

2001

## Will Retrocession to a Communist Sovereign Have a Detrimental Effect on the Emphasis and Enforcement of Laws Protecting Hong Kong's Environment?: The Czech Experience as Contraposition

J. Cameron Thurber

Follow this and additional works at: <https://ir.law.fsu.edu/jtlp>



Part of the [Comparative and Foreign Law Commons](#), [Environmental Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Thurber, J. Cameron (2001) "Will Retrocession to a Communist Sovereign Have a Detrimental Effect on the Emphasis and Enforcement of Laws Protecting Hong Kong's Environment?: The Czech Experience as Contraposition," *Florida State University Journal of Transnational Law & Policy*. Vol. 11: Iss. 1, Article 2. Available at: <https://ir.law.fsu.edu/jtlp/vol11/iss1/2>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Journal of Transnational Law & Policy by an authorized editor of Scholarship Repository. For more information, please contact [efarrell@law.fsu.edu](mailto:efarrell@law.fsu.edu).

---

## Will Retrocession to a Communist Sovereign Have a Detrimental Effect on the Emphasis and Enforcement of Laws Protecting Hong Kong's Environment?: The Czech Experience as Contraposition

### Cover Page Footnote

Commercial Litigation Associate with Moyle, Flanigan, Katz, Raymond & Sheehan in West Palm Beach, Florida; J.D., Florida State University College of Law, 2001; M.P.A., Florida State University, 1991; B.S. in Criminology, Florida State University, 1988. The author would like to thank Professor Tahirih V. Lee for her comments and suggestions. This paper is dedicated to the memory of Dr. John C. Thurber for a lifetime of academic and professional inspiration.

**WILL RETROCESSION TO A COMMUNIST  
SOVEREIGN HAVE A DETRIMENTAL EFFECT  
ON THE EMPHASIS AND ENFORCEMENT OF  
LAWS PROTECTING HONG KONG'S  
ENVIRONMENT?**

**THE CZECH EXPERIENCE AS  
CONTRAPOSITION**

J. CAMERON THURBER\*

Table of Contents

|      |  |    |
|------|--|----|
| I.   | Introduction.....  | 39 |
| II   | The Czech Experience in Environmental Law.....   | 41 |
|      | A. Under Communist Rule .....  | 41 |
|      | B. After the "Velvet Revolution".....  | 43 |
| III. | Hong Kong Environmental Law Under British Rule .....   | 47 |
| IV.  | Overview of Chinese Environmental Law .....  | 50 |
|      | A. History.....  | 50 |
|      | B. Recent Developments.....  | 55 |
| V.   | Overview of Hong Kong Environmental<br>Law Since the Retrocession.....   | 57 |
|      | A. Overview of the Hong Kong Special<br>Administrative Region's Political and<br>Legal Structure Relating to Environmental Law ..... | 57 |
|      | B. Recent Developments.....  | 58 |
| VI.  | Looking Into the 21st Century .....  | 61 |

I. INTRODUCTION

On July 1, 1997, the governance of Hong Kong was transferred from British rule to the People's Republic of China. This transition had, and continues to have, major impacts in many areas of the law for the Hong Kong Special Administrative Region (HKSAR), China, and the international community. Although much of the focus of these legal changes has centered on economic, political, international and human rights laws, the

---

\* Commercial Litigation Associate with Moyle, Flanigan, Katz, Raymond & Sheehan in West Palm Beach, Florida; J.D., Florida State University College of Law, 2001; M.P.A., Florida State University, 1991; B.S. in Criminology, Florida State University, 1988. The author would like to thank Professor Tahirih V. Lee for her comments and suggestions. This paper is dedicated to the memory of Dr. John C. Thurber for a lifetime of academic and professional inspiration.

retrocession promises to have a significant impact on HKSAR environmental law, as well. In particular, conventional wisdom holds that the transition to a Communist state will have a negative effect on the emphasis and enforcement of laws protecting Hong Kong's environment.<sup>1</sup>

The change in Hong Kong sovereignty from a democratic, capitalist nation to an authoritarian Communist country contrasts with the trend of the past decade. Many countries, particularly in Central and Eastern Europe, have repudiated Communism in favor of democratic governments and free market economies. In the newly formed Czech Republic, the past decade of democracy has resulted in positive changes for laws protecting the environment.<sup>2</sup>

This article will examine the question of whether the transfer of Hong Kong's sovereignty to a Communist government will have the reverse effect on environmental law when compared with the Czech experience in shedding its Communist system. Although Hong Kong has been granted at least semi-autonomous rule as a Special Administrative Region, China still has ultimate authority over the Region and exerts great political and legal influence over it.<sup>3</sup> The thrust of this article, therefore, will be on the impact of national policies on both the national and regional emphasis and enforcement of laws protecting the environment, especially where the administration and enforcement of national policies has been locally delegated. The emphasis will generally be on political policies and their implications rather than on economic policies and implications, except where political decisions are made for economic reasons or are inextricably linked with economic policies. A brief overview of the current HKSAR political and legal structure, and how it interacts with that of mainland China, will be presented in Part V.

For the purposes of this article, the term "Communism" will primarily refer to a Marxist-Leninist, totalitarian and authoritarian form of government as once existed in Eastern Europe and currently exists in China.<sup>4</sup> References to democracy

---

1. Benjamin L. Liebman, *Autonomy Through Separation?: Environmental Law and the Basic Law of Hong Kong*, 39 HARV. INT'L. L.J. 231, 242 (1998).

2. Professors Eva Kruzikova & Vaclav Mezricky (Charles University Law Faculty, Czech Rep.), Address to The Florida State University College of Law on legal changes in the Czech Rep. since 1989 (Oct. 26, 1999).

3. Michael C. Davis, *Constitutionalism Under Chinese Rule: Hong Kong After the Handover*, 27 DENV. J. INT'L L. & POL'Y 275, 297-302, 304-05 (1999).

4. Jaques deLisle, *Political Alchemy, The Long Transition, and Law's Promised Empire: How July 1, 1997 Matters - and Doesn't Matter - in Hong Kong's Return to China*, 18 U. PA. J. INT'L ECON. L. 69, 79-80 (1997).

will generally imply the "liberal-democratic" political and governmental structures of countries of Western Europe and North America, and particularly the United Kingdom.<sup>5</sup>

The Czech Republic is well-suited for comparison with Hong Kong for three major reasons. As already mentioned, the diametrically opposed recent history in terms of change in the form and political ideology of national governance of the Czech Republic and Hong Kong provides the initial basis for comparison. Second, both Hong Kong and the Czech Republic have extensive environmental problems, particularly with pollution. Hong Kong is one of the most heavily polluted regions in the Pacific Rim,<sup>6</sup> and the Czech Republic is one of the most environmentally damaged countries of the former Soviet Bloc.<sup>7</sup> Finally, both Hong Kong<sup>8</sup> and the Czech Republic<sup>9</sup> have a political dilemma involving strong economic development interests at odds with the need for protection of the environment.

## II. THE CZECH EXPERIENCE IN ENVIRONMENTAL LAW

### A. Under Communist Rule

Following the end of World War II and a brief attempt at a democratic government in Czechoslovakia, in 1948 the Czechoslovak Social Democratic Party attained power and soon began the transition to a Communist state and Soviet satellite country.<sup>10</sup> The Communist government remained in power until the "Velvet Revolution" in late 1989, which resulted in democratic elections and reforms in early 1990.<sup>11</sup> During Communist/socialist rule, the government considered

---

5. *Id.*

6. Liebman, *supra* note 1, at 239.

7. David E. Madeo, *Environmental Contamination and World Trade Integration: The Case of the Czech Republic*, 26 LAW & POL'Y INT'L BUS. 945, 953 (1995).

8. Julie Bloch, *Conservation in a Concrete Jungle: Political, Legal and Societal Obstacles to Environmental Protection in Hong Kong*, 6 GEO. INT'L ENVTL. L. REV. 593, 593 (1994).

9. Elizabeth F. Brown, *In Defense of Environmental Rights in East European Countries*, 1993 U. CHI. L. SCH. ROUNDTABLE 191, 197-201 (1993).

10. LIBRARY OF CONGRESS FED. RESEARCH DIV., CZECHOSLOVAKIA: A COUNTRY STUDY, reprinted in FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 1-36 (Ihor Gawdiak ed.).

11. Radio Prague, *History Online: The Velvet Revolution*, available at <http://www.radio.cz/history/>, reprinted in FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 37-41 [hereinafter Radio Prague].

environmental problems a political threat.<sup>12</sup> According to Communist doctrine at the time, a polluted environment could not exist in a socialist country, as Communism and socialism were considered to be of "the most progressive order."<sup>13</sup> Basically, one reason the Communist government ignored pollution was because to admit to the problem would mean admitting Communism was not perfect.<sup>14</sup>

Additionally, the Communists placed much value in economic development and production while placing almost no value in environmental protection.<sup>15</sup> State-owned heavy industry in the centrally planned economies like Czechoslovakia wasted raw materials and energy and were only concerned about meeting production quotas.<sup>16</sup> There were, however, four major environmental laws and over 350 regulations on the books by the late 1970s, but these laws were widely ignored, as they were not enforced and financial sanctions served no deterrent effects.<sup>17</sup>

The result of forty years of the Communist Czechoslovakian government's absence of any real policy towards the environment (besides the unrestricted exploitation of natural resources and the environment) was environmental devastation on a grand scale.<sup>18</sup> The Czech Republic was one of the most heavily polluted and environmentally damaged countries in Europe by 1989, and was the worst in terms of air pollution.<sup>19</sup> More than sixty percent of Czechoslovakia's forests were (and still are) damaged from acid rain, a result of inefficient power plants that burned brown coal.<sup>20</sup> Fifty-seven percent of the country's drinking water was so polluted it was unhealthy.<sup>21</sup>

---

12. Vaclav Mezricky, *State of the Environment in the Czech Republic*, FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 138-139.

13. MINISTRY OF ENV'T OF THE CZECH REP. & CZECHOSLOVAK ACADEMY OF SCIENCES, ENVIRONMENT OF THE CZECH REPUBLIC 18-19 (1990), reprinted in FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 1-18 [hereinafter MINISTRY].

14. Margaret Bowman & David Hunter, *Environmental Reforms in Post-Communist Central Europe: From High Hopes to Hard Reality*, 13 MICH. J. INT'L L. 921, 926 (1992).

15. MINISTRY, *supra* note 13, at 11-12.

16. Mark Mininberg et al., *Promoting Economic Growth and Environmental Protection: The Institute for Sustainable Development*, 9 CONN. J. INT'L L. 69, 71 (1993).

17. Bowman & Hunter, *supra* note 14, at 938.

18. Madeo, *supra* note 7, at 942.

19. *Id.* at 953; Mezricky, *supra* note 12, at 140.

20. Mezricky, *supra* note 12, at 140-41.

21. *Id.* at 140.

### B. After the "Velvet Revolution"

The Velvet Revolution, or as the Czechs prefer, Listopadove udalosti (November events), was a six-week period between November 17 and December 29, 1989, in which the ruling Communist government in Czechoslovakia was driven out of power.<sup>22</sup> Democratic government and reforms replaced the old regime, and the country began a fast-paced transition to a market-based, capitalist economy.<sup>23</sup> Due in large part to the speed with which these reforms were taking place, in 1992 the Slovak people voted to split from Czechoslovakia and form the Slovak Republic with Bratislava as its capital.<sup>24</sup> Hence, the Czech Republic was born.

The new government, eager to join Western democratic capitalist countries as a trading partner, made environmental regulation and protection a priority during its early years in order to break down the international trade barriers the country's high level of pollution had erected.<sup>25</sup> Premier Vaclav Klaus and other pro-economic development and property rights factions resisted efforts to pass and strengthen laws to protect the environment, fearing such protections would slow economic growth, raise the unemployment rate, and interfere with property rights.<sup>26</sup> The Czech Constitution and the Charter of Fundamental Rights and Freedoms, which were written during this time, reflected a compromise between both the pro-environmental protection and pro-economic development sides. The environmentalists, who had a friend in former President Vaclav Havel, garnered an edge on environmental issues.<sup>27</sup>

Article 7 of the Czech Constitution states, "The state shall take care that the natural resources [of the Czech Republic] are exploited economically and that Nature's wealth is duly protected."<sup>28</sup> The Czech Constitution, ratified on December 16, 1992, incorporates the Charter of Fundamental Rights and Freedoms in Article 3.<sup>29</sup> This Charter, passed in 1991, prohibits using privately owned property in a way that damages nature or

---

22. Radio Prague, *supra* note 11, at 37.

23. *Id.* at 39-41.

24. *Id.* at 39.

25. Madeo, *supra* note 7, at 955-56.

26. Brown, *supra* note 9, at 197-201.

27. *Id.* at 200-01.

28. ÚSTAVA ČR [Constitution of the Czech Rep.] art. 7, reprinted in FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 54-73.

29. *Id.* at art. 3.

the environment beyond statutory limits<sup>30</sup> and prohibits anyone from exercising their rights to the extent it endangers or damages natural resources or the environment.<sup>31</sup> The Charter also guarantees the right to live in a "favourable living environment" and the entitlement to "timely and complete information [regarding] the state of the living environment and natural resources."<sup>32</sup> The Charter gives the citizens standing to enforce these rights through the Constitutional Court.<sup>33</sup>

Most Czech environmental protection laws were passed between 1990 and 1992 when the zeal to reform was still strong.<sup>34</sup> The General Environmental Protection Law, the Clean Air Act and the Act on the State Administration of Waste Management were passed in 1991; the Regulation on Waste Management Programs was also adopted by the government that year.<sup>35</sup> In 1992, a weak, Communist-era 1973 Water Act was amended and strengthened.<sup>36</sup> These new Czech environmental laws contained provisions for administrative fines and sanctions and a duty for polluters to clean up their environmental damage and restore the ecosystem to its natural state.<sup>37</sup> A 1990 amendment to the criminal code made endangering the environment a criminal offense, and a 1992 law made every Czech citizen responsible for preventing environmental pollution.<sup>38</sup>

After 1992, Premier Klaus began choosing weak environmental ministers.<sup>39</sup> Environmental problems faded as a political priority, displaced by a political emphasis on the economy and market reforms.<sup>40</sup> Public support for environmental protection measures waned with the political support for

---

30. Constitutional Act of January 9, 1991, instituting the Charter Of Fundamental Rights And Freedoms as a Constitutional Act of the Federal Assembly of the Czech and Slovak Federal Rep., art. 11, § 3, *reprinted in* FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 74-82.

31. *Id.* art. 35 § 3.

32. *Id.* art. 35 §§ 1, 2.

33. Bowman & Hunter, *supra* note 14, at 940.

34. Kruzikova & Mezricky, *supra* note 2; *see also* MINISTRY OF ENV'T OF THE CZECH REP., STATE ENVIRONMENTAL POLICY, Aug. 23, 1995, *reprinted in* FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 66-99.

35. Bowman & Hunter, *supra* note 14, at 940-43.

36. Madeo, *supra* note 7, at 956.

37. *Id.* at 957-58.

38. *Id.*

39. *Id.*

40. John F. Casalino, *Shaping Environmental Law and Policy of Central and Eastern Europe: The European Union's Critical Role*, 14 TEMP. ENVTL. L. & TECH. J. 227, 252-53.



economic reasons as well.<sup>41</sup> Laws making owners of private property liable for inherited environmental damage on their lands and requiring environmental audits had a negative effect on the privatization process where formerly state-owned companies were sold off to Czech citizens through a lottery, which in some cases also involved foreign investors.<sup>42</sup> Many industrial sites were heavily polluted from the Communist era.<sup>43</sup> Even though the state of the environment did improve somewhat during the mid-1990s and the overall level of pollution dropped between 1992 and 1994, this was primarily due to reduced economic output from decreased operations of heavily polluting factories rather than better environmental management.<sup>44</sup>

After 1996, political support began to improve again for environmental protection laws.<sup>45</sup> One of the main goals of the Czech government is to be admitted into the European Union (EU) early in the 21st Century. Political officials realize they will have to meet strict EU pollution limits and have environmental laws which reflect those of the EU through the approximation process.<sup>46</sup> Additionally, estimates that environmental degradation was causing the Czech Republic to lose five to seven percent of its gross national product each year emphasized the economic benefits of environmental protection.<sup>47</sup>

The environmental ministers have been "getting better" since 1996, which, when combined with the government's interest in obtaining admission to the EU, has resulted in a renewed political emphasis on environmental laws.<sup>48</sup> The current government, though, is still not quite environmentally friendly, as more than ten years after the fall of the Berlin Wall many government ministers are still members of the Communist Party.<sup>49</sup> The current environmental minister, Milos Kuzvart, while of an environmental protection mindset, is young and not yet politically

---

41. Brown, *supra* note 9, at 198-99.

42. Madeo, *supra* note 7, at 959-60. However, the Czech government promised to reimburse property owners for the costs of environmental clean-up under some limited circumstances.

43. *Id.* at 955.

44. Casalino, *supra* note 40, at 249.

45. Kruzikova & Mezricky, *supra* note 2.

46. *Id.*; see also Jennifer A. Vinson, Article Review, 11 GEO. INT'L ENVTL. L. REV. 812 (1999) (reviewing Andrej Hronec, *The Approximation of EU Environmental Legislation in the Czech Republic*, 8 EUR. ENVTL. L. REV. 17 (1999)).

47. Madeo, *supra* note 7, at 958-59.

48. Kruzikova & Mezricky, *supra* note 2.

49. *Id.* According to lectures by professors at Charles University Law Faculty attended by the author, Prague, Czech Rep., on May 25, 1999, the Communist Party still secures about 16% of the votes in Czech elections.

strong enough to stand up to the old ministers.<sup>50</sup> However, things are definitely looking better for the Czech environment following this renewed emphasis on enforcing laws that protect the environment.

Recently, a report by the Organization for Economic Cooperation and Development (OECD) praised government efforts to clean up pollution and protect the environment since 1990.<sup>51</sup> "Thanks to the importance attached to the environment . . . the expenditures on environmental protection rose to three percent of GDP [gross domestic product] in 1996, which is comparable to other OECD countries."<sup>52</sup> Air pollution has decreased fifty percent in the past ten years, but twenty-three percent of Czechs still breathe heavily polluted air.<sup>53</sup> The decrease in air pollution, a remnant of the Communist era, is primarily due to enforcement of the 1991 Clean Air Act, which resulted in massive investment to install pollution filters in factories.<sup>54</sup> The OECD report suggested even tighter enforcement of environmental laws through increasing fines and drawing up a new environmental policy for the Czech Republic, which outlines specific goals and deadlines for meeting EU environmental requirements.<sup>55</sup>

The transition from a Communist to a democratic government and free market economy has benefited the Czech environment through an increased emphasis on and enforcement of environmental protection laws, although much remains to be done. While the Czech Republic needs new laws on water protection, waste management and assessments on the impact of new construction on the environment, factories today produce ninety percent less sulfur emissions than ten years ago.<sup>56</sup> Environment Minister Kuzvart is hopeful these tough new laws will be enacted soon.<sup>57</sup> The Ministry of the Environment is principally responsible for the enforcement of environmental protection laws through the Czech Environmental Inspection

---

50. *Id.*; *EU Too Hard in Assessing Environment*, CZECH NEWS AGENCY, Oct. 27, 1999.

51. *Czech Environment Better, but Problems Persist*, CZECH NEWS AGENCY, Apr. 14, 1999 [hereinafter *Czech Environment*].

52. *Id.*

53. Katka Fronk, *Air Pollution Drops Dramatically*, THE PRAGUE POST, Apr. 28, 1999, available at 1999 WL 8731909.

54. *Id.* This statistic accounted for non-enforcement and economic factors in its determination.

55. *Czech Environment*, *supra* note 51.

56. *EU Too Hard in Assessing Environment*, *supra* note 50.

57. *Id.*

Agency, which also delegates this responsibility to nine regional offices.<sup>58</sup>

### III. HONG KONG ENVIRONMENTAL LAW UNDER BRITISH RULE

Hong Kong (which actually comprises the island of Hong Kong, Kowloon, Stonecutter's Island, and the New Territories) was acquired by Great Britain between 1842 and 1898 through treaties and a subsequent lease after the Opium Wars.<sup>59</sup> Throughout most of the tenure of Hong Kong as a British colony, environmental protection was largely ignored by the legal and political process.<sup>60</sup> The first laws related to sanitation were Good and Cleanliness Ordinances enacted by the local legislature in 1844 and 1845.<sup>61</sup> Other laws enacted by the British colonial government during the 18th century and into the early 19th Century dealt primarily with public health, hygiene, and land use rather than directly with environmental protection.<sup>62</sup> Interestingly, many public health laws were resisted by both the government and populace as an unnecessary intervention in an individual's behavior.<sup>63</sup>

In the early and mid-20th Century, most environmentally-related legislation dealt primarily with land use and zoning.<sup>64</sup> Only in the fifteen or so years before the end of British rule did Hong Kong begin to tackle environmental problems directly.<sup>65</sup> Hong Kong's regional government did not have an agency charged with environmental protection until 1986, when it established the Environmental Protection Department (EPD).<sup>66</sup> Hong Kong's first white paper on environmental problems was not published until 1991.<sup>67</sup> Due to these developments, as well as the "passage of many significant environmental laws over the past two decades,"<sup>68</sup> it appeared Hong Kong was finally getting serious about environmental protection.

---

58. VACLAV MEZRICKY, STATE ADMINISTRATION OF ENVIRONMENTAL PROTECTION, FLA. STATE UNIV. COLLEGE OF LAW 1999 SUMMER PROGRAM IN LAW AT PRAGUE, INTRODUCTION TO THE CZECH LEGAL SYS. AND INSTS. COURSE MATERIALS 143-47.

59. Peter Wesley-Smith, *The Future of Hong Kong: Not What It Used To Be*, 30 VAND. J. TRANSNAT'L L. 421, 423 (1997); see also Bloch, *supra* note 8, at 593.

60. Bloch, *supra* note 8, at 593.

61. Bryan Bachner, *Conserving a Legal Heritage in Hong Kong: Environmental Regulation After 1997*, 19 LOY. L.A. INT'L & COMP. L. REV. 363, 365 (1997).

62. *Id.* at 365-66.

63. *Id.*

64. *Id.* at 366-67.

65. *Id.* at 367-70.

66. Liebman, *supra* note 1, at 238.

67. *Id.* at 231.

68. Bachner, *supra* note 61, at 369.

However, despite the number of environmental laws on the books in the 1990s, enforcement was a problem.<sup>69</sup> A survey by the Hong Kong Environmental Law Association found that in 1993, the judiciary generally imposed only nominal fines on polluters (if they were caught in the first place), making it more financially beneficial for the offenders to pay the fines rather than stop polluting.<sup>70</sup> The two main reasons for this enforcement void were Hong Kong's emphasis on the economy over all else<sup>71</sup> and a lack of citizen concern or involvement in environmental policies.<sup>72</sup>

As with the Czech Communists and later political officials after the formation of the Czech Republic, many in Hong Kong viewed economic development and environmental protection as inconsistent goals,<sup>73</sup> despite the growing idea of sustainable development.<sup>74</sup> Industry and government always had a close relationship under British rule,<sup>75</sup> as Hong Kong's economic prosperity was Britain's most important interest in the colony.<sup>76</sup> Hong Kong regional government policies have reflected the British government's interest.<sup>77</sup> Environmental groups gave Chris Patten's government failing marks in protecting the environment and controlling pollution in the mid-1990s,<sup>78</sup> and had similar concerns at that time about Tung Chee-hwa's future leadership which was to follow the retrocession.<sup>79</sup>

Citizen apathy and the inability of public interest groups to gain enough power to influence local or British national politics are closely related to the government's choice of economy over environmentalism. A 1996 study by a Hong Kong environmental group revealed the region was dead last among 39 other countries

---

69. Patricia Young, *Patten Fails Green Test*, S. CHINA MORNING POST, Sept. 25, 1995, at 6; see also Bloch, *supra* note 8, at 628-29; Liebman, *supra* note 1, at 238-39.

70. Kathy Griffin, *Survey Shock Over Low Pollution Fines*, S. CHINA MORNING POST, June 9, 1994, at 4; see also Liebman, *supra* note 1, at 240.

71. Liebman, *supra* note 1, at 240; see also Bloch, *supra* note 8, at 600, 629; Davis, *supra* note 3, at 297.

72. Liebman, *supra* note 1, at 239-40.

73. Brown, *supra* note 9, at 127-201; Bloch, *supra* note 8, at 629.

74. Edward D. McCutcheon, *Think Globally, (En)act Locally: Promoting Effective National Environmental Regulatory Infrastructures in Developing Nations*, 31 CORNELL INT'L L.J. 395, 409 (1998) (citing THE WORLD BANK, WORLD DEVELOPMENT REPORT 1994 - INFRASTRUCTURE FOR DEVELOPMENT 1 (1994)). Sustainable development seeks to balance economic progress and development with environmental concerns.

75. Bloch, *supra* note 8, at 629; see also Bachner, *supra* note 61, at 372.

76. Liebman, *supra* note 1, at 240.

77. Bloch, *supra* note 8, at 600-01.

78. Young, *supra* note 69, at 6; see generally Patricia Young, *Rare Court Victories in Japan Spur HK Action*, S. CHINA MORNING POST, July 17, 1995, at 5.

79. Fiona Holland, *Green Warning to Candidate*, S. CHINA MORNING POST, Dec. 5, 1996, at 4.

and territories in ranking public support for environmental issues.<sup>80</sup> Unlike the United States, there were only a handful of pro-environmental organizations existing in Hong Kong prior to the transition in governance, and public interest groups had little influence in the territory's politics.<sup>81</sup> This lack of public participation is partially due to domination of the legislature by business and industry advocates.<sup>82</sup>

On its home turf, the British government was much more progressive in terms of environmental protection. Some of the first environmental acts date back to the mid-19th Century, and an 1868 case opinion by the House of Lords imposed strict liability for polluting another's land in certain instances.<sup>83</sup> Although they have not always been consistently enforced, British law provides for strict administrative and criminal penalties and civil remedies for harm resulting from environmental damage.<sup>84</sup> The Environmental Agency (for England and Wales) and the Scottish Environmental Protection Agency were formed in 1996, consolidating the previous duties of several forerunner agencies and coordinating local authorities.<sup>85</sup> The United Kingdom has also been a signatory to many international environmental law treaties and agreements, and applied most of these to Hong Kong.<sup>86</sup>

In relating British environmental policies in the Hong Kong territory to those in the British Isles, the United Kingdom placed more emphasis on and more strictly enforced environmental protection laws at home than in Hong Kong. Except for applying international treaties of which it was a signatory, the British government took a laissez-faire attitude toward Hong Kong and left the development and enforcement of environmental protection laws to the local colonial government.<sup>87</sup> In contrast, the British government put great emphasis on the economic development of the region to the detriment of the environment.<sup>88</sup>

---

80. Liebman, *supra* note 1, at 239-40.

81. Bloch, *supra* note 8, at 607.

82. Bachner, *supra* note 61, at 372.

83. Valerie M. Fogleman, *English Law - Damage to the Environment*, 72 TUL. L. REV. 571, 573-75 (1997).

84. *Id.*

85. *Id.* at 576; Stephen Tromans, *Developments in the European Community and United Kingdom*, 8 NAT. RESOURCES & ENV'T 43, 44 (Spring 1994).

86. Liebman, *supra* note 1, at 261-63; *see generally* Bloch, *supra* note 8, at 609.

87. Bachner, *supra* note 61, at 370.

88. Bloch, *supra* note 8, at 601.

Arguably, a firm legal foundation for protecting Hong Kong's environment was established late under British rule,<sup>89</sup> but overriding political concerns, as well as public and government apathy, generally led to non-enforcement of these laws and regulations.<sup>90</sup> As a result, Hong Kong has been called "[a] first world economy with a third world environment"<sup>91</sup> and Victoria Harbour "a vast sewage and waste pit."<sup>92</sup> The government of the United Kingdom, a first world democracy, has shown that "democracy may not always result in pro-environmental decisions . . . ."<sup>93</sup> through its governance of the Hong Kong territory.

#### IV. OVERVIEW OF CHINESE ENVIRONMENTAL LAW

##### A. History

China is a relative latecomer in the area of environmental protection law compared to the United Kingdom and other Western democracies, but, like the Czech Republic and Hong Kong, has increasingly done more in this area over the past twenty years. Traditionally, China has relied more on community morals and customs to resolve disputes and check behavior than a structured legal system.<sup>94</sup> Informal mediation has long been favored over formal means for dispute resolution.<sup>95</sup> Under the danwei system, similar to the tithings and frankpledge of medieval England,<sup>96</sup> each citizen belongs to a self-policing unit that monitors each person's behavior.<sup>97</sup>

Following the Communists' rise to power in 1949, limited environmental laws were passed in 1956, 1957, and 1962.<sup>98</sup> However, the Great Leap Forward and the resulting emphasis on development and productivity led to massive ecological

89. Bachner, *supra* note 61, at 363; see also Bloch, *supra* note 8, at 594.

90. Bachner, *supra* note 61, at 370; Griffin, *supra* note 70, at 4.

91. Liebman, *supra* note 1, at 239 (citing Mei Ng & Lisa Hopkinson, *A Little Green Dragon?*, 5 *ASIAN J. ENV'T MGMT.* 75, 75 (1997)).

92. *Id.* (citing *Reclamation of the Harbour - Fate or Folly?*, *URB. PLAN. & ENVTL. R.*, Dec. 1995, at 1).

93. Bloch, *supra* note 8, at 607-08.

94. William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 *STAN. ENVTL. L. J.* 125, 125 (1997).

95. Michael Palmer, *Environmental Regulation in the People's Republic of China: The Face of Domestic Law*, *CHINA Q.*, Dec. 1, 1998, at 788, available at 1998 WL 31507442.

96. J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 8 (1990).

97. Alford & Shen, *supra* note 94, at 133.

98. Palmer, *supra* note 95.

destruction and pollution.<sup>99</sup> The importance and enforcement of environmental laws was virtually nil until the early 1970s.<sup>100</sup> This neglect, occasionally interspersed with the passage of impotent environmental legislation, corresponds with the Czech experience under Communism.

A second phase of Chinese environmental law and policy began following its attendance at the 1972 United Nations Conference on the Human Environment in Stockholm, Sweden.<sup>101</sup> In 1973, China's first national conference on environmental protection resulted in the first somewhat comprehensive law in this area.<sup>102</sup> A more comprehensive environmental protection law was passed in 1979, and "[t]he general drift towards safeguarding environmental welfare" led to mention of environmental protection and pollution control in Article 11 of the 1978 Constitution and Article 26 of the 1982 Constitution.<sup>103</sup>

The Chinese government accelerated its emphasis on protecting the environment through legislation by passing comprehensive environmental protection laws in 1979 and 1989 and an air pollution law in 1987.<sup>104</sup> A slew of civil and criminal environmental laws and regulations have been passed by the National People's Congress (NPC) in the past decade,<sup>105</sup> and in some cases serious offenders may now face capital punishment for environmental crimes such as dumping toxic wastes.<sup>106</sup> A number of administrative and enforcement agencies have also been established at the national and local levels of government.<sup>107</sup> The State Environmental Protection Administration (SEPA) is the main national agency, and provincial and local governments have local Environmental Protection Bureaus (EPB's) to implement national laws and policies.<sup>108</sup>

In 1993, Qu Geping, head of the National Environmental Protection Agency (NEPA; the forerunner of SEPA) predicted that because of the government's emphasis on environmental

---

99. *Id.*

100. *Id.*

101. *Id.*; Paul J. Smith, *Free Trade and the Environment: Will Free Trade Save China's Environment?*, 1 *BUFF. J. INT'L L.* 27, 29 (1994).

102. Palmer, *supra* note 95.

103. *Id.*; see also Alford & Shen, *supra* note 94, at 129.

104. Palmer, *supra* note 95; Alford & Shen, *supra* note 94, at 129-31, 133.

105. Palmer, *supra* note 95; Alford & Shen, *supra* note 94, at 129-31; Zhang Hongjun & Richard J. Ferris, Jr., *The Environmental Regulatory Regime of the People's Republic of China: A Primer Addressing Practical Concerns of Foreign Investors*, 27 *ENVTL. L. REP.* 10228 (1997).

106. Hongjun & Ferris, *supra* note 105.

107. Palmer, *supra* note 95.

108. *Id.*

protection through the China Action Programme, "pollution [would] be under control, that cities [would] be cleaner and that China's ecology greatly improved [by the end of the 20th Century]."<sup>109</sup> Instead, China was the world's third leading carbon dioxide emitter in 1993 and may be first by 2025.<sup>110</sup> Twenty percent of deaths in China's urban areas were caused by environmental hazards in 1994, and respiratory disease from pollution was the second leading cause of death in China in 1996.<sup>111</sup> China's water pollution problem is at a critical level.<sup>112</sup> These statistics beg the question: Why have China's environmental problems worsened over the past twenty years in spite of the proliferation of environmental protection laws?

The answer to this question is primarily threefold, although these main reasons are inter-related. First, like in Hong Kong, environmental issues in China have taken a back seat to economic and production concerns due to political policies favoring development of the economy.<sup>113</sup> Central planning in the past largely ignored environmental concerns.<sup>114</sup> During the reign of Deng Xiao Ping, China sought to quadruple its gross national product during the last twenty years of this century, and China's gross domestic product hovered around ten percent during the 1980s and early 1990s.<sup>115</sup> Mou Guangfeng, Deputy Director of the Policy and Legal Department of SEPA, claimed, "China's high-speed economic growth has put enormous pressure on its environment."<sup>116</sup> Xie Zhenhua, Beijing's EPB director, said, "China's environment [has] been sacrificed" in order to have more economic development.<sup>117</sup>

Additionally, in 1994 it was estimated that it would cost the PRC \$300 billion to control pollution and clean up the environment, an expense China said it could not afford.<sup>118</sup> Free trade advocates argue poor, developing countries can not afford to protect the environment until they reach a point where they can

---

109. Zhu Baoxia, *Ecological Protection the State's Top Task*, CHINA DAILY, Feb. 3, 1993, at 11, available at 1993 WL 10862926.

110. Alford & Shen, *supra* note 94, at 126-27.

111. Smith, *supra* note 101, at 28-29; Alford & Shen, *supra* note 94, at 126.

112. Michael A. Gheleta, *Sustaining the Dragon: Rational Use and Protection of China's Water Resources in the Twenty-First Century*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 221, 224 (1998).

113. *Id.*; Chan Wai-Fong, *Economic Growth Leaves a Dirty Trail*, S. CHINA MORNING POST, Nov. 29, 1994, at 11; see also Smith, *supra* note 101, at 40-41.

114. Smith, *supra* note 101, at 28.

115. Gheleta, *supra* note 112, at 223.

116. Wai-Fong, *supra* note 113, at 11.

117. *Id.*

118. *Id.*



feed their people, at which time they then become willing to pay for environmental protections.<sup>119</sup> China's political policies on this issue were summed up when Premier Li Peng stated China will only be able to participate more in global environmental protection after it has improved economically, become more developed, and eliminated poverty.<sup>120</sup>

To encourage economic development, China had made it easier for foreign industry to locate polluting factories in China.<sup>121</sup> These foreign companies were often lured by China's comparatively lax environmental laws, *inter alia*, and this led a NEPA official to characterize China as a "dumping ground" for businesses that cannot meet their own countries' environmental laws.<sup>122</sup> This proliferation of foreign-owned factories in China, while providing for much-needed employment and economic development, has severely worsened China's environmental problems.<sup>123</sup>

Second, a period of decentralization over the past twenty years has also affected the national government's ability to emphasize enforcement of environmental and pollution laws.<sup>124</sup> Responsibility for environmental quality now generally rests with local governments,<sup>125</sup> but local EPB's have limited power to enforce national laws; for example, under a 1987 air pollution law, they could issue warnings and fines to polluters but could not shut the offending company down without national approval.<sup>126</sup> Regional governments are also generally slow to obey commands from the central government.<sup>127</sup>

Economic priorities of regional and local governments also have taken priority over national, regional and local environmental policies and laws. Local "EPB's are often compromised by government policies of economic growth and local pressures to ignore environmental standards."<sup>128</sup> Local governments, which often have a financial interest in local enterprises or foreign industry located in the area, will often

---

119. Smith, *supra* note 101, at 36.

120. *Id.* at 41.

121. Tom Korski, *Lax Laws Allow Foreign Pollution to Relocate*, S. CHINA MORNING POST, Mar. 4, 1997, at 12.

122. *Id.*

123. Smith, *supra* note 101, at 31.

124. Bachner, *supra* note 61, at 383-84.

125. Alford & Shen, *supra* note 94, at 131.

126. *Id.*

127. *Id.* at 134; Liebman, *supra* note 1, at 279.

128. Palmer, *supra* note 95.

tolerate polluting factories.<sup>129</sup> Furthermore, local EPB's must rely on locally-raised revenues, which frequently come from local industries.<sup>130</sup>

Lack of meaningful fines and corruption at the local level further creates problems.<sup>131</sup> Polluters figure it is often more cost-effective to pay fines than correct their behavior when they compare the expense of modifying their operations, or a reduction in profits from such modifications, to the amount of any fines to which they may be subject.<sup>132</sup> Corruption also leads to regulatory confusion and inconsistent enforcement,<sup>133</sup> as the degree of corruption may vary greatly between the regulators and officials with whom a polluter must do business.

Third, environmental protection laws themselves are somewhat to blame. They are often viewed more as policy statements than "real" primary laws.<sup>134</sup> The environmental protection laws on the books are frequently vague and sometimes contradictory.<sup>135</sup> An emphasis on social harmony rather than formal legal codes has pervaded Chinese history, making law less important than in other countries, particularly those in Europe and the West.<sup>136</sup> Lawyers play a relatively unimportant role in the enforcement of Chinese environmental laws, which remains principally an administrative rather than legal area.<sup>137</sup> There is also a dearth of judicial decisions interpreting environmental laws, and this can lead to inconsistencies in enforcement.<sup>138</sup> In addition, Chinese law itself can be an impediment to the enforcement of environmental laws, as, for example, a citizen must be directly affected by another's action to have standing in a Chinese court.<sup>139</sup>

---

129. Wai-Fong, *supra* note 113, at 11.

130. Alford & Shen, *supra* note 94, at 142.

131. Smith, *supra* note 101, at 40.

132. *Id.*; Palmer *supra* note 95.

133. Hongjun & Ferris, *supra* note 105; *see generally* deLisle, *supra* note 4, at 84.

134. Palmer, *supra* note 95.

135. Hongjun & Ferris, *supra* note 105; *China Must Map Out Strategy on Resources*, CHINA DAILY, Nov. 6, 1997, available at 1997 WL 13647816 [hereinafter *China Must Map Out*].

136. John Copeland Nagle, *The Missing Chinese Environmental Law Statutory Interpretation Cases*, 5 N.Y.U. ENVTL. L.J. 517, 523-24 (1996).

137. Palmer, *supra* note 95.

138. Nagle, *supra* note 136, at 517-18; Palmer, *supra* note 95.

139. Palmer, *supra* note 95.

### B. Recent Developments

Very recently, though, there have been some encouraging developments evidencing that the national emphasis on environmental policy may be starting to pay off and trickle down to regional and local governments. In 1998, China spent \$10 billion, or one percent of its gross domestic product, on environmental protection.<sup>140</sup> While China reportedly now needs at least \$54 billion for a new environmental protection project, it already plans to have spent \$22.5 billion by the beginning of the 21st Century on the Trans-Century Green Project.<sup>141</sup> These expenditures will finance 1600 new environmental projects.<sup>142</sup>

Qu Geping admitted in 1998 that the patchwork of environmental laws was not working properly and needed revision.<sup>143</sup> Contradictions in these laws were pointed out at a 1997 conference, and the research director for the NPC Environmental and Resource Protection Committee (ERPC) called for a "mother law" to coordinate the myriad environmental protection laws.<sup>144</sup> At the ERPC forum held November 4-7, 1999, it was announced the NPC Standing Committee had recently promulgated six environmental laws and thirteen environmentally-related resource protection laws.<sup>145</sup> ERPC Vice Chairman Zou Jiu-hua emphasized that enforcement of the laws was as important as the laws themselves.<sup>146</sup>

The environment, and especially the enforcement of environmental protection laws, seems to be gaining ground as a priority not only on the national level, but on the local level as well.<sup>147</sup> As of February 1998, China had shut down approximately 60,000 severe polluters out of 70,759 deserving of enforcement attention,<sup>148</sup> and almost one thousand factories had been closed down along one highly polluted river alone.<sup>149</sup> Zou Jiu-hua called for local governments to strengthen their own environmental

---

140. *Foreign Firms in China Adjust to New Environmental Standards*, CHINAONLINE, July 29, 1999, available at 1999 WL 20785588 [hereinafter *Foreign Firms*].

141. *A Profile of China's Environmental Protection Industry*, ASIA PULSE, Feb. 19, 1998, available at 1998 WL 2949375 [hereinafter *A Profile*].

142. *Id.*

143. *NPC to Revise Environmental Laws*, CHINA BUS. INFO. NETWORK, May 28, 1998.

144. *China Must Map Out*, *supra* note 135.

145. Wang Chi & Yang Junjiang, *NPC Forum on Environmental Protection Held in Guiyang*, WORLD NEWS CONNECTION, Nov. 7, 1999, available at 1999 WL 26460445.

146. *Id.*

147. *Foreign Firms*, *supra* note 140.

148. *A Profile*, *supra* note 141.

149. Liebman, *supra* note 1, at 242.

protection regulations and to more strictly enforce these laws,<sup>150</sup> and it appears local governments are getting more strict with polluters.<sup>151</sup> There is a rising tide of complaints about pollution by the public.<sup>152</sup> Surprisingly, even though the Chinese government has traditionally been wary of grassroots public involvement in policy issues,<sup>153</sup> the central government appears to have finally realized the importance of involving the public in preventing further pollution and destruction of the environment.<sup>154</sup> Zou Jiu-hua stated, "sustainable development depends on the support and participation of the masses," and called for public education and more environmental obligations on the part of the citizenry.<sup>155</sup>

Most importantly in terms of long term political policy, the Chinese government now seems to realize, as the Czech government did in the mid-1990s, that environmental problems affect the "sustained and coordinated development of the entire national economy."<sup>156</sup> Pollution is an obstacle to economic development,<sup>157</sup> as the World Bank estimated that pollution costs the Chinese economy eight percent of its annual gross domestic product per year.<sup>158</sup> Premier Li Peng said, "[E]nvironmental protection is a basic state policy which is directly related to China's long-range development."<sup>159</sup> It would be easy to characterize these recent reports as merely being the same lip service that has been paid to environmental protection previously. However, in 1999, Eastman Kodak closed one of its plants in Wuxi because new environmental laws would not have made continued operations cost-effective.<sup>160</sup> Perhaps even more telling of China's renewed emphasis on the environment is a report that the New Zealand forestry industry, which has been suffering from severe financial problems, is pleased China's new, tough laws halting timber production will result in more business for them.<sup>161</sup>

---

150. Chi & Junjiang, *supra* note 145.

151. *Foreign Firms*, *supra* note 140 (citing attorney Richard Ferris of the International Practice Group of Beveridge & Diamond, Washington, D.C.).

152. *Id.*

153. See generally deLisle, *supra* note 4, at 82-83.

154. Chi & Junjiang, *supra* note 145.

155. *Id.*

156. *Id.*; see also MINISTRY, *supra* note 13, at 68-70.

157. *A Profile*, *supra* note 141.

158. Chi & Junjiang, *supra* note 145.

159. *Top Legislator Stresses Need to Preserve Environment*, XINHUA ENGLISH NEWSWIRE, Aug. 6, 1998, available at 1998 WL 12175575 [hereinafter *Top Legislator*].

160. *Foreign Firms*, *supra* note 140.

161. *Chinese Move Offer Forestry Fresh Hope*, N.Z. HERALD, July 8, 1998, available at 1998 WL 9239318.

These are signals that China is beginning to focus more on rational allocation of resources instead of "predatory exploitation of nature."<sup>162</sup>

## V. OVERVIEW OF HONG KONG ENVIRONMENTAL LAW SINCE THE RETROCESSION

### A. Overview of the Hong Kong Special Administrative Region's Political and Legal Structure Relating to Environmental Law

The Basic Law, Hong Kong's current constitutional document, is the product of the 1984 Sino-British Joint Declaration regarding the impending transition of power.<sup>163</sup> Drafted in the mid- to late-1980s and enacted by the NPC in 1990, China had a strong hand in drafting the Basic Law.<sup>164</sup> In general, the Basic Law makes no significant mention of environmental policies or laws.<sup>165</sup> Article 7 makes land and natural resources state property, but makes their management the responsibility of the HKSAR.<sup>166</sup> Article 97 allows the HKSAR to set up organizations for "environmental sanitation."<sup>167</sup> Article 109 requires the HKSAR government to make policies in regard to protecting the environment.<sup>168</sup>

The Basic Law also has provisions that may allow the central government to pressure or force the HKSAR government to bring its environmental laws into line with those of the PRC. Under Article 17, the NPC Standing Committee can invalidate laws passed by the Hong Kong legislature if the laws are not in conformity with the "Central Authorities" relationship with the HKSAR.<sup>169</sup> Under Article 159, the NPC is empowered to amend the Basic Law.<sup>170</sup> However, there may be inherent contradictions in other Articles of the Basic Law as to how much Beijing can directly and overtly influence HKSAR environmental policies.<sup>171</sup>

162. *China Must Map Out*, *supra* note 135.

163. Davis, *supra* note 3, at 277-78.

164. *Id.* at 278, 305.

165. Liebman, *supra* note 1, at 237-38.

166. *Id.* at 237-38; *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Adopted on April 4, 1990, 3rd Session, 7th National People's Congress of the P.R.C. [hereinafter *Basic Law*].

167. Liebman, *supra* note 1, at 237-38; *Basic Law*, *supra* note 166.

168. Liebman, *supra* note 1, at 237-38; *Basic Law*, *supra* note 166.

169. *Basic Law*, *supra* note 166; Davis, *supra* note 3, at 291.

170. *Basic Law*, *supra* note 166.

171. Liebman, *supra* note 1, at 291.

Despite the provisions for Chinese sovereignty that are present in the Basic Law, Hong Kong's political structure is actually more autonomous under Chinese rule than it was under British rule because of the Basic Law.<sup>172</sup> "Colonial Hong Kong's laws and government structures have hardly been models of liberal-democratic ideals," and local citizens had virtually no input on British policies and only a limited voice in local laws.<sup>173</sup> As a colony, Hong Kong shared in the freedoms but not the democratic process of the United Kingdom.<sup>174</sup> Colonial laws permitted censorship and the suppression of political dissent, although the British government did allow a Bill of Rights Ordinance and other reforms to be enacted in the decade prior to the retrocession.<sup>175</sup>

China may not need or want to directly and overtly exert its influence over Hong Kong, especially since other countries with a financial interest in Hong Kong might react negatively to such action.<sup>176</sup> By the time of the retrocession, "China [had] put in place a post-1997 political regime occupied almost entirely by its loyal lieutenants."<sup>177</sup> Tung Chee-hwa was named Chief Executive of the HKSAR by a PRC-backed Selection Committee.<sup>178</sup> HKSAR leaders, therefore, generally favor mainland policies, and Beijing officials thus have no reason to interfere with HKSAR policies.<sup>179</sup> The bottom line is that Chinese national policies can and do affect Hong Kong policies, especially in areas like the environment where the Basic Law is relatively silent.

### B. Recent Developments

Three years after the retrocession, Hong Kong remains very polluted. Air pollution is estimated to be responsible for two thousand deaths each year in Hong Kong.<sup>180</sup> Tung Chee-hwa admitted recently that Hong Kong still has serious problems in terms of its living environment.<sup>181</sup> For example, three-quarters of

---

172. deLisle, *supra* note 4, at 79-80; see also Bloch, *supra* note 8, at 601; Wesley-Smith, *supra* note 59, at 440-41.

173. deLisle, *supra* note 4, at 79-80; see also Bloch, *supra* note 8, at 601.

174. Bloch, *supra* note 8, at 601.

175. deLisle, *supra* note 4, at 80-81; Davis, *supra* note 3, at 286-87.

176. Davis, *supra* note 3, at 275-76.

177. *Id.* at 305.

178. deLisle, *supra* note 4, at 99.

179. Davis, *supra* note 3, at 306-07.

180. *Even Bronze Lions Wear Antipollution Masks in H.K.*, ASIAN ECON. NEWS, May 31, 1999, available at 1999 WL 8874147.

181. Michael Wong, *Tung's World-Class Vision*, H.K. STANDARD, Oct. 7, 1999, available at 1999 WL 28655283.

the sewage discharged by Hong Kong into the harbor has been only minimally treated at best.<sup>182</sup> Despite having enacted a number of environmental protection laws and having established enforcement mechanisms for these laws, Hong Kong's continued obsession with trade and the economy has suppressed vigorous enforcement of these laws.<sup>183</sup> Comparatively, China appears to be taking a more aggressive approach in enforcement of environmental laws, and in terms of political emphasis on the environment and environmental protection laws, China has already surpassed Hong Kong.<sup>184</sup>

Rob Law, Director of Environmental Protection for the HKSAR, claimed the total level of pollution-related fines has risen dramatically over the past few years.<sup>185</sup> Other environmental officials, though, concede anti-pollution laws are lax and ineffective.<sup>186</sup> There is a lack of coordination among government departments engaged in environmental protection.<sup>187</sup> Operators of illegal diesel fuel stations are often back in operation within a day of being arrested,<sup>188</sup> and an Environmental Impact Assessment Ordinance (EIAO), which received international acclaim when passed in 1998,<sup>189</sup> is facing challenges.<sup>190</sup> Professor Lam Kin-che, director of the Chinese University's Centre for Environment, said "action more than words was needed in

---

182. John Gittings, *Kowtow Command Angers Hong Kong Democrats*, THE GUARDIAN (London), Oct. 9, 1999, available at 1999 WL 25738006; Julie Schmit, *Hazardous to Your Health - and Pocketbook*, USA TODAY, Oct. 22, 1999, at 14A.

183. Liebman, *supra* note 1, at 240-43; see generally Bachner, *supra* note 61, at 370-71, 382.

184. See generally Liebman, *supra* note 1, at 240-43; Bachner, *supra* note 61, at 370-71, 382.

185. Senior HK Official on Environmental Protection, XINHUA ENGLISH NEWSWIRE, Feb. 23, 1999, available at 1999 WL 7920495 [hereinafter *Senior HK Official*].

186. Schmit, *supra* note 182, at 14A.

187. David Evans, *Green Lobby Warns of Economic Growth Threat*, S. CHINA MORNING POST, June 9, 1999, at 1, available at 1999 WL 19485370.

188. Glenn Schloss, *Jail Urged for Fuel Cheats "Lenient Penalties" Allow Illegal Filling-Station Operators to Thrive*, S. CHINA MORNING POST, Nov. 22, 1999, at 4, available at 1999 WL 28999219.

189. Senior HK Official, *supra* note 185.

190. Plato K.T. Yip, Asst. Dir., Friends of the Earth, *Government Cutting Environmental Corners* (letter to the editor), S. CHINA MORNING POST, Nov. 27, 1999, at 14, available at 1999 WL 30350177. The Environmental Impact Assessment Ordinance requires developers to apply for environmental permits and subject the undeveloped land to studies before construction can begin. The ordinance has been criticized for not being stringent enough and allowing the EPD too much discretion, which is often skewed in favor of developers. See Ravina Shamdasani, *Activists Claim Law Investigation Guidelines Allow Developers Free Hand to Push Through Projects Environment Reports "Flawed,"* S. CHINA MORNING POST, Oct. 2, 2000, at 4, available at 2000 WL 26864428.

combating environmental problems.”<sup>191</sup> In a recent opinion poll, eighty percent of respondents said the HKSAR government has not done enough to control pollution.<sup>192</sup>

Arguably, there are some signs that HKSAR policies will have more emphasis on environmental protection and the enforcement of environmental laws in the future. Tung Chee-hwa, in his 1999 annual policy address to the Hong Kong legislature, said “tough action” was needed to reduce pollution, and acknowledged pollution affected Hong Kong’s economy by deterring foreign investors.<sup>193</sup> He also said the principle of sustainable development (recently embraced by China) was an important concept for the HKSAR to adopt, and proposed allocation of \$100 million to educate the public about the concept.<sup>194</sup> Within a fortnight of Tung’s speech, South China’s Guangdong Province and the HKSAR announced formation of a special cooperation group for sustainable development.<sup>195</sup> Furthermore, to support his claim that “[i]t is high time we faced up to the problem,” Tung Chee-hwa announced a \$30 billion, 10-year environmental plan for the HKSAR.<sup>196</sup> New measures calling for an eighty percent reduction in vehicle emission pollutants by 2005 and a new sewage treatment system were also recently announced for Hong Kong.<sup>197</sup>

Critics, however, said Tung Chee-hwa’s focus on the environment in his speech was only to avoid contentious political issues, especially regarding demonstrations marking the Tiananmen Square massacre of 1989.<sup>198</sup> Democratic party members and pro-democracy groups, who in the past tended to be advocates of greater environmental protection,<sup>199</sup> said the speech was “hollow” and “boring.”<sup>200</sup> Shortly after his speech, Tung Chee-hwa said on a call-in radio show that the “[g]overnment

---

191. Tessi Cruz, *Joint Fight Against Pollution*, H.K. STANDARD, Oct. 7, 1999, available at 1999 WL 28655299.

192. Ambrose Leung Tsung-Yan, *Economic Concerns Beat Environment*, S. CHINA MORNING POST, Dec. 3, 1999, at 2, available at 1999 WL 30350771.

193. Gittings, *supra* note 182.

194. Wong, *supra* note 181.

195. *Guangdong, HKSAR Cooperating in Environmental Protection*, WORLD NEWS CONNECTION, Oct. 15, 1999, available at 1999 WL 26453841.

196. Chris Yeung, *Tung’s \$30b Green Crusade – Environment and Education Targeted ‘to Make SAR World-class City,’* S. CHINA MORNING POST, Oct. 7, 1999, at 1, available at 1999 WL 26575740.

197. Gittings, *supra* note 182.

198. *Id.*

199. Bloch, *supra* note 8, at 280.

200. Wong, *supra* note 181.



could not rush into tough legislation."<sup>201</sup> And his recent call for the HKSAR's incorporation of sustainable development was actually first made in 1993 by officials in the colonial government.<sup>202</sup>

## VI. LOOKING INTO THE 21ST CENTURY

The Czech experience over the past decade evidenced positive effects on environmental law and policy resulting from a transition from a Communist to a democratic constitutional government. But Hong Kong's transition from rule by a Western democratic country to a Communist state will probably not have a negative, or reverse, effect on Hong Kong's environmental laws and policies in the foreseeable future. After examining the Czech transition from Communist rule (which devastated the country's environment) to a democratic government (which resulted in significant progress being made in cleaning up the environment and protecting it from further harm), one might reasonably apply a reverse analogy and expect a transition to Communist rule to negatively impact the emphasis and enforcement of laws protecting Hong Kong's environment. Professor Bryan Bachner of the City University of Hong Kong argued the transition to Chinese sovereignty would not bode well for Hong Kong's environment.<sup>203</sup>

However, unlike the Czech Communists, the current Chinese Communist regime at least seems to be more enlightened about environmental protection, although this enlightenment is probably primarily due to China's realization of the importance and interdependence of environmental impact, especially pollution and environmental degradation, on the economy. Chinese leaders, and now perhaps some HKSAR leaders, have also finally seemed to realize the importance of citizen involvement in environmental protection and the enforcement of these laws.<sup>204</sup> Of course, there are some troubling developments as well, such as the Three Gorges Dam project,<sup>205</sup> but the overall

---

201. Ng Kang-Chung & Jimmy Cheung, *Green Campaign Will Create Jobs*, S. CHINA MORNING POST, Oct. 8, 1999, at 4, available at 1999 WL 26575888.

202. Bachner, *supra* note 61, at 374-75.

203. *Id.*

204. See Gittings, *supra* note 182; *Top Legislator*, *supra* note 159; see generally Bloch, *supra* note 8, at 607-08; *China: Students Ready to Save the World*, CHINA DAILY, Feb. 9, 2000, at 1, available at 2000 WL 4115121.

205. McCutcheon, *supra* note 74, at 406-07. The Three Gorges Dam is a project to build a hydro-electric power generation facility. There are concerns the dam will not allow sufficient down-river water flow to dilute sewage, and the habitats of four endangered

policy trend is promising so long as China's actions in the future continue to match its rhetoric.

Thus far, retrocession has produced few significant changes in overall environmental policy. Although the United Kingdom is generally considered to be a liberal Western democracy, Hong Kong had neither autonomy nor any real voice in British government.<sup>206</sup> Except for binding Hong Kong to international treaties, the British national government did not provide much policy support for environmental laws, but instead left this area up to the local Hong Kong government.<sup>207</sup> Provided China does not frequently act to quash HKSAR legislation or impose national law under Articles 18, 19, 158, 159, or 160 of the Basic Law,<sup>208</sup> Hong Kong may at least theoretically have become more democratic and autonomous under a Communist sovereign. Mainland China, though, can still exert considerable influence over HKSAR policies through indirect means.<sup>209</sup> This influence may already be resulting in indirect pressure on the HKSAR government to emphasize and enforce environmental protection laws.<sup>210</sup>

While both China and Hong Kong already have a number of environmental laws on the books, only China has recently appeared to be more serious about enforcing them on a wide basis.<sup>211</sup> If the HKSAR government is able to relinquish some of its emphasis on the economy and actually follow through on Tung Chee-hwa's statements by more strictly enforcing environmental laws already in place, such a real emphasis on environmental policies could eventually mirror that of mainland China.<sup>212</sup> But given the attitude of the HKSAR leaders, such action would probably result from the realization of the negative impact a deteriorating environment might have on the economy and productivity rather than altruistic concerns for the environment.

---

species may be destroyed by the project. The project will "inundate 28,000 acres of high-quality farmland" and deprive others downstream the "use of the river for agriculture and fishing." *Id.* at 407.

206. Bloch, *supra* note 8, at 601.

207. *See generally id.* at 603; Bachner *supra* note 61, at 365-70.

208. *Basic Law*, *supra* note 166, arts. 18-19, 158-60.

209. Davis, *supra* note 3, at 305; Gittings, *supra* note 182.

210. *See generally* Wong, *supra* note 181; Gittings, *supra* note 182; Yeung, *supra* note 196.

211. *See generally* Liebman, *supra* note 1, at 240-43.

212. *See* Wong, *supra* note 181; Gittings, *supra* note 182; Yeung *supra* note 196; Jennifer Ehrlich & Cheung Chi-Fai, *SAR Chokes as Pollution Levels Soar*, S. CHINA MORNING POST, Mar. 29, 2000, at 1, available at 2000 WL 14847508.

Despite passage of the EIAO, little significant action seems to have yet taken place under Tung Chee-hwa's leadership of the HKSAR other than rhetoric and the announcement of new measures and proposals.<sup>213</sup> Since the retrocession, it is apparent there has only been a continuation of the relative minimal emphasis and minimal enforcement of regional environmental laws that Hong Kong had under British rule. Recent Harvard Law School graduate Benjamin Liebman pointed out "Hong Kong's paradox is that it may have both too much and too little autonomy in environmental lawmaking."<sup>214</sup> Because the Chinese government appears to be more active than the HKSAR government in environmental protection, Liebman was probably correct in stating that Hong Kong may "suffer from the non-application of [Chinese] national environmental standards."<sup>215</sup>

At least for the foreseeable future, and in contrast to what one might expect after examining the Czech experience, the emphasis on and enforcement of laws protecting Hong Kong's environment may actually increase somewhat under Chinese sovereignty over prior levels under British rule. For example, the EPD recently denied renewal of permits which allowed a South Korean contractor to dump vast quantities of contaminated mud in the South China Sea,<sup>216</sup> and also denied approval to build a railroad through an environmentally sensitive valley.<sup>217</sup> But at the same time, the HKSAR Financial Secretary dismissed recycling efforts by "saying the recycling industry had no future in the [HK]SAR."<sup>218</sup> The accuracy and reliability of EIAO-required assessments have been questioned.<sup>219</sup> Additionally, while some leaders have at least publicly stated a policy of greater environmental protection through the law is necessary to ensure Hong Kong's continued success as an international center of trade and finance, businesses still are commercially interested in Hong Kong despite its environmental problems.<sup>220</sup>

---

213. Wong, *supra* note 181; Gittings, *supra* note 182; Yeung *supra* note 196.

214. Liebman, *supra* note 1, at 294.

215. *Id.*

216. Jennifer Ehrlich, *Muddy Waters: A Review of Toxic Dumping has Dredged Up a Problem for CT9*, S. CHINA MORNING POST, Oct. 7, 2000, at 13, available at 2000 WL 26865149.

217. *An End to Apathy . . .*, S. CHINA MORNING POST, Oct. 18, 2000, at 23, available at 2000 WL 26866197.

218. *Recycling Pays Off with the Right Will*, S. CHINA MORNING POST, Oct. 5, 2000, at 18, available at 2000 WL 26864862.

219. Felix Chan, *Greens Attack Environment Reports*, S. CHINA MORNING POST, Oct. 23, 2000, at 5, available at 2000 WL 26866566.

220. David Evans, *Poor Air Fails to Hurt Lure of SAR*, S. CHINA MORNING POST, Oct. 27, 2000, at 3, available at 2000 WL 26866990.

The prognosis for the emphasis on and enforcement of Hong Kong's environmental laws is one of guarded, limited and probably incremental progress. Support for protection of the HKSAR's environment, while still overshadowed by economic concerns, is on the rise, but it remains an uphill battle. Results from any new environmental laws and enforcement initiatives will likely be mixed, although there should be some improvement over the status quo during British rule. The determining factor in how much progress is made and how quickly it happens will likely be the degree of success internal and external forces, particularly mainland Chinese leadership efforts, have in pressuring HKSAR leaders and the EPD to follow through on their commitments with real action in promulgating and enforcing environmental laws and regulations. Direct interference by mainland China in this area could be viewed as a harbinger for intervention in other policy specters, and could cause uneasiness in the Hong Kong population and international business community. Therefore, any pressure applied by China will likely be subtle and indirect. It is apparent action must be taken to cease and attempt reversal of environmental degradation in the HKSAR, lest it become uninhabitable for both businesses and people.