

HONG KONG'S HUMAN RIGHTS AFTER THE REVERSION OF THE FORMER BRITISH COLONY TO THE PEOPLE'S REPUBLIC OF CHINA

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ABSTRACT

Prior to Hong Kong's reversion to the sovereign control of the People's Republic of China, and subsequent to the hand-over on 1 July 1997, legislative and administrative changes were undertaken with respect to human rights. This paper addresses those changes and assesses whether there has been any erosion of those rights.

BACKGROUND

While Hong Kong was under British control, the United Kingdom ratified the International Covenant on Civil and Political Rights¹ (ICCPR) in 1976, and extended the treaty's application to Hong Kong in that year.² On 8 June 1991, the Hong Kong Bill of Rights Ordinance³ (Ordinance), entered into force thereby

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¹ *International Covenant on Civil and Political Rights*, Dec. 19, 1966, 999 *United Nations Treaty Series* 171. On the ICCPR generally see, Manfred Nowak, *U.N. Covenant On Civil And Political Rights: CCPR Commentary* (1993). With specific reference to Hong Kong, see Geping Rao, "The Application Of The International Covenant On Civil And Political Rights To Hong Kong", 2 *Pa. Rim . & Pol'y J* 9 (1993)

It may also be stated that just as in the case of the ICCPR, the United Kingdom also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1976 on behalf of Hong Kong which has been incorporated into the law of Hong Kong. *The International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 *United Nations Treaty Series* 3. On the ICESCR generally see Asbjorn Eide, Catarina Krause & Allan Rosas, *Economic, Social And Cultural Rights: A Textbook* (1995); Matthew Craven, *International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995).

² In both the United Kingdom and Hong Kong, treaties require domestic legislation to become effective in domestic law, see Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* 39 (1994). For a discussion of the historical development of application of treaties in Hong Kong, see G. Marston, "Unincorporated Treaties and Colonial Law Hong Kong's 'Parliament Belge,'" (1990) 20 *Hong Kong LJ* 178, 194.

³ "The Hong Kong Bill of Rights Ordinance of 1991" June 8 (1991) 30 *Int'l Leg. Mat.* 1310. For the origin and drafting history of the Ordinance see Philip Dykes, "The Hong Kong Bill of Rights 1991: Its Origin, Content and Impact", in J. Chan & Y. Ghai, eds., *The Hong Kong Bill of Rights: A Comparative Approach* 39-50 (1993). For a broad insight into the

incorporating the ICCPR into the law of Hong Kong. The National People's Congress (NPC) of the People's Republic of China (PRC), the highest organ of state power under the Constitution of the PRC, adopted the *Basic Law*⁴ of the Hong Kong Special Administrative Region (SAR) on 4 April 1990, pursuant to Article 31 of the Constitution which states that "[t]he state may establish special administrative regions when necessary." The *Basic Law* is sometimes referred to as Hong Kong's mini-constitution although it is subordinate to the PRC constitution.⁵

The *Basic Law* asserts the PRC's sovereignty over Hong Kong⁶ and declares that the Hong Kong SAR shall "exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power."⁷ Hong Kong maintains its own judicial system⁸ (the common law), and PRC national laws are not to be applied in the Hong Kong SAR, subject to specific exceptions.⁹ Moreover, "[n]o department of the Central People's Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in

Ordinance's impact both internally and internationally, see J.M.M. Chan, "Hong Kong's Bill of Rights: Its Reception Of And Contribution To International And Comparative Jurisprudence", (1998) 47 *Int'l & Comp L Q* 306

⁴ The *Basic Law* of the Hong Kong Special Administrative Region of the People's Republic of China is found in (1990) 29 *Int'l Leg Mat* 1511. An early informative examination of what was supposed to benefit the people of Hong Kong by way of fundamental rights is discussed by P. H. Palumbo, "Analysis of the Sino-British Joint Declaration and the *Basic Law* of Hong Kong: What Do They Guarantee the People of Hong Kong After 1997?", (1991) 6 *Conn J Int'l L* 667. For a discussion of the 1988 draft of the *Basic Law* see Peter Wesley-Smith & Albert Chen, eds., *The Basic Law and Hong Kong's Future* (1988). Also see generally, Yash Ghai, *Hong Kong's New Constitutional Order* (1997) 65-69, 137-151.

⁵ To say that the *Basic Law* will serve as a mini-constitution is controversial, see Yash Ghai, n.4, 137 *supra*, and Ann D. Jordan, "Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the *Basic Law* of the Hong Kong Special Administrative Region", (1997) 30 *Cornell Int'l L J* 335, 351 who argues that "[i]n the Chinese legal hierarchy the *Basic Law* is merely another . . . national-level law" and hence "is not a mini constitution". On the other hand, Tung Chee-hwa, the Chief Executive in Hong Kong has said "[t]he *Basic Law* is the constitutional law of the Hong Kong Special Administrative Region"; see Hong Kong's Chief Executive Tung Chee-hwa Gives First Policy Address, *BBC Summary of World Broadcasts*, (1997) 10 October available in LEXIS, NEWS Library, Curnws File.

⁶ *Basic Law*, art. 1 declares that the Hong Kong SAR "is an inalienable part of the People's Republic of China."

⁷ *Basic Law*, art. 2. The *Basic Law* preamble also states that "under the principle of 'one country, two systems,' the socialist system and policies will not be practised in Hong Kong."

⁸ *Basic Law*, art. 81 provides "[t]he judicial system previously practised in Hong Kong shall be maintained, except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region."

⁹ *Basic Law*, art. 18.

accordance with" the *Basic Law*.¹⁰

In the Sino-British Joint Declaration, the 1984 treaty¹¹ signed by the British and Chinese Governments on the question of Hong Kong, it expressly stipulated that "[t]he provisions of the International Covenant on Civil and Political Rights and the International Covenant Economic, Social and Cultural Rights [ICESCR] as applied to Hong Kong shall remain in force."¹² Commentators have generally discussed Hong Kong's post-1997 treaty obligations with reference to treaties applicable to Hong Kong that the PRC had not joined, including the ICCPR and the ICESCR.¹³ Although the PRC has indicated that it would become a party to the two international covenants, it has not done so as of this date.¹⁴ Although the PRC is not a party to the ICCPR, it has indicated that it, and not the Hong Kong SAR, will be responsible for meeting the reporting requirements of the treaty.¹⁵ Tung Chee-hwa, the Hong Kong SAR Chief Executive, welcomed¹⁶ the PRC's

¹⁰ *Basic Law*, art. 22.

¹¹ 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, 26 September 1984, *Gr Brit Treaty Series* (1984) No. 26 (Cnmd 9543), reprinted in 23 *Int'l Leg Mat* (1984) 1366. The treaty was initialed on 26 September 1984, signed on 19 December 1984 and ratified on 27 May 1985.

¹² Joint Declaration, n. 11 *supra*, in Annex 1, Section XIII; *Basic Law*, art. 153 also provides that "[i]nternational agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region."

¹³ See, for example, Roda Mushkat, "Hong Kong As An International Legal Person", (1992) 6 *Emory Int'l L Rev* 105, 150. The PRC had removed doubt about Hong Kong's future international rights and responsibilities in February 1996 when it acknowledged that Hong Kong would continue to participate in more than 200 multilateral treaties; Simon Holberton, "China Agrees on HK Treaties", *Financial Times* (London), Feb. 10, 1996, available in LEXIS, ASIAPC, Allasi File; "HK's Special Legal Status Under Basic Law Highlighted", *XINHUA News Agency*, 3 March 1998, available in LEXIS, NEWS Library, Curnws File.

¹⁴ On 26 October 1997, just prior to the Clinton-Jiang summit in Washington, China signed the ICESCR but has not ratified it. China has not signed the ICCPR; see Prepared Statement By Mike Jendrzeczyk Before The Senate Foreign Relations Committee Concerning U.S.-China Policy, *Federal News Service*, 14 May 1998, available in LEXIS, ASIAPC Library, Allasi File. On 22 June 1998, it was announced that PRC Vice-Foreign Minister Yang Wenchang explained the ICESCR to the NPC's Standing Committee members; "NPC Standing Committee To Mull Drafts Of Three Laws", *Xinhua News Agency*, 22 June 1998, available in LEXIS, ASIAPC Library Allasi File.

¹⁵ Chris Yeung, Beijing Vow On Rights Reports; UN To Be Advised On Hong Kong, *South China Morning Post*, 23 November 1997, available in LEXIS, ASIAPC Library, Allasi File. Prior to 1 July 1997, the date of PRC resumption of PRC sovereignty over Hong Kong, the United Kingdom submitted a total of four periodic reports to the Human Rights Committee on the implementation of the ICCPR with respect to Hong Kong, together with several supplementary reports requested by the Human Rights Committee between 1976 and 1 July 1997.

¹⁶ Chief Executive Welcomes Chinese Decision On Human Rights Reports, *BBC Summary*

announced intentions.

THE HONG KONG LEGISLATURE AFTER JULY 1, 1997

Despite the provision in the Sino-British Joint Declaration that the “legislature of the Hong Kong Special Administrative Region shall be constituted by elections,”¹⁷ the membership in the Hong Kong Legislative Council (LegCo), the lawmaking body in the SAR, has been a source of contention.¹⁸ It will be recalled that in the 1995 LegCo election, out of the 20 of 60 seats that were directly elected, the pro-Chinese parties won only four seats while the two pro-democracy parties won sixteen seats.¹⁹ The PRC created a Preparatory Committee before the end of 1995, that was given the responsibilities of creating the government structure for post-30 June 1997 Hong Kong, and for determining the method of selecting the Chief Executive of the SAR.²⁰ The members of the LegCo elected in 1995 were to serve in office until 1999, but the Preparatory Committee was given the responsibility of selecting a provisional unelected legislature to replace the elected LegCo upon the transfer of Hong Kong on 1 July 1997. On 24 March 1996, the Preparatory Committee passed a resolution officially establishing a provisional legislature and on 11 December 1996,²¹ the Preparatory Committee selected the first Chief Executive of the Hong Kong SAR, Tung Chee-Hwa.

On 23 February 1997, the Standing Committee of the PRC’s NPC published details of existing laws of Hong Kong considered to be contradictory to the *Basic Law* that were earmarked for change on 1 July 1997. These included the Legislative Council Electoral Provisions Ordinance.²² In the days immediately

of World Broadcasts, 24 November 1997, available in LEXIS, ASIAPC Library, Allasi File.

But see Nihal Jayawickrama, “Human Rights in Hong Kong: The Continued Applicability of the International Covenants”, 25 *Hong Kong L J* (1995) 171 (who argues that the Hong Kong SAR after 1 July 1997, succeeds to the British obligation to make the periodic reports concerning the ICCPR to the United Nations Human Rights Committee).

¹⁷ Annex 1, 1.

¹⁸ On the background of the Hong Kong Legislative Council and the Chinese-British differences over LegCo’s membership after June 30, 1997, see Steven L Chan, “Differences Between British and Chinese Views Of Law Forebode Uncertainties For Hong Kong’s People After The 1997 Transfer”, (1996) 15 *UCLA Pac. Basin L J* 138, 168-173.

¹⁹ Sheila Tefft, A Red-Faced China Vows to Ignore Hong Kong Vote, *Christian Science Monitor*, 19 September 1995, at p. 6. Of the remaining 40 seats, 30 were filled by occupation-based functional electorates while 10 were filled by local representative bodies. When factoring in all 60 seats, Legislative Council was almost evenly split between pro-democracy and pro-China parties. *ibid*.

²⁰ See Jonathan Sprague, “Hong Kong Committee to Prepare China’s Sovereignty”; *Reuters World Service*. 29 December 1995, available in LEXIS, NEWS Library, Arcnws File.

²¹ Steven L. Chan, n. 18, 199-202 *supra*; John M. Rogers, “Anticipating Hong Kong’s Constitution from a U.S. Legal Perspective”, 30 *Vand J Transnat’l L* (1997) 449, 484-489.

²² “China Publishers List Of HK Laws To Be Revoked, Revised”, *Xinhua News Agency*, 23 February 1997, available in LEXIS, NEWS Library, Curnws File.

before the PRC's resumption of sovereignty over Hong Kong attempts were made in LegCo to amend the Hong Kong *Bill of Rights Ordinance*,²³ to no avail.²⁴ Members of the Provisional LegCo were named by the PRC on 21 December 1996,²⁵ and that body took office on 1 July 1997, to function no longer than 30 June 1998, when the first Hong Kong SAR Legislative Council would be established.²⁶

At the first meeting of the Hong Kong SAR's new cabinet, the Executive Council, legislation was introduced for a proportional representation system to elect 20 of the LegCo's 60 seats with the remainder to be chosen by special interest groups from the business sector and the professions.²⁷

A challenge to the legitimacy of the Provisional LegCo also came in July 1997, but the Court of Appeal held that as the Provisional LegCo was endorsed by the PRC's NPC, and that it lacked jurisdiction to challenge NPC decisions. Did this decision mean that the NPC could openly violate the *Basic Law*, and further, that Hong Kong courts lacked authority to rule negatively on NPC decisions?²⁸ Another challenge came in the form of an omnibus bill passed by the Provisional LegCo just after the resumption of sovereignty that the transfer of the common law traditions into the Hong Kong SAR left a legal vacuum. The Court held that Article 160 of the *Basic Law* specifically provided for the continuation of the common law.²⁹

²³ *Hong Kong Bill of Rights Ordinance, Ordinance 59 of 1991*, Legal Supplement No. 1, Hong Kong Government Gazette, 7 June 1991, at A 399-A433. This Ordinance is reproduced in Andrew Byrnes & Johannes Chan, eds. *Public Law And Human Rights: A Hong Kong Sourcebook* (1993) 218-229.

²⁴ Frank Zhang, "Doomed Legislature Passes Raft Of Liberal Laws Before Handover", *Agence France Presse*, 27 June 1997, available in LEXIS, NEWS Library, Curnws File; Quinton Chan, "Rights Amendment To Last Three Days", *South China Morning Post*, 28 June 1997, available in LEXIS, NEWS Library, Curnws File.

²⁵ "List of the 60 Appointees to the Provisional Legislature", *Agence France Presse*, 21 December 1996, available in LEXIS, NEWS Library, Curnws File. The Selection Committee designated persons to the Provisional Legislature were all pro-PRC individuals; see "China-Backed Interim Legislature Named; Other Developments", *Facts on File World News Digest*, 31 December 1996, available in LEXIS, NEWS Library, Curnws File.

²⁶ "HK Provisional Legislative Council", *Xinhua News Agency*, available in LEXIS, NEWS Library, Curnws File.

²⁷ Edward A. Gargan, "New Hong Kong Chief Curbs Political Parties", *New York Times*, 9 July 1997, at p.6.

²⁸ For a commentary on the decision, see Edward A. Gargan, "In a First for China, Hong Kong Lawyers Mount a Challenge to Rule", *Int'l Herald Tribune*, 23 July 1997, p.4. See also Linda Choy & Genevieve Ku, "Fears as bulwark of Basic Law falls", *South China Morning Post*, 30 July 1997, p.7, available in LEXIS, NEWS Library, Curnws File.

²⁹ "Court of Appeal Approves Hong Kong's Legislature", *Agence France Presse*, 29 July 1997, available in LEXIS, NEWS Library, Curnws File. For a criticism of the Court's decision by the Hong Kong based non-governmental organization, Hong Kong Human Rights Monitor, see *Response to the Judgment of the Legality of the Provisional Legislative*

The electoral plan for the May 1998 LegCo election was approved by the Provisional LegCo on 28 September 1997.³⁰ Under a complex system called proportional representation, only 20 of the 60 legislative seats would be elected by all the voters of Hong Kong. Another 30 seats were to be elected by "functional constituencies," each seat representing a particular business, industry or profession, such as banking, insurance etc. The remaining 10 seats would be elected by an 800-member electoral committee, also made up of business leaders and pro-PRC persons.

An attempt to have foreign observers monitor the 24 May 1998 election had little support from the Hong Kong Government.³¹ The election went smoothly as expected, with democratic candidates garnering more than 60 percent of the popular vote.³² The *Basic Law* under Article 68 provides: "the method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong [SAR] and in accordance with the principle of gradual and orderly progress. The ultimate aim is to elect all 60 LegCo members by universal suffrage." The number of LegCo seats to be directly elected is to rise to 24 in 1999, and to 30 by the year 2004. The *Basic Law* provides a mechanism for the people of Hong Kong to decide how best to achieve the aim of direct elections for all 60 LegCo seats after 2007. To institute direct elections for the 60 seats prior to 2007, the NPC would have to give its approval.³³ The newly elected Legislative Council was sworn into office on 2 July 1998.³⁴

At its final sitting on 7 April 1998, the Provisional Legislature passed the *Adaptations of Law (Interpretive Provisions) Bill*. Although the Hong Kong SAR Government claimed that the law was technical in nature, and that it was simply replacing references in Hong Kong laws from the use of "Crown" to "State,"

Council (30 July 1997), available in <http://www.hknet.com/~hkhrm/pr300797e.htm>.

³⁰ Edward A. Gargan, "Pro-China Forum Sharply Limits Who May Vote in Hong Kong", *New York Times*, 29 September 1997 at p.A3; "Paper defends Provisional Legislature over passage of election bill", *BBC Summary of World Broadcasts*, 2 October 1997, available in LEXIS, NEWS Library, Curnws File.

³¹ Tim Cribb, "Hong Kong's election commission slammed for barring foreign monitors", *Agence France Presse*, 1 March 1998, available in LEXIS, NEWS Library, Curnws File (a total of 2.79 million people registered to vote).

³² John Pomfret, "Point Made in Hong Kong: Democratic Opposition Gets 60% of Popular Vote", *Int'l Herald Tribune*, 26 May 1998, p.1. For the various aspects of the Legislative Council Election, including the candidates and their platforms and the entire results see <http://www.info.gov.hk/election/legco.htm>.

With respect to the 30 seats elected by professional groups, only 23 percent of 140,000 eligible voters participated in the election and some seats were decided by fewer than 100 voters; "An Apathetic Start to Hong Kong Vote", *Int'l Herald Tribune*, 6 April 1998, at p.4; John Pomfret, "A Hong Kong Dilemma", *Int'l Herald Tribune*, 27 May 1998, at p.27.

³³ Mark Landler, "Hong Kong Confronts Democracy: How Soon?", *New York Times*, 27 May 1998, at p.A6.

³⁴ "Hong Kong's new legislature sworn in", *Agence France Presse*, 2 July 1998, available in LEXIS, NEWS Library, Curnws File.

critics³⁵ of the bill said that it would place the Hong Kong SAR Government, and Chinese governmental bodies such as the Xinhua News Agency, the Chinese Foreign Ministry and the Peoples' Liberation Army, and other central government agencies, above Hong Kong Law, in contravention of Article 22 of the *Basic Law*.³⁶

There was valid concern about immunity from Hong Kong law for PRC institutions in the Hong Kong SAR due to two previous incidents. The first of these involved the privacy law in operation before the resumption of PRC sovereignty over Hong Kong, and its continuation thereafter. Under the privacy law, individuals were entitled to receive a copy of their personal data file from government offices or businesses that had compiled such a file; upon request a copy of their personal file was supposed to be provided to them within 40 days.

Ms. Emily Lau Wai-hing, a pro-democracy politician, requested a copy of her personal file from the Hong Kong office of the Xinhua News Agency, which functioned as the PRC's de facto consulate in Hong Kong while it was still a British colony. After ten months, Ms. Lau received a one-line reply from the Xinhua News Agency advising her that it held no file on her. Ms. Lau asked the Privacy Commissioner to investigate the case. The Commissioner believed that the Agency had broken the law and passed the case to the Department of Justice for possible prosecution. On 28 February 1998 the Department of Justice indicated that it had decided not to prosecute the case.³⁷

The second situation involved Ms. Sally Aw, whose company owned several Chinese- and English-language daily newspapers in Hong Kong. Ms Aw was accused by Hong Kong's anti-corruption commission of conspiring in a scheme to defraud advertisers by inflating the circulation figures of her English-language newspaper, *The Hong Kong Standard*. Three of the newspaper's current and former executives were prosecuted by the Department of Justice, but Ms. Aw was not charged. Ms. Aw is a pro-PRC politician and enjoys close ties to Hong Kong's Chief Executive, Tung Che-hwa. The Secretary of Justice refused to give any reasons for her refusal to prosecute Ms. Aw.³⁸

³⁵ Diane Stormont, "Hong Kong bill puts Beijing above the law", *Daily Telegraph*, 8 April 1998, at p.15, available in LEXIS, NEWS Library, Curnws File; Gren Manuel, "King-sized questions", *South China Morning Post*, 7 April 1998, at p.17, available in LEXIS, NEWS Library, Curnws File.

³⁶ Indira A.R. Lakshmanan, "Threat to rule of law fuels fears for Hong Kong freedom", *Boston Globe*, 6 April 1998, at p.A1 (there is a representative list of laws that would no longer bind Chinese authorities); see Lucia Palpal-Iatoc, "Bill violates Basic Law", *Emerging Markets Datafile*, 7 April 1998, available in LEXIS, NEWS Library, Curnws File.

³⁷ Philip Segal, "Rights in Hong Kong Are Facing Time of Trial", *Int'l Herald Tribune*, 4 March 1998, at p.8.

³⁸ Mark Landler, "Hong Kong Rulings Stir Fears Over Law System", *New York Times*, 31 March 1998, at p.A8 (in her political role, Ms. Aw was a delegate to the Chinese People's Political Consultative Conference).

Clearly, the *Adaptations of Law (Interpretive Provisions) Ordinance*, and the broad definition of “state”, leaves a large gray area left for future interpretation.

THE RIGHT OF ABODE IN HONG KONG

The Sino-British Joint Declaration, Section XIV, the *Basic Law*, in Article 24, and the ICCPR in Article 12(4), all provide for who has the right of abode in the Hong Kong SAR. As soon as Hong Kong’s reversion to the PRC occurred, many Chinese nationals who believed they could secure an amnesty and permanent residency in Hong Kong, attempted to enter Hong Kong. In addition, PRC-born children of at least one Hong Kong resident parent, and wives of Hong Kong resident men also surrendered at the Hong Kong immigration office; so many so that Hong Kong-PRC controls were stepped up to stem the influx.³⁹ The legal one-way permit allowed from the PRC to Hong Kong was set at 150 persons per day, with 66 of those places allocated for children. There was an estimated 66,000 children with a right of abode that awaited entry into Hong Kong with a view to settlement.

The *Immigration Ordinance* was amended on 9 July 1997, and was made retroactive to 1 July to stem the tide.⁴⁰ A “certificate of entitlement” was introduced, securable in the PRC, and was required before any of the children could legally exercise their right of abode and gain entry to Hong Kong. No provision was made for the 1,500 children who had entered Hong Kong illegally before midnight on 30 June 1997, and so they were subject to deportation.⁴¹

Clearly, there is discrimination against Chinese-born children of Hong Kong permanent residents, as there is no quota for children of Hong Kong permanent residents who are born outside of Hong Kong or the PRC. These children are entitled to enter Hong Kong using a passport or travel document issued by the country where the children are born. Moreover, they are allowed to apply to the Hong Kong Immigration Department, either in Hong Kong or from abroad, for the “certificate of entitlement”. If they have entered Hong Kong, these persons can remain in Hong Kong while their application is being verified.⁴²

In September 1997, as both Hong Kong and the PRC were bound by the

³⁹ “Border patrols stepped up amid fear of Chinese influx to Hong Kong”, *Agence France Presse*, 4 July 1997, available in LEXIS, NEWS Library, Curnws File.

⁴⁰ See story by Keith B. Richburg, “New Hong Kong Council Meets To Redo Laws; Beijing-Named Body Votes To Expel ‘Illegal’ Residents”, *Washington Post*, 10 July 1997, at p.A21.

⁴¹ Keith Richburg, “Hong Kong Legislature Votes To Deport Children”, *Int’l Herald Tribune*, 10 July 1997, at p.4.

⁴² See “Urgent Appeal to the UN Human Rights Committee”, *Newly Inaugurated HKSAR Government Depports Children Having Rights Of Abode (Immigration Ordinance B Deprivation of Children’s Rights of Abode, Arbitrary Deportation & Violation of Liberty of Movement)* (July 1997), available in <http://www.hk.super.net/hkhrcl/unhrc-ii.htm>.

Convention on the Rights of the Child,⁴³ an urgent appeal was made to the United Nations Committee on the Rights of the Child in a special report⁴⁴ urging the Committee to demand that the Hong Kong SAR Government repeal the discriminatory parts of its law on the right of abode. Another urgent appeal was subsequently made in November 1997, concerning discrimination as to the right of abode in Hong Kong, to the United Nations Committee on Economic, Social and Cultural Rights.⁴⁵

The constitutionality of the 9 July *Immigration Ordinance* was challenged before Hong Kong's Court of First Instance, but on 9 October the Court upheld the validity of the *Ordinance* as well as its retroactivity to 1 July. It held that the children faced deportation because they entered the SAR without a Chinese exit visa.⁴⁶

FREEDOM OF ASSOCIATION: LABOR

In the days immediately preceding 1 July 1997, the LegCo passed a number of laws involving social welfare. One such law granted more rights to trade unions, including the power to bargain collectively with employers on wages and benefits, and to use union funds for political activity, or the expansion of workers rights, for example their right to compensation for deafness caused by poor working conditions. Another provided for new environmental safeguards for Hong Kong's harbor against massive land reclamation projects,

⁴³ *Convention on the Rights of the Child* (1989), G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/25, reprinted in 28 *Int'l Leg. Mat.* 1456. The Convention was extended to Hong Kong in 1994. On March 2, 1992 China, ratified the Convention thereby agreeing to "respect and ensure" (Art. 2), the rights identified by the Convention; see *Convention on the Rights of the Child*, U.N. Doc. ST/LEG/SER.E15 203 (1997). By ratifying the Convention, Hong Kong and the PRC were bound to "undertake all appropriate legislative, administrative and other measures for the implementation" of the Convention (Art. 2).

On the Convention generally, see Lawrence J. LeBlanc, *The Convention On The Rights Of The Child* (1995). On the PRC's implementation of the Convention, see Timothy John Fitzgibbon, "The United Nations Convention On The Rights Of The Child: Are Children Really Protected? A Case Study Of China's Implementation", (1998) 20 *Loy L A Int'l & Comp LJ* 325.

⁴⁴ Urgent Appeal to the United Nations Committee on the Rights of the Child (Newly Inaugurated Hong Kong Special Administrative Region Government Deports Children to China whose Families are in Hong Kong & Denies Children's Rights to Education) (Sept. 1997), available in <http://www.hk.super.net/~hkhrccrc.97.htm>. The special report claims that art. 9 and art. 10 of the Convention are contravened by the amended *Immigration Ordinance* (1997) 9 July.

⁴⁵ Urgent Appeal to the UN Committee on Economic, Social and Cultural Rights ("Newly Inaugurated HKSAR Government Deports Children to China whose Families are in Hong Kong") (Nov. 1997), available in <http://www.hk.super.net/~hkrc/cesccr-97.htm>.

⁴⁶ "Court Allows Deporting Of Hong Kong Children", *Int'l Herald Tribune*, 10 October 1997 at p. 5.

and gave Hong Kong's *Bill of Rights* precedence over all other legislation. Chief Executive Tung Chee-hwa, asked the Provisional LegCo to scrap all these changes; however, the LegCo decided to suspend their operation until further study.⁴⁷

Article 39 of the *Basic Law* states:

Provisions of ... international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

Hence, these rights under the *International Labor Conventions* were entrenched laws, and were to be enjoyed by Hong Kong residents after 30 June 1997. The Provisional LegCo passed the Legislative Provisions (Suspension of Operation) Bill 1997 into law on 16 July 1997. This Bill withdrew operation of the labor and union rights referred to earlier.

It will be recalled that the NPC published⁴⁸ its own list of Hong Kong laws, that it considered contradictory to the *Basic Law*, earmarking those laws for repeal on Chinese resumption of sovereignty on 1 July 1997. The shadow Provisional LegCo adopted thirteen bills⁴⁹ since early May 1997 that would become effective on taking office after 30 June. It met in the early hours of 1 July, and passed the *Hong Kong Reunification Ordinance* thereby validating the aforementioned bills.

On 29 October 1997 the Provisional LegCo adopted the *Employment and Labour Relations (Miscellaneous) Amendments Ordinance* that repealed the previous laws protecting trade unions in collective bargaining. It banned use of union funds for political purposes and placed restrictions on appointment of union officials by trade unions.⁵⁰ The Hong Kong Confederation of Trade Unions filed a complaint⁵¹ with the International Labour Organization against the Hong Kong SAR Government's repeal of collective bargaining and anti-union discrimination laws.

⁴⁷ Keith B. Richburg, "Hong Kong Council Meets To Redo Laws", *Washington Post*, 10 July 1997, at p.A21; "Legislature Votes Down Hong Kong Labor Rules", *Int'l Herald Tribune*, 17 July 1997 at p. 4 (Three of the four laws suspended involved labor and union rights, while the fourth law dealt with the Hong Kong Bill of Rights).

⁴⁸ "China Publishes List Of Hong Kong Laws To Be Revoked", Revised, *Xinhua News Agency*, 23 February 1997, available in LEXIS, NEWS Library, Curnws File.

⁴⁹ HK - Background: HK Provisional Legislative Council, *Xinhua News Agency*, 1 July 1997, available in LEXIS, NEWS Library, Curnws File.

⁵⁰ See International Confederation of Free Trade Unions, HK Labour Express, "Government Repeals Collective Bargaining Law", available in <http://www.icftu.org>.

⁵¹ *ibid.*

FREEDOM OF EXPRESSION AND THE PRESS

Even before the change of sovereign control, the Provisional LegCo passed the *Public Order (Amendment) Act 1997*, that enabled the Commissioner of Police to prevent a non-governmental organization (NGO) from operating or a public demonstration being held if he thought it might jeopardize national security. On 19 July 1997, the Hong Kong SAR Government set out guidelines empowering the police to act. "National security" was defined to mean "threat to peace" or "promoting independence for Taiwan or Tibet"⁵² as "such advocacy might threaten the territorial integrity and independence of the People's Republic of China."⁵³ By 14 October, there had been close to 200 demonstrations, and government officials indicated that the ability to demonstrate meant that Hong Kong people were exercising their freedoms.⁵⁴

During March 1998, Hong Kong Home Affairs Secretary David Lan responded to a report, released by the International Federation of Human Rights Leagues, entitled "Hong Kong et les libertés: un processus d'érosion,"⁵⁵ on the eve of Chief Executive Tung Chee-hwa's official visit to France. In his response, he stated that there had been more than 1,000 demonstrations and public protests in Hong Kong since the hand-over, thereby indicating that political protest was alive and well in Hong Kong.⁵⁶

Although Article 23 of the *Basic Law* provides that the Hong Kong SAR "shall enact laws on its own to prohibit any act of. . . secession, sedition, subversion against the Central People's Government" no legislation in these areas has been passed to date. There is the feeling that a certain amount of self-censorship by the press is being observed.⁵⁷ Although the Hong Kong Journalists Association and Article 19, the International Centre Against Censorship were "gravely" concerned for freedom of expression in Hong Kong on the eve of resumption of PRC sovereignty,⁵⁸ and although Frontier Party spokeswoman Emily Lau Wai-

⁵² "Tighter 'No Protest' Rules Are Set in Hong Kong", *New York Times*, 19 July 1997 at 4. (The guidelines were to prevent undermining the Communist Party or defying the PRC's claim of sovereignty over Tibet and Taiwan). For the background leading up to the issuance of the guidelines and a summary of the guidelines, see "Hong Kong government issues 'national security' guidelines", *BBC Summary of World Broadcasts*, 30 July 1997, available in LEXIS, NEWS Library, Curnws File.

⁵³ "Hong Kong Moves to Ban Protests", *Int'l Herald Tribune*, 19-20 July 1997, at p.4.

⁵⁴ Frontier's Emily Lau slams chief executives policy address, *BBC Summary of World Broadcast*, 14 October 1997, available in LEXIS, NEW Library, Curnws File.

⁵⁵ The report is found in <http://www.fidh.imaginet.fr/uiindex.htm>.

⁵⁶ Tim Cribb, "Hong Kong rejects charge of human rights erosion under China", *Agence France Presse*, 10 March 1998, available in LEXIS, NEWS Library, Curnws File.

⁵⁷ Kieron Flynn, "Hong Kong journalists prepare fight to safeguard press freedom", *Agence France Presse*, 18 July 1997, available in LEXIS, NEWS Library, Curnws File.

⁵⁸ See "Conclusions And Recommendations", *Hong Kong Journalists Association* art. 19,

hing spoke of a “culture of silence and impotence” in the media, censorship appeared to be a non-issue.⁵⁹ It did mean, however, that freedom of the press in practice was not often challenged.⁶⁰

In the Hong Kong Journalists Association (Article 19) publication, *A Report on Freedom of Expression in the Hong Kong SAR one year after the change of sovereignty*, it reported that ‘freedom of expression remains alive’, that ‘[p]atience and tolerance have characterised Beijing’s approach to Hong Kong over the past year’. However, the report noted that Hong Kong ‘is still under threat’ and presents recommendations to alleviate that threat.⁶¹

BILL OF RIGHTS ORDINANCE

Just prior to 30 June 1997 the LegCo passed the *Hong Kong Bill of Rights (Amendment) Ordinance 1997*, to reverse the Court of Appeal decision in *Tam Hing-ye v. Wu Tai-wai* which had held that the *Hong Kong Bill of Rights* had no application to a legal dispute involving private individuals. On 25 February 1998, via the *Hong Kong Bill of Rights (Amendment) Ordinance 1998*, the Provisional LegCo repealed the changes created by the 1997 amendment as the Government argued that the 1997 amendment created “uncertainties and confusion”. It was the Government’s position that the original purpose in *Ordinance* of 1991 was to bind Government and public authorities only, and that the 1998 amendment merely restored the original purpose of the *Ordinance* of 1991. The Government explanation is that Article 39 of the *Basic Law* which guarantees the ICCPR standard of rights and freedoms to be enjoyed by Hong Kong residents is preserved and is not affected by the 1998 amendment, only the “uncertainties and confusion” are removed.⁶² Moreover, the Government contended that the 1997 amendment “could have inadvertently imposed obligations on private citizens, contrary to the intent of the *Ordinance*.”⁶³

Critics of the 1998 amendment indicated that it would “make it binding not only on the Government and public bodies, but also as between private

Report 1997, available in <http://www.freeway.org.hk/hkja/publications>. Also informative is A. Lin Neumann, “Press Freedom Under the Dragon”, available in <http://www.cpj.org.pubs>.

⁵⁹ Gren Manuel, “Censorship fears fail to materialise”, *South China Morning Post*, 12 Jan 1998, at p.13, available in LEXIS, NEWS Library, Curnws File.

⁶⁰ See Mark Landler, “Hong Kong Worries: Can The Press Remain Free?”, *Int’l Herald Tribune*, 23 March 1998, at p.4.

⁶¹ The 1998 Report is found in <http://www.freeway.org.hk/hkja/publications>.

⁶² For the Hong Kong Government’s detailed explanation of the purpose behind the amendments, including a summary of the *Tam v Wu* case see, “Hong Kong Government Bill to dispel uncertainties and confusion”, *M2 Presswire*, 16 January 1998, available in LEXIS, NEWS Library, Curnws File.

⁶³ “Hong Kong Government: Hong Kong Bill of Rights (Amendment) Bill 1998”, *M2 Presswire*, 22 January 1998, available in LEXIS, NEWS Library, Curnws File (“Explanation offered by Secretary for Home Affairs, David Lan”).

individuals",⁶⁴ and that the Government's "real intention was to protect the business community against complaints lodged under the *Bill of Rights* by 'private individuals'".⁶⁵

CONCLUSION: ASSESSMENT OF HUMAN RIGHTS IN HONG KONG DURING ITS FIRST YEAR AFTER THE REVERSION TO PRC SOVEREIGNTY

In its annual report on human rights practices for 1997, the United States Department of State found that there was little apparent change in the tradition of free speech and of freedom of the press since the reversion. However, it did find that "some journalists practiced self-censorship for fear of running afoul of the new authorities." The report further indicates that freedom of assembly continues, and that "demonstrations continued to take place regularly". Furthermore, it was found that the Hong Kong Government "took no action to restrict the operations of parties, other political organizations, or NGO's. Freedom of association continues."⁶⁶

The non-governmental agency, Human Rights Watch, in its assessment of the first six months following the reversion found that "[n]o human rights organizations based in Hong Kong, domestic or international, reported significant hindrance of their activities either before or after the handover."⁶⁷

In his forward to the second report to the British Parliament, the British Foreign Secretary, Robin Cook, said with respect to the period of July-December 1997:

Hong Kong retains a free and dynamic press. Political parties remain active. . . Demonstrations and public protests have continued on a regular basis, with the police acting generally with restraint, . . . NGOs, including those opposed to the Chinese Communist Party and present Chinese Government continue to operate freely.

He added the Chinese leadership and the PRC's senior representatives in Hong Kong "have repeatedly emphasised their commitment to uphold the Joint Declaration and the *Basic Law*, and to respect Hong Kong's high degree of autonomy. These assurances have been supported by practical actions."⁶⁸

⁶⁴ Margaret Ng, "Wrong way on Rights", *South China Morning Post*, 23 January 1998, at p.21, available in LEXIS, NEWS Library, Curnws File.

⁶⁵ Hong Kong's human rights commitment questioned by watchdog, *Agence France Presse*, 4 March 1998 available in LEXIS, NEWS Library, Curnws File.

⁶⁶ U.S. Department of State, Hong Kong Report on Human Rights Practices for 1997. (30 January 1998), available in <http://www.state.gov/>.

⁶⁷ Human Rights Watch World Report 1998: Hong Kong, available in <http://www.hrw.org/hrw>.

⁶⁸ Forward by the British Foreign Secretary, Robin Cook, to the six-monthly report on the implementation of the joint declaration on Hong Kong. July-December 1997 (Foreign

In a speech the following day, Mr. Cook indicated that “the rule of law is alive and well” in Hong Kong.⁶⁹ Despite all of the favorable statements, there were still concerns expressed.⁷⁰

At the end of the second six months following the reversion of Hong Kong to the PRC, Mr. Cook reiterated that “senior Chinese leaders, including President Jiang Zemin, personally reassured me of their continuing commitment to the principle of ‘One Country, Two Systems’. The practical evidence is that they are true to their words.”⁷¹

Another periodic assessment was made on 25 February 1998 by the United States House of Representatives Speaker’s Task Force on the Hong Kong Transition. The summary of the report indicated in the previous report:

Hong Kong’s reversion to China was characterized as ‘so far, so good.’ Six months after the official reversion, that characterization still applies. . . the very negative scenarios for Hong Kong, which many had predicted thus far, have not occurred. . . To date, the Hong Kong people seem to enjoy the same basic liberties and rights they enjoyed prior to the reversion.⁷²

In its report issued on 22 May 1998, the Speaker’s Task Force found:

no clear threat to Hong Kong’s autonomy. . . The Hong Kong media continues to operate freely. There are no taboo subjects. . . In general, the Hong Kong judiciary continues to operate independently and without taint of political influence.⁷³

The report dated 23 July 1998 of the Speaker’s Task Force cautiously repeated its assessments of “so far, so good”.⁷⁴

The reversion of Hong Kong to PRC sovereignty has brought changes; however, the human rights record of the Hong Kong SAR has at its first anniversary shown that the “one country, two systems” concept has worked out quite well. Apart from a few *Ordinances* that have been inconsistent with the *Basic Law*, justice

Office Press Release, 20 January 1998), available in <http://www.britain-info.org/>. The forward is also found in Foreign & Commonwealth Office, 28 *Survey of Current Affairs* 23 (January 1998).

⁶⁹ Press Release, “Hong Kong: Looking to the Future”, 21 January 1998, available in <http://www.britain-info.org/>.

⁷⁰ Six-monthly report on Hong Kong. Published July 1998: forward by the British Foreign Secretary, Mr. Robin Cook, 21 July 1998, available in <http://www.britain-info.org/>.

⁷¹ *Ibid.*

⁷² The Speaker’s Task Force on the Hong Kong Transition, Second Report, February 25, 1998, available in <http://www.house.gov/>.

⁷³ The Speaker’s Task Force on the Hong Kong Transition, Third Report, May 22, 1998, available in <http://www.house.gov/>.

⁷⁴ The Speaker’s Task Force on the Hong Kong Transition, Fourth Report, July 23, 1998, available in <http://www.house.gov/>.

continues to be administered by an independent judiciary. Since reunification, the Hong Kong SAR has retained the common law traditions, and the rule of law in its exercise will eventually test the legal changes that have occurred. In its wisdom, the Human Rights Committees, operating under the ICCPR and the ICESCR, can review the Hong Kong SAR's record of compliance.