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# Conclusion or Observation on Autonomy Model as a Mean to solve Sovereignty Dispute: Integration or Separation?

An analysis of territorial autonomy based on the case of the Hong Kong  
Special Administrative Region

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## List of abbreviations

Art.	Article
CE	Chief Executive
CEEC	Chief Executive Election Committee
CFA	Court of Final Appeal
HKSAR	Hong Kong Special Administrative Region
ICCPR	International Covenant of Civil and Political Rights
LegCo	Legislative Council
NPC	National People's Congress
NPCSC	National People's Congress Standing Committee
PRC	People's Republic of China
SAR	Special Administrative Region
SARS	Severe Acute Respiratory Syndrome
SEZ	Special Economic Zone

## 1. Introduction

On July 1<sup>st</sup>, 1997, Hong Kong, the last vestige of British imperialism, was restored to Chinese sovereignty. The handover marked the end of British rule and the adoption of a unique model, developed in order to accommodate Hong Kong's return to a China that has a system totally different from the former authorities' capitalistic system. The „one country, two systems“ principle suggests Hong Kong to be both an inalienable part of China and a distinct entity with a high degree of autonomy. The „one country, two systems“ concept is a most complex and elaborate conjoining of an all-powerful sovereign with a small autonomous enclave. By the time of reversion, dire prophecies about Hong Kong's future took over. The main concern was that Hong Kong, under the watchful eyes of its Chinese sovereign, would not be able to enjoy its promised „high degree of autonomy“, and critics worried about the functioning of the Hong Kong autonomy model. The downright pessimistic predictions saw Beijing interfere in Hong Kong's political, legal and social life, trampling upon its freedoms. But do these predictions prove to be eligible? Does Hong Kong enjoy its promised „high degree of autonomy“ ten years after reversion? Which obstacles hamper the development and protection of Hong Kong's autonomy?

In the term paper at hand, I want to follow these questions. To introduce to the subject, I will first define the term of autonomy and then look at a theoretical approach focusing on territorial political autonomy *per se*. On the basis of Hannum and Lillich's conception of autonomy in international law, I will spot criteria referring to the autonomous status of a region. Then the interest may lay on China and its autonomy policy, focusing mainly on the Hong Kong Special Administrative Region (HKSAR) and its specific autonomy model. The case of Hong Kong shall be examined on the basis of the theoretical criteria outlined before. This approach shall allow to extract conclusions about the integrity of the „one country, two systems“ model in Hong Kong and permit to discuss the concept of territorial autonomy in general.

## 2. Theoretical approach

### 2.1. Defining Autonomy

Deriving from the greek „auto“ (self) and „nomos“ (rule), autonomy represents the principle of self-determination. Politically, the concept of autonomy applies to the status of recognized minority communities within larger social contexts, and particularly state formations<sup>1</sup>. In law theory, the term of autonomy appears in different legal contexts and is not a well-defined legal concept. In this paper, the term of autonomy is used as general term in the context of „territorial political autonomy“, which is defined as an arrangement aimed at granting special powers of legislation, administration and adjudication to a particular territory<sup>2</sup>. Thus, autonomy is regarded as granting internal self-government to a region and as partial independence from the influence of the national or central government<sup>3</sup>.

### 2.2. Concept of Territorial Autonomy onto Hannum & Lillich

As mentioned above, autonomy is not a well-fitted legal term. It has to be given concrete content in each case. Organizational as well as substantive rules for autonomous entities do not follow a given and uniform pattern and autonomy can be granted under different legal forms<sup>4</sup>. The degree of autonomy and the extent of the powers transferred to the autonomous authorities vary from case to case. Although each case of autonomy is different, an autonomous region should have certain status and powers.

In their broad analysis of different autonomies, Hannum and Lillich<sup>5</sup> identify a number of minimum governmental powers a territory would need to possess if it were to be considered as autonomous and self-governing. These correspond to the three powers of the state: The legislative, executive and judicial power.

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<sup>1</sup> Darity, 224 f.

<sup>2</sup> Lapidoth, 33, see also Heintze, 18.

<sup>3</sup> Heintze 1998, 7 f.

<sup>4</sup> Heintze 2003.

<sup>5</sup> Hannum / Lillich, 249 ff.

### 2.2.1. Legislative

There should exist a locally-elected body with some independent legislative power. The local legislative body should be independent within the realm of its competences which should include authority over local matters such as health, education, social services, local taxation, internal trade and commerce, environmental protection, zoning and government structure and organization. The legislative statute's decisions should not be subject to veto by the central government unless those decisions exceed its competence or are inconsistent with constitutional provisions.

### 2.2.2. Executive

There should be a locally-chosen Chief Executive who has general responsibility for the administration and execution of local laws or decrees. The appointment of the Chief Executive can possibly be subject to approval or confirmation by the central government.

### 2.2.3. Judiciary

There should be an independent local judiciary with power of jurisdiction over local matters. Members of the local judiciary may also be subject to approval or confirmation by the sovereign government. Questions which raise the realm of local power or concern the relationship between the autonomous and the central government may be considered by a local court in the first instance and may be appealed to a non-local court or a joint commission for final resolution.

However, autonomy does not imply that a territory must be completely independent and comparable with a sovereign State. Thus, the status of autonomy is not inconsistent with specific limitations on local power in areas of special concern to the sovereign government. Among those kinds of subordination to the central government are: Delegation of competence in the area of foreign relations and defence as well as in matters of immigration and the security of borders, the establishment of a common customs union or currency, the subordination to the highest judicial authority of the

sovereign State and the approval of any proposed amendment of the constitution or other basic constituent documents<sup>6</sup>.

### 3. Autonomy Regimes in the People's Republic of China

In China, the establishment of autonomy has been used for three purposes: a) to define and recognize minorities, b) to promote special economic zones and c) to reintegrate regions that have been under colonial power<sup>7</sup>. Accordingly, there can be identified at least three different kinds of autonomy models in China: Ethnic autonomy, special economic zones and special administrative regions. Since this paper mainly focuses on the third kind of autonomy - the Special Administrative Region of Hong Kong - the first two models are only described in short in order to provide an overview of China's autonomy policy.

#### 3.1. Ethnic Autonomy

Being a continent-sized country, the People's Republic of China can be thought as a multinational empire, holding together a remarkable number of ethnic groups<sup>8</sup>. In 1953, the Chinese government invited groups to submit claims being a minority and 400 groups did so. After „scientific investigations“, the State Council whittled down this number dramatically. Hence China classifies its population into fifty-five ethnic or nationality groups, of which fifty-four are regarded as minorities<sup>9</sup>. The preamble of the constitution of the PRC proclaims that China is a „unitary multinational state built up jointly by the people of all its nationalities“ and that the „state does its utmost to promote prosperity of all nationalities in the country“. But just as the state has played a debatable role in defining and recognizing minorities, so has it in establishing autonomy. Autonomy for minorities is part of a broader package which is elaborated in Art. 4 of the 1982 PRC constitution. It says: „Regional autonomy is practiced in areas where people of minority nationalities live in compact

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<sup>6</sup> Hannum/Lillich, 248 ff.

<sup>7</sup> Ghai 2000, 83.

<sup>8</sup> Pei, 315.

<sup>9</sup> Ghai 2000, 78 ff.

communities; in these areas organs of self- government are established for the exercise of the right of autonomy.“ Though five autonomous regions (Inner Mongolia, Xinjiang, Guangxi, Tibet and Ningxia), 31 autonomous prefectures, 124 autonomous counties<sup>10</sup> have been declared and the 1984 Regional Ethnic Autonomy Law grants a set of rights of self-administration to the minority regions<sup>11</sup>, the affiliated provisions do not add up to a system of autonomy as generally understood. As described above, territorial political autonomy does imply some significant powers of independent decision-making at the legislative, executive and judiciary level. Under authoritarian rule and the doctrine of „democratic centralism“, emphasizing state unity and sovereignty, the „self-governing“ autonomous ethnic entities hardly inhere such powers in reality<sup>12</sup>. The discretion of the organs of self-government is strictly limited. The organs of self-government are bound by the principles of the Chinese state system and most regulations and policies require the consent of higher state organs. Their financial and other resources depend on grants from the centre and for example, key positions in the autonomous areas are covered by the nomenclature<sup>13</sup>. The autonomous governments have to work ultimately under the „unified leadership of the State Council“<sup>14</sup>. Accordingly, ethnic autonomy in China bears little relation to the concept of autonomy outlined in the theoretical approach above.

### 3.2. Special Economic Zones

Within the framework of China’s „socialist modernization“ program and in order to animate the stagnant Chinese economy, five Special Economic Zones (SEZ) were established in the early 1980ies in order to allow greater economic freedoms. The main purpose was to provide grounds for experimentation with new economic forms and to revitalize the underutilized Chinese economic system through the introduction

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<sup>10</sup> Pei, 321.

<sup>11</sup> Pei, 320 considers the following rights of self-administration to be the most important powers granted to the regional governments in the 1984 Law on Regional Ethnic Autonomy: Limited legislative power (Art. 19), Limited power of appeal (Art.20) and local fiscal powers.

<sup>12</sup> Pei, 321.

<sup>13</sup> Ghai 2000, 77 ff.

<sup>14</sup> Art. 15 PRC Regional Ethnic Autonomy Law.

of foreign capital and technology in specific areas of the country<sup>15</sup>. Special laws were enacted in the Special Economic Zones to pursue this aim, establishing a different regime of laws and particularly commercial laws<sup>16</sup>. Even though the SEZ were assured „substantial autonomy“ and a simplified administrative structure encompassing planning administration, state banking and insurance<sup>17</sup>, neither policy nor administrative decisions are made by the SEZ authorities. The management of the zones comes under the authority of the provinces. Important policy decisions are made by the provincial authorities, who have to negotiate with and seek approval of the State Council and in some instances of the National People‘ Congress or its standing committee. It would seem that in the case of the Special Economic Zones, the Chinese authorities understand autonomy as arrangement to promote economic development, advancing the implementation of new economic rules but operating politically within a regime of national policies and institutions. Hence the special economic zones have little in common with the concept of autonomy onto Hannum and Lillich; they merely are instruments to carry out policy decided by the institutions of the central state<sup>18</sup>.

### 3.3. Special Administrative Regions

As part of the reunification strategy of the People‘ s Republic of China (PRC), Den Xiaoping - Chinese leader at that time - elaborated an innovative concept to reintegrate Taiwan to the mainland by the early 1980s. Den‘ s brainchild was to establish a Special Administrative Region under the principle of „one country, two systems“. The latter was designated to accommodate the economic, social and political system of Taiwan with the Leninist principles of political and economic organization in the mainland, providing „a high degree of autonomy“ to the aspired territory. Taiwan refused the reunification with the PRC. However, the „one country, two systems“ principle then was applied to the former colonies Hong Kong (in 1997) and Macau (in 1999). Since an examination of both cases Macau and Hong Kong would go beyond the scope of this paper, the following chapters discuss China‘ s restoration autonomy

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<sup>15</sup> Ota, 2 ff.

<sup>16</sup> Ghai 2000, 85.

<sup>17</sup> Ota, 5.

<sup>18</sup> Ghai 2000, 85 f.

policy by introducing and examining the case of Hong Kong only. Pei<sup>19</sup> describes Hong Kong as the only example of self-administration and de facto autonomy in China. In order to evaluate this characterization and analyze the Hong Kong model of autonomy fundamentally, the establishment of the Hong Kong Special Administrative Region shall be pictured from its very beginning.

## 4. The Hong Kong Special Administrative Region

### 4.1. Historical Background

As a result of the opium war, Hong Kong was standing under British rule since 1842 and the treaty of Nanjing pinned down the cession of the island of Hong Kong to the British crown in perpetuity. In 1898, the Second Convention of Peking determined the continuation of the lease for another 99 years<sup>20</sup>. Hong Kong was never thought to be a regular colony of the British empire. By the occupation of Hong Kong, Great Britain did not aim for territorial expansion, but for commercial benefits. Trade was the *raison d'être* of the „British“ Hong Kong and in order to advance the colony's economic power, the British occupants imposed only minimal regulations on Hong Kong's commercial and societal life. Consequently, Hong Kong happened to be one of the world's most advanced free market economies, a capitalistic system *par excellence*<sup>21</sup>.

By 1980, the oncoming expiration of the lease eventually led to negotiations about the restoration of the island of Hong Kong to the People's Republic of China. Since China was still ruled by traditional imperial and socialistic rules and posed a gross contrast to the progressive entity of Hong Kong, an unification under the existing Chinese system was inconceivable. The political system of China could still be thought as typical Leninist state in which neither democracy nor a significant role of the law in the protection of rights exists and the ways of life in mainland China and

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<sup>19</sup> Pei, 329 ff.

<sup>20</sup> Werner, 97 ff.

<sup>21</sup> Werner, 53.

the cosmopolitan city of Hong Kong differed substantially<sup>22</sup>. Yet in the first place, the integration of a highly efficient economic system in an extremely regulated socialistic economic system was quite out of question.

Though China, on its way to economic reforms and looking for access to the modern world, saw Hong Kong's restoration as a great opportunity to build a contact point to the capitalist world. Hong Kong was thought as a facilitator for mainland trade and investment, providing a training ground for China to learn and practice capitalist skills in a market environment<sup>23</sup>. Hence China had great interest in reintegrating Hong Kong under its sovereignty and at the same time desired the maintenance of the booming economic system on the island.

By signing the Sino-British Joint Declaration in december 1984, Chinese and British authorities determined the restoration of Hong Kong to China on July 1<sup>st</sup>, 1997. In line with Art. 31 of the constitution of the People's Republic China, the treaty anticipated the formation of a Special Administrative Region, which was going to enjoy a „high degree of autonomy“<sup>24</sup>. The socialistic politics of the People's Republic China were not going to be applied in Hong Kong and at least during the first 50 years, the capitalistic system was determined to be retained<sup>25</sup>. Thus, the Joint Declaration provided the basis for the implementation of the „one country, two systems“ model and paved the way for a fitting return of Hong Kong to Chinese sovereignty.

## 4.2. The Basic Law

On July 1<sup>st</sup>, 1997, the provisions of the Joint Declaration came into effect and Hong Kong was restored to Chinese sovereignty. The basic principles of the newly established Special Administrative Region are defined in the Basic Law, a constitution-like legal construct elaborated by a committee appointed by the Chinese govern-

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<sup>22</sup> Chan/Fu/Ghai, 5.

<sup>23</sup> So, 42.

<sup>24</sup> Preamble of the Basic Law.

<sup>25</sup> Joint Declaration, Art. 3 (1) and (2).

ment<sup>26</sup> that dominates all local statutes of the territory<sup>27</sup>. The Basic Law thus enjoys constitutional status and can be thought as the legal embodiment of the „one country, two systems“ model<sup>28</sup>. It aims to ensure the coexistence of capitalism and communism within one sovereignty and intends to keep the fragile balance between a powerful sovereign and a comparatively small autonomous entity<sup>29</sup>. Since the PRC constitution says nothing about the establishment and the competences of Special Administrative Regions aside from Art. 31, the Basic Law inheres the substantial role of defining the division of powers between the central authorities and the Hong Kong government. In the next section, the fundamental principles of the „one country, two-systems“ model enclosed in the Basic Law shall be presented first. In order to analyze Hong Kong’s institutions of autonomy in the light of Hannum and Lillich’s conception of autonomy outlined earlier, the Basic Law assignments of granting legislative, executive and judiciary powers to the Hong Kong SAR will be revealed in detail after.

### 4.3. General Principles

The Basic Law characterizes the HKSAR as a local administrative region of the People’s Republic of China, which enjoys a high degree of autonomy and comes directly under the Central People’s government<sup>30</sup>. According to provisions of the Basic Law, the socialist system and policies are not practiced in the SAR<sup>31</sup>. The laws in force are the Basic Law, laws previously in force (common law, rules of equity, ordinances, subordinate legislation and customary law) and the laws enacted by the legislation of the region. Apart from a few exceptions such as the Law on the National Flag or the Law on Territorial Sea, national laws shall not be applied in the HKSAR<sup>32</sup>. Further-

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<sup>26</sup> The Basic Law was elaborated by the 59 members of the Basic Law Drafting Committee. See Werner, 157.

<sup>27</sup> Basic Law Art. 11 sec. 2.

<sup>28</sup> Geping, 2.

<sup>29</sup> Chan/Fu/Ghai, 4.

<sup>30</sup> Art. 12 Basic Law.

<sup>31</sup> Art, 5 *ibid*.

<sup>32</sup> Art. 18 Basic Law.

more, Hong Kong shall be ruled by Hong Kong people<sup>33</sup> and while the regional government has been delegated powers over all internal matters, the Central People's government is responsible for foreign affairs relating to the HKSAR<sup>34</sup>.

Hence the Basic Law attributes Hong Kong legislative, executive and judicial power<sup>35</sup>. These three pillars of autonomy will be examined in the following section. For this purpose, the theoretical assumptions of Hannum's and Lillich's theory will be presented again in short. Subsequently, the case of Hong Kong will be analyzed step by step.

#### 4.4. The HKSAR Institutions of Autonomy

##### 4.4.1. Legislative

Hannum and Lillich take into consideration various factors when analyzing the autonomous status of a region. What concerns the legislative power of autonomous entities, they take account of the following fundamental points<sup>36</sup>:

- Independent legislative power: Is the local legislature one of general powers restricted only by specific grants of authority to the principal entity or does it enjoy limited authority subject to the reserved or residual powers of the sovereign state?
- Veto powers: Does the central government retain either a legislative or executive veto over local enactments? Is the veto power only applied on decisions of the regional legislature that exceed its competences or are inconsistent with constitutional provisions?
- Election: Is the legislative body chosen by local constituencies?

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<sup>33</sup> Art. 3 *ibid.*

<sup>34</sup> Despite the PRC's general responsibility for external affairs, there is a considerable delegation of powers in this area: Hong Kong can maintain its internal trading and other economic relations and is able to keep and enlarge its membership of international and regional economic and financial institutions and conclude commercial treaties with other states. For a detailed account see chapter VII Basic Law and Ghai 2000, 93.

<sup>35</sup> Art. 2 Basic Law.

<sup>36</sup> Hannum/Lillich, 224 ff.

Art. 17 of the Basic Law states that the Hong Kong SAR shall be „vested with legislative power“. The Legislative Council (LegCo) constitutes the legislative body of Hong Kong and is composed of 60 members. The LegCo holds the function to enact, amend or repeal laws, to approve budgets introduced by the government and to monitor the governmental activities in general<sup>37</sup>. Thus, the LegCo is not authorized to legislate completely independent. The central authorities can impose certain restrictions concerning the application of laws. According to Art. 17 of the Basic Law, laws enacted by the legislature of the Hong Kong SAR must be reported the Standing Committee of National People’s Congress. The NPC reviews the LegCo legislation and has the power of veto over laws which the Standing Committee deems to violate Basic Law provisions regarding responsibilities vested in the Chinese authorities. What is more, the Standing Committee may add or delete from the list of national laws applied to the Hong Kong SAR. The list includes laws relating to defense and foreign affairs as well as other matters outside the limits of the autonomy of Hong Kong<sup>38</sup>. And in the end, the power of amendment of the Basic Law is vested in the National People’s Congress<sup>39</sup>.

However, despite the apparent constraints, considering the LegCo’s legislative activities since 1997, Werner characterizes the scope of Hong Kong’s legislative competences as very widespread. Though its activities are restricted by the Chinese sovereign, the LegCo is able to create Hong Kong’s legislative background to a large extent<sup>40</sup>. Also, since it concerns only decisions that either contravene the Basic Law or go beyond the HKSAR’s competences, the NPC’s veto power does not conflict with Hannum and Lillich’s conception of an independent legislature.

Indeed, there is a critical point Hong Kong’s legislative system holds when assessing the situation according the principles mentioned in the conceptual analysis of autonomy onto Hannum and Lillich. Namely, the legislative cannot be thought as fully locally-chosen. One half of the 60 members of the LegCo is appointed through direct

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<sup>37</sup> Art. 73 Basic Law.

<sup>38</sup> See Art. 18 Basic Law and Annex III Basic Law.

<sup>39</sup> *ibid* Art. 159.

<sup>40</sup> Werner, 202.

election by geographical constituencies, while the other half is elected indirectly through functional constituencies (professional or special interest groups involved in the electoral process). The functional constituencies exist to „safeguard the prosperity and stability of Hong Kong“ and allow that „people from various walks of life can have balanced participation in political life“<sup>41</sup>. But in fact, the balanced participation argument can hardly stand up to a rational assessment. The functional constituencies model is neither based on a coherent theory of sector representation, nor does it follow a consistent approach to determine voting power. In most cases, the functional constituencies are business corporations which can be conveniently controlled by economic incentives and political pressures based in Beijing<sup>42</sup>. Comparing the voting activities of LegCo representatives elected by the geographical and functional constituencies between 1998 and 2003, a study reveals that the majority of functional constituency legislators tended to disagree with geographical constituencies amendments in favor of public sector accountability, human rights protection, democratic development and rule of law in the political realm<sup>43</sup>. Accordingly, Steinhardt states that the functional constituencies effectively represent a „bargain between Beijing and the Hong Kong business elite“<sup>44</sup>. Thus, the functional constituencies keep a debatable function and cannot be fully considered as a locally chosen legislative body.

#### 4.4.2. Executive

As in terms of legislative power, Hannum and Lillich take into consideration specific factors when studying the executive power of an autonomous region<sup>45</sup>:

- How and by whom is the Chief Executive selected?
- Responsibilities of the executive: Which authorities inheres the executive?

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<sup>41</sup> Chinese Vice-Premier Qian Qichen cited in Steinhardt, 100.

<sup>42</sup> Steinhardt, 98.

<sup>43</sup> Kwok, 409.

<sup>44</sup> Steinhardt 101, see also Ghai 2000, 94f.

<sup>45</sup> Hannum/Lillich, 219 ff.

- Political character of the executive: Does the executive represent the central government or the local government?

Art. 16 of the Basic Law says: „The Hong Kong SAR shall be vested with executive power. It shall, on its own, conduct the administrative affairs of the Region (...)“. The Chief Executive of the Region is the head of the government. He is selected by an 800 members election committee and appointed by the Central People’s government<sup>46</sup>. As the Electoral Affairs Commission informs, 664 members of the CEEC (Chief Executive Election Committee) are selected through functional constituencies and its subsectors, while 96 seats are determined ex-officio (members of the LegCo, Hong Kong deputies to the National People’s Congress, Hong Kong members of the National Committee of the Chinese People’s Political Consultative Conference) and 40 by appointment of religious bodies<sup>47</sup>. It is obvious that the method for the selection of the CEEC and the Chief Executive is an extremely complex matter that lacks transparency and is quite incomprehensible from the outside. But what can be said is that since their impact is even more profound, the functional constituencies actually hold an even more debatable role in the CE elections than in the LegCo elections. Particularly the composition of the 96 seats determined by posts indicates a linkage between Beijing and the Chief Executive elections<sup>48</sup>. Indeed, the Chief Executive is officially chosen by local constituencies, but in real terms, Beijing is not completely barred from the election process<sup>49</sup>.

The Chief Executive is vested with extraordinary competences. His powers and functions include the responsibility for the implementation of the Basic Law and other Laws, to decide on government policies and to implement the directives issued by the Central People’s government. The Chief Executive also plays an important role in appointing officials: He is assigned to appoint and to remove judges from the courts of all levels, members of the Executive Council and officials of the Civil Serv-

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<sup>46</sup> Annex I Basic Law.

<sup>47</sup> Steinhardt, p. 99, for a detailed account see Electoral Affairs Commission online.

<sup>48</sup> Steinhardt, 97 ff.

<sup>49</sup> As for the LegCo election, universal suffrage in the CE elections is the ultimate aim. After 2007, the method for the selection of the CE can be amended if there is such need (Art 45/ Annex I Basic Law). But for the 2008 elections, the NPC decided to adhere to the current election method. (Ahl, 65 f.).

ice. What is more, the Chief Executive is assigned to return Laws and budgets passed by the LegCo if he considers them to contradict the overall interests of the region. In cases of hardship, the Chief Executive is even allowed to dissolve the Legislative Council<sup>50</sup>. On his part, the Chief Executive cannot be dismissed by the LegCo, even on impeachment, except with the approval by Beijing<sup>51</sup>. Consequently, the head of Hong Kong's government has firm control over the legislative process through vetoes over bills and legislative proposals. This emphasizes the weakness of Hong Kong's legislative when comparing with the executive and it can be said that the internal political system is heavily weighted in favor of the Chief Executive<sup>52</sup>.

Caught in a difficult position, the Chief Executive is accountable to the Central People's government as well as to the HKSAR<sup>53</sup>. However, considering the debatable election method and the obvious aim of the Central People's government to establish a strong executive in Hong Kong, the Chief Executive is foremost responsible to the central government. He has to work well with Beijing, since the long term well-being of Hong Kong depends on that. Thus, even in the absence of direct intervention by Beijing, the Chief Executive is constrained to make sure his policies toe the line of the Chinese sovereign<sup>54</sup>. This assumption is undermined by the happenings in correlation with the departure of Hong Kong's first Chief Executive Tung Chee-hwa:

Soon after taking office in 1997, Tung faced several crises such as the huge financial collapse, the bird flu outbreak, the delayed opening of the new international airport and the SARS epidemic. Being unable to take action on these situations accurately and therefore lacking political legitimacy, Tung's popularity ratings reflected the Hong Kong people's dissatisfaction with his performance<sup>55</sup>. However, the Tung government crisis hit its peak in september 2002, just after he was confirmed for a second term of office. Immediately after his reelection, the announcement was made

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<sup>50</sup> Chapter IV Section 1 Basic Law.

<sup>51</sup> Ghai 2000, 93.

<sup>52</sup> *ibid*, 93.

<sup>53</sup> Art. 43 Basic Law.

<sup>54</sup> Wong, 58, see also Wai, 270 ff.

<sup>55</sup> Wong, 59.

that it was time for Hong Kong to deal with Article 23 of the Basic Law. Article 23 states that the HKSAR shall enact laws on its own to prohibit any act of treason, secession, sedition and subversion against the Central People's government. Draft legislation of the anti-subversion bill was put to the legislature in 2003. But Tung was confronted with huge public opposition for the proposal, since it was perceived to threaten fundamental rights and freedoms of Hong Kong's population. Facing a public rally of 500'000 participants against the Article 23 legislation, Tung was forced to withdraw the bill<sup>56</sup>. Thus, observers state that the decision to withdraw the bill from the legislative agenda must have been taken in Beijing, since the consequences of enforcing even an amended bill was too risky<sup>57</sup>. Ever since this event, Tung's popularity did not improve. In March 2005, he resigned, saying it was due to poor health. But signs that he may have slipped in favor with Beijing emerged already in december 2004, when Chinese President Hu Jintao used a public speech to admonish the Hong Kong government on its performance<sup>58</sup>.

According to these past happenings, it can be concluded that in some measures, the Chief Executive is relying on the Central People's government. Beijing articulates with Hong Kong's executive and some authors even characterize the Chief Executive as a „mainland puppet“ who is both unwilling and unable to stand up to the Chinese government<sup>59</sup>.

But returning to Hannum and Lillich's conception of executive powers in an autonomous region, Hong Kong's executive cannot be denoted as completely unsuitable. Although selected under debatable conditions, there is a Chief Executive in the Hong Kong SAR who has general responsibility for the administration and execution of local laws or decrees. By considering that the appointment of the Chief Executive can possibly be subject to approval or confirmation by the central government<sup>60</sup>, their conception of autonomy already doesn't require complete autonomy of the re-

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<sup>56</sup> Loh, 295 ff.

<sup>57</sup> *ibid*, 298.

<sup>58</sup> BBC News 10.03.2005, see also Willmann, 66 ff.

<sup>59</sup> BBC news 10.03.2005, see also Ghai 2000, 92 ff and Loh, 302 f.

<sup>60</sup> Hannum/Lillich, 5.

gional government. Moreover, Hannum and Lillich do not apply certain standards of distribution of power between the executive, legislative and judiciary in their theoretical approach. Therefore, although holding a very contended position in the local political system, Hong Kong's executive corresponds to Hannum and Lillich's conception of autonomy at least to some extent.

#### 4.4.3. Judiciary

In terms of judicial powers, Hannum and Lillich mention two main factors which indicate the degree of local judiciary<sup>61</sup>:

- The manner of selection of local judges, particularly the judges of the highest local court
  
- Whether or not the local judiciary is independent in the jurisdiction on local matters

The Basic Law states that the HKSAR shall be vested with independent judicial power, including that of final adjudication<sup>62</sup>. Thus, the Basic Law determines the establishment of a local Court of Final Appeal<sup>63</sup> and by claiming that Hong Kong courts shall exercise judicial power free from any interference, Art. 85 insists further on the establishment of an independent local judiciary.

The appointment of local judges of the courts at all levels is part of the Chief Executive's competences. According to Art. 88 of the Basic Law, judges of the HKSAR are appointed by the head of the government on recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors. In the case of appointment or removal of judges of the Court of Final Appeal, the Chief Executive shall in addition obtain the endorsement of the Legislative Council and report such appointment or removal to the Standing Committee of the National People's Congress (NPCSC) for the record<sup>64</sup>.

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<sup>61</sup> Hannum/Lillich, 228 ff.

<sup>62</sup> Art. 19 Basic Law.

<sup>63</sup> Art 81 *ibid*.

<sup>64</sup> Art. 90 Basic Law.

These election procedures accentuate the strong position of the Chief Executive already mentioned in the section about the HKSAR executive. Due to Beijing's strong articulation with the HKSAR executive, an involvement of the mainland authorities in terms of the selection of the Hong Kong judiciary can not be precluded. Safe this reservation, the election system of the Hong Kong judiciary corresponds to Hannum and Lillich's conception of autonomy. Considering that in their theoretical approach, local judiciary may even be subject to approval or confirmation by the sovereign government, the HKSAR method of selection of local judges seems to be in accordance with their idea of autonomy.

This argument does not count for the competences granted to the Hong Kong courts, however. Although the Basic Law declares that the local courts shall have jurisdiction over all cases in the region, it limits the scope of local judicial power by declaring that the power of interpretation on the Basic Law is vested in the Standing Committee of the National People's Congress. In adjudicating cases, the courts of the HKSAR only have the power to interpret the Basic Law on their own when the NPCSC authorized them in advance<sup>65</sup>. This means that the ultimate right to interpret the Basic Law lies in Beijing, while the Hong Kong courts only have the right to do so under certain circumstances. Thus, the two institutions with jurisdiction to interpret the Basic Law are the courts of Hong Kong (including the Court of Final Appeal CFA) and the NPCSC - two organs with distinct ideological settings that will inevitably disagree over questions of interpretation. Hong Kong retained its common-law system practiced under British rule when being reintegrated to the PRC. Yet the PRC is not a common-law jurisdiction and the rules of interpretation and the assumptions and presumptions in the two systems are not the same. Hence discordances are to be expected <sup>66</sup>.

This assumption is backed up by an incident in 1999, when the Chinese government intervened abruptly on a ruling of the Court of Final Appeal, referring to its right to

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<sup>65</sup> Art 158 *ibid.*

<sup>66</sup> Fu/Harris/Young, 1 f.

interpret the Basic Law<sup>67</sup>. By the end of January 1999, the Court of Final Appeal rendered a decision on the issue of right of abode (i.e. the status of a permanent resident in Hong Kong). The question was whether, under Article 22 and 24 of the Basic Law, mainland children born of Hong Kong parents have the right of abode in Hong Kong. The CFA held that the right of a child born to parents with the right of abode was not subject to mainland law on entry into Hong Kong and decided that a child had the right of abode even if the child was born before the parent acquired the right of abode. But the Hong Kong government did not like the ruling: It feared that a large number of children in the mainland would seek to settle in Hong Kong. Consequently, the Chief Executive requested the State Council to interpret the Basic Law, which amounted to an appeal to the NPCSC against the decision of the CFA. The interpretation delivered what the HKSAR government sought. The NPCSC stated that the mainland laws regulating the entry of a mainland person to Hong Kong applied to children entitled to a right of abode under the Basic Law and held that the legislative intent was to extend the right of abode to a child only if at the time of the child's birth a parent had acquired the right of abode already. Hence, the NPCSC reversed the judgement of the CFA. But the latter found that the right of abode was a core right under the International Covenant of Civil and Political Rights (ICCPR) as it applied in Hong Kong and taking away a core right by retroactive legislation was inconsistent with the Basic Law. In asserting its legal authority, the CFA declared that mainland laws inconsistent with the Basic Law would not be enforceable in Hong Kong and that it is for the courts of the HKSAR to determine whether an act of the NPCSC is inconsistent with the Basic Law. But Beijing did not accept the CFA decision implying that mainland laws inconsistent with the Basic Law would not be enforceable in Hong Kong. The mainland authorities asserted that Hong Kong courts could not challenge the power of the highest state organ National People's Congress (NPC). Consequently and in order to avoid an escalation of the constitutional crisis, the CFA clarified the part of its judgement which related to the NPC and the NPCSC

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<sup>67</sup> There are two other cases of interpretation of provisions of the Basic Law by the NPCSC: Interpretations on Constitutional Reforms in 2004 and the interpretation on the term of office of the Chief Executive in 2005. For reasons of time these cases can not be pictured here. However, they underscore the point that the Hong Kong judiciary enjoys little independence. See Ghai 2007, 134 ff.

and stated that it did not question the authority of the NPCSC and accepted its ruling<sup>68</sup>.

Indeed, the clash between the Mainland authorities and the CFA signified the substantial differences between the two legal and political systems of the mainland and Hong Kong. Through the exercise of the power of interpretation of the Basic Law, the Chinese government casted doubt on the principles of judicial independence and the power of final adjudication codified in the Basic Law<sup>69</sup>. China's political system is not governed by civil law and the NPCSC's function is not to maintain the rule of law. Instead, the NPCSC is primarily a political body under the direct control of the Communist Party and is geared to implement the Party's political interests. Hence the NPCSC's power to interpret the Basic Law can be categorized as part of a general power to make decisions, rather than an usurpation of Hong Kong's independent judicial power<sup>70</sup>. Even so, the Hong Kong judiciary cannot be denoted as independent body as Hannum and Lillich suggest in their theory. The CFA (along with its underlying legal system) is in a weak position and perpetually vulnerable to attacks from political institutions such as the Hong Kong government or the central authorities in Beijing<sup>71</sup>. The power of interpretation of the Basic Law vested in the NPCSC is not consistent with the conception of an independent local judiciary where local courts have the final jurisdiction and rule independently in accordance with the legal order of the region.

## 5. Conclusion

The establishment of the autonomous HKSAR in 1997 formed a union of two very different legal, political and social systems. For both Hong Kong and the mainland, autonomy was the favored approach for the restoration of Chinese sovereignty. The objective of the „one country, two systems“ was to separate the two distinct eco-

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<sup>68</sup> Ghai 2007, 132 ff, Chan, 413 ff, Wong 61 ff.

<sup>69</sup> Ghai 2007, 138.

<sup>70</sup> Fu/Harris/Young, 8.

<sup>71</sup> Wen, Perspectives Online.

nomic, political, legal and social systems; to grant „a high degree of autonomy“ to the HKSAR but also to achieve unity with mainland China. Compared to the two other forms of autonomy known in China, Ethnic Autonomy and the Special Economic Zones, the autonomy model as practiced in Hong Kong proved well. As mentioned in short above, the Ethnic Autonomy model as well as the Special Economic Zones have little in common with Hannum and Lillich’s concept of autonomy. The governmental competences granted to these regions are very narrow and they have no independent legislative, executive and judicial powers. In dealing with Hong Kong, however, being a region in a unique political and economic position, the central authorities have taken a comparatively extensive hands-off approach. In its role as the mainland’s window to the world, Hong Kong is the first „minority“ region in China to be regarded as autonomous and having more developed political and economic systems than the center<sup>72</sup>.

Assessing the situation in theoretical terms rather than comparing the different autonomy models in China, a less positive image of the degree of autonomy in the HKSAR emerges, however. While the legislative enjoys widespread competences and - safe in the area of the method of election of the LegCo - correspond to Hannum and Lillich’s conception of autonomy to a large extent, this can not be stated for the executive and the judiciary. The internal political system of the HKSAR is heavily weighted in favor of the executive and since the Chief Executive is apparently involved with Beijing from the moment of his election, the real degree of Hong Kong’s autonomy is casted in doubt. Focusing on the Hong Kong judiciary, this assertion is upheld. The right to interpret the Basic Law does not correspond to the independent judiciary Hannum and Lillich envisage in their theory. Instead, it constitutes a delicate point of intersection, which - as part of a general power to make decisions - allows the Chinese central authorities to influence Hong Kong’s legislation and legal system.

Hence, although indicating a great pass forward in China’s autonomy policy and attributing a high degree of autonomy compared to the other autonomous regions in China, the „one country, two systems“ model as applied in Hong Kong is not yet an

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<sup>72</sup> Fu/Harris/Young, 4.

indicative for the idea of territorial autonomy in general. There are still too many loopholes that allow the central authorities to interfere into Hong Kong's political and legal life. But in the end, what applies to many cases also applies to Hong Kong: Autonomy is a highly complex compromise solution between two parties pursuing their individual interests. Thus to develop further political and legal structures facilitating the coexistence of autonomy and sovereignty, a prevailing atmosphere of conciliation and goodwill is needed.

## Declaration of academic integrity

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