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The Reunification of China: An Examination of the Legal Systems of the People's Republic of China, Hong Kong, and Taiwan

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I. A Historical Review Of The Chinas

The Chinese empire has existed in one form or another for over 2,000 years. Many battles have taken place on her soil and many different countries have laid claim to her resources. The concept of nationalism is so deeply ingrained in her people that even in her present divided state, reunification remains a primary objective for all Chinese. Now, as we face the turn of the millennium, there seems to be a possible hope that all of China may once again become reunited.

The most recent attempt at reunification began in 1975 when Premier Zhou Enlai introduced the “Four Modernizations Program” designed to help bring the People’s Republic of China (PRC) into the global economy. To achieve this modernization the PRC followed an “open economic policy” which included the expansion of the PRC’s foreign trade and importation of a large quantity of advanced technology and equipment from the developed world. Keeping in line with this new open economic policy, the PRC subsequently adopted a new political posture towards the reunification of China calling for the “peaceful reunification” instead of “liberation” of Taiwan and Hong Kong. A new Constitution was ratified in 1983 which reflects not only this economic openness but the hope for reunification as well. The new Chinese Constitution le-

3. Valauskas, China’s Special Economic Zones, 9 Hastings Int’l & Comp. L. Rev. 152, 163-65 (1986). The “Four Modernizations” were to be carried out in two stages. Stage one was to build an independent industrial and economic system. The second stage was to accomplish the modernization of agriculture, industry, national defense, and science and technology before the end of the century.
4. Id. at 164.
6. See generally The Constitution of the People’s Republic of China (1983), re-
gitized the newly formed Special Administrative Regions (SARs) by
providing for their autonomy in Article 31. The first of these regions was
the Shekou Industrial Zone near Hong Kong. Many more SARs have
been established by Premier Zhao who expanded the economic autono-
mous regions in an effort to increase development near the Chinese coast.
As of 1988, nearly 300 cities and counties had been opened to the possi-
bility of direct integration into the pacific and global economies.

During this time of economic openness on the mainland, the British
began facing the inevitable expiration of their lease on Chinese territory
near Hong Kong in 1997. Without these leased territories, Hong Kong
would be unable to sustain its population and would loose its position as
one of the financial capitals of the world. For this reason, the British
entered into negotiations with the PRC and promulgated the Joint Decla-
ratement of the Government of the People’s Republic of China and the Gov-
ernment of the United Kingdom of Great Britain and Northern Ireland
on the Question of Hong Kong (Joint Declaration) in 1984. This agree-
ment in effect transfers the sovereignty of Hong Kong from the British to
the PRC in 1997. Under the terms of the Agreement, Hong Kong will
become a Special Administrative Region which will retain a “high degree
of autonomy” for a period of fifty years.

Soon after the signing of this agreement the PRC issued a declara-
tion which indicated their intent that this agreement would pave the way
for the reunification of the Republic of China, Taiwan (Taiwan) with the
PRC. The declaration was entitled the “Nine-Points Plan” and effectively
reiterated the “one China, two systems” approach adopted in the Joint
Declaration. The terms of this proposal mirror the Hong Kong Joint

printed in, The Constitution of the People’s Republic of China, 3 CONSTITUTIONAL
7. Id. art. 31.
8. Valauskas, supra note 3, at 185.
10. Note, The Reversion of Hong Kong to China: Legal and Practical Questions, 21
WILLAMETTE L. REV. 327, 333 n.36 (1985). Without the cooperation of the PRC, Hong Kong
would not be able to survive because of lack of basic resources such as water and an airport.
11. See generally Agreement on the Future of Hong Kong, Sept. 26, 1984, United King-
dom of Great Britain and Northern Ireland-People’s Republic of China, reprinted in 23
I.L.M. 1366 (hereinafter “Agreement”).
12. See id. art. 27 and Annex I.
13. M. LASATER, supra note 5, at 103-04. The nine points include:
1. Talks between the CPC and the KMT regarding reunification;
2. facilitate the exchange of mail, trade, air, and shipping services and visits by
relatives and tourists as well as academic, cultural, and sport exchanges, and
reach an agreement thereupon;
3. after reunification, Taiwan can enjoy a high degree of autonomy as a SAR
and can retain its armed forces. The central government will not interfere with
local affairs;
4. Taiwan’s current socio-economic system will remain unchanged, so will its
Declaration in most respects; however, the Plan offers Taiwan more autonomy with regard to international affairs and defense than the Joint Declaration with Hong Kong.\textsuperscript{14}

Unfortunately for the PRC, the Taiwanese did not respond favorably to the offer. Since the revolution, Taiwan has maintained a policy of "Three No's" with regard to the mainland: No contacts, no talks, no compromise.\textsuperscript{16} As recently as 1989, the Taiwanese were still espousing this as their official position toward the PRC;\textsuperscript{18} however, the recent lifting of travel and trade restrictions to the PRC by Taiwan is an indication of a possible new political force in Taiwan.\textsuperscript{17} Also, in an effort to appear reasonable toward the PRC, the government in Taiwan has developed its own reunification plan: "One country, two equal governments."\textsuperscript{18} While, Taiwan feels this is the ideal model of transition for handling the relationship between the two sides before reunification, a closer look reveals this is really no change from the present situation.\textsuperscript{19} Both governments hold that there is only one China, and at the present time, there are two governments. The difference is that under this system, Taiwan would be able to participate in international organizations as an equal with the PRC and receive recognition as a legitimate government of China from other countries. The mainland firmly rejects this proposal because they

way of life and its economic cultural relations with foreign countries;

5. people in authority in Taiwan may take up posts of leadership in national politics;

6. when Taiwan's local finances are in difficulty, the Central Government shall help out as they see fit;

7. there will be no discrimination against Taiwanese who want to settle on the mainland. They will have the freedom of entry and exit from the mainland;

8. businessmen will be allowed to invest in the mainland and their interests and profits are guaranteed; and

9. the reunification of the "motherland" is the utmost priority and should be accomplished above all else. We charge the Kuomintang with pursuing this goal through meaningful dialogue and compromise.

\textsuperscript{14.} Id. at 132.

\textsuperscript{15.} Id. at 114.


\textsuperscript{17.} N.Y. Times, Jan. 28, 1989, at 4, col. 3. Since Taiwan has eased travel restrictions to the PRC, over 400,000 Taiwanese have visited the mainland as well as a limited number of student groups from the PRC which have been allowed to visit Taiwan. See also Taiwan Allows Citizens to Visit Relatives in China, L.A. Daily Journal, Oct. 15, 1987, at 9, col. 1.

\textsuperscript{18.} Jiaquan, Taiwan's New Mainland Policy Raises Concern, BEIJING REV., May 22-28, 1989, at 23. The basic differences between this and the PRC's "one country, two systems" are these. First, Taiwan's plan advocates that both the PRC and Taiwan hold their own independent sovereignty. Second, the relationship between the PRC and Taiwan would be equal. Neither government would be servient to the other. Third, this idea of two equal governments is one for a transitional period only. In the long run, there would be only one country and one government.

\textsuperscript{19.} Id.
feel sovereignty can vest itself in only one government. While the official line of the Taiwanese towards the PRC has not changed, more moderate rhetoric is being espoused by the heads of state. As stated by Shao Yu-ming, head of Taiwan’s information bureau on October 13, 1988, “[our] position vis-a-vis the mainland [is] security, non-governmental contacts, no direct contacts, contact limited to civil affairs, and gradual progress.”

As positive relations continue to grow between the PRC and Taiwan, the Hong Kong Basic Law Drafting Committee (BLDC) has been completing some important sections of the Basic Law for the new Hong Kong, SAR. The Joint Declaration states clearly that in the new Hong Kong, SAR, the executive shall be accountable to the legislature, yet the Basic Law as drafted does not give any power of accountability to the Legislature. Even their power of impeachment must be approved by the PRC. These variations from the Joint Declaration are beginning to make the citizens of Hong Kong very nervous regarding the PRC’s promise of “a high degree of autonomy” for the region.

On the mainland, the PRC has been experiencing some problems of its own in the form of an overheated economy, inflation, unemployment, bottlenecks in energy, raw materials and transportation, and income disparities. The general dissatisfaction of the populous, along with the students’ cries for greater political freedom, lead to the demonstrations in Tienanman Square in April and May of 1989. The frustration of the government with the slow progress of the modernization plan culminated in the massacre of demonstrators on June 4, 1989. This nationwide crackdown effectively closed the major trading cities to the full implementation of Premier Zhao’s coastal development policies. In retrospect however, the crackdown had little effect on international business. Although the events in Beijing weigh heavily on our minds, we need only remember how quickly the demonstrations of 1987 faded from the forefront of world politics to understand how this recent atrocity may impact future relations. U.S. business, usually a key indicator of the importance of world events, has become increasingly confident about the stability of China’s

20. Id. at 24.
22. Lau, Structure of the Hong Kong Special Administrative Region Government, 20 CASE W. RES. J. INT’L L. 51, 57 (1988). See page 18 of this article for a more complete assessment of the Basic Law. The complete text of both the first and second drafts of the Basic Law are reprinted in 22 CHINESE L. & GOV’t, Fall 1989, at 12, 196 [hereinafter The Basic Law].
23. Id. at 58.
24. Agreement, supra note 11, art. 27 and Annex I. See also Yu Shek, Basic Law — Basic Problems, 40 FREE CHINA REV., Mar. 1990, at 24. Mr. Yu Shek states that a recent poll noted that confidence in Beijing has fallen from 75 percent in the beginning of 1989 to 52 percent after the May 20th declaration of Martial Law in Beijing. A table of additional statistics is reprinted in the article as well.
26. Fincer, supra note 9, at 28.
economy. It wavered slightly with Beijing’s response to the student demonstrations in early 1987, and all indications point to the market in China returning to normal again. The recent visits by U.S. officials and the lifting of martial law in China are merely the latest indications of normalcy in the region.

While some indicators seem to point to the eventual reunification of all of China, there are some important legal considerations which must be explored. The remainder of this article will examine the legal systems of the PRC, Hong Kong, and Taiwan in light of the proposed “one country, two systems” model of reunification in the hopes of determining whether irreconcilable differences exist which would prevent the eventual reunification of all of China.

II. The Legal System of the People’s Republic of China

The legal system in the PRC has gone through many changes in the short time since the revolution. In the period immediately following the ouster of Chiang Kai-shek’s Nationalists, the PRC sought to rid itself of foreign control over its land and assets. To do this they expropriated large capital, industrial, and trade holdings and transferred ownership of those holdings to the Government. During this period of isolation from the world, the PRC did not have a well defined legal system to protect private interests or individual rights. As it became increasingly evident to the PRC that they could not remain isolated without falling hopelessly behind the rest of the world in terms of technology and productivity, they began to change their legal system from one which was primarily regulatory to a more formal legal system which mirrored those of Western countries. They believed the establishment of a formal legal system would prompt the West to accept them as a responsible member of the world economic community, thus opening the way for trade and economic development within China.

Because of China’s prior occupations by industrialized nations, foreign direct investment in China has become synonymous with negative attributes such as “arrogance, gunboat diplomacy, and religious proselytizing.” In an effort to change the way the populace views foreign investment and to change the way the rest of the world views the PRC, the government introduced in 1975 a program entitled “the Four Modernizations.” The program’s goals include the building of an independent industrial and economic system and the modernization of agricultural, indus-

28. Valauskas, supra note 3, at 161. Foreign owners were compensated for their holdings, however, most of the money was retained by the government because of large tax debts which were unpaid.
29. Id. at 172-73.
30. Id. at 174.
31. Id. at 159.
trial, defense, and science industries before the end of the century.\textsuperscript{32}

To better achieve these goals, the PRC adopted a new Constitution in 1983 which included provisions for autonomous economic zones, as well as fundamental rights for citizens and foreigners in the PRC.\textsuperscript{33} One should be wary of the longevity of this new PRC Constitution, however, as the PRC has amended and adopted new Constitutions several times over the past thirty years, usually for political expediency.\textsuperscript{34}

While the PRC has come a long way from its extreme socialist rhetoric of the past, history is one of the only measures of reality by which the world judges the legitimacy of a government. In historical terms, the PRC does not fare well. China has on numerous occasions promised different indigenous groups special treatment and then reneged on its promises. Examples of the PRC asserting its autonomy include the treatment of the Shanghai capitalists in 1949 and the Tibetans in the early 1950's. The capitalists in Shanghai were promised in 1949 that their forms of business enterprise would be tolerated under the new socialist state that was being established in China, but within five years they were effectively and in some cases personally wiped out.\textsuperscript{35} In Tibet, the situation was quite similar. In the early 1950's, Tibet was promised autonomy in return for its "peaceful liberation." By the mid-1950's, PRC military forces occupied Tibet, and the Tibetan independent militia was disbanded under the direction of the PRC army.\textsuperscript{36} It is these inconsistencies in the policies of the PRC government that makes its current promises of increased economic openness and autonomy for the SARs very tenuous.

A. Legal Philosophy

The Chinese people have inherited one of the oldest philosophical histories of any people on the earth. The teachings of Confucius are still ingrained in the values and morals of the people today. The Confucian theories of \textit{li} and \textit{fa} form the core of Chinese legal thought. \textit{Li} is a collection of customs which regulate social conduct. \textit{Fa} are rules of law which codified the edicts of the Imperial rulers. For the Chinese, \textit{li} takes precedence over \textit{fa} because it encompasses normative rules of morality and proper behavior.\textsuperscript{37} The reluctance of the PRC to formulate a formal legal system has its roots in traditional Confucian morality which prefers social

\textsuperscript{32} Id. at 163-64. See also Christ. Sci. Mon., July 11, 1988, at 10, col. 1.
\textsuperscript{33} See PRC Const., supra note 6, art. 67.
\textsuperscript{34} Lau, supra note 22, at 51.
\textsuperscript{35} Remarks, The Hong Kong Accords as a Model for Dealing with Other Disputed Territories, 80 AM. SOC'Y INT'L PROC. 348, 351 (1986) (reported by Kevin M. Harris).
\textsuperscript{36} Id. at 357.
pressure to the use of force by the state. However, the recent influx of foreign investment has caused the Chinese to adopt several business practices which are counter to this legal philosophy. Examples of this are the adoption of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the United Nations Convention on Contracts for the International Sale of Goods. China's legal tradition is to seek equitable solutions by bringing both parties into harmony with each other and with society through the use of informal discussions and negotiations. The acceptance of the two conventions mentioned above means that Chinese contracts will now conform to Western standards, and disputes will be settled through formal arbitral channels.

Modernization is not the only influence which has impressed itself on Confucian thought. Marxist/Maoist views of law and society have also crept into China's legal system. Currently, the legal system retains Confucian ideas regarding the formation of behavior through education and adds some Marxist/Maoist ideas regarding a rational ordered society. This view, held by many scholars regarding the flexibility of the Chinese legal system, is but one example of the Confucian influence. Professor Horsley states, "while one can not go so far as to state categorically that everything is negotiable in China, it is the case that Chinese laws may often be viewed as flexible guidelines. If circumstances warrant and if appropriate government approvals are obtained, special treatment can be granted." The PRC has also adopted some socialist views regarding the power of Government. One of the most fundamental differences is that in the PRC, legislative interpretation is the "primary and most important mode of legal interpretation." The leaders of the PRC feel that since the Legislature is the representative body of the people, it should decide how the laws should be applied to the people. Judicial interpretation in Chinese courts binds only the case under consideration. Additionally, the PRC does not subscribe to the theory of stare decisis. Legal theory aside, the Constitution, starting with the preamble, and continuing through the first

38. Woo, supra note 37, at 122.
40. Farina, supra note 37, at 139. Informal discussions reflect the Chinese desire to avoid direct confrontation and preserve societal harmony.
41. Id. at 142.
42. Horsley, Comment on Laws and Legal Developments Affecting Foreign Investment in China, 2 CHINA L. REP. 175, 177 (1988).
44. Fung, supra note 43, at 703.
several articles of the general principles section, sets out the basic form of the political nature of the PRC as being pure Socialism. In this regard, the PRC, as expressed by Professor Li Chang-Doe, has reaffirmed its commitment to collective individualism stating that “the basic task of the nation in the years to come is to concentrate its effort on socialist modernization.”

Whereas the Constitution in Articles 33 through 50 sets out the basic rights of its citizens, it must be realized that individual rights are not inherent in the PRC, they are realized only by the graciousness of the state. Also, article 51 expressly limits those rights by declaring that, “. . . their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens.” This article in essence subrogates the individual’s free exercise of those rights by recognizing them only when they are serving the state. This was most evident with the recent prosecution and execution of participants in the freedom rallies in June of 1989.

While there is a tremendous Marxist/Maoist influence on the Chinese legal philosophy, the system itself does retain the fundamental importance of national independence, equality, mutual benefit, and reference to international law.

B. Views On International Law

Recently, as mentioned above, the PRC has increased its awareness of international law. The PRC has always considered international treaties as the primary source of international law. Recent treaties concluded by the PRC with other nations indicate an even greater willingness on their part to participate in the international legal community. The best indicia of these changing conditions is the approval by the PRC of the supremacy clauses included in transnational contracts. These clauses dictate that international treaty law will be supreme to domestic law in the event of a conflict. Responding to this trend, one scholar wrote, “in China treaties are superior to municipal law, so that a treaty inconsistent with a [Chinese] law must be applied by Chinese organs, irrespective of whether the treaty is entered into before or after the enactment of the law.” Unfortunately, this same respect for international business law

45. See generally PRC Const., supra note 6, forward and general principles.
47. PRC Const., supra note 6, arts. 33-50; Note, supra note 46, at 116.
48. PRC Const., supra note 6, art. 51.
50. Farina, supra note 37, at 143.
51. Mushkat, supra note 37, at 189; Remarks, supra note 35, at 352. The principle of pacta sunt servanda is hailed by the Chinese as an important factor in treaty law.
has not been extended to the area of human rights. The PRC is not a signatory to any of the international covenants on human rights.\textsuperscript{53}

C. \textit{Recent Changes In PRC Law}

Several recent legal changes in the PRC are excellent examples of their increased willingness to cooperate with foreigners in the areas of foreign investment and joint ventures.

In the late 1970's, the PRC developed a system of Special Administrative Regions. These regions are endowed with several autonomous features which make investment very lucrative for foreigners.\textsuperscript{54} The purposes of these zones are to attract foreign investment, facilitate the importation of modern technology, improve Chinese managerial skills, expand foreign trade, and increase foreign exchange earnings.\textsuperscript{55} While given increased autonomy in business and economic affairs, the SARs are still tied very closely to the central government.\textsuperscript{56} The SARs also suffer from typical bureaucratic problems such as lack of detail and clarity in their regulations as well as labor problems which tend to make them less inviting to foreign investors.\textsuperscript{57}

Along with the SARs, the PRC also adopted several new laws regarding Joint Ventures which were designed to make investing in the PRC easier and more profitable.\textsuperscript{58} In a final attempt to simplify dealings with


\textsuperscript{55} Fenwick, \textit{ supra} note 54, at 377; Note, \textit{ supra} note 54, at 349.

\textsuperscript{56} Regulations on Special Economic Zones in Guangdong Province, art. 12. It reads: [A]ll sovereign rights within a special zone . . . are controlled by our government. All units of enterprises and undertakings and personal activities within the special zones must abide by the laws of China. All administrative matters are handled by the Administrative Committee for Special [Economic] Zones . . . [T]he direction of economic development of these zones and the construction of enterprises and undertakings must be examined and approved by the Special Zone Development Corporation. See also Fenwick, \textit{ supra} note 54, at 381.

\textsuperscript{57} \textit{Id.} at 392. The lack of detail in the regulations leaves some very crucial administrative items to be decided by the committee on a case-by-case bases. While this may be the preferred method of dispute resolution for the Chinese, foreign businesses are very wary of the possible results. Also, the labor force available in the SAR's are not productive due to the lack of incentive in the socialist system. Requests by the foreign owners to promote efficiency and productivity by rewarding their employees with bonuses and penalizing the underproductive met with strong opposition from the bureaucracy who feel "uneasy with the extraordinary leeway accorded zone investors."

\textsuperscript{58} Au, \textit{The Hopes and Fears of Foreign Direct Investment}, 2 \textit{J. CHINESE L.} 359, 363
the PRC, the Central Committee passed a series of new State Secret Laws. The new laws recognize that a state secret should be limited only to material that has a specific reason to be kept secret. Previously, all material was considered secret unless specifically deemed public. Under the new law, the presumption has shifted toward free access. For foreigners attempting to negotiate with the Chinese, one of the major obstacles has always been extracting legal, economic, and other relevant information from government officials. With these new laws, access to information is one problem which should not stand in the way of successful business negotiations.

The advent of these new changes in the PRC's approach to foreigners and international cooperation signal an important change in legal attitudes in the PRC. No longer insisting that they have absolute control over every aspect of their country, they seem to be content to control the social and political aspects and let the market control the economic forces.

III. THE LEGAL SYSTEM IN HONG KONG

The island of Hong Kong was ceded to Great Britain as a result of the Opium Wars in the 19th century. To obtain sufficient resources to maintain the island, Great Britain entered into a lease with the Chinese for additional territory on the mainland adjacent to the island. This lease expires in 1997. Loss of these additional territories would represent a ninety-two percent loss in land control and would completely devaluate Hong Kong as a financial center. As a result, former Prime Minister Margaret Thatcher and Premier Deng Xiaoping agreed after their meeting in September 1982, to open negotiations regarding the fate of Hong Kong. Both agreed their primary goal was the maintenance of stability and prosperity in Hong Kong. Two years of subsequent negotiations culminated in the signing of the Joint Declaration on the future of Hong Kong by the governments of Great Britain and the PRC.
A. Current Legal Structure

Before examining the future of Hong Kong, it would be useful to review the current legal structure to better appreciate the breadth of the changes in store for Hong Kong. Under the terms of the Joint Declaration, the current legal system will remain intact until 1997. A precise definition of the current legal system is debatable, even among British scholars. As Britain's Financial Secretary Sir Phillip Haddon-Cave stated in 1974, "[e]ssentially, the Hong Kong style [of government] is government by consultation and consent." 

There are three documents which convey authority to govern Hong Kong and its adjoining territories. They are the Order of Council, Letters of Patent, and Royal Instructions. The Order of Council defines the boundaries and jurisdiction of the governing bodies in Hong Kong. The Letters of Patent create the Office of the Governor as well as the Executive and Legislative Council. The Letters also delineate the specific powers of the Governor. The Royal Instructions outline the duties of both the Executive and Legislative Councils. In addition to granting power, these documents also express the limits of power to be exercised by the government in Hong Kong. Specifically, they note that the British Parliament has the power to make laws binding on Hong Kong. However, by convention, this procedure is rarely used unless Great Britain wants to unify a particular law in all of its territories.

The Governor is by far the most powerful official in the colony. The Letters of Patent give the Governor the power to make laws, give land grants, appoint judges, and dismiss officers of the government. The Governor is appointed by the Crown and relies only upon recommendations and public opinion to decide what course of action to take in any given situation.

Aside from the Governor, there are three additional governing bodies. Two of these bodies, the Executive Council and the Legislative Council, serve as advisors to the Governor. The third body, the Urban Council, has been granted limited authority to control certain domestic issues.

The members of the Executive Council are appointed by the Crown. Membership is customarily limited to ten people and their duties include

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66. Remarks, supra, note 33, at 351. See also Agreement, supra note 11, art. 4.
68. N. MINERS, supra note 67, at 65.
69. Id.
70. Id.
71. Id. at 66,67.
72. Id. at 70.
73. Id. at 65.
74. Id. at 78.
making recommendations to the Governor on substantive legal issues.\textsuperscript{75} The Legislative Council, consisting of approximately fifty-two members appointed by the Crown, votes on issues which the Governor raises.\textsuperscript{76} Since the 27 official members of the Council are compelled to vote with the Governor, who has the ability to break any ties in the Legislative Council, the unofficial members can never move the Council in opposition to the Governor. However, control is not the purpose of the Council. The Council is used mainly as a forum in which the Governor puts forward ideas for future policy changes and the unofficial members point out where they find these policies insufficient or harmful to the population.\textsuperscript{77}

Conversely, the Urban Council functions with some autonomy from Great Britain and the Governor. The Urban Council has developed out of a local administrative council to become the controlling body for local issues. It is the only body whose unofficial members are elected by the public. As of 1983, fifteen members have been appointed by the Governor and fifteen members have been elected as representatives of the people.\textsuperscript{78} The functions of the Council include the licensing of businesses with regard to environmental and health issues, maintenance of recreation facilities, and administration of cultural services.\textsuperscript{79} The Council receives seventy-five percent of its operating budget from the Legislative Council and the other twenty-five percent from park fees. The Urban Council is able to use the funds at their discretion as long as the expenditures remain within their statutory power.\textsuperscript{80}

Even though there are no elected representatives in the Legislative and Executive Councils, the people of Hong Kong do wield some influence over the decisions of the Governor. Pressure groups consisting primarily of members of the business community are able to express their views regarding important issues before the issues are formally presented in the Council sessions. This unofficial public referendum is held to avoid possible contested votes in the Councils.\textsuperscript{81} It is through this process that consultation and consent of the governed is obtained.

\textbf{B. Legal Philosophy}

Under British common law theory, the purpose of the law is to protect the individual from the tyranny of the government; therefore, laws are codified with the intent of minimizing arbitrary conduct by power

\textsuperscript{75} \textit{Id.} at 81.
\textsuperscript{76} The Executive and Legislative Councils on July 26, 1990, endorsed the British administrations position that 20 seats (one-third) of the Legislative Council should be directly elected by 1991. \textit{See} Yu Shek, \textit{supra} note 24, at 28.
\textsuperscript{77} N. Miners, \textit{supra} note 67, at 164.
\textsuperscript{78} \textit{Id.} at 224-25.
\textsuperscript{79} \textit{Id.} at 225.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.} at 130. There has not been a contested vote in the Legislative Council since 1955.
The Hong Kong government incorporates this idea in its system of advisory councils. As in Great Britain, there are no specific statutory safeguards for the fundamental rights of the people. The watchfulness of the Council members is assumed to be sufficient to protect the people from overburdening restrictions by the Governor. Also mirroring the British system is the make-up of the judiciary. Unlike the United States, Hong Kong Courts do not have the power of judicial review. Once an act is passed by the Governor, it is assumed to be in line with the Constitutional documents. Unless and until the act is overruled by the British Parliament, the judiciary is required to enforce it.

C. The Basic Law of Hong Kong, SAR

During negotiations with Great Britain, the PRC insisted on the complete restoration of Chinese sovereignty over Hong Kong in 1997 and rejected any British administrative role after that date. However, the British insisted that the current economic system in Hong Kong remain intact for at least fifty years after 1997. Several specific provisions were included in the Joint Declaration which will not only insure Chinese sovereignty but also the maintenance of the capitalistic society in Hong Kong. Under the terms of the Joint Declaration, Hong Kong will become a Special Administrative Region (SAR) under Article 31 of the 1982 PRC Constitution. The post 1997 SAR, known as Hong Kong-China, will be vested with executive, legislative, and independent judicial power, including that of final adjudication. Even though provisions were made in the Joint Declaration to insure Hong Kong's autonomy, the extent of that autonomy will be decided by the creation of a mini-constitution which is being drafted for Hong Kong by the Basic Law Drafting Commission (BLDC) — all members of which were appointed by the PRC.

There are several specific guarantees which were negotiated into the Joint Declaration to protect the people and their way of life. The first and most important was the PRC's guarantee that Hong Kong would retain a "high degree of autonomy, except in foreign and defence affairs." Also, the PRC agreed that Hong Kong will be allowed an independent judiciary

82. Mushkat, supra note 37, at 174.
83. N. Miners, supra note 67, at 67.
84. Id.
85. The complete texts of both the first and second drafts of the Basic Law have been reprinted in, 20 CHINESE L. & GOV'T, Fall 1989, at 12, 196.
86. M. Lasater, supra note 5, at 109.
88. Remarks, supra note 35, at 351. See also Agreement, supra note 11, Annex 1(1).
89. Remarks, supra note 35, at 352.
90. Agreement, supra note 11, art. 1(2).
which includes the power of final adjudication.\textsuperscript{91} Of final importance is the guarantee by the PRC that the rights and freedoms of the people will be maintained.\textsuperscript{92} The laws in Hong Kong are not to be changed, including the common law principles used by the courts to make decisions.\textsuperscript{93} In terms of economic relations, no taxes will be levied on Hong Kong and their currency will remain freely convertible.\textsuperscript{94} Hong Kong is also to be allowed to maintain and foster economic relationships with other countries, including maintenance of its seat in GATT and other international economic bodies.\textsuperscript{95} In terms of international law, Hong Kong will continue to be bound by the provisions of the Covenant on Economic, Social and Cultural Rights as well as the Covenant on Civil and Political Rights.\textsuperscript{96}

While the PRC continues to maintain that Hong Kong will retain its economic independence, they are beginning to show signs of tightening their political grip on the island. This is most evident in the drafts of the basic law which have been released for review. The BLDC has completed some important sections of the Basic Law. As it is drafted now, the Basic Law enumerates the following powers to the executive:

1. The power to enforce the laws;
2. the power to approve or disapprove of the laws passed by the legislature;
3. the power to carry out executive orders by the Government of the PRC; and
4. the power to dissolve the legislature with the approval of the government of the PRC.\textsuperscript{97}

The second draft of the Basic Law outlines the procedure for selecting the Governor. The Basic Law calls for the formation of a representative Election Committee which shall be composed of 800 members from all sectors of the community. However, the membership of the committee will not be elected by universal suffrage, they will be appointed by the Central People’s Government of the PRC.\textsuperscript{98}

The Legislature, on the other hand, has been given limited power to make and amend laws. As now drafted, the powers of the Legislature include:

1. Making and amending laws according to the Basic Law;

\textsuperscript{91} Id. art. 1(3), Annex I(III).
\textsuperscript{92} Id. Annex I(XIII).
\textsuperscript{93} Id. Annex II).
\textsuperscript{94} Id. art. 1, §§ 7-8.
\textsuperscript{95} Id. art. 1(9).
\textsuperscript{96} Id. Annex I(XIII). See generally International Covenant on Economic, Social and Cultural Rights, supra, at 53; International Covenant on Civil and Political Rights, supra, at 53.
\textsuperscript{97} Lau, supra note 22, at 55.
\textsuperscript{98} The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft), 22 Chinese L. & Gov’t, Fall 1989, at 106.
2. amending and approving the financial budget; and

3. impeaching the chief executive in cases of serious breach of law and gross dereliction of duty and to report to the government of the PRC for action.99

The Joint Declaration stated clearly that the executive, appointed by the PRC, shall be accountable to the legislature which is elected from the populous. Yet the Basic Law as drafted does not give any power of accountability to the Legislature.100 Even their power of impeachment must be approved by the PRC. Comments by Premier Deng further illustrate the PRC’s tightening grip regarding the future of Hong Kong. One Chinese newspaper reported that in a meeting with Premier Deng Xiaoping, the BLDC was told by Premier Deng that the Basic Law should not be too detailed and should not borrow wholesale from the West. He also stated, “the people of Hong Kong should love both Hong Kong and China,” doubting whether, “elections by universal suffrage could produce such patriots.” He further declared that, “the doctrine of separation of powers was unsuitable for Hong Kong” since this doctrine was for countries and Hong Kong was not a sovereign country.101

While the people of Hong Kong wait anxiously for the outcome of the drafting sessions, Premier Deng has made it quite obvious that a “high degree of autonomy” applies only to economic matters and that political freedoms may have to be sacrificed.

IV. THE LEGAL SYSTEM OF TAIWAN

The Republic of China, Taiwan (ROC or Taiwan) came into existence as a result of the revolution of 1911. While the government was officially formed after the revolution, significant resistance to the ROC led to many domestic and international power struggles. In 1937, the Japanese attacked the mainland thrusting the Chinese into World War II. At the conclusion of the war, the Allied Powers restored the Chinese territories under Japanese occupation to the ROC. At that time, most countries recognized the Republic of China under the leadership of President Chiang Kai-Shek as the legitimate government of China. The government’s problems continued, however, because of an ever growing challenge to its power from the communist insurgents. This challenge culminated in the overthrow of the ROC government in 1949 and its subsequent withdrawal from the mainland to the island provence of Taiwan where it now resides.102

100. Id. at 58.
101. Id. at 59.
102. See generally China, supra note 2, at 21-7.
A. The Legal System

The Constitution of the ROC was promulgated on December 25, 1946, three years prior to its exile in Taiwan. The Constitution sets forth a republican form of government consisting of a National Assembly and five independent branches of government. As a result of the Communist Revolution on the mainland, the ROC passed “temporary provisions” giving the President the power to suspend the mandates of the Constitution and impose emergency rule over China. This provision was instated in 1949 and is still in effect today.

The National Assembly is comprised of 2,691 elected members representing all of China. Because of the temporary provisions, the last full election was held in 1947. Since the revolution, the government in Taiwan has claimed a right to govern all of China; therefore, mainlanders representing the vast population on the mainland dominate the Taiwanese central government. Since the middle of the 1970’s, a gradual “Taiwanization” of the political system has taken place. Partial elections were called for by the President in 1969 and again in 1981 to fill some vacancies left by mainlanders who had either died or retired. Currently, there are approximately 1,152 members holding seats in the assembly. The functions of the Assembly include electing the President and Vice President. The President in turn, serves as the head of state and the commander-in-chief of the armed forces. The President can negotiate treaties, declare war, and proclaim peace, as well as appoint and remove civil servants.

The five branches of the government serve to maintain a system of checks and balances on the allocation of power in the government. The Executive Yuan is headed by the Premier who is appointed by the President. The Premier serves as a liaison between the President and the Legislature. The functions of this branch include informing the Legislative Yuan of administrative policies and plans of the President as well as being available to answer any questions regarding those policies. The Executive Yuan also has the duty of resolving disputes between any of the

103. CONSTITUTION OF THE REPUBLIC OF CHINA, reprinted in CHINA, supra note 2, at 425.
104. Id. at 425 (the five branches are: control, legislative, executive, examination, and judicial).
105. Id. at 84. The only significant impact the provision has had on the government is the suspension of full elections. Since the ROC still claims to rule over all of China, most of the representatives in the Assembly are representatives of territories on the mainland. Since elections can not be held in those territories, those members who were elected in 1947 are still representatives today.
106. Id. at 87.
107. M. LASATER, supra note 5, at 114.
108. CHINA, supra note 2, at 88.
109. Id.
110. Id. at 87.
111. Id. at 91.
112. Id. at 95.
other Yuans in the government.113

The Legislative Yuan is comprised of 760 elected members from all of China. Similar to the situation in the National Assembly, there has not been a full election in the Legislature since 1948. Currently, there are approximately 395 members, 100 of which are newly elected.114 The function of the Legislative Yuan is to "legislate on behalf of the people."115 They also approve of all administrative policies promulgated by the President and the Executive Yuan.116

The Judicial Yuan is headed by a President and Vice President who are appointed by the National President. These officers handle the administrative details of the Judicial Yuan. There are also 17 Grand Justices appointed by the National President who serve as Justices in the highest court of appeals. The Grand Justices have the power to interpret the Constitution and declare that laws passed by the Legislative Yuan are in violation of its parameters.117

The Examination Yuan is headed by a President and Vice President who are also appointed by the National President. Their functions include proctoring the Civil Service examination and administering the workings of the civil service organization for the government.118

The final branch is the Control Yuan. This body is comprised of 223 elected members from Mongolia, Tibet, and Chinese residence abroad. Currently, there are 74 members serving in the Control Yuan.119 The functions of the Control Yuan are to review the laws and policies of the other branches then either consent, censor, or audit their decisions. They also have limited power of impeachment.120

B. Legal Philosophy

The philosophy guiding the Government of the Republic of China is based upon the teachings of Sun Yat-Sen. During his battle against imperialism, Dr. Sun developed and argued the merits of the "three principle's of the people." These principles guide the decisions of the ROC leaders today.121 The three principles include min tsu, min chuan, and min sheng. Loosely translated, Min tsu means nationalism. This principle embodies the strong sense of loyalty the ROC has toward its land and people. This is one reason why they still insist upon reunification with the mainland even though it may not be in their best interest economically.122

113. Id.
114. Id. at 98.
115. Id.
116. Id.
117. Id. at 101.
118. Id. at 103.
119. Id. at 109.
120. Id.
121. Id. at 73.
122. Id. at 74; M. LASATTER, supra note 5, at 119.
Min chuan is the Chinese word for sovereignty. When used in this context, however, it means considerably more, standing also for the pursuit of democracy. Unlike Jean Jacques Rousseau, Dr. Sun believed democracy is not the natural organization of society, but is a condition which must be constantly strived for by all people. The concept of the five yuan of government exemplifies the government structures needed to prevent the monopolization of power by one person thus insuring the growth of democracy in society.

The final principle is min sheng or livelihood. Dr. Sun believed that working for one's livelihood was the driving force in social progress. This is best illustrated by the tremendous progress made by the Taiwanese in developing their economy and domestic social system.

C. Political Parties

An interesting change is currently taking place in Taiwan regarding the structure of Taiwan's political parties. While multiple parties are not prohibited by law in the ROC, there has traditionally been only one dominate party, the Kuomintang (KMT). Founded by Dr. Sun who led the revolution in 1911, control of the party passed to President Chiang Kai-Shek who fled to Taiwan during the Communist Revolution in 1949. Because full elections haven't been held since that time, the KMT still controls well over a three-fourths majority in all the elected bodies in the government. A few minority parties, the Young Chinese Party and the Chinese Democratic Socialist Party, have also held a few seats in each elected assembly.

In the 1986 elections, a new opposition party, the Democratic Progressive Party emerged on the political agenda. They won substantial support in the population by running on a platform of “self-determination” for the people of Taiwan. Although advocating independence from the mainland is still illegal in Taiwan, the ideas of self-determination and increased representation for the Taiwanese in the legislature are gaining support from the population and in the government. Even the new President, a member of the KMT, is a native Taiwanese. It is believed that with the ground swell of popular support for self-determination, the KMT will have to modify its positions regarding reunification with the mainland or risk losing control of the government they have worked so hard to maintain.

124. CHINA, supra note 2, at 74.
125. See generally M. Lasater, supra note 5, at 114.
126. CHINA, supra note 2, at 116.
127. Id. at 117-19. As of 1983 the Young Chinese Party held 64 seats in the National Assembly and the Chinese Democratic Socialist Party held 35.
129. Id.
V. LEGAL CONFLICTS WHICH MAY HINDER REUNIFICATION EFFORTS

This final section will discuss some of the concerns expressed by Chinese legal scholars regarding the possible reunification of both Hong Kong and Taiwan with the PRC.

A. Hong Kong And The PRC

1. Philosophical Differences

As discussed previously, the purpose of laws in Western society is to protect the individual from the tyranny of the government. The laws are codified to minimize the arbitrary conduct of power holders.\textsuperscript{130} By way of contrast, the Chinese believe strongly in moral right and wrong (\textit{li}). They believe in customary notions of behavioral norms and do not feel a need to codify laws reflecting these norms. They enact laws only when they need to elicit some sort of change in the societal norms (\textit{fa}). Laws in the PRC are "political instruments" of the state, explicitly designed to achieve certain objectives.\textsuperscript{131} While the Joint Declaration expressly provides for the power of final adjudication to be vested in the Hong Kong courts as well as the preservation of the common law system, a potential problem arises when these laws conflict with the Basic Law as drafted by the PRC.\textsuperscript{132} In a judicial case where the issue to be decided involves the interpretation of the Basic Law, the decision of the Hong court must be certified to the Chief Executive or the PRC Standing Committee and the answer provided must be adhered to by the Hong Kong courts.\textsuperscript{133} The question then arises: Who decides whether a decision of the court contravenes the Basic Law? The Joint Declaration is silent on this particular issue.\textsuperscript{134} Under common law, that decision should be left to the judiciary, under Socialist rule, the legislature should decide. As drafted in the Basic Law, the Hong Kong SAR is vested with independent judicial power, including that of final adjudication. However, the Hong Kong courts will have no jurisdiction over cases relating to the "acts of state." The Courts of the region must obtain a statement from the Chief Executive on questions concerning the acts of the state, whenever such questions arise in a legal proceeding. This statement will be binding on the courts.\textsuperscript{135} The question of who decides what an "act of state" is has not yet been an-

\textsuperscript{130} Mushkat, supra, note 37, at 174.
\textsuperscript{131} Id.
\textsuperscript{132} Agreement, supra note 11, at art. 3(3).
\textsuperscript{135} The Basic Law, supra note 22, art. 19. The Basic Law goes on to state that the Chief Executive shall obtain the certificate from the Central People's Government of the PRC. See also Cheng, supra note 134, at 80.
swered by the Basic Law.

2. Constitutional Conflicts

The Joint Declaration states that Hong Kong will become a Special Administrative Region "in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China." While the Basic Law is given elevated status in the hierarchy of laws in the PRC, it is still subject to conformity with the PRC Constitution. The preamble and the first several articles of the general principles section of the PRC Constitution advocate pure socialism. Article 67 of the PRC Constitution is also in direct contrast with the claim that an SAR can be autonomous. This article gives the National People's Congress power to annul local and regional regulations which conflict with the ideals and provisions of the Constitution. Since these ideas include socialism, any system which conflicts with socialist principles has the potential to be annulled by the National People's Congress. Obviously, there is shaky ground at best for the stability of the SARs under the current version of the Chinese Constitution.

3. Enforcement of the Joint Declaration

Since the PRC has never admitted to not having sovereignty over Hong Kong, the question remains as to whether the Declaration would be considered a valid international agreement subject to enforcement by the International Court of Justice. Under the internationally accepted definition of "treaty," the general consensus is that it is a valid international agreement.

This conclusion rests on the fact that the Joint Declaration falls within the established definition of an international treaty as incorporated in Article 2 of the 1969 Vienna Convention on the Law of Treaties. This definition equates a treaty with "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

Even assuming the agreement is valid internationally, enforcement will be difficult considering Great Britain will give up all physical control
over the Hong Kong territories and the PRC has not accepted the compulsory jurisdiction of the International Court of Justice. As mentioned previously, however, the Chinese do consider treaties the primary source of international law and the principle of *pacta sunt servanda* is hailed by the Chinese as an important factor in treaty law. What remains to be seen is exactly how the PRC will interpret the Joint Declaration and whether that interpretation conforms to the interpretation by the rest of the world.

4. Restraint and Compromise are Needed

Other than the possible threat of international economic retaliation, the Chinese seem to have absolute control over the fate of Hong Kong. Certainly it is in their best interest, economically and politically, to maintain the Hong Kong system with as much stability as possible. To effect this stability, a certain amount of compromise will be required by the PRC as well as by Hong Kong. As the situation stands, Hong Kong will be at the mercy of the severe swings in political thought which tend to occur in the PRC. Only through open dialogue and consensus will the people of Hong Kong and the rest of the world gain faith in the future of Hong Kong as one of the financial capitals of the world.

B. Taiwan And The PRC

1. Political Biases

The first step which must be taken to begin Taiwan’s reunification with the mainland is to reconcile the deep political biases which these two governments share. More than ninety-five percent of the people on Taiwan are originally from mainland China. They share the same language and have inherited the same culture and way of life. However, the memories of the harshness of the Communist Revolution which drove them from their homes in 1949 are still very vivid. There is a widespread fear in Taiwan that if reunification occurs, Beijing will eventually impose socialist rule on the island. Another equally important reason for Taiwan’s reluctance to negotiate for reunification is the state of the PRC’s economy. Many Taiwanese scholars believe reunification with the mainland at this time would undermine the Taiwanese economy. There is fear that talks would undermine investor and foreign confidence in Taiwan. Also, as was evident in Hong Kong, the fear of reverse technology
transfers (i.e., "brain drain") has been a significant hinderance in the decision regarding whether or not to negotiate with the PRC. Finally, the perception of the communists is so bad in Taiwan, any signs of conciliation by the Taiwanese government would most definitely cause the people of Taiwan to distrust the government.\textsuperscript{150}

The differences between the Nationalist Government on Taiwan and the PRC are deeper than the conflicting economic and political systems. Each was committed for decades to a "war of words," insisting that history and experience would vindicate its position regarding the best means for the political and economic development of China.\textsuperscript{151} Therefore, most Taiwanese seem content to remain with the status quo for the time being.\textsuperscript{152}

2. Economic Ties

Both the PRC and Taiwan stand to lose a great deal economically if they do not open up the trade lines between their respective regions. In the period between 1979 and 1987, entrepot trade between the mainland and Taiwan via Hong Kong was valued at $5.5 billion U.S. dollars, including $1.1 billion of goods from the mainland and $4.4 billion from Taiwan.\textsuperscript{153} This trend has increased every year. In 1988 alone, indirect trade through Hong Kong jumped fifty-nine percent.\textsuperscript{154}

This trade, which mostly benefits Taiwan, is hindered by the many obstructions Taiwan has installed regarding trade with the PRC.\textsuperscript{155} Taiwanese authorities continue to adhere to the practice of "indirect, non-governmental trade with the mainland." As a result, most of the trade which takes place between the two governments goes through Hong Kong.\textsuperscript{156} When Hong Kong becomes a part of the PRC in 1997, this trade will technically have to end. In order to maintain and increase their economic relations with the mainland, Taiwan will have to repeal their trade restrictions and allow direct trade with the mainland.

3. Philosophical Differences

The principles of Socialism and the "Three People's Principles" are in direct conflict. While both embody the concept of Nationalism, they espouse opposite views regarding the governing of the people.\textsuperscript{157} Democracy and socialism differ in many respects, the most significant being the placement of power within the government structure. While in a democ-
racy checks and balances are used to prevent possible abuses of power, a socialist country vests the government’s power in a single body which governs for the betterment of the state as a whole. There is no possible way to resolve the many differences between Socialism and Democracy. For true reunification of these governments to occur, one or the other will have to compromise their philosophy. After such a protracted battle, it will be extremely difficult for either side to just “lay down their arms;” and at this point, neither of them will.158

4. Enforcement of a Reunification Agreement

Given the possibility that these two governments did come to a written agreement regarding reunification, what are the possible enforcement mechanisms available? A stark difference between this situation and that of Hong Kong’s exists which makes the outcome unclear. The object of the Joint Declaration was a territory which both governments claimed a limited right to govern. Conversely, both the PRC and Taiwan claim there is only one China to which Taiwan belongs. In this scenario, both governments claim they are the legitimate government of all of China. A reunification agreement between Taiwan and the PRC would probably be deemed domestic in nature, not international. Thus, such an agreement would not be subject to any enforcement mechanisms of the international community.159 To ensure international enforcement of the agreement, both governments will first have to declare themselves separate international entities. This is something both have refused to do thus far.

VI. Conclusion

Since the Joint Declaration has already been signed, the above discussion regarding Hong Kong is purely academic. Hong Kong has no choice but to become part of the PRC. What will be of interest in the future is how the PRC reacts to each of the above mentioned problems. If the problems are ignored, they are likely to cause serious political and social unrest in the PRC and Hong Kong. If the PRC compromises and allows Hong Kong to actually govern itself with regard to domestic issues, the world, and especially Taiwan, will probably have a much greater respect and trust for the PRC and its offers for reunification.

With regard to Taiwan, if reunification ever occurs between Taiwan and the PRC, it will either be the result of a military conquest, or the result of substantial political change in the PRC. Since Taiwan has everything to lose and very little to gain by reunification, it is not likely to occur soon.

The success or failure of these reunification efforts lies almost primarily on the political winds in the PRC. While the PRC can not effectively cut itself off from the world economically like it did in the 1950’s, it

158. Remarks, supra note 35, at 358.
159. Id. at 364.
can continue to stifle political change and force a strong hand on Hong Kong's internal affairs. Recent history leads me to believe this will not be the case. Each of the last five or six waves of democratic activism in the PRC has directly inspired the future leaders of the nation toward greater openness. If the PRC hopes to continue on its road to economic prosperity, it must start loosening its grip on the Chinese people. For as millions of Chinese so vividly demonstrated once again, "men and women do not live by rice alone."

The over 2000 year history of the Chinese empire has been filled with many events. Too often the negative moments overshadow the many positive contributions the Chinese have made to better our society. It is the hope of everyone that the PRC has learned the many valuable lessons of the past, and will continue to strive toward greater openness and democratic freedom in the future.

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160. Fincet, supra note 9, at 5.
161. Lord, supra note 25, at 22.
162. The author wishes to thank Jeff Maddox and Professor Ved Nanda for their comments and suggestions on earlier drafts of this article.