially obstructionist local political interests. To insure that the second objective will be satisfied, the PRC has increased the transfer of Communist cadres to Hong Kong and has expanded the number of PRC-controlled enterprises there. However, this policy of sending more cadres to Hong Kong makes post-1997 prospects more grim as the people of Hong Kong may suspect that the PRC's so-called "high degree of autonomy" is rhetorical only.

A more optimistic assessment of the impact of 1997 on the future of Hong Kong is presented in Benjamin P. Fishburne's Article. According to him, some of the ingredients of Hong Kong's success, such as its location, infrastructure and air link in southeast Asian air traffic, are virtually immune from political interference after 1997. In addition, he observes that Hong Kong's legal structure does not lend itself very well to government interference with business. Any attempt by the Chinese authorities after 1997 to change this legal structure would meet with great difficulty, given the likely resistance of Hong Kong's post-1997 legislature and the business community to tampering with Hong Kong's recipe for success. Moreover, foreign business interests in Hong Kong, to varying degrees, will seek to preserve Hong Kong. The significant and growing number of joint Hong Kong-Chinese business operations will also be a force for stability.

With respect to the concern about the departure of large numbers of Hong Kong's best educated and most talented people, Fishburne hopes that not all these departures are permanent and China might provide human resources needed. On the political side, he notes that it is in China's self-interest to keep Hong Kong viable and prosperous in the post-1997 period as an inducement to Taiwan for eventual reunification under the "one country, two systems" model.

V. DRAFTING THE BASIC LAW TO IMPLEMENT THE SINO-BRITISH JOINT DECLARATION

The Joint Declaration is to be implemented by a Basic Law of the Hong Kong Special Administrative Region ("SAR") which will be enacted by the PRC's National People's Congress; therefore, the Basic Law is of vital importance in maintaining Hong Kong's prosperity in the post-1997 period. The next four Articles in this issue deal with certain important issues relating to the Basic Law. At the time these Articles were written, the final draft of the Basic Law was not published though most of its contents were already released to the public. It is believed the con-

tents of the final draft and the Basic Law ultimately to be enacted will not be significantly different from those provisions already released. However, several important issues of the Basic Law have not yet been decided. Therefore, when reading these Articles, one should bear in mind that some analyses and conclusions must be viewed as tentative. Emily Lau provides an overall survey of the structure of the Hong Kong SAR. The structure of the SAR government is supposed to be based on provisions in the Joint Declaration, yet there is only one short paragraph in Annex I of the Joint Declaration:

The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants. The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government. Principal officials . . . shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People's Government. The legislature of the Hong Kong Special Administrative Region shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature.²¹

During the two years of the Basic Law drafting process it has been demonstrated, Lau observed, that the vague principles contained in the Joint Declaration could be subjected to wide ranging interpretations, which sometimes might deviate significantly from the general understanding in 1984 that the PRC would not interfere with the SAR administration and would give it "a high degree of autonomy." At the time of Lau's writing, the PRC has not agreed to the direct election of the SAR chief executive, nor does the PRC make clear how the members of the legislature will be elected. In 1987, the PRC announced its opposition to partial direct election of the present Hong Kong legislature. Lau concludes that the structure of the SAR, when formally announced, will not adequately guarantee the "high degree of autonomy" for the SAR provided in the Joint Declaration.

The crucial issue of the constitutional relationship between the PRC's Central People's government and the Hong Kong SAR is analyzed in Joseph Y.S. Cheng's Article. The constitutional basis of the Hong Kong SAR is article 31 of the 1982 PRC Constitution.²² Some Hong Kong groups pointed out that the capitalist system to be continued in Hong Kong for fifty years after 1997 would be contrary to at least two articles of the PRC Constitution, namely:

ARTICLE 5 The state upholds the uniformity and dignity of the socialist legal system. No law or administrative or local rules and reg-

²¹ Joint Declaration, *supra* note 16, Annex I, § 1.

²² P.R.C. CONST. art. 31.

ulations shall contravene the Constitution.²³

ARTICLE 6 The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.²⁴

These groups would like the PRC to revise article 31 of the Constitution to provide a more specific guarantee for the Hong Kong capitalist system in the post-1997 period. However, as Cheng observes, the PRC has been reluctant to even discuss the issue. On the question of "residual powers," i.e., those powers not specifically provided in the PRC Constitution or the Basic Law of the Hong Kong SAR, the draft article 9 of the Basic Law makes it clear that those powers belong to the PRC's National People's Congress, its Standing Committee or the State Council, but they may delegate those powers to the Hong Kong SAR. With respect to the question of amending the Basic Law of Hong Kong, the draft provides that amendment could be initiated by the Standing Committee of the National People's Congress, the State Council and the Hong Kong SAR. The amendment has to be approved by the National People's Congress. Thus, Cheng notes that under this arrangement the PRC would in fact have full control of the amendment process. The power of interpretation of the Basic Law is in the hands of the Standing Committee of the National People's Congress. In view of this arrangement on the relationship between the PRC Central authorities and the Hong Kong SAR, Cheng concludes that the Basic Law will offer very limited guarantees for the political autonomy of the Hong Kong SAR.

Denis Chang's Article takes a jurisprudential approach to the issue of the Basic Law. According to him, some of the currently encountered difficulties in the drafting of the Basic Law for the SAR go to the very concept and test the coherence of the two different legal systems. In China, the moment the political norms change, the legal system has to adjust. The norms are classified in hierarchical order: policy line, direction indicator and policy. Law is intended to implement policy as defined by the Communist Party. Therefore, among the most crucial problems in jurisprudential terms are the application of Chinese laws to the SAR, the interpretation of the Basic Law and other matters that touch upon the interface and differentiation of the two systems. He hopes that as the tale of two legal systems unfolds, law will within its proper sphere become established as a principle, a product as a means of mediation between the two systems. This hope is unlikely to be realized if the promises for a "high degree of autonomy" contained in the Joint Declaration are not "solemnly kept." He, however, declines to say

²³ *Id.* art. 5.

²⁴ *Id.* art. 6.

whether the contents of the draft Basic Law, as made public so far, have kept the promises contained in the Joint Declaration.

In his Article, Michael C. Davis focuses on the issues facing a comparative legal scholar as the British common law and the Chinese civil law systems "collide" during the drafting of the Basic Law. After analyzing the issues of the composition of the future legislature, selection of a governor, human rights and the interpretation and implementation of the Basic Law, he suggests a model for constitutional judicial review in Hong Kong. Taking into account Hong Kong's unique circumstances and the "stark contrast" between Hong Kong and China's constitutional values, Davis proposes a bifurcated system of a decentralized incidenter system at the local level and a centralized principaliter system to resolve issues such as the national/local division of constitutional power.

In addition to providing analysis, Davis challenges comparative law scholars to take advantage of the opportunity Hong Kong provides for participation—both theoretical and practical—in the development of a unique constitutional framework. Admittedly not the final word on the subject, this Article sets up a valuable foundation for further development and refinement of models of constitutional judicial review for Hong Kong.

VI. CERTAIN LEGAL ISSUES ON TRANSFERRING HONG KONG TO CHINA IN 1997

The next four Articles in this collection cover four specific legal problems relating to the death penalty, extradition, international transportation, and nationality and passports. At present, the death penalty is retained in the legal systems of both Hong Kong and the PRC, as indicated in Andrew Scobell's Article. However, while in the PRC death penalties were frequently imposed, since 1966 those in Hong Kong convicted of crimes that carry the death penalty and sentenced to death have had the punishment commuted to life imprisonment. Scobell suggests it is possible that more death penalties will be imposed and carried out following 1997. In 1965 Great Britain enacted the Murder (Abolition of Death Penalty) Act abolishing the death penalty for murder.²⁵ Thus, all death sentences have since then been commuted to life imprisonment by the "Governor-in-Council" or more precisely the "Queen-in-Council" (the Queen in consultation with the Privy Council in London). Annex I of the Joint Declaration states that the system of appeal to the Privy Council in London will be abolished and the "power of final adjudication" will rest with an appeals court in the Hong Kong SAR.²⁶ More-

²⁵ Murder (Abolition of Death Penalty) Act, 1965, ch. 71, *reprinted in* 8 HALSBURY'S STATUTES OF ENGLAND 541 (3d ed. 1969).

²⁶ Joint Declaration, *supra* note 16, Annex I.

over, a survey conducted by the University of Hong Kong indicated that an overwhelming majority of the respondents favored the death penalty for premeditated murder, while a majority also supported extending the death penalty for bodily harm, armed robbery and rape. With the removal of the British administration in Hong Kong in 1997, it is unlikely that the Chief Executive of the Hong Kong SAR, who is to be appointed by the PRC, would routinely commute a death sentence to life imprisonment.

At present, Hong Kong maintains extradition relations with many countries and areas through its connection with Great Britain. Will such relations continue after 1997 with the termination of British rule? This issue is analyzed by Janice M. Brabyn. Hong Kong's present extradition powers and relations are a direct consequence of its colonial status. The British Fugitive Offenders Act of 1967 provides in section 17 for its extension to colonies' authorities to surrender persons found within their territory to other British Commonwealth countries.²⁷ The Fugitive Offenders (Hong Kong) Order of 1967 extends the Act's application to Hong Kong.²⁸ For non-Commonwealth countries, extradition is based on extradition treaties concluded by Great Britain and their application to Hong Kong through the British Extradition Act of 1870.²⁹ A British colony, which has achieved independence and which has become a full member of the British Commonwealth of Nations, needs only to ask other members of the Commonwealth to designate the new state as one to which their Commonwealth rendition legislation applies. For treaty-based extradition, ex-colonies can rely on the general principle of treaty succession and, in addition, could enter into inheritance agreements or make unilateral declarations of continuity which are normally accepted by other treaty partners. However, Brabyn suggests that these methods for continuing extradition relations may not be applicable to Hong Kong. This is because, explained Brabyn, Hong Kong is not moving from colonial status to independence, it is becoming a part of the PRC, a country which has no bilateral extradition treaty with any country, though it has ratified a few international multilateral conventions which contain provisions on extradition of specific offenses such as hijacking.

The Hong Kong SAR cannot succeed to the British extradition treaties as of right. Succession will depend on the willingness of the other treaty partners. Moreover, a question exists as to whether, after 1997 when the Hong Kong SAR will no longer be associated with a Common-

²⁷ Fugitive Offenders Act, 1967, *reprinted in* 17 HALSBURY'S STATUTES OF ENGLAND 517 (4th ed. 1986).

²⁸ Fugitive Offenders (Hong Kong) Order, 1967 S.I. 1967 No. 911 *as amended by* S.I. 1968, Nos. 292, 1375.

²⁹ Extradition Act, 1870, 33 & 34 Vict., ch. 52, *reprinted in* 17 HALSBURY'S STATUTES OF ENGLAND 478 (4th ed. 1986).

wealth member, will other Commonwealth countries be willing to extend extradition relations to it? In view of this situation, Brabyn concludes that unless special arrangements are made, it is probable that Hong Kong's present abilities to extradite and to obtain extradition will be seriously curtailed after 1997.

Gary N. Heilbronn's Article deals with a very important commercial question of whether the transfer of Hong Kong to the PRC in 1997 would affect Hong Kong's international air transportation relations. During 1985-86, thirty scheduled airlines operated 55,094 passenger flights and 3,424 cargo flights to and from Hong Kong, maintaining direct links to 105 cities, 52 of them being non-stop services. Over a dozen-scheduled (charter) air carriers operated 218 passenger and 496 cargo flights, with another 1,430 non-revenue flights being made. These extensive international aviation relations have been handled solely by Great Britain. According to Heilbronn's analysis, if proper measures are taken, there will be a continuation of Hong Kong's international aviation relations after 1997. Regarding British aviation laws now applicable to Hong Kong, he suggests that they should be replaced by Hong Kong legislation before 1997, then by paragraph 3 of Annex II of the Joint Declaration that legislation would continue in force.³⁰ With respect to those multilateral international aviation treaties applicable to Hong Kong through Great Britain, since the PRC is already a party to virtually all those treaties, the extension of the PRC's sovereignty to Hong Kong in 1997 would automatically bring the application of these treaties there under the international law principle of partial succession. As to the question of the continuation of certain bilateral air services agreements concluded by Great Britain and made applicable to Hong Kong, they will no longer be applicable to Hong Kong after 1997. However, the PRC has concluded many bilateral air transportation agreements with other countries, so there should not be any difficulty for the PRC in addressing this problem before 1997 or after.

At present, among the 5.5 million population of Hong Kong, 98% are of Chinese origin.³¹ Since Chinese nationality law operates essentially *jure sanguinis* and China does not consider Great Britain to have acquired sovereignty in Hong Kong through unequal treaties, the population of Chinese origin are considered as Chinese. On the other hand, Great Britain views the whole of Hong Kong as a part of the dominion of the Crown, so those born there are British Dependent Territories Citizens (BDTC) by virtue of such birth, irrespective of ethnic origin. It is

³⁰ Joint Declaration, *supra* note 16, Annex II, § 3.

³¹ HONG KONG 1986 (Hong Kong Government Annual Report); HONG KONG GOVERNMENT INFORMATION SERVICES, HONG KONG: THE FACTS: IMMIGRATION (1986).

estimated that there are 3.25 million BDTs in Hong Kong.³² The remaining part of the population are Hong Kong residents, most of them are of Chinese nationality. The complicated nationality laws relating to Hong Kong are analyzed in Robin M. White's Article.

The Sino-British Joint Declaration and its Annexes do not itself refer directly to the nationality issue. It is only mentioned in the Chinese Memorandum appended to the Joint Declaration. In the memorandum, it is stated that "under the Nationality Law of the People's Republic of China, all Hong Kong Chinese compatriots, whether they are holders of the British Dependent Territories Citizens' Passport or not, are Chinese nationals."³³ In Annex I of the Joint Declaration, the residents of Hong Kong, whether they are BDTs or not, are guaranteed of their right to travel and return.³⁴ The arrangement on the nationality issue probably has "extracted as many concessions as it could" from the Chinese side, White concludes.

In accordance with international practice, a person who travels abroad only needs one travel document, i.e., his or her passport. In the case of the Hong Kong SAR after 1997, a permanent resident of Hong Kong will normally hold dual passports from among the five types of travel documents in addition to a British or third country nationality passport. These travel documents are:

1) The British National (Overseas) Passport, this document is currently used by Hong Kong residents for international travel. This passport is issued for a ten-year period. A holder of this passport may use it after 1997 until its expiration date, but it will not be renewable.

2) The British Overseas Citizen Passport ("BOC"), this document is issued primarily to non-Chinese ethnic minorities in Hong Kong. After 1997, the BOC status would be transmissible for two generations to dependents of the holders if they would otherwise be stateless.

3) A Hong Kong Certificate of Identity ("COI") is now issued to about one million Hong Kong residents who are not considered as British dependent territories citizens. The COI will continue to be issued by the Hong Kong government before 1997 and normally for a ten year period. It can be used after 1997 until its expiration date.

4) A Hong Kong SAR Passport will be issued by the Hong Kong SAR government to Chinese residents in Hong Kong after 1997.

5) Travel Documents of the Hong Kong SAR will be issued by the Hong Kong SAR government to non-Chinese residents in Hong Kong after 1997.

³² HONG KONG: THE NATIONALITY PROVISIONS OF THE HONG KONG ACT 1985: A DRAFT ORDER IN COUNCIL, 1986, Cmnd. No. 9637.

³³ Joint Declaration, *supra* note 16, Exchange, Chinese Memorandum.

³⁴ *Id.* Annex I.

White also examines these classes of documents and related nationality issues.

VII. A COMPARATIVE PERSPECTIVE—THE SINO-PORTUGUESE NEGOTIATION ON THE MACAO QUESTION

The last Article in this issue, written by Jaw-ling Joanne Chang, deals with distinctive features of the PRC's negotiating behavior in the settlement of the Macao issue. While there are many articles dealing with the Hong Kong issue, Chang's Article is the only comprehensive analysis of the PRC-Portugal settlement of the Macao question. In 1557, China agreed to Portuguese settlements in Macao but still retained Chinese sovereignty there. Rent was paid to China by the Portuguese for the territory until 1849. In the Protocol of Lisbon of 1887, Portugal's right of "perpetual occupation" was recognized by China.³⁵ In a protocol signed by Portuguese officials in Macao and the leftist organizations there in 1967, the PRC gained substantial leverage in influencing Macao's affairs. In the Sino-Portuguese negotiation on the Macao question conducted between 1986 and 1987, only two major issues became controversial. The first one was the transfer date. The PRC originally wanted to take over both Macao and Hong Kong at the same time in 1997. Portugal, on the other hand, wanted to return Macao to China after 2000. A compromise was reached to return Macao on December 31, 1999. The second issue was more serious. Portugal allows dual nationality, but the PRC does not. There are approximately 100,000 ethnic Chinese in Macao having Portuguese passports, about a fifth of Macao's population. Portugal would like to preserve their rights in Macao as Portuguese citizens, despite the fact that under PRC law they should be considered Chinese since they were born in a territory which the PRC has never conceded to be Portuguese territory, though administered by Portugal with Chinese tolerance. Finally, a compromise was reached under which these dual nations will use Portugal's passports for international travel. Portugal will not exercise consular protection to them while they are in Macao and the PRC. The second part of Chang's Article deals with the PRC's negotiating tactics and post-negotiation maneuvers. Since the implementation of the Sino-British Joint Declaration on Hong Kong requires negotiating many transition agreements between the two countries before 1997, this section of Chang's Article should be useful to scholars and practitioners involved in such negotiations.

³⁵ BUREAU OF PUB. AFF., U.S. DEP'T OF STATE, BACKGROUND NOTES, MACAU 3 (Oct. 1982).

VIII. CONCLUDING OBSERVATIONS

The Hong Kong question involves many legal problems and it is not possible to deal with all of them in this issue. However, this topical issue does cover some of the most important legal issues which may inspire others to carry on further research on the subject. The *Case Western Reserve Journal of International Law* is to be congratulated for organizing and editing this interesting and valuable issue on the question of Hong Kong.