Reconceptualizing “One Country, Two Systems” in the Quest for Autonomy and Human Rights in Hong Kong under Chinese Sovereignty

By

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A thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science
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Abstract

Title: Reconceptualizing “One Country, Two Systems” in the Quest for Autonomy and Human Rights in Hong Kong under Chinese Sovereignty
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This thesis proceeds from a pluralistic perspective in the belief that there is a need to search for a theoretical reinforcement of Hong Kong’s quest for autonomy and human rights under the “one country, two systems” formula. It focuses on the question of how the protection of human rights in Hong Kong (a) could and (b) should be treated under Chinese sovereignty and how that treatment should be related to philosophies of legal and cultural pluralism. The goal is to work through two sets of China-centered discourses about pluralism and then see how they help inform the principles and the institutional practice with respect to Hong Kong. The first discourse, which is dealt with in Chapter Two, might be called “external” legal pluralism – namely, the (evolving) arguments China has made with respect to the need of other states and the international community to respect the particularities of China in the realm of international human rights. The second discourse, which is the subject of Chapter Three, examines how China has dealt with its own internal diversity, in terms of law, political practice and embedded philosophy. The idea is then to work from a critical account of China’s approach to diversity in these two contexts to the specific normative and institutional issues that circulate within the “one country, two systems” concept relating to Hong Kong. Chapters Four and Five deal with the preservation of autonomy and human rights in Hong Kong under Chinese sovereignty. They examine, at historical and conceptual levels, the essence, scope and implications of the “one country, two systems” formula and explore how a reconceptualization of that formula could help lend normative support to a robust, separate human rights regime within Hong Kong.
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Introduction

On July 1, 1997, Hong Kong, which for the previous 156 years had been under the jurisdiction of the United Kingdom, became a Special Administrative Region (SAR) of the People's Republic of China (PRC). As the red flag with five golden stars of the PRC was hoisted in Hong Kong on the first of July, and as the Union Jack was lowered for the last time, a profound political transition occurred in Hong Kong: the Chinese government replaced Her Majesty's government as the ultimate font of power and authority in the territory. This event was fascinating because of its uniqueness and complexity, and, foremost, because of its potential political ramifications for future political development in China as well as for the new world order. It brought under one rule two opposing ideologies, two conflicting political and economic systems, and two incompatible sets of values, beliefs, and ways of life.

It was under the concept of "one country, two systems" that the reintegration of Hong Kong with China took place. This ingenious concept tried to establish a political enterprise unprecedented in history, which was institutionalized through a complex normative framework created for Hong Kong by means of international and domestic regulation. However, responding to two contradictory goals, namely, integrating Hong Kong with China and securing Hong Kong's autonomy, the regulation was inherently ambiguous. Not surprisingly, even under the best circumstances, the transfer of sovereignty over Hong Kong under "one country, two systems" would be a complex undertaking fraught with difficulties. Although there was no shortage of enthusiasm for
the idea of "one country, two systems," there was great doubt and controversy regarding its implementation.

When the Sino-British Joint Declaration on the Question of Hong Kong (hereinafter the Joint Declaration) was signed in 1984, one of the major concerns of the people of Hong Kong was the protection of human rights. Foremost on their minds since the signing of the Joint Declaration were questions such as whether Beijing would abide by the 1984 Sino-British Joint Declaration and whether China's mini-constitution for Hong Kong -- the Basic Law -- would effectively and sufficiently guarantee the territory a high degree of autonomy. Both documents set out China's commitment to human rights and fundamental freedoms in Hong Kong to survive the retrocession of 1997. The promises, as written, appeared cause for optimism, and China's rhetoric might have seemed laudable. But, China's controversial human rights record with its own people raised concerns about human rights in post-1997 Hong Kong. Many people in Hong Kong doubted the intentions and ability of China to carry out its declared commitment to human rights. Would China keep its promises? Would China be willing to permit an autonomous, free society to exist under the umbrella of its rule? How much political autonomy and freedom would China allow Hong Kong people to enjoy? Would the people of Hong Kong get to exercise the political freedom they had enjoyed under British rule? Would political parties be free to organize, and would elections be free and fair?

And so on. There appeared no simple or easy answer to the above questions, which all

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1 See M. Roberti, The Fall of Hong Kong: China’s Triumph and Britain’s Betrayal (New York: John Wiley and Sons, Inc., 1994) at 65-78.
2 On this point, Yash Ghai pointed out that "[t]he basic framework to facilitate the exercise of rights was established in the Joint Declaration... [i]t consists of regional autonomy, a market economy, some separation of powers, an independent judiciary, a measure of democracy, civil society, and the common law. On the whole the Basic Law preserves this general framework, although in somewhat weaker form."
hinged on one thing – Hong Kong’s autonomy as a special administrative region in China enumerated in the Joint Declaration and the Basic Law.

There has been a sharp division of views about Hong Kong’s fate as a special administrative region of the PRC since the signing of the Joint Declaration in 1984. Those who harbor a positive vision of Hong Kong’s future predict minimum change in people’s rights and freedoms, way of life, and economic welfare. They place their faith in the institutions and people who have made Hong Kong what it is today. They have done so with good reason: the institutions there remain strong, stable, and principled; the people are realistic and adaptable, having a good sense of what will be tolerated and accepted by China and what will not; and both the institutions and people owe their success to a deeply-rooted rule of law that pervades Hong Kong. Some also believe that China has every reason to maintain the status quo in Hong Kong. Among such reasons, the most obvious is that China needs Hong Kong in its economic modernization and in its long cherished goal of national reunification.

On the other hand, for many people inside and outside Hong Kong, China’s tainted human rights record and long-term political instability cannot help but mean that “one country, two systems” is an illusory promise. They point to many things China has been doing, such as the rolling back of democracy in the Hong Kong Legislature election, as

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indications that the prospects of human rights and freedoms in Hong Kong seem gloomy. Moreover, given the fact that there exist many loopholes and ambiguities in the Basic Law, it would be only futile to count on such a law to protect Hong Kong from arbitrary interference by the Chinese government in Beijing.6

In my view, it would be premature to tell at this point which of the divergent predictions will prove nearer the truth. It would also be premature to conclude that the status quo will remain intact in all aspects for the foreseeable future, although Hong Kong has thus far made a smooth transition from British to Chinese rule. Past scholarly literature on the question of human rights protection in Hong Kong under Chinese rule focused largely on empirical observations and on the extent and level of positive entitlements provided by the Joint Declaration and the Basic Law. Although those writers explored a variety of areas with a view to refurbishing the legal armory of counsel arguing the territory's case for a robust, separate human rights regime from the rest of China, they seldom ventured deeply into the normative aspects of rights thinking. Virtually no original theoretical framework has been presented to give a deep, normative foundation for Hong Kong's claim to an autonomous status and a separate human rights regime.

This dissertation proceeds from a different perspective in the belief that there is a need to search for a theoretical reinforcement of Hong Kong's quest for autonomy and human rights. I focus on the conception of human rights in Hong Kong under the "one country two systems" formula, rather than on the state of human rights. This does not imply that I regard other approaches as less important -indeed, quite the contrary. I

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believe ideas of human rights, even in their most philosophical language, are generally motivated by a concern about and responses to the empirical state of human rights. However, in the end, ideas can also hopefully serve to change that environment. Although clear thinking about human rights in Hong Kong under Chinese rule is not the key to the struggle to implement them, and it may not even be essential to successful political action on their behalf, theoretical and normative perspectives color the way we interpret empirical observations. And at the end of the day, both empirical observations and normative perspectives have an impact on our policy prescriptions.

It is a truism that the Hong Kong case constitutes an unprecedented experiment of national reintegration. As Mushkat rightly observes, "[t]he post-1997 Hong Kong predicament may be said to constitute what has been termed in jurisprudential discourse a 'hard case'. The novel formula of 'one country, two systems' cannot be placed within a clear set of unambiguous rules or established conventions of international law, nor can authoritative guidance be derived from international practice and precedent." However, I think the value of Hong Kong as an object of this study does not rest on any qualities of exotic uniqueness it may possess. Rather, Hong Kong is valuable as an alternative repository of human experience, a laboratory with its own distinctive furnishings for the exploration of universal human dilemmas. Moreover, a conceptualization of Hong Kong's quest for autonomy and human rights must be envisioned and explored with an awareness that Hong Kong's reintegration with China should be thought of more as an ongoing process rather than as a definite end result.

6 Ibid.
7 R. Mushkat, "Hong Kong's Quest for Autonomy: A Theoretical Reinforcement" in R. Wacks, Hong Kong, China and 1997: Essays in Legal Theory (Hong Kong: Hong Kong University Press, 1993) at 307.
This dissertation begins with a brief historical account of the "Hong Kong question" and then takes a close look at the transfer negotiations between China and the United Kingdom in terms of the normative debates that led up to the final agreements and an appraisal of how the end result conceptualizes and operationalises the Hong Kong-China relations. It then focuses on the question of how the protection of human rights in Hong Kong (a) could and (b) should be treated under Chinese rule and, most importantly, how that treatment should be related to philosophies of legal and cultural pluralism. The goal is to work through two sets of China-centered discourses about pluralism and then see how they help inform the principles and the institutional practice with respect to Hong Kong. The first discourse, which is dealt with in Chapter Two, might be called "external" legal pluralism – namely, the (evolving) arguments China has made with respect to the need of other states and the international community to respect the cultural (and other) particularities of China in the realm of international human rights. The second discourse, which is the subject of Chapter Three, examines how China has dealt with its own internal diversity, in terms of law, political practice and embedded philosophy. It looks at the extent to which China’s discourse-to-the-world in respect of the need to respect diversity has some analogue with respect to the treatment of provinces, regions and minority groups. The idea is then to work from a critical account of China’s approach to diversity in these two contexts (China facing the world and China facing its own internal diversity) to the specific normative and institutional issues that circulate within the “one country, two systems” concept relating to Hong Kong. Chapters Four and Five, which are thematic to the dissertation, focus on the preservation of autonomy and human rights in Hong Kong under Chinese sovereignty. They examine, at historical and
conceptual levels, the essence, scope and implications of the “one country, two systems” formula and explore how a reconceptualization of that formula could help lend normative support to a robust, separate human rights regime within Hong Kong. In the concluding chapter, the dissertation also tries to situate the case of Hong Kong in the context of thinking and practice on diversity, regional autonomy in the Greater China area and to explore its potential contribution as an institutional vehicle for dispute resolution and as a possible model or example for the management of territorial entities (such as Tibet, Taiwan, and so on.) that either demand or enjoy the right to self-government or a high degree of autonomy.
Chapter One: Setting the Scene - the Historical and Political Context of Hong Kong

Introduction

In this chapter, I begin with an interpretative account of the history of the “Hong Kong question” from the cession of Hong Kong Island to the British Crown in 1842 to the late 1940s. I continue with an account of the treatment of Hong Kong, including the eventual decision to return Hong Kong to China, by both the United Kingdom and the PRC during the post-War period from 1945 to the early 1980s. I next review the past decade and a half of drastic changes in Hong Kong with the aim of providing a more informed appreciation of the forces and dynamics that will continue to shape Hong Kong’s political and legal landscape for some time to come. In the next section, I then go on to trace the evolving constitutional order in Hong Kong. I bring into focus the major institutions and issues that shape the transition process and help to define the challenges ahead. I show that Hong Kong’s political destiny has historically been determined mostly by external, rather than internal, political forces. Particularly as Hong Kong entered the period of transition, the presence of China and its attitude towards Hong Kong, in one way or another, set the parameters of any possible constitutional reforms initiated by the British and Hong Kong governments. Nevertheless, although the transition of sovereignty turned a new page with respect to Hong Kong’s constitutional status and national identity, it will not change many of the built-in concerns and aspirations of the Hong Kong people whose varied responses to the reintegration process have shaped the conduct of China and
the local authorities. I conclude that the future of Hong Kong rests with the
conceptualization and successful implementation of the “one country, two systems”
formula.

Part One: Hong Kong’s Path to the Present

I. A Legacy from the Past

The Hong Kong region (hereinafter Hong Kong) comprises the Hong Kong Island,
the small district of Kowloon on the mainland just opposite, the interland known as the
New Territories and more than two hundred small islands. Before the arrival of the
British, it had been part of China.

Britain seized the territories in three separate stages in the 19th century. In the
drly 19th century, British merchants began to export opium in exchange for Chinese
goods in an attempt to balance their trade deficits with Chinese merchants. In 1838, the
Chinese Emperor of the Qing dynasty ordered the eradication of the opium trade that was
lucrative to both the British government and merchants, and was crucial to the economy
of British colonialism in Asia. The Chinese government tried to forbid the opium trade
because opium threatened to turn China into a nation of addicts, because it was illegal
according to Chinese laws, and, more importantly, because it was paid for largely by

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2 See Hong Kong Government Information Services (HKGIS), Hong Kong 1987 (Hong Kong: Hong Kong Government Information Services, 1987) at 296. See also S. Tsang, Hong Kong: An Appointment with China (London: I.B. Tauris, 1997) at 1-12.
silver, whose expenditure had a serious impact on the Chinese Empire’s economy.⁴ In 1839, the envoy of the Chinese Emperor ordered the British merchants in Canton to surrender their contraband supplies of opium and eventually required them to retreat from Canton. Later, British merchants persuaded the British government to use military forces to open up the Chinese market and to seek the acquisition of a permanent, safe territorial base near the coast of China where they would no longer be subject to the irksome restraints on trade imposed by the Chinese government. In support of the merchants’ claim for compensation and their wider interests in opening up Chinese market for trade, Britain declared war on China, sent expeditions to blockade the Canton River and Yangtze River, and eventually compelled the Chinese authorities to negotiate. Part of the price the Chinese Empire was forced to pay for a settlement of the so-called First Opium War was the cession of the Island of Hong Kong in perpetuity to Britain under the 1842 Treaty of Nanking.⁵ Subsequently, Hong Kong was occupied by Britain and the British colonization of Hong Kong began in the early 1840s.⁶

The British acquired the second part of Hong Kong in 1860 after a British expeditionary force had invaded Beijing (Peking), looted the Forbidden City, and burnt down the Summer Palace, a royal garden symbolizing the highest achievements of ancient

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³ HKGIS, ibid.; see also P. Wesley-Smith, Constitution and Administrative Law in Hong Kong: Text and Materials, vol. 1 (Hong Kong: China and Hong Kong Law Studies, 1987) at 33-34.
⁴ British merchants brought English silver, cotton, woollens, furs and other goods to Canton in exchange for Chinese silks and teas and gradually added a flow of opium from India into China in an attempt to balance their trade deficits with Chinese merchants. In 1796, the Chinese Emperor banned the use, sale and importation of opium. However, opium traffic continued to grow, causing a high amount of silver outflow when Chinese teas and silk exports became insufficient to match the increasing opium influx. See F. Welsh, A History of Hong Kong (London: HarperCollins Publishers, 1993) at 32-61; S. Shipp, Hong Kong, China: A Political History of the British Crown Colony’s Transfer to Chinese Rule (Jefferson, North Carolina: McFarland and Company, Inc., Publishers, 1995) at 7-8.
⁵ Treaty of Nanking, Aug.29, 1842, Great Britain-China, 50 British & Foreign State Papers (Gr. Brit.) 10.
Chinese architectures and arts.\textsuperscript{7} The \textit{Convention of Peking} ended the Second Opium War and secured the southern part of the Kowloon Peninsula and Stonecutters Island in perpetuity to Britain.\textsuperscript{8}

China’s sufferings continued through the end of 19th century. Japan defeated China in the Sino-Japanese War of 1894-95, forcing China to cede Taiwan to Japan. A weakened China then had to open the door for the Western powers to acquire treaties for more “leasing” ports along the China seacoast.\textsuperscript{9} By the second \textit{Convention of Peking}, which concluded in 1898, the British occupied the New Territories and the surrounding islands under a 99-year lease, with a view to converting it into a cession at a more proper time. In legal terms, the sovereignty of the New Territories and the surrounding islands should be returned to China at midnight June 30, 1997 when the lease expired, while the Island of Hong Kong and Kowloon, being ceded to Britain in perpetuity, would remain under British rule.\textsuperscript{10}

As a result of these three treaties signed by China and Britain, the geographical boundaries of Hong Kong were established in 1898.\textsuperscript{11} Hong Kong’s deep harbor provided an anchorage safe from most weather and possible attack, and the settlement in the new British crown colony quickly grew. By the early twentieth century Hong Kong

\textsuperscript{6} See Wesley-Smith, \textit{supra} note 3 at 34. See also I. Scott, \textit{Political Change and the Crisis of Legitimacy in Hong Kong} (London: Hurst and Company, 1989) at 40-41.

\textsuperscript{7} The Second Opium War was sparked by China’s decision to search a ship, the Arrow, which was flying a British flag and anchored in Canton in 1856. According to Wong, the British side used the Arrow incident as an excuse to wage war on China in an attempt to force the Chinese Emperor to legalize opium and to increase British economic interests in China. For a detailed discussion of the origins of the Second Opium War, see J.Y. Wong, \textit{Deadly Dreams: Opium, Imperialism, and the Arrow War (1856-1860) in China} (Cambridge: Cambridge University Press, 1998) at 1-40, 457-86.

\textsuperscript{8} HKGIS, \textit{supra} note 2 at 296.

served as an important regional hub for trade between southern China, southeast Asia and the Pacific area. It had periods of considerable prosperity, but slid into gentle decline, as Shanghai became the focus of Western economic expansion in China after the First World War.\textsuperscript{12}

II. Modern Chinese Nationalism and the “Hong Kong Question”

As Hong Kong gradually emerged as an entrepot in the Far East, its fate appeared to be dependent upon political and economic forces largely beyond its control since the very moment of British colonization of Hong Kong. In 1911, the Nationalist Revolution overthrew the imperial Qing Dynasty ruled by the minority nationality of Manchu and the Republic of China (ROC) came into being.\textsuperscript{13} The question of revising or abrogating treaties signed by the Qing imperial government with Western powers came under serious discussion among Chinese diplomats, scholars and revolutionaries at least as early as the mid-1910s. For instance, M.T.Z. Tyau, a lecturer at Tsinghua University in Beijing argued in a Chinese academic journal in 1917 that those treaties should be revised so as to end extraterritorial rights in China and all leased territories, including Hong Kong’s new territories, should be returned to China, because China’s new political circumstances since the fall of the Qing dynasty made the doctrine of \textit{rebus sic stantibus}, or “so long as

\textsuperscript{10} It must be noted that China always claimed that the 1842 and 1860 treaties between Britain and China were invalid. \textit{Ibid.} See also Wesley-Smith, \textit{supra} note 3 at 41-50.

\textsuperscript{11} See Wesley-Smith, \textit{ibid.} at 33-50.

\textsuperscript{12} R. Buckley, \textit{Hong Kong: The Road to 1997} (Cambridge: Cambridge University Press, 1997) at 1-7.

conditions remain the same," applicable. Tyau’s article indicates newly acquired knowledge and sophisticated use of modern international law among the Chinese in their attempts to redress foreign encroachment on its sovereignty and territorial integrity. At the 1919 Paris Peace Conference, the Chinese delegation requested that “all hindrances to China’s free development be removed in conformity with the principles of territorial integrity, political independence and economic autonomy which appertain to every state” and that all “treaties or agreements made with China under circumstances precluding the free exercise of her will” be revised or abrogated. Dr. Sun Yat-sen, the founding father of the Republic of China, devoted himself to the abolition of the so-called “unequal treaties” between China and Western powers. As a result, the notion of “unequal treaties” became very popular in China. It was directed against any treaties that imposed unilateral obligations on China and rendered unilateral rights for the Western powers. According to Lane, the term “unequal treaties” “reflected a popular bitterness toward the cruel mistreatment China had received from foreigners, while at the same time appealing to the foreigners’ own sense of fairness. The term encompassed the moral aspect of China’s pleas for treaty abrogation, which said that using force to gain rights

16 For example, in his famous “Last Will and Testament”, Dr. Sun taught his Nationalist followers that “abolishing the unequal treaties should be carried into effect as soon as possible.” See Shipp, supra note 4 at 17.
17 While opinions differ as to the definition of unequal treaties, it is generally agreed that the term refers to such treaties as are characterized by a deviation from the principle of the sovereign equality of states. (See Max Planck Institute for Comparative Public Law and International Law, Encyclopedia of Public International Law, vol. 7 (Amsterdam: North-Holland, 1984) at 514.) Beginning from the Opium War of 1840 and for the subsequent 100-year period, most of the treaties which China concluded with the foreign powers bear the stigma of unequal treaties.
and territory in China had been wrong, and the legal element, which argued that accepted

tenets of international law supported the Chinese case for treaty revision. The concept of
unequal treaties thus became a rallying point for anti-imperialist sentiment in China.\footnote{18}

In the 1920s and 1930s, the Nationalist government courted popularity by
demanding the abolition of foreign privileges in China. In 1929 and 1931, it made
unilateral declarations of its intention to abolish all foreign extraterritorial jurisdiction in
China imposed by unequal treaties.\footnote{19} During its brief period of dominance, the Nationalist
government did achieve some success in reducing the treaty privileges of Western
powers in China. In World War Two, when China was negotiating with Britain for the
termination of British extraterritorial rights in China, the Nationalist government
demanded the termination of the 1898 lease of the New Territories. Britain agreed to
abandon its extraterritorial rights elsewhere in mainland China, but declined the
termination of the 1898 lease. China made it clear that it reserved the right to reopen
negotiations in the future.\footnote{20} By 1943, the Nationalist Government had thus succeeded in
abolishing extraterritorial rights in mainland China through negotiations, leaving,
however, the question of Hong Kong unresolved.\footnote{21}

Japan defeated the British army and occupied Hong Kong for three years and eight
months during World War Two.\footnote{22} When the Japanese surrendered in 1945, the British
government frustrated the attempts of China as well as the United States to have Hong

\footnote{18} Lane, \textit{supra} note 14 at 29.
\footnote{19} See A. Neoh, "Hong Kong's Future: The View of a Hong Kong Lawyer" (1991) 22 Cal. Western. Int'l L. J. 309 at 318.
\footnote{21} See Neoh, \textit{supra} note 19 at 318.
\footnote{22} See Buckley, \textit{supra} note 12 at 13-17.
Kong handed back to China and announced that it would regain the colony. The Chinese Nationalist government led by General Chiang Kai-shek protested against sole British acceptance for what the Nationalists considered Chinese territory. Thus, the surrender ceremony in Hong Kong was held by Britain, but on behalf of both the Chinese and British governments. The colony Britain returned to in 1945 was a shambles, destitute and depopulated.

In 1949, the Chinese Communists headed by Mao Zedong (Mao Tse-tung) defeated the Nationalist government in the 1945-1949 Chinese Civil War and drove Chiang and his Nationalist followers to Taiwan. On October 1st, 1949, Mao announced the establishment of the People’s Republic of China in Tiananmen Square in Beijing. Since the inauguration of the PRC, the Chinese Communist government continued to maintain the view of the previous Nationalist government that Hong Kong was Chinese territory to be recovered “when conditions are ripe”. Despite its radical anti-imperialist and nationalistic policies in the 1950s-70s, the PRC did not demand the immediate return of Hong Kong, but took a highly pragmatic policy toward the question of Hong Kong. The main reason was that the Communist regime, suffering from international isolation and Western economic embargo after the Korean War, wanted to use Hong Kong as an enclave in which it could deal with the West and the Nationalist government in Taiwan. Besides, the PRC also depended on the huge amount of foreign exchange that Hong Kong

24 See Shipp, ibid. at 13.
25 When the People’s Liberation Army reached Guangdong, it made no attempt to cross the Hong Kong border to take back Hong Kong in 1950. See C.K. Lau, Hong Kong’s Colonial Legacy: Hong Kong Chinese’s View of the British Heritage (Hong Kong: The Chinese University Press, 1997) at xi-xii.
brought to China every year. The reason for PRC's pragmatic policy toward Hong Kong was clearly revealed in a speech by Mao Zedong in 1959, in which he declared that "[i]t is better to keep Hong Kong the way it is. We are in no hurry to take it back. It is useful to us right now." Even at the height of the Cultural Revolution, when local leftists were engaged in "anti-imperialist" riots in Hong Kong, the order from Beijing was not to recover the colony.

However, while the PRC tolerated British occupation of Hong Kong, it consistently made it clear that it considered the above-mentioned three treaties concerning Hong Kong to be "unequal" and thus void, and that it would never allow Hong Kong to become an independent state.

26 Ibid. at xiii.
27 Shipp, supra note 4 at 12.
28 The PRC consistently emphasized the illegality and invalidity of such treaties, although the PRC never specifically articulated criteria that would serve as a definition of an unequal treaty. (See Cottrell, supra note 9 at 27.) Although the PRC's position is in conflict with the West's emphasis on the binding force of treaties, one scholar observed that the Chinese rationale for abrogating unequal treaties "can be justified by legal principles acceptable to the West. For example, the United Nations Charter clearly sets forth the fundamental importance of the principles of sovereign equality, national self-determination, the prohibition of the use of threat of force in international relations, et cetera. Thus, a treaty which violates one or more of these principles would be not only 'unequal' but inconsistent with the Charter and thereby invalid under Article 103 of the Charter". (See H. Chiu, "Certain Legal Aspects of Communist China's Treaty Practice" (1967) Proc. Am. Soc'y Int'l L. 117 at 120, 126. See also G. L. Scott, Chinese Treaties: The Post-Revolutionary Restoration of International Law and Order (Dobbs Ferry, N.Y.: Oceana Publications Inc., 1975) at 85-99.)

Note, however, the common Western view that such principles affect treaty formation and validity only since those principles entered into treaty law, and do not apply retroactively to affect treaties imposed in an era when it is argued, force and colonization were lawful.
III. One Country, Two Systems

In the late 1970s, as the period before the termination of the New Territories lease continued to shorten, concerns about the future of Hong Kong began to be expressed both in the territory itself and among foreign investors. The inability of the British colonial government to grant new land leases beyond 1997 severely affected investors' confidence in Hong Kong's future. In the late 1970s, the economy of Hong Kong plummeted due to the uncertainty caused by the 1997 deadline. The British concluded that confidence in Hong Kong would further erode in the 1980s unless some actions were taken on the New Territories lease. In September 1982, British Prime Minister Margaret Thatcher visited Beijing to pave the way for formal negotiations on Hong Kong's future. In the beginning, the British hoped that China would simply agree to continued British sovereignty. However, given its ignominious cession to Britain in the last century, the Chinese leaders felt that they had no option but to insist on the end of British rule over Hong Kong, the first Chinese territory lost to foreign imperialists in the century of shame and humiliation that began with the Opium Wars of 1839-42. The late Chinese paramount leader, Deng Xiaoping, told Thatcher that China had refused to recognize any

30 Leases in the New Territories were limited to 15 years and could be renewed, but only until three days before the end of June 1997. Lease holders and prospective lease bidders worried about what to expect after expiration of Britain's 99-year lease on the New Territories. See Shipp, supra note 4 at 21.
31 See Cohen & Chiu, supra note 29 at 4.
32 See Ng, supra note 13 at 67.
33 For a detailed account of the Sino-British negotiations on the question of Hong Kong, see Scott, supra note 6 at 171-219.
of the three "unequal treaties" regarding Hong Kong and was determined to recover complete sovereignty over Hong Kong in 1997. In the mean time, Deng told the British that the Chinese government would devise a workable method for maintaining stability and prosperity in Hong Kong. Diplomatic talks began in July 1983, but they did not get off to a good start. Discussions continued until 1984, when "it became clear [to the British government] that the continuation of British administration after 1997 would not be acceptable to China in any form." The British felt that they had no choice but to change course.

By mid-1984, both sides came to an agreement whereby Hong Kong, after 1997, would become a Special Administrative Region (SAR) under the authority of the Central People's Government of the PRC, i.e. a species of local government within a unitary state. The Sino-British Joint Declaration on the Question of Hong Kong (September 26, 1984, hereinafter the Joint Declaration) was ratified by the British Parliament in March 1985 and by China's National People's Congress (NPC) in April 1985. This document became effective May 27, 1985 and was registered as a treaty with the United Nations, in accordance with Article 102 of the United Nations Charter on June 1, 1985, by both the British and Chinese governments. The Joint Declaration articulates China's policy of "One Country, Two Systems" on Hong Kong. The highlights of the Joint Declaration are as follows:

34 In the view of the Chinese government and the Communist Party, continued British presence in Hong Kong after 1997 would constitute a "de facto renewal of the unequal treaties" that could by no means be allowed. See Shipp, supra note 4 at 36.
36 HKGIS, supra note 2 at 1368.
(1) After 1 July 1997, Hong Kong shall become a Special Administrative Region of the PRC. It shall enjoy a “high degree of autonomy” except in foreign and defense affairs;

(2) Hong Kong shall be vested with executive, legislative, and independent judicial power, including that of final adjudication;

(3) Hong Kong shall maintain the capitalist economic and trade systems for fifty years after 1997;

(4) the existing social and economic system shall remain unchanged;

(5) the National People’s Congress of the PRC shall enact a Basic Law to implement the Joint Declaration;

(6) Hong Kong may maintain and develop relations and conclude and implement agreements with states, regions, and relevant international organizations;

(7) international agreements to which China is not a party but which are implemented in Hong Kong may remain in effect; and

(8) Hong Kong shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of speech, of the press, of assembly, and of association. Private property rights will be protected.39

When the contents of the agreement were announced in the autumn of 1984, the majority of local people accepted the agreement with relief.40 After all, neither the British nor the Chinese government had given the people of Hong Kong a direct say in the

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38 HKGIS, Hong Kong: The Facts-the Sino-British Joint Declaration (Hong Kong: HKGIS, 1989) at 1.
39 The Joint Declaration, supra note 37; see also Chiu, supra note 35 at 5.
40 See Welsh, supra note 4 at 513.
secretly conducted negotiations.\textsuperscript{41} Being effectively kept out of the negotiation tables, their only choice was to accept the agreement or "not have one at all".\textsuperscript{42} They wanted to look forward to a bright tomorrow rather than a future with a dark cloud hanging over their heads.\textsuperscript{43} The Joint Declaration was also well received by the international community. From the perspectives of international law and politics, the agreement is undoubtedly a remarkable document, negotiated peacefully by two countries with proud histories and totally divergent ideologies. It was indeed a historically rare peaceful transfer of a territory of six million people from one country with a pluralistic representative system to another with a system of authoritarian, single-party rule. At stake for Britain was giving up the last bastion of the British Empire, one that was rich, successful and deeply embedded in Western capitalism. At stake for China was resumption of sovereignty over the first territory China had lost to Western imperial powers during a historical period of humiliation and national disintegration.

The Joint Declaration is indeed a remarkable international agreement, a product of both diktat and bargaining. In the mid 1980s, the PRC under Deng's pragmatic leadership was in a process of embracing free market-oriented reforms and limited political liberalization. However, it was still an authoritarian communist state and deeply aware of the history of past Western intervention and imbued with a strong sense of nationalism. For the British, in the given circumstances, the agreement was perhaps the best obtainable deal that Britain could get for Hong Kong.

\textsuperscript{41} See generally Cotrell, supra note 9 at 98-153.
\textsuperscript{43} See Welsh, supra note 4 at 513-14.
Under the visionary concept of "one country, two systems" with "Hong Kong people ruling Hong Kong", Hong Kong would retain "a high degree of autonomy" under Chinese sovereignty and remain a capitalist society for 50 years after the transfer of sovereignty. The framework established by the Joint Declaration was designed to enable Hong Kong and its people to continue to prosper in a stable way in accordance with the way of life that had allowed the territory to flourish. In other words, capitalism would continue in Hong Kong under Chinese sovereignty, but not British rule. For the Chinese authorities, with the sovereignty question disposed of, a century and a half of events viewed by Chinese people as humiliations was brought to an end with some elegance and pride. The Chinese government, although still a communist and nationalistic regime, could afford to be "generous" and "accommodating". On the other hand, Hong Kong has been transformed from "a barren island" to become the eighth largest trading economy in the world during one and a half century's British rule. The peaceful and smooth transition of sovereignty over Hong Kong has enabled and will continue to enable Hong Kong to play a major role in the international economy of East Asia and a crucial role in the economic development of China itself. Moreover, the significance of Hong Kong extends far beyond the realm of economics. The author will return to this point in the following chapter.

IV: Hong Kong in Transition: 1984-1997

With the conclusion of the Joint Declaration, uncertainty about the fate of Hong Kong after 1997 was cleared and the transition of Hong Kong from a British crown
colony to a special administrative region of China formally began. As required by the Joint Declaration, Britain continued to administer Hong Kong for the meanwhile, and the PRC officially committed itself to give its full cooperation. However, the initial euphoria within the territory and a Sino-British era of good feelings after the ratification of the Joint Declaration in May 1985 were short-lived. Relations between Britain and China soon became strained due to scores of unresolved differences ranging from Hong Kong’s electoral reforms to infrastructural developments and social and legal matters. \(^{44}\) China was opposed to any fundamental changes in Hong Kong’s system during the transition period, insisting that, when Beijing agreed to maintain Hong Kong’s “existing systems” in the Joint Declaration, that meant existing in 1984. The British held that Hong Kong was such a dynamic society that there would have to be evolution during the run-up to 1997. As Buckley commented, “[i]t was, in essence, a long battle over whether the British government and its Hong Kong administrators should determine the course of events until 1997 or, as China insisted, the only way forward was to align London with the Chinese version of how ambiguous agreements ought to be interpreted.”\(^{45}\)

China’s main task during the transition was to draft the Basic Law, the mini-constitution under which the future Hong Kong Special Administrative Region would exist. Drafting of the Basic Law was done unilaterally by China in accordance with the Joint Declaration and under the guidance of its National People’s Congress; neither the British nor Hong Kong governments had any formal role in its drafting. Nevertheless, the Chinese government could not completely ignore the rising public demand for democratic changes in Hong Kong. It had to win the hearts and minds of the people of Hong Kong in

\(^{44}\) *Ibid.* at 519-36.
order to ensure a smooth transition and continuing stability and prosperity in Hong Kong. The Basic Law would spell out how the Joint Declaration would be interpreted by the PRC and translated into a local law of constitutional status. In June 1985, China announced the formation of a Basic Law Drafting Committee. The committee consisted of fifty-nine mainlanders and twenty-three Hong Kong members who were charged with drawing up a constitutional document for Hong Kong based upon the principles and policies of the Joint Declaration. 46 Though the membership of the Drafting Committee was weighted in favor of the mainland, China made some effort to allow the input of Hong Kong community views through its creation of a 178-member Basic Law Consultative Committee consisting entirely of representatives of various sectors of the Hong Kong community selected by the Chinese government. 47 Some Hong Kong members served on both committees. The first draft of the Basic Law was released for public comment in April 1988. It elaborated the provisions of the Joint Declaration into a detailed document considered by China as suitable for enactment into domestic law. Discussions on the first draft and successive ones of the Basic Law were protracted and serious, with representatives of most sections of Hong Kong opinion on both the drafting

45 Buckley, supra note 12 at 118.
46 See M. Roberti, The Fall of Hong Kong: China’s Triumph and Britain’s Betrayal (New York: John Wiley and Sons, Inc., 1994) at 141-44. 47 Critics pointed out that members of this committee were all hand-picked by Beijing and were well known to be pro-China and conservative in their political views and that democratically-minded people had encountered great difficulties in having their voice heard in the process. For a detailed discussion on the drafting of the Basic Law, see M. K. Chan, “Democracy Derailed: Realpolitik in the Making of the Basic Law, 1985-1990” in M. K. Chan and G. A Postiglione, eds., The Hong Kong Reader: Passage to Chinese Sovereignty (Armonk, New York: M. E. Sharpe, 1996) at 8-40. See also P. Pigott, Hong Kong Rising: The History of a Remarkable Place (Toronto: General Store Publishing House, 1995) at 186-87.
committee and the consultative committee. Points of principle were cogently argued and some substantial amendments were later agreed by Beijing. 48

The drafting process was also embroiled in frequent controversy when the Chinese government was trying to dominate the drafting process by managing it closely. 49 Some local critics accused China of intolerance of substantive input or representation by the Hong Kong people in the drafting process. They argued that the few members that truly represented the interests of Hong Kong’s people were overwhelmingly outnumbered by those representing China’s interests and the members from Hong Kong who were primarily representatives of Hong Kong’s big business interests. 50 A final version was formally promulgated by China on April 4, 1990.

The confidence of Hong Kong people in the Chinese government, albeit fragile, might have continued steadily toward 1997 had it not been for the political crisis in mainland China posed by the 1989 pro-democracy movement. Beijing’s suppression of the pro-democracy movement in June 1989 drastically altered Hong Kong’s perceptions of the very nature of the Communist party-state. Increasingly belligerent statements by the Chinese officials about Hong Kong’s future, in particular their attacks on democratic groups dedicated to political reforms before the handover, helped erode the Hong Kong people’s confidence in the Basic Law. Worse yet, China’s expulsion of two leading Hong Kong activists, Martin Lee and Szeto Wah, from the Basic Law Drafting Committee for

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48 See Welsh, supra note 4 at 524-25.
49 See Chan, supra note 47 at 7-9.
their support of the student-led pro-democracy movement in Beijing, had also had an effect.\textsuperscript{51}

The \textit{Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China} was promulgated by the President of the PRC on April 4, 1990.\textsuperscript{52} Modeled on the Joint Declaration, the Basic Law incorporates many of the principles of that document and seeks to give effect to its intent. In structure, the Basic Law consists of 160 articles, followed by three annexes. Under the Basic Law, the Hong Kong Special Administrative Region (HKSAR) shall be an unalienable part of the PRC and a special administrative region directly under the authority of the Central People's Government of the PRC. It provides that the HKSAR enjoys "a high degree of autonomy" except in the areas of foreign affairs and defense, and practices a system and policies fundamentally different from the PRC's.\textsuperscript{53}

At the same time, the Basic Law also contains some important qualifications to Hong Kong's autonomy. For instance, Articles 17 and 158 give the Standing Committee of China's National People's Congress, advised by a Basic Law Committee, the power to interpret the basic law and review other laws for compliance within the scope of local/central relations and central authority, while the local courts explicitly have the power to interpret and implicitly the power of judicial review within the scope of...

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\textsuperscript{52} The Basic Law was promulgated by President Yang Shangkun after it was adopted at the Third Session of the Seventh National People's Congress on April 4, 1990. See "Decree of the President of the People's Republic of China," No. 26, Apr. 4, 1990, in the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong: Joint Publishing (H.K.) Co. Ltd., 1991). [hereinafter the Basic Law]

\textsuperscript{53} See generally \textit{ibid.}
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autonomy.\textsuperscript{54} (I will return to the question of the relationship between the NPC and the courts of Hong Kong in Chapter Five.) As the final authority to interpret the Basic Law lies with the central authorities, rather than the independent courts of the HKSAR, the scope of Hong Kong's autonomy is ultimately dependent upon decisions made in Beijing. The generality of the language used in the Basic Law also affords China considerable policy discretion in exercising its ultimate power. In the view of many within Hong Kong, the vagueness of the Basic Law provides a potential legal basis for the central authorities to exercise control over the internal affairs of the HKSAR in addition to those of defense and foreign affairs.\textsuperscript{55}

With the Joint Declaration and the Basic Law in place, one might think that the transformation of sovereignty over Hong Kong would be relatively smooth; however, that was not the case. Sino-British relations deteriorated rapidly as a result of the outcry against Beijing's military suppression of the pro-democracy demonstrators in 1989. The political crisis in mainland China following the Tiananmen incident also changed the entire nature of local politics in Hong Kong. Consequently, the implementation of the Joint Declaration soon became embroiled in major difficulties in the early 1990s. Firstly, there were those arising from different interpretations of what was agreed upon in the Joint Declaration. The former and future rulers of Hong Kong diverge widely in their political, economic, and social systems. Despite the elaborate details of the relevant treaties providing for the transfer, there existed disagreements during the entire period of transition. Secondly, there were also different interpretations of the meanings of some of the provisions in the Joint Declaration as well as opposing understandings of the pace and

\textsuperscript{54} ibid., art. 158.
extent of the changes which were to be introduced into the territory during the transition.\textsuperscript{56} China was opposed to any fundamental changes in Hong Kong’s system. As already noted, the Chinese authorities insisted that when Beijing agreed to maintain “existing systems” in Hong Kong, that meant existing in 1984. China did not want to give Britain a blank check to change Hong Kong’s political and legal systems before 1997. Implicitly, Chinese leaders felt that a system of government in Hong Kong, which had suited London for the best part of 150 years without any significant change, and which contained no hint of democracy, would also suit them very well indeed.

With little doubt, the most publicly acrimonious debate concerned the constitutional reform package introduced by the last British Governor of Hong Kong, Chris Patten, to expand democratic practices in Hong Kong in the early 1990s. Mr. Patten, a former British cabinet member and Conservative Party chairman, was appointed Governor of Hong Kong in July 1992.\textsuperscript{57} Responsive to the rising aspirations of democratic and liberal opinion in Hong Kong following the Tiananmen incident, Patten’s mandate was to take a strong stand with the Chinese government and to proceed at full speed with democratizing Hong Kong’s political system.\textsuperscript{58} It was a mandate that was unlikely to endear him to Chinese officials. Three months after taking office, he presented proposals in his first major policy speech to the Legislative Council (Legco), on 7 October 1992, a series of measures to broaden the voting base for the next Legco

\textsuperscript{55} See Cottrell, \textit{supra} note 9 at 188-89.
\textsuperscript{57} See Shipp, \textit{supra} note 4 at 97-98.
\textsuperscript{58} See Blyth & Wotherspoon, \textit{supra} note 51 at 276-85.
elections in 1995. The 1995 election was a crucial one, one of the purposes of which was to choose members of the Legislative Council through to 1997. The original idea was that those elected in 1995 would sit on a “through train” and, after serving two years as the last legislature under British rule, would sit for two more years as the first legislature of the Hong Kong SAR. But since British sovereignty would come to an end on 30 June 1997, such an arrangement could only be possible if China agreed to the form of the 1995 Legco elections. Under Patten’s proposed formula for the 1995 elections, residents of Hong Kong would vote directly for 20 of 60 available legislative seats (up from 18 in 1991), leaving 30 “functional constituency” seats to be decided by voting from all working residents. The plan would raise voter participation for functional constituencies from 110,000 in 1992 to an estimated 2.7 million potential voters without increasing the number of legislative seats to be decided by direct election. It would lower the voting age from 21 to 18. Patten’s plan also called for direct elections for the lower level district boards and municipal councils, whose members had largely been appointed in the past. Those elected to serve in lower level boards or councils would make up the Election Committee, who would elect the remaining 10 members of the Legislative Council. For the first time in Hong Kong’s history, the people of Hong Kong would

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60 In its literal sense, “through train” means uninterrupted train service between Hong Kong and mainland China without interruption at the border. It was used to symbolize a proposal to allow sitting members of the last Legislative Council under British rule to serve as members of the legislature of the Hong Kong Special Administrative Region of the PRC without new elections.

61 See Patten, supra note 59.
directly or indirectly elect all members of the Legislative Council in the 1995 elections under Patten’s electoral plan.

Patten’s package was an accelerated expansion of representative government that would increase the size of the electorate, make local governing bodies elected rather than appointed, increase the number of elected seats on the Legislative Council, and shift the balance of power from the Governor and his Executive Council to the fully representative Legislative Council.62 In essence, the proposed political reforms exploited the gray area not only of the Joint Declaration but also of the Basic Law, maximizing the room for popular elections within the boundaries of their provisions.63

The Chinese government flatly rejected Patten’s proposals and denounced the plan as a violation of the Joint Declaration and the Basic Law.64 Internationally isolated in the aftermath of the Tiananmen military crackdown but defiant, Chinese leaders responded in kind to Britain’s initiative, producing the heightened tensions that characterized Hong Kong’s final years of transition to Chinese rule. China claimed that the proposals contravened the “agreements and understandings” which it suggested had been reached between British and Chinese foreign ministers shortly before the Basic Law was promulgated in April 1990. The “agreements and understandings” on the pace of

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62 Ibid.

63 According to the Basic Law and related decisions adopted by China’s National People’s Congress, “[t]he first Legislative Council of the Hong Kong Special Administrative Region shall be composed of 60 members, with 20 members returned by geographical constituencies through direct elections, 10 members returned by an election committee, and 30 members returned by functional constituencies.” But these documents were silent on the specific election schemes under which the 60 Legco seats should be returned. Patten’s strategy was to adhere to the wording of the Basic Law, but he exploited the loop-holes and filled in the gray areas not clearly defined in the Basic Law. See “Decision of the National People’s Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region,” adopted at the Third Session of the Seventh National People’s Congress on 4 April 1990, text in Y. Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese
democratization for Hong Kong committed Britain specifically to “converge” prior to 1997 with the formula for the Legislative Council set down in the Basic Law.  

Therefore, by announcing the Patten package unilaterally without prior consultation with the Chinese side, said China, the British government had violated the Joint Declaration and the Sino-British understandings which stipulated closer cooperation between the two sides.

Though the British presented their ideas about democratization as openly as possible, Chinese officials found it difficult to grasp what the British were attempting. The proposals, and indeed the idea of democracy, were alien to them. They therefore had an inadequate understanding of the real impact of the scheme the Hong Kong government proposed. China’s reaction towards Patten’s constitutional reforms was also influenced by a basic distrust of the British and of their supporters in the territory. This derived from China’s tendency to adopt a doctrinal and nationalistic view of the British colony. It colored their judgment of Britain’s intentions there and the nature of British rule. PRC leaders and officials suspected that the British engaged in a conspiracy to undermine the actualization of full Chinese sovereignty, to plant pro-British elements in the political establishment after 1997, and to spread the virus of democracy to the mainland. In the eyes of Chinese officials, Patten was encouraging the very sort of uncontrollable pluralism in Hong Kong that the Chinese government feared could develop in China;

_Sovereignty and the Basic Law_ (Hong Kong: Hong Kong University Press, 1997) at 571-72; see also the Basic Law, _supra_ note 52, Annex II: (1) 1.

64 See Leung, _supra_ note 56 at 34-42.

65 Ibid.

66 Ibid.


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hence, his actions were part of a British plot to destabilize Hong Kong and embarrass China. In addition, Patten angered Chinese officials for the sin of violating previous understandings and common sense between the two sides. He reversed the practice of consulting the Chinese side in advance of major decisions and denied them the veto they felt was implicit in previous Sino-British understandings.

China and Britain entered into negotiations over the electoral arrangements for the 1995 elections in Hong Kong. After 17 rounds of extensive and protracted diplomatic talks, the two sides were unable to reach an agreement when the negotiations collapsed in November 1993. The Hong Kong government then went ahead with the original Patten proposals and a new Legislative Council was formed in 1995 in accordance with them. After the breakdown of the talks, the Chinese side determined that it would have no choice but to undo, after the handover, any constitutional changes made unilaterally by the Patten government. In retaliation, the Chinese government declared that the fully elected Legislative Council would be dissolved once the Hong Kong SAR came into existence and a “provisional legislature” whose members were to be hand-picked by Beijing would be set up instead. The highly controversial Provisional Legislature was to be an interim body intended to operate as a fully fledged legislature for one year, after which there were to be fresh elections for a two-year legislative council.

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68 See Li, supra note 59 at 51-65.
71 ibid. at 40.
Ironically, the introduction of democratic reform in Hong Kong only really started to be put into effect a few years before the British government had to hand the colony back to China. Under such arguably hypocritical circumstances, the constitutional reforms pushed by Patten, without China's consent and in a confrontational manner, were destined to be tentative and short-lived, because China would by no means be expected to tolerate them after the handover. With the foregoing in mind, questions arise as to how Patten's constitutional reforms should be evaluated. On the one hand, Patten's reforms and his relentless, confrontational approach generated intense tensions between the British and Chinese governments. The reforms also polarized the local society and set off lively debates on both the scope and pace of democratization. Because of the reforms, Hong Kong went through turbulent days of mistrust and intolerance among the British and Chinese governments, local politicians, local political organizations, and the general public. On the other hand, Patten's electoral reforms did reflect and spur the aspirations of the Hong Kong people for a more democratic government through an increase of direct representation in the Legislative Council and the lower councils. In the aftermath of the Tiananmen incident in 1989, there was a surge in popular demand in Hong Kong for a faster pace of democratization. Hong Kong's political leaders reached a rare consensus that the pace of building democracy should be hastened. The sweeping victory won by the pro-democracy forces in the 1991 and 1995 elections indicated that the people of Hong Kong did want democracy. In the 1991 elections, of the 18 seats contested, pro-

74 See generally Li, supra note 59 at 51-65.
75 See So, supra note 67 at 60-61.
democracy candidates won 16. In the 1995 Legco elections, groups and independent candidates generally recognized as belonging to the pro-democracy camp performed very well. For instance, the Hong Kong Democratic Party fielded 15 candidates and won 12 seats among the 20 seats in geographical constituencies. It had altogether 19 seats in the Legco and became the foremost party. By contrast, many of the candidates from the pro-China party, the Democratic Alliance for the Betterment of Hong Kong (DAB), were defeated in the elections. Among the seven DAB candidates in geographical constituencies, only two were eventually elected. Those defeated included the chairman and the two vice-chairmen of the party. The outcome was seen as a strong affirmation by the people of Hong Kong of their desire to maintain their way of life and to preserve their rights and freedoms. Patten’s reforms helped to elevate local democratic pressure groups to formal political parties and to consolidate their populist alliance with the grassroots population.

In addition, as Alvin So observed, there were many indicators that the democratic project established itself in Hong Kong civil society partly because of the debate over constitutional reforms and the 1991 and 1995 elections. Firstly, in the early 1990s most of the Hong Kong people considered themselves informed about government policies related to their livelihood due to the Sino-British debate over Patten’s electoral reforms and the extensive media coverage and commentary on political issues. Secondly, service professionals and the grassroots populations became more assertive in protests and social

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79 See Blyth & Wotherspoon, supra note 51 at 241-243.
movements. Thirdly, aside from protests and demonstrations, political participation through regular channels greatly expanded. Lastly, Patten's reforms further enhanced the prestige of the democrats. The growing power of the pro-democracy forces probably influenced London's policy toward the last phase of reversion. Unfortunately, after the promulgation of the Basic Law in 1990, the scope for constitutional reform in Hong Kong in the early 1990s was seriously restricted and it was almost too late for the Hong Kong government to make any significant change in Hong Kong's political structure.

With the end of Sino-British cooperation, the Chinese government decided to prepare for the 1997 transition single-handedly, that is, without British cooperation or participation. Chinese officials repeatedly stated that Patten's reforms would become null and void as of 1 July 1997. China would dissolve the Legco elected under a system it did not approve when it resumed sovereignty over Hong Kong in July 1997.

As the Sino-British confrontation dragged on, China accelerated preparations for a shadow government, called "the second stove," to be installed in Hong Kong when it resumed sovereignty over Hong Kong. In June 1993, China appointed 57 members to the Preliminary Working Committee (PWC) for the HKSAR Preparatory Committee, ahead of the formal HKSAR Preparatory Committee that was scheduled to begin work in early 1996. The PWC was set up as the consequence of the Sino-British dispute over Hong Kong's political transition. There is no provision in the Basic Law that spells out the

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80 See So, supra note 67 at 74-76.
81 Ibid. at 75.
82 During the years 1982-1992, the Chinese government had banked on cooperation with the British to prepare for the 1997 transition. After seventeen rounds of talks on Hong Kong's political reform proposals, the communication between the two countries suffered a total "breakdown". The Economist wrote, "[t]he divorce papers between China and Britain [were] filed." The Economist, 5 March 1994 at 30.
83 See Lo, supra note 77 at 30-31.
establishment of such a body. The PWC was an ad hoc appointed body composed of mainlanders and pro-Beijing Hong Kong people, empowered to deliberate and advise on a variety of issues related to the pending transition. The political and legal sub-groups of the PWC made a controversial suggestion that an alternative body to the Legislative Council elected in 1995 under Patten’s electoral formula be established and sit for one year until new elections complying with China’s interpretation of the Basic Law could be held in 1998. The proposed Provisional Legislature would start functioning on 1 July 1997, with powers and functions similar to those of a normal Legco as defined by the Basic Law. A year later, the National People’s Congress Standing Committee adopted PWC’s suggestion and resolved unanimously to dismantle Hong Kong’s existing Legislative Council on 1 July 1997. This signaled the end of the “through train” arrangement set out in the Basic Law.

The 150 member Preparatory Committee was set up in January 26, 1996 in accordance with a decision of the National People’s Congress of the PRC on April 4, 1990. The Preparatory Committee exercised its authority under the NPC and its major task was to establish the first HKSAR government. This included the responsibility to form a 400-member Selection Committee which in turn was to recommend a candidate for the future Chief Executive to the central government for appointment, and also to prescribe the specific method for forming the first Legislative Council. While the PWC had been set up in response to Patten’s political reform proposals, the Preparatory Committee had been provided for in the Basic Law and its legitimacy, unlike that of the

84 In December 1995, the PWC went out of existence, after having labored for two and a half years.
85 See Lo, supra note 77 at 30-31.
86 See B. Howlett, Hong Kong: A New Era (Hong Kong: the Information Services Department, 1998) at 6.
PWC, was unquestioned.87 Of the 150 members, 56 were mainlanders and 94 were Hong Kong people.88 Business tycoons and pro-China political groups were strongly represented in the Preparatory Committee, while members of the popular Democratic Party and other democrats were all excluded.89 In March 1996, the Preparatory Committee for the SAR voted in Beijing to set up an appointed provisional legislature to replace the legislative “through train”, and issued a decision setting out the selection process, terms and duties of the provisional legislature. The Governor of Hong Kong denounced the decision as a violation of the Basic Law and “a black day for democracy.”90 The Preparatory Committee also established the Selection Committee, composed entirely of Hong Kong people, to recommend a candidate for HKSAR's first Chief Executive. The committee was also charged with selecting members of the provisional legislature. The Selection Committee strongly favored candidates from a pro-Beijing, business background. Without the cooperation of the Hong Kong government, the Chinese government was especially encouraged by the fact that about 6000 people applied to join the 400-seat Selection Committee. With the exception of the pro-democracy camp, the applicants included elites from all sectors of the society. However, opinion polls showed that the majority of the grassroots populations had little confidence in the Preparatory Committee due to its failure to consult Hong Kong people and lack of transparency.91

87 See the Basic Law, supra note 52, Annex I (6) and Annex II (1) (1); see also “Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region,” supra note 63, clause 2.
88 See Howlett, supra note 86 at 6.
89 See So, supra note 67 at 73.
90 See South China Morning Post, March 25, 1996.
91 See ibid., 24 June 1996.
With respect to the selection of the Chief Executive, the Basic Law rejects direct election by the Hong Kong people. Instead, the Selection Committee was empowered to select a candidate for the first Chief Executive for the central government to appoint. On December 11, 1996, the Selection Committee chose Tung Chee-hwa, a shipping magnate, as the first Chief Executive of the HKSAR. Mr. Tung had been appointed to the Executive Council by Governor Patten and thus had inside knowledge of the Hong Kong government. He also had good working experience with both mainland China and Taiwan and had wide contacts in the West and in the international business community.

Ten days after the selection of the Chief Executive-designate, the Selection Committee picked sixty out the 130 “candidates” to serve on the provisional legislature in the face of international criticism and continued local protests. The decision to establish an appointed legislature to replace the popularly elected Legislative Council was the subject of intense controversy. It raised serious concerns about the legality and legitimacy of the Provisional Legislative Council, because there is no mention of such an interim body in the Joint Declaration and the Basic Law. Article 68 of the Basic Law states that, under the principle of “gradual and orderly progress”, “the ultimate aim is the

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92 Article 45 of the Basic Law provides that:

“The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People’s Government.

The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.”

The Basic Law, supra note 52, art. 45.

93 See South China Morning Post, 12 December 1996 at 1; see also the Basic Law, supra note 52, arts. 43-58, Annex I.

94 See Chang & Chuang, supra note 70 at 125-27.

95 See South China Morning Post, 22 December 1996, at 1.
election of all members of the Legislative Council by universal suffrage.” The decision to dissolve an elected legislature and replace it with an appointed one rolled back expanded democracy and violated the spirit of the Basic Law. Moreover, Annex II of the Basic Law explicitly provides for specific methods for forming the first HKSAR legislature. Therefore, the appointment of the provisional legislature failed to comply with the specific method for forming the initial HKSAR legislature prescribed by the Basic Law.

Another difficulty with the provisional legislature was the lack of popular support. Under the “one country, two systems” formula, Hong Kong people were, and are, promised rule of Hong Kong by themselves. However, China excluded the democrats from the Preparatory Committee as well as the Selection Committee, on the grounds that they refused to recognize the legitimacy of the provisional legislature. As the democrats represented a major segment of Hong Kong public opinion, the arbitrary exclusion cast doubts on the validity of the initial legislature of the HKSAR and the meaning and credibility of “one country, two systems”, “Hong Kong people ruling Hong Kong” and “a high degree of autonomy” that China promised Hong Kong to enjoy.

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96 Article 68 of the Basic Law provides that:

The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.

The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.”

The Basic Law, supra note 52, art. 68
Part Two: Hong Kong’s Evolving Constitutional Order

The history of Hong Kong’s politics is full of irony and paradox. Before concessions were made during the run-up to 1997 to allow increased political participation, the colonial government of Hong Kong was largely autocratic, unrepresentative and unaccountable. It was against this background that the British and Chinese governments reached an agreement, in which Britain agreed to relinquish sovereignty over Hong Kong in exchange for China’s commitment to maintain Hong Kong’s existing political, economic, social and legal systems for at least fifty years from the 1997 transfer date.98 Clearly the two governments were intent on establishing the continuity of past and future systems, even if the ideological and constitutional foundation of those systems was to be radically changed under Chinese rule.

In this section, I first provide a brief account of the constitutional and political structure of Hong Kong under British rule. As North reminds us that “[h]istory matters ... the past can only be made intelligible as a story of institutional evolution,”99 the purpose of this brief excursus is to locate the subsequent section within its historical context. I then examine the new constitutional order of the HKSAR established under the Joint Declaration and the Basic Law.

97 See ibid., Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures.
98 See the Joint Declaration, supra note 37, art. 3.
I. Hong Kong as a British Colony: The Political Framework on the Eve of Sino-British Negotiations

Hong Kong’s basic political framework under British rule was created in the Victorian era and had remained relatively unchanged until early 1980s, although there had been occasional alterations.\(^{100}\) Under the British constitutional law, Hong Kong was a “crown colony.” The political framework of the colony was set out by a written constitution, consisting of the Letters Patent and the Royal Instructions.\(^{101}\) The Letters Patent of April 5, 1843, and the Royal Instructions, issued on the following day, regulated the political system of the new colony and consequently became the constitution of the British colony of Hong Kong for 150 years.\(^{102}\) The Letters Patent stipulated the relationship between Hong Kong and London as well as the colony’s internal political system. The core of Hong Kong’s political system was the Governor, the Executive Council and the Legislative Council. The Governor of Hong Kong was chosen by the British prime minister and formally appointed by the Queen. He was the representative of the British Crown in Hong Kong, head of the Hong Kong colonial government and Commander-in-Chief of the British forces stationed in Hong Kong. In formal terms power was concentrated in the hands of the governor. He had the highest authority in the

\(^{100}\) See N. Miners, *The Government and Politics of Hong Kong*, 2nd ed. (Hong Kong: Oxford University Press, 1977) at xv.


\(^{102}\) See P. Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*, 2nd ed. (Hong Kong: Longman Asia, 1994) at 42-46.
colony, answerable not locally but to the imperial government. He appointed members of the Executive Council and Legislative Council and all judges and all public officials, and made policy and directed its implementation. In general the Governor bore complete responsibility for the peace, order and good government of the colony. The Letters Patent created an Executive Council to advise the Governor on policy and administration, as well as a Legislative Council to help him in law making. The Executive Council consisted of *ex-officio* members, including the Chief Secretary, the Commander of British Forces, the Financial Secretary and the Attorney General, and unofficial members of local influence chosen by the Governor, predominantly European at the beginning but predominantly Chinese by the 1970s. The Executive Council met weekly, discussing administrative policies and giving advice to the Governor. All proposed bills were sent to the Executive Council for consideration before their introduction into the Legislative Council.

The Legislative Council functioned as the legislature of the colony. It debated and passed new laws, allocated funds, and raised questions on behalf of citizens of Hong Kong. The composition of the Legislative Council remained largely unchanged from the 1840s to the 1980s. Until 1985 the Legislative Council had been composed entirely of

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107 Article VII(1) of the Letters Patent provided that “The Governor, by and with the advice and consent of the Legislative Council, may make laws for the peace, order, and good government of the Colony.” This article suggested that it was the Governor of Hong Kong that formally possessed the law-making authority in Hong Kong while the Legislative Council was only supposed to provide advice and a “check” on the.
members nominated by the Governor and appointed at the Queen's pleasure. The Governor was the President of the Council and presided over the Council's meeting. In 1985 the Council consisted of fifty-seven members: the Governor, the Chief Secretary, the Financial Secretary, the Attorney General, another seven civil servants, twenty-two appointed members selected by the Governor and twenty-four elected members. The overwhelming majority of bills debated in the Council were moved by the government. Members of the Council could also move private members' bills, subject to certain restrictions concerning public expenditure. The Governor had the power to dissolve the legislature if an important government bill was defeated, but in practice this had never happened. Elections were held every three years since 1985, but were based on an extremely narrow franchise and were thus of little democratic value. Only a minute proportion of the population was qualified to vote by the stipulated standards of education, tax paying status, or membership in professional bodies - some 70,000 people in all in 1985.

As far as the relationship between Hong Kong and Britain was concerned, the British government in London was the highest and final authority over the affairs of Hong Kong. Britain exercised its sovereignty over Hong Kong in the appointment of the Governor, senior government officials, judges and members of the Legislative and


109 See Miners, ibid. at 7; Morris, supra note 103 at 200-203.

110 See C. Lo, "Constitution and Administration" in Nyaw & Li, supra note 78 at 3.

111 Ibid.

112 See Morris, supra note 103 at 200-203.
Executive Councils, and as well as over the territory's foreign affairs and defense. Ghai summarized the overall situation as follows:

Britain retained the power to legislate for Hong Kong either by an act of parliament or by prerogative, i.e., by the executive. It also retained control over the legislative process in Hong Kong by its powers of disallowance and the reservation of certain types of legislation for its approval... It appointed and dismissed the Governor and other senior officials in the territory, and had the power to give directions to the Governor on the discharge of his functions.\(^{113}\)

However, in the past several decades, the British government largely left the Hong Kong government to its own devices. The British government rarely intervened into the internal affairs of Hong Kong or vetoed laws passed by the Legislative Council of Hong Kong.\(^{114}\) In formal constitutional terms, parliamentary acts passed in London imposed restrictions on the colonial legislature; however, in practice the legislation of the British Parliament for Hong Kong was limited to a few areas such as defense, aviation, nationality, and treaties. In fact, Hong Kong acquired much more autonomy in its internal affairs than was strictly provided by its constitution. After World War Two, economic and social policies were increasingly being made locally even while London occasionally used its unchallenged power in the crucial decisions concerning selection of the governor and senior local officials.\(^{115}\) However, although the Governor had been invested with what one would consider dictatorial power, he was in practice put under considerable restraints. He was required to obey the laws of Hong Kong, British laws extended to

\(^{113}\) Ghai, supra note 63 at 115.

\(^{114}\) The last time when the Crown vetoed a law passed by the Hong Kong legislature was in 1913. Only once in Hong Kong's history did the Crown instruct the Governor not to allow a bill to pass. See E. Wang, Hong Kong,1997: The Politics of Transition (Boulder: Lynne Rienner Publishers, 1995) at 65.
Hong Kong, and any instructions issued by the British Secretary of State. He was supposed to consult with the Executive Council (his cabinet) on all important issues. Even though he had the power to act against the advice of the Executive Council, that power was rarely used.116 A well-established practice was that the government held discussions with the local communities concerned through an extensive network of advisory committees and consultative organizations before administrative policy decisions were made.117 The main business of public administration was controlled in the town areas by the Urban Council-Administration and in the rural areas by the Regional Council-Administration relying on an intricate network of voluntary committees, agencies and private clubs able to voice commercial, industrial, and also traditional “lineage” interests. Under both arrangements, there existed a myriad of civilian consultation committees, manned by residents of village standing and influence, which interacted for mutual information and persuasion.118 At the highest level an Independent Commission against Corruption (ICAC) was empowered to fight all kinds of illegal practices by corrupt government officials. In some sense, the people and government in Hong Kong worked together in a system of voluntary consultation, “in which there was considerable public participation in administration, what the Hong Kong government has called

115 See Ghai, supra note 63 at 17-19.
116 The Governor was required to report to the Crown with reasons when he decided to act against the advice of the Executive Council. See “Royal Instructions”, supra note 101, art. XII.
117 See Ghai, supra note 63 at 17-19.

After the handover, following public consultations in mid-1998, the Hong Kong government decided to reorganize the structure for delivering municipal services in order to improve co-ordination and efficiency. In December 1999, the Legislative Council passed the Provision of Municipal Services (Reorganization) Bill. This provides the legal basis for the reorganization of the municipal services. The Provisional Municipal Councils were dissolved after the terms of office of the incumbent members expired on 31 December 1999. The Hong Kong government set up new dedicated agencies to be responsible for food safety, environmental hygiene and leisure and cultural services with effect from January 2000.
government by consensus and consultation and others have called the ‘administrative absorption of politics’.\textsuperscript{119}

It must be pointed out, however, that during most of the 150 years British rule Hong Kong saw an essentially autocratic and undemocratic system of British colonialism without any element of representative government. In the early days of colonization, the British governed Hong Kong with strong tint of racial and cultural superiority. There existed for a long time what Wesley-Smith described as a body of ‘anti-Chinese legislation’ in the Hong Kong statute book.\textsuperscript{120} Before the Second World War, the Europeans had a preemptive right to privileged status within the political and legal systems and openly discriminated against the Chinese.\textsuperscript{121} For instance, although ethnic Chinese accounted for 98 per cent of the colony’s population, few had been appointed to higher-level administrative offices before the 1970s.\textsuperscript{122} The local population had never been given a fair opportunity to develop self-government, and the move to democratic government had been procrastinated.

There were several reasons contributing to the long delayed democratization of Hong Kong. Indeed, as many have observed, for the period from the end of the Second World War until the early 1980s, the vast majority of the Chinese population had no interest in the business of government.\textsuperscript{123} Apart from the generation born and bred in

\textsuperscript{119} Ghai, \textit{supra} note 63 at 18.
\textsuperscript{121} \textit{Ibid}.
\textsuperscript{122} Between 1947 to 1960 the colonial government appointed only seven Chinese as administrative officers, compared to 41 expatriates. By 1970, Chinese comprised 19 percent of the directorate class (heads of government apartments, senior professional officers, and other positions of similar status); by 1980, 39.2 percent; and by 1985, 52.5 percent. See E. Wang, \textit{supra} note 114 at 67.
\textsuperscript{123} See D. Wilson, \textit{Hong Kong! Hong Kong!} (London: Unwin Hyman, 1990) at 55-80.
Hong Kong after the Second World War, most Hong Kong citizens were migrants who left or ‘escaped’ from mainland China. The causes of mass immigration had sometimes combined political and economic hardship at home. When China was plagued with Western and Japanese invasion, civil wars, corruption, social injustice, famine, and natural catastrophes from mid-19th century to 1949, Hong Kong was a refuge or a port of emigration for the dispossessed, the alienated, and the persecuted in all walks of life. After the Communists won over the Nationalist government in the Chinese Civil War of 1945-1949, refugees arrived from Shanghai and elsewhere, bringing capital and entrepreneurial skills, while immigrants from South China supplied labor for the factories. The influx reached 100,000 a year after Communist victory. For many people in this group, Hong Kong was merely a convenient refuge and therefore their political demands were limited. It is hardly surprising that developing a sense of belonging to a place ruled by foreigners proved to be difficult, and thus newcomers did little to challenge colonial rule or demand participatory democracy. Until the early 1980s, the vast majority of Hong Kong people showed little desire to participate in political activity.

Secondly, it was also because of China’s consistent opposition to the democratization of Hong Kong politics that Britain refrained from introducing democracy reforms in the colony. As we have seen, the PRC consistently regarded Hong Kong as Chinese territory that was occupied by the British until such time as the Chinese government deemed it appropriate to reclaim it. The PRC had always made it clear that it

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124 See D. Duncanson, supra note 106 at 23.
125 Ibid.
would by no means allow Hong Kong to attain political independence. As well, as Miners has demonstrated, the British colonial regime in Hong Kong rested on China’s consent and had to operate within the parameters set by several factors, one of which was the policies of China. China would not tolerate any movement towards participatory democracy or self-government that China considered as preparatory for independence. By the same token, the local Chinese population’s tacit attachment to British colonial rule can also be explained by the lack of an alternative to colonial rule.

Thirdly, Chinese people have little experience with constitutions, parliaments, and courts of law; they have much experience with arbitrary autocratic emperors, dictators, warlords, and ruthless Communist Party officials. They are socially trained to defer to authority rather than demanding the development of representative government. This helps to explain why the majority of Hong Kong people had long been largely apolitical and there had not been public demand for the end of colonial rule and participatory democracy in the territory until the early 1980s.

Despite the undemocratic and unaccountable features, the Hong Kong colonial government managed to maintain its political control and succeeded to a surprising degree in avoiding challenges to its legitimacy. The colonial government had generally been efficient and clean, especially since the 1970s. With an often inefficient and repressive government in China, the people of Hong Kong seemed content with a stable

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127 Political scientist Norman Miners pointed out that: “Hong Kong’s political institutions must operate within the parameters set by four factors: the policies of China and Britain, the attitudes of the local population, and the state of the economy. All three parties have proven indispensable. Each has had to cooperate with the other two.” See N. Miners, The Government and Politics of Hong Kong, 5th ed. (Hong Kong: Oxford University Press, 1991) at 251. See also J.T.H. Tang & F. Ching, “Balancing the Beijing-London-Hong Kong ‘Three-Legged Stool,’ 1971-1986” in Chan & Postiglione, supra note 47 at 41-43.
and prosperous life even though they were under colonial rule. For them, Hong Kong’s main attractions were political stability, economic prosperity, and social and cultural freedoms.

One of the most important features of British colonial rule in Hong Kong was the rule of law, which protected the security of person and property of the inhabitants and secured for them other important rights and freedoms. One of the first acts of the British in Hong Kong was the establishment of a system of law. In August 1844 English law was introduced to Hong Kong by the 1844 Supreme Court Ordinance (No. 15 of 1844). Section 3 of that Ordinance provided, *inter alia*, that “the law of England shall be in full force in the said Colony of Hong Kong except where the same shall be inapplicable to the local circumstances of the said Colony, or of its inhabitants.” Accordingly, English law was either specifically imported into Hong Kong or incorporated into local ordinances. The courts of Hong Kong followed the practice and procedure of the English courts and applied English and Privy Council decisions in all areas of law. In Britain, the rule of law and judicial independence from executive and legislative interference had long been the hallmark of British constitutional practice. Under the British legal system and framework of laws, law, rather than arbitrary power, governed the exercise of official authority. The rule of law recognized that the judiciary had the power to review the

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131 See Ghai, *supra* note 63 at 22.


133 For a full discussion of the sources of law in Hong Kong, see Y. Ghai, *supra* note 63 at 335-70. See also P. Wesley-Smith, “The Common Law of England in the Special Administrative Region” in R. Wacks, ed.
administration of laws by the executive, and that courts, in order to be impartial arbiters, must render judgments independent of the political views of the executive. The British, as they did in all other British colonies, introduced their legal and judicial systems into Hong Kong. The courts of Hong Kong were independent of the executive and legislature branches. Trials were presided over by judges whose tenure was protected by law, who did not take orders from government officials, and who did not hesitate to rule against the government. A judge made a ruling after hearing both sides of an argument presented to the best of their ability by lawyers who formed an independent legal profession and whose rights as advocates were guaranteed by law. Decisions of the courts of Hong Kong were subject to review and reversal only by the Judicial Committee of the Privy Council in Britain. One hundred and fifty years of British rule endowed Hong Kong with the forced gifts of common law, rule of law, judicial independence, an independent legal profession and the jury system. The Hong Kong judiciary was scrupulously honest and independent of any executive or legislative interference with its adjudication. Significant indigenization of the judiciary and the legal profession had occurred over the past twenty years leading up to the handover; local Chinese professionals were well trained and largely in control of these institutions. While the colonial rulers retained the prerogative to make oppressive laws relatively unchecked by their subjects, they were restrained by the democratic tradition and public sentiment in Britain and by a degree of effectiveness of the courts in restraining abuse of political power. Ghai suggested that "[t]he rule of law became a powerful means to legitimize colonial rule, particularly as the

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133 See Ghai, ibid. at 22.
ideology of a democratic and accountable government could not be pressed into service.”\textsuperscript{135} Indeed, the independence of the judiciary and the supreme rule of law (even the sovereign is not above the law) had been a critical means of protecting individual rights and freedoms and ensured that colonial rule in Hong Kong was generally benign and enlightened. The Chinese people of Hong Kong were able to enjoy all the fruits of a free society except for self-government.

II. “Hong Kong People Ruling Hong Kong”: The New Constitutional Order in the HKSAR

On 1 July 1997 sovereignty over Hong Kong reverted to the PRC and the Basic Law of the HKSAR became the governing constitutional document of the HKSAR. The Basic Law incorporates the dictates of the Sino-British Joint Declaration and derives its legitimacy as a subset of the 1982 Constitution. Article 31 of the 1982 PRC Constitution, very simply, provides that:

\begin{quote}
The State may establish special administrative regions where necessary. The systems to be applied in special administrative regions will depend on the actual circumstances in the region and be determined by law passed by the National People’s Congress.\textsuperscript{136}
\end{quote}

\textsuperscript{134} See generally Y. Ghai, \textit{ibid.}, Chapter Seven: The Legal and Judicial System, at 281-333.

\textsuperscript{135} \textit{Ibid.} at 25.

This provision acts as the constitutional basis for the establishment of the HKSAR upon the resumption of Chinese sovereignty over the territory. As a result of this provision, new to the 1982 Constitution and lacking any analogue in the PRC’s three previous state constitutions, it became possible for the PRC government to negotiate an agreement with Britain to provide SAR status for Hong Kong following its reversion to Chinese rule. On the other hand, the novelty of this provision and the fact that no other special administrative region was then in existence raised questions as to the nature and extent of the autonomy to be provided to special administrative regions when one was established pursuant to the new constitutional provision.

In accordance with the provisions of Article 31 of the Chinese Constitution, the Basic Law was enacted by the PRC to incorporate the mandates of the Joint Declaration into domestic law. It acts as a hybrid quasi-constitution by attempting to integrate the provisions of the Joint Declaration within the constitutional framework of the PRC.137 When the Basic Law was being drafted, China repeatedly assured Britain and Hong Kong that China would maintain Hong Kong’s existing political and legal systems basically unchanged for at least fifty years after the reversion of sovereignty. The promise was made to maintain the confidence of Hong Kong people in Chinese rule. It also reflected China’s genuine desire that there should be no radical changes in the existing political systems before and after the handover.138 At the time of Sino-British negotiations over Hong Kong, the Chinese leaders, with support from the local conservative business elites, favored the then-existing model of strong government, coupled with a free-wheeling

137 See generally Ghai, supra note 63 at 61-62, 176-77.
capitalist economy, which was accountable not to the local population but to the metropolitan power. Not surprisingly, the Joint Declaration and the Basic Law establish a political system for the HKSAR which appears a copy of the colonial system with limited changes and which, in many aspects, retains the overall political structure and essential elements of the old system.

The HKSAR government is divided into the three usual branches: the executive, legislative and judiciary. In broad terms, the Basic Law sets up an executive-led government in Hong Kong, coupled with a weak legislature and limited democratic representation. Institutionalizing the policy of “Hong Kong people ruling Hong Kong”, the Basic Law provides that the Hong Kong SAR government shall be composed of local inhabitants. Under the Basic Law, the Chief Executive, like the Governor before him, is the kingpin of the political system and enjoys sweeping executive powers. The Chief Executive is the head of the HKSAR and represents the region. He or she is responsible for implementing the Basic Law and other laws, signing bills and budgets passed by the Legislative Council, promulgating laws, making decisions on government policies and issuing executive orders. He or she nominates and reports to the central government for appointment of principle officials. He or she appoints and removes judges of the courts at all levels in accordance with legal procedures. Moreover, the Chief

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140 See the Basic Law, supra note 52, arts. 44, 55 and 67.
141 Ibid., art 43.
142 The power of the Chief Executive to appoint and remove judges is under considerable restraints according to the Basic Law. Articles 88, 89 and 90 provide that judges of the courts of the HKSAR shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors. A judge may only be removed for inability to discharge his or her duties, or for misbehavior, by the Chief Executive on the
Executive implements the directives issued by the central government in respect of the relevant matters and deals with external affairs of Hong Kong. He or she approves the introduction of motions regarding revenues or expenditure to the Legislative Council, pardons persons convicted of criminal offenses or commutes their penalties, and handles petitions and complaints.  

By the terms of the Basic Law, the Chief Executive must be a national of China of no less than 40 years of age who is a permanent resident of the region and has ordinarily resided in Hong Kong for a continuous period of 20 years. He or she shall be selected by election or through consultations held locally and be appointed by the central government. The Chief Executive must also be a person of “integrity, dedicated to his or her duties”. While the Basic Law specifies that the “ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures,” it is not until after 2007 that the Chief Executive may be selected by universal election. The power of

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143 See infra text accompanying notes 188-195 for more details.
144 Ibid., art. 44.
145 Ibid., art 47.
146 Ibid., art 45.
147 Ibid., art 45.
148 The first Chief Executive of the HKSAR was selected by a 400-member Selection Committee composed entirely of permanent residents of Hong Kong and appointed by the Central Authorities in December 1996. According to Annex I, Paragraph 1 of the Basic Law, the Chief Executive shall be elected by “a broadly representative Election Committee” and appointed by the Central Authorities. Paragraph 7 goes on to provide that: “If there is a need to amend the method for selecting the Chief Executive for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People’s Congress for approval.” Therefore, it can be said that the Basic Law sets out no definite timetable for the transition to fully democratic selection or elections of the Chief Executive. Instead, it provides a ten year transitional period (i.e. until 2007). After 2007, changes to the procedures for the selection or elections of the Chief Executive can be made if they have the support of two-thirds of all members of the Legislative Council and the Chief Executive and the
election is now vested in a 400-member Election Committee whose members are named by Beijing, although the Basic Law specifies that the committee shall be "broadly representative." The chief executive will be appointed by the central government on the basis of the results of elections or consultations to be held locally. The term of office of the Chief Executive shall be five years, and he or she may serve for no more than two consecutive terms.

The Chief Executive is assisted by the Executive Council in policy-making. The Chief Executive selects a group of people to form the Executive Council, which he must consult before making important policy decisions, introducing bills into the Legislative Council, making important subordinate legislation, or dissolving the Legislative Council. Members of the Executive Council are appointed by the Chief Executive from among the principle officials of the executive authorities, members of the Legislative Council and public figures. They are Chinese citizens who are permanent residents of Hong Kong with no right of abode in any foreign country. The Executive Council normally meets once a week and is presided over by the Chief Executive. Its proceedings are confidential, although many of its decisions are made public. The Chief Executive is not obliged to accept the council's advice. If the Chief Executive does not accept a majority opinion of the Executive Council, he or she must put the specific reasons on record.

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approval of the NPC Standing Committee. See the Basic Law, Annex: I: Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region, supra note 52.

149 Ibid., Appendix: I.
150 Ibid., art. 46.
151 Ibid., art. 54.
152 Ibid., art. 55.
153 Ibid., art. 56.
The key responsibility within the territory for the performance of the government lies with the Chief Executive and the Chief Executive alone. Under his authority, the HKSAR government exercises the following powers and functions according to the Basic Law:

(1) formulating and implementing policies;
(2) conducting administrative affairs;
(3) conducting external affairs as authorized by the central government under the Basic Law;
(4) drawing up and introducing budgets and final accounts;
(5) drafting and introducing bills, motions and subordinate legislation; and
(6) designating officials to sit in on the meetings of the Legislative Council and to speak on behalf of the government.\textsuperscript{154}

The government is required to abide by the law and be accountable to the Legislative Council.\textsuperscript{155}

The Legislative Council is vested with the legislative power in the HKSAR, which "shall be constituted by elections."\textsuperscript{156} The Legislative Council is composed of 60 members, representing three different types of constituencies: geographical constituency, functional constituency and election committee. Members of the Legislative Council must be Chinese citizens who are permanent residents of Hong Kong with no right of abode in any foreign country. However, permanent residents of the HKSAR who are not of Chinese nationality or who have the right of abode in foreign countries may also be

\textsuperscript{154} Ibid., art. 62.
\textsuperscript{155} Ibid., art. 64.
\textsuperscript{156} Ibid., arts. 66, 68.
elected members of the Legislative Council, provided that the proportion of such members does not exceed 20 percent of the total membership of the Council.\textsuperscript{157} The Basic Law provides that the method for its formation is to be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.\textsuperscript{158} The Basic Law sets out the composition of the first three terms of the Legislative Council as follows:

<table>
<thead>
<tr>
<th>Membership of the Legislative Council of the HKSAR (60 in total)</th>
<th>First Term (2 years)</th>
<th>Second Term (4 years)</th>
<th>Third Term (4 years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) elected by geographical constituencies through direct elections</td>
<td>20</td>
<td>24</td>
<td>30</td>
</tr>
<tr>
<td>(b) elected by functional constituencies</td>
<td>30</td>
<td>30</td>
<td>30</td>
</tr>
<tr>
<td>(c) elected by an election committee</td>
<td>10</td>
<td>6</td>
<td>0</td>
</tr>
</tbody>
</table>

In May 1998, 20 members of the first term of the Legislative Council were elected from geographical constituencies by universal suffrage. It was here that democracy found its beachhead. Under a proportional representation system, Hong Kong was divided into five geographical constituencies, each having three to five seats. The vote was on a one-

\textsuperscript{157} \textit{Ibid.}, art. 67.  
\textsuperscript{158} \textit{Ibid.}, art. 68.
person, one-vote basis within each geographical constituency. Any permanent resident of the HKSAR who is a Chinese citizen with no right of abode in any foreign country may stand for election in any geographical constituency, provided that he or she is a registered elector on the General Election Roll, has attained the age of 21, and has ordinarily resided in Hong Kong for the preceding three years. During the 1998 elections, a record number of 1.49 million Hong Kong residents, or 53 per cent of the 2.8 million registered voters, turned out to vote at 496 polling stations. During the 2000 Legco elections, nearly 44 per cent of the 3 million registered voters cast their votes in geographical constituency elections.  

Each functional constituency represents an economic, social, or professional group which is of substantial size and importance in the HKSAR. In the 1998 and 2000 elections, there were 28 functional constituencies which returned 30 members to the Legislative Council. For functional constituency elections, a candidate must, besides

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160 The delimitation of functional sectors and corporate bodies, their seat allocation and election methods, together with the division of geographical constituencies and the voting method for direct elections therein, are to be specified by and electoral law introduced by the Hong Kong government and passed by the Legislative Council. See the Basic Law, Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and its Voting Procedures, 1 (2).  
161 According to the Hong Kong Legislative Council Ordinance (1997), there are 28 functional constituencies in the HKSAR. They are the following: (a) the Heung Yee Kuk functional constituency (Heung Yee Kuk is a political organization controlling the indigenous villages in Hong Kong’s New Territories and is the Government’s statutory adviser on New Territories matters); (b) the agriculture and fisheries functional constituency; (c) the insurance functional constituency; (d) the transport functional constituency; (e) the education functional constituency; (f) the legal functional constituency; (g) the accountancy functional constituency; (h) the medical functional constituency; (i) the health services functional constituency; (j) the engineering functional constituency; (k) the architectural, surveying and planning functional constituency; (l) the labour functional constituency; (m) the social welfare functional constituency; (n) the real estate and construction functional constituency; (o) the tourism functional constituency; (p) the commercial (first) functional constituency; (q) the commercial (second) functional constituency; (r) the industrial (first) functional constituency; (s) the industrial (second) functional constituency; (t) the finance functional constituency; (u) the financial services functional constituency; (v)
satisfying the usual age and residential requirements, be a registered elector on the
General Electoral Roll and also a registered elector of, or have a substantial connection
with, the relevant functional constituency.

The Election Committee was composed of 800 members who were HKSAR
permanent residents, and returned 10 members of the first term Legislative Council in
the May 1998 elections and 6 members in the September 2000 elections. In accordance
with the principle of gradually increasing democratization, seats returned by the Election
Committee will be phased out in the third Legislative Council. Yet even then half of
the Council’s sixty members will be elected by functional constituencies, which in total
represent only 180,000 or so citizens out of an electorate of three million. These
deviations from the democratic ideal must be acknowledged, yet at the same time

the sports, performing arts, culture and publication functional constituency; (w) the import and export
functional constituency; (x) the textiles and garment functional constituency; (y) the wholesale and retail
functional constituency; (z) the information technology functional constituency; (za) the catering functional
constituency; (zb) the District Council functional constituency. The composition of each of these functional
constituencies is specified by the Hong Kong Legislative Council Ordinance. In the 1998 elections, the
labour functional constituency returned three members while the other 27 functional constituencies returned
one member each. See the Hong Kong Legislative Council Ordinance (1997), Hong Kong Government
Gazette 134 of 1997, cap. 542, section 20. online: Government of Hong Kong Web Services <
162 The Election Committee was composed of 800 members from the following sectors:
(1) Industrial, commercial and financial sectors; (2) the professions; (3) labor, social services, religious
and other sectors; (4) members of the Legislative Council, representatives of district-based organizations,
Hong Kong deputies to the National People’s Congress, and representatives of Hong Kong members of the
National Committee of the Chinese People’s Political Consultative Conference. Each sector returned 200
members of the Election Committee. See the Basic Law, supra note 52, Annex I and II.
163 See the above table.
164 The system of functional constituencies has been subject to criticism and challenged in court. For
instance, in Lee Miu-ling v. Hong Kong (A.G.), the plaintiffs challenged the validity of the functional
collector system of elections on three levels: “First, functional constituencies, they argued, violated the
principle of universal and equal suffrage because the system disenfranchised approximately one million
Hong Kong people who were eligible to vote only in the geographical constituencies. Second, functional
constituencies were repugnant to equal suffrage because the vast differences in their size created gross
disparities in voting power. Finally, individual functional constituencies were attacked for their
susceptibility to abuse and corrupt practices...” The arguments were rejected by the Court of Appeal and
further leave to the Judicial Committee of the Privy Council was denied. See Lee Miu-Ling v. Hong Kong
(A. G.) (1995), 5 HKPLR 181(H.C.), Keith J., aff’d (1995), 5 HKPLR 585(A.C.); S. Young, supra note 107
at 678, 709-21.
recognition must be given to the fact that a substantial number of delegates (twenty in the first term, twenty-four in the second, and thirty in the third) will be chosen by geographic constituencies where the vote is allocated on a "one person, one vote" basis. Using Chinese practices as a benchmark, this seems a positive achievement. Although the Basic Law procrastinates over the establishment of a truly democratic and accountable system of government until a distant future, it at least formally promises that the long-term target is direct election of all Legco members through universal suffrage.165

The normal term of office of the Legislative Council is four years, as opposed to five for the Chief Executive.166 Although members of the Legislative Council come from different constituencies, they basically have the same duties and rights. Members are immune from legal action in respect of their statements at meetings of the Council and are not subject to arrest when attending or on their way to a meeting of the Council.167

The main powers and functions of the Legislative Council are to enact, amend, or repeal laws; to examine and approve budgets introduced by the government; to approve taxation and public expenditure; to receive and debate the policy addresses of the Chief Executive; to raise questions on the work of the government; to endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court, etc.168 Although the Legislative Council is vested with much power as the law-making body of the region, there are many restrictions on these powers. Firstly, a bill

165 Article 68 provides that "The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage." The Basic Law, supra note 52, art. 68.
166 See the Basic Law, supra note 46, art. 69.
167 Ibid. arts. 77, 78.
168 Ibid., art. 73.
passed by the Council becomes law only after it is signed and promulgated by the Chief Executive.\textsuperscript{169} The Chief Executive may refuse his or her assent to legislation if he or she considers any bill to be incompatible with the overall interests of the HKSAR.\textsuperscript{170} The veto can be overturned if the Legislative Council passes the original bill again by not less than a two-thirds majority of all the members. The Chief Executive may either sign the bill or dissolve the Legislative Council and call for elections within three months.\textsuperscript{171} Although the Chief Executive would probably be reluctant to use his or her veto, the threat remains in the background for possible use against a recalcitrant Legislative Council.

Another restriction relates to the procedure for initiating legislation. Members of the Legislative Council may introduce bills to the Legislative Council, individually or jointly. However, they may not introduce private bills which relate to "public expenditure or political structure or the operation of the government".\textsuperscript{172} Nor may they introduce bills "relating to government policies" without the written consent of the Chief Executive.\textsuperscript{173} Clearly, these provisions in the Basic Law are designed to limit the powers of the Legislative Council to initiate legislation and ensure that the executive would be the principal source of legislative proposals. Serious concerns arise that the scope of restrictions are so unclear that these wide ranging provisions may totally negate the powers of the Legislative Council to initiate legislation and reduce the Legislative

\textsuperscript{169} Ibid., art. 76.  
\textsuperscript{170} Ibid., art. 49.  
\textsuperscript{171} Ibid., art. 70.  
\textsuperscript{172} Ibid., art. 74.  
\textsuperscript{173} Ibid.
Council to a debate chamber. In that case, the major role of the Legislative Council would be that of scrutiny and review of governmental proposals. 174

The second major constitutional function of the Legislative Council is to control public expenditure. Article 73(2) and (3) of the Basic Law provide that the Legislative Council has the power to examine and approve budgets introduced by the government and to approve taxation and public expenditure. 175 As we have seen, this function is restricted by the rule that members of the Legislative Council cannot introduce private members' bills which relate to "public expenditure". Therefore, it is the government that bears the primary responsibility for planning the collection and expenditure of public money. The Legislative Council cannot compel the government to spend money on new projects. It can stop the government raising taxes or imposing new ones, but it cannot reduce existing taxes and deprive the government of the revenue it needs. It could, in theory, bring all government operations to a standstill by voting against the budget and refusing to authorize any expenditure in the new financial year.

The third constitutional role of the Council is to monitor the performance of the administration. The Basic Law provides specific provisions for the accountability of the government to the legislature. 176 The Legislative Council receives and debates the policy addresses of the Chief Executive. It may raise questions on the work of the government and ask government officials to testify or give evidence before the Council or its various

174 See Ghai, supra note 63 at 252-53.
175 See the Basic Law, supra note 52, art. 73.
176 Article 64 provides that:
"The Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region; it shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; it shall answer questions raised by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure." Ibid., art. 64.
Although policy-making is almost entirely the preserve of the executive, checked by its advisory boards and committees, the Council can still exert significant influence as the Basic Law requires that government policies need the approval of the Legislative Council.

The third branch of government is the judiciary. The Joint Declaration provides that, after the establishment of the HKSAR, the judicial system previously practiced in Hong Kong would remain intact except for those necessary changes consequent upon the vesting in the courts of the HKSAR of the power of final adjudication. The Basic Law stipulates that the judiciary of the HKSAR is responsible for the administration of justice, operating on the principle of independence from the executive and legislative branches of the government. Members of the judiciary are immune from legal action in the performance of their judicial functions.

Prior to the handover, the court system in Hong Kong followed broadly that in the U.K. The courts of justice comprised the Supreme Court (which includes the Court of Appeal and the High Court), the District Court (including a Family Court), the Magistracies (including a Juvenile Court), the Coroners’ Court and also the Lands Tribunal, the Labor Tribunal, the Small Claims Tribunal and the Obscene Articles Tribunal. The Hong Kong Court of Appeal heard appeals from the High Court, the District Court, and the Lands Tribunal. The Court of Appeal also answered questions of

\footnotesize{Ibid., arts. 48, 73.  
178 The Joint Declaration, supra note 37, Annex I: Elaboration by the Government of the People’s Republic of China of Its Basic Policies Regarding Hong Kong, art. III.  
179 See the Basic Law, supra note 52, art. 85.  
180 See M.L. Chan, “From the Privy Council to the Court of Final Appeal: Will the Area of Non-justiciability be the Same in Hong Kong After July 1, 1997?” (1997) 19 Loy. L.A. Intl & Comp. L. J. 413 at 416-17.
law from the lower courts. Appeals from the Court of Appeal proceeded to the Judicial Committee of the Privy Council in London. Normally, the Privy Council heard cases in London, but when it heard appeals from Hong Kong, it operated as a court of Hong Kong. An appeal from the Court of Appeal in Hong Kong to the Privy Council had to satisfy the following conditions: (1) The matter in dispute concerns an amount of HK$ 500,000 or more; (2) The question involved is of great general or public importance. Decisions of the Privy Council were final and binding on the Hong Kong courts.

While many former British dependent territories retain the Privy Council as their court of final appeal upon independence, this option was politically unfeasible in so far as Hong Kong is concerned. Another body was needed to assume this role. In the Joint Declaration, the PRC promised not to significantly change the judiciary after the transfer other than replacing the Privy Council with a court of final appeal (CFA). In other words, the court of final appeal was to be the only institutional replacement within the existing legal structure. Many view the CFA’s establishment as a vital safeguard of Hong Kong’s autonomy and a crucial mechanism for the protection of citizens from possible arbitrary interference by Beijing after the handover. However, both the Joint Declaration and the Basic Law provide few details on the structure, composition, or jurisdiction of the CFA. The Basic Law only provides that the chief justice of the CFA must be a Chinese citizen who is a permanent resident of the HKSAR with on right of abode in any foreign

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181 See Ghai, supra note 63 at 300.
182 Ibid. at 300; C. Shum, General Principles of Hong Kong Law, 2nd ed. (Hong Kong: Longman Hong Kong, 1994) at 12-18.
country.\textsuperscript{184} Thus, the task of negotiating on this replacement occurred within the Sino-
British Joint Liaison Group, which, after many rounds of talks, finally reached an
agreement in 1995.\textsuperscript{185} The agreement met with strong local opposition, especially from
some members of the legal profession and democratically minded people. According to
the 1995 Sino-British agreement, Hong Kong courts have no jurisdiction over “acts of
state such as defense and foreign affairs”. Opponents argued that the inclusion of the
undefined words “acts of state”, left the CFA vulnerable to China’s interference.\textsuperscript{186} In
Hong Kong under British rule, there was very little which was beyond the purview of the
courts. Only a few matters in the common law tradition, such as declarations of war,
recognition of a foreign government, and delimitations of territorial boundaries, are
classified as acts of state in respect of which the courts defer to the executive branch.
However, while the standards of English common law seem to define “acts of state” in a
narrow fashion, some people in Hong Kong fear that China might reinterpret that
meaning to extend beyond the customary interpretation of acts relating to foreign affairs
and defense matters to include acts of the government in relation to its own citizens.\textsuperscript{187}

Another area of controversy relates to the composition of the court and the number
of foreign judges. The Basic Law provides that the Court of Final Appeal “may as
required invite judges from other common law jurisdictions” to sit on the Court of Final

\textsuperscript{184} See the Basic Law, \textit{supra} note 52, art. 90.
\textsuperscript{185} The Sino-British Joint Liaison Group reached an initial agreement in 1991. The agreement was opposed
by the Hong Kong Bar Association and rejected by the Legislative Council, on the grounds that the
executive agreement limited the statutory power of the court and did not allow any flexibility in the
composition of the CFA. Both sides of the Joint Liaison Group had to renegotiate the agreement and some
amendments were agreed in 1995. See Ghai, \textit{supra} note 63 at 299-305.
\textsuperscript{186} See Feinerman, \textit{supra} note 183 at 82-83.
\textsuperscript{187} \textit{Ibid.}
Appeal. (italics supplied) During the Sino-British Liaison negotiations, the Chinese government insisted that the number of foreign judges permitted to sit on the CFA would be limited to one out of the five. Democratically-minded people considered the inclusion of foreign judges on the CFA the key to ensure judicial independence from China and, thus, were opposed to China's restriction. The legal profession, such as the Hong Kong Bar Association and the Law Society, also strongly criticized the restriction as a violation of the Joint Declaration and the Basic Law. For them, both documents left it to the CFA to decide when foreign judges might be "required". The court composition proposed by China, however, added a restriction not contemplated in either document, and usurped the power of the CFA itself to determine whether any foreign judges might be required for a particular case, and if so, how many. As the autonomy of the CFA to decide on overseas judges was undermined, the independence of the members would not be adequately secured.

188 The Basic Law, supra note 52, art. 82.
189 The Hong Kong Court of Final Appeal Ordinance (1995) provides that: "(1) Subject to subsection (4), an appeal shall be heard and determined by the Court (of Final Appeal) constituted as follows—
(a) the Chief Justice or a permanent judge designated to sit in his place under subsection (2);
(b) 3 permanent judges nominated by the Chief Justice; and
(c) 1 non-permanent Hong Kong judge or 1 judge from another common law jurisdiction selected by the Chief Justice and invited by the Court.
(2) The Chief Justice shall be President of the Court, and where he is not available for any cause to hear an appeal he shall designate a permanent judge to sit in his place and be President.
(3) Where pursuant to subsection (2) a judge is sitting in place of the Chief Justice the Court must still consist of 5 judges."

Hong Kong Court of Final Appeal Ordinance (1995), Hong Kong Government Gazette 79 of 1995, Chapter 484, Section 16. See also A.S.Y. Cheung, "The Legal System: Falling Apart or Forging Ahead?" in Cheung & Sze, supra note 56 at 15-20.

The Chief Justice of the Court of Final Appeal is appointed by the Chief Executive of the HKSAR on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors. He or she may be investigated only for inability to discharge his or her duties, or for misbehavior, by a tribunal appointed by the Chief Executive and consisting for not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal. In addition, the Chief Executive must obtain the endorsement of the Legislative Council and report such appointment or removal to the Standing Committee of the NPC in Beijing for the record. See the Basic Law, supra note 52, arts. 88, 89 and 90.
These two issues raised fears among members of the legal profession and the democrats as to the true nature of judicial independence in the HKSAR court system. To their dismay, the 1995 Sino-British agreement on the CFA overwhelmingly reflected China's demands in the negotiations. The 1995 agreement could only be implemented through an ordinance enacted by the Legislative Council. In 1995, the Hong Kong government pushed for a draft bill on the creation of the CFA in the Legislative Council. The Hong Kong Court of Appeal Ordinance (No. 79 of 1995) was passed after a tense debate in the Legislative Council and signed into law in August 1995. The long dispute surrounding the creation of the CFA finally came to an end.

Under the Basic Law, members of the judiciary are immune from legal action in the performance of their judicial functions. Judges of the courts are appointed by the Chief Executive on the recommendation of the Judicial Officers Recommendation Commission, an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors. A judge may only be removed for inability to discharge his or her duties, or for misbehavior, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges. In addition, in the case of the appointment or removal of judges of the CFA and the Chief Judge of the High Court, the

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190 In regard to the number of overseas common law judges that will sit on the CFA, the agreement stipulated that the CFA's be composed of a Chief Justice, three permanent judges, and one non-permanent judge chosen from either a group of Hong Kong judges or a group of overseas common law judges. Under the accord, only one overseas common law judge, at most, could sit on the CFA. For a full discussion of the Sino-British agreements on the CFA, see D. Lee, "Discrepancy Between Theory and Reality: Hong Kong’s Court of Final Appeal and the Acts of State Doctrine" (1997) 35 Colum. J. Transnat'l L. 175 at 184-93.
191 See Ghai, supra note 63 at 302.
192 See the Basic Law, supra note 52, art. 85.
193 Ibid., art. 88.
194 Ibid., art. 89.
Chief Executive shall obtain the endorsement of the Legislative Council and report such appointment or removal to the Standing Committee of the National People’s Congress for the record.\textsuperscript{195}

The courts decide cases in accordance with the laws of the HKSAR. The laws applied by the courts are, principally but not exclusively, the Basic Law, the laws of the HKSAR, and “the laws previously in force in Hong Kong including the common law, rules of equity, ordinances, subordinate legislation and customary law.”\textsuperscript{196} Significantly, the courts may refer to precedents in other common law jurisdictions.\textsuperscript{197} Laws inconsistent with the Basic Law are invalid and may be declared repealed by the Standing Committee of the National People’s Congress (NPC) on the establishment of the HKSAR or subsequently in accordance with the Basic Law (art. 160).\textsuperscript{198} Moreover, there is

\textsuperscript{195} \textit{Ibid.}, art. 90.
\textsuperscript{196} \textit{Ibid.}, arts. 8, 18.
\textsuperscript{197} Article 84 of the Basic Law provides that: “The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.” \textit{Ibid.}, art. 84.
\textsuperscript{198} The Basic Law provides that:

“Article 8: The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region...”

Article 160: Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.”

In February 1997, the NPC Standing Committee, after examination of the proposals made by the Preparatory Committee of the HKSAR and in accordance with the two above provisions, adopted a decision on treatment of matters relating to the laws previously in force in Hong Kong. In the decision, the NPC declared 14 ordinances and subsidiary legislation as well as a number of individual provisions in various ordinances and subsidiary legislation previously in force in Hong Kong to be in contravention of the Basic Law and not to be adopted as the laws of the HKSAR upon the establishment of the HKSAR on July 1\textsuperscript{st}, 1997. The reasons why these laws previously in force in Hong Kong were singled out and repealed were various. Some ordinances, such as the\textit{Royal Hong Kong Regiment Ordinance} (Cap. 199), were repealed due to Hong Kong’s new constitutional status as a SAR under Chinese sovereignty, while others, such as Section 2(3), 3 and 4 of the\textit{Hong Kong Bill of Rights Ordinance} (Cap. 383) were deemed by the NPC as inconsistent with the Basic Law for political reasons. (I will return to the Hong Kong Bill of Rights Ordinance issue in Chapter 4.)
considerable room for the application of national laws of the PRC. A list of national laws of China is included in Annex III to the Basic Law.

The power of interpretation of the Basic Law is vested in the Standing Committee of the NPC in Beijing, not in the courts of the HKSAR, pursuant to Article 158 of the Basic Law. But since this would be contrary to the Joint Declaration, which states that “the SAR will be vested with independent judicial power including that of final adjudication”, Article 158 goes on to state that the Standing Committee shall authorize the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of the Basic Law which are within the limits of the autonomy of the SAR. This provision has been interpreted by the courts of Hong Kong to allow judges to invalidate laws passed by the SAR legislature if a judge when trying a case decides that an ordinance in question violates the Basic Law.


199 The second paragraph of Article 158 goes on to state that:

“The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgements which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People’s Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgements previously rendered shall not be affected.”

While it is not quite clear which provisions of the Basic Law are within the limits of the autonomy of the HKSAR and, thus, can be interpreted by the courts of Hong Kong, the Basic Law makes it clear that the final arbiter of the meaning of the Basic Law is the Standing Committee of the NPC in Beijing.

See the Basic Law, supra note 52, art. 158.

200 In Ng Ka Ling & Others v. the Director of Immigration, the CFA stated that the courts of the HKSAR “undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. Although this has not been questioned, it is right that we
In sum, the Basic Law establishes a constitutional framework for the governance of the HKSAR under Chinese sovereignty. This framework consists of regional autonomy, some separation of powers, a measure of democracy, an independent judiciary, and the rule of law. The Basic Law is not simply a statement of intentions nor is it a policy document. It is now part of Hong Kong’s domestic law and a law which touches so much of Hong Kong’s way of life. It is a law which the Hong Kong courts and judges have to apply, uphold, and interpret. Lawyers need to have a full and confident familiarity with it. Working with and understanding the Basic Law presents a new experience for the government, the legislature, the courts and the legal profession. The Basic Law creates a new era of constitutional law and constitutional litigation in Hong Kong.

**Conclusion**

The reversion of Hong Kong from Britain to China was an event of major historical significance for Hong Kong and China. Hong Kong was seized by the British through military coercion during the 19th century when China was weak. To the Chinese people, the cession of Hong Kong set a very bad precedent for other Western powers to force should talk this opportunity of stating it unequivocally.” The CFA’s position in *Ng Ka Ling* on the constitutional jurisdiction of the courts of Hong Kong relating to legislation enacted by the legislature of the HKSAR or acts of the executive authorities of the HKSAR has not been questioned or challenged by the NPC, the HKSAR government or private citizens. What has been controversial is the jurisdiction of the courts of the HKSAR to examine whether any legislative acts of the NPC or its Standing Committee are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. I will discuss the constitutional relations between the courts of the HKSAR and the NPC and its Standing Committee in Chapter 5 in details.

*Ng Ka Ling v. the Director of Immigration*, [1999] 1 HKLRD 315 at 337. [hereinafter *Ng Ka Ling*]
Imperia1 China to sign similar pacts, turning the country into a "semi-colony". Since the establishment of the Nationalist government in 1911, successive Chinese leaders had sought to abolish Western unilateral treaty privileges in China and to recover Chinese territories lost to Western powers during the 19th century. Under such circumstances, Hong Kong as a British colony often seemed fragile and uncertain. When the Chinese communists came to power in mainland China, they inherited the stance of the previous Nationalist government that Hong Kong was part of Chinese territory which had been seized by British imperialists through "unequal treaties" and which should be returned to China when the time was ripe. But, there appeared to have been no Chinese demand for rendition of Hong Kong during the period from the 1950s to the late 1970s, until the British virtually invited it in the early 1980s. Maintaining Hong Kong's status quo proved invaluable to China. After Deng Xiaoping launched economic reforms drive to modernize China's ailing economy in the late 1970s, Hong Kong's economic and political importance to China became even more pronounced.

China's policy toward Hong Kong is based on the concept of "one country, two systems," and is intended to achieve two important objectives: the reunification of the Chinese nation and the maintenance of economic prosperity and stability in Hong Kong. The slogan was originally designed in the late 1970s to aid reunification with Taiwan.

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201 See Wesley-Smith, supra note 23 at 422.
202 See Chiu, supra note 35 at 3-4; Cottrell, supra note 9 at 32.
203 See Scott, supra note 6 at 166-70.
204 According to Yahuda, from the end of the 1970s, Hong Kong has provided the PRC with between 60 and 80 per cent of total foreign direct investment; it has ranked either first or second as both trader and investor in all but five of China's 30 provinces and municipalities; it has been at the center of a complex web of relations linking China with overseas Chinese communities, and is at the heart of 'Greater China' linking southern China with Hong Kong and Taiwan. See M. Yahuda, "Hong Kong: A New Beginning for China?" in J.M. Brown & R. Foot, eds., Hong Kong's Transitions, 1842-1997 (Hampshire: Macmillan Press Ltd., 1997) at 199-202.
although it quickly became the formula for the recovery of Hong Kong and Macao. As we have seen, on the issue of Chinese sovereignty over Hong Kong, the PRC’s stance was consistent, rigid and uncompromising. As the PRC government regarded the treaties which had ceded Hong Kong Island and Kowloon and leased the New Territories as unequal and invalid, the Chinese side insisted that Chinese sovereignty was indisputable and non-negotiable and could not be compromised or diluted. In addition, the Chinese government opposed any form of continued British administration in Hong Kong after 1997 but demanded a full recovery of Chinese sovereignty. Once the Chinese government under Deng was determined to have its way over the full recovery of Chinese sovereignty, the fate of Hong Kong was sealed. There were only two critical issues left to be resolved by both sides: how China would administer Hong Kong after 1997 to maintain its prosperity, and how to ensure an undisturbed transition. As independence was never a feasible alternative for Hong Kong and the “one country, two systems” formula was probably the best possible solution to the question of 1997, the Hong Kong, who had been denied a say in the Sino-British negotiations, accepted the Joint Declaration without too many misgivings.

As Tsang suggests, China’s policy towards Hong Kong since the early 1980s has in fact been based on the principle of allowing “maximum flexibility within a rigid

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205 See Buckley, supra note 12 at 109.
206 See Tang & Ching, supra note 127 at 47.
207 Ibid. at 49-50.
208 Yahuda suggested that: “Although it was in China’s interests to arrive at an agreed settlement with Britain, there was never any question that this time it was the Chinese government who held the whip hand. In retrospect, it is evident that it was China’s undoubted capacity to have reclaimed Hong Kong at any time of its choosing that allowed the territory to continue to be administrated by the British for so long.” See Yahuda, supra note 126 at 63.
The "one country, two systems" formula meets the need for both rigidity and flexibility. Under the principle of "one country", China would permit Hong Kong to enjoy "a high degree of autonomy", provided Hong Kong would continue to be deemed by the Chinese leadership as economically beneficial and not harmful to its claim of sovereignty. The implication of this policy is that China would for its own interests hold back from intervening in local politics during and after the transition. China would tolerate a region under its sovereign control actually exercising autonomy in ways that are fundamentally different from the rest of the country. Under its roof it would allow an area where modern capitalist enterprise was possible, where the rule of law was properly applied, where human rights and freedoms were protected by the law, where the civil service was clean and efficient, and where a degree of democracy prevailed.

Significantly, the "one country, two systems" formula was not only based on the economic importance of Hong Kong to China, but was also formulated to achieve the unity of the Chinese nation. That has always been a critical issue in Chinese thinking since ancient times. Modern nationalism has intensified that sentiment for China's communist leaders, especially as the appeal of communist ideology has waned. From a PRC perspective, the retrocession of sovereignty over Hong Kong is part of re-establishing the unity of the Chinese state. Hong Kong was only the forerunner. Macao followed suit and reverted to Chinese sovereignty in 1999. After Hong Kong and Macao, Taiwan could also be unified with mainland China.²¹⁰ That said, given the political

²⁰⁹ See Tsang, supra note 42 at 414.
²¹⁰ So far, the government of Taiwan has vehemently refused to unite with China under the "one country, two systems" arrangements as applied to Hong Kong and Macao and to become a special administrative region of the People's Republic of China. Taiwan argues that, unlike pre-handover Hong Kong and Macao,
realities, Chinese leaders realized, a way must be found to accommodate the different conditions in Taiwan, in Macao, and in Hong Kong. That way, of course, is what we know as “one country, two systems”, a formula of “unity with diversity” or the coexistence of two political systems under the single roof of Chinese national sovereignty and territorial integrity. The current Chinese leadership takes considerable pride in the “one country, two systems” concept, proposing it as a means of solving peacefully a number of conflicts, domestic and international. I think that there can be no question that China’s leaders intend to do their very best to make not only the recovery of sovereignty but also the implementation of the policy of ‘one country, two systems’ a resounding success. The main doubts center on their capacity to resolve the problems that arise from the enormities of the differences between the “two systems”.

China seemingly provides sweeping legal guarantees for Hong Kong’s future under Chinese sovereignty. All these guarantees seem laudable. However, as the Chinese saying goes, “law alone cannot be implemented by itself.” The implementation of the “one country, two systems” arrangement will largely depend upon the tolerance, self-restraint and political good will of China. The 15 years of Hong Kong’s transition leading up to 1997 showed that it was China that had the ultimate say in what was permitted in Hong Kong. Its policy towards Hong Kong became a dominant factor in the local political scene. For instance, the opposition of the PRC to Western democratic ideas and institutions imposed a limit on the scope, extent and pace of democratization in Hong

the Republic of China on Taiwan has been a sovereign state since 1911, and that any fundamental change to the constitutional status quo must acquire the consent of the people of Taiwan.

211 See I. Kelly, Hong Kong: A Political-Geographic Analysis (Hong Kong: MacMillan Press, 1987) at 115.
Kong and thus restricted the role which the local population could play during the transition period.

However, this was not a simple linear development. The ascendancy of China’s power was constrained due to its need and desire for a successful take-over, which could not be achieved without the cooperation of the Hong Kong people in the transitional period and beyond. It was shown that the Chinese government was willing to accommodate the wishes of the local people, as long as it felt secure that its sovereignty over, and its basic interests in, Hong Kong were not at risk. Therefore, I suggest that the successful implementation of the “one country, two systems” formula equally depends on the continuing willingness of the Hong Kong people to stand up for what they want within the framework set out by the Basic Law. The politics of democratization in transitional Hong Kong indicates that, although democratization in Hong Kong is necessarily shaped by the PRC’s political development and atmosphere, the aspiration of the public for a high degree of autonomy and political opposition in the territory have already produced their own dynamics and propelled limited democratic reforms further.

Now Hong Kong finds itself directly facing its national government following the withdrawal of the British administration which acted as a buffer between Hong Kong and China. If Hong Kong is to preserve its autonomous and free society, this status is not bestowed, but rather earned by devoting all the persuasive powers and resources at Hong Kong’s disposal to defending the principles of “one country, two systems”. One way by which the people of Hong Kong can persuade Beijing to allow them a large scope of autonomous power, or a quicker pace of democratization, is to convince the latter that, if the HKSAR continues to function as an economically prosperous, socially free and
politically democratic Chinese community of pluralist and cosmopolitan flavor, much credit will be given to the "one country, two systems" formula.
Chapter Two: Human Rights – China’s Perspectives in National and International Context

Introduction

This chapter focuses on China’s international position on human rights reflected in official doctrine and practice since the founding of the People’s Republic of China (hereinafter the PRC) in 1949. The goal is to work through this set of China-centered discourses about external legal pluralism in order to locate the subsequent discussion on Hong Kong’s autonomy and human rights within a broader historical, philosophical, political and legal context. To identify China’s international position on human rights and probe its sources is surely to take on ‘trouble’, because we are entering a highly speculative area, handicapped by the recentness of events and the uncertainty of Chinese politics. However, notwithstanding the foregoing difficulties that haunt this theoretical enterprise, there are several reasons that tempt me to venture into this realm. Firstly, the PRC enjoys the symbolic advantage of being the most populous country in the world, representing one-fifth of humanity. Arguably, China’s inclusion in the international human rights regime will make that regime truly universal, if nothing else. Secondly, the PRC enjoys the affiliational advantage of being at one and the same time a great power, the last major communist country, and the largest developing country. Thirdly, it enjoys the cultural advantage of being the heir to a distinctive history and cultural style.

The PRC’s views on international human rights merit a fair hearing and careful study. While attention often focuses on the important role the international community plays in
addressing concerns over China’s human rights situation, there is little awareness of the seriousness of China’s new human rights rhetoric. It is not enough merely to quote Chinese statements on human rights, many of which carry their own refutation. What we should do is to inquire in each instance into the extent to which there is evidence to support the Chinese belief. Any attempt to fully understand the distinctive Chinese approach to human rights would require viewing it from many angles, only some of which can be attempted here. Although Chinese ideas and practices relating to rights draw on aspects of traditional Chinese culture which have not lost relevance in today’s China, it is suggested that the PRC’s views on human rights are largely the result of ideological and political considerations. It is shown in this chapter that the sources of China’s new human rights discourse that was vigorously developed to respond to international criticism of its human rights record since 1989 have deep roots, both theoretical and practical, in Marxism-Leninism and Maoism.

Before we discuss the content and characteristics of China’s international stance on human rights, it is necessary to understand the ideological, historical and political sources of the PRC’s domestic human rights policy as background. Therefore, I begin with a brief investigation of the human rights history of the PRC. I will also discuss and analyze the theoretical foundations of the Chinese conception of human rights prior to studying China’s position on international human rights.

**Part One: Human Rights History of the PRC: A Constitutional Perspective**
I. From the Establishment of the PRC to the End of the Cultural Revolution: 1949-1979

In 1949, the Communist Party headed by Mao Zedong (Mao Tse-tung) defeated the Nationalist government in the Chinese Civil War of 1945-1949 and drove general Chiang Kai-shek and his Nationalist Party followers to Taiwan. The ouster of the Nationalist government and the inauguration of the People's Republic of China marked the beginning of a new era in Chinese history. Mao and his communist comrades took over a politically divided and economically backward China which had suffered from long years of Western imperial invasion and civil wars. Following Marxist-Leninist doctrines as a matter of course, the communists completely abolished the old legal system of the Nationalist government, because they believed the old legal system protected only the interests of the bourgeoisie and feudal landlords and repressed the great masses of the working people.\(^1\) Shortly before the coming into being of the PRC, the Central Committee of the Communist Party of China issued the "Instructions on the Abolition of the Complete Six Codes of the Nationalist Party and the Confirmation of the Judicial Principles of the Liberated Areas".\(^2\) The Instructions demanded that all the laws and decrees of the Nationalist government be abolished and that the judicial organs of the Communist Party use party policies, regulations and resolutions as the basis for their work. Chinese jurists generally viewed the "Instructions" as the starting point of the building of the legal and judicial systems of

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2 The Complete Six Codes was a compendium of the laws and decrees of the Nationalist government which were modeled on Western laws.
the "New China". However, the rejection of the legal system of the Nationalist government compelled the PRC to undertake the very difficult task of building a modern legal system from the ground up. Communist laws, decrees and codes were few and inadequate during the early years of the PRC. The Land Reform Law, the Regulations to Punish Counter-Revolutionaries and Embezzlers, the Law for National Regional Autonomy, the Marriage Law, the Trade Union Law and the Labor Protective Law were promulgated, in order to facilitate the Land Reform Movement, the Movement to Suppress Counter-Revolutionaries, the Movement for Ideological Remolding of the Intellectuals and a number of other political movements. In these mass movements, special tribunals were established. They had unrestricted jurisdiction and could impose any penalty. Since legal texts were few, and on many points, non-existent, the Party was actually the main source of law, informed by Marxist-Leninist ideology and Chinese custom.

There were systematic violations of basic human rights in the first three or so years of the PRC. The Land Reform Movement began with land distribution, but ended in 1951 with mass trials and executions. The Movement to Suppress Counter-Revolutionaries was carried out to eliminate "class enemies" with mass public trials in the cities. In most of those cases, no defense lawyers were provided and no right of appeal to higher courts was allowed. These political campaigns, often characterized by intimidation, torture, labor camps, and executions were aimed at the radical transformation of society, rather than at the establishment of the rule of law. The

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3 See Wu, supra note 1 at 1-4.
5 See Wu, supra note 1 at 6-8.
theoretical basis for the systematic violations of human rights was derived from the Leninist doctrine of class struggle, proletarian dictatorship, and antagonistic contradiction between the working people and the "class enemies". Mao Zedong believed that class struggle did not end with the establishment of the PRC. On the contrary, it continued to exist and there was always the danger of "capitalist restoration". According to Mao, five percent of the population (that was, over 25 million people in 1949) were "class enemies" and should be denied political and civil rights. The denial of rights of political opposition was justified by class differentiation and class struggle in the name of the goals of socialist revolution. Mao once stated that "[our policy of benevolence is applied only within the ranks of the people, not beyond them to the reactionaries or the reactionary activities of reactionary classes." Since, according to Party policy, rights belonged only to the people and class enemies were to be ruthlessly suppressed, the notion of universal human rights was conceptually ruled out.

The period of 1954-1957 saw a strong move towards the establishment and institutionalization of a formal legal system based on the Soviet model and experience. The first session of the First National People's Congress adopted the PRC's first state constitution which created a system of government almost identical to that which exists today. Drafts of criminal law, criminal procedure law, and civil law were also developed during this period. In 1954,

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11 None of them, however, was enacted or had any legal force by the time when the Cultural Revolution ended in 1976.
the promulgation of the Organic Laws of the People’s Court and People’s Procuratorates formalized the role of the courts, the judiciary, and the prosecutorial section.

The 1954 Constitution enumerated such basic rights of citizens of the PRC as freedoms of speech, of the press and publication; freedoms of association, assembly, procession, demonstration, and religion; freedom from arbitrary arrest; equality before the law; and the right to vote and stand for election. However, the 1954 Constitution failed to establish constitutionalism, if that is defined as including the limitation of government powers in the interest of individual rights. The 1954 Constitution and the legal system were designed as instruments for implementing government policy under the absolute leadership of the Communist Party. The Constitution served the government and the Party rather than limiting them. Accordingly, the enjoyment of citizens’ rights existed only to the extent that they were in line with Party policy, and Party policy changed. It was also defined by Party politics.

The process of legal formalization and institutionalization came to an abrupt halt in 1957 when Party politics took command. The Great Leap Forward Movement was initiated to collectivize the Chinese peasantry and industrialize the cities, which eventually evolved into economic disasters and widespread famine. The Anti-Rightist Movement was launched to promote compliance of intellectuals with the party line. In the end, hundreds of thousands of liberal-minded cultural figures, writers, professionals, scientists, and intelligentsia were persecuted for, in many cases, unchecked allegations and then suffered long-term political oppression. The fledgling legal system developed under the 1954 Constitution was deemed an impediment to the dominant position of the Party and suffered serious setbacks. After 1957, the

12 See e.g. Hsia & Johnson, supra note 10; Jones, supra note 10.
13 See Folsom & Minan, eds., supra note 7 at 9.
role of the people’s courts and procuracies was to a large extent undercut while the Party and the police gradually assumed the major role in law enforcement.\textsuperscript{15}

In 1966, Mao launched the Great Proletarian Cultural Revolution (hereinafter the Cultural Revolution) in an effort to attack bureaucracy, to dispose of his political rivals, to prevent a return to the ‘capitalist road’, and to renew the impulse for revolutionary transformation.\textsuperscript{16} The whole country was turned upside down in mass protest movements which soon degenerated into vigilantism, terrorism, and gangsterism. The previous organizational frameworks of party and state were dismantled and replaced by the “revolutionary committees” which were joint agencies of both the Party and the state. The doctrine of the absolute leadership of the Party was further reduced to a personality cult of the “great helmsman”.\textsuperscript{17} The legal system was attacked as Soviet revisionism. While the work of the judicial bodies was suspended, tens of millions of the “class enemies” and “capitalist advocates” in the party and in society at large were arrested, tortured, mentally abused, jailed, or executed without due process. The rights and freedoms of real or imagined opponents to Maoism were arbitrarily denied. Even their family members were subjected to severe discrimination. Estimates of death due to execution or maltreatment ran from

\textsuperscript{14} \textit{Ibid.}

\textsuperscript{15} On the effect of the Anti-Rightist movement on the China’s legal development. Jianfan Wu, a communist jurist commented that: “The anti-rightist struggle, both ideologically and theoretically, wreaked havoc upon many effective legal principles and institutions, and encouraged the belief that left was better than right and that law should be looked down upon.” See Wu, supra note 1 at 10-13.

\textsuperscript{16} There might be a number of reasons explaining why Mao initiated the Cultural Revolution. One of the reasons was that Mao reduced Marxism to an ideology of endless class struggle which Mao believed was the only way to radically transform the Chinese society into the ultimate utopia of communism. As Linden observed, “Mao’s Cultural Revolution was a fateful episode in the career of the Marxist utopian project in its twentieth-century Leninist form. In contrast with his earlier views during the Yanan period (1936-1944), Mao now saw a future of endless conflict and revolutions within revolutions. Even communist society, if attained, he now believed, would be a stage of such ongoing struggle. Mao’s rejection of the Marxist dream of harmony in favor of perpetual struggle was a destruction of the object of hope originally animating Marxism and Marxism-Leninism, a step in the unraveling of a secular faith.” C. Linden, “Marxism-Leninism in the Soviet Union and the PRC: Utopia in Crisis” in F. Michael, \textit{et. al., China and the Crisis of Marxism-Leninism} (Boulder: Westview Press, 1990) at 18. See also Folsom & Minan, eds., supra note 7 at 10-11.
severed hundreds thousands into the tens of millions. The Cultural Revolution characterized by radical left-wing domination of the Party and government, harsh "class struggle", mass campaigns, and repressive policies came to an end upon the death of Mao in September 1976.  


As the great survivor of purges, Deng Xiaoping assumed power three years after Mao’s death to lead the nation battered by the Cultural Revolution and directionless during the 1976-1979 post-Mao power struggle. In the economic sphere, he was forced to resort to a free market system and the opening up of China to foreign investment in order to stimulate economic development. In the political area, he started de-Maoization by cautiously calling for the development of socialist democracy and legality in an effort to restore the Party’s prestige lost in the Cultural Revolution and to keep the Party in power. Mao’s disastrous Cultural Revolution was officially denounced as "ten years of turmoil". Millions of political victims including a large number of veteran party members were rehabilitated. More significantly, the Party ideology began to change under the leadership of Deng Xiaoping. It was declared that the past practice of mass political campaigns was to be abandoned, that economic development instead of

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17 See ibid. at 11.
18 Shortly after Mao’s death, some of the key radicals associated with the Cultural Revolution, the leading figure among whom was Mao’s widow, were arrested in an internal coup. The reformers began to take over State power.
19 At the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China, Deng Xiaoping and his supporters began to assume power while Hua Guofeng, Mao’s chosen successor, was falling from power and, later on, ousted. Deng’s power was not fully consolidated until 1980. See S. Ogden, China’s Unresolved Issues: Politics, Development, and Cultural, 3rd ed. (New Jersey: Prentice Hall, 1995) at 65-67.
20 The resolution, adopted at the sixth plenary session of the Eleventh Central Committee of the Party, re-evaluated many political events in the history of the PRC and rehabilitated many Party leaders purged by Mao in the past political movements. See generally the Central Committee of the Communist Party of China, Resolution on Questions of Party History since the Establishment of the PRC (Beijing: Foreign Language Press, 1981).
class struggle was now to be emphasized, and that socialist democracy and a socialist legal system ought to be developed.\footnote{Ibid. See also the Central Committee of the Communist Party of China, \textit{Communique of the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party} (Hong Kong: Joint Publishing Co., 1978).} The Party leaders believed that what was at fault in the past was not so much the socialist system but the way the system was run. Among the causes of the Cultural Revolution identified by Deng and his comrades, many of whom had been victimized during the lawless Cultural Revolution, was the lack of socialist democracy and legality.\footnote{A PRC scholar stated: "It is quite clear that if we can practice 'rule of law' and if our country's socialist legal system ...develops to achieve the goal of 'having laws for people to follow, strictly observing these laws, severely enforcing these laws and seriously dealing with law breakers,' then the chaotic lawless situation which occurred during the ten years of turmoil, the stamping on the solemn constitution like waste paper, the arbitrary dismissal of the Chairman of the state and his death resulting from insulting and persecution and other shocking atrocities, will never occur." cited from Chiu, \textit{supra} note 10 at 51.} Thus, the need to build democracy and legality became a key theme for the leadership.

Since 1979, much work has been done to introduce a formalized legal system. Entire segments of law were replaced by new codes and statutes. Many legal institutions were established.\footnote{See Folsom & Minan, \textit{supra} note 7 at 13-17; see generally S.B. Lubman, ed., \textit{China's Legal Reforms} (Oxford: Oxford University Press, 1996) at 1-21.} Law curricula were revived in academic institutions. Lawyers once again began to practice. In December 1982, a new Constitution was adopted during the fifth session of the Fifth National People's Congress (China's indirectly elected parliament), codifying the new Party policy on socialist democracy and the rule of law.\footnote{The \textit{Constitution of the People's Republic of China} (1982), adopted by the Fifth Session of the Fifth National People's Congress on December 4, 1982, reprinted in R. Folsom & Minan, \textit{supra} note 7 at 945-68. [hereinafter the 1982 Constitution] For a full discussion of the 1982 Constitution of the PRC, see \textit{e.g.} Fiss, \textit{supra} note 10 at 61-71; W. C. Jones, "The Constitution of the People's Republic of China" (1985) 63 Wash. U.L.Q. 707 at 707-735; Hsia & Johnson, \textit{supra} note 10 at 19-38; Chiu, \textit{supra} note 10 at 50-60.} As with its three predecessors, the 1982 Constitution reaffirms the PRC's adherence to communism, to Marxism-Leninism and Maoism as the state ideology, and to socialist public ownership of the means of production and a centrally planned economy. However, it contains quite a few important new provisions, such as the
replacement of class struggle by modernization as the primary task of the state, decentralization of political powers, and, most notably, the obligation of the Communist Party to abide by the Constitution and the law.\(^{25}\) As a matter of textual analysis, the Party now must operate within the scope of the Constitution and the law, and its once unlimited power over the state and people is constitutionally restricted. This may appear trivial to those unfamiliar with the Chinese legal system and political culture. However, the distinction made in the 1982 Constitution between the Party as a "proletarian vanguard organization" and the state as an apparatus representing the will of all the classes of the people represents a major departure from Leninist and Maoist orthodoxy and can be seen as a step forward towards the rule of law in China.\(^{26}\)

III. Civil and Political Rights under the 1982 Constitution

Chapter 2 of the 1982 Constitution lists a number of "fundamental rights and duties of citizens". These rights and duties immediately follow Chapter 1 on general principles and symbolize a higher priority for citizens' rights.\(^{27}\) Chapter 2 is also more detailed and elaborate than the corresponding parts of the three previous state constitutions, which were enacted in

\(^{25}\) See the 1982 Constitution, ibid., Preamble and Chapter One. Article 5 of the Constitution provides: "The state upholds the uniformity and dignity of the socialist legal system. No law or administrative or local rules and regulations shall contravene the Constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be looked into. No organization or individual may enjoy the privilege of being above the Constitution and the law."


\(^{27}\) See the 1982 Constitution, Chapter 2: The Fundamental Rights and Duties of Citizens, supra note 24 at 952-954.
1954, 1975 and 1978. A quick glance at Chapter 2 suggests that a Chinese citizen formally shares almost the full complement of civil and political rights that people of modern, Western liberal democracies enjoy. Under the 1982 Constitution, citizens of the PRC have the right to equality before the law; the right to vote and stand for election; freedoms of speech, of the press, of assembly, of association, and of demonstration; the right to liberty; freedom of religious belief; the right to personal dignity; freedom and privacy of correspondence; the right to criticize and make suggestions to any state organ or functionary. Of tremendous significance was the inclusion of the right to equality before the law, which had previously been repudiated as a bourgeois concept. As noted before, Party policy used to categorize the Chinese population into different classes. Those with bad class backgrounds or political labels suffered institutionalized discrimination and were often deprived of political rights and civil liberties. The inclusion of the equality provision in the Constitution was part of an attempt by the new Party leadership to abandon the ill-fated Maoist theory of “class struggle under socialism” and to build up a formalized legal system that applied to all Chinese citizens regardless of their class.

28 For a full discussion of the history of China’s constitutional protection of political rights, see Nathan, supra note 26.
29 The 1982 Constitution, supra note 24, art. 33.
30 Ibid., art. 34.
31 Ibid., art. 35.
32 Ibid., art. 37.
33 Ibid., art. 36.
34 Ibid., art. 38.
35 Ibid., art. 40.
36 Ibid., art. 41. Why these rights were chosen for inclusion can be explained by a complex mix of Marxist-Leninist ideas, and of the historical experience of the Chinese revolution, as well as of traditional thought and practices. Following the precedent of the majority of other states established in the post-World War Two era, and influenced by the Soviet constitutions, China incorporated in its first Constitution of 1954 the majority of the human rights principles mentioned above. In spite of their changing character, all four of China’s post-1949 constitutions provided guarantees not only of economic, social and cultural rights, but of civil and political rights. Over time, some rights were and some subtracted, but they all included guarantees for the freedoms of speech, of the press, of assembly, of association, of demonstration, of person, freedom of religious belief, the right to equality before the law and the autonomy of national minorities.
nature. Nominally, all Chinese citizens are equal before the law.\textsuperscript{37} As Kent observed, "[i]n its provision of civil and political rights, the 1982 Constitution fulfilled the conservative function of underwriting social stability. This role was consistent with its official representation as a significant break with the mores of the Cultural Revolution."\textsuperscript{38} In line with the reaction against Cultural Revolution practice, a number of other new provisions were included in the 1982 Constitution to prevent the recurrence of the gross human rights abuses of the Cultural Revolution. Among them are those on arrest, detention, search, and personal dignity. Article 37 prohibits "unlawful deprivation or restriction of citizens' freedom of the person by detention or other means" and "unlawful search of the person of citizens", both of which were common practice during the Cultural Revolution.

Although an argument can be made that the Constitution does not guarantee its own efficacy and many of the rights guaranteed have proven a mere formality in practice, the provisions concerning citizens' rights in the 1982 Constitution can still be seen as marking significant progress in human rights protection in China. It responds to the grievances the people suffered during the Cultural Revolution and codifies popular aspirations of the nation that the past will not be repeated. At least on paper, it pays more attention to the civil and political rights of citizens of the PRC without regard to their class membership. The inviolability of guaranteed rights is repeatedly emphasized such that their very existence in the Constitution is important, because they have the potential to be activated, to serve as points of reference for broader political legitimacy, and to fuel rising expectations.\textsuperscript{39}

\textsuperscript{37} \textit{Ibid.}, art. 33.
\textsuperscript{38} A. Kent, \textit{Between Freedom and Subsistence: China and Human Rights} (Hong Kong: Oxford University Press, 1993) at 85. [hereinafter "Between Freedom and Subsistence"]
\textsuperscript{39} In the early 1980s, the Chinese government even launched a nationwide legal education campaign to educate the people, making them conscious of their rights.
However, although the 1982 Constitution includes many of the same rights as those of the Western liberal democracies and affords the individual more protection of rights than did its predecessors, there are fundamental deficiencies or limitations in this document if it is to be the basis for full protection of civil and political rights in China. Firstly, the 1982 Constitution falls short of the international standards of human rights in many respects. Many of the internationally recognized rights and freedoms, such as the right to privacy, the right to be presumed innocent until proven guilty, the right to freedom of movement and residence, the right to access to information, and the right to form and to join trade unions are not included. There is no counterpart to the provisions in the Universal Declaration and the Covenant on Civil and Political Rights against slavery or servitude; torture or cruel, inhuman, or degrading treatment or punishment; and the right to leave one’s country and to return. The 1982 Constitution even eliminates the freedom to strike previously recognized in the 1975 and 1978 Constitutions.

Secondly, the 1982 Constitution rejects the idea of the primacy of individual rights in favor of communist doctrinal principles. It has been implied that no exercise of constitutional rights and freedoms should contradict the “Four Cardinal Principles” enshrined in the preamble to the Constitution itself: keeping to the socialist road, upholding the people’s democratic dictatorship,

41 Ibid., art. 11.
42 Ibid., art. 13.
43 Ibid., art. 19.
44 Ibid., art. 23.
45 Along with the freedom of strike, also gone were “the rights to speak out freely, air their views fully, hold great debates and write big character posters.” These rights were commonly used by the mass in the Cultural Revolution to challenge the political establishment and were recognized in the 1975 and 1978 Constitutions. Understandably, these rights commanded little sympathy on the part of the new Party leadership and, hence, were dropped. See Copper, supra note 8 at 21-29.
insisting on the leadership of the Party, and Marxism-Leninism-Maoism. The “Four Cardinal Principles” were first preached by Deng Xiaoping in response to the 1978-79 Democracy Wall Movement calling for more democratization in China. Doctrinal consensus and constitutional jurisprudence have concluded that these principles form the basis of the 1982 Constitution. In practice, these principles have frequently served to undermine full enjoyment of the rights and freedoms conferred on the citizens of the PRC.

Thirdly, many of the rights have been effectively offset by the “duties of citizens” listed in the Constitution. Under the 1982 Constitution as with all its predecessors, rights are made inseparable from duties. Every citizen enjoys the rights but at the same time must perform the duties prescribed by the Constitution and the law. This linking of individual rights to the performance of duties is consistent with some interpretations of Marxist ideology according to which rights derive from duties; without fulfillment of duties there will be no rights. Rights are perceived as rewards granted by the state as an aspect of dutiful life in socialist society. Therefore, Chinese citizens must earn their rights through ideologically correct thought and behavior. As Henkin notes, “[i]n China, living under socialism assures the individual satisfaction of basic human needs, and society provides the individual with particular rights, the reward of fulfilling his obligations to the society.” Furthermore, the Constitution emphasizes the related notion of the subordination of individual rights to group interests. All individual rights are restricted in their practical scope by Article 51, which provides that “[t]he exercise of the

46 See the 1982 Constitution, supra note 24, Preamble.
47 See Michael, supra note 16 at 185-95; Copper, supra note 8 at 27-29.
48 Article 33 of the 1982 Constitution provides that: “Every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law.” The 1982 Constitution, supra note 24, art. 33.
freedoms and rights of citizens of the People’s Republic of China may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens."  

This article circumscribes citizens’ rights and makes them subordinate to the general welfare.

Fourthly, no promise of remedies is specified in the Constitution to ensure that any person whose rights and freedoms are violated shall have an effective remedy and that any person claiming a remedy shall have his right thereto determined by judicial or other competent authority. The only remedy for violations of citizens’ rights is provided in a paragraph in Article 41, which reads that “[c]itizens who have suffered losses through infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with law.” This vaguely phrased provision is not sufficient to ensure appropriate remedies to victims of human rights violations given that the right to compensation is made subject to restriction “in accordance with law” and only to cases where “civic rights” are violated.

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50 The 1982 Constitution, supra note 24, art. 51.

3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.”

52 The 1982 Constitution, supra note 24, art. 41.
53 The 1982 Constitution does not specify which rights are “civic rights”.
IV. Social, Economic and Cultural Rights under the 1982 Constitution

The Constitution contains a comprehensive number of provisions concerning social, economic and cultural rights. Social, economic and cultural rights guaranteed under the Constitution include the right to work, the right to rest, the right to a system of retirement for workers and staff in state enterprises and government organs, the right of old, ill and disabled citizens to material assistance from the state and society, the right to education, the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. In the PRC, women and men are supposed to have equal rights in all spheres of life. Under the section “General Principles”, the state undertakes to develop socialist educational undertakings and works to raise the scientific and cultural level of the whole nation, to promote the development of the natural and social sciences, to develop medical and health services, and to promote modern medicine and traditional Chinese medicine. The state also is committed to promoting the development of literature and art, the press, broadcasting and television

54 The 1982 Constitution provides that citizens of the PRC have the right as well as the duty to work. See the 1982 Constitution, supra note 24, art. 42.
55 Ibid., art. 43.
56 Ibid., art. 44.
57 Ibid., art. 45.
58 Ibid., art. 46.
59 Ibid., art. 47.
60 Ibid., art. 48.
61 Ibid., art. 19.
62 Ibid., art. 20.
63 Ibid., art 21.
undertakings, publishing and distribution services, libraries, museums, cultural centers and other cultural undertakings,64 and to train specialized personnel in all fields who serve socialism.65

Traditionally, the constitutions of the PRC have given greater emphasis to social, economic and cultural rights than to civil and political rights. In the 1982 Constitution the former category of rights is elaborated in greater detail than is the latter. Constitutional guarantees of economic, social, and cultural rights of all citizens cover every major category set forth in the International Covenant on Economic, Social, and Cultural Rights. However, a characteristic feature of these provisions is a lack of legal guarantees and a strong emphasis on the material foundations of these rights. In other words, social, economic, and cultural rights guaranteed under the Constitution are not enforceable in courts and are dependent for fulfillment and expansion on the development of the socialist economy.66

Thus, as with civil and political rights, social, economic and cultural rights are regarded as grants of the state which are held only contingently. Moreover, social and economic rights are not equally distributed as between the peasantry and the workers and staff in both state enterprises and governmental institutions. Under China’s socialist socio-economic security system, many economic and social rights like the right to retirement pensions and the right to social security are realized by means of employment. Peasants fall outside the welfare benefits

64 Ibid., art. 22.
65 Ibid., art. 23.
66 Article 14 of the Constitution provides that: “The state properly apportions accumulation and consumption, pays attention to the interests of the collective and the individual as well as of the state and, on the basis of expanded production, gradually improves the material and cultural life of the people.” Practical constraints which hinder the full enjoyment of the economic, social and cultural rights are implied here, while the state undertakes to take measures to create the necessary material conditions. Ibid., art. 14.
and social security system provided by the state to workers and staff in state enterprises and governmental institutions.67

Part Two: The Evolving Chinese International Position on Human Rights

I. Historical Background

The purpose of this section is to identify, describe and demonstrate the following: what the content of China's international position on human rights has been historically, and how this has affected current-day Chinese perceptions; the extent to which China's perspectives on international human rights have been shaped over the decades by Marxist-Leninist ideology and Party policy; and the extent to which China's position has been shifting in keeping with China's new place in the post-Tiananmen and post-Cold War era.

In order to understand better China's current position on international human rights, I will first look at the remarkable evolution of China's view on international human rights during the Cold War era. I then concentrate on the period since the crackdown of the pro-democracy movement in June 1989. Throughout all the twists and turns in China's relations with the outside world, I will show how changes in China's human rights policy have been linked to China's new foreign relations in the post-Cold War and post-Tiananmen era. I will also identify continuities in

China’s view on international human rights, even though dramatic changes have taken place in China’s human rights discourse since the coming into being of the PRC.

1. 1949-1979

When the PRC came into being in 1949, the Chinese leadership – as it did in so many other spheres – drew inspiration from the Marxist-Leninist theory of society and formally adopted the Soviet model of socialist legality and of a rights system. This model gave collective and national interests priority over individual rights, put strong emphasis on economic and social rights, and showed a tendency to diminish the role of civil and political rights and freedoms. This socialist conception of human rights, which is philosophically in disagreement with that of the West, has been a consistent theme in the human rights thought of the PRC. However, China’s international position on human rights has gradually evolved in response to its changed national and foreign policies and its relation to the international community, from totally dismissing the concept of “human rights” to formally acknowledging its commitment to fundamental international human rights.

When the PRC was established in 1949, the world was dominated by two opposing superpowers, namely the United States and the Soviet Union. The U.S.’ anti-Communist rhetoric and a common Marxist-Leninist ideology led to a strategic alliance between the PRC and the Soviet Union. The new China under Mao chose to “lean to one side”, that of the Soviet

(Canberra: the Australian National University, 1990) at 15. [hereinafter “Human Rights in the PRC”]

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Union, against the United States and its capitalist allies. Sino-Western relations became more hostile after the outbreak of the Korean War, which lasted three years and took more than a million Chinese and American lives. The Korean War had terrible consequences for China’s relations with the United States and its allies for more than two decades. Moreover, China’s bitter experience with the imperialist powers, dating back to the Opium War of 1839 to 1842, profoundly influenced the attitudes of the Chinese leadership toward the West. The legacy of hostility led the Western countries not only to refuse to extend diplomatic recognition to the government of the PRC, but also to conduct an active policy of weakening and isolating the PRC. As a result, the PRC was excluded from the United Nations and ignored by other intergovernmental organizations in the 1950s and 1960s. After the Sino-Soviet relations broke down in the early 1960s over controversies relating to sovereignty, leadership in the socialist camp, and ideology, China found itself internationally isolated and its international position weakened by simultaneously strained relationships with the two superpowers. The dual-adversary policy against both superpowers in the 1960s had the effect of shutting China out from the international community.

68 See P. van Ness, “Three Lines in Chinese Foreign Relations, 1950-1983: The Development Imperative” in D.J. Solinger, ed., Three Visions of Chinese Socialism (Boulder: Westview Press, 1984) at 122. 69 The Korean War broke out on June 25, 1950. In October, 1950, when the U.S. led troops were rapidly moving toward the Chinese frontier, Chinese troops entered the war. The war came to an end in July 1953 when an armistice was finally signed. See J. R. Faust & J. F. Kornberg, China in World Politics (Boulder: Lynne Rienner Publishers, 1995) at 130-132. 70 See ibid. at 132-136. 71 The Republic of China (ROC) was one of the founding members of the United Nations and a permanent member of the UN Security Council. When the Nationalist government of the ROC was defeated in the Chinese Civil War and driven to Taiwan in 1949, the question arose whether China should be represented in the United Nations by the government of the PRC in Beijing or the government of the ROC in Taipei. The United States and other Western countries managed to keep the PRC from taking over the Chinese seat for two decades, on the ground that the PRC failed to meet the “peace-loving” standard set forth in the UN Charter. Therefore, before the PRC joined the UN in 1971, the Chinese seat was held by the Republic of China on Taiwan. See R.S. Chavan, Chinese Foreign Policy: The Chou En-Lai Era (New Delhi: Sterling Publishers Pvt Ltd., 1979) at 201-205. 72 See van Ness, supra note 68 at 128-31.
During this period of time, Chinese leaders made plain their contempt for the Western view of human rights as reflective of the individualistic and exploitative character of the capitalist societies, and held the Socialist and Third World view of international human rights which emphasized the collective right of the peoples under colonial rule to self-determination, the right to development, and other social and economic rights. However, on the international stage, the Chinese said very little publicly when it came to issues regarding international human rights.73 Suffering from being rejected by the United Nations, which China once condemned as a “body manipulated by the United States”, and a “dirty international political stock exchange in the grip of a few big powers”74, the PRC vigorously criticized virtually every activity of the United Nations in the 1950s and 1960s.75 Understandably, the PRC dismissed international human rights precepts set forth in the UN Charter and various other UN-sponsored international human rights documents to which the PRC was not a signatory.76

On 25 October 1971 the UN General Assembly adopted a resolution, sponsored and supported by many newly independent developing countries in Africa and Asia, calling for the immediate expulsion of the representative of the Republic of China (ROC) from the UN, and the recognition of the representative of the Government of the PRC as the sole legitimate representative of China in the UN and the recognition of the PRC as one of the five permanent members on the UN Security Council.77 The PRC was recognized as the official holder of the

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76 See Wu, supra note 73 at 15.
77 After the resolution was passed, the ROC delegation withdrew from the United Nations and all the bodies affiliated to it. The PRC delegation attended the 26th Session of the UN General Assembly on 15 November 1971. See Chavan, supra note 71 at 206-207.
China seat, after being denied entry into the United Nations for twenty-two years. Since its entry into the United Nations and its recognition by an overwhelming majority of the countries of the world, China became one of the central forces in world politics. It was accepted by the international community as a great power when it became one of the permanent members of the UN Security Council. Its role in world affairs was developing fast and could no longer be ignored. By the end of 1973, the PRC established diplomatic relations with such major Western countries as France, Great Britain, West Germany, Australia, Canada and Japan, and took steps to normalize its relations with the United States.

Among the many developments attendant on China’s entry into the United Nations, one of the most significant was China’s rapid embrace of a wide range of international relations, including membership in most international organizations, in sharp contrast to its situation before 1971. Naturally, this increasing involvement with other nations necessitated far greater attention to international law. By accepting the membership of the United Nations, the PRC admitted its acceptance of the purposes and principles of the UN Charter and its obligations under that Charter. It also assumed the obligation to abide by the basic human rights principles enshrined in the Charter upon joining the United Nations. At least on paper, the Chinese government affirmed its “faith in fundamental human rights, in the dignity and worth of the human person,” and

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78 In 1970, 54 countries extended diplomatic recognition to the government of the PRC while 67 recognized the government of the ROC. Only a year later, the PRC established diplomatic relations with 69 countries while the ROC had the support of 54 countries. In 1991, twenty years after the PRC joined the UN, the number of countries that had established diplomatic relations with the PRC increased from 69 in 1971 to 140 in 1992, while over the same period, the ROC diplomatic ties plunged to 29 in 1991. See Q. Zhao, Interpreting Chinese Foreign Policy: The Micro-Macro Linkage Approach (Hong Kong: Oxford University Press, 1996) at 59.

undertook to promote and encourage respect for human rights and fundamental freedoms by virtue of its membership in the UN.  

Although the entry into the UN in 1971 was of profound importance in promoting the emergence of China as a major actor in international affairs, China's suspicion of the United Nations did not immediately disappear in the first few years of its participation. During much of the 1970s, China's behavior in the United Nations was generally marked by the discrepancy between normative activism and participatory aloofness. It showed greater interest and participation in the general debate on principles, but shied away from many of the UN functional committees and subsidiary bodies. As for human rights issues, the PRC seemed to show selective and politicized interest in such rights as the right to decolonization, freedom from racial discrimination, the right to development, and women's rights. For instance, in his debut address to the UN General Assembly, the Chinese representative made reference to collective rights, saying that the Chinese people, who had suffered for long from imperialist aggression and oppression, had consistently supported all oppressed peoples and nations in their just struggle to win freedom and liberation. On the other hand, the PRC refused to participate in the UN Commission on Human Rights in the 1970s. It did not participate in the vote on the UN General Assembly's resolutions on human rights in some countries such as Chile (1974). As Kent observed, "China appeared to be feeling its way, wishing neither to flout UN conventions nor to

81 According to Kim, the PRC showed interest only in the Special Committee on the Situation with Regard to the Implementation the Declaration on the Granting of Independence to Colonial Countries and Peoples. Its participation in the committee was more extensive and continuous than that in any other subsidiary organs of the UN General Assembly. See Kim, supra note 75 at 116-21.
82 Ibid. at 97-177.
83 See Chavan, supra note 71 at 207.
84 See "Human Rights in the PRC," supra note 67 at 57.
conform to any identifiable position on human rights, adopting in preference an ‘evasive position of non-committal’.”85 China’s representatives to the UN as a rule avoided the issue of human rights in interviews and most public statements.

More importantly, in the few speeches and statements in which a human rights issue was directly mentioned, the Chinese representatives tended to politicize the human rights issue and link it to its ideology of anti-imperialism, anti-colonialism and anti-superpower hegemonism. In their views, human rights issues, as with other specific issues, should not be discussed in abstract terms or in isolation from the larger forces of historical trends. They claimed that there could never be “human rights and equality, still less any guarantee of or respect for human rights, if the struggle for them was divorced from the struggle against imperialism and hegemonism.”86 The issue of human rights for the people of the Third World, of which the PRC was the self-proclaimed leader, was not an independent and isolated one but subordinate to the struggle against imperialist aggression, colonial oppression, and capitalist exploitation. In other words, human rights should first be understood in terms of national liberation, political independence, and economic development. The Chinese delegates repeatedly declared that colonialism run counter to the fundamental Charter principles of national self-determination and respect for human rights and, hence, decolonization should be one of the primary tasks of the UN.87

2. 1979-1989

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85 “Between Freedom and Subsistence,” supra note 38 at 101.
86 GAOR, 29th Sess., Third Committee, 2085th meeting (8 November 1974), para. 43. (cited from Kim, supra note 75 at 162-63.)
87 See ibid. at 173-174.
Before 1979, China’s socialist domestic political, economic, cultural and legal systems had been deliberately insulated from the outside world. Both foreign capitalist and non-capitalist influences were largely excluded. The adoption of the economic reform and “open door” policy in 1979 has led to radical changes in China’s international position. During the period of 1979-1989, China’s foreign policy was reoriented from highly ideological and conflictual statecraft to one that stressed the expansion of economic exchanges with Western countries and the absorption of their investment and technology. This new foreign policy, coupled with a new political culture, which allowed and encouraged wider debate on domestic and external policies on almost every subject, affected the PRC’s international human rights discourse. The new leaders’ pragmatism and openness to ideas from abroad made the Chinese government more receptive to international human rights rhetoric. As a result, Chinese scholars and international lawyers began to openly discuss human rights issues which used to be taboo in academic research. In some of the discussions, several scholars even went so far as to claim that human rights had developed from originally being a concept mainly serving the capitalist class into a term embracing the “common interests of all mankind” and that “no political system in the world, whatever its ideology, could publicly oppose the concept of human rights.” Moreover, they pointed out that the nature of China’s activities in the United Nations demonstrated that “the Chinese government was beginning to shoulder more and more responsibilities and duties in regard to the upholding of basic human rights.”

90 Ibid.
In the international arena, the Chinese government began changing its attitude from open hostility to a more conciliatory stance on human rights. It cited international human rights standards in its criticism against other governments such as the Soviet Union for their human rights violations. It also supported international criticism and, in some cases, sanctions against Rhodesia, South Africa, Chile, and Israel. At the United Nations in the 1980s, while the PRC continued its traditional policy of supporting the General Assembly’s resolutions on self-determination and decolonization, and on opposition to apartheid, racial discrimination and discrimination against women, it exhibited increasing willingness to get involved in UN-centered human rights organizations and activities. Starting from 1979, Chinese delegates attended the UN Commission on Human Rights as observers. Since 1982, China has been elected a member of the UN Commission on Human Rights and, quite ironically, was Vice-Chair in the year of Tiananmen crackdown. Chinese delegates have also joined its Sub-Commission on Prevention of Discrimination and Protection of Minorities as well as the Working Group on Indigenous Populations and the Working Group on Communications affiliated with the Sub-Commission. The Chinese government also worked closely with such international organizations as the International Labor Organization and the International Committee of the Red Cross in various

93 See “Human Rights in the PRC.” supra note 67 at 57-58.
95 Ibid.
programs related to human rights.\textsuperscript{96} Noticeably, the Chinese government began to respond to human rights representations made by foreign governments and non-governmental organizations (NGOs).\textsuperscript{97} For instance, in response to Amnesty International’s repeated criticism of China’s human rights conditions, Chinese officials held meetings with representatives of the London-based human rights NGO in the early 1980s to discuss human rights issues and cases.\textsuperscript{98} When Chinese leaders were frequently questioned about human rights by foreign leaders, NGOs, journalists, and members of the public in various occasions, they tended to respond to world public opinion in a mild way, playing down the issues rather than publicly denying international standards of human rights.\textsuperscript{99}

There were also dramatic changes in the Chinese government’s attitude towards international human rights treaties and documents. Since 1980, the Chinese government has signed, ratified and participated in seven international human rights conventions, namely the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crimes of Apartheid, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Elimination of All forms of Racial Discrimination, the Convention Relating to the Status of Refugees, the Protocol Relating to the Status of Refugees and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.\textsuperscript{100} The Chinese government

\begin{footnotes}
\item[97] Ibid. at 528-36.
\item[99] See Cohen, \textit{supra} note 96 at 535.
\item[100] China has ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N.\
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has submitted reports to the UN committees which are responsible for monitoring implementation of some of these treaties. Significantly, the PRC has signed both the International Covenant on Civil and Political Rights (ICCPR) (5 October 1998) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (27 October 1997). The National People’s Congress Standing Committee ratified the ICESCR on 28 February 2001. The ICCPR has yet to be ratified.

In short, the PRC has readjusted its position on international human rights law and come closer to accepting its legitimacy since 1979. With little doubt, it can be considered an advance that the Chinese government now feels obliged to justify its actions in the field of human rights by reference to international standards and that its choice of justifications may influence its freedom of action. Furthermore, the Chinese government stepped up its efforts to participate in the international human rights movement in a more active way during most of the 1980s.

However, it is worth noting that the PRC acknowledges international human rights standards only when they do not threaten its political interests or do not expose the true scale of violations of human rights within its borders. The increasingly active role China has played in shaping the international human rights movement has also proven a double-edged sword. As Amnesty International observed in a report on China’s human rights, “[w]hile it has played a positive role in developing aspects of some standards, it has consistently sought to undermine
and weaken standards dealing with violations about which it feels vulnerable.\textsuperscript{101} Although the PRC joined a number of UN human rights conventions, the Chinese government made reservations to all of them regarding the implementation mechanisms that could possibly influence its national jurisdiction over human rights issues. It does not recognize the competence of the International Court of Justice to settle disputes relating to human rights, nor does it allow the individual complaint procedure that is provided for in the International Convention on the Elimination of All Forms of Racial Discrimination.\textsuperscript{102} The PRC is obliged to report on, and receive criticism of, its treatment of individuals to international committees set up under various human rights treaties to which the PRC is a party state. However, the PRC has not responded fully to the concerns raised by such committees as the Committee Against Torture.\textsuperscript{103} In the reports submitted to international human rights bodies, the Chinese have generally sought to justify all its actions in the field of human rights and rhetorically denied allegations of human rights violations. Furthermore, although there was a trend towards relaxation of its previous hard-line position on human rights and preparedness to accept international standards, the Chinese government held a dualistic approach and a limited view of human rights. It criticized other states such as the Soviet Union for human rights abuses while refusing to discuss its own. It also


\textsuperscript{102} Under Article 14 of the Convention against Racial Discrimination, a State Party may at any time declare that it recognizes the competence of the Committee against Racial Discrimination to receive and consider communications from individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in the convention. No communication shall be received by the committee if it concerns a State Party which has not made such a declaration. The PRC has not made such a declaration recognizing the competence of the Committee against Racial Discrimination. See B.A. Andreassen & T. Swinehart, ed., \textit{Human Rights in Developing Countries 1990: A Yearbook on Human Rights in Countries Receiving Aid from the Nordic Countries, the Netherlands and Canada} (Kehl: N.P. Engel Publisher, 1991) at 105-106.

\textsuperscript{103} Amnesty International, “No One Is Safe”, \textit{supra} note 101 at 78.
strongly asserted in many of its public statements that its human rights record is an "internal affair" in which the international community should by no means intervene.\textsuperscript{104}

It is noticeable that human rights in China had almost never been a bone of contention between the PRC and the Western countries during the Cold War era. Few human rights violations in the PRC had been exposed before China opened its door to the outside world in 1979. Even in the years of the Cultural Revolution, the PRC seemed to be accorded a peculiar immunity from international scrutiny.\textsuperscript{105} As Cohen observes, "[n]o systematic or serious effort was made by governments or human rights organizations to call the PRC to account or even to document its abuses. No detailed analysis of China's human rights record appeared."\textsuperscript{106} The main reason was the lack of free access to human rights information in China, which had been very much isolated and beyond reach from 1949 to 1979.\textsuperscript{107} Until the late 1970s, the Chinese government did not allow foreigners to travel to most parts of the country. Facts or figures on human rights conditions were censored. Few Chinese people were allowed to travel abroad and their contacts with foreigners were closely monitored by the government.

The years since 1979 saw a greater degree of political pluralism, market-oriented economic reforms, increased respect for civil and political rights, and the institution of legal reforms that called for equality before the law and greater respect for citizens' rights. All these encouraging developments made many optimists in the West think that China was on the way toward a Western-style democracy and the rule of law. In the meantime, the Soviet-led communist regimes still posed a grave threat to the security of the Western liberal democracies during much of the

\textsuperscript{104} The author will return to this point in the following section.
\textsuperscript{105} Cohen, \textit{supra} note 96 at 449.
\textsuperscript{106} \textit{Ibid.}
\textsuperscript{107} See \textit{ibid.} at 451-56.
1980s. As a consequence, many Western governments and private citizens in academia and human rights practice were friendly toward the Chinese government and, hence, avoided the subject of human rights violations in China both in public discussions and in research. The Western media seemed to prefer talking about Soviet human rights abuses rather than those of China. This double standard seemed to create “a conspiracy of silence” surrounding human rights abuses in the PRC.

In her well documented work on the decade-long tolerance by the international community of human rights abuses in China, Cohen explained that there were several other reasons why human rights abuses in the PRC were largely overlooked in the international community before 1989. Firstly, it was so difficult to deal with the enormous numbers of Chinese victims of human rights abuses that many in the West were hesitant to take up the issue of human rights in China. Due to the overwhelmingly large scale of violations, a tremendous amount of time and effort would be required to organize, categorize, and evaluate such information, precluding many of those involved in human rights from tackling China’s human rights situation. Secondly, “[s]everal distinct prejudices have worked in China’s favor and have made many reluctant to judge Chinese human rights practices too harshly - its time-honored civilization, its daring socialist experiment, and its tragic history.” Cohen explained that reverence for China’s centuries-old civilization blinded many intellectuals in the West to human rights realities in the

109 See Cohen, supra note 96 at 449.
110 For a full elaboration on the reasons why the PRC was exempted from international accountability for its human rights abuses, see Cohen, ibid. at 451- 491.
111 Ibid. at 456-59.
112 Ibid. at 456-57.
113 Ibid. at 459.
PRC. Some even thought that Chinese socialism might be an answer to old China’s problems, such as chaos, famine, national disintegration and social injustice. Furthermore, the fact that China had been ruthlessly exploited and humiliated by Western imperialism in the nineteenth century and thereafter also caused the West to move slowly on human rights issues.\textsuperscript{114} Thirdly, there was the absence of a lobby for human rights in China exerting pressure on governments or NGOs to act on human rights abuses in the country.\textsuperscript{115} Cohen concluded that the above reasons had exempted the PRC from the concerns of the international human rights community during the 1970s and 1980s when international human rights increasingly became a publicized issue in the West. China’s human rights practice was not a matter of importance that affected the relations between the PRC and other nations, especially the Western countries.

3. 1989 - Present

The prejudices in China’s favor in terms of its human rights practice were decisively interrupted by the shattering events of 1989. Much of the widespread belief that China should be treated differently and the favorable opinion of China that had been built up over the previous decades came to an end with the military crackdown on the 1989 democracy movement that centered on Tiananmen Square.

The democracy movement was triggered by the death of Hu Yaobang, a popular symbol of reform and liberalism. He was removed from his position as General Secretary of the Communist Party of China in early 1987 for having permitted the student demonstrations for

\textsuperscript{114} \textit{Ibid.} at 459-68.
\textsuperscript{115} \textit{Ibid.} at 468-71.
democracy and against government corruption in late 1986. He was also accused of tolerating the spread by leading intellectuals of “bourgeois liberalism”, a code word for Western values and ideas. His death served as an excuse for pro-democracy students to take to the street. Students shouted slogans and waved banners calling for political reform, institutional democracy, and an end to government and Party corruption, thus setting off two months of the democracy movement of 1989. The student-led demonstration soon developed into a nationwide protest movement. Participants came from all walks of life, including intellectuals, urban workers, small business owners, government officials, service personnel, and even some party cadres. The Party leadership took several weeks to figure out how to respond to the students’ demands, which the Party leaders considered threatening to the very foundations of Party rule. After martial law was proclaimed in Beijing but failed to stop demonstrations, the Party leadership under Deng Xiaoping sent military forces in the name of “restoration of law and order” to dispel peaceful demonstrators in Beijing. Hundreds, perhaps thousands, of civilians were believed to be killed in Beijing, followed by a large-scale crackdown movement in which many people were arrested for their participation in the democracy movement.

The military crackdown affected China’s ties with the outside world in two ways. Domestically, the results of the crackdown were devastating to China’s progress toward a more democratic society and dashed hopes for democracy in the PRC. The crackdown also represented a major crisis for the Party whose political legitimacy had already been severely weakened by the Cultural Revolution and, more recently, by the widespread corruption of Party officials. The

116 See Ogden, supra note 19 at 72-73.
117 See generally R. Benewick, “The Tiananmen Crackdown and Its Legacy” in Benewick & Wingrove, supra note 74 at 5-20.
118 Ibid.
internal uncertainty was compounded by the simultaneous collapse of communism in the Soviet Union and Eastern European countries. Consequently, the door to the outside world was mostly closed for the rest of 1989 as well as for 1990 and 1991, as fear of outside political and cultural influence overcame the desire to import new technology and capital from the West.

The international community - and Western nations in particular - was shocked and outraged by the crackdown. Many countries imposed sanctions on the PRC and the army in particular. Almost overnight, human rights situation in China became front-page news in the Western media, which all condemned this serious violation of human rights in the PRC. From then on, Western feelings about China took a major new turn toward negativism. Many Westerners had supposed China was different from other communist countries, but discovered that it was not. Human rights became a major contentious issue for the first time in the relations between the PRC and the international community. The crackdown not only ruined China's image as a part of the international community of civilized nations, but also damaged China's relations with the Western industrial nations. After a decade of relative lack of concern on the part of the United States, a new scrutiny of China's human rights practices emerged as a salient feature of bilateral relations between the PRC and the United States. From 1990 to 1994, the annual renewal of Most-Favored-Nation (MFN) trading status for China was a focal issue in

\[119\] For instance, U.S. President George Bush announced a set of sanctions in response to the Tiananmen massacre only one day after the incident. Measures against Beijing included suspension of all government-to-government military sales and commercial exports of military materials; suspension of exchange visits by U.S. and Chinese military personnel; sympathetic review of requests by Chinese students studying in the United States to extend their stay, etc. See Faust & Kornberg, supra note 69 at 140-41.

Sino-US relations. Under the Bush Administration, the US Congress tried to legislate conditions on renewal of China's MFN trading status but failed due to presidential vetoes in 1990 and 1991. When President Clinton came to office in 1993, he took a hard line on the PRC and issued an executive order which linked the annual extension of MFN trading status for the PRC with an improvement in its human rights condition. The PRC government firmly opposed Washington's attempts to set conditions that the PRC would have to meet in order to continue receiving renewals, claiming that the Chinese government would never "accept U.S. dictates on how to behave toward its own citizens." The Clinton administration gave in to the Chinese resistance to pressure in the spring of 1994 when President Clinton announced that he had decided to delink human rights from the annual renewal of MFN trading status for the PRC.

In the months following the crackdown, the PRC was the subject of mounting international criticism and intensive investigations in the United Nations, its specialized agencies such as the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter the Sub-Commission), and other intergovernmental organizations such as the World Bank and the International Labor Organization. At the 41st session of the Sub-Commission in August 1989, a resolution was adopted that expressed dismay

122 Ibid.
123 See Copper, supra note 120 at 336.
124 On May 26, 1994, President Bill Clinton announced that: "I have decided that the United States should renew Most Favored Nation trading status toward China. This decision, I believe, offers us the best opportunity to lay the basis for long-term sustainable progress in human rights and for the advancement of our other interests with China ... I am moving, therefore, to delink human rights from the annual extension of Most Favored Nation trading status for China." "Clinton's Call: Avoid Isolating China," The New York Times, May 27, 1994, at A 8.
at the killings and arrests of peaceful demonstrators in China and called for clemency towards persons deprived of their liberties as a result of their participation in the demonstrations. At the 46th session of the U.N. Commission on Human Rights held in early 1990, a draft resolution, called "Situation in China," was put before the commission. The draft resolution expressed concern regarding allegations of human rights violations in the PRC and endorsed the resolution passed by the Sub-Commission in August 1989. However, after intense Chinese lobbying, the draft was defeated in a procedural no-action vote by a simple majority of 17-15 with 11 abstentions. Some other international organizations also exerted great pressure on the Chinese government to ensure full observance of international human rights standards. In early 1990, the International Labour Organization’s Governing Body adopted a resolution expressing deep concern regarding the allegations of serious human rights violations of independent union leaders and activists and urged that the Chinese government respect the right to form labor unions and freedom of association. All these international organizations, which enjoy an institutionally based authority, exerted powerful moral pressure on the Chinese government in view of China’s permanent membership in the U.N. Security Council.

International human rights NGOs have also played a significant role in the process of the internationalization of China’s human rights movement. NGOs shifted much of their attention to

126 The Resolution states that:
"The Sub-Commission of Prevention of Discrimination and Protection of Minorities,
Concerned about the events which took place recently in China and about their consequences in the field of human rights,
1. Requests the Secretary-General to transmit to the Commission on Human Rights information provided by the Government of China and by other reliable sources;
2. Makes an appeal for clemency, in particular in favor of persons deprived of their liberty as a result of the above-mentioned events."
E/CN.4/Auv.2/1989/L.31. See also ibid. at 10-18.
127 Ibid., at 18-21.
128 Ibid.
129 See “Between Freedom and Subsistence”, supra note 38 at 215-16.
130 Ibid. at 5.
China after the June 1989 incident and the fall of communism in the Soviet Union and East Europe. They exert considerable influence on the UN human rights bodies, international organizations and foreign governments because they are seen as neutral and above political pressures. Among them are Amnesty International and Human Rights Watch. Both of them published a number of influential reports which documented systematic human rights abuses in China and caught widespread attention of the world media.\textsuperscript{131}

The Chinese leaders had to respond to a storm of foreign criticism of its human rights abuses. With little doubt, they felt compelled to adopt new policies to tackle this new situation where, for the first time, its human rights practices became the focal point of the world media and a centerpiece in its relations with the Western countries. The Chinese government reformulated its position on human rights with three different sets of responses to the pressure from the international community in general and the Western liberal democracies in particular.\textsuperscript{132} Initially, the Chinese government’s responses to international criticism of the 1989 crackdown and subsequent repression and to heightened world efforts to press China’s human rights practices into closer alignment with international standards were mostly hostile and defensive. It bitterly resented charges by foreigners concerning abuses of human rights, calling these allegations unfriendly interference in China’s internal affairs.\textsuperscript{133} It saw such foreign pressure as an affront to China’s national sovereignty, designed to undermine the legitimacy and power of the Chinese government. Secondly, however, “Chinese leaders have also espoused a soft line at times making


\textsuperscript{132} See Copper, \textit{supra} note 120 at 328-49.

\textsuperscript{133} \textit{Ibid.}, at 331-36; “Multilateral Monitoring”, \textit{supra} note 125 at 10-13.
concessions and bending to foreign and international pressure." In order to improve its image abroad, the Chinese government reiterated its commitment to abide by the principles and purposes of the U.N. Charter relating to respect and protection of human rights and fundamental freedoms. It at times made concessions in response to foreign and international pressure and released a number of political prisoners detained after the 1989 crackdown to please the international community. It even invited some foreign and international human rights delegations to visit China and engaged in dialogue with them on a wide range of human rights issues as a sign that the government wished to improve its human rights image. China lobbied intensively for what it called a "non-confrontational" approach, replacing multilateral action at the United Nations (the resolution at the U.N. Human Rights Commission in particular) and public censure with quiet diplomacy and bilateral dialogues on human rights. While the Chinese government insisted that dialogue "on the basis of mutual understanding and seeking a common ground while preserving differences" is the key to any progress in international human rights, many countries that were most critical of China's human rights policies and practices following the 1989 crackdown saw a shift in the position on the most effective way of dealing with human rights issues in China in the mid-1990s. As Human Rights in China, a human rights group based in New York, points out:

Whereas in the past such governments had generally addressed rights violations in China through a combination of diplomacy and public censure both on a bilateral and multilateral level, now they are virtually unanimous in promoting the idea that the most effective way of improving Beijing's human rights practices is through 'engagement' and 'dialogue.' Quiet bilateral diplomacy,

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134 Copper, *ibid.* at 336-37.
they claim, has already achieved more results than the multilateral approach exemplified by the tabling of resolutions critical of China at the annual sessions of the U.N. Commission on Human Rights.\textsuperscript{136}

Take the Canada-China dialogue for example. On April 14, 1997, near the conclusion of the annual session of the U.N. Commission on Human Rights, the Canadian government announced that it would no longer co-sponsor the China resolution and, in the same news release, made public a package of bilateral "co-operative human rights initiatives" with China. The Canadian government explained its new position as follows:

The government has decided, in light of the significant weakening in consensus on the resolution among its traditional co-sponsors, that it no longer carries the same weight it has in the past year. Under the circumstances, we concluded that Canada could have a greater influence on the state of human rights in China by pursuing and intensifying our promising \textit{bilateral} measures.\textsuperscript{137} [emphasis added]

At present, the China-Canada human rights dialogues, as with the bilateral dialogues between China and some other states such as Australia, Norway, Sweden, Brazil and the European Union, combine regular diplomatic exchanges of views on human rights, including high-level roundtable discussions and symposia, with programs of cooperation, involving training courses and study tours for officials, conferences, sponsorship of academic research on rights and so on.\textsuperscript{138}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{135} In the early 1990s, a number of Western countries sent high level delegations to China. Countries involved included France, Australia, Britain, Switzerland and the United States. \textit{Ibid.}
  \item \textsuperscript{137} Government of Canada, News Release No. 70, April 14, 1997.
  \item \textsuperscript{138} The shift to bilateralize international efforts to achieve improvements in China's human rights situation is a cause of deep concern for some international human rights NGOs such as Human Rights in China. These NGOs maintain that the major push for bilateralization has come from the Chinese government itself, with the objective of eliminating multilateral pressure, and that by making human rights standards negotiable in discussions between
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The Chinese government's third category of responses vis-à-vis foreign criticism of its human rights record involves the formulation of a more sophisticated theoretical response. Before 1989, despite the Marxist proclivity to theorize on almost every subject, there had been no coherent or officially sanctioned Chinese theory of human rights. The paucity of such documentation by Chinese communist theorists was matched by a poverty of theoretical insight. As a consequence, the Chinese government found itself unable to respond to foreign criticism with its own view on human rights in the few months following June 1989. As Copper observes, "[t]his also explains why Peking's reactions ... were disparate, disconnected, and in many ways dysfunctional at first, and as time has passed Peking has developed a more cogent, rational policy to deal with human rights criticism."

The Chinese government was faced with a dilemma in face of mounting international criticism and was forced to rethink the role of human rights discourse in international relations. On the one hand, its membership in the United Nations and its adherence to many of the UN's human rights treaties compelled it to accept the legitimacy of internationally established norms and to adopt the rhetoric of human rights set forth in the UN Charter and the Universal Declaration of Human Rights. On the other hand, Chinese leaders and Marxist theorists believed that "the theory of human rights in the West is a full display of capitalist values and ideology" and "should not be accepted as the only criteria of human rights for all humanity." Therefore, they sought to advance a rival conception of human rights to justify China's controversial human rights practices and parry international criticism.

individual states, this shift also poses a serious challenge to the already-tarnished credibility of the international human rights monitoring mechanisms of the United Nations. See "Human Rights in China", supra note 136.

139 See "Between Freedom and Subsistence", supra note 38 at 217-19.

140 See Copper, supra note 120 at 341.

There have been important outward changes in China’s responses to external criticism since the spring of 1991 when the Chinese foreign minister announced that the Chinese government was willing to discuss human rights in an international context. This indicated its readiness to participate in the international debate on human rights. The government and many Marxist theorists began to grapple with the difficult human rights issues. Obviously, they were experiencing a sense of an urgent need to incorporate the concept of human rights into contemporary official ideology and to formulate a distinct Chinese theory of human rights. For instance, in a book on human rights published in 1991, it was stated that:

The question of human rights is one of the most complex and hotly debated of all issues in the international arena. It seems that all major political incidents in the modern world are intimately linked with human rights. It is also an issue of considerable political significance with China, and one of great sensitivity. The international bourgeoisie have been able for far too long to carry on as though they have some monopoly over human rights .... We are therefore faced with the urgent task of coming to grips with the theory of this issue and of educating the broad masses of cadres and people, in particular young students, how to utilize a Marxist perspective to achieve a thorough and correct understanding of human rights. [emphasis added]

Starting from the early 1990s, the government took a number of human rights initiatives, including setting up human rights research groups, sponsoring seminars and conferences on human rights, frequent press briefs, and receiving foreign delegations to discuss human rights issues. The human rights topic often appeared and was a salient issue in the media in China and in the Chinese government’s statements in various international organizations. In November

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142 See Copper, supra note 120 at 343.
1991, the Chinese government published a "White Paper", *Human Rights in China*, which fully stated the PRC’s fundamental attitude towards human rights. The basic premises of the White Paper on Human Rights are that each nation has its own concept of human rights founded in its own political, economic and social system and is free to implement international standards according to its specific cultural, historical, ideological, and political particularities. This development coincided with a newly-emerged Association of Southeast Asian Nations (ASEAN) consensus on human rights during the early 1990s that agreed that "while human rights are universal in character, implementation in the national context should remain within the competence and responsibility of each country, having regard for the complex variety of economic, social and cultural realities." Similarities between the ASEAN’s view and China’s also included the emphasis on state sovereignty and noninterference, the priority of the right to development, self-determination and opposition to the use of human rights as a condition for aid. These views were carried into the 1993 Bangkok Declaration issued in the preparatory meeting of Asian countries to the United Nations World Conference on Human Rights, held in Vienna between 14th and 25th, June 1993. Both China and the ASEAN states played an important role in formulating the Bangkok Declaration which was famous for its challenge to the applicability of “universal standards” of human rights in Asia. Taking up a relativist position, the


144 *The White Paper,* *supra* note 94 at 8-45.


Bangkok Declaration argued for the importance of unique Asian backgrounds — historical, cultural, religious and economic — in determining human rights standards. The position also advocated that such standards were generally a domestic matter and that sovereign states had "the primary responsibility for the promotion and protection of human rights through appropriate infrastructure and mechanisms." Besides the two documents, a great amount of literature was produced in numerous government pronouncements, declarations, and in scholarly opinions to promote a Chinese view on human rights. The White Paper and the Bangkok Declaration are the most authoritative and comprehensive statements of China's position on human rights and thus the focus of this section. The majority of the White Paper was devoted to detailing the enjoyment of the rights set forth in the Chinese constitution and law. In the following discussion, however, the author will focus primarily on underlying questions such as basic human rights values reflected in official doctrine and the sources of such values, rather than on the specific human rights situation in the PRC.

II. Theoretical Dimensions: Marxism-Leninism on Human Rights

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148 Ibid.
In the early 1990s, the Chinese government began to wrestle with international human rights due to the enormous amount of attention that had been given to the subject of China’s human rights condition, both domestically and internationally. The difficulty the government encountered was to discover a new language of Chinese human rights which it could assert was more compatible with China’s economic, social and historical conditions and cultural values. Meanwhile, ideologically and psychically, the collapse of communism in the former Soviet Union and East Europe came as a big blow to the Chinese communists and made them fearful of any challenge to its utopian vision and its claim to legitimacy. Naturally, this overriding concern for the fate of communism in China resulted in a refusal to kowtow to Western values in the human rights debate between China and Western liberal democracies. The underlying objectives and ideological principles of Chinese communism limit the nature and content of human rights discourse in the PRC. Arguably, Marxist-Leninism orthodoxy plays a diminishing role in domestic and foreign policy decision-making in today’s China.\(^{150}\) However, Marxism-Leninism is a very specific ideological system, whose pure philosophical form continues to find true believers among the Chinese leaders and Marxist theorists, despite the long-term signs of degeneration. They are still committed to Marxism-Leninism, at least to the extent that it serves immediate political interests. The concepts and language of Marxism-Leninism have informed the thinking of Chinese political leaders and theorists, and they continue to justify their domestic and foreign policy choices in these ideological terms.\(^{151}\)

\(^{150}\) See G. White, “The Decline of Ideocracy” in Benewick & Wingrove, supra note 74 at 21-33; B. Womack, “The Problems of Isms: Pragmatic Orthodoxy and Liberalization in Mainland China” in Lin and Myers, supra note 120 at 3-21.

\(^{151}\) Ibid.
In general terms, ideology still has both prescriptive and proscriptive functions in Chinese official human rights discourse. One implication of the following analysis is that Marxist-Leninist ideology and socialist values have actually inhibited the formulation of China's human rights discourse of the 1990s. Because Marxism-Leninism remains the official state ideology of the PRC and has had a profound influence on the thinking of Chinese leaders and Marxist theorists, any discussion of China's official human rights discourse needs to be prefaced by a sketch of Marxist-Leninist premises.

1. Marxist-Leninism on the Development of Human History

Marxism-Leninism is a composite of two parts. In mid-nineteenth century Germany and England, Karl Marx and Frederick Engels developed a theory of history known as dialectical materialism which claims to have discovered the law of development of human history. Leninism, on the other hand, is a set of pragmatic theories of how to turn Marx's idealistic blueprint into the inevitable triumph of socialist revolution.152

According to Marxism-Leninism, human conditions are not naturally given or divinely created but historically generated and are changed constantly in human history.153 Marxism holds that the driving force of social change is class struggle between dominant and exploited

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152 While Marx provides the theoretical basis of Leninist practice, Lenin developed Marxism in many aspects: how to lead the class struggle to victory in practical action; how to recognize that conditions are ripe for victory; and how to exercise total revolutionary dictatorship once power is won as the indispensable means for the transition to communism. See Linden, supra note at 16.

153 Engels stated that: “We make our history ourselves, but, in the first place, under very definite assumptions and conditions. Among these the economic ones are ultimately decisive. But the political ones, etc., and indeed even the traditions which haunt human minds also play a part, although not the decisive one... In the second place, however, history is made in such a way that the final result always arises from conflicts between many individual wills, of which each in turn has been made what it is by a host of particular conditions of life.” Engles to J. Bloch.
classes and the determining power is economic rather than political. The Marxist-Leninist interpretation of human history considers the control of the means of production as the determining factor in a political order leading to class struggle. Class struggle leads the way to successive stages of human development: capitalism replaces feudalism, socialism overrides capitalism. Socialist society is the preliminary stage of the ultimate and ideal communist society and will eventually dissolve into the later stage where classes and class struggle are eliminated. In capitalism, Marx saw the government as controlled by the capitalist class, who owned the means of production and as a tool for exploiting the great masses of the exploited proletariat class. Capitalism contains within it the seeds of its own destruction. Inexorably, the proletariat - "grave diggers" of capitalism - was, in order to attain its emancipation, to overthrow the bourgeoisie, to conquer political power, to establish its own revolutionary dictatorship and to transform the means of production into state property. Through a period of transformation, this proletarian rule would lead to the disappearance of classes, the withering away of the state and the introduction of the communist society. 154

V. I. Lenin, who was the leader of the Russian Marxist party (Bolshevik) and masterminded the Russian Revolution of 1917, developed the theory of "party-mindedness" (partyinost) which required that a highly disciplined Communist Party lead the communist revolution to overthrow the rule of the capitalist class and establish the dictatorship of the proletariat. 155 Like Marx and Engels, Lenin regarded the state as a coercive instrument "for the

(September 21-22, 1890), Selected Correspondence of Karl Marx and Friedrich Engels (Moscow: Foreign Language Publishing House, 1953) at 498-99.


155 Leninism certainly had its roots in the thoughts of Marx and Engels. A link between Lenin and Marx and Engels was that they all urged the proletariat to unite as a class and to use their power to overthrow the rule of the bourgeoisie. However, it was Lenin who applied this idea to the communist party as a revolutionary vanguard of the communist revolution.
exploitation of the oppressed class”, and the law as an instrument of state power designed to secure the dominance of the ruling class.\textsuperscript{156} In a capitalist society, law was deemed to be the tool of political oppression and economic exploitation by the ruling capitalist class. In a socialist society, law was the instrument suppressing the class enemies of the ruling proletariat, which exercised its ‘dictatorship’ over socialist society through the representation of its vanguard, the Communist Party. The Communist Party was considered supreme and infallible and should have total control over both the government and the military, which were merely tools of the “proletarian dictatorship”.

2. Marx’s Critique of Rights\textsuperscript{157}

It is fair to say that Karl Marx held the human race in high esteem. One of the key philosophical bases of Marxism is the concept of emancipation, which calls for changing “all circumstances in which man is a humiliated, enslaved, abandoned and contemptuous being”.\textsuperscript{158} Sharing with Kant a recognition of “the irreducible value of every human individual,”\textsuperscript{159} he believed in the fundamental goodness of human nature and held out the prospect that man would

\textsuperscript{156} V. I. Lenin stated in his \textit{State and Revolution} that: “According to Marx, the state is an organ of class domination, an organ of oppression of one class by another; its aim is the creation of ‘order’ which legalizes and perpetuates this oppression by moderating the collisions between the classes.” V. I. Lenin, supra note 154 at 9. See also \textit{ibid.} at 12-15.


one day change the circumstances leading to the basic deprivations in the development of “human powers”, and live in a world that would enable him to achieve his full potential.160 He rejected the natural law justification of human rights and considered rights a consequence of historical struggles against servitude and inhuman conditions which had been historically generated.161

Essentially, Marx understood human rights in a social and economic sense and analyzed them against the background of a determined stage of the development of socio-economic relations. The criticism of the bourgeois state of that time was for him the starting point for the conception of human rights in a socialist state. In capitalism, capitalists own the means of production while proletarians have only their labor power. The proletariat are forced to sell their service to the capitalist on unfavorable terms. For Marx, this inequality of economic conditions has its analogue in the inequality of political and social conditions.162 And both of them enslave men, and hinder the development of their potentialities. Under economic and social conditions which are based on private ownership of the means of production, it is virtually impossible to get any real guarantee at all of human rights for all the people. Hence, the emphasis in Marx was upon creating an economic situation in which people’s most basic needs are equally met. Marx conceived of realizing the full set of human rights only through introducing the dictatorship of the proletariat, under which the private ownership of the means of production was to be abolished and then, since no other class could exist, no class would be exploited and dominated. This would mean real freedom and equality.

160 See Golubovic, supra note 157 at 71-72.
161 Ibid at 72.
162 See Hunt, supra note 157 at 173.
Marx regarded the notion of rights, presented as the "common interest" of the whole of society and its members, as a bourgeois invention for maintaining its own class goals. In the class divided capitalist society, rights are necessary when the interests of an individual or group clash with the common interests of all individuals. Essentially, "[a]ny appeal to rights is but a sign that the economic situation that leads to freedom from the fears and competitiveness that characterize a capitalist economy and a bourgeois morality has not been realized." Once the capitalist society with its private ownership of the means of production and its class antagonism is abolished and a communist society with widespread altruism and an abundance of resources comes into being, rights no longer serve a purpose.

Yet, it has been convincingly demonstrated that Marxism has an authoritarian human rights tradition as well as a humanistic one. Marxism-Leninism is ideological in that it ignores the interests of individuals insofar as they have no bearing on the goal of a communist society. The realization of communism is of supreme importance and, hence, measures helping to secure this end must override individual rights and freedoms. It is obvious that, under the whole conceptual framework of the proletarian dictatorship and of the one-party state, there is little room for individual rights. The conception of Leninist rights emphasizes the pre-eminence of the state over the individual and links this idea to the supremacy of Party power over individual rights, because, as Henkin observed, "socialism implies a commitment to the welfare of the

163 See Golubovic, supra note 157 at 72.
society as a whole. The individual is not the foundation or the focus of society, though he (and his descendants) are, of course, the beneficiaries of a socialist society.\(^{168}\) Individual rights are subordinate to the needs of the socialist society and state and may be sacrificed for the purpose of the socialist future.\(^{169}\) “The dominant value or goal, perhaps the only rights of the individual, then, is to live in a socialist society. In such a society, a person enjoys, meaningfully and fully, benefits, opportunities – call them freedoms, rights – not freedom from or rights against the society, but rights and freedoms within it, as a member of society.”\(^{170}\) Leninism rejected such things as civil society and the state of the rule of law, embracing instead the dictatorship of the proletariat which was viewed as power unbound and unconfined by any laws. Accordingly, a “right” is understood to be a particular kind of benefit which the state grants to people, whether as individuals or as groups. Since the individual is regarded as a social being achieving self-realization and material satisfaction through the collective, and political expression through his class nature, rights, in particular, political rights, are granted to the individual according to his class status. Party leaders determine what rights can be given at any specific time and to whom. Rights given today can be taken away tomorrow in accordance with changing circumstances and a changing party line.

3. Ideology, Socialist Values and China’s Human Rights Discourse

In the early 1990s, there was evidence that the real content of the ruling ideology of the Communist Party of China had in fact been shifting to pragmatism, nationalism and

\(^{168}\) Edwards, Henkin & Nathan, supra note 26 at 22.

\(^{169}\) See Henkin, supra note 167 at 57-58.
authoritarian developmentalism. However, much of Marxist-Leninist orthodoxy is still retained in China’s official discourse. Similarly, as discussed above, the salience of China’s human rights discourse varies in accordance with changing Party politics and domestic and foreign policies over the last five decades. It should be noted that overall human rights conditions have improved radically since 1979. Official discourse on human rights has also responded to a changed world. The Chinese government, at least, has been impelled to adopt the rhetoric of human rights and to assume international human rights obligations by adhering to international agreements. But, at the ideological level, the Chinese leaders and theorists continue to draw inspiration from the Marxist-Leninist theory of rights, while rejecting the ideals of Western human rights thought.

In order to understand China’s position on human rights, it is useful to distinguish between what might be called the underlying ideology and embedded values and the rhetoric of human rights. China’s human rights discourse within the first realm displays great continuities. Those continuities reveal much about what the PRC aspires to and where international human rights stand in its political system. They also form a human rights tradition of basic, widely held values and so offer insight into an important part of China’s political culture. The greatest changes have been registered in the second realm. The two interconnect at a number of different levels, but in operational terms it is the role of the Party that facilitates the linkage.

III. Rhetorical Dimensions of China’s Human Rights Position

The Chinese government has repeatedly stated that it is committed to the principles of the UN Charter and the Universal Declaration of Human Rights and recognizes the universality of

170 Ibid. at 23.
international human rights standards. Yet it also argues that there has never been a fixed definition of the concept of human rights in the world. Because of tremendous differences in historical background, social system, cultural tradition and economic development of the countries, they differ in their understanding and practice of human rights. Each country may have its own conception of human rights and must be free to implement international standards according to their specific cultural, historical and political circumstances. China, and only China, can make its own interpretation of human rights that suits its national particularities and weigh different human rights tenets or provisions as it chooses.

China's official discourse on human rights has been the subject of international criticism on the ground that it has been developed to deflect foreign criticism and avoid international accountability. In its official pronouncements, the Chinese government categorically denies that there are any human rights violations occurring within its territory, and frequently points to legal text to prove its point. However, as Davis observed, "Chinese reflection often turns to basic questions about human rights values, including questions about the sources of such values and their compatibility with contemporary Asian society. If one looks beyond the rather dire Chinese human rights record of recent years and considers the world of ideas in China as an indication of emerging values, there is room for some optimism that human right conditions and protection in China may eventually improve." If this observation is correct, there is a need to take seriously Chinese reflection which addresses the concerns to which the idea of human rights speaks today.

172 Ibid. at 8-9.
173 See generally ibid.
Generally, the PRC’s discourse on human rights of the 1990s contains some long-held arguments as well as important innovations which fall into three categories: Firstly, the issue of human rights falls by and large within the domestic jurisdiction or sovereignty of each country. Based on this principle, foreign criticism of China’s human rights amounts to interference in its internal affairs. Secondly, economic development is the foundation for human rights and determines the extent to which human rights are guaranteed. The right to subsistence is the most important of all human rights, without which the other rights are out of the question. Because of China’s enormous population and lack of modernization, the Chinese government has had to give precedence to food, shelter, health care, and education over other rights. Thirdly, the rights of a citizen are inseparable from his duties to the state, society and other fellow citizens. Every citizen enjoys the rights and at the same time must perform the duties prescribed by the law. Human rights are always subject to limitations on their enjoyment which governments may legitimately impose.

1. The Principles of State Sovereignty and Non-Interference and International Human Rights

Among China’s arguments concerning international human rights, the most fundamental and most deeply rooted of them is an extremely strong, unconditional defense of state sovereignty. The Chinese government consistently argues that, despite its international aspect, human rights issues fall, by and large, within the domestic jurisdiction or state sovereignty of

each country. At the United Nations World Conference on Human Rights, the Chinese Delegation Head made plain China's view on the issue of state sovereignty in the context of human rights as follows:

According to the U.N. Charter and the norms of international law, all countries, large or small, strong or weak, rich or poor, have the right to choose their own political system, road to development and values. Other countries have no right to interfere. To wantonly accuse another country of abuse of human rights and impose the human rights criteria of one's own country or region on other countries or regions are tantamount to an infringement upon the sovereignty of other countries and interference in the latter's internal affairs, which could result in political instability and social unrest in other countries. As a people that used to suffer tremendously from aggression by big powers but now enjoys independence, the Chinese have come to realize fully that state sovereignty is the basis for the realization of citizen's human rights. If the sovereignty of a state is not safeguarded, the human rights of its citizens are out of the question, like a castle in the air.  

This sovereignty argument was repeated in the White Paper on Human Rights and in numerous government pronouncements. Furthermore, the Chinese government succeeded in carrying this theme into the Bangkok Declaration. With such an argument, the Chinese government sought


177 In the Bangkok Declaration, the signatories emphasize "the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure." In contrast, the Vienna Declaration and Program of Action, adopted by 171 UN member states including the PRC by consensus, contains quite a few major items that China did not support in its policy, had opposed during the drafting process in Vienna or had failed to endorse from the Bangkok Declaration. First and foremost was the recognition of the universality of human rights. The Vienna Declaration states that:

1. The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question...

5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the
to place the interpretation and implementation of international human rights standards firmly in the domestic sphere while generally acknowledging in its rhetoric the legitimacy of international human rights.

Since the establishment of the PRC, the Chinese government has unambiguously insisted on the doctrine of absolute sovereignty which, under traditional international law, was absolute, inviolable and inalienable. In fact, sovereignty is deemed by the PRC to be the core of all fundamental principles of international law and, furthermore, the legal foundation on which international institutions and norms are grounded. Chinese official statements and scholarly writings on the UN Charter-based international order emphasize the traditional positivist notion of sovereignty according to which international law is forged through the individual consent of each state. As a result, the doctrine states that no nation can infringe on China's sovereignty. It also supports the PRC's belief that it has an absolute right to make independent decisions concerning its domestic and foreign affairs. This theme is central to all Chinese international law positions.

Given its bitter experience with Western and Japanese imperialism in the nineteenth and twentieth centuries, it is understandable that the PRC has adamantly argued for the absolutist notion of state sovereignty, which it learnt from the Soviet Union in the 1950s. Historically, the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

Moreover, the Vienna Declaration provides that "lack of development may not be invoked to justify the abridgement of internationally recognized human rights" in Section I, Paragraph 10.


The concept of sovereignty reflects a concern deeply embedded in the Marxist-Leninist theories on international relations, that of the strong oppressing the weak. Moreover, the absolute sovereignty doctrine was frequently recalled by the Soviet bloc as a defense against the Western majority that then existed within the United Nations in matters the Soviet-led socialist states considered domestic. The sovereignty argument that the Chinese government made is strikingly similar to that of the former Soviet Union and its communist allies in East Europe. The views they share on the issues concerning state sovereignty and human rights can be summarized as follows.

Firstly, international implementation and co-operation in the area of human rights should be consistent with the principles of sovereignty and non-intervention set forth in the U.N. Charter. Secondly, since such human rights issues as normative definition, scope, and implementation fall basically within the domestic jurisdiction of each state, the effort to protect these rights will come from within the internal social structure of a country, particularly its socio-economic system.

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182 Jhabvala notes that the view that human rights treaties must "respect" the sovereignty and the "domestic jurisdiction" of states has been a long-standing Soviet view. See Jhabvala, supra note 180 at 487.
183 In his speech at the Summit Meeting of the UN Security Council, the Chinese Premier stated China's stance on the issue of international co-operation, saying that "China values human rights and stands ready to engage in discussion and co-operation with other countries on an equal footing on the question of human rights on the basis of mutual understanding, mutual respect and seeking consensus while reserving differences. However, it is opposed to interference in the internal affairs of other countries using the human rights issue as an excuse." "Chinese Views on a New World Order", Beijing Review, Feb. 17-23, 1992, vol. 35, no. 7, at 10. Soviet scholar expressed almost the same opinion years before. Soviet scholar Vladimir Kartashkin once said: "Co-operation among States in promoting and encouraging respect for human rights and in achieving other aims of the UN must be based, according to Article 1 of the Charter, on the observance of its principles. This means that co-operation of States in the field of human rights must be combined with unfailing observance of the principle of sovereign equality of States and non-interference in the affairs which are essentially within their domestic jurisdiction." V. Kartashkin, "The Socialist Countries and Human Rights" cited in Jhabvala, supra note 180 at 487-88.
Thirdly, international human rights standards are to be enforced through the laws of domestic
governments in the context of their particular socio-economic system. Therefore, countries with
divergent socio-economic systems inevitably would implement human rights differently. Lastly,
while the promotion of human rights is essentially a domestic matter, the international
community should give its primary attention to the massive gross violations of human rights
resulting from foreign invasion and occupation, colonial rule, racism, and apartheid.184

The intention of the Chinese government is clear. By advancing the sovereignty and non-
interference argument, the Chinese government attempts to take away the whole basis for a
dialogue on universal human rights and thus undermine the legitimacy of international scrutiny
of its domestic human rights situation. Foreign expression of concerns for China’s human rights
situation are responded to with the countercharge that these representations violate the principles
of state sovereignty and non-interference set forth in the UN Charter. The Chinese government
frequently dismisses foreign pressure as an affront to China’s national sovereignty, politically
motivated and designed to undermine the legitimacy and authority of the Chinese government.185

2. The Right to Subsistence and Development

In the early 1990s the Chinese government introduced a new human rights concept, the
right to subsistence, as the most important of all human rights. The right to subsistence, together

185 For instance, Guo Jisi, a Chinese human rights writer once commented on this point, saying that: “There are some
people in the world, however, who pay undue attention to a handful of domestic anti-government forces and the
‘human rights’ of so-called dissidents while ignoring the interests and well-being of the broad masses of people.
Since they dislike the political, economic and social systems of a country, they support a country’s anti-government
forces and try to apply pressure on the government. They create turbulence in the country in an attempt to subvert the
with the right to development, constitutes China’s new approach to answer foreign criticism and challenge the Western conception of human rights.\textsuperscript{186}

Take the White Paper for example. In an attempt to put the Western countries on the defensive, the 1991 White Paper on Human Rights devoted a good deal of space to depicting how dire the human rights situation was in “old China”. It blamed the Western imperialist for waging hundreds of wars on varying scales against China and causing immeasurable losses to the lives and property of the Chinese people during the period of 1840 to 1949.\textsuperscript{187} It stated that the Chinese people did not have any human rights to speak of in the old China when they were enslaved and oppressed by the alien imperialist powers and “Chinese reactionary forces”. It was only after the establishment of the PRC that the Chinese people put an end to the nation’s history of dismemberment, oppression and humiliation and won the basic guarantee for their life and security.\textsuperscript{188} Speaking of the human rights situation in the PRC, the White Paper stated that China was the world’s biggest developing country with a large population but a small acreage of arable land. The most important thing to more than one billion Chinese people at present was to have

\begin{footnotesize}
\begin{itemize}
\item It was in 1840 that Imperial China was defeated in the First Opium War and forced to sign the Treaty of Nanjing with the Great Britain, symbolizing the beginning of a century of Western imperialist invasion and exploitation of China. 1949 was the year when the PRC was established. The White Paper enumerated how the Western and Japanese violated the human rights of the Chinese people in “old China”: 1. The imperialists massacred Chinese people in untold numbers during their aggressive wars. 2. The imperialists sold, maltreated and caused the death of numerous Chinese laborers, plunging countless people in old China into an abyss of misery. 3. Under the imperialists’ colonial rule, the Chinese people had their fill of humiliation and there was no personal dignity to speak of. 4. Forcing more than 1,100 unequal treaties on China, the imperialists plundered Chinese wealth on a large scale. See \textit{ibid.} at 9.
\item \textit{Ibid.} at 10-11.
\end{itemize}
\end{footnotesize}
adequate food and clothing with access to medical care and education. The accomplishment of all this was a genuine safeguard to the fundamental subsistence rights of the Chinese people.\textsuperscript{189}

Some critics pointed out that such arguments were a diversion. By making all human rights equivalent to the rights of subsistence, and especially by emphasizing the right to subsistence as the most important right ahead of all other rights, the Chinese government could hide their poor human rights record in other areas.\textsuperscript{190} However, if one does not merely focus on China’s real or disguised political intention of initiating the conceptual debate concerning the right to subsistence, but instead seeks the origin of the Chinese approach to human rights, one would find that the promotion of the right to subsistence as the most important human right derives mainly from Marxist thought. A Marxist conception of human history holds that humans must satisfy their basic needs for food, shelter, and clothing before they can pursue matters of the mind and spirit. One of the fundamental beliefs of Marxism is that the level of subsistence “forms the foundation upon which state institutions, the legal conceptions, art, and even ideas on religion” rest.\textsuperscript{191} A person suffering from delusions because of hunger can hardly be expected to make political participation a priority. This belief that the satisfaction of subsistence needs is of far greater concern than individual political interests explains why socialist societies differ from the Western democracies in perspective and emphasis when it comes to human rights. The socialist system is advertised as one offering full protection for new types of rights, such as the right to housing, the right to work, and access to free social insurance services. It is said that these rights are a precondition for the enjoyment of more traditional rights like free speech or freedom of

\textsuperscript{189} \textit{Ibid.}
\textsuperscript{191} F. Engels, “Speech at the Graveside of Karl Marx,” in Marx & Engels, \textit{supra} note 165 at 167.
beliefs. In this way, Marxist theory has encompassed within itself the basic content of social and economic rights.

To a nation long suffering from chaos and crisis, it seemed reasonable for the People's Republic in its early years to give subsistence rights priority over other types of rights. Since the founding of the PRC in 1949, China's socialist economic system has largely succeeded in assuring an equitable distribution of goods so that the basic needs of its vast population are met in spite of the low technological level and low per capita income of the country. The right to minimal subsistence; to basic education and health care; to freedom from famine; and to freedom from foreign intervention, domination, and occupation have been established not only in theory and but also in practice. 192 Few would deny that China has made remarkable successes in meeting the people's basic needs in China's past practice.

In short, since 1949, as a socialist country, China has traditionally conformed with the view of Marxism which emphasizes the social and economic aspects of human rights and considers the aspirations of its people as realizable mainly through collective social and economic action. With little doubt, there is validity to the argument that subsistence rights are important. The realization of human rights cannot be guaranteed merely by legal procedures and

192 Ogden once commented on China's post-1949 successes, saying that: "What is striking about the successes is that, with few exceptions, they are in areas in which the objectives of socialism and development are compatible and where Chinese cultural values are not seriously challenged. Viewed in developmental terms, China's success as an LDC [less developed country], and as a country with strongly socialist political values, policies, and objectives until 1979, include the following: 1. Sustained agricultural and industrial growth rates (and for the last decade, a GNP growth rate far exceeding that in the developed world); 2. A remarkably equitable distribution of goods; 3. Guarantees of minimal food consumption, housing, and medical care for most Chinese; 4. Preventive health care, resulting in high life expectancy and low infant mortality rates; 5. An ability to mobilize the people effectively for the state's purposes; 6. Stability and unity (except for the self-induced chaos of the "ten bad years"); 7. The guarantee of China's national security and the prevention of civil war- China's first government since the first half of the nineteenth century able to do so; 8. Low levels of inflation (except briefly in 1988-89); 9. Rural small-scale industrialization; 10. Low unemployment, with higher unemployment in recent years as the price for major economic reforms that have propelled the economy forward; 11. Population control (once the decision was finally made to control the population in the late 1970s); 12. Limited foreign indebtedness and a balance of trade surplus; 13. High
constitutional proclamations without the existence of the adequate material and social conditions. Nonetheless, what makes China’s argument questionable is its attempt to silence foreign criticism by invoking its achievements in improving the subsistence needs of the Chinese people in the past. Critics pointed out that achievements of the past could by no means justify abuses in other areas of human rights, either in the past or at present. Another problem with China’s argument is that it is intended to prioritize certain types of human rights and establish a new hierarchy of human rights. This approach has already been discredited by the majority states of the international community. The Vienna Declaration on Human Rights, which was endorsed unanimously by all participating countries including the PRC, claims that:

All human rights are universal, indivisible and inter-dependent and inter-related. The international community must treat human rights globally in a fair and equal manner in the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.\(^3\)

3. The Relationship between Rights and Duties

The third category of China’s discourse on human rights deals with the relationship between the rights and duties of the individual. In his speech to the Vienna Conference on Human Rights, the Chinese delegate stated that:

\(^3\) Ogden, supra note 19 at 350-51. (emphasis added)
The rights and obligations of a citizen are indivisible. While enjoying his legitimate rights and freedoms, a citizen must fulfill his social responsibilities and obligations. There are no absolute individual rights and freedom, except those prescribed by and within the framework of law. Nobody shall place his own rights and interests above those of the state and society, nor should he be allowed to impair those of others and the general public.\(^{194}\)

As previously surveyed, the constitutions of the PRC have traditionally stressed the relationship and interdependence between rights and duties. In the PRC, observing duties is the best way of looking after individuals rights; community and obligation seem to come before individual and right under the Chinese constitutions. This linking of individual rights to the performance of social duties is consistent with Marxist doctrine. Also, Chinese traditions and history have buttressed this view by emphasizing the unequivocal priority of collective good over individual rights.\(^{195}\)

The direct link established under China’s Constitution between rights and duties and the subordination of individual rights to collective good do not satisfy the requirement of international human rights law. It is widely recognized that public order of a society and the general welfare may require certain specific limitations on rights. But those limitations are permitted only to the extent that they would not swallow up rights or make individual rights wholly subordinate to the perceived general welfare. Furthermore, the permissible limitations on certain rights do not allow limitation of non-derogable human rights and freedoms such as the


\(^{194}\) Tang, supra note 176 at 215.

right to life and freedom from torture. Clearly, the Chinese argument that subordinates rights to duties and individual rights to the collective good is problematic under international human rights law. The argument is, therefore, expressed in a marginally weaker sense in China's international discourse on human rights, although that very idea is still upheld in the context of China's domestic human rights.

Conclusion

This chapter examined China's official international views on human rights. It is suggested that the sources of Chinese new human rights discourse that was vigorously developed to respond to international criticism of its human rights record since 1989 have deep roots, both theoretical and practical, in Marxism and Leninism.

As background, I began with a discussion of the ideological, historical and political sources of PRC domestic human rights policy. Before the end of the Cultural Revolution, the theoretical basis for the violations of human rights was derived from the Leninist doctrine of class struggle, proletarian dictatorship, and antagonistic contradiction between the ruling classes and their "class enemies". Since according to Leninism and Party policy rights belonged only to the people and class enemies were to be ruthlessly suppressed, the notion of universal human rights was conceptually ruled out. The 1954, 1975, and 1978 state constitutions stipulated that

Chinese citizens enjoyed many of the same rights as those spelled out in the Universal Declaration of Human Rights and other international human rights treaties. However, the enjoyment of citizens' rights was restricted to the extent that they were in line with Party policy, and Party policy changed. Since 1979, the Chinese leadership under Deng Xiaoping undertook to build socialist democracy and legality. As a consequence, the 1982 Constitution made a significant progress in protection of human rights in China by attaching greater importance to the civil and political rights of citizens of the PRC without regard to their class nature. The inviolability of guaranteed rights is repeatedly emphasized and their very existence in the Constitution is important. On the other hand, there are fundamental deficiencies or limitations in this document, both normative and institutional, which prevents it, even in principle, from being the basis for full protection of civil and political rights in China. The Constitution also contains a comprehensive number of provisions concerning social, economic and cultural rights. However, even less than civil and political rights, social, economic, and cultural rights guaranteed under the Constitution are not enforceable in courts and are viewed as dependent for fulfillment and expansion on the development of the socialist economy.

The following section examined what the content of China’s international position on human rights has been historically. I first looked at the remarkable evolution of China’s view on international human rights during the Cold War era. From 1949 to 1971, the Chinese government openly dismissed international human rights standards set forth in the U.N. Charter and other international human rights documents. It modified its position in the early 1970s upon its entry into the United Nations. It assumed the obligation to abide by the basic human rights principles enshrined in the U.N. Charter by virtue of its membership in the U.N. In its first few years in the
United Nations, the PRC tended to politicize human rights issue and link it to its ideology of anti-imperialism, anti-colonialism and anti-superpower hegemonism.

The adoption of the economic reform and the "open door" policy in 1979 has led to radical changes in China's international position on human rights. During the period of 1979-1989, the Chinese government exhibited increasing willingness to accept the legitimacy of international human rights and to get involved in U.N.-centered human rights organizations and activities. However, the Chinese government still held a dualistic approach and a limited view of human rights. Its human rights rhetoric was in many occasions self-serving and selective.

After the military crackdown in the summer of 1989, the matter of China's human rights violations became a major contentious issue for the first time in the relations between the PRC and the international community. In response to a storm of foreign criticism of its human rights abuses, the Chinese government sought to advance a rival conception of human rights to justify its controversial human rights policies and to parry international criticism. China's position on human rights was fully stated in the 1991 White Paper, the Bangkok Declaration, a number of government pronouncements and scholarly literature on human rights. The last section explored the three categories of China's human rights discourse of the 1990s: the sovereignty argument, the right to subsistence argument and the rights versus duties argument.

The discourse about human rights is essentially a discourse about values. Which values are used is a subjective determination in any event and profoundly affects the conclusions reached. Subjective perceptions emanating from a discrete set of values and standards necessarily affect any analysis. As such, within the parameters of Marxism, much can be understood about China's human rights discourse of the 1990s. The recent Chinese discussion about international human rights is not only a matter of contingent policy designed to appease the international community,
but finds a very solid and coherent foundation in a series of traditional PRC understandings on
the essential values of society, on the relationship between the state and the individual, between
the international community and the state, and between international and domestic law.
Chapter Three: China’s Central-Regional Relations: Pluralism, Regional Identity, and Local Autonomy in a Centralized State

Introduction

This chapter looks at China’s approaches to its own internal diversity with respect to the treatment of provinces, regions, and minority groups. Before I try to conceptualize the crucial relationship between the HKSAR and the central government in Beijing, it is necessarily useful to look at China’s central-regional relations in terms of law, political practice and embedded philosophy. This is because many of the questions relating to human rights and autonomy in Hong Kong under Chinese sovereignty have to be understood not only in the context of Hong Kong’s specific historical background and political circumstances but also from broader historical and political perspectives. As Hong Kong now operates as a special administrative region of China with “a high degree of autonomy”, the PRC’s efforts to permit and contain various levels of regional autonomy within China itself since its establishment in 1949 seem an obvious starting point for study. A salient characteristic of China, as discussed below, is its ethnic, regional as well as cultural heterogeneity – result of a long historical process. If there is evidence that the Chinese state can be understood as a more or less successful aggregate of the center and the various peripheral regions which enjoy a life of their own and a fair degree of autonomy, it may help to engender more confidence in the Hong Kong arrangement and encourage a higher degree of connectedness to the Chinese constitutional order. It may also facilitate a genuine discourse on “one country, two systems” that is grounded in a deeper argument about the value of political pluralism.
Pluralism as a way for people to govern themselves is being recognized by many nations of the world as the only way leading to the respect of human rights, cultural plurality, and national economic prosperity and stability. It may be defined as the “diffusion and dispersal of power in a political system from central authorities to more or less autonomous groups, organizations and individuals, typically expressed in the establishment of ‘bargaining’ rather than ‘command’ relationships between them.” The term “pluralism” was originally considered by political scientists primarily applicable to Western liberal democracies rather than communist states.

Characterized by an official ideology, power monopoly by a single mass party, control of social life and mass media, control of the armed forces, and a centrally planned economy, a typical communist state leaves pluralism little if any chance of taking root. In the case of the PRC, pluralism had long been ideologically and politically unacceptable for most of the years since the Chinese Communist Party (CCP) came to power in 1949. The CCP adopted a centrally controlled system in which the state monopolized nearly all of the nation’s political, economic, and social affairs. For nearly three decades since 1949, it moved inexorably to expand its control of society and turned the whole state/society into a single mass organization. Free and autonomous opposition groups or associations outside the CCP were banned. Virtually all social organizations were structured vertically in a hierarchical form. There was no scope for autonomous group activity of the kind familiar in Western liberal democracies; there was little private sphere in which individuals could freely associate to pursue shared purposes and express distinctive identities - whether these be of a political, socioeconomic, ethnic, religious, professional, or civic character. The CCP was the source of all political power and had the exclusive right to legitimize and control all other political organizations. Political power within

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the CCP was itself highly centralized, coercive and hierarchical in nature, rather than dispersed, negotiated and horizontal. In this monolithic structure, political pluralism which refers to the diversification of power and the existence of a plurality of autonomous groups, institutions, and organizations essentially did not exist in the PRC.

In 1978, the CCP under the leadership of Deng Xiaoping began a process of economic reforms that has led to more than twenty years of rapid economic growth, averaging around 9 percent per year. The reform measures encouraged unleashing individual initiative in order to boost productivity and prosperity; they set out explicitly to foster economic diversification, in terms of the form of ownership and focus of economic decision-making; and they called for a proliferation of horizontal relations between economic actors in the context of the spread of market relations. During the past twenty years, fundamental structural changes have occurred in the economy with increased market orientation, and China has become deeply involved in international trade and finance. Economic reforms have clearly had a major impact on Chinese society. The reforms have pluralized Chinese society and magnified the different and often conflicting economic interests of its various classes, groups, organizations and regions. It has been demonstrated that the foundation of a civil society is taking shape in China. Just as there is less interference from the state in the everyday personal lives of the Chinese people, the people are experiencing more flexibility and options. Burgeoning market economy and increasing horizontal ties among private entrepreneurs, professionals, migrant workers, and foreign investors have reshaped the previous vertically structured nature of Chinese social organization. Autonomous economic, social, cultural and professional organizations are forming, which will,

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in time, challenge and constrain the once omnipotent state power and provide a basis for a more democratic political process. The emergence of civil society in China, if nascent and rudimentary, seems to foreshadow the beginning of a less homogeneous but more pluralistic society.

Yet, paradoxically, the widely held assumption in the West, whether explicit or implicit, is that political pluralism is still lacking in Chinese politics. In this view, the pluralizing changes that have transformed Chinese society over the last twenty years have been strictly and effectively confined to the economic, social and cultural arenas. The political system is believed to be still tightly controlled by a rigid centralized party-state authority, which continues to hold on to its power monopoly and is prepared to call on the means of coercion to crush any organized political opposition without mercy. While such assumption has a certain basis in Chinese reality, this way of viewing the current situation in Chinese politics tends to overlook the fact that, although full democracy has certainly not been achieved in China, there is nevertheless evidence of a fledgling pluralism. In the opinion of this writer, although this pluralism has not been systematically developed and institutionalized and is not necessarily of a Western kind, the pluralization of Chinese politics contains potentially decisive elements which could well determine the direction that China will take going into the twenty-first century.

Furthermore, as China and its 1.2 billion people are struggling to find a modern identity and come to grips with the outside world, these pluralistic elements are connected with a larger set of questions which involve the future political shape of not mainland China alone but rather the other areas of Greater China including Hong Kong, Macao, Taiwan, and national minority areas such as Tibet, Xinjiang and Inner Mongolia. The Chinese nation is currently in the throes

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4 Ibid. at 22-26.
of two opposed political and economic trends: one set of forces leading to the integration of the Greater China areas; the other leading to devolution with a shift of economic and political power from the center to provinces, localities, groups, organizations or even individuals. For some China analysts, Hong Kong, Macao and even de facto independent Taiwan can be seen as temporary anomalies which will eventually disappear into a homogeneous PRC. For others, the rise of civil society, regional consciousness and local autonomy and the decline of central power may lead the country toward a Yugoslavia-style break-up. Perhaps neither prediction should be tested by its reliability but by the way it draws attention to trends which are developing in China. China today stands at a crossroads, facing historical choices as to what political structure it is going to develop in order to survive and prosper as a modern nation. As the highly centralized Leninist party-state system is increasingly at odds with the nascent, yet growing, market economy and civil society in mainland China and is fundamentally inconsistent with modern capitalism and expanding democracy in Hong Kong and Taiwan, efforts will have to be made to create a new political structure suited to the Chinese nation as a whole.

Over the last few years, the topic of the political future of the Chinese world have become one of the new focuses of scholarly scrutiny both in and outside China. Consequently, a large number of academic works have been published to explore the complex dynamic of Chinese politics by focusing on various dimensions of the topic. In this chapter the author will look for evidence that there are emerging pluralistic elements in Chinese politics from the perspective of local autonomy and national regional autonomy. I try to demonstrate that pluralism and local autonomy are already an accepted phenomenon in China — whether it be of an institutionalized system or of an unwritten and unspoken, but tacitly understood and shared, code of conduct among those who are involved in Chinese politics. Without pretending that this survey can
encompass all of those elements, I choose to focus on two that are felt generally to be of direct relevance to the topic of the thesis project, namely, regional autonomy and protection of human rights in Hong Kong under Chinese sovereignty. Together with the previous chapter, this chapter is to form the basis of the thematic chapters which follow. It focuses on certain pluralizing changes in China as a point of departure in examining broader questions about the future of pluralism in the Chinese state in general and in the Hong Kong Special Administrative Region in particular. I look for evidence that these changes reflect the emergence of a unique form of pluralistic political order in the PRC and take up a number of issues fundamental not only to the political transition underway in mainland China but to the question of Hong Kong.

In the first section of this chapter, I will focus on the impact of economic decentralization on the redistribution of political authority between the central government and the provinces. I will demonstrate that economic reforms have brought about major changes in the structure and dynamics of Chinese regional politics. In the second section, I will turn to the question of national regional autonomy in China, trace the policy changes that have occurred in the PRC, and examine the legislation and its implementation concerning national regional autonomy. The national regional autonomy system stipulated in the PRC Constitution guarantees national minorities a wide range of rights and privileges including the right to regional autonomy and self-government. I argue that, although the system has not been meaningfully respected in practice, it represents creative efforts by the PRC government to deal with its minority populations and has opened up the potential for national minorities to demand genuine autonomy and self-government in the future. Although China’s attempts to deal with its national minorities are too context-sensitive to be generalized to the historical and legal particularities of Hong Kong, it is still possible to search for broad acceptance of a limited set of general principles (as reflected in
the spirit of the "national regional autonomy" system), some of which, like equality between majority and minority groups, are already well established, and to use those principles as a guide for pursuing political solutions of minority-majority disputes in China in general and of the Hong Kong-China relations in particular.

Part One: Growing Regionalism and Local Autonomy in the Political Process

Part One deals with regionalism and local autonomy in China from the perspective of the central-local government relations. For the sake of relevance and convenience, only those concerning provinces or provincial-level units will be considered.

I. China’s Central-Regional Relations from a Historical Perspective

The present state of China has long deep roots in history and cannot be clearly understood without examining the system’s historical roots that tap far into the distant past. The problem of contemporary regional politics in China, therefore, must be seen in the light of a tradition that spans numerous centuries. Because the richness and complexity of China’s regional politics cannot adequately be covered by even a multi-volume tome, this chapter will simply draw a few significant brush strokes to give Western readers a clearer sketch of the historical context within which China’s regional politics operates.
In terms of size China is the third largest country in the world. From the Pamir Plateau to the Pacific Ocean it extends 2,300 miles, and it measures more than 2,500 miles from the northern Manchuria to the islands in the Southern China Sea. This vast land displays a wide range of differing geographical conditions and climates. The land slopes down from west to east, from the Pamir and Tibetan Plateau to the shores of the Pacific. The altitudes of mountains and rivers diminish with it. China's climate is hot and humid in the south and cold and dry in the north.5

The inhabitants of these immense spaces shaped the Chinese civilization, which is the oldest continuous, major culture in the world today. In a simplified way, the traditional Chinese view holds that Chinese civilization started from a small ethnic group living in the Yellow River basin in north China some five or six thousand years ago.6 This small core group, referred to as the Han Chinese later in history, gradually emerged as the dominant ethnic group in central China. They spread out to take control of a large area of land, assimilating the original inhabitants or driving them off into less fertile areas. In the course of the centuries, the Han Chinese became a product of the constant intermingling of races caused by wars, colonization, transfers of population, and infusion of peoples.7 Such races as Turkish, Mongol, Korean, Tibeto-Burman contributed to the formation of the Han Chinese people. Ninety per cent of the population are more concentrated toward the east and more thinly distributed toward the western

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6 The Chinese belong to the racial type known as Mongolian, a group which also includes the Koreans, Japanese, Mongolians, Eskimos, and American Indians. See L.U. Bing, Outlines of Chinese History (Taipei: Ch'eng-Wen Publishing Company, 1967) at 1-9.
hinterland. Far from forming a homogeneous whole, the various peoples of Chinese language and culture differ in traditions, customs, and the dialects they speak.8

The country is so large and its regional differences are so great that in the course of its history it might easily have broken up permanently into separate nations, as Europe did after the decline of the Roman Empire. What seems to have prevented this breakup in China was a centralized empire governed by a uniform administrative system.

Chinese historians traditionally take the view that the first ancient Chinese state known as the Xia dynasty was founded in 2205 B.C.9 The Xia was the first of the three ancient dynasties, followed by the Shang and the Zhou.10 During this period of Chinese history, the kings were in theory heads of the state, but they did not rule an integrated empire by directly administering each of its territories. All they could claim within the limits of feudalism was the allegiance of a number of great nobles, each of whom similarly claimed the allegiance of minor nobles. The real unit of sovereignty was not the nation but the domain of the feudal lord.11 During the second half period of the Zhou dynasty, the king’s power weakened, and the feudal states under one king gradually were transformed into independent kingdoms.12 Several large states contended for territory and leadership in a changing series of alliance and open wars. In the end, the state of Qin (pronounced “chin”, the name “China” probably deriving from the name Qin) swallowed up all

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8 Ibid. at 3-6.
9 See Bing, supra note 6 at 10-14.
10 The recorded dates of the three first dynasties were: Xia (2205 – 1766 B.C.), Shang (1766-1122 BC), and Zhou (1122-256 BC). See J. A. G. Roberts, A History of China: Prehistory to C. 1800 , vol. 1 (Phoenix Mill: Alan Sutton Publishing Ltd., 1996), Chronological Table at ix.
11 Ibid. at 14-17.
12 The Zhou dynasty was the longest dynasty in Chinese history. It was divided into two periods- Western Zhou period and Eastern Zhou period. The second half is usually subdivided into two sections- Spring and Autumn period (722-481 BC.) and Warring States period (403-221 B.C.). Ibid. at 12-24.
of its feudal rivals and established the first national dynasty - the Qin Empire, one which created a non-feudal, non-hereditary, centralized, bureaucratic administration.\textsuperscript{13}

It is widely held that the establishment of the Qin dynasty was a major watershed in Chinese history and marked the beginning of a new political order.\textsuperscript{14} The Qin ruler who in 221 BC. conquered all the Chinese territories assumed the ambitious title "Shi Huang Di", or "the First Emperor". He exerted tremendous effort to develop the country as a whole, standardizing all weights, measures, and currency. Chinese characters, which had begun to show regional diversity before imperial unification, were also standardized throughout the empire. Thus communication among peoples speaking mutually incomprehensible dialects was facilitated, and a strong weapon for cultural integration was forged. A network of imperial highways built primarily for strategic purposes was contracted. A Great Wall was erected in the northern frontier to fend off the invasions of nomadic tribes.\textsuperscript{15}

Once China was united as a single empire, the emperor started the formation of a centralized state and an autocratic government. Since the decline of the Zhou regime, centuries of decentralization had divided China into numerous rival states without a central authority to arbitrate peace. The Qin emperor and his ministers blamed feudalism for all political chaos of the past and determined to organize a strong, centralized government. Feudal states and feoffs were abolished and the country was divided into thirty-six provinces, soon increased to forty-eight. Each province was jointly administrated by three top officials who acted as checks upon

\textsuperscript{13} The Qin Empire was established in 221 B.C. and ended in 210 B.C.


each other: a civilian governor, a military commander and a direct representative of the central
government. All local officials were accountable to the emperor and subject to dismissal. 16

The imperial unification of the Qin in 221 B.C. is a major milestone in Chinese political
history. For the first time, China experienced a state structure that placed the entire population
directly under the control of a single imperial administration. The emperor appointed
professionally qualified officials over specific territorial jurisdictions, paid them fixed salaries,
controlled them by means of written correspondence, and replaced them at prearranged periods.
Although the Qin empire fell soon after the death of the First Emperor, the centralized,
bureaucratic government that he created emerged as the prototype of China's imperial rule for the
dynasties to come. Starting from the Qin, much of Chinese history naturally divided into
dynastic periods. When a unified dynasty collapsed, the Chinese empire fell apart and a chaotic
period of internal war followed. But, interestingly, the ancient Chinese always emerged from the
chaos by reestablishing the centralized bureaucracy model which the First Emperor of the Qin
pioneered. Succeeding dynastic rulers of Imperial China believed that only a unified, centralized
state could guarantee peace and order and, therefore, brooked no alternative to an autocratic
bureaucracy.

The central problem facing rulers of an empire as large and diverse as China was the
maintenance of effective control throughout its various provinces and districts with the assistance
of a mere handful of literately skilled personnel. The balance between regional control for widely
establishing law and order, on the one hand, and central control for unifying the country, on the
other hand, has always been a delicate one in Chinese history. Throughout the course of Chinese
history, various measures were taken to eliminate local influence so as to discourage any

16 See Gernet, supra note 7 at 106-08.
decentralizing tendencies. For instance, the functions of local officials dispatched from the center to administer the provinces were strictly limited to such issues as the maintenance of public order and the collection of taxes. Moreover, regional inspectors traveled throughout their designated areas and annually reported on local administration to the imperial secretariat in the capital. These measures produced an overall rise in bureaucratic centralization and a decline in provincial power. Also, Chinese history indicates that dynasties often toppled because of a decrease in imperial authority and an increase in local power. The remarkable stability of the Chinese state over a period of many centuries may be credited to the centralized, bureaucratic state structure, which continued to inspire the most fundamental political conceptions of the Chinese.

In 1842, Imperial China, defeated in the Opium War by Great Britain, entered into an era characterized by Western and Japanese imperial exploitation and internal political disintegration. As Hao and Lin observed, “[s]ince the mid-19th century, a constant theme in Chinese politics had been the decay of the supposedly centralized imperial system on the one hand and the rise of regionalism on the other. Despite the efforts of the late Qing Dynasty to restore central power by building new railroads and training the New Army, the trend toward greater local control—especially in the form of warlordism—continued. In the end, growing centrifugal forces had become such an ‘insoluble systemic problem’ that it not only helped end China’s last imperial system but also precluded the birth of a strong post-Qing national consensus and leadership...”17

In 1911, the last Chinese emperor was overthrown in the Republican Revolution and the

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Republic of China (ROC) was established. ¹⁸ From 1911 until the late 1920s – and in some respects until the late 1940s – most of China was ruled by local warlords, and there was no strong central government. The local warlords were military personalities who controlled regions by commanding troops and keeping them fed.¹⁹ Warlordism was a relic of the past in its worst aspects, a phenomenon of regionalism which had emerged before in the throes of confusion between dynasties when central purpose and, therefore, central control were weak. This period of civil wars and political and social disintegration was brought to an end by the military triumph of the Nationalist army during the civil wars of 1920s. As a result, the Nationalists took over central powers in China. However, the Nationalist government of the ROC hardly managed to govern all of China as a unified state, most of which continued to be dominated by local warlords. Its inability to establish a truly national government contributed to its failure to win the support of the Chinese people and the loss of its claim to legitimacy during the Chinese Civil War of 1945-1949.²⁰ Together with the Nationalist army’s military defeat in the battlefields with the People’s Liberation Army (PLA) and the disastrous economic crisis that swept areas ruled by the Nationalist government, the government of the ROC was ousted by the Communist Party in 1949.

¹⁸ See e.g. Fairbank, supra note 15 at 250-53; Li, supra note 5 at 434-41.
¹⁹ Li explains that: “[a] warlord was a man who fought for personal gains, territorial or otherwise, rather than principles. His position might be that of a governor-general, a governor, or simply a military commander with enough following to make his weight felt. He was sovereign within the territory he controlled; he recruited his own bureaucratic and military personnel, levied taxes, and administrated justice. With no lofty principles to claim the loyalty of the people he ruled, his major and perhaps only asset was his army... From 1926 to 1927 there were dozens, if not hundreds, of warlords. Small warlords attached themselves to big warlords as necessity arose but declared their independence as soon as they were strong enough to do so. Some of the big warlords had under their control two or three provinces, while in other cases two or three warlords might share one province. Under the nominal control of each of these warlords there were numerous small warlords feuding constantly among themselves.” Ibid. at 446-47.
²⁰ See Fairbank, supra note 15 at 331-37.

When the Communists took over China in 1949, they inherited a destitute China, suffering from more than a century of Western and Japanese imperial aggression, civil wars, and political chaos. In the short term, the government needed to secure peace, stability and order within the nation. In the long term, the leaders of the "New China" sought to design and implement a strategy of economic and social development that could transform China into a prosperous and powerful country. Since, generally speaking, the Chinese people had longed for a unified state and a strong central government to establish order and discipline, to ensure a sufficient supply of food and clothing, and to secure peace and national unity, the initial phase of public sentiment in the first few years of the PRC was one of euphoria, based on growing confidence in the Communist Party and government.  

After years of guerrilla wars with the Nationalists and the Japanese, the Party now faced the difficult task of creating a new administration that could be relied on to carry out the communist revolution, which was meant to reform every segment of society. One of the lessons the Party had learnt from the failure of the late Qing emperors and the Nationalist government was that effective central control over the provinces was to be established as soon as possible. However, the "New China" lacked both the qualified administrative personnel and the experience to govern this massive and diverse nation from a central place.

From 1949 to 1979, the central government experimented with different ways of maintaining control over the provinces with varying success. Initially, the country was divided into six "great military and administrative regions", each under a bureau with military and
This regional arrangement allowed a great deal of local autonomy to deal independently with problems, while the regime consolidated its rule. However, conflict between the center and regional powers came to a head in early 1954 and resulted in a serious but limited intra-Party power struggle. Two veteran regional leaders were purged in the political campaign against the "Gao and Rao Anti-Party Alliance". Gao and Rao, heads of the Northeast Military and Administrative Region and the East China Military and Administrative Region respectively, were allegedly opposed to the newly introduced centralized economic planning in favour of local interests and attempted to solicit support from the armed forces stationed in the local areas. The six great administrative regions were abolished following these purges. The provinces became administrative units under direct control of the central government.

After a three-year period of economic rehabilitation and repression of political opponents, the central government in Beijing was in firm control of the state and society and felt confident that it was able to initiate a transformation of society. In 1954, the National People’s Congress met for the first time and adopted a new state constitution. Under the 1954 Constitution, China was established as a unitary state with a single legislature, the National People’s Congress, the supreme state organ whose deputies were elected to a four-year term by provinces, self-governing municipalities (Beijing, Shanghai and Tianjin), national autonomous regions and the armed forces. A series of People’s Congresses was established at provincial and lower levels, and each of these in turn voted to send a certain number of their members to the next higher congress.

21 Ibid. at 345-51.
22 See S. Zhao, “China’s Central-Local Relationship: A Historical Perspective” in Jia & Lin, supra note 17 at 24-25.
24 Ibid.
26 Ibid.
Nominaly, the people’s congresses at various levels were legislative bodies and the governments were the executive arms of the congresses. However, the real power actually laid with the Communist Party, whose officials also held government posts in a parallel system. Shirk describes the relationship between the Party and government as one of delegation in which the communist party is the “principal” and the government is the “agent”. The Party has formal political authority over the government, which does the actual work of administering the country.\(^\text{27}\)

As to the central-provincial relations, the constitution established a system which drew heavily on the Soviet model as well as China’s imperial tradition. Although national unification and centralization of power have traditionally been goals of pre-Communist rulers, the example of the Soviet Union and its centralized model of administration probably played a larger part in determining the designs for local government at the time when the 1954 Constitution was drafted.\(^\text{28}\) As Uhalley points out, “[t]he Soviet influence in this constitution with the strong emphasis on centralized control, while not the only influence, is evident.”\(^\text{29}\) The Soviet system involved a hierarchical, bureaucratic structuring of state system. The government of each administrative unit was subject to local control and also was strictly subordinated to the next


\(^{28}\) In his famous article “On the People’s Democratic Dictatorship” which was published three months before the PRC was established, Mao Zedong unambiguously claimed “It was through the introduction of the Russians that the Chinese found Marxism. Before the [Russian] October Revolution the Chinese not only did not know Lenin and Stalin but also did not know Marx and Engels. The gunfire of the October Revolution helped the progressive elements of the world and of China to use the world outlook of the proletariat as the instrument for perceiving the destiny of the country, and for reconsidering their own problems. Travel the road of the Russians -- this is the conclusion.” Mao Zedong, “On the People’s Democratic Dictatorship” (30 June 1949) in T. Saich, ed., *The Rise to Power of the Chinese Communist Party: Documents and Analysis* (Armonk, New York: M.E. Sharpe, 1996) at 1366.

\(^{29}\) Uhalley, *supra* note 23 at 105-106. See also Gernett, *supra* note 7 at 661-67.
higher level. Constitutionally, the PRC is a unitary country with its state power concentrated with the central government. As agents of the central government, the provincial governments were to serve as intermediaries between the localities and the center and their use of power was subject to central review and supervision.

In the centralized political structure, the central government mainly makes use of three instruments to exercise its control over the provinces: Marxism-Leninism orthodoxy, the nomenklatura system combined with Party discipline, and the centrally planned economy.

i. Marxism-Leninism Orthodoxy

Over the long years of Communist struggle for power, Marxist-Leninist orthodoxy had traditionally played a central role in ensuring the unity and conformity of the CCP and its army. One of the key Leninist organizational principles concerning the communist party as a vanguard of the Communist revolution was the doctrine of “democratic centralism”, which called for centralized decision-making, with free discussion at the policy formulation level. Once a decision was made at the top, however, all must abide by it without dissent. The Chinese Communists borrowed this doctrine from the Russians to standardize policy-making and political life within the Party. Mao Zedong elaborated on the principle of “democratic centralism”, claiming that

30 It is worth noting that the political structures established under the 1954 Constitution were modeled on those of the former Soviet Union but were not exact duplicates. For instance, the PRC Constitution, unlike its counterpart of the Soviet Union, did not allow the subnational administrative units the right to secede.

31 According to Harasymiw, the term “nomenklatura” means “nomenclature”, “a list of positions, arranged in order of seniority, including a description of the duties of each office. Its political importance comes from the fact that the party’s nomenklatura contains the most important leading positions in all organized activities of social life.” See B. Harasymiw, “Nomenklatura: The Soviet Communist Party’s Leadership Recruitment System” (1969) 2 Canadian Journal of Political Science 493 at 494. See also S. G. Breslin, China in the 1980s: Central-Province Relations in a Reforming Socialist State (London: MacMillan Press Ltd., 1996) at 12-25; S. Zhao, supra note 22 at 21-24.
"the Communist Party not only needs democracy but needs centralization even more." For Mao, the principle meant that, in a system of democratic centralism, "[t]he minority is subordinate to the majority, the lower level to the higher level, the part to the whole, and the entire membership to the Central Committee [of the Communist Party]." After the Communists came to power, they resorted to this principle for effecting centralized control over separate regions on an ideological basis. Under the highly centralized political structure, the pursuit of local interests by the localities was discouraged and, in some cases, forbidden. One of the themes of the party line in terms of center-province relation was that "the part" (a province) must be subordinate to the "whole" (the national government). Although the principle of democratic centralism encouraged free and frank discussion and bargaining between the central government and the provinces during the policy decision-making process, the provinces had to firmly implement the decisions of the central government. Thus, "democratic centralism" functions as a powerful ideological tool to bind local governments to the policies and decisions of the central government and to ensure a compliant local leadership at all levels. However, from the beginning of the PRC, central-provincial relations have been problematic, partly

33 Mao Zedong, "Rectify the Party's Style of Work", in Selected Works of Mao Zedong, vol. III. (Beijing: Foreign Language Press, 1965) at 44. (citing from S. Zhao, supra note 22 at 22.)
34 Ibid.
35 Article 15 of the Constitution of the Chinese Communist Party provides that:
"Only the Central Committee of the party has the power to make decisions on major policies of a nationwide character. Party organizations of various departments and localities may make suggestions with regard to such policies to the Central Committee, but shall not make any decisions or publicize their views outside the party without authorization.
Lower party organizations must firmly implement the decisions of higher party organizations. If lower organizations consider that any decisions of higher organizations do not suit actual conditions in their localities or departments, they may request modification. If the higher organizations insist on their original decisions, the lower organizations must carry out such decisions and refrain from publicly voicing their differences, but have the right to report them to the next higher party organization..."
because of the contradiction between democracy and centralism that is inherent in the principle. In administrative practice, this contradiction is manifested in a dichotomy between the control implicit in a general policy made at the center as against the pluralism which must crop up in attempting to fit this policy to concrete situations in the provinces. It also presents a theoretical account of the reasons behind various changes made by the central government in the division of power between center and provinces.

ii). The Nomenklatura System and Party Discipline

Another instrument at the central government’s disposal for controlling the provinces is the nomenklatura system. The nomenklatura system was first adopted by the Soviet Communist Party. The system defines the jurisdictions of different governing bodies in the appointments and dismissals of Party officials. It also includes institutions and processes for making appropriate personnel changes. By relying on the nomenklatura system, authorities ensure that leading institutions throughout the country will exercise only the autonomy granted to them by the Party. The Chinese Communist Party structure is modeled on the Soviet system. Administrative units exist in a complex hierarchy of ranks. Directly below the central government are provinces, national autonomous regions, and self-governing municipalities, all of equal rank. At the next lower level are prefectures or prefecture-level units and below them are counties or counties-level units. A party hierarchy parallels the government hierarchy. Party

36 See Zhao, supra note 22 at 21-22.
37 See generally Harasymiw, supra note 31 at 493-97.
39 Ibid. at x.
committees at each administrative level control the appointments and dismissals of personnel at the next lower level. They propose candidates to higher levels, and vet lists of candidates proposed by lower-level Party committees. By means of this political hierarchy, the central authorities in Beijing hold the ultimate power to appoint and remove Party and government officials at provincial and lower levels.

The appointment of local officials has always been a critical political decision that is not taken lightly by central leaders. The central authorities tend to appoint officials who are more willing to effectively carry out central policies rather than pursue local autonomy. Moreover, the center takes advantage of many types of political tactics to prevent local officials from using their local power bases to challenge central authority. Provincial leaders are often transferred from one province to another to "drive a wedge between the leader and his local power base". Alternatively, the central government may promote a provincial leader to a central leadership position to bring him under direct central scrutiny. The last resort is the use of purges against errant provincial leaders. The monopoly that the central government has over appointment and removal of provincial leaders constitutes the ultimate check against the development of localism and a powerful tool to ensure loyalty, compliance and self-censorship from provincial leaders.

In Chinese politics, the chief relation between the central government and the provinces is the provincial leaders’ role as agents of the former. Provincial leaders generally understand that their tenure of office depends on the degree of provincial responsiveness to central directives. In the pre-reform era, provincial leadership demonstrated remarkable responsiveness

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40 See Breslin, supra note 31 at 13.
41 Ibid.
42 Ibid. at 13-17.
to central initiatives and the level of divergence among the provinces in policy implementation was quite low.

iii). Centrally Planned Economy

The third instrument used by the central authorities in Beijing to maintain control over the provinces was the centrally planned economic system. Over the period of 1949-1978 the PRC operated a centrally planned economic system along the lines of the model borrowed from the Soviet Union. According to this model the economy was managed by a highly centralized and pyramidal administrative system, in which governmental organs at every level directed economic activity. Centralized planning dominated resource allocation, and a bureaucratic government administration oversaw most aspects of economic decisions relative to production, investment, and prices. Production units in agriculture and industry were given little incentive to improve their economic performance. Large, key enterprises were under the central plan, receiving supply allocations from central government agencies and handing over their output to unified allocation by the central government.44

In this centrally planned economic system, the state budget became the repository for virtually all local profits as well as tax revenue. These resources were controlled by the central government. In addition, all major investment projects were included in the annual national economic plan and financed from the state budget. There was no systematic relationship between provincial revenue collections and provincial expenditures. A province which remitted

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more revenue to the central government did not necessarily receive more expenditures or investment.\textsuperscript{45}

The centralized system of economic planning embracing fiscal revenue-sharing, expenditure, and redistribution system enabled the central government to exert great influence on provincial economic development. As long as the provinces were beholden to the central government for key economic resources, the central government was able to maintain a monopolistic control over the provinces' economies.

To sum up, the central-regional relations in China in the period of 1949-1979 were primarily one of control and compliance. Through those traditional control instruments the central authority maintained its political dominance over the provinces. The provincial governments were agents of the central government, with limited power to implement and execute the policies and directives from the center. This highly centralized political and economic structure did succeed in helping the Communists consolidate their power and mobilize resources for rapid economic growth in the early years of the PRC.\textsuperscript{46} However, the efficacy of the system, with the characteristic of excessive emphasis on centralization and unification, proved to be problematic soon after it was installed.\textsuperscript{47} The tight control over the provinces by the central authority in Beijing, particularly by those central functional ministries, frequently resulted in


\textsuperscript{45} See Breslin, \textit{supra} note 31 at 22-23; Zhao, \textit{supra} note 22 at 23-24.

\textsuperscript{46} Western commentators generally agreed that during the first three decades after 1949, the Chinese government did successfully achieve its goal of rapid industrialization through central planning mechanisms. The PRC's economy achieved high rates of industrial growth, estimated to be approximately 10 percent per year from 1949-1980. However, as with their Soviet counterparts, the central planners in China put industry first to feed economic growth, with industry receiving priority over agriculture. Within industry, they laid overemphasis on the development of heavy industry at the expense of consumer goods and light industry. The price of this economic development approach was continued low living standards. See "Political Logic," \textit{supra} note 27 at 24-29.
economic inefficiency and administrative mismanagement. As of the late 1950s when the economy increased in its size and complexity, the loss of local and provincial initiative due to the high degree of concentration of political and economic power brought so many serious problems that the central leadership had to call for a return to decentralization.48

During the first three decades of the PRC, the PRC government carried out several major institutional reforms and structural changes in a continuous search for an appropriate balance between the central authority and the provincial powers. A full description of these decentralization measures is beyond the scope of our discussion.49 The key point is that these reforms were plagued with cycles of "centralization-decentralization-recentralization", which did not lead to any fundamental structural changes in central-provincial relations. Throughout the period of 1950s-1970s, the PRC continuously sought a workable set of principles for balancing the powers of the center and those of the provinces. The result was a restless shifting among different schemes for the division of authority and for chaotic and conflicting authority relations at and below the provincial level. Since the central government was never prepared to allow local governments to operate in a relatively independent manner before the reform era beginning in 1978, the degree of provincial autonomy during the period of 1949-1978 was remarkably low or non-existent.

III. Pluralism and Local Autonomy: Reforming Central-Provincial Relations

47 See Zhao, supra note 22 at 24-29.
48 Ibid.
49 Ibid.
Though this subsection is concerned with changing central-provincial relations in the reform era, we need first to look briefly at the general path of economic reforms because the two processes are closely interconnected in the context of the PRC.

1. Transition from a Centrally Planned to a Market Economy: A Brief Description

The death of Mao Zedong as well as the end of the Cultural Revolution in 1976 led indirectly to Deng Xiaoping’s accession to power two years later. At the time when Deng and his supporters came to power, China was at an economic impasse, socially torn apart, and morally adrift. Serious economic problems and a crisis of political legitimacy threatened the very foundation of the Party’s claim to power. To solidify their legitimacy and to restore the Party’s prestige, the new leaders—many of whom were purged and victimized in the traumatic Cultural Revolution—decided to make a psychological break with the Maoist era and to improve economic performance and raise living standards. The central authority of the Party gradually moved toward de-Maoization, delivering the whole country from the extreme forms of ideological conditioning. Many of Mao’s radical doctrines and policies were repudiated. In place of class struggle and isolation, the new leaders announced that their priority was to modernize China’s agriculture, industry, defense, and science and technology. At a crucial plenary session of the Central Committee of the CCP held in 1978, Deng and his political allies gained the upper hand

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51 Ibid. at 50-55.
52 The ambitious Four Modernizations Plan was to occur in agriculture, industry, science and technology. None of these modernizations promised political reform.
over Maoist loyalists and began to dominate decision-making in the Party.\textsuperscript{53} The communiqué of that meeting announced that the Party would replace its emphasis on the ideology of “class struggle” that had characterized the Mao era to that on economic growth and “socialist modernization”\textsuperscript{.54} A series of policies were to be initiated to reconstruct the Chinese economy. Moreover, it was quite clear to Deng and his supporters that China could not prosper without access to foreign technology, foreign expertise, and even foreign capital. Therefore, a large part of reform had to be a new “open door” policy to the West.\textsuperscript{55}

Since that meeting China’s economy has undergone a process of recovery from central planning and a move to a market orientation. In a somewhat simplified way, China’s economic reform process can be sub-divided into three phases, judging from significant differences in development strategies and policies pursued.\textsuperscript{56}

The first phase dealt with agriculture reforms. Deng’s economic modernization drive started with agriculture which was the largest sector of China’s economy.\textsuperscript{57} The agricultural sector had long lagged behind hopes and expectations and was the bottleneck holding back the economy. Under the Maoist system, resources flowed primarily through a vertical, bureaucratically dominated system which controlled the goods produced in the countryside and transferred them according to the dictates of a centrally planned economy.\textsuperscript{58} By the late 1970s,

\textsuperscript{53} The Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party was held in December 1978 in Beijing. It was at this meeting that Deng Xiaoping effectively replaced Hua Guofeng, Mao’s hand-picked successor, as China’s paramount leader.
\textsuperscript{55} Ibid. at 56-76.
\textsuperscript{57} According to White, in 1978, 82\% of China’s population (roughly 790 million people) lived in rural areas; of the total labour force then, about 76\% per cent worked in the countryside, mostly in agriculture. See G. White, \textit{Riding the Tiger: The Politics of Economic Reform in Post-Mao China} (Hampshire and London: The MacMillan Press Ltd., 1993) at 85.
\textsuperscript{58} Ibid. at 95-99.
pressures to reform the lagging agriculture sector were building. Agricultural reforms introduced by Deng and his followers mainly aimed at correcting the distortions and improper incentives that prevailed under the Maoist rural economic model. Beginning in 1979 Chinese leaders agreed on the need to abandon the centralized and rigidly controlled agricultural system. Several types of household responsibility systems were adopted throughout the country, which permitted peasants much greater autonomy in arranging their economic activities upon fulfillment of their “responsibilities” and the free disposal of returns at their discretion. They were in essence an incentive, a decollectivizing measure that transferred decision making power from collective production units to the household. The household signed long-term land contracts with the collective unit to assume all responsibility for work on the still nominally collective-owned land and to bear the entire responsibility for its own profit and loss. The household responsibility systems were enthusiastically embraced by peasants who had now more incentive and autonomy to work harder in order to raise family income. Another major government policy shift was to encourage the development of private and collective industry and commerce in the countryside. In the 1980s, rural industrialization grew up rapidly and changed the Chinese industrial landscape.

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59 Ibid.; see also Naughton, supra note 44 at 65-80.
60 See Wang, supra note 50 at 264-65; White, supra note 57 at 99-107.
61 Although the land remained formally in the possession of the collective, the new system of renting the land to households by means of renewable leases amounted to a form of de facto ownership.
62 Wang observes that the household responsibility systems have several advantages, including the following: (1) encouraging peasants to work harder in order to receive more income; (2) allowing the peasants to manage their own production under the most favorable local conditions; (3) avoiding the problem of constant complaints by peasants about unfair distribution of earnings. He concludes that “[t]he advantages of the responsibility system, combined with the policy of private plots and free market, gave a tremendous boost to peasant morale and resulted in increased output and work enthusiasm.” Wang, supra note 50 at 265. For a detailed discussion of China’s agricultural reform policies and their impact on the countryside, see also White, supra note 57 at 99-107.
63 See Wang, supra note 50 at 267-68.
Significant structural changes in agriculture production evolved from this decentralized household-based farming. In the 1980s, rural production grew about two and a half times. Undoubtedly, the initial phase of economic reforms proved to be a triumph for Deng and his followers. Chinese leaders now realized that incentive economic policies based on freedom, autonomy and motives of personal profit could make a big difference in organizing individuals in order to improve their welfare and also to strengthen the state.

The second phase of economic reforms mainly involved the delegation of greater authority to state-owned industrial enterprises with the objective of improving economic efficiency. Following the emerging success in agricultural reform, the Party proposed in 1984 a set of directives for accelerating reform in the industrial sector.\(^{64}\) State enterprises were released from the bureaucratic tyranny of central government ministries with their central planning orientation. Central planning would no longer be mandatory but would become more flexible. The enterprises themselves were encouraged to choose new, flexible, diversified forms of organization and to be responsible for their own success and failure. Instead of requiring factories to turn over their profits to the state, taxes were to be levied. After-tax profits were to be retained by the enterprise for investment, expansion and distribution as bonuses to employees. The government also took concrete measures to increase the role of macro-economic control instruments (such as the fiscal and financial systems) and to subject state enterprises increasingly to market influence.\(^{65}\) Although economic reforms in the industrial sector have followed an uneven path, they have improved the overall economic performance of China’s industrial enterprises.\(^{66}\) Similar to the responsibility system in agriculture, vastly improved incentives for

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\(^{64}\)Ibid.

\(^{65}\) See Cheng, supra note 56 at 86-87.

\(^{66}\) See generally Naughton, supra note 44 at 97-136, 173-243.
production promoted greater autonomy of state enterprises in industry. While agriculture developed in the countryside, industrial enterprises also forged ahead.

The focal point of the third phase of economic reforms was on the efforts to transfer economic authority to provincial and local governments. As discussed above, previous to reforms, China had adopted a highly centralized and pyramidal planning system. The central government, which asserted direct control over the operation and management of key industrial enterprises, determined the quantity and types of products to be produced, distributed materials for production in a unified way, and controlled funding for renovation, expansion and workers’ welfare. Under this system, provincial and local governments had little incentive to improve the performance of state-owned enterprises. Moreover, the centralized fiscal system required that all locally generated revenues be remitted to the Ministry of Finance in Beijing. The central government monopolized budgetary control over provincial expenditures, leaving provincial governments little freedom to make their own spending decisions.67 This overconcentration of financial authority and economic decision-making power in the central political machinery often led to inefficiencies. In the late 1970s, Chinese leaders realized that economic authority had to be decentralized to provincial and local levels.68 A set of decentralization measures was introduced in 1980 to expand the fiscal authority and resources of provinces in order to give greater initiative to provincial governments. The centralized system whereby all revenue was handed upwards and all expenditure was allocated from above was replaced by a system whereby each province made a revenue-sharing contract with the central government to fix for five years the amount of revenues they must remit to the center and to retain a proportion or all of the revenues over that amount. The advantage of this policy was the strong incentive for provincial

67 See “Political Logic,” supra note 27 at 154-62.
authorities to expand their revenue base by developing their local economies. Provincial and local officials became interested in finding ways of promoting the sale of their localities' goods in other domestic and in international markets, and in attracting investment from other areas, and especially, from abroad.

The expanded economic autonomy of the provinces was further enhanced by other administrative decentralizing measures. Many key industrial enterprises previously under central ministerial management were now managed by provincial and local governments. Provincial governments were granted more authority in such matters as approving capital construction projects, imports and foreign joint ventures, resources allocation, retention of foreign joint ventures, and many others. More significantly, the Party central leadership decided to devolve a large part of its nomenklatura authority to provincial party committees in 1984. The Central Committee of the Party retained formal authority over the provinces by virtue of its power to appoint provincial governors and Party chief secretaries. But the number of posts directly managed by the Central Committee of the Party fell by almost two-thirds (from 13,000 to 5,000). Clearly, provincial leaders now had more discretion to exercise their own authority in local personnel management. "The reform did not reduce the total size of the nomenklatura but expanded the patronage opportunities of local party officials."72

To sum up, when the Chinese leaders decided to launch economic reforms in the late 1970s, they believed that China's poor economic performance before the reform era was simply a

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69 Ibid.
70 See “Political Logic,” supra note 27 at 178.
71 Ibid. at 179.
72 Ibid.
result of the suppression of the freedom of people to pursue their own interests. The reform
measures therefore involved a greater degree of decentralization which provided people with the
opportunity and incentive to pursue individual, group or local interests. After decades of near
complete state control, initiative that had been virtually wiped out under Mao burst forth again
with astonishing speed, enthusiasm, high hopes, and energy. Deng's economic reforms have
generated rapid and sustained economic growth, unprecedented rises in real income and living
standards, and have transformed China's once insular command economy into a major trading
nation. In more than twenty years, China has had the fastest growing economy in the world,
outperforming most of the developing countries and, especially, those former centrally planned
economy countries in East Europe and the former Soviet Union.73 Hundreds of millions of the
Chinese people are living better. Perhaps never in history have so many risen so rapidly out of
poverty.

At the same time, rapid economic transformation has brought significant changes in the
economic structures. Without doubt, economic freedom, pluralism, and efficiency have increased
substantially in Chinese society. Those changes have also presented major challenges to the
political order established in the preceding years. Not surprisingly, a transformation of such
magnitude and speed has given rise to a wide range of questions. Such issues as the political
consequences of economic liberalization and pluralization have been the subject of intense
interest as well as debate well beyond the community of China specialists.

2. Rising Regionalism: Political Implications of Economic Pluralism

73 See Naughton, supra note 44 at 3-24.
Two decades of economic reforms have seen the center of gravity in economic administration shift from the central government to peasant households, enterprises, and provincial and local governments. Although the central authority retains supervision of major economic actors and decision makers, market reforms have resulted in the transfer of a degree of authority away from traditional power holders to wider sectors of the population. While the loosening of party and state control is pervasive in every aspect of economic life, the features of a pluralistic society are emerging as a by-product of economic diversification. Take the changes in ownership and property rights, for example. Coupled with the ever-greater roles played by markets and incentives and the increasing decision-making authority of individuals, enterprises and local government institutions is a dramatic change in the ownership and property rights structure in the Chinese economy. While the land remains collective property, the agricultural sector has been de facto privatized. In the non-agricultural sector, various new forms of ownership have emerged from within the socialist economy. Roughly speaking, mainland China currently has four types of ownership outside of agriculture: state-owned enterprises, collective-owned enterprises, private enterprises and foreign firms. In some places, the introduction of the shareholding system is creating a joint government-private ownership. Although the state-owned enterprises are still predominant in the economy, the non-state sector – including massive private foreign investment, growing stock markets and private enterprises – has played an increasing role in spurring China’s economic development. The consequences of this pluralization were almost entirely unforeseen at the outset of the reforms. Overall, not only was the speed and breadth of

75 For a detailed discussion on the growth of the non-state sector in China, see Naughton, supra note 44 at 137-69.
economic pluralization unanticipated, but also the political and economic impacts of this pluralization were more profound than anyone predicted.

The shift from a planned economy to a market economy has had a far-reaching impact on mainland China's political, social, and ideological development. It is interesting to observe how China's party-state apparatus originally designed to manage a rigid central planning economy responded to a dynamic, market-oriented economy that has been characterized by both unforeseen consequences of economic changes and *ad hoc* policy adjustments and pragmatic experiments. Shirk suggests that the greatest challenge of China's economic reform is the political one. On the one hand, market reforms aimed at improving the performance of the economy must be formulated and implemented by the Communist political system and must reflect the actual power relationships operating in the political realm. On the other hand, "[a] transformation of the economic structure involves redistributing authority and rewards among sectors, bureaucratic agencies and regions." While politics and economic policies are closely intertwined in the context of the PRC, it is suggested that the reforms of the economic structure have unavoidably led to a structural readjustment of political power and interests as well.

As political changes in the reform era are a bundle of numerous interrelated dimensions, I do not intend to conduct a comprehensive analysis at this point. Rather, I will focus on one of the most significant results of China's economic reform process, namely, the evolving central-provincial relations. Since the relations between Beijing and provinces are generally decentralized, the apparent present deterioration of central control and rising provincial

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77 Ibid.

78 Ibid.
autonomy increasingly becomes an issue of grave concern among many people in and outside China. Also, the topic of China’s central-provincial relations has recently come under scholarly scrutiny by those engaged in Sinology in general and Chinese political sciences in particular. An extensive body of literature on China’s changing central-provincial relations and the meaning and implications of those changes has been published in the past few years.79 China scholars have developed a wide variety of theories, models, and approaches in an attempt to identify this complex dynamic.80 While substantial disagreements exist among them, few of them deny the significance of the introduction of a widespread policy of decentralization — and its more immediate and obvious consequences — in China’s central-provincial relations, which may well determine China’s future.

1). Emergence of Regionalism 81

Before the start of the economic reforms in 1978, the rhetoric of the Party and government stressed the national interest, and any attempt to pursue individual, group or regional interests was to be criticized and treated as a departure from orthodoxy. As discussed above, under the


80 See generally Chung, ibid.
centrally planned economic system, planning of production, allocation of materials, and budgetary control of income and expenditures were controlled by Beijing. Although this highly centralized system had a paralyzing effect on local initiative and autonomy, it remains "a highly significant but as yet unanswered question" why the Chinese leaders decided to take the path of economic decentralization.\textsuperscript{82} Shirk demonstrates that decentralization is a key element in the political strategy of economic reform.\textsuperscript{83} Although formal authority is held by the central authority in Beijing, provincial leaders have traditionally been key players in the PRC's politics.\textsuperscript{84} On the one hand, they exert considerable influence on national decision-making through their representation in the all-powerful Central Committee of the CCP, aided by political and patronage ties with top leaders. On the other hand, the center must rely on provincial leaders to implement its policies. Shirk observes that, because provinces are an important power base of the Party, it is crucial for top Chinese leaders to build support at the provincial level in order to compete for power.\textsuperscript{85} "Whenever a Party leader perceived that rival leaders were blocking his policy initiatives by their control over the central bureaucracy, he attempted to build support for his initiatives by 'playing to the provinces'."\textsuperscript{86} When Deng and his followers encountered considerable resistance to the reform drive from ideological hard-liners and economic central planners in Beijing, Deng turned to provincial leaders to solicit support for his reform policies. In 1980, a fiscal decentralization program was initiated which gave provinces more control over their own resources. Many state-owned enterprises controlled by the central ministries were turned over to provincial and local governments. Many of the other reform policies also reflect

\textsuperscript{81} The terms provincialism, regionalism and localism have been used to describe the problems of provinces versus the central authority in Beijing. These terms are used somewhat interchangeably in this essay.

\textsuperscript{82} See "Chinese Political System," supra note 76 at 82.

\textsuperscript{83} Ibid. at 82-86.

\textsuperscript{84} Ibid. See also Wang, supra note 50 at 152.
the strategy of “playing to the provinces”. According to Shirk, Deng’s decentralization policy helped him win the support for the reform drive from provincial leaders and made them the core of his reform coalition.

Since the introduction of the fiscal decentralization, fundamental changes have taken place in the role of the provinces and their relationships with Beijing. While the center has far less control than it once did over local economies and hence over provinces and localities, the degree of provincial autonomy increased dramatically. The delegation of authority and resources to provincial governments has meant to many provincial leaders that local interest is now taking center stage. Under the revenue-sharing contract system introduced in 1980, each province could keep the proportion of the locally generated revenue over and above the fixed amount to be remitted to the central government. Provincial and local leaders responded to this opportunity with a burst of entrepreneurial enthusiasm and strove to expand local economies in order to increase their tax revenues. Moreover, a heavy emphasis is placed on local economic growth in the evaluation of provincial leaders’ performance. As their reputation as well as political ambitions are now to be enhanced by economic growth and social development within their domains, provincial leaders are strongly motivated to pursue local interests. Localism may also be fueled by local officials’ bureaucratic imperative towards maintaining and expanding their bailiwicks and their wish to minimize local discontent and to expand their patronage base.

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85 See “Chinese Political System,” supra note 76 at 82.
86 Ibid.
87 Ibid. at 84.
88 Ibid. at 86-87.
90 Ibid.
91 See “Political Logic,” supra note 27 at 182-85.
The scope for the pursuit of local interest has also been much greater in the reform era. Provincial leaders not only have strong incentives to develop local economies, but also have access to the resources necessary to accomplish this development. Provinces are granted extensive authority over taxation and expenditures, investment, foreign trade and enterprise management under their jurisdiction. Provincial and local leaders have gained increased discretionary power to manage local economies when the center sets out more flexible performance targets and exerts less rigorous monitoring. The newly-acquired economic clout has translated into political power in some areas which comes, in many cases, at the expense of central authority.

All in all, economic and other practical interests of individual provinces strongly suggest a trend towards regionalism. There is evidence suggesting that regional consciousness is on the rise on the part of both provincial leaders and the population of the localities under their governance. Goodman regards provincial leaders as both central agents and local representatives at the same time, facing cross pressures from the center and the locality. Top provincial leaders are hand-picked by the central authorities to implement central directives in the locality. In the final analysis, these leaders are accountable to the central government rather than the people. However, localities offer fertile ground for cultivating a provincial leader's career. Aside from maximizing support for central policies and minimizing resistance, provincial leaders inevitably have to deal with problems facing the locality and its people. It is their duty to take into account local conditions in the implementation of central policies and directives. All

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92 Ibid. at 169-96.
94 See “Center and Province,” supra note 43 at 12-19.
provincial leaders are advocates and defenders of local interests to some extent. Paradoxically though, they serve as local representatives to the center through whom local interests are presented, negotiated and accommodated within the party-state apparatus. It may be difficult to generalize precisely how provincial leaders play these conflicting roles in particular cases. The trend, however, is that their roles as representatives of their constituencies are increasing while their roles as central agents are waning. More and more provincial and local officials keep watch over local interests in their own way, and carry out directives from the central government as they see fit. Swarms of local political elite are emerging, who, while not challenging the overall authority of the center, have built up their political capital more in the regions than in Beijing. It was reported that some provincial officials declined promotions to the central party/state bureaucracy and opted to stay in the provinces to exercise political influence.

Collective local consciousness is also on the rise. Lam analyzed the articulation of local interest in Shanghai in the context of central-Shanghai relations in the 1980s. Lam noted that by early 1980s, Shanghai local officials, intellectuals and ordinary people started openly complaining about Beijing's excessive control of Shanghai's economy and social development, which Shanghai believed stymied local growth. Views complaining about central policy and articulating local interests appeared in different arenas and forums: seminars and conferences sponsored by local governmental agencies, academic journals and local mass media, and the Municipal People's Congress of Shanghai. Interestingly, the annual meetings of the municipal congress had become a major public forum to air local grievances against Beijing's tight control

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96 See Delfs, *supra note 93*; Kaye, *supra note 93*.
97 See "Political Logic," *supra note 27* at 189.
and, in some cases, against Shanghai municipal leaders’ inability to stand up to Beijing. For instance, in 1988 when the political atmosphere was unprecedentedly open and tolerant throughout the whole country, local deputies to the Shanghai Municipal People’s Congress severely criticized Jiang Zemin, then mayor of Shanghai, for failing to address the problems of great concern to the local people in his work report to the congress. Moreover, local deputies’ strong dissatisfaction resulted in Jiang’s failure to have two incumbent deputy mayors re-elected at that session – a surprising event that had rarely happened in China. By the early 1990s, the central government could no longer turn a deaf ear to Shanghai’s grievances but granted greater fiscal authority and more preferential economic policies to Shanghai. With an imperial blessing dispensed by Deng Xiaoping, Shanghai was set to become a pioneering model of bold economic reforms and the “open door” policy for the rest of the country, in fact giving it permission to sidestep central bureaucratic restrictions.

Shanghai is certainly not alone in terms of its delicate relations with the center and growing local consciousness. All over the country, local aspirations are widespread and growing. Economic decentralization as well as the emergence of different local cultures and communities contribute to an increase in local autonomy at the expense of the central government. Localism – in the sense of a political identification with the locality – has become a crucial theme in China’s national development. As increasingly autonomous provinces go their own way, tensions between the center and the province have intensified in many areas.

99 Ibid. at 133-41.
100 Ibid. at 139-41.
101 Ibid. at 140-41.
2). Center or Locality: The Failure to Rein in the Provinces

Generally speaking, growing provincial authority over economic planning and policy can be considered favorable to the process of reform, because the provinces are able to provide incentives appropriate to their special conditions. However, the rise of localism has also had its share of costs in terms of China’s national development. Although decentralization has resulted in improved economic efficiency, it has limited the central authorities’ financial resources and reduced their ability to exercise overall control over the economy. Moreover, it has weakened the integrity of central financial and bureaucratic structures.

The main reason for this is that, when local interests often run counter to the state, provincial and local governments tend to pursue their own economic priorities irrespective of national goals and needs. Local governments have employed various legal, quasi-legal, and illegal strategies to augment local revenues. Many have engaged themselves in tax evasion and fraud at the expense of central revenues. In China most taxes are collected by provincial and local governments and then split with the central government, leaving a great deal of room for tax evasion and fraud. As the balance of power over total revenues in the wake of fiscal decentralization has shifted decisively in favour of the provinces and localities, the central

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104 Wang notes that there are four strategies through which local governments often use to enhance their revenue base: The first is to negotiate with the central government for favorable arrangement within the revenue-sharing framework; the second strategy is to take a non-cooperative position whenever local governments consider central policies detrimental to their interest; the third is to hold back as much local funds as possible from central extraction; the fourth is to impose ad hoc charges on local enterprises. See Wang, ibid. at 95-97.
105 Ibid. at 96.
government's rise in revenues lagged far behind the rate of national economic growth.\textsuperscript{106} In a now-famous paper published in 1993, Hu Angang and Wang Shaoguang contended that China's state revenue had dropped from 32.1 percent of its GNP in 1978 to 14.2 percent in 1992. That was barely a third of the proportion in major developed countries.\textsuperscript{107} They estimated that in the year 2000 China's state revenue could diminish to 11.3 percent of its GNP. The pair, who were consultants to the Chinese Academy of Social Sciences and had done their post-doctoral research at Yale University, saw in this erosion of central control over revenues a cause for alarm: a serious decline in China's central state capacity that threatened macroeconomic stability, the organizational integrity of the state and potentially even national unity.\textsuperscript{108} They warned that since China now had a weak central authority and strong local governments, China could break into independent republics on the model of post-Tito Yugoslavia unless drastic steps were taken to curb the economic power of local authorities and reinforce central authority over macroeconomic policy. Many analysts in and outside China voiced similar concern of a chaotic, disintegrating China in the wake of rising local autonomy (discussed further below).\textsuperscript{109}

Another negative effect of weakening central control is the emergence of "local protectionism". In the reform era, provinces frequently find themselves competing with one another for the resources, benefits, and exemptions distributed by the central government, for foreign investment, and for opportunities to engage in lucrative foreign trade. "Local protectionism" occurs when local governments erect trade barriers to protect local interests.\textsuperscript{110} It

\textsuperscript{106} See Ferdinand, \textit{supra} note 103 at 41-47.
\textsuperscript{109} I will return to this point later.
\textsuperscript{110} See "Political Logic," \textit{supra} note 27 at 185-87.
takes the form of governmental directives placing restrictions on or raising obstacles to the flow
of raw materials, manufactured goods, capital and labor across administrative boundaries. In the
1980s when China's distorted price system greatly favoured downstream processing at the
expanse of energy and raw materials, many local governments erected administrative blockades
to forbid the export of locally available raw materials to other regions and preferred to set up
their own processing plants. For instance, during the so-called "wool wars" in the late 1980s,
provinces levied high, if informal, taxes on wool trading to keep the wool needed by each
province's domestic industries out of the reach of other provinces. Since prices for most
commodities were freed in the 1990s, local governments' protectionist strategies have shifted to
the protection of local markets, not raw materials. Protectionist methods include low-interest
loans and other financial incentives for local industries; lists of products banned from being
imported from other regions; imposition of fixed ratios on the sale of local products by
commercial enterprises. Enterprises from other provinces are often harassed by local officials
on unchecked allegations and have difficulties in finding local personnel, office space, or energy
supply for their business. Worse yet, there are reports that, in some cases, even local courts have
engaged themselves in the beggar-thy-neighbour games, operating only in local interest.

Many Chinese economists and political scientists argued that local protectionism had
turned provinces into "independent kingdoms" as the national market was segmented by
administrative barriers. They alleged that the protectionist surge was the outcome of
decentralization, which had transferred considerable authority as well as responsibilities to

111 See Delfs, "Beggar Thy Neighbour", supra note 93 at 89.
113 See "Political Logic," supra note 27 at 186.
provïnciaI and local governments. They concluded that this problem could only be solved by restoring power to the central government.\textsuperscript{116} Others seemed less concerned with local protectionism, holding that it was just a temporary problem during a time when market competition mechanisms had yet to be fully established.\textsuperscript{117}

From the mid-1980s onwards, Chinese leaders moved to address the problems of the loss of central control and inter-provincial conflicts which they considered a potential threat to political stability.\textsuperscript{118} Voices from Beijing called for subordination of local interests to the national interest under "the idea of coordination of all the activities of the nation like moves on a chessboard."\textsuperscript{119} Beyond ideological exhortation, the central government took concrete measures to recentralize certain economic authorities such as banking, finance, and investment authorization procedures. Moreover, initiatives aimed at promoting inter-regional economic cooperation in the context of "lifting regional blockades and ending departmental fragmentation" were given great emphasis.\textsuperscript{120} In the early 1990s, Party Secretary General Jiang Zemin made a series of speeches on the subject of strengthening central government control over the regions. In 1994, a tax reform plan was introduced in an effort to retrieve from the provinces a greater share of total state revenues. The purpose of the tax reform was to establish separate central and provincial taxation systems, under which certain types of taxes would be paid to the center and others to the provinces. Under the new system, the revenue-split between center and provinces was set at

\textsuperscript{114} For instance, there have been numerous reports in the media that some local courts refuse to enforce court rulings delivered by other local courts that are deemed detrimental to local interest. See van Kemenade, \textit{supra} note 102 at 272-73.
\textsuperscript{115} See "Political Logic," \textit{supra} note 27 at 186: R. Delfs, "Beggar Thy Neighbour," \textit{supra} note 93 at 89.
\textsuperscript{116} See e.g. Hu & Wang, \textit{supra} note 107; Delfs, \textit{ibid}.
\textsuperscript{117} See Yang & Wei, \textit{supra} note 79 at 461-63.
\textsuperscript{119} \textit{Ibid.} at 298.
approximately 60%-40% - a neat reversal of previous years.\textsuperscript{121} Although the recentralization policies and reforms achieved limited success, they made few inroads into the structural problems which gave rise to the weakening of central authority over macro-economic control and the rise of local autonomy.\textsuperscript{122}

As China witnessed the birth pangs of a new economic system, a fundamental change in the roles and functions of the provinces and their relationships with Beijing was an inevitable consequence of this process. There were four distinct phases that could be clearly identified in the evolution of the central-provincial relationships during the reform era: the emergence of a conflict of interests between and among the center and the provinces; increasing local autonomy; a growing divergence of interests; and the failure to rein in the provinces.\textsuperscript{123} Questions arise as to what further institutional reforms are required to establish a rational division of functions and powers between the center and the provinces. Just as the Chinese government has explored the best way of handling central-provincial relations in the reform era, so it has experimented with different degrees of decentralized control with varying success. The search for an efficient and workable institutional relationship between center and provinces will continue to present the PRC regime with serious problems in the future.

3). Centralism, Regionalism or Federalism: Toward a More Pluralistic System

\textsuperscript{120} *Ibid.* at 298-305. On inter-provincial economic cooperation in China, see also Yang & Wei, *supra* note 79 at 472-75.
\textsuperscript{121} See Kaye, *supra* note 93 at 19.
\textsuperscript{122} *Ibid.*
\textsuperscript{123} See Breslin, *supra* note 31 at 55.
As a result of decentralization, China's central-provincial relationships have been transformed dramatically in favour of local interests and autonomy and will continue to do so for some time. The question arises whether the increasingly self-willed provinces can continue to grow in power without fatally damaging the integrity of the centralized, unitary party-state regime. In recent years, the community of sinologists has been debating the prospect that growing centrifugal forces in China could tear the country apart. For some sinologists, the unity of China can no longer be taken for granted in the face of greater provincial autonomy and weaker central government. Many speculate that the country is headed for a break-up, a scenario which worries a lot of people in and outside China. China's official rhetoric vehemently denounces speculation on the possible dismemberment of the nation as tensions between the center and the provinces increase. Some sinologists agree with the latter view, pointing to the centripetal forces that have held the country together over the course of history. However, all seem to acknowledge that it is imperative for China to reconstitute its basic political structures in the wake of the fundamental economic transformation presently under way. Historical evidence shows that economic reforms in communist states often are accompanied by some reform of the political system. Hence, while the economic reforms are gradually transforming China's once rigid centrally planned economy into a free market economic powerhouse, it seems unlikely that China's political structures in general and the institutional relations between and among the center and the provinces in particular will remain untouched. In fact, all indications point to significant changes that have occurred with respect to the functions and powers of the center and

124 See e.g. J. Fitzgerald, "'Reports of My Death Have Been Greatly Exaggerated': The History of the Death of China" in Goodman & Segal, supra note 79 at 21-58; Kaye, supra note 93 at 18-20; G. Segal, "China's Changing Shape" (1994) 73 Foreign Affairs 43-58; A. Waldron, supra note 79 at 117-128.
125 See Kaye, supra note 93 at 18.
126 See Yang & Wei, supra note 79 at 456-76. See also Fitzgerald, supra note 124 at 21-58.
the provinces. The question yet to be answered is what kind of institutional framework has to be established to manage effectively the dynamic relations between and among the center and the provinces. The ongoing debate described above suggests that we are witnessing a restoration in Chinese political thought regarding the traditional concern with the problem of the relationship between the center versus localities.

Closely connected with the debate over China’s future as a unitary state is a revival of interest in federalism, which has been promoted by some Chinese intellectuals and Western sinologists as the cure for the thorny problem of central-provincial relations. They argue that, for the long term, the only way out of the problem of centralism versus regionalism is a federal system. Yan Jiaqi, a prominent Chinese political scientist and an exiled dissident, proposes a Chinese “federal state” (lianbang guojia) with a formalized and institutionalized division of power along the lines of a federal system. He contends that a democratic, federal political structure is the best way to reform China’s internal politics and to resolve the problems concerning Hong Kong, Taiwan and Tibet. British sinologist Gerald Segal holds similar views.

127 See generally Waldron, supra note 79; Kaye, supra note 93, at 20.
128 On this point, Yan reasoned that: “In China, the development of a market economy has led to a steady decline in the influence of Communist ideology; as the party’s controls weaken, more and more people wonder if China will face traumas of division and secession. ... [S]eparatist forces have long been active in Xinjiang, Inner Mongolia, and Tibet, and recently they have found encouragement in the USSR’s decline and the in Taiwanese assertiveness... However, separatist movements within China face a major obstacle: the Han majority, numbering over a billion people, are devoted to the idea of a united China under a system of centralized state power. Throughout history, whenever China fragments, this idea has returned tenaciously to promote reconsolidation...It seems to me that only some type of genuine federalism can provide a balanced response to separatist demands. There needs to be a compromise between the urge to independence of minorities and the aspirations to unity of the Han majority... In a federal system, the interaction between the provinces and cities of mainland China and the government in Beijing would also undergo some fundamental changes. The traditional system in which power is centralized in the capital would end and each province and city would fashion a local political structure suited to the nature of the region.” J. Yan, “China’s National Minorities and Federalism” (Summer 1996) Dissent 139 at 139-44. See also Waldron, supra note 79 at 116.
129 See Kaye, supra note 93 at 20.
However, the problem with a federal system in China is that "all federalism needs laws to govern." So far, China remains essentially a government of men and lacks the rule of law. The respective functions and powers of the central and provincial governments have not been clearly defined under the Constitution of the PRC. There is only one article dealing with central-provincial relations in the 1982 Constitution. Article 3 provides that "The division of functions and powers between the central and local state organs is guided by the principle of giving full play to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities." In practice, this vaguely worded article can provide little guidance in dealing with relations between the central and local governments. Strikingly, after two decades of economic decentralization, the centralized, unitary political system in which the center wields unlimited power over the provinces still reigns (at least in theory), and local autonomy still has no constitutional underpinnings. This means that, even though economic decentralization has transferred significant de facto autonomy to provincial governments and placed considerable limits on the discretion of the center, the central party-state authority remains potentially omnipotent.

From the perspective of institutional restructuring, particularly with respect to changing the central-provincial relations in the face of strengthening local autonomy, the past two decades have been a failure. Chinese authorities are still relying on the unreformed centralized party-state apparatus to organize China's vast and diverse territory. Remarkably, "China is the only country of its size in the world that still has a unitary, highly centralized political structure, which is

\[130\] ibid.
actually causing it to malfunction more and more.” If the old, Soviet-style political establishment cannot be sustained indefinitely, the difficult question for China now is how the Chinese authorities should carry out the long-delayed political reforms, one of whose themes will be devolution of power to provincial and local governments.

As China stands at a critical juncture, analysts have posited different scenarios for its future. It is suggested that all of those scenarios are possible, but caution is also warranted because China has repeatedly defied those who confidently predicted its future. “A cautious conclusion would be that the forces making for provincial autonomy and a more federalistic structure in China are more weighty and likely to be more constant in the future than those against.” Probably more likely in the short run, given the approach to date, are informal, unwritten understandings between center and provinces over the division of power. In the long run, what will evolve would be a federal system where governmental functions may not be solely vested in a single level or form of government and where national unity is based on political and economic diversity. This political pluralism may also foreshadow the beginnings of a more democratic system in China if it is properly managed and guided.

132 Van Kemenade, supra note 102 at 258.  
133 Predictions of China’s future range from a continuance of the status quo, a chaotic disintegration, authoritarian-pluralism scenario to a federal system where political pluralism and a free market economy are joined. See, e.g., Kaye, supra note 93 at 18; Waldron, supra note 79 at 116; Montinola, Qian & Weingast, supra note 79 at 50-81; R. Scalapino, supra note 79 at 963-65.
Part Two: Autonomy or Assimilation: Pluralism in China’s National Minority Regions

The issue of local autonomy in China’s ethnic minority regions poses problems for China somewhat different from those of the provinces. Historically, China is a multiethnic country formed from the territorial expansion and a fusion among different peoples over the course of history. Its widely dispersed population is characterized by tremendous geographic, linguistic, cultural and religious diversity. The dominant ethnic group in China is known as the Han nationality which has approximately 1.1 billion people. There are about 91 million people in China who are officially recognized as national minorities. Since ancient times, problems involving national minorities have been the source of intense feelings and conflict. They have also weighed constantly as an important issue for China’s rulers. In the reform era, ethnic relations between the Han nationality and the minority nationalities have become more problematic as the long record of tension and conflict continues.

The purpose of this section is to examine regional autonomy in China’s national minority areas and its implications for legal and political pluralism in China and, particularly, for Hong Kong’s autonomy from China, on the assumption that the Chinese government’s policies with respect to national minority regions reflect a much wider politics pervading the whole country. It can be said that both the national regional autonomy system for national minorities and the “one country, two systems” formula for the people of Hong Kong are designed to facilitate political integration and national unity in China which maintains the integrity of the state while satisfying

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134 Wilson, supra note 112 at 301.
both the interests and regional aspirations of some subnational units within it. From such a perspective, Hong Kong is not an entirely new challenge to the Chinese government. While Hong Kong people are not an ethnic minority in China, they may be fruitfully thought of as a cultural minorities. Therefore, an examination of the PRC’s long experience with its national autonomous regions is much in order if we are to understand the full complexity and dynamics of the evolving Hong Kong-China relations.

I. The Geographic and Historical Legacy

There are, in all, fifty-six officially recognized “nationalities” incorporated into the PRC’s territory.136 According to the 1990 National Population Census, the largest ethnic group, the Han nationality, constitutes about 92 percent of the Chinese population. Some 8 percent of the population are officially identified as “minority nationalities”. There is a great variation in the size of these minority groups. No one is especially large. The most populous group is the Zhuang nationality, with more than fifteen million people. The least populous, the Lhoba nationality, numbered only 2,312 in the 1990 census. More famous perhaps are the Tibetans (4.6 million), Mongols (4.8 million), and Uighurs (7.2 million).137 National minorities are found in all parts of the country. The number of China’s national minorities is small relative to her total population, but the areas they have traditionally inhabited account for almost 60 percent of the territory of the

136 See “Questions and Answers: China’s Minority Peoples” (1979) 22 Beijing Review, no. 6 at 17-21; “National People’s Congress Opens” (1979) 22 Beijing Review, no. 25 at 5-6.
137 See supra note 135 at 34.
country, mainly the border and remote areas which are of strategic importance and are extremely rich in natural resources.\textsuperscript{138}

The languages spoken by China's national minorities range widely, belonging to four of the world's largest language families: Sino-Tibetan, Turkic-Altaic, Austro-Asiatic, and Indo-European.\textsuperscript{139} Some minorities such as the Tibetans, Mongols, and Koreans have a very rich literature, while others lack written scripts. Also in terms of culture and religion, features of the Zhuangs, Manchus, and Koreans are in many ways similar to features of the Han socio-cultural organization. At the other end are those minorities such as the Tibetans, Uygurs, Kazakhs who have distinct, strong cultures, fine literature and arts and pervasive religions with clergies which once held powerful social and political influence. The religions with the most numerous adherents are Islam and Buddhism. There are also Catholics and Protestants, especially in the border areas of Southwest China. Many national minorities have maintained their own "tribal religions".\textsuperscript{140} Considerable differences also exist among national minorities with respect to political systems, social relations and stages of economic development. Some national minorities, such as the Mongols, Manchus, and Tibetans, once established states quite independent of the Chinese empire. Some of the minorities retained the slave or serf systems and the hunter-gatherer economy into the 1950s. Some even had no class structures formed when the PRC was established.\textsuperscript{141}

\textsuperscript{138} See J. Wang, \textit{supra} note 50 at 163.


Historically, those people living within the regions of what we know today as China belonged to numerous ethnic groups. Relations between the majority, the Han, and the other minority groups have rarely been easy. Peoples other than the men of Han were considered to be culturally and technologically inferior to the Han and were generally referred to as "the barbarians." In 221 B.C., the Kingdom of Qin conquered all Han Chinese feudal states and expanded to incorporate many non-Han areas within its frontiers. Non-Han peoples were either expelled to ever more marginal lands or assimilated into the conquering Han Chinese. In the succeeding Han Dynasty, the Chinese court adopted a policy of reliance upon the attractions of Chinese culture and civilization. Chiefs of the neighboring barbarian tribes were allured or pressured to submit regular tributes as a token of their submission to the Chinese emperor. They were often rewarded for subjugation with imperial posts and titles as well as precious gifts such as gold, silks, tea and china. In many cases, the rewards given by the Han emperor were far in excess of the tributes that the barbarians had submitted. Even though the tributary system was sometimes expensive to the Chinese court, it did politically and culturally fit many of the neighboring barbarians into the Chinese imperial order by allowing them to exercise autonomous rule under varying degrees of Chinese imperial supervision and control. Of course, the policy of appeasement and diplomacy was always backed by military force. Military actions were

142 More than eight thousand separate groups were documented in Chinese historical records over a period of almost three thousand years. See J. T. Dreyer, China's Forty Millions (Cambridge, Massachusetts: Harvard University Press, 1976) at 7. [hereinafter "China's Forty Millions"]
143 Ibid. at 17-18.
144 Ibid. at 18.
145 See Y.S. Yu, Trade and Expansion in Han China (Berkeley: University of California Press, 1967) at 396.
frequently taken against the barbarians beyond the range of the Chinese emperor’s mandate to secure the border regions or expand territory. By means of the “carrot and stick” policy, the Chinese empire managed to take control of enormous territories previously inhabited by the barbarians over the long course of history.

However, the more effective force behind Chinese imperial expansion was the influence of Chinese cultural and material civilization rather than military conquest or coercion. The traditional Chinese world view saw China as the center of the world and the hub of civilization. As far as the Chinese were concerned, it was a favor on their part to bestow the blessings of their own cultural and material civilization to the “uncivilized barbarians.” As Thierry describes, the Han Chinese used to think that:

The basis of the difference between the Hans and the Barbarians was not originally of an ethnic nature, but rested on a relationship to Civilization, since for the Chinese there is Civilization ... And the relevant criterion to establish this difference is sedentarization: the civilized one is the one who constructs towns and devotes himself to agriculture. ... The nature of Barbarians is to wander like animals in zones unsuited to sedentary culture such as steppes and mountains ...

Han-Chinese were notoriously contemptuous of the non-Chinese peoples who did not share their language, values and moral principles, methods of agriculture, lifestyles, and other cultural attributes. They considered the barbarians uncivilized and without culture, yet culturally assimilated and politically integrated them into the Han Chinese commonwealth. Confucian cultural consciousness tended to deny the very existence of minority cultures. In Confucianism,

there was no concept of Chinese culture and other cultures, only Chinese culture or no culture at all.\textsuperscript{149} Because the criterion that differentiated the Han Chinese and the barbarians was mainly of a cultural nature, barbarians could become members of the Chinese commonwealth by adopting the Han Chinese culture and moral principles. Time and again in Chinese history “barbarians” were made “Chinese” and even given high posts in the government.

Confucianism called for a policy of propagating Chinese culture and Confucian moral teachings to win over the barbarians. Believing in the universality of Chinese culture and kingship, Master Confucius favored a benevolent attitude towards the barbarians. He argued that China would benefit if the barbarians would ‘come and be transformed’ by the superior Chinese culture. He had remarked in the \textit{Analects} that “if remoter people are not submissive, all the influences of civil culture and virtue are to be cultivated to attract them to be so; and when they have been so attracted, they must be made contented and tranquil.”\textsuperscript{150} However, this idealistic theory of cultural persuasion frequently was not followed in practice. More often than not, the dominant concern of China’s imperial politick was not to integrate culturally the peoples on the periphery of the Chinese empire, but rather to control them. The long tradition of Chinese imperial statecraft developed the use of both persuasion and coercion as interdependent strategies to maintain central control over the barbarians, with sufficient native support to ensure the need for minimal imperial government personnel and resources.\textsuperscript{151} The political leaders of minority

\textsuperscript{148} For instance, the Han Chinese even in ancient time seemed to have indulged in comparing barbarians with all kinds of animals.

\textsuperscript{149} The Han Chinese are by no means one-way carriers of a superior culture. There are numerous historical examples of mutual cultural enrichment between the Han and non-Han Chinese. Mackerras disputes that “while it is true that China contributed a good deal more in terms of culture to the minorities than the other way around, the influences were by no means all in one direction.” C. Mackerras, \textit{China’s Minorities: Integration and Modernization in the Twentieth Century} (Hong Kong: Oxford University Press, 1994) at 24.


\textsuperscript{151} See “China’s Forty Millions,” \textit{supra} note 142 at 9-10.
peoples were allowed to exercise autonomous rule because that allowed the Chinese empire to control the minority regions more effectively. Dreyer suggested that the goal of Chinese imperial policy toward ethnic minorities was "a pluralistic form of integration that aimed at little more than control. Abstention from aggression and a vague commitment of loyalty to the emperor and the Confucian values he embodied were sufficient to attain this level of integration. Barbarians’ traditional customs, languages, and governing systems were not interfered with so long as they did not pose a threat to the Chinese state."152

The downfall of the Qing dynasty in 1911 marked the beginning of a post-imperial era for China. Dr. Sun Yat-sen, the founder of the Republic of China (ROC), recognized the existence of four distinct minority groups in China, i.e., the Manchus, Mongolians, Tibetans, and Huis (a term that included Muslims in China) and the equality of all ethnic groups.153 However, he was also of the opinion that because of the absolute prominence of the Han and the insignificant numbers of minorities, the Chinese state was essentially composed of one nationality.154 His ultimate goal was assimilationist, to "facilitate the dying out of all names of individual peoples inhabiting China," and to unify and fuse all the peoples into "a single cultural and political whole".155 A few years later, under the influence of the Soviet Union and Comintern, Dr. Sun added the concepts of self-determination and autonomy for minorities to his policy platform, but

152 Ibid. at 12-13.
153 Ibid. at 16.
154 In his “Race and Population,” Dr. Sun said that: “Although there are a little over ten millions of non-Chinese in China, including Mongols, Manchus, Tibetans, and Tartars [Turks], their number is small compared with the purely Chinese population, four hundred million in number, which has a common racial heredity, common religion, and common tradition and customs. It is one nationality.” Sun Yat-sen, “Race and Population,” in L. S. Hsu, Sun Yat-sen: His Political and Social Ideals (Los Angeles: University of Southern California Press, 1933) at 168.
these concepts were never properly implemented by Dr. Sun and his Nationalist followers. Dr. Sun's successor, Chiang Kai-shek, adopted an even more explicitly assimilationist policy, claiming the common ancestry of all inhabitants of China. Chiang asserted that "That there are five peoples designated in China is not due to differences of race or blood but to religion and geographical environment. In short, the differentiation among China's five peoples is due to regional and religious factors, and not to race or blood." The assimilationist policy of Chiang's Nationalist government had few practical consequences for ethnic minorities themselves, because many of the minority regions were under the control of semi-independent warlords or native ruling elites throughout the Nationalist period. Preoccupied with fighting sundry warlords, Japanese aggression, and the Communists, the Nationalist government paid little attention to minority areas and, in any event, had limited resources to implement its minority policies.

To sum up, the traditional relations of the Han Chinese with non-Han minority peoples generally were coloured by Chinese imperial domination and the assumption of Chinese cultural superiority. On the part of the Chinese state, there were two parallel tendencies, one toward assimilation and the other toward pluralism, as the most effective means for dealing with ethnic minorities. The two tendencies were often mutually complementary, parts of a single policy to maintain Chinese imperial order and to secure a superior-inferior relation between the dominant Han majority and the non-Han minorities. Both had important implications for later PRC policy toward national minorities.

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156 Dreyer noted that Dr. Sun, "more orator than logician, never bothered to reconcile these two sets of views," namely his early assimilationist views on China's ethnic composition and the concepts of self-determination and autonomy. Ibid. at 17.

II. The Chinese Communist Party and the National Minorities to 1949

From early times, the Chinese Communist Party nationality doctrine has closely followed the teachings of Karl Marx and V.I. Lenin and the theory and practice of the Soviet Union on the management of nationality problems.\(^\text{159}\) In 1922, the Manifesto of the Second CCP Congress recognized the equality of the nationalities.\(^\text{160}\) The manifesto proposed the establishment of a Chinese federal republic where Mongolia, Tibet and Eastern Turkestan (Xinjiang) were to be autonomous states and to unite with China proper on the basis of their free will.\(^\text{161}\) When the short-lived Chinese Soviet Republic was established in the rural areas controlled by the CCP in 1931, the CCP adopted a Draft Constitution and a resolution on the nationality question in China, both explicitly recognizing the right to self-determination of national minorities.\(^\text{162}\) Closely modeled on the 1924 Constitution of the Soviet Union, Article 14 of the Draft Constitution provided that:

> All Mongolians, Tibetans, Miao, Yao, Koreans and others living on the territory of China shall enjoy the full right to self-determination, i.e., they may either join the Union of Chinese Soviets or secede from it and form their own state as they may prefer. The Soviet regime of China will do its utmost to assist the national minorities in liberating themselves from the yoke of imperialists, the Nationalist militarists, tusi [native officials], the princes, lams and others, and in achieving

\(^\text{158}\) For an extensive analysis of the Nationalist government record with respect to the treatment of minorities, see ibid. at 18-41. See also Mackerras, supra note 149 at 49-72.

\(^\text{159}\) Ibid. at 63.


\(^\text{161}\) Ibid. at 42.

\(^\text{162}\) See “China’s Forty Millions,” supra note 142 at 63-64; Mackerras, supra note 149 at 72-73.
complete freedom and autonomy. The Soviet regime must encourage the
development of the national cultures and the national languages of these
peoples.\textsuperscript{163}

The question which puzzled many was how the Communists, with a strong sense of Chinese
nationalism and national unity and deep roots in Chinese century-long imperial tradition, could
promise with such apparent ease the right of ethnic minorities to self-determination, secession
and independence. According to Dreyer, the CCP nationality policy during the pre-1935 period
might have been formulated to rally the support of national minorities and alleviate their
traditional fears of Han control and assimilation.\textsuperscript{164} Another important factor might be the heavy
influence of the Comintern whose agents dominated the CCP policy-making during the pre-1935
period. This might explain why the Leninist nationality policy, including supporting the right of
national minorities to secession and independence, was unquestioningly adopted by the CCP with
little regard to the tradition and realities of the Chinese state.

This idealistic policy changed with the rise to power of Mao Zedong in 1935.\textsuperscript{165} Mao was
a strongly nationally-minded politician and independent of the guidance of the Comintern.
He was critical of the nationality policy prior to his coming to power and reversed the Party’s
stand on the right of national minorities to secession and independence. His vision of the Chinese
state was that of a unified state with a population composed of many nationalities which were
equal and had the right to self-government. National minorities should not be forced to be

\textsuperscript{163} C. Brandt \textit{et al.}, \textit{A Documentary History of Chinese Communism} (London: Allen and Unwin, 1952) at 219.
\textsuperscript{164} See “China’s Forty Millions,” \textit{supra} note 142 at 64.
\textsuperscript{165} At the Zunyi Conference of 1935, Mao Zedong defeated his political rivals and came to power as the new
chairman of the Politburo. He was challenged but never ousted from the Party leadership from then on. See F.\nMichael, \textit{China through the Ages: History of a Civilization} (Boulder: Westview Press, 1986) at 210-11.
assimilated into the Han Chinese but were to be encouraged to preserve and develop their own cultures, languages and customs.\textsuperscript{166}

Mao's ideas were later incorporated into official CCP policy on national minorities and put into practice in the CCP-held areas. From 1936 to 1949, several national autonomous governments for Huis (Chinese Muslims) and Mongols were established by the CCP. The largest was the Inner Mongolian Autonomous Region set up in 1947, two years before the establishment of the PRC, in an attempt to prevent Inner Mongolia from separating from China and uniting with the independent, Soviet-backed Mongolian People's Republic (Outer Mongolia).\textsuperscript{167}

To sum up, the CCP minorities policy prior to the coming into being of the PRC included the equality of nationalities, the right to self-government within a unified Chinese state, a united front with cooperative native ruling elite against the Nationalist government and "foreign imperialist encroachments" in the border areas, and respect for minority cultures, customs and languages.


After the PRC was founded in 1949, the CCP considered nationality policy to be of utmost importance and exerted great effort to establish a set of policies and measures to deal with its nationality problems. The reasons are not difficult to find. First and foremost, the CCP nationality policy is dominated here by nationalistic concerns and a perceived need to control remote border regions that might otherwise fall under the influence of hostile foreign or domestic

\footnotesize{\textsuperscript{166} See "China's Forty Millions," \textit{supra} note 142 at 67.  
\textsuperscript{167} See Mackerras, \textit{supra} note 149 at 103-104; "China's Forty Millions," \textit{supra} note 142 at 79-82.}
forces. The ethnic minorities inhabit 50-60 percent of China’s territory, principally the strategic national border areas, which are as important for their rich deposits of raw materials as they are for defense. Also, the policy toward minorities is informed by an ideologically-motivated desire to make of China “one big cooperative family” - that is, to obtain the collaboration of all the peoples living in China in building a new socialist state. In the early 1950s, the CCP and the Chinese government followed a policy based on the notion that the PRC was a “unitary multinational country”. This notion involved two principles balanced against each other: that minority regions were integral parts of China, any possibility of secession or independence being absolutely ruled out under any circumstances; national minorities should be treated equally and were to enjoy national regional autonomy in areas where they were concentrated. A system of national regional autonomy was formally introduced into the Common Program of the Chinese People’s Political Consultative Conference - the PRC’s provisional constitution - to allow national minorities a limited degree of autonomy. It was also laid down in Article 3 of the 1954 Constitution of the PRC, which provided that:

168 The 1954 Constitution, supra note 25, art. 1.
169 The Common Program provided that:

“Article 9: All nationalities within the boundaries of the People’s Republic of China shall have equal rights and duties.

Article 50: All nationalities within the boundaries of the People’s Republic of China are equal. They shall establish unity and mutual aid among themselves, and shall oppose imperialism and their own public enemies, so that the People’s Republic of China will become a big fraternal and cooperative family composed of all its nationalities. Nationalism and chauvinism shall be opposed. Acts involving discrimination, oppression, and disrupting the unity of the various nationalities shall be prohibited.

Article 51: Regional autonomy shall be exercised in areas where national minorities are concentrated, and various kinds of autonomous organizations for the different nationalities shall be set up according to the size of the respective peoples and regions. In places where different nationalities live together and in the autonomous areas of the national minorities, the different nationalities shall each have an appropriate number of representatives in the local organs of state power.

Article 53: All national minorities shall have freedom to develop their spoken and written languages, to preserve or reform their traditions, customs, and religious beliefs. The people’s government shall assist the masses of all national minorities in their political, economic, cultural, and educational development.”
The People's Republic of China is a unitary multinational state. All the nationalities are equal. Discrimination against or oppression of any nationality, and acts which undermine the unity of the nationalities, are prohibited.

All the nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own customs and ways.

Regional autonomy applies in areas where a minority nationality lives in a compact community. All the national autonomous areas are inseparable parts of the People's Republic of China.170

The PRC government's propaganda claimed the national regional autonomy system to be in line with the actual situation in China and in accordance with Marxist-Leninist doctrines on nationality relations. It argued that China had historically been a unified state with centralized power.171 Over the course of history, nationalities became closer because of regular cultural interchange and economic cooperation and the unification of nationalities was a natural course. The areas populated by minority nationalities remained integral parts of China for many hundreds of years. There was no need for them to separate from their great "motherland". Moreover, because the Han Chinese were more economically and culturally advanced, ran the argument, it was in the fundamental interest of national minorities to stay in the PRC so that they could flourish with the assistance of the Han.172

The national regional autonomy system was also justified on the ground of geographic distribution of the nationality population. China's national minority areas are often co-inhabited by two or more nationalities. None of China's minorities, it was claimed, was in exclusive

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172 Ibid. at 7.
possession of contiguous territories free of other minorities or Han Chinese. For example, Xinjiang is regarded as the place where Uygurs are concentrated, and yet there are thirteen other nationalities there. The CCP claimed that this type of situation made an ethnically-oriented federal system in China unworkable and impractical. Rather, the national regional autonomy system was deemed the most appropriate for China’s minorities to enjoy the right to national autonomy, because only under this system could all nationalities - those with large populations as well as those with small compact ones, those which live in big compact communities as well as those which live in small ones - set up their autonomous governments commensurate with their size. Under the 1954 Constitution, autonomous governments might be established at the autonomous region (equivalent to a province), autonomous prefecture, autonomous county and autonomous township levels. With the level of autonomy depending on the population and size of a given region, the national regional autonomy system was said to be the “only possibility” for all nationalities to exercise autonomy in their scattered areas of concentration. For instance, while the majority of the population in Jinlin Province was of the Han, there was a large Korean community concentrated in Yanbian area which made up 74 percent of the total population in 1952. Since the province and the national autonomous region were of equal administrative status under the PRC constitutions, Jinlin Province was not permitted to have a national autonomous region established within its boundaries. Instead, a Korean national autonomous prefecture (zi-zhi-zhou) was set up in 1952 as a subprovincial administrative unit of Jinlin Province to let the Koreans in Yanbian practise self-government. Although the administrative status of the

173 Ibid.
175 See He, supra note 171 at 7.
176 See C. J. Lee, “The Political Participation of Koreans in China,” in Suh & Shultz, supra note 171 at 93-112; Meckerras, supra note 149 at 147.
Yanbian Korean Autonomous Prefecture was one level lower than that of the Inner Mongolian Autonomous Region, the substance of autonomous rights enjoyed by the Koreans in Yanbian was essentially no different from that of the Mongols in Inner Mongolia. Because the national regional autonomy system allowed autonomous entities to be organized on different administrative levels rather than on a single level (as would be the case under the standard federal system), the CCP claimed to have found a flexible and practical system of autonomous entities for all national minorities to enjoy special rights and benefits. The late premier of the PRC, Zhou Enlai, called the policy of national regional autonomy the nucleus of CCP minority policy, claiming that the system was "a correct combination of national autonomy and regional autonomy, a correct combination of economic and political factors; this not only makes it possible for a nationality living in a compact community to enjoy the right to autonomy, but also enables nationalities which live together to enjoy the right of autonomy... Such a system is a creation hitherto unknown in history."\(^{177}\) (emphasis added)

During the period from 1949-1957, the minority policy of the Chinese government can best be described as one of gradualism and pluralism.\(^{178}\) The PRC government held a relatively tolerant and benign attitude toward minorities and made considerable concessions and exemptions to accommodate local conditions. Traditionalist Han attitudes toward minorities, labeled "Great Hanism", were condemned in Party propaganda. Han officials were required to respect local customs, cultures and religious traditions. Upper class secular and religious leaders of minorities were invited to join the newly-established national autonomous bodies and take up honorific positions. The Chinese government introduced a plan called "nationationalization of the administrative bodies of regional autonomy", which was designed to ensure a number of

\(^{177}\) Zhou, supra note 174 at 22.
minority representatives on government bodies proportional to their percentage of the population in the autonomous regions. Enormous efforts were made to train and promote skilled, professional minority officials. Open class struggle and mass political campaigns, so prevalent in other parts of the country at that time, were purposefully avoided to dispel minorities’ fears of Han repression. The PRC government engaged in social engineering on a large scale, starting various types of relief work, introducing new technology, tackling illiteracy and disease, and constructing energy, communication and transportation projects in minority areas. It is fair to say that nationalities questions were generally handled with sensitivity in the early 1950s. As a result, relations between the Han Chinese and minorities improved.

The policy of gradualism and pluralism came abruptly to an end in 1957 when the political winds in Beijing shifted to radical leftism. Accordingly, the Party policy with respect to national minorities saw a rather drastic reversion towards assimilation of minorities. A series of radical leftist programs were brought in minorities areas to accelerate forced socialist transformation of minority societies. When Mao hastily launched the large-scale collectivization program in 1958, the rural areas inhabited by the Uygurs, Koreans, Mongols, and Miaoas were included, along with the Han areas. The Chinese government started encouraging minorities to abandon their old customs and traditions, learn Chinese written and spoken language, and wear Mao-style suits. Many of those who asserted their ethnic identities were purged in the Anti-Rightists Movement for the sin of “local nationalism.” During the Cultural Revolution (1967-1976), minorities experienced the most assimilative period in the history of the PRC. Although the policy of national autonomy and equality remained on the book, they were discarded in

179 See Wang, supra note 50 at 163-164.
180 See Mackerras, supra note 149 at 146-48.
181 Ibid. at 150-153.
realities. Harsh class struggle, repeated political campaigns and mass social mobilization were pursued on a daily basis to achieve complete socialist transformation. The ruthless assimilative policy had dramatic effects on national minorities as well as their relations with the Chinese government and the Han Chinese. With little surprise, the policy of forced assimilation gave rise to ethnic conflicts, tensions, and, in some cases, violence, the best-known perhaps being the uprising of the Tibetans led by the Dalai Lama in 1959 and the exodus of about 60,000 Kazakhs across the border to the Soviet Union in 1962.

IV. Revival of Ethnic Awareness and Return to Pluralism: Reality and Policy in the Reform Era

After Deng Xiaoping came to power in the late 1970s, virtually every former Party policy connected with radical leftism and the Cultural Revolution was reassessed. The extreme assimilationist policies that the radical leftists tried to implement in the Culture Revolution were soon discontinued, while the Chinese government formally admitted serious mistakes made in the past handling of minorities. In the early 1980s, the priority of the nationality policy was modified to center on economic development and effective implementation of the national regional autonomy system. As Dreyer has observed, the main change in policy toward minorities might be motivated by several reasons: Firstly, the post-Mao leadership had a strong interest in developing the minority areas and in utilizing their rich resources to fuel the Four

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181 Ibid.
182 Ibid.
183 Ibid.
184 Ibid. at 153-55.
Modernizations drive. The minority areas are among the poorest and least-developed regions in China. Minorities needed a greater say in matters concerning the development of local economy and the exploitation of natural resources which were to be used to benefit the local population.\(^{185}\) Secondly, a special treatment of the minorities would help convince Taiwan to accept a similar status of autonomy within the PRC.\(^{186}\) Thirdly, China’s nationality policy was closely intertwined with its foreign policy. Many minority nationalities such as the Koreans, Mongols, Kazakhs, Uygurs, Miao, and Zhuangs have kin beyond China’s borders. A favorable treatment of minorities would certainly help China maintain a friendly relationship with those relevant neighboring countries and strengthen its internal stability and defense capacity.\(^{187}\)

The loosening of political and economic restrictions and the return to pluralistic policies led to a revival of nationalist consciousness in many parts of the minority areas. Contrary to the Chinese government’s expectations that economic and social liberalization and improvement of living standards would alleviate minorities’ dissatisfaction with Chinese rule, minorities began in the late 1970s to assert vehemently their national identity and to demand that their rights to national autonomy should be actually respected.\(^{188}\) Minorities’ discontent for the first time received public attention through the mass media at the third session of the National People’s Congress in 1980 when minority deputies openly voiced sharp criticisms, claims and suggestions concerning the CCP’s nationality policy.\(^{189}\) They demanded an effective implementation and expansion of national autonomy in all dimensions. Following this event, there was an extensive


\(^{186}\) The PRC’s policy toward Taiwan was shifted to one inducing Taiwan’s peaceful reunification with the mainland after the establishment of diplomatic relations with the United States in 1979, although the PRC government has repeatedly refused to renounce the use of military force to achieve national reunification. However, by the mid 1980s, the issues of Hong Kong and Macao came to the fore.

\(^{187}\) See Dreyer, “China’s Political System,” *supra* note 185 at 377.

\(^{188}\) See “Ethnic Minorities in China,” *supra* note 140 at 41-42; Mackerras, *supra* note 149 at 153-54.
discussion about the real meaning of the term "national autonomy" in Chinese governmental and academic circles as well as in minority regions. While substantial disagreements existed on what national autonomy was all about and how far it could or should go in self-administration and policy-making, consent was reached on one point – that further legislation was needed to enhance legal guarantees for, and the rights to, self-government.\(^{190}\)

The 1982 Constitution devotes a great amount of space to national minority issues. It reaffirms the equality of all nationalities, protects the lawful rights and interests of all national minorities, and prohibits the discrimination against and oppression of any nationality.\(^{191}\) It provides detailed provisions for national autonomy similar to those in the 1954 Constitution but gives national minorities more rights than they ever had before. Under the 1982 Constitution, the rights of national minorities to autonomy have mainly three components:

1. **Political Autonomy:** The Constitution guarantees certain autonomous political rights for national minorities. It stipulates that the chairmanship and vice-chairmanships of the standing committee to the people’s congress of an autonomous unit shall include a citizen or citizens of the nationality or nationalities exercising regional autonomy in the area concerned; the

\(^{189}\) *Ibid.*


\(^{191}\) Article 4 of the 1982 Constitution provides that:

"All nationalities in the People’s Republic of China are equal. The state protects the lawful rights and interests of the minority nationalities and upholds and develops the relationship of equality, unity and mutual assistance among all of China’s nationalities. Discrimination against and oppression of any nationality are prohibited; any acts that undermine the unity of the nationalities or instigate their session are prohibited.

The state helps the areas inhabited by minority nationalities speed up their economic and cultural development in accordance with the peculiarities and needs of the different minorities. Regional autonomy is practiced in areas where people of minority nationalities live in compact communities; in these areas organs of self-government are established for the exercise of the right of autonomy. All the national autonomous areas are inalienable parts of the People’s Republic of China.

The people of all nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own ways and customs."

administrative head of an autonomous area shall be a member of the nationality, or of one of the nationalities, exercising regional autonomy. The autonomous authorities exercise the same powers as local organs of the state; at the same time, they exercise the right of autonomy within the limits of their authority as prescribed by the Constitution, the law of national regional autonomy and other laws. More significantly, the people’s congresses of national autonomous areas are empowered to enact autonomy regulations and specific regulations in the light of the political, economic and cultural characteristics of the nationality or nationalities who practice autonomy. These autonomous regulations become effective only after being approved by the standing committee of the higher level people’s congress.

(2) Economic Autonomy: Autonomous organs are granted broad authority to administer local economy and finances. They have the power to run the local economy “under the guidance of state plans” and to manage and use all locally generated revenues on their own. The state is to give “due consideration” to local circumstances when exploiting natural resources in autonomous areas. Moreover, the state is obliged to give financial, material and technical assistance to the minority nationalities to accelerate their economic development.

(3) Language, Educational and Cultural Rights: National minorities have the right to use and develop their own languages and freedom to preserve their own customs. For example, in national autonomous areas, court hearings should be conducted in the language(s) in common use in the locality; indictments, judgments, notices and other documents should be written in the

192 Ibid., arts. 113, 114.
193 Ibid., art. 115.
194 Ibid., art. 116.
195 Ibid., art. 117.
196 Ibid., art. 122.
relevant nationality language(s). Translation should be provided for any participants who do not know the relevant language in court hearings.\(^{197}\)

Autonomous authorities are to independently administer educational, scientific, cultural, and public health affairs in the locality, protect the cultural heritage of the national minorities and work for the development and prosperity of their cultures. In performing their functions, autonomous authorities should use the spoken and written language or languages in common use in the locality.\(^{198}\)

Based on the relevant articles of the 1982 Constitution, a new *Law on National Regional Autonomy* was passed by the National People’s Congress in 1984 to provide further legal guarantees for autonomous rights. The new law strengthens and, in some aspects, expands previously existing autonomous rights which are formulated in very general terms under the 1982 Constitution. For instance, it explicitly provides that autonomous authorities have the right not only to draw up local legislation with respect to regional autonomy and other regulations appropriate to the political, economic and cultural characteristics of the locality, but also to alter or cease to implement any laws or regulations issued by the central authorities if these laws and regulations do not suit the local conditions.\(^{199}\) Over half of the autonomous units have passed autonomy laws and special statutory provisions dealing with a wide range of issues, such as management of natural resources, economic development, environmental protection, land utilization, foreign trade and investment, marriage and family law, and so on.\(^{200}\) The law also grants broader rights to autonomous authorities to manage the local economy, allowing

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\(^{197}\) *Ibid.*, art. 134.

\(^{198}\) *Ibid.*, arts., 4, 121.


autonomous governments to adopt special policies and flexible measures in accordance with local economic conditions and to promulgate its own economic policies and plans in light of the local economic conditions. As for relations between the autonomous unit and the state, the state is committed to providing financial and other support and assistance. 201

The 1982 Constitution and the Law on National Regional Autonomy of 1984 have granted national minorities the most pluralistic rights in comparison with any of the previous legislation. Questions arise as to how genuine national regional autonomy is in the reform era. To answer the question, it is necessary to examine the achievements and the limitations, the legal form and the actual practice, of the national regional autonomy system. The present Chinese government and the CCP tend to congratulate themselves on their newly liberalized policies towards national minorities rather than to dwell upon the mistakes of the past. Official propaganda frequently points to the achievements of the revitalized national regional autonomy system. For example, many new autonomous units were set up in the 1980s and 1990s. By 1992, there were five autonomous regions, thirty autonomous prefectures, 124 autonomous counties and 1,200 autonomous townships; their combined area covered 64.5 percent of the PRC's total territory. 202 National minorities were generally exempted from the "one child" policy which was strictly implemented among the Han Chinese. Between 1982 and 1990 censuses, while the Han population grew a total of ten percent, the minority increased by 35 percent overall. One of the most striking cases was that of Manchus, the ethnic group that ruled the Chinese empire form 1644 to 1911 and was generally regarded to have gradually assimilated into the Han majority since the fall of Qing dynasty. Their population increased by 128 percent during the 1982-1990

201 See supra note 199.
202 See “China's Political System,” supra note 185 at 381.
period, from 4.3 million to 9.8 million. In the 1982 and 1990 national censuses, as many as fourteen million people who previously identified themselves as Han came out and registered as minority nationalities. It became even more popular among certain groups of people seeking to be officially recognized as national minorities, after the Chinese government initiated several affirmative action programs in the 1980s. Under these programs, national minorities are granted such privileges as exemption from the “one-child” policy, tax reduction, preference for admission to institutions of higher education, and more religious and cultural freedom from government interference. There has been increased representation of national minorities in the National People’s Congress, the government and the CCP. Under the 1982 Electoral Law, minority deputies should account for about 12 percent of the deputies to the NPC, well above their percentage (8 percent) in the total PRC population. Four minority leaders were elected to the vice-chairpersons of the Standing Committee of the 9th NPC in March 1998. Special efforts have been made to train new Party cadres and government officials of minority background. Fourteen minority leaders were elected to the 15th Central Committee of the CCP in September 1997.

After three decades of policy vacillation between pluralism and forced assimilism, the present Chinese government claims to have established a comprehensive legal system that warrants equal rights for all nationalities and regional autonomy for national minorities. However, despite the liberalization of previously very repressive policies, the reality is that minority discontent is still widespread among the population. Ethnic issues have increasingly

203 The figure did not necessarily represent natural increase of Manchus population. See Gladney, supra note 139 at 172-73, 186.
204 See “China’s Political System,” supra note 185 at 382.
205 See ibid. at 186-88; Heberer, supra note 140 at 37-39.
become a source of dissatisfaction, conflict and even violence in recent years.\textsuperscript{208} One may expect these to become more acute in the future. Critics contend that this is because national regional autonomy does not \textit{de facto} exist or exists merely as lip service in China. "National regional autonomy" only means that there can be limited local control over the administration of resources, taxes, family planning, education, legislation, and religious expression. It does not mean that true political choice is in minority hands. First and foremost, secession or independence is absolutely prohibited under any circumstance. All the minority areas are declared "inalienable parts of the PRC" by the 1982 Constitution, which indicates unambiguously the supremacy of the unitary Chinese state. Therefore, one of the key problems with national autonomy is that minorities have virtually no say with respect to their political system or status in the Chinese state but to accept the granted autonomy. In other words, the enjoyment of autonomous rights is contingent upon minorities' acceptance of the national regional autonomy system, whose scope and contents are determined by the central authority unrepresentative of the minorities. If autonomy must give way to the state and the despotism of the central authority when the two sides have different goals or interests, the fundamental premise of national regional autonomy is inherently deficient.

In a similar vein, the national regional autonomy system is inconsistent with the very nature of the centralized, hierarchical party-state structure of the PRC. As discussed above, the PRC is a unitary, centralized country with its state power concentrated with the central authority in Beijing. Regional autonomous units are subject to local control but are also subordinated to


units of the higher level. For instance, all autonomy regulations adopted by national autonomous regions must be approved by the Standing Committee of the National People’s Congress before they take effect. This provision guarantees that the use of power of autonomous authorities is subject to central review and supervision. Also, the exigencies of centralized administration according to the principle of “democratic centralism” tends to preclude any meaningful national regional autonomy. Although the head of an autonomous government must be a member of the minority, this constitutional provision remains largely symbolic in practical terms, because the real power in autonomous regions actually lies in the hands of CCP secretaries who are always of the Han.

To sum up, the PRC nationality policy of the 1980s and 1990s have undoubtedly been an improvement on those of the previous periods. The new policy represents a return to a philosophy of pluralism, which acknowledges the distinctiveness of national minorities and shows a higher degree of tolerance for political, social and cultural diversity. The PRC Constitution guarantees that national minorities have the right to self-government and enjoy certain privileges over the Han majority. However, due to insufficient constitutional guarantee for autonomous rights and lack of the rule of law, genuine national autonomy has to a large extent not been achieved in reality.

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208 During the past two decades, demonstrations and violent disturbances rooted in minority dissatisfaction, local nationalism and ethnic tensions are known to have occurred in Xinjiang, Yunnan and Inner Mongolia, in addition to the well-known case of Tibet. See Mackerras, supra note 149 at 159-164.

209 See the 1982 Constitution of the PRC, art. 115, supra note 131 at 340.
Conclusion

The preceding analysis has described and evaluated the forms in which pluralism tendencies are developing in China. Although the situation described above may represent only a transitional stage, it is clear that China has been emerging as a more diverse place. Two decades of economic reforms have brought about major changes in the structure and dynamics of Chinese regional politics, and these changes have important, long-term political consequences. The decentralization of power in the reform era has transformed the traditional Maoist relationship between the center and the provinces. Policies made in Beijing are now increasingly the product of compromise between Beijing’s interests and those of local governments. The changes in Chinese regional politics seem to have led to a political system that is quasi-pluralistic in character and will probably produce the basis for a more pluralistic and competitive form of politics. The problem now is that China does not have a federal system that is fixed by the law, and the central government continues to deal with local governments by means of myriad ad hoc agreements made after complex bargaining negotiations. If pluralism is to become a permanent and irreversible feature of the Chinese polity, serious political reforms will have to be made in the future to create a foundation for pluralistic political institutions suited to a market economy. This is not going to be an automatic process, but one that is defined by a new relationship between the center and the provinces and new inter-provincial links. The best solution seems to be a federal system which is to give the provinces, by means of constitutional procedures, genuine local autonomy. Within this framework, the state or the central government may assume a more responsive and democratic role than it has played before, the role of the mediator and the coordinator between different interest groups, organizations, and localities. A federal system
would also help accommodate China’s national minorities who are increasingly prepared to exert
greater pressure for recognition of their distinct identity. China needs to build upon rather than
obliterate its ethnic and cultural diversities. If national unity is to be preserved, the Han Chinese
will have to change their traditional chauvinistic attitude toward ethnic minorities and learn the
arts of accommodation and compromise. As with the evolving central-provincial relations, new
arrangements will have to be made to create a new type of relationship between the Chinese state
and national minorities, which will allow minorities’ feelings of national identity to survive and
even prosper within the Chinese state.

It is very likely that there will be a continuation of the present pluralization of the Chinese
polity, with provinces increasingly able to bargain with Beijing for access to valued resources
and to define and influence policy making, and national minorities increasingly aware of their
national identity and prepared to demand genuine autonomy and self-government. After two
decades of reforms which have had a significant impact on nearly every aspect of Chinese
society, the time has arrived for a rethinking of the roles and functions of the center and the
provinces and the relations between the Han Chinese and national minorities. If China is to
preserve its national unity and prosper economically in the 21st century, a new constitutional
structure suited to the Chinese nation must be established on sound normative foundations in the
future. Surely, this will be a very difficult and complex task which involves careful calculation
and thoughtful institutional design.
Chapter Four: Preserving Human Rights and Freedoms in

Hong Kong: A Theoretical Reinforcement

Introduction

As outlined in Chapter One that, under the concept of “one country, two systems,” the HKSAR has become an unprecedented experiment in political and socio-economic regulation with a form of government that moves far beyond the existing federal model. The implications of the experiment are far-reaching. Among the many issues of legal and political significance pertaining to the transfer of sovereignty, few have engendered as much interest, anxiety and debate in the territory as those related to human rights. Such concerns are easily understandable, given the fact that the most direct impact of the reversion of Hong Kong would be on the people of Hong Kong. The reversion and the events leading up to it present incredible challenges to the way of life that the people of Hong Kong previously enjoyed under British rule, as well as to the institutions that support Hong Kong’s way of life. While the agreement between the British and the Chinese governments sought to preserve the unique nature of the society, the people of Hong Kong have experienced fundamental changes in the nature of their system of governance since July 1, 1997. The laissez faire, democratizing and legally distinct colonial regime that had previously governed Hong Kong in the final years was replaced by a regime acceptable to the Chinese communist regime. The changes naturally raise important questions about the sustainability of the evolving democratic changes in Hong
Kong and about the likely impact of the new regime on the protection of human rights and fundamental freedoms of the people of Hong Kong.

The preservation of the rights and freedoms in Hong Kong after the transfer of sovereignty is also of great interest and concern to the international community. Firstly, China is an increasingly important actor in the evolving international order and in geopolitical affairs. How it meets its obligations under the Joint Declaration to respect and ensure internationally recognized rights and freedoms in Hong Kong will influence other international actors' faith in China's credibility and integrity as a member of the international community. Secondly, the successful implementation of "one country, two systems" arrangements will also raise hope for the establishment of a more human rights sensitive social and legal order in the rest of China. Thirdly, the continuity of human rights protection in Hong Kong after the handover is likely to increase China's influence on general international human rights discourse, as discussed in Chapter Two. Lastly, the international legal aspects of Hong Kong's predicament are also of considerable significance. The original concept of 'one country-two systems' is without direct parallel in international law. Obviously, there is a need to determine its formal parameters and to examine its practical implications. Study of the concept may also help highlight its potential contribution as an institutional vehicle for dispute resolution and as a possible model for the management of territorial entities within sovereign states which either claim or enjoy a degree of autonomy.

For these reasons, the preservation of human rights in Hong Kong under Chinese rule has acquired considerable ideological and practical importance and come under close international as well as domestic scrutiny since the signing of the Joint Declaration.
Human rights activists, commentators, government policy analysts and scholars around the world have exerted much effort assessing how human rights and freedoms should and will be protected under Chinese sovereignty. A great amount of literature has been published to explore the scope, modalities and prospects for the protection of rights and freedoms in the HKSAR. Perhaps never before, even during the spate of decolonization during the 1950s and 1960s, has a new entity been created with such attention to its human rights dimension. Beginning with the Sino-British agreement determining the basic features of the PRC’s resumption of sovereignty and moving on to the “mini-constitution” created to govern Hong Kong and from there to the controversy surrounding the introduction of a bill of rights into Hong Kong’s legal system – human rights issues have been critical at every stage of determining Hong Kong’s new status as an SAR of the PRC. The most frequently expressed view, perhaps incorporating an element of wishful-thinking and speculation, is that the main issue is whether China will honour its pledge to allow Hong Kong to maintain its rule of law and basic human rights. In other words, the future of Hong Kong rests with the political good will of China to implement faithfully the Joint Declaration and the Basic Law. It also, many writers believe, depends on the willingness of the international community to monitor China’s fulfillment of its obligations. As a result, much of the attention has focused on whether the provisions of the Joint Declaration and the Basic Law would sufficiently protect Hong Kong’s autonomy, capitalist economic system, the rule of law and human rights from China’s interference, and whether Hong Kong’s existing political, economic, social and legal systems would be preserved within the confines of vague statutory language and unclear lines of legal authority. The approach most commonly taken by writers on Hong Kong-
related issues is an interpretative analysis of the provisions of the Joint Declaration and the Basic Law through an exploration of the possible meanings of its various terms and concepts. However, few have analyzed at the conceptual level the essence, scope, and implications of the "one country, two systems" concept.

It is with this view in mind that this chapter seeks to conceptualize the question of autonomy and human rights protection in Hong Kong from a pluralistic perspective – not with the assumption that all aspects of the problem can be comprehended, but as a contribution to an integrative approach in which a conceptual clarity can be achieved that facilitates the course of human rights and autonomy in Hong Kong.

Part One: "One Country, Two Systems" as a Normative Framework for Preserving Human Rights in the HKSAR

I. Building A Normative Framework

Accompanying the transition of Hong Kong from a British colony to a Chinese special administrative region was the need to create a new legal framework for the continuation of human rights protection in Hong Kong. The Joint Declaration, the Basic Law, and other supplementary laws, policies, and agreements collectively sketch a
framework ensuring continuity without radical changes. As with the previous human rights regime, the sources of the rights and freedoms applicable in the HKSAR include both international treaties and domestic legislation. The basic framework for the protection of rights and freedoms was first addressed in the 1984 Joint Declaration in general terms. Article 3 (5) provides that rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief as well as of private property, of ownership of enterprises, of legitimate right of inheritance and of foreign investment, are to be ensured and protected by law in the HKSAR. Annex I to the Joint Declaration, which further elaborates China’s basic policies regarding Hong Kong, provides that the HKSAR government shall protect the rights and freedoms of inhabitants and other persons in Hong Kong according to law. The rights and freedoms “provided for by the laws previously in force in Hong Kong” are to be continued. In addition to the rights and freedoms specified in Article 3 (5), the rights to form and join trade unions, of demonstration, inviolability of the home, the freedom to marry and the right to raise a family freely are also provided in the Joint Declaration. Some legal rights are specified in Annex I, guaranteeing "every person" the rights to confidential legal advice, access to the courts, representation in the courts by

1 For a detailed discussion of the legal framework for the protection of rights and freedoms in the HKSAR, see generally Y. Ghai, Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law (Hong Kong: Hong Kong University Press, 1997) c. 9 at 371-427.
4 Ibid.
lawyer of his or her choice, to obtain judicial remedies, and to challenge the actions of the executive in the courts. The rights of religious organizations and believers to maintain their relations with religious organizations and believers elsewhere and to run schools and welfare organizations, as well as their autonomy from their mainland counterparts, are guaranteed. However, while the Joint Declaration is a legally-binding treaty between Britain and China, it must be noted that the Declaration itself provides no implementation measures that would ensure the effective enforcement of the rights and freedoms guaranteed therein. As there exist many loopholes and ambiguities in the agreement and China and Britain are miles apart in their respective understandings of it, disputes over its interpretations and implementation are likely to arise. In any case, no matter how strongly the legal effects of the Joint Declaration might be interpreted by the British side, bilateral, or other, international legal processes will not likely be the means of solving potential disputes over the implementation of the agreement in the future.

Another key source of international human rights in the HKSAR is the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Annex I of the Joint Declaration provides that the provisions of the ICCPR and ICESCR as applied to Hong

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5 Ibid. Article XIII of Annex I basically reiterates the rights and freedoms prescribed in Article 3(5). However, it goes on to add a few rights and freedoms not specified in Article 3(5), such as the rights to form and join trade unions, etc.

6 Ibid.

7 Ibid.


Kong shall remain in force after the transfer of sovereignty.¹⁰ The ICCPR and ICESCR were ratified by Britain and applied to Hong Kong in 1976.¹¹ By that act, Britain undertook the domestic obligations: (a) to respect and to ensure, without discrimination, to all inhabitants of Hong Kong the rights recognized in the Covenant; (b) to adopt such legislative or other measures as may be necessary to give effect to those rights, in some cases undertaking to repeal or abolish the domestic legislation which contravenes the purpose of the Covenant; and (c) to ensure that any person whose Covenant rights are violated shall have an effective remedy.¹² However, during the period from 1976 to 1991, the ICCPR had very little impact on the law and practice of Hong Kong. The ICCPR was not incorporated into Hong Kong statutory law until 1991. In line with the Westminster tradition, treaties have the status of the domestic law of Hong Kong only if and when legislation is specially enacted for that purpose.¹³ Without such legislation, the courts of Hong Kong do not give direct effect to the treaties nor can the treaties be invoked by individuals as a basis for judicial or other remedies.¹⁴ That is to say, the rights of the ICCPR remained as treaty rights during the period from 1976 to 1991, which gave way to the incorporation into the domestic law of Hong Kong – although the British government insisted that the Covenant had already been, prior to 1991, fully implemented in Hong


¹¹ See Ghai, supra note 1 at 374, 376. Since that time, Britain ratified other international covenants on behalf of Hong Kong, including the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, and the Convention on the Elimination of All Forms of Discrimination Against Women.

¹² See ICCPR, supra note 10, art. 2.

¹³ E.g. AG for Canada v. AG for Ontario [1937] AC 236, R v Director of Immigration, ex parte Pan Zeyan (1993) 3 HKPLR 565. (cited from Ghai, supra note 1 at 374)

¹⁴ See R. Mushkat, “International Human Rights Law and Domestic Hong Kong Law” in R. Wacks, ed., Hong Kong’s Bill of Rights: Problems and Prospects (Hong Kong: University of Hong Kong Faculty of Law, 1990) at 29.
Kong through existing legislation and common law and no new legislation was necessary to incorporate the Covenant into domestic law. This had been the official position of the British government until early 1990s.\(^{15}\)

In the aftermath of the military crackdown of the 1989 pro-democracy movement in Beijing, the issue of protection of human rights became one of the top priorities on the agenda of the Hong Kong government. And the need to promulgate a bill of rights to enhance human rights protection in the future HKSAR gained new urgency. It was against that background that the *Hong Kong Bill of Rights Ordinance* was enacted in 1991.\(^{16}\) Its purpose was “to provide for the incorporation into the law of Hong Kong of

\(^{15}\) The British position was challenged internationally and domestically. Britain had no bill of rights or a written constitution under which legislative or executive encroachment on Covenant rights could be reviewed by the courts. Moreover, it had not incorporated the Covenant into its domestic law as had many other States parties. Thus, the Covenant was not directly applicable and so could not be invoked before a court or other authority. Due to the absence of constitutional guarantees of the rights set out in the Covenant as well as the incorporation of the Covenant, the Human Rights Committee held in 1991 that the legal system of the United Kingdom and of Hong Kong did not ensure fully that an effective remedy was provided for all violations of the rights contained in the Covenant. See Human Rights Committee, “Summary Records of the Meetings of the Forty-First Sessions,” *Official Records of the Human Rights Committee 1990/91*, vol. 1, CCPR/10 (New York: United Nations, 1995) at 194. See also A. Byrnes, *supra* note 8 at 145; Y. Ghai, *supra* note 1 at 376.

\(^{16}\) See *Hong Kong Bill of Rights Ordinance*, Ordinance No. 59 of 1991 (in force on 8 June 1991). [hereinafter HKBORO]

Some other international human rights treaties received similar treatment. For instance, a similar process was followed for the Convention against Torture through the enactment, in January 1993, of the *Crimes (Torture) Ordinance* (Cap. 427) which gives effects to the provisions of the Convention. The *Crimes (Torture) Ordinance* ’s substantive provisions were closely modeled on the relevant provisions of the *Criminal Justice Act 1988* of the United Kingdom, which had given effect to the Convention against Torture in the metropolitan territory of the United Kingdom. In June 1997, China’s Permanent Representative to the United Nations notified the United Nations Secretary General on the continued application of the Convention in the HKSAR with effect from 1 July 1997. The Chinese government also assumed responsibility for the international rights and obligations arising from the application of the Convention to the region. (See “Report of the HKSAR of the People’s Republic of China in the Light of the International Covenant on Civil and Political Rights (ICCPR),” paras. 104-107, available online at HKSAR Home Affairs Bureau Homepage <http://www.info.gov.hk/hab/new/index_e.htm>)(date accessed: February 7, 2001).

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was extended to Hong Kong in October 1996. The *Sex Discrimination Ordinance* was enacted in July 1995 and came into full force in 1996. The Ordinance renders unlawful discrimination on the grounds of sex, marital status or pregnancy in specified areas of activity. Since its enactment, the Hong Kong government has reviewed legislation that provides for differential treatment for women and men. Where appropriate, legislative amendments have been introduced to remove differential treatment. In its Note dated 10 June
provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong.” An amendment to the *Letters Patent* was made to ensure that no future legislature, which derived its competence from the *Letters Patent*, could validly enact any law inconsistent with the ICCPR as applied to Hong Kong. This amendment also came into effect on 8 June 1991. The impact of the *Bill of Rights Ordinance* on the Hong Kong legal system during the last years of British rule was profound. It exerted fundamental influence on legislative processes, as the Ordinance required that all pre-existing legislation inconsistent with it be repealed to the extent of the inconsistency. The Ordinance gave the courts of Hong Kong the authority to examine legislation for consistency with the Ordinance in specific cases. In the six-year period from June 1991, when the bill came into force, to mid-1997, some three hundreds cases were brought to court in accordance with the Ordinance. There were a number of cases where the courts found that certain provisions in pre-existing legislation were inconsistent with the ICCPR as applied to Hong Kong through the Ordinance and were, therefore, void.

1997, the Chinese government notified the Secretary-General of the United Nations that the Convention would apply to the HKSAR with effect from 1 July 1997. (See *ibid.*, paras. 58-87, Annex 8.


18 The amendment (art. VII(5)) reads that:

“The Provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the laws of Hong Kong. No Law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No. 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong.”


The status of the *Bill of Rights Ordinance* was that of an ordinary ordinance. However, it was entrenched indirectly by an amendment to the *Letters Patent*. While the *Letters Patent*, as British imperial
From the outset, the Chinese government warned against having a bill of rights with supremacy over other laws in Hong Kong as it would violate the tenets of the Basic Law. The real reason might have been that the Chinese side was suspicious that such moves, together with Governor Patten’s electoral reforms, were part of a British conspiracy to destabilize Hong Kong’s existing constitutional system by undermining the power of the government in favor of individuals’ rights. After the Hong Kong government enacted the Bill of Rights Ordinance in face of strong Chinese opposition, Chinese officials claimed that the Bill of Rights Ordinance with superior status over other legislation would undermine the authority of the Basic Law and, therefore, would be repealed. Specifically, they singled out three sections in the Bill of Rights Ordinance which they believed gave the human rights law supreme power to override over laws. Sections 3 and 4 provided for rules of construction: that any legislation predating the Ordinance should be given a construction consistent with it, but if not, it was to be repealed to the extent of that inconsistency; and that legislation adopted after the Ordinance should be construed consistently with the ICCPR. Section 2(3) required that in interpreting the Bill of Rights Ordinance “regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong” the provisions of the ICCPR. In February 1997, the Standing Committee of the National People’s Congress (NPCSC) adopted a decision that the above-mentioned three sections of the law, ceased to operate on 1 July 1997, the Bill of Rights Ordinance remained in force. But its “quasi-superior status” over that of other legislation lapsed.


For a discussion on the compatibility of the Hong Kong Bill of Rights Ordinance with the Basic Law, see Ghai, supra note 1 at 418-420.

See HKBORO, supra note 16, sections 3 and 4.

Ibid., section 2(3).
of the Bill of Rights Ordinance were not to be adopted as the laws of the HKSAR upon the resumption of Chinese sovereignty, on the grounds that they were "in contravention of the Basic Law." Subject to widespread criticism from people in the local community and around the world, the NPCSC's decision rolled backed the sweeping guarantees of international human rights already (indeed, increasingly) enjoyed by the people of Hong Kong, and effectively reduced the Bill of Rights Ordinance to ordinary legislation with no overriding effect on other laws that are inconsistent with it after the 1997 handover.

The most important domestic source of rights and freedoms in the HKSAR is the Basic Law, which is to be the constitutional document for the HKSAR, the source of authority for its legislative, executive, and judicial organs, and the touchstone of validity for its specific laws. That is to say, it is supreme and overrides other laws of the region which are inconsistent with it. The Basic Law contains a broad range of rights and introduces into domestic legislation the rights and freedoms granted protection by the Joint Declaration. Provisions on rights and freedoms are spread throughout the Basic Law. As general principles of the Basic Law, Article 4 provides that the HKSAR "shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with the law").


28 Article 11 of the Basic Law reads that: "In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practiced in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law. No laws enacted by the legislature of the Hong Kong Special Administrative Regions shall contravene this Law."
while Article 6 guarantees the right of private ownership of property. Specific rights and freedoms are listed in Chapter III which is entitled “Fundamental Rights and Duties of the Residents.” The civil and political rights and freedoms specified in the Joint Declaration are all provided. The Basic Law also enlists some social, economic and cultural rights. Article 39 provides that the ICCPR, ICESCR, and international labor conventions as applied to Hong Kong shall be implemented through legislation by the region.

The Basic Law divides individuals in the HKSAR into three general categories: permanent residents, non-permanent residents and persons other than residents of Hong Kong (e.g. visitors). In principle, all persons in the HKSAR are equal before the law and guaranteed rights and freedoms. But, some rights are reserved for a specific type of residents. For instance, the right to vote and the right to stand for election are confined to permanent residents of Hong Kong.

Overall, the language and scope of rights in the Basic Law appears adequate. Ghai made a comparison between the Bill of Rights Ordinance and the Basic Law:

The Bill of Rights is confined to what might be called civil and political rights. The reach of the Basic Law is wider, encompassing economic, social and cultural rights also. The Basic Law represents a much better balance of rights, entitlements and

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The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, adopted on 4 April 1990 by the Seventh National People’s Congress of the People’s Republic of China at its Third Session, reprinted in Ghai, supra note 1 at 535-70. [hereinafter the Basic Law]

29 Ibid., art. 4.
30 Ibid., Chapter III: Fundamental Rights and Duties of the Residents. See also the Join Declaration, supra note 2, art. 3(5) and Annex I.
31 Ibid., arts. 26-32.
32 Ibid., arts. 33, 34, 36 and 37.
33 Ibid., art. 39.
34 Ibid., art. 25.
duties, and is more sensitive to the truth that human dignity is a matter not merely of abstract rules but of social and economic conditions when these abstract rules become real. It departs from the Bill of Rights in another respect; it provides also for the duty of residents. The notion of duties— with its ideological overtones— however, play only a small role, and although the plural form is used in the heading of Chapter III, only one duty is specified: the obligation to abide by the laws.16

Rights in the Basic Law are generally formulated in absolute terms and there is no general scheme for limitations on rights. Article 39 appears to require that any restrictions prescribed by law meet the requirements of the ICCPR, ICESCR and the international labor conventions as applied to Hong Kong.37

To sum up, the new human rights regime in the HKSAR includes both international and domestic sources of rights and freedoms. Together, these sources should provide Hong Kong with a reasonable legal framework for the protection of human rights. The Basic Law reiterates the basic human rights set out in the Joint Declaration, adds several others, and repeats that the two international human rights covenants shall remain in force under international law. The Bill of Rights Ordinance incorporates into domestic law the provisions of the ICCPR as applied to Hong Kong, so its scope is therefore limited to civil and political rights. Besides, the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law),

16 Ghai, supra note 1 at 392-93.
37 Article 39 of the Basic Law provides:
"The provision of the International Covenant on Civil and Political rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

The Basic Law, supra note 28, art. 39.
some of which are important sources of rights and freedoms, shall be maintained
according to the Joint Declaration and the Basic Law.\textsuperscript{38}

However, the existence of a human rights regime is, by itself, no necessary guarantee
of the substantive realization of human rights and freedoms. This is particularly true as
far as China is concerned. The following discussion examines some of the troubling
questions which will likely arise when Hong Kong asserts its autonomy and human rights
from China and the concomitant theoretical paradoxes entailed by such normative
encounters.

II. "Rights without Anchors"?\textsuperscript{39} Hong Kong’s Separate Human Rights
Regime versus China’s Rigid Principle of “One Country”

As previously mentioned, the “one country, two systems” formula was originally
designed by the Chinese leadership in the late 1970s to facilitate China’s long cherished
goal of reunification with Taiwan, under which neither Taiwan nor the mainland would
have to undergo drastic changes of their present political, economic, and social systems.\textsuperscript{40}
After China and Taiwan are reunified under the formula, the claim is that Taiwan will
enjoy “a high degree of autonomy” and can maintain its current political, economic and
social systems.\textsuperscript{41} This new model of reunification repudiates the previous policy of Mao

\textsuperscript{38} See the Joint Declaration, supra note 2, Annex I (II); the Basic Law, supra note 28, art. 8.
\textsuperscript{39} I borrow this apt phase from James Allen’s “Rights Without Anchors: Hong Kong Adrift” in R. Wacks,
\textit{Hong Kong, China and 1997: Essays in Legal Theory} (Hong Kong: Hong Kong University Press, 1993) at
41-60.
\textsuperscript{40} See G. Edwards, “Applicability of the ‘One Country, Two Systems’ Model to Taiwan: Will Hong
Kong’s Post-Reversion Autonomy, Accountability, and Human Rights Record Discourage Taiwan’s
\textsuperscript{41} \textit{Ibid.}
that called for “liberation of Taiwan,” China’s code phase for military invasion and forceful reunification. However, it must be pointed out that, despite the strategic shifts in approaching the goal of national reunification under the pragmatic leadership of Deng Xiaoping, the cardinal principle of “one China”, that is, China’s state sovereignty over Taiwan, remains unchanged.  

Later, the Chinese leadership expanded the scope of “one country, two systems” to include the other two Chinese territories, namely, Hong Kong and Macao, at the time yet to be recovered by China. The principle of “one country” is also at the center of China’s policy toward Hong Kong. “One country” signifies the recognition of China’s sovereignty and of the sovereign prerogatives of the central government. As Tsang correctly pointed out, “[t]he PRC’s toleration of Hong Kong as a British colony after 1949 was a concession made for pragmatic reasons and in consideration of its wider interests. However, in so doing, the PRC at no point lost sight of the sovereignty issue. It could avoid the matter because the British had not provoked it over the sovereignty of Hong Kong.”

Technically, the issue of sovereignty should not continue to be a bone of contention now that the PRC has resumed the exercise of international legal sovereignty over Hong Kong. However, as the PRC and the HKSAR work together to set out the parameters of Hong Kong’s autonomy, the scope of sovereignty will continue to be a sensitive issue and be worked out in the give and take of the HKSAR and Beijing relations. Any perceived challenge from the HKSAR to the jurisdictional rights of the central authorities

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43 See supra text accompanying notes 205-09 in Chapter One.
in Beijing could be viewed as a potential threat to the legitimacy of the regime to rule. Concession is seen as appeasement, with adverse implications for domestic politics and national unity in China as a whole. That kind of perception is reinforced by the fact that nationalism and sovereignty remain the strongest political cement holding the “ideologically bankrupt” Chinese Communist Party together in the post-Cold War era.

If, in resolving any conflict of policy or interests between the HKSAR and China, the paramount consideration is always the supremacy of Chinese jurisdiction, there is a real danger that China’s rigid notion of sovereignty will be used to vindicate policies that are inimical to Hong Kong’s autonomy. Ghai observes:

Chinese authorities have sometimes given the impression that ‘sovereignty’ is a repository of a vast array of powers and immunities, brooding over the Basic Law, and justifying extensive intervention in the region.45

Even though China’s power to intervene in Hong Kong’s local affairs is constrained by a set of domestic and international legal instruments guaranteeing Hong Kong ‘a high degree of autonomy’, the central authority in Beijing can still resort to some mechanisms in the Basic Law to exert its view of its sovereign power. Such mechanisms include its power to appoint the Chief Executive of the HKSAR and other senior officials, to amend and interpret the Basic Law, and to deal with defense and foreign affairs of the HKSAR. Should the Chinese leadership in Beijing object to any development in the SAR, it may be tempted to use those mechanisms to directly assert its control or to gradually tighten its grip over the territory, if not openly renege on its promises.

45 Ghai, supra note 1 at 149. See also Y. Ghai, “Litigating the Basic Law: Jurisdiction, Interpretation and Procedure,” in J. M.M. Chan, H.L. Fu and Y. Ghai, eds., Hong Kong’s Constitutional Debate: Conflict over
In the Basic Law, there are also mechanisms by which the HKSAR is allowed to
govern its internal affairs within certain parameters. In other words, there are provided
various forms of autonomy from the central authority. Apart from these areas of
reserved local governance, human rights issues are within the scope of Hong Kong’s
autonomy according to the Basic Law. They face the same threat of inroads posed by the
Chinese concept of sovereignty, or “one country”. As previously discussed, state
sovereignty has been one of the predominant themes in China’s official views concerning
human rights. The Chinese official discourse has traditionally emphasized that “there is
an important relationship between state sovereignty and human rights”. China has
applied its assertion of an absolutist expression of sovereignty over its territory and
internal affairs to Hong Kong. Since the establishment of the PRC, China had
repeatedly cited its historical sovereignty over Hong Kong and its territorial integrity to
crosscut British claims to Hong Kong and to justify the resumption of Chinese
sovereignty. After the signing of the Joint Declaration, China continued to rely on its
absolutist concept of sovereignty to promote its interests and agenda in Hong Kong, and
to decry any perceived foreign interference in China’s “internal affairs” including human
rights issues. For instance, the Chinese government reacted to Chris Patten’s democratic

46 See ibid.
47 See text accompanying notes 176-85 in Chapter Two.
E.P. Mendes & A-M Treholt, Human Rights: Chinese and Canadian Perspectives (Ottawa: The Human
Rights Research and Education Center, University of Ottawa, 1997) at 229. See also “Chinese Views on a
New World Order - Chinese Premier Li Peng’s Speech at the Summit Meeting of the UN Security Council
49 See Tsang, supra note 44 at 418.
50 ibid. at 418-19.
51 See generally ibid. at 418-26.
 initiatives with strong opposition, arguing that its sovereign rights were undermined. China has also made clear that it does not regard the Joint Declaration as limiting or diminishing its sovereign rights over Hong Kong in any way. Instead, Chinese officials tend to view the "one country, two systems" arrangement as an act of sovereign grace, expressed in the form of a declaration. In both the Joint Declaration and the Basic Law, China promised that the ICCPR and the ICESCR as applied to Hong Kong shall remain in force. However, Chinese officials refused to openly undertake the obligation to submit periodical reports under the ICCPR on behalf of Hong Kong. One of the arguments put forward by the Chinese side was that China as a sovereign state, which was not itself a party to the two human rights covenants at that time, was therefore under no legal obligation to engage in continued reporting to UN treaty bodies with respect to Hong Kong after 1997.

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52 See supra text accompanying notes 57-81 in Chapter Three.
54 Ibid. at 387.
55 On this point, the Human Rights Committee holds a different view. The committee, at its 1453rd meeting on 20 October 1995, made clear its view on future reporting obligations in relation to Hong Kong in a statement made by the Chairperson:

"The Human Rights Committee - dealing with cases of dismemberment of States parties to the International Covenant on Civil and Political Rights - has taken the view that human rights treaties devolve with territory, and that States continue to be bound by the obligations under the Covenant entered by the predecessor State. Once the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, such protection cannot be denied to them by virtue of the mere dismemberment of that territory or its coming within the jurisdiction of another State or of more than one State.

However, the existence and contents of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong make it unnecessary for the Committee to rely solely on the foregoing jurisprudence as far as Hong Kong is concerned. In this regards, the Committee points out that the parties to the Joint Declaration have agreed that all provisions of the Covenant as applied to Hong Kong shall remain in force after 1 July 1997. These provisions include reporting procedures under article 40. As the reporting requirements under article 40 of the International Covenant on Civil and Political Rights will continue to apply, the Human Rights Committee considers that it is competent to receive and review reports that must be submitted in relation to Hong Kong."

Statement by the Chairperson on Behalf of the Human Rights Committee Relating to the Consideration of the Part of the Fourth Periodic Report of the United Kingdom Relating to Hong Kong, Report of the
In short, the relationship between the Chinese conception of state sovereignty and Hong Kong's promised autonomy and its impact on human rights in Hong Kong are so important that they cannot be overstated. The human rights regime in the HKSAR operates at the intersection of China's sovereignty and Hong Kong's autonomy. It tries to entrench internationally recognized human rights within a state whose conception of human rights asserts that the issue of human rights falls by and large within the sovereignty of each state in the international system. It seeks to maintain a separate human rights system marked by free elections, civil society, free press, and respect for individual rights, but depends for its validity and integrity on a tightly controlled and authoritarian state. A way must therefore be found to conceptualize the relationship between China's sovereignty and Hong Kong's autonomy so as to establish the operational limitations of Chinese sovereignty in the region and to enhance Hong Kong's claims to autonomy and human rights. It will be argued that the way forward can be distilled from China's dual posture of decrying outside interference in human rights matters and of accommodating intra-China differences through various pluralism arrangements, of which the notion of a SAR is one. By proceeding along these lines, it is hoped that a persuasive argument can be made that shows China's concern at the international level is not state sovereignty per se (but rather freedom from outside intervention) and that its attitude to governance within China has also not been one of monolithic sovereignty over all regions. From China's own discourse, history, and policies can flow a pluralistic accommodation of a human-rights-oriented legal order in


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Hong Kong. This chapter, plus Chapter 5, seeks to establish the core elements of the just-indicated reconceptualization.

Part Two: Reconceptualizing “One Country, Two Systems” as a Pluralistic Conception of Chinese Sovereignty

To the PRC leadership, the crux of Hong Kong’s reunification with the mainland has been the recovery and full-fledged actualization of China’s sovereignty. China’s sovereignty over Hong Kong means more than nominal status transfer with a change of flag; rather, it requires the genuine actualization of control and full jurisdiction. This means that tensions between China’s approach to the concept of sovereignty and Hong Kong’s quest for autonomy and a separate human rights regime are inevitable. And in some cases, serious conflicts between the two systems can occur in spite of Beijing’s careful stance of non-interference since the handover, because the contradiction between “one country” and “two systems” is inherent. Ghai points out that “[C]hinese jurisprudence, dominated as it is by rigid ideas of sovereignty, does not seem easily to accommodate the concepts that underlie autonomy.” Will the people of Hong Kong and the PRC leadership reach an accommodation which can both assuage PRC concerns over sovereignty and ensure Hong Kong’s continued human rights protection and

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56 See M.K. Chan, The Challenge of Hong Kong’s Reintegration with China (Hong Kong: Hong Kong University Press, 1997) at 7-9. [hereinafter “Hong Kong’s Reintegration”] See also K.P. Lane, Sovereignty and the Status Quo: The Historical Roots of China’s Hong Kong Policy (Boulder: Westview Press, 1990) at 7-9.

57 See infra text accompanying notes 45-82 in Chapter Five.
autonomy? With such prospects a possibility, it is a propitious time to examine the concept of “one country, two systems”, in its various dimensions, so as to provide some conceptual clarity to a novel and complex subject.

I. Reconstructing Sovereignty in the International Context

So far, little thought has been given to whether or how the innovative experiment in Hong Kong might be converted into an opportunity for a recasting of Chinese conceptions of sovereignty and autonomy. Might the “one country, two systems” concept be interpreted in a way that gives a deep normative foundation for Hong Kong’s quest for autonomy and human rights that not only conforms to the legal commitments regarding Hong Kong but also meshes with important official and traditional Chinese self-understandings? This question points out the key purpose of this study: to analyze whether a reconceptualization of the “one country, two systems” formula might contribute to lessening tensions between China’s absolutist notion of sovereignty and greater autonomy for the HKSAR, and how, in turn, it might be made to enhance prospects for a robust, special human rights regime in Hong Kong and to help restructure China domestically. Towards this end, I first attempt to come to grips with the nature and evolution of the concept of sovereignty on the international level, both as a normative concept and as it emerges in contemporary political practice. I then relate the discussion to the Chinese context as elaborated in Chapters Two and Three.

58 Ghai, supra note 1 at 133.
I. State Sovereignty: A Definition and Brief History

Sovereignty is a relatively modern idea, and while I need not belabor its origins, a brief review is a useful point of departure. As the concept of sovereignty has evolved profoundly over history and has been used in different senses by different people, the definition of sovereignty – if that is taken to include the delineation of the implications of being a sovereign state – seems a perpetually tentative and controversial undertaking. But there is still a broad concept with which we can begin: sovereignty is the supreme and ultimate authority in a political community. Austin once offered a classical definition of sovereignty:

The generality of the given society must be in the habit of obedience to a determinate and common superior; whilst that determinate person, or determinate body of persons must not be habitually obedient to a determinate person or body. (emphasis omitted)

In his view, when a society is sovereign, it is subject to no higher authority and is an “independent political society”, that is, a state. Hinsley, one of the foremost contemporary exponents of the concept of sovereignty, defines sovereignty as “final and

59 Oppenheim comments that “there exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.” L.F.E. Oppenheim, International Law, vol. 1 (London: Longman, 1905) at 103.
absolute authority in the political community." Philpott characterizes sovereignty as supreme legitimate authority within a territory: authority is "the right to command, and correlative, the right to be obeyed."

The term sovereignty had existed in fact well before scholars attempted to conceptualize it in a systematic manner, although popular references to the term might be traced to the works of French philosopher Jean Bodin in the late 16th century. In the beginning, sovereignty was essentially an internal concept, the locus of ultimate authority in a society, rooted in its origins in the authority of sovereign princes. The English word sovereignty originally derived from the French term souverain: a supreme ruler not accountable to anyone, except perhaps to God. It developed as an instrument of European monarchies for the assertion of royal authority over feudal princes in the construction of modern territorial states in Medieval Europe, which was the cradle of the modern sovereign state. According to Camilleri, by the end of the 15th century there

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62 "At the beginning, at any rate, the idea of sovereignty was the idea that there is a final and absolute political authority in the political community; and everything that needs to be added to complete the definition is added if this statement is continued in the following words: and no final and absolute authority exists elsewhere". Hinsley, supra note 60 at 25-26.
63 Ibid. at 1.
64 See "Evolution of Sovereignty", supra note 60 at 17.
were up to 500 semi-independent political units under the feudal system in Europe, where there existed "a cosmopolitan patchwork of overlapping loyalties and allegiances, geographically interwoven jurisdictions and political enclaves," with no clear line between the domestic and the external. In the sixteenth century, while the Renaissance and Reformation undermined the universal authorities – the Pope and the Emperor, power became centralized in the secular monarchies. Together with the emergence of a new economic class, the growth of trade and manufacturing, and a rapidly changing political and social environment, the feudal system in Europe was in decline. Gradually, a system of territorially-bounded independent – that is sovereign – states, each equipped with its own centralized administration and holding an effective monopoly on the use of force replaced the feudal system.70

The birth of state-centric sovereignty as the principal building blocks of the international system is customarily dated from the end of the Thirty Years' War in 1648. The Peace of Westphalia, which brought the Thirty Years' War to an end, established rules that liberated states from the traditional hegemony of Papal authority and confirmed the absolute rights of secular rulers to sovereignty and nonintervention.71 After the Peace of Westphalia, state sovereignty became a firmly established norm of political life in Europe. The so-called "Westphalian state system", under which the state asserted its absolute authority within its territorial boundaries, gave the absolutist state the public authority to enforce and legitimize a system of domestic and external relations. During

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69 Camilleri, ibid. at 13.

the late eighteenth century, some states experienced democratic revolutions that
transposed the political legitimacy of the country from the king to the people ("popular
sovereignty").

As conventionally conceived, sovereignty encompasses two distinct yet interrelated
facets, one internal and one external. The first, sometimes characterized as the positive
aspects of sovereignty, gives a sovereign state supreme authority within its borders. That
is, there are no higher authorities and no entities with the authority to take coercive, or
indeed any type of, action within the territorial limits of the state. The sovereign state has
exclusive jurisdiction over its territory and its occupants and resources, and it is at liberty
to treat its citizens as it likes and is beyond the purview of the international community.

But, there are external limits to which the supreme authority of the sovereign is
subject. By assigning mutually exclusive (i.e., territorially-defined) areas for the exercise
of this supreme authority, the sovereigns find thereby a convenient way of squaring their
claims to supremacy with the mutual recognition of equality and the principle of
nonintervention. Nonintervention is the duty correlative to the right of sovereignty. Other
states are obliged not to interfere with the internal affairs of a sovereign state. A state’s
actions are a legitimate concern of other states only if they impinge on the sovereignty of
those states. As Max Huber pointed out in the Island of Palmas case, "[t]erritorial
sovereignty . . . involves the exclusive right to display the activities of a State. This right
has as corollary a duty: the obligation to protect within the territory the rights of other

71 See S.D. Krasher, "Sovereignty and Nonintervention" in G.M. Lyons and M. Mastanduno, eds., Beyond
Westphalia? State Sovereignty and International Intervention (Baltimore: Johns Hopkins University Press,
1995) at 234-36.

States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory."\(^{73}\)

The Westphalian notion of sovereignty thus created both the modern state and the international system. Most of the fundamental norms, rules and practices of modern international relations rested on the premises of that notion. Sovereignty within a territory meant not only supreme authority within borders, but also entailed the right of states to be free from external interference. Following the Peace of Westphalia the state became the principal agent and architect of international discourse and obligation. While the state was generally conceded nearly exclusive control over its own population and territory, international law concerned itself largely with protecting the rights of territorial states in their contacts inter se.\(^{74}\)

The international system based on sovereignty and nonintervention was initially centered in Europe, where European states were treated as mutual sovereigns within the context of recognition of certain international norms. Gradually, non-European states came to embrace the concept of sovereignty and their sovereign rights were recognized as they were integrated into the international society of nation-states. The Westphalian notion of sovereignty reached its peak in 1945 when the Charter of the United Nations enshrined state sovereignty, territorial integrity and sovereignty equality of states as the hallmarks of international relations along with international cooperation to achieve certain ends including respect for human rights.\(^{75}\)

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\(^{73}\) *Island of Palmas* [U.S. v. the Netherlands], 2 *Reports of International Arbitral Awards* (1928) at 838. Cited from Fowler & Bunck, *supra* note 67 at 13).

\(^{74}\) See *ibid*.

\(^{75}\) *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945, art. 1, para 2, art. 2, para 1,7. [hereinafter the UN Charter]
The foundation of the U.N. Charter is the sovereign equality of all U.N. members. 76 Member states are required to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." 77 Specifically, the U.N. Charter prohibits interference in a sovereign states’ domestic affairs. "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matters to settlement under the present Charter." 78 This is subject to the authority granted to the Security Council to authorize intervention in order to preserve and protect international peace and security.

2. Moving beyond Westphalia – A New Sovereignty for a New World Order

Philpott asserts that “[i]n the history of sovereignty one can skip three hundred years without omitting noteworthy change.” 79 Indeed, while the concept of sovereignty is by no means static and immutable, revolutions in the idea of sovereignty are rare.

The sovereign state is not a fact of nature or an immutable feature of human condition but the solution to a problem – a modern and European solution. In the classic formulation of its initial leading theorist, Jean Bodin, together with many other classical thinkers, sovereignty means authority over all matters and by its nature has to be both

76 Ibid.
77 Ibid., art. 2, para. 4.
78 Ibid., art. 2, para. 7.
79 “On the Cusp of Sovereignty”, supra note 68 at 43.
absolute and indivisible. Why is it thought that a state must be sovereign in this sense? The problem in political theory out of which this notion of sovereignty arises is how social order is to be maintained in the face of the tendency to disorder. To Bodin, the bottom line of making and sustaining of state sovereignty is the capacity to monopolize the domestic use of violence in order to guarantee social order, to deter would-be invaders, and to prevail over invaders should deterrence fail. If the sovereign is to play the role of guaranteeing social order, its power must be unlimited in relation to other human agencies within the society. It cannot be shared by separate agents or distributed among them but all has to be entirely concentrated in a single individual or group.

Bodin’s definition of state sovereignty as ultimate and unlimited power within a political community, formulated to facilitate the rulers’ consolidation of power within the emerging nation-states in Medieval Europe, seems still to have wide currency in today’s world.

The classical conception of sovereignty raises questions as to whether states by virtue of their sovereign status possess a set of identical rights and obligations, regardless of their sizes, population, history, economy, levels of development, or political and military powers. Or, alternatively, does sovereignty in practice confer somewhat different rights and impose somewhat different duties upon sovereign states of diverse origins, powers, forms of governance and societal particularities? According to Fowler and Bunck, there are basically two schools of thought in response to the above questions:

“Either sovereignty is viewed as something absolute that may be won or lost or as

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81 See Franklin, “Introduction to Jean Bodin’s On Sovereignty,” ibid. at xii-xxvi.
something variable that may be augmented or diminished. In metaphorical terms, some 
conceive of sovereignty as a chunk; others take it to be a basket. It seems that classical 
writers of sovereignty tended to view sovereignty as absolute, unlimited, monolithic 
chunks, indivisible and applied in a uniformed manner to all juridically-equal states. Until 
World War Two, the traditional notion of state sovereignty and its corollary, 
onintervention, were the "cardinal principles" and "principal values" of the international 
system, which was what Henkin has called a "liberal" system of independent, 
impermeable, monolithic states. 

However, in the middle of this century when two horrifying world wars had failed 
the traditional system of sovereign states and set the stage for an evolution in our 
approach to international relations, there was a pressing need to rebuild and rethink the 
concept and practice of sovereignty. History shows that the concept of sovereignty comes 
about as a response to specific historical circumstances and is itself a product of 
particular social and economic conditions. Naturally, it is an ongoing accomplishment of 
international practice rather than a "once and for all" creation of norms. With the 
international social and political landscape in transition, the nature and scope of 
sovereignty must also undergo comparable changes in order to adapt to a new world 
order.

1) Human Rights and Sovereignty

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82 See "Evolution of Sovereignty", supra note 60 at 28-34.
83 The following discussions of the chunk and basket approaches to sovereignty draw on Fowler and 
Bunck's Law, Power, and the Sovereign State: the Evolution and Application of the Concept of 
Sovereignty. Fowler & Bunck, supra note 67 at 64.
Several trends in international law and relations following the end of World War II called into question the primacy and sanctity of state sovereignty. A principal cause of the reconfiguration of sovereignty was the international human rights movement emerging from the detritus of World War Two. The 1945 United Nations Charter (beyond its Westphalian components), the principles of Nuremberg, the 1948 Genocide Convention, and the 1948 Universal Declaration of Human Rights heralded the birth of the movement, which shook off the foundation of absolute state sovereignty and penetrated the state monolith beyond repair. By slow degrees, absolute sovereignty began to yield ground to a new way of thinking which drew some conclusions from the increasing internationalization of human rights. This new way of thinking rejected the assumption deemed implicit in absolute sovereignty that human rights constituted exclusively an internal affair of the particular country.

Nowadays, after half a century the proposition that human rights are no longer a matter of exclusive domestic jurisdiction is indisputable. There have been more than two dozen international agreements codifying internationally recognized human rights. At least in theory, as well as to an increasing extent in practice, states that fail to fulfill basic duties to their citizens may find their sovereign rights temporarily held in abeyance, subject to multilateral decision-making processes.

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85 Ibid.
89 See Henkin, supra note 84 at 31-32.
90 Ibid. at 32.
91 As in the cases of Kurds in Iraq and ethnic Albanians in Kosovo, Yugoslavia.
Henkin summarizes in his lucid analysis on the relationship between human rights and sovereignty some of the normative derogations from traditional sovereignty in contemporary international law that have evolved as a result of the international human rights movement:

- that the international system, still very much a system of independent states, has moved beyond state values towards human values and towards commitment to human welfare broadly conceived;
- that an international law of human rights has penetrated the once-impermeable state entity and now addresses the condition of human rights within every state;
- that the international law of human rights now includes important norms to which some states have not consented;
- that the international system has developed institutions for enforcing human rights law against “sovereign” states and has sometimes encouraged states to “intervene” in other states in support of human rights; … \(^92\)

Over the past half century, with the development of internationally recognized and binding human rights norms, sovereignty has undergone a dramatic transformation. A set of international legal norms and institutions now exists, requiring states to act within the parameters of international human rights standards. Put simply, state sovereignty, at least in relation to the individual, has lost its absolutism. By the same token, by making inroads into the once exclusive domain of sovereign states, the individual citizen of a state has now acquired a status and a stature which have transformed him and her from an object of international compassion into a subject of international right. \(^93\)

\(^92\) Ibid. at 32.
Another increasing encroachment on traditional sovereignty comes from the much more recently established international norm of self-determination. If Cobban is correct when he asserts that "the history of self-determination is a history of the making of nations and the breaking of states," then the furtherance of self-determination for distinct nationalities is set to be in conflict with sovereignty, whose history was that of state building and, in some cases, the breaking of nations.

Self-determination is taken to mean the right of cohesive groups, or "peoples", to freely determine their political status and freely pursue their economic, social and cultural development, free of external domination. The concept encompasses the notion of free choice and a spectrum of political arrangements, including independent statehood, association with other groups in a federal state and other forms of autonomy short of independence. Initially, the term self-determination came into common use in the 19th century as advocacy directed to disparate people who spoke the same language, such as Germans and Italians, to group themselves together and form a new state. Self-determination achieved greater prominence and wider recognition as a political-philosophical concept following World War One. When the victorious powers were busy redrawing state boundaries, self-determination became the touchstone for the creation of

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93 See Henkin, supra note 84 at 44.
95 See K.S. Shehadi, "Clash of Principles: Self-Determination, State Sovereignty, and Ethnic Conflict" in Hashmi, supra note 60 at 131-49.
96 Article 1 of both the ICCPR and ICESCR provides that:
"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."
ICCPR and ICESCR, supra note 10.
new states that arose out of the rubble of the Austro-Hungarian and Ottoman empires.97 Both U.S. President Woodrow Wilson and Soviet leader Vladimir I. Lenin began to espouse the principle of self-determination, although their philosophies were fundamentally different.98 Lenin, who encouraged the exploited peoples to become revolutionaries by overthrowing exploitative bourgeois governments and realizing their right to self-determination, advocated violent secessions.99 In contrast, Wilson enunciated peaceful and democratic referenda.100 Even after the settlement of Versailles, however, the concept was not universally accepted.101 Wilson’s idealistic vision of self-determination and self-government for all peoples was conceived primarily as a political and moral ideal; at the time, it had little, if any, application to the “uncivilized” peoples who lived in the European colonies.102 The League of Nations did not explicitly mention the principle of self-determination in its covenant.103 In the Aland Islands case, the International Committee of Jurists appointed by the Council of the League of Nations

99 Ibid. at 21-22.
102 See Hill, supra note 100 at 120-122.
103 Instead, Article 22 of the Covenant of the League of Nations provides that:

“To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.”
denied self-determination as a "positive rule of the Law of Nations" and its application to non-European colonial territories.\(^{104}\)

The adoption of the United Nations Charter in 1945 marked the beginning of a new phase in the development of self-determination.\(^{105}\) This second phase began, as did the first phase, by identifying self-determination as a principle rather than as a right.\(^{106}\) The situation had changed significantly by the early 1970s. The principle of self-determination was frequently cited by the international community to justify its unequivocal stand against colonialism and to provide a legal basis for the process of decolonization.\(^{107}\) The development of an international law of human rights helped to elevate self-determination to the level of a fundamental collective human right. While

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\(^{104}\) See Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aland Islands Question, League of Nations Off. J., Spec. Supp. No. 3 (Oct, 1920) at 5. In a subsequent report to the Council of the League of Nations, the Commission of Rapporteurs stated that: "Is it possible to admit as an absolute rule that a minority of the population of a State, which is definitely constituted and perfectly capable of fulfilling its duties as such, has the right of separating itself from her in order to be incorporated in another State or to declare its independence? The answer can only be in the negative. To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity."

\(^{105}\) The development of an international law of human rights helped to elevate self-determination to the level of a fundamental collective human right. While

\(^{106}\) It is interesting to note that it was the Soviet Union that insisted on the inclusion of self-determination in the UN Charter at the 1945 San Francisco Conference on the United Nations. See F.L. Kirgis, Jr., "The Degrees of Self-Determination in the United Nations Ear" (1994) 88 Am. J. Int'l L. 304 at 304. See also the UN Charter, supra note 75, arts. 1(2), and 55.

there exists no consensus as to whether the right to self-determination can be considered *jus cogens*, it is certain that self-determination is now widely accepted as a norm of international law. International law, however, has been far from clear regarding whether the right to self-determination should be extended beyond the colonial context and used as a basis for allowing the secession of distinct minority groups within an independent state. It seems that the character of self-determination recognized as a legal norm is usually narrowly confined to the cases of people under colonial rule. The United Nations long held to the view that nations that do not inhabit former colonial territories have, from a legal perspective, no right to self-determination.

In the period from 1975 to 1990, decolonization gradually declined as the dominant form of self-determination. With this decline have come increasing opportunities to fashion alternatives. In the international political arena, a number of alternative and competing models of self-determination have now emerged to challenge the traditional understanding of the right that regards self-determination as primarily, if not exclusively, a vehicle for decolonization, not a justification for nationalist secession. Self-determination has once again assumed a salience within the international arena in the post-Cold War era: the dissolution of the Soviet Union; the bloody conflict in former Yugoslavia; the apparent settlement between Eritrea and Ethiopia; the partition of Czechoslovakia; and the continued warfare in Sri Lanka, and so on. All have implicitly or explicitly raised questions of self-determination and its relationship to sovereignty. With

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108 Among international lawyers there is a controversy as to whether self-determination is a recognized legal norm outside the colonial context. See Hill, supra note 100 at 122-23.
110 Arguably, minority racist rule was also added as a context of denial of the right to self-determination quite early on. See generally Cassese, supra note 98; M.A. Hill, *ibid.*
111 *Ibid.* at 123-28;
international law largely left stranded by these latter manifestations of nationalist
assertiveness, balancing the right of people to self-determination, including the ultimate
consequence of secession, with the maintenance of the sovereign integrity of nation-states
poses a major challenge in the 21st century.

In order to maintain world peace and order and to prevent the formation of an
unwieldy number of independent states, the current international system does not
recognize a general right of secession but may assist the government of a state to find
constructive alternatives to secessionist claims.112 Attempts have been made to
reconstruct the once externally oriented self-determination to a principle that operates in
addition and, indeed, even primarily within the territorial confines of existing states and
that focuses on the structure of domestic political institutions.113 These institutions may
include minority protection regimes, democratic political processes, safeguards for
cultural rights, and various forms of federative autonomy.114

In short, self-determination in the post-Cold War era has taken a turn inward:
peoples, generally defined as those within existing national boundaries and usually
possessing some ethnic or cultural distinctiveness, are seen to have a right to self-
determination that may be fulfilled through internal democratic processes and self-
governance.115 In other words, self-determination can operate for groups within states but

112 See T. Franck, "Post Modern Tribalism and the Right to Secession" in C. Brolmann et. al., eds., Peoples
and Minorities in International Law (Dordrecht: M. Nijhoff, 1993) at 19-27.
113 See generally M. Satterthwaite, "Human Rights Monitoring, Elections Monitoring, and Electoral
Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to
Democracy (Dordrecht: M. Nijhoff, 1994).
114 Of the many ways in which the international community has attempted to focus the right inward, the
fostering of democratic governance has by far attracted the most attention. Ibid; J. Anaya, Indigenous
115 I.J. Gassama, "Safeguarding the Democratic Entitlement: A Proposal for United Nations Involvement in
not at the expense of state sovereignty and territorial integrity. In this sense, the notion of internal self-determination can be identified with that of autonomy. Autonomy is what many sub-state groups are agitating for at present. Self-determination does not necessarily mean independence. These groups use the rhetoric of self-determination to pursue their continued existence as diverse and uniquely different communities, without sacrificing the multiethnic, pluralist order that, after all, still, in one degree or another, typifies most states in the world.

In this process the traditional concept of sovereignty must be seen in a new light so that it can be shared between the unified state and various ethnic, cultural, or linguistic minority groups and be grounded in the democratic and human rights norms. Whether or not such a new paradigm has yet been legally-established, massive normative shifts toward the internal aspects of self-determination bring with them new considerations for the concept of sovereignty. Against that background, sovereign states’ claims to exclusivity on both international and domestic levels have been greatly diluted.

3). Global Interdependence, Supranational Organizations and State Sovereignty

Globalization and increased interdependence of states are cited as another threat to state sovereignty. Globalization can be understood simply as the stretching, deepening and speeding up of global interconnectedness, i.e. the multiplicity of networks, flows, transactions and relations which transcend the states and societies which constitute the

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116 In some situations, cultural or linguistic autonomy can be considered adequate expression of self-determination.
Two of the most significant changes relating to globalization are increased trade and investment flows between countries and increased non-economic contacts between peoples in different countries. The proliferation of regional trade and integration regimes, such as the EU, NAFTA, and WTO, among others, signals the growing global consensus that development, security, and prosperity are maximized through international openness and interdependence. The revolution in telecommunication technology, now links people who lacked the means and opportunity to communicate previously and facilitates the identification of problems and interests among them. Convenient accessible transportation accelerates mass movements of people, thus liberating populations from specific territories. With increased globalization of the world community the nation-state's independent capacity to control events within in its borders is challenged by transnational corporations, economic globalization and trade, and the rise of global communications and technology. As a result, the efficacy of the individual state is greatly weakened unless it acts in concert with other states. For example, the collapse of a major international stock exchange would cause global reverberations. As development, security, and prosperity are

117 By some estimates, more than 90 per cent of existing states contain a plurality of national, ethnic, or linguistic groups. See W. J. Norman, "Towards a Philosophy of Federalism" in J. Baker, ed., Group Rights (Toronto: University of Toronto Press, 1994) at 81.
119 Ibid.
121 McGrew, supra note 118 at 190.
maximized through international openness and interdependence, sovereignty’s importance is decreasing in international intercourse.\textsuperscript{122}

The European Union is perhaps the most visible manifestation. As is known, two disastrous world wars broke out in Europe which was the birthplace of the Westphalian state system. In the aftermath of World War Two, Europe had to look to transnational and international cooperation as a solution to the continued prospect of conflict. The union began with economic integration and is gradually developing a regional political system. Nowadays member states of the EU have become more integrated and surrender more and more of their powers to the supranational government.\textsuperscript{123} In a parallel manner, international institutions, such as the WTO, World Bank, and IMF, have similarly proliferated, claiming and exercising powers that were historically reserved to the states. They act as genuine supranational entities and exercise some degree of sovereign power.\textsuperscript{124}

As these non-state actors that escape in large measure the territorial and political control of the state appear on the international stage, the exclusivity and inviolability of state sovereignty are increasingly mocked by global interdependence. Therefore, it does not make much sense to continue to accord overriding primacy to the concept of national sovereignty in a shrinking and increasingly interdependent world. While not disputing that states still retain the ultimate legal claim to effective supremacy over what occurs within their own territories, this power is juxtaposed, to varying degrees, with the


\textsuperscript{123} See M. De La Madrid H., supra note 72 at 554-56.

expanding jurisdiction of institutions of international governance and the constraints of, as well as the obligations derived from, international law.

In summary, the preceding pages have provided an overview of the ways international law and relations have changed the traditional notion of absolute sovereignty over the last half a century. Today, as a result of historical, social, and technological conditions created by new processes and new actors, sovereignty is confronting a crisis that compels us to reconsider its place and role in modern society. As former U.N. Secretary-General Boutros Boutros-Ghali observes, “[a] major intellectual requirement of our time is to rethink the question of sovereignty – not to weaken its essence, which is crucial to international security and cooperation, but to recognize that it may take more than one form and perform more than one function.”

The rapidity of the changes taking place and the often ill-defined international mechanisms through which they are effected make it difficult for us to fully comprehend their effects on the traditional sovereignty concept at this stage. However, the foregoing review affords a few preliminary generalizations: the concept of sovereignty has been a flexible, yielding doctrine, not bound by its written word. It is a relatively new concept for human beings, one that is evolving with changes in international law and politics over the centuries. A “New Sovereignty” regime is now displacing traditional conceptions of sovereign power as an absolute, indivisible, territorially-exclusive and zero-sum form of public power.

Sovereignty is, unlike a reservoir which can be only full or empty, a divisible nexus of powers of which some may be kept, some limited, some lost. To put it in another way, sovereignty can be partial, it can be partly lost and partly retained, so that it can both be and not be. It's also possible to point not simply to loss of sovereignty by states but also to its redistribution, and to multiple levels and centers of sovereignty rather than identifying sovereignty with one level or center, the state. An absolute formula for state sovereignty is not likely to make sense in a shrinking and fragmenting world, and different circumstance – different socioeconomic and cultural systems, different types of communities, different technologies – demand different formulae. Different formulae are needed from an internal standpoint, although they make international life more complex and difficult. Moreover, if sovereignty is defined as a set of powers of any particular state, this set of powers has evolved significantly since 1648, and it differs among states. Thus sovereignty is contingent, both inter-temporally and intra-temporally.

II. Thinking Pluralistically about Sovereignty: The Chinese Conception of State Sovereignty and Its Implications for Hong Kong's Autonomy and Human Rights

1. Traditional State-Oriented and Power-Centered Conception of Sovereignty

The Chinese government has consistently insisted on the traditional, positivist doctrine of state sovereignty, which is deemed by the PRC to be absolute, inviolable,
There are at least four inter-related conceptual dimensions underlying Chinese conceptions of state sovereignty:

a). Absolute Sovereignty: The Chinese government has adopted the traditional, positivist notion of sovereignty ever since the establishment of the PRC in 1949. This theory defines sovereignty as ultimate and unlimited power within a political community. The Chinese views maintain that respect for state sovereignty is one of the most fundamental principles of international law which should apply to all areas of international relations including human rights issues. The main concern of the international system should be how to maintain, not how to relinquish, sovereignty.

b). The Principle of Non-intervention: Closely intertwined with the notion of sovereign equality of states is the principle of non-intervention into matters of domestic jurisdiction, either by other states or by the institutions of international legal order, including the United Nations (UN Charter, art. 2). The PRC regards non-intervention as one of the foundational principles of international law. The PRC asserts that such matters as form of government, economic system and human rights are in the category of China’s domestic affairs in which other countries may not interfere.

c). Territorial Integrity: Since the coming into being of the People’s Republic, the inviolability of Chinese territory has always been a theme of China’s foreign policy.

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128 It is recognized that this combined state-oriented and power-centered version of “positivism” is by no means shared by all legal positivists.
131 See Kim, supra note 127 at 411.
China claims that Chinese territory includes mainland China, Hong Kong, Macao, and Taiwan. Chinese official statements have argued that Hong Kong, Macao, and Taiwan were, are, and always will be Chinese territory; their return to the mainland is viewed as not only legally and morally right but inevitable in the course of history. By maintaining that Hong Kong, Macao and Taiwan are integral parts of Chinese territory, China bases its claim on the principle of territorial integrity which is a powerful counter-principle against Taiwan independence or self-determination for Hong Kong and Macao.

d). National Self-Determination: The PRC government asserts that China’s state sovereignty belongs to the Chinese nation as a whole, that is, the more than 1.2 billion Chinese people. Consequently, there can be only one China, with the central government in Beijing as the “sole legitimate government of China” and the only holder of Chinese sovereign prerogatives. Taiwan independence or self-determination of Hong Kong is not permitted because the majority of the Chinese people oppose it. In this way, China not only countered the claims to self-determination of the “rogue regions” with the principle of territorial integrity, but it also sought to claim this principle for itself (its whole people).

These four conceptual dimensions underlying the Chinese conception of state sovereignty touch upon various other policy points. In fact, China’s positivist version of state sovereignty is deeply institutionalized in China’s foreign policymaking process and has long been the basic tenet of China’s foreign policy known as the Five Principles of

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134 See e.g. “White Paper on Taiwan”, ibid.
Peaceful Coexistence. Much of Chinese foreign policy practice, particularly after 1989, has focused on the vigorous defense of China’s own sovereignty and the sovereignty of others. Although every state acts in what it considers to be its sovereign rights and interests, China’s claims of sovereignty are perhaps unusually broad. As the PRC tends to view itself, especially vis-à-vis developed states, as a historically wronged and currently “weak” state, it has a heightened sensitivity to anything threatening its sovereign rights and national interests.

What is more, Marxist jurists in China drew very closely on the Soviet doctrine of illimitable sovereignty in the initial years of the PRC. They rejected the theory that individuals or international organizations could become subjects of international law, a theory deemed by the Chinese jurists as having the effect of denying or devaluing the supremacy of state sovereignty. They also sought to thwart such concepts as “world law” or “transnational law”. They decried these concepts of being nothing less than a conspiratorial scheme to transform international law into a “world legal order”, “world government” or “world state” dominated only by a few capitalist big powers. In the 1960s and 1970s, Chinese writers and diplomats fiercely criticized the theory of “limited sovereignty” which was being developed by some scholars in the West as well as the Soviets (after the Soviet troops took over Czechoslovakia in 1968). For them, the theory

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135 The Five Principles of Peaceful Coexistence were promulgated by Premier Zhou Enlai of China and Prime Minister Nehru of India in 1954, to guide relations between the two states. The Five Principles are: (1) mutual respect for each other’s territorial integrity and sovereignty; (2) non-aggression; (3) non-interference in each other’s internal affairs; (4) equality and mutual benefit; (5) peaceful coexistence. See R. C. North, The Foreign Relations of China (North Scituate, Mass.: Duxbury Press, 1978) at 132.

136 See supra texts accompanying footnotes 116-49 in Chapter Two.


138 Ibid.
of "limited sovereignty" was simply an instrument of U.S. and Soviet Union aggression and superpower hegemony. 140 Instead, the Chinese emphasized the principles of mutual respect for state sovereignty and territorial integrity, non-aggression, non-intervention, sovereign equality and mutual benefit, and peaceful coexistence as the primordial norms of international law. 141

The historical, psychological, and ideological legacy has remained deep in the Chinese national psyche and explains in part why Chinese jurists and diplomats today still echo the above thesis constructed in the early years of the PRC, even though China today faces a very different world order. 142 It is understandable that a nation like the Chinese should wish, and indeed strive, to jealously guard against any erosion, or perceived erosion, of its sovereignty. However, it must be pointed out that, in the Chinese context, there is always a need to distinguish the real from the rhetorical in available written materials because of the highly politicized nature of jurisprudence and the party-controlled press in China. 143 The Chinese conception of sovereignty should not be solely assessed by its rhetoric. In recent years, the intellectual coherence and plausibility of China's sovereignty discourse have been in steady decline, and the postulated nexus between theory and practice is now decidedly tenuous. Chinese writers on sovereignty have shown a reluctance to adapt to the changed domestic and international environment and to come up with a new discourse that corresponds to China's current practice in

139 Ibid.
141 See supra note 135.
international affairs. Their vigorous defense of classical, absolute sovereignty as the basis for international relations is basically an article of faith rather than the result of academic reflection. What is often overlooked in their discussion is that the PRC government has in practice adopted a more pragmatic policy of limited sovereignty governing contemporary international law and relations. For instance, the remarkable economic growth in China over the last twenty years has been made possible by China’s growing engagement with and dependence on the world economic system. And it hardly need be pointed out that the entering into treaties and other agreements with other states and the participation in international institutions such as the UN are themselves factual as well as juridical limitations on China’s sovereignty. 144

Is China still a recalcitrant, realpolitik power that has adapted its outward behavior but has not learned a new way of thinking? Will the Chinese gradually change their perceptions of sovereignty, national interests and China’s place in the international community over the course of reform and open-door policy? The underlying perspective adopted in the thesis suggests that it is not only Chinese behavior within the international community that has demonstrated a more sophisticated pattern than conventional analyses might have suggested, but also new syncretic Chinese ideologies compounded from Marxism and other elements which are being created in the PRC at present, and which may replace outmoded ideology with some successor belief system. 145 It seems necessary to approach the Chinese conception of sovereignty from this same perspective.


one that is intended to rise above the exclusive use of rhetorical referents.\textsuperscript{146} Given the frequent discrepancy between words and deeds in China's legal position, the seeming lack of a new Chinese discourse of sovereignty at present should not be taken to imply that China cannot, or will not, redefine its concept of sovereignty. After two decades of economic reforms and open-door policy, the Chinese policy-makers and intellectuals have become more conscious of the need to observe international law. Even on such issues as human rights while they may continue to reject Western values to varying degrees, they have nonetheless increasingly come to discuss the issues using international legal concepts.\textsuperscript{147} With the emergence of a new world order and its deepening engagement with international society, China is facing an increasing challenge to reconstruct its absolute, positivist conception of state sovereignty to make it correspond to its current domestic and international practices.

2. Chinese Sovereignty Understood from Inside Out and From the Ground Up

One of the purposes of this chapter is to urge a gradual but serious disengagement of the Chinese intellectuals and policy-makers from the mind-set which sees the world as best organized on the basis of sovereign states, supposedly endowed with unfettered

\textsuperscript{146} Perez reminds us that:

"One of the oldest distinctions in philosophical discourse is that between 'words about words' and 'words about things.' Much scholarship among international lawyers and political scientists, as well as table-talk of diplomats and other practitioners concerning the somewhat airy concept of sovereignty, has suffered all too much from a failure to appreciate the confusion that flows from treating a word as though it were a fact."


\textsuperscript{147} See Feinerman, supra note 144 at 186-209.
discretion to order their internal affairs in any way they see fit, and to conduct their external affairs on the basis of the consent of each of the interacting state parties. The task will certainly not be easy. I do not attempt to predict what will happen but rather to project future trends and alternative policy options through a balanced analysis of China's words and deeds. Toward that end, I believe that a more productive approach than briskly rejecting the Chinese rhetoric as self-serving and self-righteous casuistry in an absolutist manner is to engage China on its own terms. At minimum, a country must stand up to scrutiny on its own terms. That is to say, China must be able to withstand criticism of both its theory and empirical practice that is based on premises posited by China itself.

To what extent the Chinese conception of sovereignty is valid in the present stage of international relations is debatable. However, what I would like to point out here is that, although the Chinese rhetoric generally adheres to the classical, monolithic and absolutist sovereignty, its practices have increasingly been confronted with the modern reality of pluralism and diversity. The international system is autonomous in the sense that it exists apart from Chinese participation in it; as a result, it also constrains the PRC's actions in the international community. Given that a new international discourse has emerged which now fundamentally questions the classical, positivist concept of sovereignty in the future of the global order, China is under challenge on a wide variety of fronts related to sovereignty, human rights, regional autonomy, and so on. What are the future prospects and directions of the Chinese conception of state sovereignty? While the tension between its classical doctrine of sovereignty and modern reality is

149 Ibid. at 21-22, 31-32.
increasingly evident in current Chinese practice, it is my submission that the present rhetoric does not necessarily negate the possibility that an open, tolerant and pluralistic form of sovereignty may emerge as the new norm of Chinese political order.

The tension between China's classical doctrine of sovereignty and modern reality is perhaps most evident in its Hong Kong, Macao and Taiwan policy. Both the classical and the modern paradigms are pursued at once. The former is evident in China's consistent claims that its sovereignty over Hong Kong, Macao and Taiwan is indisputable, inviolable and indivisible. The latter is reflected in the fact that China seems willing to "sacrifice" some sovereign prerogatives when coming to the issue of reunification in return for economic benefits and political stability. As observed by Mushkat, the "one country, two systems" formula has created unique political communities (the Hong Kong and Macao SARs) which are not "states" yet possess "stately attributes", not "sovereign" yet "highly autonomous", not "conventional" members of the international community yet respectable "actors" on the international stage.\textsuperscript{150} Although the formula may work reasonably well for most political purposes, the SARs possession of state-like characteristics are incompatible with identifying Chinese sovereignty solely with the central authority in Beijing. By their very nature, the SARs undermine China's monolithic conception of sovereignty. On the surface, they meet the commonly accepted criteria of sovereign statehood – a permanent population; a defined territory; effective government; and capacity to enter into relations with other states and international organizations, as will be discussed in the next paragraph.\textsuperscript{151} Yet, these

\textsuperscript{150} See R. Mushkat, \textit{One Country, Two International Legal Personalities: The Case of Hong Kong} (Hong Kong: Hong Kong University Press, 1997) at 1. [hereinafter "Two Personalities"]

\textsuperscript{151} Ibid.
entities do not possess sovereign status (at least, not sovereign state status) in the international community, and their legal status exists in some sort of theoretical limbo.

One expedient way to dissolve the puzzle, as frequently attempted by Chinese writers, is to claim that the grant of autonomy to SARs is simply an exercise of Chinese sovereignty or an exercise of delegation within Chinese sovereignty.\(^{152}\) According to them, the SARs are not independent entities incorporated into a federal system, but administrative regions subordinate to the central government. “One country, two systems” is not “two sovereigns within one country”, nor even “two competing political entities within one country”. In the final analysis, the Chinese central government retains ultimate decision-making power over the SARs in certain areas, including defence and foreign affairs.\(^{153}\) But, their somewhat formalistic explanation leaves unresolved a number of important questions and, particularly, has little relevance to delineating the present state of Chinese sovereignty. That is, although the Chinese rhetoric of sovereignty assumes that Chinese sovereignty can never be divided, commuted or eroded, the reality is quite the opposite. While lacking formal sovereignty, the Hong Kong and Macao SARs have acquired considerable capacity to take part in international activities independently. Take the Hong Kong SAR for example. The Joint Declaration and the Basic Law grant the Hong Kong SAR extensive authority in the area of foreign relations and participation in international organizations.\(^{154}\) While residual competence in foreign affairs is said to be reserved to the central authorities in Beijing, the specific grants of competence to Hong Kong are significant. Both documents provide that the Hong Kong SAR may on its

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152 See Lane, supra note 56 at 123.
153 Ibid.
154 See generally the Joint Declaration, supra note 2, Annex I: XI; the Basic Law, supra note 28, Chapter VII: External Affairs, arts. 150-57.
own maintain and develop relations and conclude and implement agreements with states, regions and relevant international organizations in the appropriate fields, including the economic, trade, financial, and monetary, shipping, communications, touristic, cultural and sporting fields.\textsuperscript{155} The government of Hong Kong, using the name “Hong Kong, China”, may participate in international organizations, conferences and international NGOs, of which the PRC is or is not a member.\textsuperscript{156} The Hong Kong SAR also may establish official and semi-official economic and trade missions in foreign countries, reporting such missions to the central government for the record.\textsuperscript{157} It has the authority to issue passports to its residents and control immigration to Hong Kong.\textsuperscript{158}

The functions and powers expressly conferred on the HKSAR regarding external affairs are said to be matched by no other non-sovereign, subnational government in the contemporary world. Coupled with the extensive self-governing powers and independent decision-making capacity vested in the HKSAR, this has led James Tang, a noted political scientist specializing in Hong Kong and China, to conclude that Hong Kong is well-qualified to be considered a “quasi-state”.\textsuperscript{159} In a similar vein, Rhoda Mushkat has convincingly demonstrated that the HKSAR has acquired a unique form of international legal personality,\textsuperscript{160} judging from a wide range of factors including “factual ‘stately’ attributes (such as permanent population, defined territory, government); international recognition and ‘legitimacy’; international legal entitlements (e.g. right to self-

\begin{footnotesize}
\begin{itemize}
\item[155] Ibid.
\item[156] Ibid.
\item[157] Ibid.
\item[158] Ibid.
\item[160] Mushkat defines international legal personality as “the ability to act (exercise rights, bear duties) within the system of international law; entities possessing international legal personality are ‘subjects’ of international law.” Mushkat, “Two Personalities”, supra note 150 at 1.
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determination); membership in the "international civil society"; and *sui generis* qualities.”

Moreover, when locating the Hong Kong SAR within a broader constitutional framework, some scholars have even gone so far as to argue that China became a "quasi-federation" under the Basic Law. As we know, a federation divides power vertically between a central government and sub-federal units, and each sub-federal unit is autonomous within its own sphere of competence and is free from any intervention from the central government and other constituent units. The autonomy enjoyed by constituent units of a federation is usually guaranteed by a supreme constitution that is not amendable by either level of government and that is umpired by an independent supreme court. If sovereignty is defined to refer to the holder of supreme power over a given subject matter, then it follows that federations could be referred to as split, layered or shared sovereignties even when the foreign relations power resides entirely at the central level.

The relationship between the HKSAR and the central government in Beijing bears some resemblance to the ties between the central government and the constituent units in a federation. The Basic Law is generally referred to as the constitutional document of the

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161 Ibid. at 3-11.
163 Dikshit writes that:
   "A federation is born when a number of usually separate or autonomous political units (or units with some pretensions to autonomy) mutually agree to merge together to create a State with a single sovereign central government, while retaining for themselves some degree of guaranteed regional autonomy."
164 Ibid.
While some have argued that the Basic Law is merely an ordinary statute that can be repealed or modified by the simple decision of the legislature that enacted it, as a matter of practical reality the situation is quite different. Firstly, the Basic Law seeks to implement the provisions of the 1984 Sino-British Joint Declaration that is a binding international agreement which China cannot easily denounce (in view of the established principle of *pacta sunt servanda* and associated international treaty law rules surrounding the power to put an end to a treaty or treaty-party status). It is inconceivable to assume that China could at will repeal the Basic Law and deprive Hong Kong of its guaranteed autonomous status without breaching its international obligations under the Joint Declaration. Secondly, the Basic Law seems to have a special revered place in current Chinese constitutional discourse and thus may have acquired a near-permanent status. The special status of the Basic Law derives from how people actually view or think of the law. Its entrenched quality is rooted in practice and thus acquires this status through a process that is self-referential: the Basic Law is entrenched because people believe it is.

3. Hong Kong SAR as Split or Shared Sovereignty

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166 See e.g. Ghai, supra note 1; Ng Ka Ling (an infant) & Ors v Director of Immigration; Tsui Kuen Nang v Director of Immigration; Director of Immigration v Cheung Lai Wah (an infant) [1999] 1 HKLRD 315, 1 HKC 291.

167 See A. D. Jordan, “Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region” (1997) 30 Cornell Int’l L. J. 335 at 351. (arguing that “in the Chinese legal hierarchy the Basic Law is merely another . . . national-level law” and thus “is not a mini constitution”). There is no small irony here in that this view of Jordan is identical to the view of the standard British constitutional theory according to which all statutes can be modified or repealed by later Parliaments, and no statute can purport to insulate itself from such future jeopardy. Compare Mushkat, “Two Personalities,” supra note 150, Foreword (holding that “Whatever the outcome,
Although the nature of the regime set up under the Basic Law remains contentious among constitutional scholars, the forgoing discussion affords some preliminary conclusion regarding the present state of Chinese sovereignty: the “one country, two systems” formula can be understood in terms of a notion of split and shared sovereignties that may replace the unitary, indivisible conception of sovereignty. Such a conception substitutes for the traditional notion of absolute and monolithic sovereignty a constructive, empowering conception of Chinese sovereignty. Under the conception, the central government may lay claim to the highest manifestation of sovereignty, leaving the balance of powers to be negotiated with autonomous regional communities. Meanwhile, distinct regional communities could enjoy access to the autonomous spaces created by the concept of split and shared sovereignties. This way of conceptualizing “one country, two systems” anticipates and fulfills an indigenous, pluralistic Chinese conception of sovereignty. By diminishing its high demands of exclusive supreme power and accepting divided and shared sovereignties both internally and internationally, and by focusing on constitution-making procedures, the conceptualization moves beyond the familiar way of thinking to which the Chinese have become accustomed during the last half-century. It replaces the rigid notion of Chinese sovereignty as unfettered authority exercised only by the state with more expansive, pluralistic frameworks able to accommodate the progressive requirements of a multi-centric Chinese nation. China’s sovereignty does not necessarily have to be the monolith from the peak of which the central government

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The implications of the daring ‘one country, two systems’ formula will be profound for every area of Chinese life. 1997 marks the start of the PRC’s experimentation with federalism.”)

168 Ghai points out that:

“Because of the uniqueness of the arrangements established by the Basic Law, it is not easy to categorize the nature of its legal or constitutional regime. However, in order to both to understand and guide the development of institutions and policies as well as the relationship of the HKSAR to the rest of the People’s Republic of China, it is necessary to conceptualize the nature of the regime of the Basic Law.”

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flaunts ultimate authority and under the weight of which autonomous regions are, at best, kept in line and, at worst, crushed. Instead, autonomous regional communities like the HKSAR can flourish within the Chinese constitutional system based on acceptance, and operationalization, of the notion of split and shared sovereignties. Within a generally determined scope, these communities would have the authority to decide political issues and to pursue their national, cultural, social or economic goals, free from interference of the central authority.

At first glance, it is difficult to imagine how the vehemently absolutist and dogmatic outlook of the traditional Chinese concept of sovereignty could be harmonized with the more moderate and pragmatic outlook of the reconceptualized “one country, two systems” formula. For political reasons, the Chinese government would be reluctant to endorse in a formal manner any pluralistic conception of sovereignty and to validate any external (including international) claims on the shape and substance of the internal governing process in China. Nonetheless, the very existence of autonomous regional communities (SARs, national autonomous regions, and so on discussed in Chapters One and Three) necessarily means recognizing a variety of semi-sovereign powers and authorities within its constitutional framework. Although the PRC might theoretically claim a chunk of monolithic, indivisible sovereignty, the practical necessities of domestic and international relations demand concessions to distinct regional communities or other states when it comes to such issues as national reunification, human rights, and so on.

Therefore, a more in-depth analysis requires that one goes beyond China’s rhetorical flourishes and public pronouncements and locate “one country, two systems” in the wider context of China’s language, self-understanding and practice of sovereignty and

See Ghai, supra note 1 at 137.
autonomy. Here, my contention is that the “one country, two systems” policy is made not solely out of cost-benefit calculations about particular circumstances. It also meshes with traditional Chinese self-understandings of international law and politics. As with human rights, the idea of unitary, indivisible sovereignty is, to an important extent, a foreign import into China from the West. Since the Revolution, in order to respond to such Western concepts as human rights, the rule of law and market economy, Chinese Marxists prefer their independent approach, always returning to the basic tenets of Marxism to help justify the official line of the Party and the government. I propose that, now that the traditional notion of sovereignty has increasingly been lacking vision and cogency with reality, that a diffuse and diluted concept has become a credible alternative and that a place for it could be established even within the Marxist camp.

On the philosophical level, it is argued that a pluralistic notion of sovereignty could fit comfortably with Marxist dialectical materialism, which is still the official ideology and an important attribute of the Chinese political and academic elite – leaders of the Communist Party and Marxist theorists – creating and maintaining their identity and unity.169 From the view of dialectical materialism, the nature of the concept of sovereignty resembles closely that of human rights. Both are socially constructed, not discovered – for they are all invented values. Both are embedded in historical process: they have not been with humankind since societies came into being but are relatively new concepts whose contents have changed, are changing and are bound to change in the future. Both concepts are predicated upon a value system, originally and predominantly

that of the West rooted in the moral standards of Judaeo-Christianity and the political economy of modern industrial capitalism originating in and still dominated by the West.

If, as China argues, human rights is essentially "a product of historical development" contingent upon the particular social, economic, cultural and political conditions of certain societies, the same can be said to a greater or lesser extent of sovereignty. In other words, any sovereignty theory justifiable on the terms of dialectical materialism will also have to be a contingent and relative one. As previously noted, the Chinese government vigorously contends that countries with different historical traditions and cultural backgrounds and at different stages of development differ in their perceptions and practice of human rights. As each sovereign state is the appropriate locus for upholding human rights, international law can, and should, be more individualized, paying more attention to the specific characteristics of each society.\(^\text{170}\) This line of reasoning could apply with equal force to the concept of sovereignty itself that is also closely related to specific social, political and economic conditions, as well as to a society's unique history, culture and ideas. Therefore, the notion of a chunk of absolute rights that is monolithic, indivisible, and applied in a uniform manner to all juridically equal sovereigns can hardly stand within the boundaries of Marxist dialectical materialism. Instead, a concept of sovereignty consistent with dialectical materialism has to be flexible, yielding principles which vary in the contemporary world, from state to state and for the same states over time. In other words, it has to be a variable, divisible, and relative hybrid that is capable of fitting countries and regions of different backgrounds, values, and ideas.

\(^{170}\) See Liu, supra note 48 at 224.
Sovereignty features pivotally in Hong Kong’s quest for autonomy and continued protection of human rights, for the current Chinese theory of sovereignty that views sovereignty as a sacred and inviolable principle with overriding primacy does not at all augur well for meaningful and effective protection of human rights and genuine autonomy. A reconfigured Chinese sovereignty as reflected in “one country, two systems” can not only contribute to easing the mosaic of internal and external social, cultural, economic and political tensions besetting the Chinese nation, but also render a significant normative reinforcement to Hong Kong. It represents an erosion of Chinese central-state sovereignty, a decline in the effectiveness of the central authorities, and a corresponding increase in the subnational units’ autonomy (or partial sovereignty). The emergence of SARs in China indicates that under the present-day reality of China, Chinese state sovereignty can no longer be considered as indivisible. As a matter of fact (including legal fact), sovereign powers are split among the central authority and SARs. Alternatively, the state of Chinese sovereignty may lead us to coin the term “sovereignty sharing” if one insists on the philosophical indivisibility of sovereignty. A reconfigured sovereignty reconciles the seemingly conflicting objectives relating to Chinese sovereignty on the one hand with those objectives relating to the preservation of local autonomy and individual rights on the other. Under the “one country, two systems” formula, China’s sovereignty over Hong Kong is evidenced by its control over Hong Kong’s foreign affairs and defense as well as its other broad supervisory powers. In the mean time, it was previously argued that one might reasonably regard the handover as the result of an international agreement and the resulting entity would, at least in part, be defined by the terms of the Joint Declaration interpreted as a treaty. Therefore, the grant
of autonomy and the recognition of Hong Kong’s systems are not merely an exercise of China’s sovereignty on the part of the Chinese government but, at least in part, the results of a constitutive event independent of that power. If so, the logic inherent in the autonomous systems in the HKSAR must prescribe operational limitations on China’s sovereignty over Hong Kong.\(^{171}\) China’s sovereignty should not be summoned in aid as a sort of all-purpose justification for whatever the Chinese government is doing or wishes to do with respect to Hong Kong, because the central government has irrevocably delegated some of its sovereign powers to Hong Kong by means of constitutional legislation as well as international agreement.

In particular, the concept of “split and/or shared sovereignty” helps to boost Hong Kong’s claim for a separate human rights regime. Under the Joint Declaration and the Basic Law, human rights basically fall within the scope of autonomy of the HKSAR and thus are beyond the purview of the central government. If this division of power can be interpreted in terms of “split or shared sovereignty”, then the sovereignty and nonintervention arguments China makes relating to international human rights can be used to argue for China’s obligation not to interfere in Hong Kong’s internal affairs and instead to let the people of Hong Kong enjoy a higher level of human rights protection. As previously noted, the approach China takes to the applicability of international human rights to China is essentially the defense of “situation uniqueness” and the need of international community to respect the “actual situations of a given country”. As such, Hong Kong’s quest for a special human rights regime can be well justified and reinforced by the very arguments China makes to the world about the need to respect the situational particularities of different societies.

\(^{171}\) See Ghai, \textit{supra} note 1 at 149.
Just like the international community, China itself covers an immensely complex and diverse number of communities, religions, languages and cultures. In the reform and the post-Hong Kong handover era it has seen national law, subnational actors, decisional fora, and modes of regulation mutate into fascinating hybrid forms. There has been expansion of regional jurisdictions, exemplified by the establishment of the Hong Kong and Macao SARs. As a result, multiple jurisdictions are arrayed side by side in various geographical locations, such as Hong Kong, Macao, special economic zones, national autonomous regions and the rest of China and comprise a complex blend of legal orders that interact with one another, defining and constraining one another’s power. In light of this background, China can no longer be viewed as a monolithic chunk in which international human rights standards are universally implemented in different regions. Instead, regional human rights regimes more appropriate for upholding human rights are taking shape.

In the Hong Kong case, the HKSAR is vested with the authority to safeguard the rights and freedoms of Hong Kong residents according to the Basic Law and constitutes a quasi-sovereign jurisdiction to some degree independent from the rest of China. Correspondingly, the HKSAR is as much entitled to the right to non-intervention vis-à-vis the rest of China in the field of human rights as China is vis-à-vis the rest of the world. It is neither appropriate nor workable for China to measure up to its own human rights criteria or models and demand Hong Kong to comply with them. Since most of

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172 See generally Chapter Three.
173 In China’s White Paper on Human Rights, the Chinese government states that “the evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations, and involves a process of historical development. Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights. From their different situations, they have taken
China's national laws, including human rights provisions and mechanisms for their enforcement in the Chinese constitution, derive from fundamentally different economic, political, social and legal conditions from Hong Kong's, they should not be applied to the HKSAR. Instead, the rights provisions, procedures and institutions set forth in the Basic Law are specifically tailored for Hong Kong in accordance with its societal particularities and thus are best suitable for enhancing Hong Kong people's enjoyment of human rights.

**Conclusion**

The above argument for a robust, special human rights regime in the HKSAR draws on normative resources embedded in the “one country, two systems” concept in order to hold the Chinese government to its declared commitment to international human rights norms in relation to Hong Kong. It conceptualizes “one country, two systems” as a pluralistic conception of Chinese sovereignty, that is, “split or shared sovereignty”. It is demonstrated that a concept of “split or shared sovereignty”, as implied in the “one country, two systems” formula, creates new normative spaces conducive to the simultaneous consolidation of regional autonomy and human rights in the HKSAR far

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174 Article 18 the Basic Law provides that:

“National laws shall not be applied in Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The Laws listed therein shall be applied locally by way of promulgation or legislation by the Region.”

The Basic Law, supra note 28, art. 18.

175 Chinese vice-premier Qian Qichen once declared that “[t]o ensure and protect human rights is an essential part of a nation’s social policy. My government makes it a basic policy to constantly enhance the people’s enjoyment of human rights commensurate with our economic and social development.” See “Speech of the Deputy Prime Minister and Minister for Foreign Affairs of the PRC at the 8th Meeting of the
more than it justifies coercive intervention from China. It helps to come to terms with the division of power between Hong Kong and China and to find a way in which China’s sovereign power in Hong Kong might be limited in a way that can be acceptable to China itself. Such a theoretically-possible and enlightened construction of "one country, two systems" is meaningful and may be effective in changing China’s attitudes and policies towards Hong Kong, because it derives from and meshes with China’s self-understanding of and approaches to human rights, international law and its own internal jurisdictional order.

Chapter Five: "One Country, Two Systems" as a Form of Autonomy for Distinct Territorial Communities

Introduction

This chapter continues to explore possible alternative formulations of the basic normative principles underlying the "one country, two systems" concept. Thus we are brought to the second aspect of "one country, two systems": the preservation of Hong Kong's autonomy. As previously discussed, although both the Joint Declaration and the Basic Law itemize in considerable detail how the HKSAR will be run as an autonomous system, these are far from foolproof guarantees that the "one country, two systems" formula will be a success. Contradictions are inherent between the principles of "one country" and "two systems" and conflicts between the HKSAR and the central authorities are bound to occur.

In what follows I attempt to put Hong Kong within the wider context of China's approach to internal diversity for different regions and ethical groups. I try to offer new perspectives on the legal and political implications of "two systems" and furnish a conception of "two systems" that is grounded in constitutionalism and pluralism. I then relate that conception to autonomy and human rights protection in Hong Kong. Before I turn to Hong Kong's case, I first examine the concept of autonomy that is essential to any adequate account of Hong Kong's autonomy.

I. Autonomy in Theoretical and Comparative Perspectives
Across the globe minority groups are asserting their distinctive ethnic, religious, linguistic, or cultural identity and demanding greater control over the expression of that identity, not only in cultural and social matters but in political and economic areas as well. The most familiar form of their struggles for recognition is the claims of minority groups to be constitutionally recognized as either independent nation states or as autonomous political entities within various forms of multinational states. The sweep of minority/separatist movements has created political instability in many areas, with consequences that are not yet fully understood. In many of those cases, absolute stances — either separatism or forced unity on the majority’s term — unleash virulent forms of nationalism on the parts of both majority and minority groups that used to be contained within a strong multinational state. Like many political communities when their very survival is threatened, nation-states controlled by majority groups frequently resort to repressive measures to insure their continued dominance, spawning prolonged and often

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1 A widely-cited definition combining objective and subjective characteristics defines a minority as a:
“group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members — being nationals of the State — possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”


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violent opposition from the disaffected minorities. Recent examples include the bloody civil wars in former Yugoslavia and the breakaway republic of Chechnya in Russia.

Nowadays, group recognition and accommodation have become one of the most difficult and pressing questions of the political era that we are entering at the beginning of the 21st century. On the theoretical level, greater attention has been given to the issues of minority and indigenous rights, reflecting a belief in the importance of preserving one's identity both as an individual and as a member of a group. Related to this is a growing consensus that diversity and pluralism are, in themselves, worthwhile goals to pursue. On the practical level, the need to search for solutions to the demands of minorities has led to various attempts to explore flexible mechanisms under which the goals and aspirations of minority groups can be satisfied while preserving the existence of states and their territorial integrity. Regional autonomy is one of those mechanisms that has increasingly been recognized in very different contexts as a means for diffusion of powers in a way that preserves the unity of a state while respecting the diversity of its population.

In her authoritative book on autonomy, Lapidoth defines territorial autonomy as follows:


6 See Hannum, supra note 1 at 3-49; Kelly, supra note 1 at 212-19.


8 See Hannum, supra note 1 at 123-332; Lapidoth, supra note 7 at 99-168.
A territorial political autonomy is an arrangement aimed at granting to a
group that differs from the majority of the population in the state, but that constitutes the majority in a specific region, a means by which it can express its distinct identity.  

In a similar way, Crawford holds that “[a]utonomous areas are regions of a State, usually possessing some ethnic or cultural distinctiveness, which have been granted separate powers of internal administration, to whatever degree, without being detached from the State of which they are part.”

Hannum and Lillich are of the opinion that “[a]utonomy and self-government are determined primarily by the degree of actual as well as formal independence enjoyed by the autonomous entity in its political decision making process.” For Hannum, there is inherent tension between the obligation of every society to recognize pluralism and diversity and the desire of every culture – whether majority, minority, or indigenous – to perpetuate its values and enforce conformity. Accordingly, “[t]he appropriate role of the state is to mediate between these competing forces, setting the parameters within which the resulting conflict will be creative rather than destructive.” Under circumstances where full secession may not be viable, autonomy, by virtue of its potential adaptability, can offer a compromise between full independence claimed by minority groups and substantial integration claimed by heterogeneous nation-states. By emphasizing internal power-sharing, through aspects of federalism and local autonomy, over external secessionist self-determination, autonomy provides multinational states a path to

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9 Lapidoth, ibid. at 33.
12 Hannum, supra note 1 at 13.
continued viability. On the other hand, acquiescing in internal self-government offers the recognition, sovereignty, and identity that minority groups crave without breaking apart the states so those groups can achieve formal independence in what might prove to be unviable nation-states of their own.\textsuperscript{14}

One of the great advantages of autonomy is perhaps its flexibility. A wide range of options for constructing autonomous regimes are available as models and specific contextual factors can be taken into account in selecting the most appropriate options, melding them, and modifying them as necessary.\textsuperscript{15} Further, autonomy need not be confined to states that are constitutionally divided into different jurisdictional units. Autonomy can arise when individual communities in a federation or confederation share some sovereign authority with a central government, while retaining some degree of independence (e.g., the Swiss cantons). Alternatively, it may devolve in a unitary system where the central government surrenders certain authority to regional territorial communities (e.g., the Basque country and Catalonia in Spain).\textsuperscript{16} Whatever the abstract constitutional nature of a state, a main issue involved in the establishment of an autonomous regime is the relationship between autonomy and sovereignty. As previously demonstrated, the traditional absolutist concept of sovereignty, which is already eroding, must be seen in a new light so that it can be shared between the national-level jurisdiction and the autonomous territory. The powers of the autonomy are usually related to such basic issues as language, education, access to governmental civil service, including police and security forces, and social services, land and natural

\textsuperscript{13} See \textit{ibid.} at 123-27; Lapidoth, \textit{supra} note 7 at 9-23.
\textsuperscript{14} See Hannum & Lillich, \textit{supra} note 11 at 889
\textsuperscript{15} See \textit{ibid.}; Lapidoth, \textit{supra} note 7 at 33-36.
\textsuperscript{16} See Hannum & Lillich, \textit{supra} note 11 at 858.
resources, and representative local government structures. There are, however, different degrees of autonomy, and the extent of local self-government can range from a minimum (local councils with authority over minor issues within the municipality) to a maximum which comes close to full sovereignty (such as Greenland ‘in’ Denmark). Generally, the responsibility for national defense and the authority to conduct foreign affairs are reserved to the sovereign, although the autonomous territory may be granted specific authority to enter into international agreements with limited areas of competence and subject to the approval of the sovereign.

II. The Nature and Issues of “Two Systems”

1. “Two systems” as a Distinct Form of Regional Autonomy

According to Lapidoth, while in the majority of the cases the resort to regional autonomy is caused by ethnic tensions, other circumstances may also call for the establishment of autonomy. In her view, the primary reason for the establishment of the special administrative regions in Hong Kong and Macao is “economic”. Professor Ghai of Hong Kong University shares this view. Ghai points out: “On the whole, the ‘Two Systems’ have been seen largely in economic terms, socialism on the mainland

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17 See Hannum, supra note 1 at 458-68. (discussing the content of autonomy)  
18 See Lapidoth, supra note 7 at 33; Hannum & Lillich, supra note 11 at 218.  
19 See Hannum & Lillich, ibid. at 873-74.  
20 Ibid.  
21 Ibid.  
22 On this point, Ghai holds that “the basis of HKSAR’s autonomy is different from many other examples where it is founded in the accommodation of social, cultural or ethnic diversity.” Y. Ghai, Hong Kong's
and capitalism in Hong Kong," although the autonomy is "not restricted to the economy alone." In fact, it is a consensus among most commentators that China allowed the capitalist system of Hong Kong to continue in order not to jeopardize the economic benefits that it derived from Hong Kong. To some extent, to be sure, the desire of China to maintain Hong Kong’s stability and prosperity was the driving force behind the creation of the HKSAR. The general idea was to uphold socialism on the mainland, while temporarily accepting capitalism and allowing special autonomy in Hong Kong as an inducement for Hong Kong people’s acceptance of Chinese rule. And it is probably true that, after the handover, the convergence of interests between China and Hong Kong is perhaps the best guarantee for the preservation of autonomy in the HKSAR. But there is more to the “two systems” policy’s origin than political economy. One of the arguments I made in the previous chapters is that a conceptualization of “one country, two systems” cannot be adequately formulated within so limiting a framework. A more adequate study requires that we interpret “one country, two systems” in a wider context. Moreover, in order to gain an insight into the nature and function of autonomy in Hong Kong, we need to put the “two

New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law (Hong Kong: Hong Kong University Press, 1997) at 140.

23 Ghai, ibid. at 141. Article 5 of the Basic Law provides that “[t]he socialist system and policies shall not be practised in the Hong Kong Special Administrative Region and the existing capitalist system and way of life shall remain unchanged for 50 years.” The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, adopted on 4 April 1990 by the Seventh National People’s Congress of the People’s Republic of China at its Third Session, reprinted in Ghai, supra note 1 at 535-70. [hereinafter the Basic Law]

24 In the early 1980s when the reversion of Hong Kong was under negotiations between Britain and China, China was in the initial phase of its policies of economic reform and reaching out to the developed West. Chinese leaders were fully aware that the preservation of Hong Kong’s prosperity and stability would greatly benefit China’s economic development and the implementation of the reform and open-door policies. In contemplating resumed Chinese sovereignty, they introduced the concept of “one country, two systems” and associated notions of “Hong Kong people ruling Hong Kong” and “a high degree of autonomy” to win the support of international investors and the Hong Kong people. See generally text accompanying supra notes 50-73 in Chapter One.

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systems" policy in an evolutionary perspective. The reason is because the policy has established a dynamic, interactive system, rather than a fixed mode of distributing power, rights and duties, and thus its actual contours are beyond conventional, static analytical methods. I argue that the granting of autonomy to Hong Kong goes beyond mere economistic and strategic exercises in building credibility and confidence or a reluctant concession by China in order to keep the "duck" (Hong Kong) laying the "golden eggs". Instead, there are a variety of historical, ideological, and cultural factors, together with political and economic factors, that underlie the formation and operation of the "two systems" formula. All these factors have to be taken into consideration in any normative assessment of what the concept of "one country, two systems" stands for. And it need be kept in mind that very real local cultural and ideological structures are part and parcel of what might otherwise be simply looked at as a different economic and political "system".

In my view, the most notable point about the "two systems" concept is that it permits a greater degree of autonomy than existing alternative arrangements with China, such as national regional autonomy. In doing so, the Chinese Communist Party leadership has made a great concession ideologically and politically. Since Deng Xiaoping brought about the concept in late 1970s, many Chinese scholars and officials have struggled to find a theoretical basis for the "one country, two systems" concept from the viewpoint of Marxism-Leninism. The major theoretical framework of the

25 There is a common belief in the saying, "China would never strangle the 'duck' (Hong Kong) that is laying the 'golden eggs'."

concept can be gleaned from the following statements, made by Huan Xiang, a leading Chinese political scientist:

Based on the theory of historical materialism, those superstructures as the political and legal systems are built on an economic base. During the very long historical period before socialism can be realized, a variety of forms of economy will exist; that is to say, there will be a process under which the capitalist system and the socialist system will coexist. Since the economic base in a country will decide its social and political life, the concept of “one country, two systems” should be viewed in the light that while a certain production mode and political and legal systems suited to it are regarded as the main body in a country, other production modes and the political and legal systems suited to it that have been handed down from history in individual areas should be allowed to continue to exist.²⁷

Huan, as with other Chinese theorists who engaged in discussions on “one country, two systems”, did so mostly out of political motivations and his interpretation was intended mainly for propaganda purposes. Therefore, an internal reading of the text, trying to uncover the logical consistencies of the text, needs to be complemented by an external reading, which attempts to locate the text within a broader sociopolitical and cultural framework.

The concept and practice of “two systems” have been conditioned by the country’s past, encompassing its culture, traditions, values, by its contemporary political and economic development as well as by the political concerns of its leaders. In a sense, it embraces a commitment to constitutionalized pluralism and autonomy for distinct regional communities. The notion of constitutionalized pluralism is used here to

²⁷ Huan, *ibid.*
refer to a state which: (i) is constitutionally unitary by being under a single supreme political authority, i.e. a sovereign state; but (ii) consists of distinct regional communities within its boundaries that have been granted autonomous powers of internal administration short of full independence. Its extent can range from federalism to different forms of regional autonomy, or merely the delegation of powers to a municipal authority with expanded authority. The label or form should not matter as long as a central government agrees to power-sharing and leaves certain local matters in the hands of localities. As discussed in Chapter Three, one might suppose that pluralism, which refers to the diversification of power and the existence of a plurality of organizations, institutions, and autonomous communities, essentially does not exist in today’s China. A closer look at the current situation in Chinese politics, however, demonstrates many contrary patterns. As China has been hard-pressed from within to adopt norms of pluralism because of pressures to solicit support and maintain legitimacy among a broader array of institutions, ethnic/cultural communities and regions, the country appears to be heading towards greater decentralization, diversity and regional autonomy and weaker central authority.

The integration of Hong Kong with China can be seen in this broad context. Given that the points of undeniable contrast and possible incompatibility between the “two systems” that are formally integrated in “one country” are wide-ranging and fairly fundamental, the establishment of the HKSAR looms as a defining moment for the development of constitutional pluralism in China as a whole. Under the “two systems” formula, China permits the HKSAR to determine to a significant extent the ends that it will pursue and the means by which it will accomplish those ends. Implicit in these
arrangements is the understanding that the retention of these choices by the HKSAR will produce diversity – that, given the opportunity, Hong Kong will order its affairs in ways different from elsewhere in China. Thus, the “two systems” concept can be interpreted to serve the ends of both generalized pluralism and the specified, contextually-determined autonomy of Hong Kong. The particular philosophical conception advanced here is one based predominantly on the need to take diversity and pluralism as such to be values worth protecting and promoting, as contrasted to a presumption that uniformity and homogeneity are desirable and autonomous regimes begrudging pragmatic concessions. On this conception, the “two systems” concept both reflects and encourages pluralism, and autonomy becomes more of an end in itself. In this optic, autonomy is seen as healthy and, in some enabling sense, a healthy autonomy becomes more likely.

What is more, underpinning the “two systems” formula are changes in thinking about the appropriate approach to internal diversity within the Chinese state. Since the late 1970s, the policy rhetoric of the Chinese government has affirmatively embraced an element of pluralism and characterized special administrative regions with different systems as a source of enrichment conducive to national unity rather than division for the Chinese state.28 This, coming from a country with a long history of centralized,

28 According to the theoretical journal of the Communist Party, Hong Qi:
“The concept of ‘one country, two systems’ recognizes both the abuses of capitalism and its positive role in a certain historical stage, considers both the history of Hong Kong and its current state, upholds the socialist principles, the unity of the motherland, the interest of the state and the people, and the adherence of China’s main part of socialism, while advocating the flexibility of seeking truth from facts, and on the basis of following the socialist principles, gives attention to Hong Kong’s special conditions and the interests of all sides, and permits it to preserve capitalism for an extended period and remain independent to a certain extent.”
hierarchical and unitary political systems, can be sensibly interpreted to be grounded in a sense of tolerance and even respect for diversity. Martha Minow distinguishes these two levels of acceptance of pluralism in the following terms: "Tolerance is a political and psychological stance toward varieties of viewpoints, customs, and behaviors that signals passive acceptance and that allows that variety to exist without interference or disapproval," while respect for cultural diversity is "a more active demand than tolerance, for it may call for accommodation of subgroup practices and therefore changes in dominant institutions." Tolerance and respect for cultural diversity here become models of embracing pluralism. In Hong Kong's case, the existence and viability of Hong Kong's autonomy to some extent rest on the degree of acceptance on the part of China. China's institutionalized attitudes are an essential precondition for, as well as a component of, the "two systems" concept. This does not necessarily mean that China can act arbitrarily without regard for its legal obligations under the Joint Declaration and the Basic Law. But, in reality, it is underlying political and social attitudes and values which can easily defeat or frustrate declared policies and formal legal principles. That is particularly true in the Chinese context. Therefore, mutual trust - whether grounded in more minimal tolerance or more maximal respect - is a principle for a smooth operation of the "two systems" arrangement. It is safe to say that, when China is convinced that "two systems" is not only a practical instrument to achieve its overall objectives but also a worthy political, economic and social goal, Hong Kong's autonomy will have a much better chance of success. At minimum, tolerance must be

the predominant mode for China/Hong Kong relations, but the ideal is for this to deepen into a more active respect for cultural diversity.

Questions arise as to whether it is possible to use the Hong Kong model to fashion political integration and stability in the Greater China area, thus maintaining the integrity of the Chinese state, while at the same time satisfying the interests and regional aspirations of some subnational units within it. As noted in Chapter Two, the Chinese state is far from being heterogeneous. A wide range of groups, communities and regions of diverse ethnic, cultural, economic and political backgrounds not only coexist within the country but also closely interact with and influence each other. As various groups and communities in China are increasingly demanding recognition of group identity, distinctiveness and autonomy, their struggles intersect with each other in many different ways. Unfortunately, these demands and struggles are generally classified as different in kind and studied by different specialists. When it comes to Hong Kong, few writers are prepared to compare Hong Kong's quest for autonomy and human rights in any systematic way with the aspirations of other distinct groups and communities in China for constitutional recognition and autonomy. Seen from another angle, however, many of the problems relating to Hong Kong's integration with China are not peculiar to Hong Kong, even if they may find here their most advanced expression. If sharp boundaries are drawn around each of these different cases of diversity and recognition on the basis of their dissimilarities resulting in them being studied separately, as is usually the case, then the similarities among them are overlooked. When they are rearranged and grouped together as examples of both historically-located and evolving politics of constitutional recognition, their disregarded resemblances can come to light.
Among the many similar aspects is a longing for autonomy appropriate to the recognition and accommodation of diversity and distinctiveness. The forms of autonomy may vary. Some, such as the people of Hong Kong and Macao, strive for their own autonomous entities and distinct identity. Others may seek to participate in the existing institutions of the dominant society, but in ways that recognize and affirm, rather than exclude, assimilate and denigrate, their culturally diverse ways of thinking, speaking and acting. But, their aspirations and demands are not only mutually consistent but also mutually supportive. In time, the "one country, two systems" formula for Hong Kong could become an attractive example to some cultural/ethnic groups in China who would wish to emulate some if not all of Hong Kong’s autonomous institutions including its system of government and freedom under the law. Take Tibet for instance. The Tibetan government-in-exile, headed by the Dalai Lama, is committed to a peaceful solution to the Tibet question. The Dalai Lama has proposed that Tibet relinquish its claim for independence and become “a self-governing democratic political entity, in association with the People’s Republic of China”. 31 Under his proposal, Tibet would gain a high degree of autonomy and have the right to decide its own internal affairs, a special constitutional status similar to what Hong Kong and Macao now enjoy. The concession made by the Dalai Lama goes some way towards meeting China’s precondition for negotiation: that it is only if the Dalai Lama abandons his demand for Tibet independence

30 See generally Chapter Three.
that any form of settlement can be discussed. In view of the ongoing violence which has accompanied the collapse of the Soviet Union and Yugoslavia, autonomy for Tibet offers a possibility of an optimal solution in the interests of both sides – in other words, one achieved through negotiation and compromise.

In short, the “one country, two systems” formula can become a useful instrument for minority groups in China to propose governance arrangements that ensure their continued existence and distinctiveness. In order to do so, the “one country, two systems” concept has to be understood broadly, not only as a particular political arrangement but as both a perspective on political life and a bundle of normative principles as well. Rarely has a pluralistic constitutional arrangement been designed with the sort of foresight that facilitates relatively frictionless coexistence of various groups within one country in a context where a conflictual outcome was at least possible. Certainly the former Soviet Union and Yugoslavia were not. Countries such as Canada and Belgium also stand as reminders of how difficult pluralistic federation may be to achieve, even among tolerant and democratic peoples. Moreover, a focus on general perspective and normative principles is crucial not just in order that one particular experiment can generate a model for other areas. This more generalized focus can also be crucial as a way of viewing and handling the specific arrangement itself, as specific arrangements which have functioned well for some periods may turn out to be unsatisfactory or conflict-generating at a later stage when internal or external conditions have changed.

These observations indicate that finding approaches which will solve all problems, at all times, is virtually impossible. But, this is not to say that constructive approaches cannot be found. There are approaches that are inherently flexible so that they may be
adjusted according to the particularities of different countries, where there are many kinds of minorities or groups, with varied needs and with greater or lesser justifications for the claims they make. The choice of approaches should depend on the nature of the problem faced and allow for wide variation in application.\(^{32}\) And the merits of approaches should also be judged in terms of variations and adjustments needed over time with respect to a given area, and not only variations as between areas.

In summary, the “one country, two systems” formula – and the experience, positive and negative, generated by its application – can be considered a potentially constructive, flexible approach to internal diversity, whose rhetoric and underlying rationales can lend support to the development of policies of group accommodation such as regional autonomy regimes or other cultural/ethnic minority protection mechanisms in China. For minority groups and communities, “two systems” can be interpreted as self-government whereby important choices are made at a level where members of distinct groups and communities can feel a sense of political efficacy. Its rhetoric may be used to foster self-rule and choice, to encourage pluralism, and to allow distinct communities to devise their own goals and experiment with their own ways of achieving them.

2. Establishing An Autonomous Regime in Hong Kong: Issues to Consider

While the “one country, two systems” concept may have the potential to become a nuanced and participatory model for internal diversity, one capable of encompassing the

\(^{32}\) See Lapidoth, \textit{supra} note 7 at x, 33-36.
very diverse meanings of autonomy implied in the challenges to the Chinese state from below and within, some cautions demand mention. As in most of the world, statements of minority policy are more often than not at least as aspirational as they are descriptive. It would be a mistake to confuse the rhetoric with a statement of the current reality. The same is true of China's ethnic/cultural minority policies. Of China's two goals in settling the Hong Kong question - regaining sovereignty ("one country") and maintaining Hong Kong's stability and prosperity ("two systems") - the second goal is perhaps the more difficult to achieve. It sets to integrate two systems within one country where the two systems are fundamentally different in values and in the way things operate. Before Hong Kong's reversion to Chinese sovereignty, Hong Kong and China had followed distinctly different paths of development. Hong Kong was a British colony characterized by clean and efficient government and the rule of law; China was an authoritarian communist state marked by one-party rule and years of internal political repression and social turmoil. Hong Kong was a hub of laissez-faire capitalism and prospered as a free port and international financial center; China was one of the largest command economies in the world which was on the brink of collapse in the 1970s. In the early 1980s, economic reforms and the "open door" policies in China narrowed the gap between Hong Kong and China as the two economies became increasingly integrated.33 "Their relationship, however, remained largely one of convenience."34

The signing of the Sino-British Joint Declaration in 1984 marked the beginning of a new China-Hong Kong relationship. While the Joint Declaration sketches a

constitutional framework for bringing the two sets of seemingly antithetical economic, political, and legal systems within the institutional structure of a single sovereign state, the points of undeniable contrast and striking differences between the "two systems" remain wide-ranging and fairly fundamental. Even if one discounts the basic dichotomy of communism versus capitalism, there are sharp discrepancies between today's mainland China and Hong Kong in terms of: levels of socio-economic development, income, ways of life, world views, and legal, political, economic systems, and administrative practices. Not surprisingly, the constitutional framework has been greeted with no small measure of skepticism by many Hong Kong residents. It also raises many constitutional and jurisprudential questions in respect of conceivable sources of control, influence or interference that range from the general-ideological to the more specific-legalistic. In the following discussion, I examine some of the unsettling issues relating to Hong Kong that are likely to be the testing ground for the "one country, two systems" formula.

1). The Relationship between Regional Autonomy and Individual Human Rights

Hong Kong's autonomy may be understood as both structure and substance, the latter introducing the question of relationship to individual human rights, a subject of great concern and frequent comment.
At present, international law scholars are divided on whether a right to autonomy for minority groups exists under international law. Hannum foresees a right to autonomy which “recognizes the right of minority and indigenous communities to exercise meaningful internal self-determination and control over their own affairs in a manner that is not inconsistent with the ultimate sovereignty... of the state.” In his view, autonomy “lies at the end of a progression of rights”. In the mean time, the right to autonomy - in the form of protection of linguistic and educational rights, control over land, natural resources or the opportunity for local group authority to address primary local concerns - “cannot replace or subvert the right of individuals of either the minority or majority,” and “recognition of minority rights should not be an excuse for abandoning the fundamental principles of non-discrimination and equality before the law.” Many other scholars do not agree with Hannum’s theory, holding that except for “peoples”, international law has not yet established a general right to autonomy. For instance, Steiner is of the opinion that a right to autonomy does not exist, although in certain situations autonomy may constitute “a practical necessity”. Mushkat points out that Hannum has offered little scope for a serious inquiry into the right asserted. “No coherent scheme of justification is erected (to allow delineation of the claim as ‘right-

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35 See e.g. H.J. Steiner, “Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities” (1991) 66 Notre Dame L. Rev. 1539 at 1547; Lapidoth, supra note 7 at 175-77. Compare Hannum, supra note 1 at 473-74.
36 Hannum, supra note 1 at 473-74.
37 Ibid. at 474.
38 Ibid.
40 See Steiner, supra note 35 at 1547.
based", "duty-based" or "goal-based"), nor are the values and principles underpinning the
detail of such a right disclosed (to facilitate a proper appraisal of the theory).\textsuperscript{42}

Although consensus has yet to be reached among international law scholars on the
above-mentioned question, some preliminary observations can be made about the
relationship between autonomy and individual human rights in the Hong Kong context.
Firstly, in the "two systems" package China offers to Hong Kong, the right of Hong
Kong people to a high degree of autonomy is explicitly guaranteed in the constitutional
documents of the HKSAR.\textsuperscript{43} On the individual level, rights and freedoms previously
enjoyed by the inhabitants of Hong Kong shall be ensured by the law and remain
unchanged for fifty years from the handover under the Basic Law.\textsuperscript{44} Therefore, it can be
argued that Hong Kong's autonomy or the "two systems" arrangement presupposes
individual rights and freedoms. Whenever these rights and freedoms are recognized and
protected for individuals, the people of Hong Kong as a whole enjoy the right of
autonomy; whenever these rights and freedoms are trampled upon by the central
authorities or the SAR government, the right of the people of Hong Kong to autonomy is
infringed. Secondly, Hong Kong's rights of autonomy flows naturally from individual
rights, because certain individual rights, such as education or democracy, can only be
exercised or fully exercised collectively. Therefore, autonomy must be a constitutional
norm (right) in its collective as well as in its individual dimension. Thirdly, the discourse
of Hong Kong's autonomy is one of reciprocity: rights of individuals and autonomous
rights of the Hong Kong people as a whole buttress and sustain each other. Individual

\textsuperscript{42} Ibid.
\textsuperscript{43} See the Basic Law, supra note 23, art. 2.
\textsuperscript{44} Ibid., arts. 4, 6, 24-42.
human rights in the full sense is the measure of autonomy which in turn is a language that gauges observance or denial of rights.

In short, the relationship between Hong Kong’s autonomy and individual human rights can humanize the former and lend to the latter a powerful language to harness the totality of Hong Kong people’s demands for and aspirations to their continued distinct identity and way of life.

2). Judicial Independence and the Constitutional Jurisdiction of the Hong Kong Courts

The legal and institutional structure of the HKSAR was constructed after years of negotiation and conflict between and among China, Britain and a variety of forces in Hong Kong for bringing two sets of economic, political, and legal systems of striking difference within the legal and institutional structure of a single sovereign state. As previously discussed, it has persistently been a grave concern to many people whether the “two systems” structure will provide a mechanism for effecting a transformation from colony to SAR that is compatible with China’s interpretation of the requirements of sovereignty and that also delivers on the promises of continuity and autonomy indispensable to Hong Kong’s continuing success. The answer will lie in what happens during these first years following the handover when the legal and institutional arrangements constructed to contain their interaction are being tested day to day. Faced with the force of events and the inescapable demands of making concrete decisions concerning politics, law, and governance for the territory, those ruling the HKSAR will
have to determine what the formally prescribed norms, rules, and structures of the SAR will mean in practice.

One of the core issues here is to determine the degree of discretion that the HKSAR can enjoy in relation to matters that are nominally within its jurisdiction and the degree of control that Beijing will seek to exercise in practice. Many have been trying to answer these questions from different theoretical perspectives – but this will still amount to little more than a sketch to guide still-needed extensive empirical and normative research. The reason is because it is not an easy task to reflect on law and politics in a political community in transition. The situation is volatile and positive developments (if there are any) are more often than not counter-balanced by immediate backlashes. Another problem stems from the intensive legal and political processes in which a legal or political act which may seem extremely important today is often overshadowed by subsequent development. Moreover, behind the formal structure there are informal processes of bargaining, negotiating, manipulating, and lobbying leading to feasible policies and solutions, which reflect a compromise or consensus among diverse and often conflicting interests of Hong Kong and China. On this view, then, a period of China-HKSAR interaction, and HKSAR practice, following the handover will tell us a great deal about what Hong Kong may remain free to pursue and develop in its own way and what it is that the two parties must be willing to embrace together.

Three and a half years have passed since the handover. In the short life of the HKSAR, while there may be grounds for optimism in other areas, some serious issues relating to Hong Kong’s legal system and judicial independence have remained the source of great controversy. This is illustrated by some recent court cases of legal
importance. In early 1999, nineteen months into the operation of the HKSAR, Hong Kong found itself facing a major constitutional crisis when Chinese officials, constitutional experts, and pro-China figures in Hong Kong opened fire on a landmark ruling of the Hong Kong Court of Final Appeal (HKCFA) issued on 29 January 1999. In *Ng Ka Ling (An Infant) and Others v. the Director of Immigration*, the court for the first time was faced with two important constitutional issues “of momentous importance for both the future of the people involved as well as the development of constitutional jurisprudence in the new order”. How they were answered would determine the shape and dimensions of Hong Kong’s human rights, judicial independence, the rule of law and political autonomy. Essentially, the cases centered on two controversial issues: (a) the right of abode for the mainland children of SAR permanent residents, especially those born out of wedlock or born before one of their parents qualified as a permanent resident; and (b) the constitutional jurisdiction of the HKSAR courts, especially in regard to the legislative acts of the National People’s Congress (NPC) and its Standing Committee.

As far as the right of abode issue is concerned, the articles of the Basic Law in dispute are Articles 24 (2), 24(3) and 22(4). Article 24(2) provides that permanent residents of the HKSAR shall be:

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45 See “Beijing Says Abode Ruling Was Wrong and Should Be Changed,” *South China Morning Post*, 9 February 1999; “Clarification Urged to Ease Beijing’s Fears,” *ibid.;* A. Ho, “It’s Time for Tung to Defend Our Rights,” *ibid.*

46 *Ng Ka Ling (an infant) & Ors v Director of Immigration; Tsui Kuen Nang v Director of Immigration; Director of Immigration v Cheung Lai Wah (an infant) [1999] 1 HKLRD 315, 1 HKC 291.[hereinafter Ng Ka Ling].

47 See generally *ibid.*

48 The Basic Law, *supra* note 23, arts. 24 (1), (2) and (3), art. 22(4).
(1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region (SAR).

(2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region.

(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories 1 and 2.

(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;

(5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and

(6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.49

Article 24(3) provides that permanent residents shall have the right of abode in Hong Kong and shall be qualified to obtain permanent identity cards which state their right of abode.50 Meanwhile, Article 22 (4) reads that, for entry into the HKSAR, people from other parts of China must apply for approval. Among them, the number of persons who enter Hong Kong for the purpose of settlement shall be determined by Chinese authorities after consulting the Hong Kong government.51 These provisions, in turn, raised two questions: (a) whether mainland children of Hong Kong residents, who were born before one of their parents became permanent residents or were born out of wedlock, have the

49 Ibid., art. 24.
50 Ibid. art. 24, para 3.
51 Ibid. art. 22, para. 4.
right of abode in the HKSAR provided for in Article 24 (2); (b) whether the entry into
Hong Kong of mainland residents claiming right of abode under Article 24 (2) is
conditioned on Article 22 (4). In short, the issue became whether Article 22(4) imposes a
restriction on the exercise of the right of abode of those mainland residents who seek to
enter Hong Kong, or have already entered, from mainland China for the purpose of
settlement. Shortly after the handover, the Provisional Legislative Council enacted the
Immigration (Amendment) (No. 2) Ordinance and the Immigration (Amendment) (No. 3)
Ordinance.52 The No. 2 Ordinance excluded mainland children born to parents who did
not have permanent resident status at the time of birth and children born out of wedlock
from the right of abode entitlement. 53 The No. 3 Ordinance of 10 July 1997 was deemed
to have come into operation on 1 July 1997 and introduced a new scheme to deal with
children born to parents of Hong Kong permanent residents.54 Under this scheme, a
person's status as a permanent resident can only be established by his holding of a
HKSAR passport, a HKSAR permanent resident card or a valid travel document issued to
him/her and of a valid certificate of entitlement also issued to him/her and affixed to such
travel document. 55 In case the person is a mainland resident, the "travel document"
required is a so-called "one way permit" issued by the Mainland Exit-Entry
Administration in the district where he/she is residing. His/Her application for a
certificate of entitlement must be made through the mainland authority instead of directly
to the HKSAR Director of Immigration. When the Director of Immigration is satisfied,
the director will issue a certificate of entitlement and send the certificate of entitlement to

52 The Immigration (Amendment)(No.2) Ordinance (122 of 1997) and the Immigration (Amendment) (No.
3) Ordinance (124 of 1997) of the HKSAR,[hereinafter No. 2 Ordinance and No. 3 Ordinance]
53 No. 2 Ordinance, ibid., schedule 1, para. 2.
54 No. 3 Ordinance, supra note 52, section 1(2).
the Mainland Exit-Entry Administration. He/She is then subject to the quota for one-way permits determined and operated by the mainland authorities. Upon the grant of the one-way permit by the Mainland Exit-Entry Administration, his/her certificate of entitlement will be affixed by them to that permit. The one-way permit is the valid travel document contemplated by the scheme introduced by the No 3 Ordinance. But the certificate of entitlement alone is insufficient to establish his/her permanent status. It can only be established by holding a one-way permit affixed with the certificate.56

On January 29, 1999, the HKCFA delivered its rulings, in which the court concluded that “a generous approach should be adopted to the interpretation of the constitutional provisions” guaranteeing the rights and freedoms of Hong Kong residents.57 The court interpreted Article 24(2) conferring the right of abode in unqualified terms on Hong Kong permanent residents, including those born before one of their parents became a permanent resident and those born out of wedlock. In the court’s view, Article 22(4) applied only to the overwhelming part of the population on the

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55 No. 3 Ordinance, ibid., section 2AA(1).
56 See Ng Ka Ling, supra note 46 at 332-33.
57 Ibid at 340. The CFA reasoned that: “Chapter III of the Basic Law begins by defining the class constituting Hong Kong residents including permanent and non-permanent residents and then provides for the rights and duties of the residents, including the right of abode in the case of permanent residents. What is set out in Chapter III, after the definition of the class, are the constitutional guarantees for the freedoms that lie at the heart of Hong Kong’s separate system. The courts should give a generous interpretation to the provisions in Chapter III that contain these constitutional guarantees in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed.”

According to Professor Ghai, there is remarkable unanimity among the Hong Kong judiciary and the parties who have appeared before it on the approach to the interpretation of the Basic Law. The approach is that of a “purposive interpretation” on the grounds that, as all have agreed, the Basic Law is “an entrenched constitutional instrument to implement the unique principle of ‘one country, two systems.’” But, the CFA reasoned in Ng Ka Ling ([1999] 1 HKLRD 339-40) that provisions in the Basic Law which guarantee rights and freedoms merit a generous interpretation. Unlike the purposive approach whose essence is to give effect to the intention of the legislature, the generous approach seems to depend less on the intention of the legislature that on the desirability of protecting rights as the constitutional duty of court. See Y. Ghai, “Litigating the Basic Law: Jurisdiction, Interpretation and Procedure” in J.M.M. Chan, H.L. Fu and Y. Ghai, eds., Hong Kong’s Constitutional Debate: Conflict over Interpretation (Hong Kong: University of Hong Kong Press, 2000) at 24-30. [hereinafter “Litigating the Basic Law”]
Mainland who had no right of abode in the HKSAR. It followed that the No 3 Ordinance was unconstitutional to the extent that it required permanent residents of the HKSAR residing on the mainland to hold the one-way permit before they could enjoy the constitutional right of abode. The Court of Final Appeal also ruled that other related provisions in the immigration ordinance amendments contravening the Basic Law were null and void. And the decisions of the director of immigration denying persons in the lawsuits the right of abode, detaining them in custody, requiring them to enter into a recognizance, or demanding a “certificate of entitlement” affixed to a “travel document” to establish or exercise the right of abode were quashed.

The HKCFA judgment surprised many people and caught the Hong Kong government off guard. As it opened the way for what many feared would be hundreds of thousands of children born on the mainland to go to Hong Kong hoping to claim their right of abode, it sparked fears of an immediate, huge influx of immigrants who could overwhelm Hong Kong’s resources such as education, health, transportation, social welfare and housing. The public was heavily opposed to the court’s generous interpretation in favor of immigrants and protection of human rights. But the judgment was hailed by the legal community in Hong Kong as a victory for Hong Kong’s autonomy and human rights. After the ruling, the HKSAR government stated that it would comply with the CFA’s ruling and take steps to ease the public’s fear of immigrant

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58 Ng Ka Ling, ibid.
59 ibid.
influx and to ensure an orderly settlement of incoming immigrants whose exact number was unknown at that time.\textsuperscript{62}

A few days later, however, the right of abode controversy took a dramatic turn when four Chinese constitutional law scholars went on China’s state-run media and launched a scathing attack on the HKCFA.\textsuperscript{63} The official Xinhua News Agency, the China Central Television and some China-sponsored Hong Kong newspapers soon followed suit. Later on, a spokesman for China’s State Council confirmed that the scholars reflected the government’s position on the HKCFA ruling and insisted that the ruling was “wrong”, “against the Basic Law” and “should be changed”.\textsuperscript{64} A constitutional crisis between the HKSAR and the Chinese central authorities was suddenly in the making.

It appeared that Chinese officials and legal scholars were angered not so much by the substantive interpretation and the associated prospect of mainland immigrants flooding into Hong Kong as by what the judgment had said about the constitutional jurisdiction of the HKCFA, especially with respect to “the legislative acts of the National People’s Congress (NPC) and its Standing Committee.” In the unanimous ruling, the five judges of the HKSAR had stated the following:

> What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People’s Congress or its

\begin{footnotes}
\item[62] \textit{Ibid.}
\item[63] The mainland legal experts in question were Professors Xiao Weiyun and Shao Tianren of Beijing University, Professor Wu Jianfan of the Chinese Academy of Social Sciences, and Professor Xu Congde of People’s University of China. They are all distinguished constitutional law scholars who had taken part in the drafting of the Basic Law. See “Beijing Says Abode Ruling Was Wrong and Should Be Changed,” \textit{South China Morning Post}, 9 February 1999. See also W. Xiao \textit{et. al.}, “Why the Court of Final Appeal Was Wrong: Comments of the Mainland Scholars on the Judgment of the Court of Final Appeal” in Chan, Fu and Ghai, eds., \textit{supra} note 57 at 53-59.
\end{footnotes}
Standing Committee. ... are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found. ... The jurisdiction of the Region's courts to examine their acts to ensure consistency with the Basic Law is derived from the Sovereign in that the National People's Congress had enacted pursuant to Article 31 of the Chinese Constitution the Basic Law for the Region ... Any limitation on the courts' jurisdiction must be found in the Basic Law itself.

A directly-related bone of contention concerns whether the Court of Final Appeal has the jurisdiction to interpret the relevant provisions of the Basic Law in adjudicating cases or is bound to seek an interpretation of such provisions from the Standing Committee of the National People's Congress (NPC) pursuant to Article 158. Article 158(1) of the Basic Law provides that the power of interpretation of the Basic Law shall be vested in the NPC Standing Committee. Article 158(2) provides that the Standing Committee shall authorize the courts of the HKSAR "to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region". But there is a limitation on the judicial jurisdiction as far as the Court of Final Appeal is concerned. Article 158 sets out two conditions under which the courts of Hong Kong shall seek an interpretation from the NPC Standing Committee. Firstly, if the provisions

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64 See ibid.
65 See Ng Ka Ling, supra note 46 at 337.
66 Ibid. at 341-45.
67 Article 158 seems to envisage a specific enactment authorizing the courts of Hong Kong to have independent power of interpretation and judicial review. This has never happened. In Ng Ka Ling, the HKCFA made a detailed examination of its constitutional jurisdiction conferred by the Basic Law. The court stated that:

"The Region is vested with independent judicial power, including that of final adjudication. The courts of the Region at all levels shall be the judiciary of the Region exercising the judicial power of the Region. In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid."

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of the Basic Law in question concern affairs which are the responsibility of the Central People’s Government, or concern the relationship between the Central Authorities and the Region. The court refers to this as “the classification condition”. Secondly, the HKCFA in adjudicating the case needs to interpret the above-mentioned provisions (the excluded provisions) and such interpretation will affect the judgment on the case. The court refers to this as “the necessity condition.” The court ruled that “it is for the Court of Final Appeal and for it alone to decide, in adjudicating a case, whether both conditions are satisfied.” If the CFA is satisfied of both conditions, it would be obliged to seek an interpretation of the relevant excluded provisions from the Standing Committee. “It is significant that what has to be referred to the Standing Committee is not the question of interpretation involved generally, but the interpretation of the specific excluded provisions.” The court then ruled in the right of abode case that it did not have to make a reference to the Standing Committee of the NPC for an interpretation of Article 24(2) (a provision within the limits of the autonomy of the HKSAR) even though Article 22(4) (an excluded provision) is “arguably relevant”. That the HKSAR ruling was immediately controversial is an understatement. It triggered a constitutional crisis that threatened to undermine the judicial independence and autonomy of the HKSAR. In the eyes of Chinese scholars and officials, the HKCFA was overreaching its power and trying to elevate its status to be above and beyond the National People’s Congress, the highest state organ under the 1984 Chinese constitution. Its language was tantamount to saying that the Hong Kong court was more authoritative.

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*Ibid.* See also the Basic Law, *supra* note 23, art. 158.

*See Ng Ka Ling, supra* note 46 at 342.


than the NPC and had the final say in interpreting the Basic Law. Under the Chinese constitution, however, not even the Supreme People’s Court has the authority to strike down NPC legislation. It was viewed as being not only presumptuous but also in violation of the Basic Law for a Hong Kong court to arrogate to itself the power to examine NPC legislative acts and to pronounce on their validity.

In a bid to defuse the territory’s first-ever constitutional crisis, the Hong Kong government took an unprecedented step in late February by requesting the HKCFA to clarify that part of the controversial right of abode ruling. Faced with “an exceptional situation”, the five judges of the CFA agreed to “clarify” the ruling and issued a brief, unanimous statement with respect to the Ng Ka Ling ruling. In the statement, the Chief Justice, Justice Andrew Li, said that the court had not intended to challenge the authority of the NPC to make interpretations of the Basic Law which would have to be followed by Hong Kong’s courts. Acts of the NPC which were in accordance with the Basic Law also could not be questioned by the court, added Mr. Justice Li. Many lawyers, legal experts and legislators in Hong Kong reacted angrily towards the SAR government’s request for a “clarification”, warning the unprecedented step could undermine the rule of law by giving the impression that the highest court in Hong Kong had bowed to political

71 Ibid.
74 The CFA stated that “The court’s judgment on 29 January, 1999 did not question the authority of the Standing Committee to make an interpretation under Article 158 which would have to be followed by the courts of the region. The court accepts that it cannot question that authority. Nor did the court’s judgment question, and the court accepts that it cannot question, the authority of the National People’s Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.” Ibid.
pressure. On the other hand, China, which did not want to see the matter blown out of proportion, seemed satisfied with the court’s modified position and decided that no further action was necessary. The ruling was left intact, and a potential constitutional crisis was averted, perhaps at the expense of the reputation and integrity of the court.

In the summer of 1999, the HKSAR government conducted a territory-wide survey to determine how many mainland children of Hong Kong residents are eligible for the right of abode in Hong Kong pursuant to the CFA ruling. When the figure was made public in May, everybody was shocked. It was 1.67 million. The figure showed that, in about ten years, there would be an influx of 1.67 million mainland children into Hong Kong. The Hong Kong government claimed that there was no way for Hong Kong to absorb that many new immigrants within such a short period of time and that a way therefore had to be found to prevent the “social disaster” from happening. Without consulting the legislature and the legal community, the SAR government decided to seek a reinterpretation of Article 22(4) and 24(2) of the Basic Law from the NPC Standing Committee in a move to overturn the HKCFA ruling and thus to revoke the right of abode for the allegedly more than 1.6 million mainland residents. On 26 June 1999, the NPC Standing Committee passed a unanimous decision which reinterpreted some sections under Article 22 and 24 of the Basic Law. According to the interpretation Article 24(2) will now mean that mainlanders born before one of their parents became a permanent

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75 “Justices Clarify Ruling: We Were Not Challenging NPC,” South China Morning Post, 27 February 1999. For a discussion on the court’s clarification and its implications for judicial independence in the HKSAR, see J. M.M. Chan, “What the Court of Final Appeal Has Not Clarified in its Clarification” in Chan, Fu and Ghai, eds., supra note 57 at 171-81.
77 Critics pointed out that the figure was highly questionable because the way the survey was conducted was flawed. “Who Rules Hong Kong?” Martin Lee’s Speech at the Goodman Memorial Seminar at the University of Toronto Faculty of Law, January 26, 2000.
resident of Hong Kong or those born out of wedlock do not have immediate right of abode.\textsuperscript{79} The reinterpretation drastically reduces the number of Mainlanders eligible for the right of abode under the CFA ruling of January 29, 1999. In the mean time, Article 22 (4) will mean that all Mainlanders, including Hong Kong permanent residents’ children born with Chinese nationality, must receive permission from the mainland authorities before entering the HKSAR for the purpose of settlement.\textsuperscript{80} Moreover, the Interpretation provides that “[a]s from the promulgation of this Interpretation, the courts of the HKSAR, when referring to the relevant provisions of the Basic Law of the HKSAR of the PRC, shall adhere to this Interpretation.”\textsuperscript{81} A few months later, the constitutional validity of the NPC reinterpretation of the Basic Law was challenged by 17 mainland migrants before the HKCFA.\textsuperscript{82} In the ruling, the bench of five top judges unanimously upheld the validity of the NPC reinterpretation, saying that:

It is clear that the Standing Committee has the power to make the Interpretation. This power originates from Article 67(4) of the Chinese Constitution and is contained in Article 158(1) of the Basic Law itself. The power of interpretation of the Basic Law [of the National People’s Congress Standing Committee] conferred by Article 158(1) is in general and unqualified terms.\textsuperscript{83}

\textsuperscript{79} “Interpretation by the Standing Committee of the National People’s Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China,” the Standing Committee of the National People’s Congress of the People’s Republic of China, 26 June 1999. Online: Government of Hong Kong Web Service http://www.info.gov.hk/basic_law/english/rph0221.htm (date accessed: 9 September 2000).
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid.
\textsuperscript{82} See Lau Kong Yung (An Infant) \& Ors v. Director of Immigration, [1999] 3 HKLRD 778. [hereinafter Lau Kong Yung]
\textsuperscript{83} Ibid. at 798.
Therefore, the court held that the interpretation was “valid and binding” with regard to the relevant parts of the Basic Law and the courts in the HKSAR were under a duty to follow it.\textsuperscript{84}

The reinterpretation of the Basic Law by the NPC Standing Committee and the recognition by the HKCFA of the unqualified power of the NPC to interpret the Basic Law finally put an end to the row over the right of abode issue. But it raised serious concerns in the local and international community about the SAR’s judicial independence which is widely viewed to be the foundation of the rule of law and high degree of autonomy in Hong Kong. Despite repeated assurance from the Chief Executive and the Secretary of Justice that the HKSAR government would rarely press for NPC reinterpretation in the future, fears of more NPC intervention remain because the Basic Law has an impact in many ways, especially on fundamental rights and freedoms.\textsuperscript{85} The right of abode cases have provoked uncertainty over many matters that hinge upon the broad relations between the central authorities and the HKSAR and that are about the scope of Hong Kong’s autonomy and fundamental rights and freedoms. Especially, they have to do with the question of how to deal with problems when the two different legal systems interface on similar issues in the future.

“Two systems” was meant to remove doubts and to provide solid foundations for those vital elements in Hong Kong’s way of life and prosperity. Instead, the NPC intervention in the right of abode case led to a significant moving of the goal posts. While the CFA ruling of January 29, 1999 might be politically unpopular and socially unbearable to the society, it was unfortunate to see that the HKCFA, meant to be the

\textsuperscript{84} Ibid. See also “What the Judges Said”, \textit{South China Morning Post}, 3 Dec. 1999; “Main Points”, \textit{ibid.}

\textsuperscript{85} See “Intervention Will Be Rare: Professor Chen,” \textit{South China Morning Post}, 6 Dec. 1999.
supreme judicial organ in the territory, had bowed to political pressure and was subject to appeal to a mainland political body. Some legal experts suggested that the NPC Standing Committee and the SAR government would likely exercise self-restraint so that in the future the Standing Committee would only deal with matters concerning the relationship between Hong Kong and the mainland. That prediction, however, could provide little comfort to people keen on Hong Kong’s autonomy and the rule of law. Even if the NPC exercises its power of interpretation only under exceptional circumstances, it can do so not only on matters directly involving the mainland but also on matters within the scope of Hong Kong’s autonomy given the unqualified authority of the NPC as now recognized by the HKCFA. Therefore, it is hard to see how the row over the right of abode case can be anything less than a landmark development in the practice of the “two systems” formula with far-reaching implications. It appears that, when the CFA’s appreciation of the true nature of “one country, two systems” fell short of China’s expectation, it was defeated. The court had to reverse its judgment and was no longer claiming any jurisdiction over acts of the NPC or its Standing Committee. The host of important

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86 See “Optimistic: Professor Chen.” South China Morning Post, 6 December 1999.
87 In Ng Ka Ling, the HKCFA made an unequivocal claim about the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People’s Congress or its Standing Committee are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In the judgment, the five top judges held that:

“In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found ... The jurisdiction of the Region’s courts to examine their acts to ensure consistency with the Basic Law is derived from the Sovereign in that the National People's Congress had enacted pursuant to Article 31 of the Chinese Constitution the Basic Law for the Region... Under it, the courts of the Region have independent judicial power within the high degree of autonomy conferred on the Region. It is for the courts of the Region to determine questions of inconsistency and invalidity when they arise... It is therefore for the courts of the Region to determine whether an act of the National People's Congress or its Standing Committee is inconsistent with the Basic Law, subject of course to the provisions of the Basic Law itself.”

In sharp contrast, the HKCFA changed its position in Lau Kong Yung, stating that: “It is clear that the Standing Committee has the power to make the Interpretation. This power originates from Article 67(4) of the Chinese Constitution and is contained in Article 158(1) of the Basic Law itself. The power of interpretation of the Basic Law [of the NPC Standing Committee] conferred by Article 158(1) is in general and unqualified terms... That power and its exercise is not restricted or qualified in any way by Articles
questions raised in the case, such as the constitutional jurisdiction of the HKCFA and the power of the NPC to interpret of the Basic Law, were all, in the end, answered in favor of the Chinese central authorities and the HKSAR executive in a way detrimental to the judicial independence of the HKCFA.

Admittedly, at least part of the controversy arose from the meeting of two constitutional systems which have different perspectives on the nature of constitutional guarantees and the role of the courts. As discussed above, the controversy between the HKCFA and the central authorities in Beijing began with and centered on the HKCFA’s statement in Ng Ka Ling about the Hong Kong courts’ authority to examine the consistency of any legislative acts of the NPC and its Standing Committee with the Basic Law and to declare them to be invalid if found to be inconsistent. After the handover, the consensus among the legal community in Hong Kong is that the courts of Hong Kong continue to have the authority to review the constitutionality of all local legislative and administrative acts pursuant to Article 158 of the Basic Law, just as they had under British rule. But the legal community was divided on the question of whether the courts of the HKSAR have the jurisdiction to examine the constitutionality of legislative acts of the NPC or its Standing Committee. In HKSAR v. David Ma Wai Kwan, the Hong Kong government submitted that prior to 1 July 1997 the Hong Kong courts could not question the validity of any Act of Parliament that was made applicable to Hong Kong by the

158(2) and 158(3) ...The authority given by Article 158(2) to the courts of the Region stems from the general power of interpretation vested in the Standing Committee ... Accordingly, the Standing Committee has the power to make the Interpretation under Article 158(1). The Interpretation is binding on the courts of the HKSAR.”

88 See Ghai, “Litigating the Basic Law,” supra note 57 at 13-19. In the first constitutional law case since the establishment of the HKSAR, the Court of Appeal assumed the jurisdiction to review the legislative and executive acts of the HKSAR without any objection from the parties involved in the case including the Hong Kong government. See HKSAR v. Ma Wai Kwan David [1997] HKLRD 761; [[1997] 2 HKC 315.
British Parliament itself, nor did they have the power to review whether any such act was inconsistent with the Letters Patent or the British constitution or to declare it to be invalid. So, this was a restriction on the jurisdiction of the Hong Kong courts "imposed by the legal system and principles previously in force" envisaged by Article 19(2) of the Basic Law. After 1 July 1997, it applied equivalently to acts of China’s National People’s Congress, so the Hong Kong government argued. That submission was accepted by the Hong Kong Court of Appeal. In Ng Ka Ling, the counsel for the Hong Kong government argued that the courts of Hong Kong have no jurisdiction to query the validity of any acts of the NPC or its Standing Committee since they are acts of the sovereign and that the jurisdiction of the courts in Hong Kong is a limited one to examine the existence (as opposed to the validity) of the acts of the Sovereign or its delegate.

The Hong Kong Court of Final Appeal dismissed the government’s submission, stating that “[t]he analogy drawn with the old order was misconceived.” The HKCFA’s line of reasoning is that, although Article 19(2) of the Basic Law provides for the limitation on the constitutional jurisdiction of the courts “imposed by the legal system and principles previously in force in Hong Kong”, it cannot “bring to the new order restrictions only relevant to legislation of the United Kingdom Parliament imposed under the old order”. Instead, the court ruled, among other things, that the courts of the HKSAR do have the authority to review the constitutionality of the acts of the National People’s Congress and


91 Ghai, ibid at 15: Ma Wai Kwan David, ibid. at 351-53. Article 19(2) of the Basic Law reads that: "The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.”

92 See Ng Ka Ling, supra note 46 at 337-38.

93 Ibid. at 338.

its Standing Committee.93 This position is hardly surprising for people trained in the common law tradition. The sole power of the judiciary to pronounce authoritative interpretation of legislation, including a constitutional statute like the Basic Law, goes to the very root of the common law system. Neither the legislature nor the executive has the power to make authoritative interpretation of the law. However, from the Chinese constitutional perspective, the HKCFA’s position was wrong and unacceptable. In the Chinese constitutional system, the National People’s Congress is the highest organ of state power and its permanent body is the Standing Committee.94 They enjoy both the power to pass legislation and to interpret legislation, a power that cannot be challenged by any other state organ, including the Supreme People’s Court. “[T]he implementation of the [Chinese] Constitution and the avoidance of legislative actions contravening it depends entirely on the self-awareness and self-restraint of the NPC and its SC [Standing Committee]. Even if it is alleged that they have acted in breach of the Constitution, there is no legal remedy, and any remedy would have to lie in the political domain.”95 In other words, constitutional review by the judiciary does not exist in the Chinese constitutional system. If the NPC makes a law that is inconsistent with the Chinese constitution, no court in China has the power to declare that law to be unconstitutional and therefore invalid. Interestingly, according to Professor Albert Chen of the University of Hong Kong, this kind of constitutional system is no stranger to common law judges and

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95 The following discussions on the doctrine of congressional supremacy of the PRC draw on Professor Albert Chen’s “The Court of Final Appeal’s Ruling in the ‘Illegal Migrant’ Children Case: Congressional Supremacy and Judicial Review.” A. Chen, “The Court of Final Appeal’s Ruling in the ‘Illegal Migrant’
lawyers in Hong Kong whose common law system was imported from the United Kingdom. As Professor Chen points out,

[i]n the U.K., the doctrine of parliamentary supremacy has reigned for centuries and still reigns today. The observance of basic constitutional and human rights norms depends on Parliament’s voluntary compliance, which is ultimately secured by history, politics, culture, and tradition. The courts have a constitutional duty to recognize and enforce all Acts of Parliament and they cannot strike any of the acts down as courts do in the United States, Canada, Australia, or India. In this regard, the Chinese system is closer to the British than to these other common law jurisdictions, despite the fact that China has a written constitution.

This explains why the mainland authorities considered the HKCFA’s statement, as a matter of principle, totally unacceptable. In the opinion of the mainland authorities and some critics of the HKCFA in Hong Kong, the HKCFA’s claim of the power of constitutional review over legislative acts of the NPC and its Standing Committee not only represented a significant departure from the pre-handover constitutional jurisprudence, but also posed a serious challenge to a fundamental principle of the Chinese constitutional system, that is, the doctrine of congressional supremacy. If the court’s ruling stands as the law of Hong Kong, it would confer on all of the courts in Hong Kong a general power to judicially review (using the Basic Law as the yardstick) the validity of legislative acts of the NPC or its Standing Committee in Hong Kong.

Children Case: Congressional Supremacy and Judicial Review” in Chan, Fu and Ghai, eds., supra note 57 at 73-96.

96 Ibid. at 77.
97 Ibid. Compare H.L. Fu, “Supremacy of a Different Kind: The Constitution, the NPC and the Hong Kong SAR,” in Chan, Fu and Ghai, eds., supra note 57 at 97-111. (arguing that the Chinese constitution and the
Professor Chen convincingly demonstrates that it is inconceivable that this was the intention of the PRC legislature when it enacted the Basic Law, because “the grant of that general power would be such a fundamental alteration of the constitutional structure and principles of the PRC.”98 For reasons discussed above, the HKCFA was forced to change its position in Ng Ka Ling and came to recognize the doctrine of congressional supremacy in its clarification of February 26, 1999 and later in its ruling in Lau Kong Yung.99

In the future, similar tensions and conflicts are to be expected in the evolution of Hong Kong’s new constitutional order, as it will certainly be difficult to reconcile the requisites of “one country” (the principle of central-state congressional supremacy must be upheld, as China insists in this case) and those of “two systems” (the courts of Hong Kong must have the right of final adjudication, free from NPC interference). One of the lessons we can learn from the row over the right of abode cases is that the development of the jurisprudence of one country with two systems depends on the understanding and mutual respect of both systems, “so that problems arising at the interface of the two systems can be resolved in a manner that is fair, constructive, and acceptable to both sides.”100

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NPC under it “are supreme in the mainland, but their supremacy is materialized in Hong Kong through the framework of the Basic Law.”

98 Ibid. at 78.

99 See Lau Kong Yung, supra note 82 at 798-800.
Conclusion

When the Sino-British Joint Declaration was signed in 1984, the protection of human rights was one of the major concerns of the people of Hong Kong. Foremost in their minds were questions such as whether Beijing would abide by the 1984 Sino-British Joint Declaration and whether the Basic Law of the HKSAR would effectively and sufficiently guarantee the territory a high degree of autonomy. Both documents set out China’s commitment to human rights and fundamental freedoms in Hong Kong to survive the retrocession of 1997. However, although it would be a mistake to romanticize the situation under British rule, tremendous differences do exist in law and practice between Hong Kong and China.

Firstly, on what might be called the jurisprudential level, China’s legal theory and constitutional order remain officially Marxist-Leninist. The law is considered part of the superstructure of a society, which serves both to reflect and reinforce the underlying economic structure, and in turn, in capitalist societies, an instrument of class oppression and domination. When it comes to human rights discourse, Chinese Marxists believe that conceptions of human rights are products of a specific economic foundation. In a capitalist society, it reflects the fundamental interests of the capitalist class in the economic and political systems. Only in a socialist society where class exploitation and oppression are eliminated does genuine and

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1 See M. Roberti, *The Fall of Hong Kong: China’s Triumph and Britain’s Betrayal* (New York: John Wiley and Sons, Inc., 1994) at 65-78.
2 On this point, Yash Ghai pointed out that “[t]he basic framework to facilitate the exercise of rights was established in the Joint Declaration... [I]t consists of regional autonomy, a market economy, some separation of powers, an independent judiciary, a measure of democracy, civil society, and the common law. On the whole the Basic Law preserves this general framework, although in somewhat weaker form.” Y. Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997) at 373.
widespread enjoyment of human rights become possible. Hence socialist human rights are superior to bourgeois human rights and represent a higher level of human rights. Further, rights in the PRC are considered to be created by the state. Therefore, instead of rights being a limit on the state, the primary optic is that the state's interests are a limit on rights. The Chinese legal system has been traditionally a system of duties rather than of rights, in sharp contrast to Hong Kong's common law system whose emphasis is on individual rights and freedoms. Moreover, the orthodoxy of Chinese legal theory views rights as collectively based, concrete, non-universal and subordinate to state sovereignty and national security. "[W]hat is implied is often that individuals should be sacrificed when necessary for the collectivity, and that those in power should decide what is good for that collectivity." Secondly, on the institutional level, there are also remarkable differences between the two systems. One of the salient features of the Chinese legal system is the rejection of the separation of state powers. This results in the absence of a system of constitutional judicial review of legislation or administrative acts by the judiciary. Given the absence of genuine competitive democratic elections, the legislature as well as the government experience little real constitutional constraint.

On the above two levels, Hong Kong has in theory and practice a profoundly different system, whose fundamental concepts of authority, jurisdiction, legality, rights and obligations, political representation and accountability and so on are modeled on those of Britain. The main points of departure of that system do not require elaboration here. Put simply, in keeping with the spirit of common law, the constitutional/legal system in Hong Kong is a product of a capitalist society, and its doctrine of precedent and judicial review is flexible and adaptable to the

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4 Ibid.

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changing needs of society. Although the colonial system of government under British rule was archaic by Western standards, it was under the control of a democratic government in Britain. British constitutional traditions and the rule of law were basically practiced in Hong Kong. After the handover, the system of government in Hong Kong became subservient to a highly centralized system of government in Beijing, such that the future of Hong Kong is inextricably linked to that of China. In view of the differences between the two systems, their coexistence under the same constitution and ultimate sovereignty is both novel and challenging. By definition, "one country, two systems" means two separate sets of political, economic and legal systems coexisting in China. It would mean that China would tolerate a region under its sovereign control actually exercising autonomy in ways that are fundamentally different from the rest of the country.

"One country, two systems" provides that the people of Hong Kong will remain for a long time a "class apart" from their fellow citizens on the mainland, and the HKSAR will develop into a territory with a distinct and separate political identity. Whatever the outcome, the implications of the daring "one country, two systems" formula are likely to be profound for many areas of Chinese life, not only in Hong Kong but also in the mainland. For China, the formula grants Hong Kong powers not vested in any of China's other subnational units. The HKSAR is the first administrative region within its borders to oblige China to maintain a meaningful separate system with "a high degree of autonomy" and a certain measure of democracy, the rule of law and human rights. Hence, this regime poses great challenges to China's conventional understanding of sovereignty, regional autonomy, and central-regional relations, and to the development of China's domestic legal and political systems. To the degree China is able to acknowledge and address these challenges, it will be better prepared to maintain Hong Kong's

7 Ching, supra note 5 at 5.
prosperity and stability, and to address questions of law and governance in China as a whole. In the mean time, the people of Hong Kong face the daunting task of asserting its will in an emerging relationship with China and of securing human rights and freedom directly from that authoritarian regime. The big question is how the separate, autonomous system of Hong Kong, in particular the rule of law with all its Western-style rights and freedoms, can long survive and thrive under Chinese rule. Any meaningful answer to such a question cannot be found without a clear understanding of what “one country, two systems” means for Hong Kong and China, including possible alternative formulations of the basic normative principles underlying the concept.

The author submits in this dissertation that the questions of Hong Kong’s autonomy and human rights protection can be located within a wider political, legal and cultural context, the dialectic between the PRC and the HKSAR, so that a philosophy of pluralism reflected in “one country, two systems” can be seen as a deep and abiding artefact of China’s own legal and political systems. It is demonstrated in Chapter Two that one has to distinguish between the rhetoric of human rights and the underlying ideology and embedded values, between formal institutionalization and actual implementation, in the guarantees of human rights in China in order to understand the complexity and dynamics of human rights issues in the country. In a parallel way, the reality of the relations between the HKSAR and China will likely diverge from the framework the Joint Declaration and the Basic Law provide. Although the relations between the HKSAR and China are formally governed by these legal instruments, conventional analytic approaches, focusing almost exclusively on the extent and level of positive entitlements which flow from the Joint Declaration and the Basic Law, do not necessarily capture the essence of the Hong Kong-China relations. And solutions to problems (including autonomy and human rights
issues) arising from the implementation of these provisions will not necessarily depend on the
details of formalist interpretations of the Joint Declaration and the Basic Law. Questions of
philosophy and political will may ultimately prove as important to securing regional autonomy
and human rights as the legal/constitutional framework.

It is therefore necessary to examine both of these aspects in Hong Kong’s integration process in
order to evaluate the reliability of the human rights guarantees in the Joint Declaration and in the Basic
Law and to refurbish the legal armoury of counsel arguing the territory’s case for a separate human rights
regime from the rest of China. As past scholarly literature has focused largely on either empirical
observations or on the extent and level of positive entitlements provided by the Basic Law and the Joint
Declaration, this dissertation proceeded from a different perspective in the belief that there is a need to
search for a theoretical reinforcement to Hong Kong’s quest for a robust special human rights regime. It
focused on the conception of autonomy and human rights in the HKSAR under the “one country, two
systems” formula, rather than on the state of autonomy and human rights. The first three chapters looked
at ways in which the Chinese system, values and approaches to external and internal diversity might
influence the operation of “one country, two systems.” The following two chapters drew on the preceding
analyses and examined the “one country, two systems” concept, breaking it into its component parts in
order to define the basic normative principles incorporated into the model for Hong Kong.

In the discussion of the meaning of “one country”, that is, China’s state sovereignty, it was
demonstrated that the PRC’s obsession with state sovereignty might be explained by a range of historical,
cultural and geopolitical factors. One of the key factors is that the ability and willingness of a government
to defend China’s territorial sovereignty have traditionally been linked with that government’s legitimacy
to rule. When the Communist Party seized the mainland in 1949, the issue of defending China’s territorial
sovereignty and achieving national reunification became one of the most pressing problems of national
security and political legitimacy for the PRC. China’s obsession with state sovereignty in international
relations spilled over into its perception of internal governance and became the cornerstone of China’s
policy toward Hong Kong as well as toward Macao and Taiwan. However, as rapidly changing domestic and external circumstances have made visible to the naked eye tensions and contradictions inherent in the Chinese positivist notion of state sovereignty, the idea that absolute sovereignty constitutes immutable language in international life is now an assumption as intolerable as it is intolerant. Even those long trained to see only coherence and rationality in the theory and practice of absolute sovereignty will have to come to accept that the notion of absolute sovereignty cannot be equated with the reality of today’s world. Although its traditional conception of sovereignty continues to be a near-controlling force affecting China’s international relations, the powers, immunities and privileges the concept carries have been subject to increased limitations. As such, Chinese sovereignty has to be envisioned as a variable, divisible, and relative phenomenon. On the national level, rather than identifying Chinese sovereignty with one level or center – the central authority – it is possible to point to multiple levels and centers of sovereignty when the central authority in Beijing surrenders certain aspects of its internal governance and external relations to distinct regional communities. In other words, there are different “building blocks” of Chinese sovereignty at the subnational level, by which various subnational groups enjoy a form of autonomy (or partial sovereignty) from the central authority and are able to determine their way of life within the state but not at expense of the state. Such a pluralistic view of the Chinese state, divided into a range of regional communities, would open up possibilities for different treatments of regions in the area of human rights, because, as China itself insists, societies with different historical traditions and cultural backgrounds and at different stages of development have different human rights requirements. To put it another way, if the implementation of universal human rights does not necessarily have to be the same among sovereign states with different societal particularities, it does not necessarily have to be the same among China’s autonomous or partially sovereign regions with almost equally different societal particularities. The heterogeneity of China makes it appropriate to sacrifice complete uniformity of treatment for those ruled by the various subnational jurisdictions. Many of the laws one must obey, the benefits one receives, and the rights one enjoys depend on the subnational jurisdiction in which one
resides. Such a new conception could help define the normative relationship between the HKSAR and the PRC with particular reference to the protection of human rights in Hong Kong and facilitate the process of accommodation, negotiation and compromise that can reconcile competing claims to sovereignty, jurisdictional autonomy and human rights.

Another key issue for Hong Kong’s future as a special administrative region of China is autonomy. From the start, it begs the question as to whether China can guarantee this sort of autonomy when no part of China enjoys clearly defined and constitutionally protected local government comparable to states in a federal system. In Chapter Three, I questioned conventional wisdom and demonstrated that there was evidence of a fledgling political and legal pluralism in today’s China. Many regions in China have gained a lot more regional autonomy as a result of economic reforms. Some of these powers have been granted formally by Beijing while others have been grabbed by the regions themselves. Although these developments are extensions and adaptations of the current system of government in China, they may be the start of a new political order. The constitutional reunion of Hong Kong with China, which may be said to exemplify some of the important traits of the China that is evolving, is occurring at a time when it could play an exceptional role in easing China’s painful transition and in providing the stimulus for further fundamental changes. The successful employment of the “one country, two systems” formula in Hong Kong would engender more confidence in similar constitutional devices and facilitate a genuine values-based discourse. The conception of “one country, two systems” affords a unique perspective that can help transform the way the Chinese people think about the appropriate approach to internal diversity. The normative aspects of the conception will have to include a (re)definition of the relationship between Hong Kong and China. However, while there is a resurgence of local consciousness and demands for autonomy in the Chinese political process, China is still a long way from the
formal federal system that Hong Kong would like. Before China works out a clear and binding division of power between the regions and the center, each side will have to learn how to handle the Hong Kong-China relations not only from its own perspective, but also from the perspective of the other as well. Operating a constitutional framework between ideologically diverse systems in a constructive way will be particularly difficult. No universal recipe exists to guide Hong Kong and China on this difficult road. A main issue is how China will exercise its virtually absolute power of interpretation of the Basic Law. Specifically, where will it look for definition of Basic Law guarantees, such as freedom of the press? Neither the Joint Declaration nor the Basic Law provides any certain answers to these critical questions.

That said, at least two points can be made in regard to the right of abode cases. One is that the common law system is forced to function under the Basic Law which is, in turn, subject to the NPC Standing Committee’s powers of interpretation and amendment. The second point is that the common law system has to adapt to a Chinese environment and operate more and more with the Chinese cultural prerequisites in mind. Both of these suggest difficulties and conflicts, because little could be more different than the conceptions of law and legitimacy implicit in the common law tradition, on the one hand, and the Chinese socialist/traditional legal system, on the other, apart from the ironic correspondence between Westminster Parliamentary supremacy and the NPC congressional supremacy insisted on by Beijing. Hong Kong’s autonomy under “two systems” does not mean Hong Kong has the power to get involved in issues concerning national sovereignty or other parts of China. Hong Kong will have regional autonomy, which is not the same as national autonomy or the sort of autonomy that federal systems give their states. Hong Kong’s autonomy under the “one country, two systems” formula can be
considered as a special form of autonomy which can act as the Great Wall against the forces from the central authorities in the north. It may stand for a pluralistic ideal that can influence other parts of China in the future. This will almost certainly not occur without a combination of forbearance and evolution in thinking in Beijing from its formal position of strength after the right of abode constitutional crisis. As such, it is not an ideal that will easily come true. But, as with democracy and human rights, an ideal is not necessarily tarnished by its being, as yet, fitfully and incompletely realized.

\[8\] See A. Chen, “The Court of Final Appeal’s Ruling in the ‘Illegal Migrant’ Children Case: Congressional Supremacy and Judicial Review” in J.M.M. Chan, H.L. Fu and Y. Ghai, eds., Hong Kong’s Constitutional Debate: Conflict over Interpretation (Hong Kong: University of Hong Kong Press, 2000) at 76-78.
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