

THE PROPOSAL TO IMPLEMENT ARTICLE 23 OF THE BASIC LAW IN  
HONG KONG: A MISSED OPPORTUNITY FOR RECONCILIATION AND  
REUNIFICATION BETWEEN CHINA AND TAIWAN

C. George Kleeman, IV\*

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\* J.D., University of Georgia School of Law, 2005; B.B.A., Terry College of Business, University of Georgia, 2001.

## I. INTRODUCTION

On July 1, 2003, the largest demonstrations since Hong Kong came under Chinese rule eight years prior took place in Hong Kong.<sup>1</sup> Nearly half a million people took to the streets to protest the government's proposal to implement Article 23 of the Basic Law.<sup>2</sup> The proposed law, which the Hong Kong government is required to implement under the terms of the handover agreement between Great Britain and the People's Republic of China,<sup>3</sup> would have created offenses for treason, sedition, theft of state secrets, and other national security crimes.<sup>4</sup> While similar laws were on the books during colonial days, they had not been strictly enforced since the end of World War II.<sup>5</sup> However, many civil liberties groups were fearful that the proposed laws would be strictly enforced in Hong Kong and used to stifle criticism of the government.<sup>6</sup> Because of the massive demonstrations and protests, the Hong Kong government withdrew the proposal on September 5, 2003.<sup>7</sup> Initially, many people anticipated the government would reintroduce the bill before the 2004 elections.<sup>8</sup> Instead, because of the outcry over the bill, the Hong Kong government eventually chose to postpone a vote on the bill.<sup>9</sup> This situation presented a unique opportunity for an improvement in relations among the

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<sup>1</sup> *For Freedom: Half a Million People Show How Unpopular China's Man in Hong Kong Has Become*, ECONOMIST, July 5, 2003, at 35 (noting that the July 1 demonstration was the second largest in Hong Kong's history, exceeded only by demonstrations set off by the 1989 Tiananmen Square protests; and those were not directed at local authorities).

<sup>2</sup> *Id.*

<sup>3</sup> Benny Y.T. Tai, *The Principle of Minimum Legislation for Implementing Article 23 of the Basic Law*, 32 HONG KONG L.J. 579, 579-80 (2002).

<sup>4</sup> See SECURITY BUREAU, PROPOSAL TO IMPLEMENT ARTICLE 23 OF THE BASIC LAW, SUMMARY OF CONSULTATION DOCUMENT, at 4 (2002), available at <http://basiclaw23.gov.hk/english/download/summarye.pdf>.

<sup>5</sup> E.g., Albert H.Y. Chen, Comment, *How Hong Kong Law Will Change when Article 23 of the Basic Law Is Implemented*, 33 HONG KONG L.J. 1, 3 (2003) (describing sedition).

<sup>6</sup> See, e.g., Press Release, Amnesty International, Hong Kong: Article 23 Legislation—The Potential for Abuse (Dec. 9, 2002), available at <http://web.amnesty.org/library/Index/ENGAS.A190042002?>.

<sup>7</sup> See Alexandra Harney & Angela Mackay, *Hong Kong Scraps Subversion Bill That Sparked Massive Demonstration*, FIN. TIMES, Sept. 6, 2003, at 8, 2003 WL 8230412.

<sup>8</sup> See Matt Pottinger & Charles Hutzler, *Chinese Reversal in Hong Kong Reveals Dilemma*, WALL ST. J., Sept. 8, 2003, at A1 (mentioning that many in Hong Kong expected the proposal to be reintroduced before summer elections in 2004 so that anti-Article 23 candidates would not be able to block the legislation if they were subsequently elected).

<sup>9</sup> See Harney & Mackay, *supra* note 7.

People's Republic of China (China), the Hong Kong Special Administrative Region (Hong Kong), and Taiwan.

Among the most vocal foreign critics of the proposal, besides international human rights groups,<sup>10</sup> were the people, media, and government of Taiwan.<sup>11</sup> While the proposal first appeared to be pushing China and Taiwan farther apart, the Hong Kong government's decision to withdraw the proposal presented an opportunity for the two nations to move closer together and towards reconciliation and reunification. China's decisions to be more responsive to the wishes of its citizens and to be more responsible in lawmaking and law enforcement, at least in Hong Kong, could have made reunification with Taiwan a reality. Hopefully, the decision to withdraw the Article 23 proposal indicates a shift in Chinese policy from one of oppression and denial of rights to a policy that respects individual rights and due process of law. Taiwan has indicated that a prerequisite to opening reunification talks with China is that China must allow the free expression of public opinion and democracy.<sup>12</sup> If China were to allow these same freedoms in Hong Kong, Taiwan may be willing to accept those actions as a sign of good faith and may be receptive to opening reunification talks with the mainland. Thus, the Chinese government could have laid the foundation for reunification through a demonstrated commitment to freedom and democracy in Hong Kong. The successful integration of Hong Kong and China could thus serve as a gateway and model for the reunification of the "two Chinas" that mainland Chinese have hoped for.<sup>13</sup>

Part II of this Note will analyze the legal and political relationship between China and Hong Kong over the past twenty years, from the initial discussions between Great Britain and China over the return of Hong Kong, through the introduction of the proposal to implement Article 23 of the Basic Law, up to the present. Part III will examine the relationship between China and Taiwan, specifically regarding the Guidelines for National Unification promulgated by Taiwan, detailing the requirements that must be fulfilled before Taiwan will open negotiations with China over a possible reunification. Part IV will

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<sup>10</sup> See, e.g., Press Release, Amnesty International, *supra* note 6.

<sup>11</sup> See, e.g., *Taiwan Urges China to Embrace Democracy, Grant Hong Kong More Freedom*, AGENCE FRANCE-PRESSE, Aug. 16, 2003 (citing comments by Taiwan President Chen Shui-Bian criticizing the proposal).

<sup>12</sup> Guidelines for National Unification, § 1(3) (1991) (Taiwan), <http://www.wulaw.wustl.edu/Chinalaw/tvguide.html> (last visited June 22, 2005).

<sup>13</sup> Colleen M. Granahan, Note, *The Prospects of a Successful Reunification of Hong Kong and China in Light of the Events at Tiananmen Square*, 10 B.U. INT'L L.J. 83, 97-98 (1992).

analyze what effect the proposal, as well as the politics surrounding it, may have on the relationship between China and Taiwan, and why this process may have led to a peaceful reunification of the two countries. Part V will conclude by discussing why the opportunity for bringing China and Taiwan closer together was not taken advantage of, but was instead squandered by bickering and political posturing by the two nations.

## II. THE RELATIONSHIP BETWEEN CHINA AND HONG KONG BEFORE, DURING, AND AFTER REUNIFICATION

The relationship between China and Hong Kong began to change significantly in the late 1970s and early 1980s as the ominous date of July 1, 1997, drew near.<sup>14</sup> On that day, Great Britain's ninety-nine-year lease on the New Territories of Hong Kong was due to expire, and the Beijing government had indicated for some time that it would not renew the lease.<sup>15</sup> The concern over the expiration of the lease began to have an impact on Hong Kong, as the economy began to slow down and residents of Hong Kong began to emigrate.<sup>16</sup> This occurred largely because people were reluctant to invest and live in such an uncertain area that was preparing for a possible seismic shift in its economic, social, and political ways of life.<sup>17</sup> Because of this increasing uncertainty, the British and Chinese governments began negotiations to discuss the future of Hong Kong in 1982.<sup>18</sup> The negotiations lasted two years and resulted in the Joint Declaration on the Question of Hong Kong.<sup>19</sup> The Joint Declaration required the Chinese government to create the Hong Kong Special Administrative Region, to be "vested with executive, legislative and independent judicial power."<sup>20</sup> Additionally, the Joint Declaration required that the

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<sup>14</sup> See Christopher K. Costa, Comment, *One Country--Two Foreign Policies: United States Relations with Hong Kong After July 1, 1997*, 38 VILL. L. REV. 825, 838-39 (1993).

<sup>15</sup> *Id.* at 837-38. Not all of the Hong Kong territory was to be returned to China, but the British government believed the island of Hong Kong would be useless without the New Territories, which are on the mainland and were due to revert to Chinese control. *Id.* at 838.

<sup>16</sup> *Id.* at 838-39.

<sup>17</sup> See *id.* at 838.

<sup>18</sup> *Id.* at 839-40.

<sup>19</sup> 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 of the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 1399 U.N.T.S. 33, 23 I.L.M. 1366.

<sup>20</sup> *Id.* para. 3(3), 1399 U.N.T.S. at 61.

laws then “in force in Hong Kong [would] remain basically unchanged.”<sup>21</sup> Most importantly, the Joint Declaration required that

[T]he current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region.<sup>22</sup>

To ensure that these policies would be maintained, the Basic Law of the Hong Kong Special Administrative Region (Basic Law) was promulgated by the Chinese government to serve as the “mini-constitution” and supreme law of Hong Kong.<sup>23</sup> The original 1988 draft of the Basic Law only requested that government of Hong Kong to enact legislation “against ‘any act designed to undermine national unity or subvert the Central People’s Government.’ ”<sup>24</sup> This initial draft appeared ominous and threatening to some, but was not of great concern to most when it was first promulgated.

In the summer of 1989, Chinese troops clashed with student demonstrators in Beijing’s Tiananmen Square, setting off massive demonstrations in Hong Kong and around the world.<sup>25</sup> As a result of both the Tiananmen Square and Hong Kong protests, the Chinese government amended the Basic Law and wrote a new article, Article 23.<sup>26</sup> The new Article 23 requires the Hong Kong government to

enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* para. 3(5), 1399 U.N.T.S. at 62.

<sup>23</sup> Inbal Sansani, *The Threat of Article 23 to Civil Liberties in the Hong Kong Special Administrative Region*, HUM. RTS. BRIEF, Spring 2003, at 28, 28, <http://www.wcl.american.edu/hrbrief/hrbrief103.pdf>.

<sup>24</sup> *Id.*

<sup>25</sup> See Costa, *supra* note 14, at 843 (citing Wendy Dulle Bowie, *The Effect of the Tiananmen Square Massacre upon Negotiations for the Draft Basic Law of the Hong Kong Special Administrative Region*, 8 DICK. J. INT’L L. 245 (1990), and Christopher D. Chan, *International Section: Hong Kong: China’s June 4 Massacre, Emigration and Capital Flight*, 3 GEO. IMMIGR. L.J. 293 (1989)).

<sup>26</sup> Sansani, *supra* note 23, at 28.

theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.<sup>27</sup>

This highly detailed and much more restrictive formulation of Article 23 was not immediately acted upon by the Hong Kong government, but was instead pushed to the back burner shortly after the 1997 handover.

Five years after the handover from British to Chinese rule, the Hong Kong government finally introduced a proposal to implement Article 23.<sup>28</sup> After several months of consultations with local non-governmental organizations and the public,<sup>29</sup> the bill seemed poised for passage until the protests in the summer of 2003. The massive public outcry forced Hong Kong Chief Executive Tung Chee-hwa to withdraw the bill, as the popular unrest led to legislative unrest.<sup>30</sup>

Despite the fears of many pro-democracy groups in Hong Kong, the government did not reintroduce the Article 23 legislation prior to the September 2004 elections. In those elections, the pro-democracy groups did not win as many seats as expected,<sup>31</sup> perhaps because the government withdrew the proposal to take the issue away from the pro-democracy parties. China's decision to respect democracy and free speech in Hong Kong, as well as to postpone implementing Article 23, could communicate to Taiwan that China would be willing to treat Taiwan in a similar fashion. The burden would then shift to Taiwan to respond to this new opportunity.

### III. THE RELATIONSHIP BETWEEN CHINA AND TAIWAN

Ever since the Chinese Nationalists left the mainland for Taiwan in 1949, relations between the two countries have gone through cycles of calm and great tension across the Strait of Taiwan. Initially, both the Communist

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<sup>27</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art. 23 (1990) (P.R.C.), 29 I.L.M. 1511, 1524, available at <http://www.hkbu.edu.hk/~pchksar/BasicLaw/bas-law0.htm>.

<sup>28</sup> Chris Yeung, *Urgency Appears to Be the Watchword; Where Once There Seemed No Rush, Leaders Now Talk of 'Top Priority'*, S. CHINA MORNING POST, Sept. 25, 2002, at 2, 2002 WLNR 4480385.

<sup>29</sup> Sansani, *supra* note 23, at 29.

<sup>30</sup> See Harney & Mackay, *supra* note 7 (describing how opposition to Article 23 led to "a challenge to the Tung government's authority").

<sup>31</sup> *Suffrage on Sufferance*, ECONOMIST, Sept. 18, 2004, at 6, 2004 WLNR 10898426.

government of the mainland and the Nationalist government of Taiwan claimed that they were the legitimate government of all China, including Taiwan.<sup>32</sup> Since the 1960s, however, the Chinese government has generally left Taiwan alone, as long as the leaders of Taiwan did not advocate independence for the island.<sup>33</sup> Beginning in the late 1970s, however, the Beijing government took a softer tone and encouraged economic links between the two nations as a precursor to reunification. This culminated in the famous “one country, two systems” proposal by Chinese Premier Deng Xiaoping in 1981.<sup>34</sup>

As Deng originally envisioned it, the “one country, two systems” model was intended to pave the way for the reunification of Taiwan and China.<sup>35</sup> The key to the proposal was China’s willingness to allow Taiwan to retain its social, economic, and political systems, as well as its armed forces, while China would be responsible for foreign affairs.<sup>36</sup> The two nations began informal meetings but failed to come any closer to the reunification envisioned by Deng.<sup>37</sup> In the early 1980s, China temporarily abandoned these discussions and instead began focusing on the question of Hong Kong.<sup>38</sup> Thus Hong Kong, and not Taiwan, became the beneficiary of and participant in Deng’s “one country, two systems” model.

While China negotiated with Great Britain and prepared for the return of Hong Kong, Taiwan took the initiative in trying to bring the “two Chinas” closer together. In 1991, Taiwan issued its own proposal for reunification with China, known as the Guidelines for National Unification.<sup>39</sup> The Guidelines consist of a three-stage plan that would gradually lead to closer ties between Taiwan and China ultimately resulting in the establishment of a “democratic, free and equitably prosperous China.”<sup>40</sup> The first stage of the plan consists of exchanges between the two countries and economic and political reforms by China.<sup>41</sup> The second phase calls for direct commercial links between the two

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<sup>32</sup> See Y. Frank Chiang, *State, Sovereignty, and Taiwan*, 23 *FORDHAM INT’L L.J.* 959, 975 (2000).

<sup>33</sup> See Zhengyuan Fu, *China’s Perception of the Taiwan Issue*, 1 *UCLA J. INT’L L. & FOREIGN AFF.* 321, 325-26 (1996-97).

<sup>34</sup> *Id.* at 327.

<sup>35</sup> See BENJAMIN YANG, *DENG: A POLITICAL BIOGRAPHY* 224 (1998).

<sup>36</sup> *See id.*

<sup>37</sup> *See id.*

<sup>38</sup> *See id.* at 224-25.

<sup>39</sup> Guidelines for National Unification (1991)(Taiwan), <http://www.wulaw.wustl.edu/ChinaLaw/twguide.html> (last visit June 22, 2005).

<sup>40</sup> *Id.* pmb1.

<sup>41</sup> *Id.* § 1.

countries and mutual visits by government officials.<sup>42</sup> The final stage consists of a long consultation period leading to the reunification of the two Chinas.<sup>43</sup> The Guidelines further reaffirmed Taiwan's pledge that it would "not . . . declare formal independence, change [its formal] name to Republic of Taiwan, insert into the constitution the formula of a 'special state-to-state relationship,' or promote a referendum with respect to the questions of independence or unification."<sup>44</sup>

Over the past several decades, mainland China has moved towards more economic liberalization,<sup>45</sup> and exchanges in business, sports, and culture between China and Taiwan have increased greatly since 1987.<sup>46</sup> Additionally, there are now direct commercial and transport links between China and Taiwan.<sup>47</sup> The other conditions set forth by the guidelines, namely that China allow free expression, implement democracy, and respect the rule of law, have yet to be satisfied by mainland China.

Through its handling of the Article 23 situation, however, the government of Hong Kong has continued to allow freedom of expression, has shown respect for the rule of law, and has moved towards allowing democracy in Hong Kong.<sup>48</sup> This may signify a shift in the thoughts of China's leaders given the high degree of control China exercises over the Hong Kong government. Thus, Chinese leadership may have a newfound concern for the freedoms of speech and expression, as well as democracy and the rule of law. If China continues to show concern and respect for these values and moves towards allowing them on the mainland, Taiwan's Guidelines for National Unification would largely be met, therefore paving the way for the reunification of the two nations.

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<sup>42</sup> *Id.* § 2.

<sup>43</sup> *Id.* § 3.

<sup>44</sup> Markus G. Puder, *The Grass Will Not be Trampled Because the Tigers Need Not Fight—New Thoughts and Old Paradigms for Détente Across the Taiwan Strait*, 34 VAND. J. TRANSNAT'L L. 481, 512-13 (2001).

<sup>45</sup> See Mure Dickie, *Property Rights Take Root: New Investor Protection Laws Appeal to Both Locals and Foreigners*, FIN. TIMES UK, Dec. 31, 2003, at 8, 2003 WLNR 8153647 (discussing proposed revisions to China's constitution to declare private property "inviolable").

<sup>46</sup> Sylvia A. Chen, *The Emerging New International Legal Order in the Western Pacific*, 87 AM. SOC'Y INT'L L. PROC. 61, 65 (1993).

<sup>47</sup> *Officials to Seek Re-Evaluation of 'Mini-three-links'*, TAIWANNEWS, Aug. 30, 2004, 2004 WLNR 7420502.

<sup>48</sup> For example, half of the sixty seats in Hong Kong's legislature are now elected by popular vote in geographically-based districts. *Suffrage on Sufferance*, *supra* note 31.

#### IV. THE OPPORTUNITY FOR CHINA AND TAIWAN TO MOVE TOWARDS RECONCILIATION

China and Hong Kong's response to the outcry over the proposal to implement Article 23 of the Basic Law presented a unique opportunity for China and Taiwan to move towards a closer relationship. The proposal posed a significant threat to freedom of speech and freedom of expression in Hong Kong. The threat to their freedoms encouraged the residents of Hong Kong to demand more democracy and more accountability from their government. By choosing not to enact Article 23 in Hong Kong, China showed that it can be responsive to its citizens and their needs and desires, just as Taiwan is. Additionally, the potential for further democratic reforms in Hong Kong shows that China is committed to political reforms. If China were to allow freedom and democracy to flourish in Hong Kong, Taiwan might be persuaded that China is willing to comply with the requirements of Taiwan's Guidelines for National Unification and all of China may be one again.

##### *A. Respecting Freedom of Speech and Expression*

The proposal to implement Article 23 of the Basic Law in Hong Kong was withdrawn primarily because of the massive protests by Hong Kong's citizens.<sup>49</sup> These protests were unlike demonstrations previously held in China because the government allowed the people to assemble freely to demonstrate and did not seek retribution, either criminally or civilly, against the protests' leaders or participants.

The results of the Hong Kong protests and the government's reaction to them stand in stark contrast to the Tiananmen Square protests over a decade ago. While the Tiananmen Square protests resulted in the massacre of unarmed student demonstrators,<sup>50</sup> the Hong Kong protests ended peacefully.<sup>51</sup> Moreover, the protesters ultimately got what they wanted, as the Hong Kong government withdrew the proposal.<sup>52</sup> Additionally, while the Chinese government retaliated against the Tiananmen Square protesters,<sup>53</sup> no further

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<sup>49</sup> See *supra* text accompanying notes 1-7.

<sup>50</sup> Alvin H. Chu, Note, *Vindicating the Tiananmen Square Massacre "The Case Against Li Peng,"* 20 WIS. INT'L L.J. 199, 200 (2001).

<sup>51</sup> Michael A. Lev, *Hong Kong Marchers Condemn Bill; Many Fear Law Would Subvert Their Freedom*, CHI. TRIB., July 2, 2003, 2003 WLNR 13862360.

<sup>52</sup> Pottinger & Hutzler, *supra* note 8.

<sup>53</sup> See Chu, *supra* note 50, at 200 (noting that "[t]he Chinese authorities later executed some

action has been taken by the governments of either China or Hong Kong against the protesters. The peaceful resolution to the Hong Kong protests could indicate a shift in the thinking of the Chinese government that could in turn open the door for the extension of free expression into mainland China. This could placate the Taiwanese, who require China to respect freedom of expression before they will discuss reunification with the mainland.<sup>54</sup>

Just as important as the Hong Kong government's recognition that the July 2003 demonstrators could protest freely and without interference was the decision to give in to their demands and withdraw the proposal. This also strikes quite a contrast with China's reaction to the Tiananmen Square protests, in which the student protesters were violently crushed, leaving their demands for socioeconomic and democratic reforms unfulfilled.<sup>55</sup> While the Beijing government still seems reluctant to respond to the demands of its citizens,<sup>56</sup> if it were to begin to respect the requests of the public in mainland China, as it respected and responded to the demands of the protesters in Hong Kong, it would assuage the fears of many Taiwanese that a reunited China would not respect the wishes of Taiwan's citizens.

### *B. The Implementation of Democracy and the Rule of Law*

In addition to protesters' demand for the tabling of the proposal to implement Article 23, they also demanded more democracy and political accountability from their government.<sup>57</sup> While Hong Kong residents currently have some influence in electing the officials who govern them, they are only allowed to elect half of the legislative branch officials and do not have the right to vote for the Chief Executive of Hong Kong.<sup>58</sup> As discussed previously, the government responded favorably to the protesters' demands that the Article 23 proposal be scrapped.<sup>59</sup> Similarly, the time may also be ripe for the

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of the student protesters in public to demonstrate the serious nature of their warnings" that the protesters "would face severe punishment if they did not turn themselves in to authorities").

<sup>54</sup> See *Guidelines for National Unification*, *supra* note 12, § 1(3).

<sup>55</sup> See *Chu*, *supra* note 50, at 200.

<sup>56</sup> See, e.g., Anthony Kuhn, *Chinese Learn True Scope of SARS from the Internet*, USC ANNENBERG ONLINE JOURNALISM R., May 22, 2003 (on file with author) (noting that the state-controlled Chinese media was not forthright about the SARS epidemic and was unresponsive to the demands of ordinary Chinese for more information and action).

<sup>57</sup> Keith Bradsher, *Security Laws Target of Huge Hong Kong Protest*, N.Y. TIMES, July 2, 2003, at A1, 2003 WLNR 5170510.

<sup>58</sup> See *Suffrage on Sufferance*, *supra* note 31.

<sup>59</sup> See *supra* text accompanying notes 1-7.

government to carry out further democratic reforms by granting the citizens of Hong Kong a larger role in determining the actions of their government. A Hong Kong government more responsive to its citizens would stand in stark contrast to the undemocratic government which existed under colonial rule.

Under British colonial rule, Hong Kong had no democratic institutions.<sup>60</sup> Prior to the 1997 handover to China, “the Governor of Hong Kong was appointed by the government of the United Kingdom and was” generally a British citizen, not a citizen of Hong Kong.<sup>61</sup> Also during colonial rule, the Privy Council in London, not the Supreme Court of Hong Kong, was the ultimate court for appeals.<sup>62</sup> Finally, prior to 1991, the Legislative Council of Hong Kong (LegCo) was also an undemocratic institution, as none of its members were elected by the people.<sup>63</sup> Instead, all sixty members of the LegCo were appointed by the Royal Governor.<sup>64</sup> In 1991, however, the British colonial government, with the consent of China, made several reforms in the selection of LegCo members.<sup>65</sup> Of the sixty members of the LegCo, twenty were elected from geographical districts, ten were chosen by a Selection Committee, and thirty were elected by various constituencies.<sup>66</sup> The constituencies are groups of people of similar backgrounds, generally from the professional and commercial classes, who were appointed by the government and were largely viewed as a pro-government group.<sup>67</sup> Thus, while there was a semblance of democracy in Hong Kong prior to the 1997 handover to China,

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<sup>60</sup> Costa, *supra* note 14, at 846.

<sup>61</sup> Carole J. Petersen, *The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong*, 32 HONG KONG L.J. 103, 106 (2002).

<sup>62</sup> See Lilly W.Y. Heong, Note, *One Country, Two Ideologies: The Rule of Law in the Hong Kong Special Administrative Region*, 16 TEMP. INT’L & COMP. L.J. 447, 466 (2002) (noting that all appeals involving novel issues were heard by the Privy Council).

<sup>63</sup> Sean Cooney, *Why Taiwan Is Not Hong Kong: A Review of the PRC’s “One Country, Two Systems” Model for Reunification with Taiwan*, 6 PAC. RIM L. & POL’Y J. 497, 512 (1997). The consent of both the Governor and LegCo was required before a bill could become law, thus the LegCo could do little by itself besides block executive action. *Id.* at 511-12. This process has remained intact since the handover, as the Chief Executive must still sign bills passed by the LegCo. See The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, art. 76 (1990) (P.R.C.), 29 I.L.M. 1511, 1533 [hereinafter Basic Law], available at <http://www.hkbu.edu.hk/~pchksar/BasicLaw/bas-law0.htm>.

<sup>64</sup> Cooney, *supra* note 63, at 512.

<sup>65</sup> H.L. Fu & Richard Cullen, *National Security Law in Hong Kong: Quo Vadis a Study of Article 23 of the Basic Law of Hong Kong*, 19 UCLA PAC. BASIN L.J. 185, 201.

<sup>66</sup> Michael C. Davis, *Constitutionalism Under Chinese Rule: Hong Kong After the Handover*, 27 DENV. J. INT’L L. & POL’Y 275, 279 (1999).

<sup>67</sup> *Id.* at 279 & n.21, 284, 298.

the Hong Kong government still remained largely unaccountable to its constituents, the people of Hong Kong.

Since the handover, Hong Kong's government has undergone further reforms in order to make it more politically accountable to its citizens. For example, Hong Kong's judiciary is no longer subordinate to the Privy Council in London. Instead, the Hong Kong-based Court of Final Appeal is now the court of last resort for Hong Kong litigants.<sup>68</sup> Additionally, the judges of the Court of Final Appeal are now subject to confirmation and removal by the LegCo,<sup>69</sup> which had no control over the Privy Council in colonial days.

The LegCo has also gained additional powers since the 1997 handover. While the LegCo had no power to remove the Royal Governor when Hong Kong was a British colony, the LegCo now has the power to impeach the Chief Executive for "serious breach of the law or dereliction of duty."<sup>70</sup> The LegCo can also force the Chief Executive to resign if he and the LegCo cannot agree.<sup>71</sup> If the Chief Executive submits a bill to the LegCo and the bill is rejected, the Chief Executive may dissolve the LegCo.<sup>72</sup> However, if the newly elected LegCo also rejects the Chief Executive's bill, the Chief Executive must resign.<sup>73</sup> Additionally, if the Chief Executive vetoes a bill passed by the LegCo and the LegCo passes the bill by a two-thirds majority, the Chief Executive must sign the bill or dissolve the LegCo.<sup>74</sup> If the newly elected LegCo again passes the bill by a two-thirds majority and the Chief Executive still refuses to sign it, the Chief Executive must resign.<sup>75</sup> Thus, the LegCo has much more power over the executive than it did during colonial days.

While there has been movement towards allowing more democracy in Hong Kong since the handover, several problems still remain. For example, laws passed by the LegCo and signed by the Chief Executive must be reported to the

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<sup>68</sup> Basic Law, *supra* note 63, art. 82, 29 I.L.M. at 1534.

<sup>69</sup> *Id.* art. 73(7), 29 I.L.M. at 1532.

<sup>70</sup> *Id.* art. 73(9), 29 I.L.M. at 1532. Once fifteen members of the LegCo have charged the Chief Executive with such an act, an independent investigation committee is formed by the Chief Justice of the Court of Final Appeal. *Id.* The committee then gives the LegCo its findings, and a two-thirds vote by the LegCo at this stage will result in the impeachment of the Chief Executive. *Id.*

<sup>71</sup> *Id.* arts. 50 & 52, 29 I.L.M. at 1529.

<sup>72</sup> *Id.* art. 50, 29 I.L.M. at 1529.

<sup>73</sup> *Id.* art. 52(3), 29 I.L.M. at 1529.

<sup>74</sup> *Id.* arts. 49 & 50, 29 I.L.M. at 1529.

<sup>75</sup> *Id.* art. 52(2), 29 I.L.M. at 1529.

National People's Congress in Beijing for approval.<sup>76</sup> Thus the Chinese government has veto power over all Hong Kong legislation. Additionally, half of the sixty members of the LegCo are still elected by the various constituencies.<sup>77</sup> Although this appears to grant the citizens more power, the increased power of the directly elected members of the LegCo is diluted by a provision allowing all laws introduced by the government to be passed by a simple majority of the LegCo, while bills introduced by an individual member of the LegCo must be passed by a super-majority vote: a majority of the members elected by the constituencies and a majority of the directly elected members must approve the bill.<sup>78</sup> Even if a bill introduced by an individual member is passed by a super-majority, it still must be approved by the Chief Executive<sup>79</sup> and the National People's Congress in Beijing before becoming law.<sup>80</sup> Thus, while the government of Hong Kong is more responsive to the wishes of its citizens than it was in colonial days, the government is only as responsive to its citizens as it chooses to be.

Shortly after the protests, it seemed that the mechanism for choosing the Chief Executive and members of the LegCo could be altered in 2007.<sup>81</sup> Although there were no firm plans for allowing the direct, popular election of the Chief Executive, many of the protesters demanded this right, and some felt it could become a reality sooner rather than later.<sup>82</sup> Feeling the pressure, the Hong Kong Chief Executive, Tung Chee-hwa, initially indicated that he would be open to electoral reforms in 2007 or even earlier.<sup>83</sup> If electoral reforms were to occur, it would be a welcome and promising sign that the Hong Kong government is committed to democracy and the rule of law.

Thus, while the government of Hong Kong has become much more accountable to its citizens over the past twenty years, further reforms are necessary. For example, doing away with constituencies and allowing all members of the LegCo to be elected from geographic districts would make the

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<sup>76</sup> *Id.* art. 17, 29 I.L.M. at 1523.

<sup>77</sup> *Suffrage on Sufferance*, *supra* note 31.

<sup>78</sup> See Basic Law, *supra* note 63, at Annex II (II), 29 I.L.M. at 1548.

<sup>79</sup> *Id.* art. 48(3), 29 I.L.M. at 1528.

<sup>80</sup> *Id.* art. 17, 29 I.L.M. at 1523.

<sup>81</sup> *Id.* Annex II (III), 29 I.L.M. at 1548.

<sup>82</sup> Julie Chao, *Hong Kong Upset over Subversion Bill*, ATLANTA J.-CONST., July 2, 2003, at A1, 2003 WLNR 6214977.

<sup>83</sup> See *HK's Tung Says Public Constitutions on Electoral Reform to Begin 2004*, AFX ASIA, Aug. 3, 2003 (relating Hong Kong Chief Executive Tung Chee-hwa's response to Democratic Party councillor Lai Chi-keong's query concerning a public consultation on electoral reforms, with Chee-hwa assuring their launch in 2004).

LegCo much more representative. Additionally, directly electing the Chief Executive would create more accountability. If these changes were made, many of the protesters' demands would be satisfied. Additionally, such reforms could signal to Taiwan that China is serious about democratic reforms and being more responsive to its citizens.

#### V. AN OPPORTUNITY SQUANDERED

The decision by Hong Kong Chief Executive Tung Chee-hwa to withdraw the proposal to implement Article 23 of the Basic Law in Hong Kong presented a major opportunity for China and Taiwan to come closer together. The proposal emboldened activists from many diverse backgrounds and from across the globe. In flexing their muscle, these groups showed the Hong Kong government that they treasure their freedoms and will go to great lengths to keep them. Additionally, the proposal also emboldened protesters to demand more accountability from their government and more democratic reforms. Both goals of the protesters were satisfied, as the proposal was withdrawn and the government hinted that further democratic reforms might be undertaken in the near future.<sup>84</sup>

In addition to the direct positive effects on Hong Kong, the actions of the Hong Kong and Beijing governments in withdrawing the proposal opened the door to fulfilling Taiwan's initial requirements contained in the Guidelines for National Unification. If the Chinese continue to embrace and uphold civil liberties and democracy in Hong Kong, the attitudes of many Taiwanese about reunification with China will likely change. If China can successfully implement the "one nation, two systems" model in Hong Kong by upholding freedom and democracy, Deng Xiaoping's vision of bringing the People's Republic of China and the Republic of China together peacefully could be within the grasp of the two nations. This is an opportunity which should not be squandered.

Within a very short time period, however, both the mainland Chinese and the Taiwanese squandered this opportunity to move closer together as tensions increased across the Strait of Taiwan. In late 2003, Taiwanese President Chen Shui-bian became more belligerent towards the mainland and began to make

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<sup>84</sup> Further protests have since taken place, with the protesters demanding more political accountability from their leaders and more democracy. See, e.g., Philip P. Pan, *Hong Kong Protesters March Again for Vote; Peaceful Gathering is Largest Since July Rally*, WASH. POST, Jan. 2, 2004, at A13.

overt threats of a formal declaration of independence.<sup>85</sup> While some believed this was mere political posturing by President Chen to aid in his spring re-election campaign,<sup>86</sup> his comments greatly angered Beijing.<sup>87</sup> Indeed, President Chen's comments also caused the United States, generally regarded as Taiwan's closest friend on the international stage, to rebuke him for acting in a unilateral manner to resolve Taiwan's future.<sup>88</sup> At the same time, however, President George W. Bush also told Chinese Premier Wen Jiabao that the United States would get involved if China were to act unilaterally to resolve the Taiwan question.<sup>89</sup> With President Chen's close and extremely controversial reelection and continued belligerence towards the mainland, tensions across the Strait are not expected to cool in time to take advantage of this unique opportunity.<sup>90</sup>

Meanwhile, in early 2004, Hong Kong Chief Executive Tung Chee-hwa indefinitely postponed the democratic reforms that would lead to direct elections of all LegCo members and of his Chief Executive position.<sup>91</sup> In April, the reforms were indefinitely postponed by the Standing Committee of the National People's Congress in Beijing, the first time that body had unilaterally interfered in Hong Kong's local affairs.<sup>92</sup> More ominous for relations between China and Taiwan, however, is the belief that China will now begin to assert itself more fully in Hong Kong's affairs, despite its promise to give Hong Kong "a high degree of autonomy."<sup>93</sup> While these

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<sup>85</sup> See Joseph Kahn, *Chinese Officers Say Taiwan's Leaders Are Near 'Abys of War,'* N.Y. TIMES, Dec. 4, 2003, at A7, 2003 WLNR 5651060.

<sup>86</sup> See Editorial, *Chinese Straits*, WALL ST. J., Dec. 3, 2003, at A16.

<sup>87</sup> Kahn, *supra* note 85 (quoting Chinese military officers who stated that "Taiwan's leadership had pushed the island toward an 'abyss of war,'" and also noting that "Chinese military officers do not write articles or speak out in official interviews without clearance from the highest levels").

<sup>88</sup> See *Bush Raps Taiwan over Referendum, as He Meets China's Premier*, CHANNEL NEWS ASIA, Dec. 10, 2003.

<sup>89</sup> *Id.*

<sup>90</sup> In fact, Taiwan's President Chen gave a speech on October 10, 2004, which he described as an overture to the mainland, but which was widely viewed as inflammatory. See *Speaking Across the Strait—Taiwan and China*, ECONOMIST, Oct. 16, 2004, at 38-39, available at 2004 WLNR 10890846.

<sup>91</sup> Philip P. Pan, *Hong Kong Postpones Timetable for Reforms; Beijing's Request for Talks Forced Delay, Officials Say*, WASH. POST, Jan. 8, 2004, at A15.

<sup>92</sup> See *U.S., U.K. Blast China Over Hong Kong Decree*, ASSOCIATED PRESS, Apr. 27, 2004, available at <http://www.foxnews.com/story/0,2933,118300,00.html>.

<sup>93</sup> Pan, *supra* note 91.

decisions obviously angered many citizens of Hong Kong,<sup>94</sup> they are equally likely to anger those in Taiwan who had hoped that China might be serious about introducing democracy in Hong Kong.

Considering these recent developments, it appears that the opportunity for China and Taiwan to move closer together in the wake of the withdrawal of the proposal to implement Article 23 has passed. While both China and Taiwan publicly claim to desire reunification, the two countries appear more eager to squabble than to take advantage of opportunities presented to them to reunify. Instead of applauding Hong Kong's and China's decisions to withdraw the Article 23 proposal, and acknowledging the newfound respect for democracy and freedom of expression in Hong Kong, Taiwan's President Chen chose to become more critical of, and more belligerent towards, the mainland. Thus, instead of taking advantage of the opportunity for a peaceful reconciliation and reunification, both Chinese and Taiwanese, as well as the rest of the world, now fear an armed conflict in the Strait of Taiwan between the two countries. As tensions across the Strait of Taiwan continue to increase and both sides become more bellicose, the world may one day regret allowing this opportunity for a peaceful solution to the "two Chinas problem" to pass by these nations.

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<sup>94</sup> *See id.* (comments of Protest Organizer Richard Tsoi).