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Introduction

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SYMPOSIUM
JULY 1, 1997: HONG KONG AND
THE UNPRECEDENTED TRANSFER
OF SOVEREIGNTY

Introduction

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I grew up, was educated through college, practiced and taught law in Hong Kong. Since leaving Hong Kong, I have kept up both emotionally and professionally with the developments there.¹ Clearly, the next most dramatic event for Hong Kong will take place on July 1, 1997 when Hong Kong will return to the People's Republic of China (PRC).

Many academics and commentators have written extensively about the transfer (or resumption) of sovereignty of Hong Kong by the PRC.² As expected, many legal, social, political, and eco-

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1. See Frankie Fook-Lun Leung, Introductory Note, *Hong Kong: The Hong Kong Court of Final Appeal Ordinance*, 35 I.L.M. 207 (1996); Frankie Fook-Lun Leung, Introductory Note, *United States: United States-Hong Kong Policy Act of 1992*, 32 I.L.M. 545 (1993).

2. See BRUCE BUENO DE MESUITA, *RED FLAG OVER HONG KONG* (1996); MICHAEL YAHUDA, *HONG KONG: CHINA'S CHALLENGE* (1996); *THE FUTURE OF HONG KONG: TOWARD 1997 AND BEYOND* (Hungdah Chiu et al. eds., 1987); HONG

conomic issues impact the transfer of sovereignty; likewise, the transfer will impact many, if not all, aspects of life in Hong Kong. I need not dwell on each specific issue impacting the transfer, or each impact of the transfer, as the ensuing Articles articulate various problems that the new Hong Kong Special Administrative Region (HKSAR) will encounter. In all areas of law that the transfer affects, the HKSAR will consistently have to tackle two concerns: (1) the lasting effects of British rule on the HKSAR; and (2) the interpretation of the Basic Law of the HKSAR of the PRC,³ which will essentially serve as the HKSAR's constitution after July 1, 1997.

The transfer of sovereignty from Great Britain to the PRC presents fascinating issues for lawyers.⁴ First, how will the PRC deal with remnants of British rule in Hong Kong? Putting it in somewhat journalistic terms, the PRC has accused the British government of implementing major changes in Hong Kong during the transitional period. For example, the British recently introduced popular elections into the Legislative Council by enlarging the enfranchised population. Such drastic changes are analogous to an outgoing owner of property, who knowing that he has to surrender the property, intentionally decides to make major structural alterations that the successor in title does not approve.

In response to the PRC's allegations, the British counterargument is simply that it can do whatever is not expressly prohibited in the 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, which sets out the guidelines governing the transfer.⁵ Secondly, the British government argues that its changes foster in the community a sense of democratic participation and a respect for the rule of law before the transfer of sovereignty, and that this type of atmosphere is the most effective way to ensure a high degree of

KONG'S TRANSITION: A DECADE AFTER THE DEAL (Wang Gungwu & Wong Siu-lun eds., 1995).

3. Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990), *reprinted in* 29 I.L.M. 1519 [hereinafter Basic Law].

4. *See* THE FUTURE OF THE LAW IN HONG KONG (Raymond Wacks ed., 1989).

5. 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., 23 I.L.M. 1371 [hereinafter Joint Declaration].

autonomy in the HKSAR post-1997.

The British attempt to implement what it deems most desirable for Hong Kong has expectedly met with strong reaction from the PRC. The PRC has declared that Legislative Councilors who were elected at the 1995 elections will have to step down on June 30, 1997, thereby virtually nullifying the effect of the recent democratic elections.⁶ Furthermore, as of December 1996, the PRC set up a provisional legislative assembly to bridge the hiatus created by the derailment of the 1995 elected legislature.⁷

The second general problem that the HKSAR will have to tackle concerns the very document that will serve as its written constitution: the Basic Law.⁸ Commentators, including myself, envision that the legislative interpretation of many articles in the Basic Law will present problems to lawyers who are trained and experience in the common law tradition.⁹

For example, article 18 of the Basic Law reads:

The laws in force in the Hong Kong Special Administrative Region shall be this [Basic] Law, the laws previously in force in Hong Kong as provided for in Article 8 of this [Basic] Law, and the laws enacted by the legislature of the Region.

National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this [Basic] Law

The Standing Committee of the National People's Congress may add to or delete from the lists of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region

In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by rea-

6. See 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, 7th National People's Cong., 3d Sess.

7. See Yash Ghai, *Back to Basic: The Provisional Legislature and the Basic Law*, 25 H.K. L.J. 2 (1995); Stephen Law Shing-Yan, *The Constitutionality of the Provisional Legislature*, 26 H.K. L.J. 152 (1996).

8. Basic Law, *supra* note 3, reprinted in 29 I.L.M. 1519 (1990).

9. See C. LOH, HONG KONG: A HIGH DEGREE OF AUTONOMY AND THE BASIC LAW (1995); INTERNATIONAL COMM'N OF JURISTS, COUNTDOWN TO 1997: REPORT OF A MISSION TO HONG KONG (1992).

son of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a *state of emergency*, the Central People's Government may issue an order applying the relevant national laws in the Region.¹⁰

Simply stated, the PRC still reserves a set of constitutional supervisory powers to apply laws promulgated in its communistic ideological framework to capitalistic Hong Kong, pursuant to the "state of emergency" provision.¹¹ This broad reservation has caused much concern in Hong Kong. Many dread the day when, for example, the Chinese Code of Criminal Procedure will be introduced and applied in Hong Kong's courts pursuant to the "state of emergency" provision.¹²

Article 19 of the Basic Law also presents a potential interpretational problem. Under its provisions, although the Hong Kong judiciary has independent judiciary power, including the power of final adjudication, this power is qualified. The article continues to state that "the courts of the [HKSAR] shall have no jurisdiction over acts of state *such as* defence and foreign affairs."¹³ Since the Basic Law's promulgation, the PRC has indicated that the words "such as" indicate that defense and foreign affairs are simply two examples of state activities over which the Hong Kong judiciary does not have jurisdiction. The exact ambit of those activities still remains undefined.¹⁴

Article 158 of the Basic Law introduces yet another concern.¹⁵ Article 158 vests in the Standing Committee of the National People's Congress [SCNPC] the power to interpret the Basic Law. Thus, if HKSAR courts need to interpret the Basic Law concerning affairs that are the responsibility of the Central Government or

10. Basic Law, *supra* note 3, art. 18, *reprinted in* 29 I.L.M. 1519, 1523 (1990).

11. *Id.*

12. See LOH, *supra* note 9; see also A. Neoh, *Hong Kong's Future: The View of a Hong Kong Lawyer*, 22 CAL. W. INT'L L.J. 309 (1991-1992).

13. Basic Law, *supra* note 3, art. 19, *reprinted in* 29 I.L.M. 1519, 1523 (1990).

14. See Xiao Weiyun, *A Study of the Political System of the Hong Kong Special Administrative Region Under the Basic Law*, 2 J. CHINESE L. 95, 112 (1988); Wu Jianfan, *Several Issues Concerning the Relationship Between the Central Government of the People's Republic of China and the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 66, 67-9 (1988).

15. See INTERNATIONAL COMM'N OF JURISTS, *supra* note 9, at 113.

concerning the relationship between the Central Government and the HKSAR, they must seek an interpretation of the relevant provisions from the SCNPC. Before giving the court an interpretation, the SCNPC must consult its Committee for the Basic Law of the HKSAR. In effect, HKSAR courts must seek a legislative interpretation of the law, which will serve as a basis for final non-appealable judgments.

It is a common and accepted practice in civil law jurisdictions that the legislature has the power to interpret laws.¹⁶ In common law jurisdictions, however, the judiciary is exclusively given the constitutional power to interpret all laws. Many fear that article 158, together with other provisions of the Basic Law, purports to encroach upon and undermine the independence of HKSAR courts in deciding cases that bear on governmental powers.¹⁷

To conclude, while Hong Kong is undergoing an unprecedented transfer of sovereignty, I, like many others, anticipate that many of the changes will have unsettling effects on Hong Kong's legal system. The following Articles explain some of those effects, discuss possible difficulties that will accompany the transfer of sovereignty, and a few even offer solutions.

16. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985). In contrast to the civil law practice, and with special reference to Hong Kong, see BERRY HSU, *THE COMMON LAW SYSTEM IN CHINESE CONTEXT: HONG KONG IN TRANSITION* (1992). See also PETER WESLEY-SMITH, *THE SOURCES OF HONG KONG LAW* (1994).

17. See Gladys Li, Chairman of the Hong Kong Bar Association, *Interpretation of the Basic Law—A High Degree of Autocracy?*, Speech at a Far Eastern Economic Review conference (1996) (transcript on file with the author).

