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# *Hong Kong in China: The Promise of “One Country, Two Systems”. A Review of Roda Mushkat, One Country, Two International Personalities: The Case of Hong Kong*

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Roda Mushkat, *One Country, Two International Personalities: The Case of Hong Kong*. Hong Kong: Hong Kong University Press, 1997.

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**Reviewed by M.J.A. Cooray\***

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One and a half centuries of British colonial rule came to an end on 30 June 1997 in a unique fashion. Hong Kong did not follow in the footsteps of other former colonies which gained self-government and joined the Commonwealth of Nations. The whole territory of Hong Kong — comprised of Hong Kong Island and Kowloon, ceded to the British in perpetuity, and the New Territories, leased to Britain for 99 years — has reverted to Chinese sovereignty.<sup>1</sup> In 1972, the United Nation’s Decolonization Committee accepted China’s assertion, in which Britain acquiesced, that the settlement of the “Hong Kong question” was “entirely within China’s sovereign right”

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<sup>1</sup> Hong Kong Island was occupied by the British forces in 1841 pursuant to the discredited Convention of Chuenpi, which was not ratified by the British or the Chinese authorities. The British occupation was formalized by the *Treaty of Nanking* (29 August 1842, China-U.K., 93 Cons. T.S. 465). A Royal Charter was issued the same year proclaiming Hong Kong to be a Crown colony, to be administered by a Governor with the assistance of a Legislative Council and an Executive Council (*Charter of the Colony of Hong Kong*, 5 April 1843, reproduced in *Laws of Hong Kong*, app. IV). The rapid development of commercial activities necessitated territorial expansion and the British imposed another treaty on the Chinese, the *Convention of Friendship* of 1860, by which the British annexed Kowloon and Stonecutter’s Island (24 October 1860, China-U.K., 123 Cons. T.S. 71). The New Territories, which have absorbed Hong Kong’s bursting population and provided a large expanse of land for industrial and manufacturing activities, were leased by the Convention of Peking for 99 years in 1898 (*Convention Respecting an Extension of Hong Kong Territory*, 9 June 1898, China-U.K., 186 Cons. T.S. 310). For Hong Kong’s constitutional developments, see P. Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*, 2d ed. (Hong Kong: Longmans, 1994) and also P. Wesley-Smith, *Unequal Treaty 1898-1997: China Great Britain and Hong Kong’s New Territories* (Hong Kong: Oxford University Press, 1980).

and was to take place "in an appropriate way when conditions were ripe." Moreover, Hong Kong "should not be included in the list of colonial territories covered by the declaration on the granting of independence to colonial countries and people."

The first formal step in settling the "Hong Kong question" was taken when the *Sino-British Joint Declaration*<sup>3</sup> was concluded on 19 December 1984 and the ratifications were exchanged on 27 May 1985. This international agreement, which was duly registered by both parties with the Secretariat of the United Nations, stipulated that sovereignty over Hong Kong would pass to China on 1 July 1997. Although Hong Kong was thereby denied the right to self-determination, the preamble to the *Joint Declaration* makes it clear that the instrument was intended to bring about "a proper negotiated settlement of the question of Hong Kong ... conducive to the maintenance of the prosperity and stability of Hong Kong." The *Joint Declaration* further guaranteed that Hong Kong would retain its character for at least fifty years after 1997. China set out its basic policies regarding Hong Kong in the *Joint Declaration* and elaborated on them in annex I of the same document.

China undertook to incorporate its basic policies regarding Hong Kong as developed in Annex I of the *Joint Declaration* into the Basic Law of the Hong Kong Special Administrative Region.<sup>4</sup> China further guaranteed that those basic policies would remain unchanged for fifty years. China's basic policies regarding Hong Kong may be briefly stated as follows:<sup>5</sup>

Upholding national unity and territorial integrity and taking account of the history of Hong Kong and its realities, the People's Republic of China has decided to establish, in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, a Hong Kong Special administrative Region upon resuming the exercise of sovereignty over Hong Kong.

The Hong Kong Special Administrative Region ("H.K.S.A.R.") will be directly under the authority of the central Chinese government, but will enjoy a "high degree of autonomy" except in matters of foreign affairs and defense. It will be vested with legislative, executive and judicial powers. The laws of Hong Kong will remain basically unchanged. Hong Kong will be ruled by Hong Kong people. Hong Kong's current social and economic systems and its life-style will remain unchanged. Fundamental human rights will be respected. Hong Kong will retain its status as an international financial centre, a free port and a separate customs territory. It will have its own independent finances and will be responsible for maintaining public order within its territory.

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<sup>2</sup> See N. Jayawickrama, "The Right of Self-Determination" in P. Wesley-Smith ed., *Hong Kong's Basic Law: Problems and Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1990) 85-98 at 89-91.

<sup>3</sup> *Sino-British Joint Declaration on the Question of Hong Kong*, 19 December 1984, U.K.T.S. 1984 No. 26, reprinted in 23 I.L.M. 1366, also reproduced in the book under review at 195ff. [hereinafter *Joint Declaration*].

<sup>4</sup> 3d Sess., 7th N.P.C., 4 April 1990, reprinted in 29 I.L.M. 1511 [hereinafter Basic Law].

<sup>5</sup> The following summarizes art. 3 of the *Joint Declaration*, *supra* note 3.

The *Joint Declaration* laid the foundation which will allow the current legal, socio-economic and political structure to survive the transfer of sovereignty. The Basic Law has established a constitutional structure similar to that to which the people of Hong Kong are now accustomed. The Basic Law provides not only for internal convergence, but also guarantees that Hong Kong will enjoy a "high degree of autonomy" as a special administrative region of China.<sup>6</sup>

The elaboration by the Government of the People's Republic of China ("P.R.C.") of its "Basic Policies Regarding Hong Kong" in section I, annex I of the *Joint Declaration*, reiterated at article 5 of the Basic Law, states that "after the establishment of the Hong Kong Special Administrative Region the socialist system and socialist policies shall not be practiced in the Hong Kong Special Administrative Region and that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years."

Rhoda Mushkat's book, *One Country, Two Legal Personalities: The Case of Hong Kong*,<sup>7</sup> examines the international legal implications of Hong Kong's transition from a Crown colony to a special administrative region of the P.R.C. In this comprehensive work, Rhoda Mushkat presents an in-depth analysis of a number of central issues. In the first chapter, she examines Hong Kong's status in international law by way of introduction. Chapter 2 is devoted to issues relating to Hong Kong's jurisdictional competence. Chapter 3 examines the nature of Hong Kong's international legal obligations. Human rights in Hong Kong are the focus of chapter 4. Selected problems of treaty law that arise in relation to Hong Kong are discussed in chapter 5. In her final chapter, the author examines the relationship between international law and Hong Kong's domestic law.

### *Hong Kong's Status in International Law*

Hong Kong does not satisfy the traditional criteria for statehood and the consequent entitlement to be treated as a subject of international law. It is not a state, yet it has "stately" attributes.<sup>8</sup> It is not independent or sovereign but "highly autonomous". It is not a conventional member of the international community, yet is an important actor on the international stage.<sup>9</sup> In chapter 1, the author rightly argues that the restrictive traditional criteria of statehood are helpful, but should not be considered exclusive or conclusive. Rather, she suggests that an assessment of international legal status or personality should be conducted with reference to a range of factors, including "stately attributes",<sup>10</sup> international recognition and legitimacy,<sup>11</sup> international legal en-

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<sup>6</sup> *Supra* note 4, art. 2. The most comprehensive account of the Basic Law is found in Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997).

<sup>7</sup> (Hong Kong: Hong Kong University Press, 1997) [hereinafter Mushkat].

<sup>8</sup> *Ibid.* at 4.

<sup>9</sup> *Ibid.* at 4-6.

<sup>10</sup> Hong Kong has a permanent population living within a defined territory, a well organised government, and a considerable degree of latitude to engage in international action. Hong Kong has been described as a quasi-state (see James T.H. Tang "Hong Kong's International Status" (1993) 6 *The Pacific Review* 205).

titlements such as the right to self-determination, membership in the international civil society<sup>12</sup> and *sui generis* qualities.<sup>13</sup>

### *How Autonomous is Hong Kong?*

Within the Crown-colony framework in which the imperial government retained important powers of control over its colonial possessions, Hong Kong has succeeded over the years in gaining a significant degree of autonomy. The queen has, in recent years, been content to leave the governor the power of assenting to bills passed by the Legislative Council and has not invoked her powers to veto Hong Kong's legislation. Only a handful of U.K. laws apply in Hong Kong.<sup>14</sup> In 1985, the British government enabled the Hong Kong legislature to pass legislation that could supersede U.K. legislation extending to Hong Kong. In recent years, neither Letters Patent nor Royal Instructions have been amended in opposition to local wishes. In effect, there has been little visible interference by London in the way the Hong Kong government has handled Hong Kong's affairs. Hong Kong practices an executive-led system of government in which policy formulation and implementation lies with the executive. The role of the legislature has been to scrutinize government policy and its transformation into legislation as well as to monitor the implementation of laws. Furthermore, with its increasing number of directly elected members, the Legislative Council has asserted a more prominent role, for instance, by amending government-sponsored legislation and by introducing private member's bills where the government has feared to take the initiative.<sup>15</sup>

Chapter 4 of the Basic Law adopts the existing legislative and executive model, as modified to meet the needs of the China-Hong Kong relationship. It provides for the appointment of a chief executive at the helm of the Hong Kong government and of an Executive Council to assist the chief executive in policy-making. The Basic

<sup>11</sup> Hong Kong has been recognized explicitly (for instance by the *United States — Hong Kong Policy Act*, 22 U.S.C.A. c. 66, S. 5701(1)(B)) and impliedly (for instance by acceptance of Hong Kong's representative offices abroad) as an autonomous territory, although Hong Kong cannot claim to have been recognized as an independent sovereign state. Hong Kong's claim to "international legitimacy" is based on its well-developed legal system founded on the respect for the rule of law.

<sup>12</sup> "International civil society" refers to international and regional organizations, multilateral conventions and intergovernmental organizations (see Mushkat, *supra* note 7 at 3, n. 10).

<sup>13</sup> See generally *ibid.* at 4-11. As the author puts it: "In particular, Hong Kong could rely on its existence as a semi-autonomous/ 'quasi state' entity for over 150 years, its unprecedented capacity for international action, its prominent position as a global economic actor and the respect it is accorded by the world's governing institutions" (*ibid.* at 10-11) [footnotes omitted].

<sup>14</sup> For an interesting examination of the changing role of Hong Kong's legislature, see K. Chcek-Milby, *A Legislature Comes of Age: Hong Kong's Search for Influence and Identity* (Hong Kong: Oxford University Press, 1995).

<sup>15</sup> See generally *ibid.* For a detailed examination of the political framework in Hong Kong under British rule in this issue, see also S. Young, "The Meaning of the Right to Vote in Hong Kong" (1997) 42 McGill L.J. 649 at 653-678.

Law also provides for the election of a Legislative Council for the region.<sup>16</sup> The Government of the H.K.S.A.R. shall be the "executive authorities of Hong Kong" and its powers include the formulation and implementation of policies and the conduct of external affairs as authorized by the central Chinese government.<sup>17</sup> The chief executive is elected by an Election Committee and the nominated candidate is appointed by the central government.<sup>18</sup> The principal government officers are nominated by the chief executive for appointment by the central government.<sup>19</sup>

The Legislative Council's role is based on its recent practice and includes the following powers and functions: to enact legislation; to examine and approve budgets; to approve taxation and public expenditure; and to monitor the government and debate issues of public interest.<sup>20</sup> The Legislative Council is to be constituted by election. The central Chinese government has no powers over the formulation or dissolution of the Legislative Council.<sup>21</sup>

As regards the judicial system, the Basic Law makes only one significant change: it replaces the Privy Council with the Court of Final Appeal.<sup>22</sup> Provisions similar to those in force prior to 1 July 1997 regarding tenure of judicial officers have been incorporated into the Basic Law. The central Chinese government has no hand in making judicial appointments. The chief executive appoints judges on the advice of an independent judicial service commission and removes judges on the advice of a judicial tribunal.<sup>23</sup>

Article 1 of the Basic Law clearly states that the H.K.S.A.R. is "an inalienable part of the People's Republic of China" and article 2 states that the National People's Congress authorizes the H.K.S.A.R. to exercise "a high degree of autonomy". The phrase "a high degree of autonomy" is not easy to define but can be taken to mean that apart from the few areas where the H.K.S.A.R.'s competence is expressly curtailed by the Basic Law, Hong Kong is free to formulate policies and to implement them through legislative and administrative means enforced in turn by the judiciary. Having conceded the difficulty of defining "autonomy" and determining its scope in practice, Mushkat nevertheless agrees that

since an essential component of autonomy is the non-interference by the principal government in areas within the sphere of competence of the secondary entity, some element of measurability is afforded by reference to the insularity of the latter [H.K.S.A.R.] from potential central control.<sup>24</sup>

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<sup>16</sup> *Supra* note 4, art. 68.

<sup>17</sup> *Ibid.*, art. 62.

<sup>18</sup> *Ibid.*, art. 45 and annex I.

<sup>19</sup> *Ibid.*, art. 48(5).

<sup>20</sup> *Ibid.*, art. 73.

<sup>21</sup> *Ibid.*, art. 68.

<sup>22</sup> *Ibid.*, art. 82.

<sup>23</sup> *Ibid.*, arts. 88-89.

<sup>24</sup> Mushkat, *supra* note 7 at 16, adopting the line of reasoning in B.Z. Tamanaha, "Post-1997 Hong Kong: A Comparative Study of the Meaning of 'High Degree of Autonomy'" (1989) 20 *Calif. W. Int'l L.J.* 41.

Two important areas which, according to the Basic Law, remain within the jurisdiction of the central Chinese government are foreign affairs relating to the H.K.S.A.R. (article 13) and defense of the H.K.S.A.R. (article 14). Even within these two areas, jurisdiction is not exclusively conferred on the central government. Article 13 clearly states that “the Central People’s Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with [the Basic Law].” For instance, the H.K.S.A.R. can maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields (article 151). A close examination of the Basic Law’s provisions relating to foreign affairs, including chapter 7 — “External Affairs” — shows that the Basic Law aims to permit the H.K.S.A.R. to maintain external relations compatible with its being a part of China. In situations where the H.K.S.A.R. is permitted to be involved in external relations, however, Hong Kong must always be represented as “Hong Kong, China”.<sup>25</sup> It is also interesting to note that while the defense of the H.K.S.A.R. is the responsibility of the central Chinese government, the H.K.S.A.R. government is responsible for the maintenance of public order in the region.<sup>26</sup>

It is inevitable that the central government will have certain powers of control over the regional government. This may move the political centre of gravity to Beijing. However, the Basic Law provides some counter-balancing mechanisms. The Standing Committee of the National People’s Congress does not have the power, for example, to interpret provisions of the Basic Law in respect of matters outside Hong Kong’s autonomous jurisdiction unless the “interpretation will affect the judgement on the cases”. Moreover, the Standing Committee is required to consult the Committee on the Basic Law before giving an interpretation of the Basic Law.<sup>27</sup> It is expected that leading and respected lawyers and academics from Hong Kong will be appointed to the Committee on the Basic Law. Again, while the National People’s Congress can amend the Basic Law, “no amendment to [the Basic Law] shall contravene the established basic policies of the People’s Republic of China regarding Hong Kong”<sup>28</sup> as set out in Annex 1 of the *Joint Declaration*.

In light of all of these factors, the author cautiously concludes that “on balance — from a purely international legal perspective, and assuming the narrowest construction of potential constraints — the H.K.S.A.R. appears to have been endowed with a ‘high degree of autonomy’.”<sup>29</sup>

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<sup>25</sup> Basic Law, *supra* note 4, art. 151.

<sup>26</sup> *Ibid.*, art. 14.

<sup>27</sup> *Ibid.*, art. 158.

<sup>28</sup> *Ibid.*, art. 159.

<sup>29</sup> Mushkat, *supra* note 7 at 22.

### *Issues of Jurisdiction*

In her examination in chapter 2 of the jurisdictional competence of Hong Kong from an international point of view, the author deals with several intriguing issues. The extension of Chinese criminal jurisdiction to acts committed in Hong Kong is just one of the issues covered. The author sets out the theoretical possibility of such an extension and argues convincingly that given Hong Kong's autonomy, such interference is unlikely to occur or to be condoned.<sup>30</sup> The author then advocates a preventive approach in the form, for instance, of agreements concerning mutual assistance in criminal matters and extradition arrangements.<sup>31</sup> Other issues canvassed in chapter 2 include the effect of the handover of sovereignty in 1997 on Hong Kong's extradition relations; immunity from Hong Kong's jurisdiction; and the extraterritoriality of Hong Kong's laws, particularly in relation to civil aviation, merchant shipping and admiralty jurisdiction.<sup>32</sup>

### *Hong Kong's International Obligations*

The international legal implications of Hong Kong's status as a "country of first asylum" are the principal focus of chapter 3. The author contends that Hong Kong's unilateral declarations of 1979 and 1989 as well as the customary status of the fundamental humanitarian principles of *non-refoulement* and temporary refuge mean that Hong Kong's obligations to refugees are not dependent on Hong Kong's status before international law.<sup>33</sup> Thus, the change of sovereignty should be irrelevant and Hong Kong's status as a country of first asylum should not arbitrarily be withdrawn.<sup>34</sup> The author's comprehensive examination of refugees in Hong Kong concludes with the observation that the repatriation of refugees is incompatible with elementary considerations of humanity.<sup>35</sup> The protection of the environment constitutes the author's other primary focus with respect to Hong Kong's international obligations.<sup>36</sup>

### *Hong Kong and Human Rights*

One of the most controversial issues that has arisen due to the transfer of sovereignty is that of nationality. The author has therefore selected nationality and related issues for discussion in chapter 4, on Hong Kong and human rights. Mushkat provides a succinct analysis of complications arising from the P.R.C. rule against dual nationality for Chinese citizens<sup>37</sup> and the rather unclear status of non-Chinese perma-

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<sup>30</sup> *Ibid.* at 50-53.

<sup>31</sup> *Ibid.* at 53.

<sup>32</sup> *Ibid.* at 53-61.

<sup>33</sup> *Ibid.* at 87-88.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* at 99.

<sup>36</sup> See *ibid.* at 99-107.

<sup>37</sup> According to the Chinese memorandum annexed to the *Joint Declaration*, *supra* note 3, all Hong Kong Chinese compatriots are Chinese nationals.

nant residents of Hong Kong. The author's criticism that Britain has not done enough to safeguard the interests of those who might be left stateless as a result of the change of sovereignty may be met, to some extent however, by the British initiative to grant British citizenship to eligible members of non-Chinese minority communities.<sup>38</sup>

### *Problems of Treaty Law*

Although traditional views of international law require the legislative incorporation of treaties for them to be enforceable under municipal law, there is increasing recognition among scholars that international treaties should receive greater respect and recognition in municipal legal systems.<sup>39</sup> It is against this backdrop that the author chooses to examine the relationship between the *Joint Declaration* and the Basic Law in chapter 5. Having argued that the *Joint Declaration* is a binding treaty, the author submits that its interpretation should be neither British nor Chinese, but undertaken according to settled principles and practices of international law.<sup>40</sup> The author posits that the Basic Law is an attempt to implement the *Joint Declaration*. Thus, as she convincingly argues, the *Joint Declaration* should serve as the point of reference for determining the intentions of Britain and China regarding future developments in Hong Kong.<sup>41</sup>

The author discusses three additional issues which have been the subject of much debate in Hong Kong, namely whether the electoral reforms of 1994, the *Bill of Rights Ordinance*<sup>42</sup> and the 1991 agreement on the Court of Final Appeal could be viewed as violations of the *Joint Declaration*. Mushkat argues that hastening the pace of democratic reform through increased representation in the legislature and the elevation of human rights to constitutional status are consistent with the spirit of the *Joint Declaration*.<sup>43</sup> The author suggests, however, that the agreement between Britain and China restricting the number of overseas judges to one member of the five-member Court of Final Appeal is in breach of the *Joint Declaration*, which provides that the Court "may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal".<sup>44</sup> The author suggests that by interpreting the *Joint Declaration* in good faith and by giving an ordinary meaning to its terms in light of its object and purpose,

[i]t is doubtless that the "ordinary meaning" to be assigned to the relevant article confers on the Court of Final Appeal discretion to decide when to invite

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<sup>38</sup> *The British Nationality (Hong Kong) Act* (U.K.), 1997, c. 20, which came into effect on 19 March 1997, is intended to grant British nationality to eligible non-Chinese residents of Hong Kong who are British Dependent Territory citizens, British Overseas or British protected citizens and who would be stateless unless granted British citizenship.

<sup>39</sup> See e.g. R.Y. Jennings, "An International Lawyer Takes Stock" (1990) 39 I.C.L.Q. 513.

<sup>40</sup> See Mushkat, *supra* note 7 at 143-145.

<sup>41</sup> *Ibid.* at 48.

<sup>42</sup> *Hong Kong Bill of Rights Ordinance* (Cap. 383).

<sup>43</sup> *Supra* note 7 at 148-152.

<sup>44</sup> *Ibid.* at 157-59 citing article X of the *Joint Declaration*.



judges from other common law jurisdictions, whom and how many to invite. There is no qualification or proviso which could support other than an intention to grant the court full discretion regarding the exercise of its power.<sup>45</sup>

### *International Law and Municipal Law*

The author's discussion of the extent to which international law forms part of Hong Kong's domestic law is more than a mere repetition of what can already be gathered from text books on international law. Mushkat offers a thorough and interesting discussion of the relevant legal principles and practical considerations relating to Hong Kong's particular circumstances and experience. After reviewing the general relationship between international customary and conventional law and Hong Kong law, the author concludes as follows:

Coterminous with the *Joint Declaration* (and the Basic Law) — which provide for the maintenance of "laws previously in force in Hong Kong (*i.e.* the common law, rules of equity, ordinances, subordinate legislation and customary law)" — customary international law [will] form part of the H.K.S.A.R. laws, treaties will be enforceable by the local courts when "incorporated" into the domestic law by legislative acts, while unincorporated treaties should remain indirectly relevant either through the interpretation of statutes, the development of the common law, and the filling of lacunae or as a source of public policy and executive rules of decision.<sup>46</sup>

### *One Country, Two Systems: The Future*

Hong Kong's future as a distinct political and economic entity depends on the promise of one country, two systems that underlies the *Joint Declaration* and the Basic Law. Will Hong Kong, while becoming an integral part of China, continue to be different from the rest of China? China's Vice-Premier and Foreign Minister Qian Qichen said recently that China needs Hong Kong as a bridge to the rest of the world as it continues to develop and to liberalize its economy. He said that the one country, two systems policy serves "the interests of Hong Kong and also, very importantly, the interests of China, and, of course, a lot of foreign investors and the international community as a whole".<sup>47</sup>

Roda Mushkat's *One Country, Two International Personalities* provides an invaluable guide to the relationship between China and Hong Kong and the principles of international law that will help Hong Kong maintain its high degree of autonomy as a special administrative region of China. The continuity of Hong Kong's legal system, constitutional structure and way of life depends on a variety of socio-political factors. Legal considerations cannot exist independently of them. Roda Mushkat does not present legal considerations in a vacuum, but rather in the context of compelling

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<sup>45</sup> *Ibid.* at 157.

<sup>46</sup> *Ibid.* at 185-86.

<sup>47</sup> "HK will be our bridge to the world, says Qian" *South China Morning Post* (16 June 1997) 21.

socio-political realities. She has selected a number of relevant issues, many of them controversial, for detailed examination. Although, as the author herself concedes, her book is not a comprehensive work on all aspects of international law relating to Hong Kong, it is a thorough and critical discussion of many international legal issues related to Hong Kong's status and its relationships with China and the global community.

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