

THE SINO-BRITISH AGREEMENT AND NATIONALITY: HONG KONG'S FUTURE IN THE HANDS OF THE PEOPLE'S REPUBLIC OF CHINA

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I. INTRODUCTION.

On July 1, 1997, the United Kingdom will officially relinquish its sovereignty over Hong Kong¹ to the People's Republic of China (PRC). The terms for the transfer of governmental control are set forth in 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 (hereinafter, "Joint Declaration"), which was signed by representatives for both governments on December 19, 1984. The terms likewise appear in the Memoranda exchanged by the United Kingdom and PRC governments on the signing date.²

Set forth in the Joint Declaration is the PRC's intent to establish the Hong Kong Special Administrative Region (SAR).³ Rules for implementing the separate government of the Hong Kong SAR are also enumerated.⁴ The creation of the Hong Kong SAR is authorized by a provision in the PRC Constitution⁵ originally in-

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1. "Hong Kong" as used in this paper refers to Hong Kong Island, the Kowloon Peninsula and the New Territories.

2. The term "Sino-British Agreement" will be used in both the text and footnotes of this paper to refer to the Joint Declaration, its three Annexes and the Exchange of Memoranda. Joint Declaration of the Government of the United Kingdom and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, United Kingdom-People's Republic of China, 1984 Gr. Brit. T.S. No. 20 (Cmd. 9352) [hereinafter Joint Declaration].

3. Joint Declaration, ¶ 3(1).

4. *Id.* ¶ 3.

5. ZHONGHUA RENMIN GONGHEGUO XIANFA (Constitution) art. 31 (China). Unlike the United States, the PRC has issued several versions of its constitution, the most recent being the 1982 version.

tended to apply to Taiwan.⁶ The SAR is one of the PRC's economic innovations, like the Special Economic Zone,⁷ designed to accelerate the PRC's modernization plans.⁸ The Hong Kong SAR will be the first manifestation of Deng Xiaoping's "one country, two systems" theory, and its success may determine future negotiations with Taiwan and Macao.⁹

The Joint Declaration outlines the division of power to be effected between the Hong Kong SAR government and the PRC government¹⁰ as well as Britain's role during the pre-transfer period.¹¹ The three Annexes appended to the Joint Declaration address, respectively: (1) the PRC's basic policies regarding Hong Kong,¹² (2) the Sino-British Joint Liaison Group,¹³ and (3) land leases.¹⁴ In addition, the United Kingdom and the PRC each submitted a memorandum discussing the future nationalities of Hong Kong's diverse population. This complex nationality issue is the focus of this paper.¹⁵

Changing the nationality status of the Hong Kong SAR residents is one of the many problems faced by the United Kingdom and the PRC in the Hong Kong changeover. Although the Joint Declaration addresses this issue, the solution it offers leaves many questions unanswered. For example, who falls within the definition

6. Note, *Chinese and Western Treaty Practice: An Application to the Joint Declaration Between the People's Republic of China and Great Britain Concerning the Question of Hong Kong*, 1 AM. U.J. INT'L L. & POL'Y 167, 189 n.150 (1986).

7. See *Regulations on Special Economic Zones in Guangdong Province*, Aug. 26, 1980, reprinted in E. ASIAN EXEC. REPORT, Oct. 15, 1980, at 27, 28. The PRC's Special Economic Zones (SEZ) are part of an experiment with free trade. Enterprises are run independently rather than by the state. *Id.* art. 10. The SEZ regulations give preferential treatment to free market operations with regard to land procurement, import duty, income tax, etc. *Id.* ch. 3.

8. See Note, *supra* note 6, at 184-87 (discussing the importance of Hong Kong to Deng Xiaoping's modernization plans).

9. See *A Significant Concept*, BEIJING REVIEW, Oct. 29, 1984, at 16. The "one country, two systems" theory was developed in an effort to attract Hong Kong and Taiwan to the reunification idea. The PRC hopes to use Hong Kong to exemplify the feasibility of capitalism and socialism under one flag. *Id.*

10. Joint Declaration, *supra* note 2, ¶ 3.

11. *Id.* ¶¶ 4-5.

12. *Id.* Annex I. Annex I establishes the Hong Kong SAR and elaborates on the future relationship between the Hong Kong SAR Government and the PRC Government.

13. *Id.* Annex II. This Annex addresses the creation and functions of the Joint Liaison Group. It details both procedural and substantive issues: setting forth requirements for future meetings and enumerating subjects for consideration.

14. *Id.* Annex III. Most of the land in Hong Kong is currently held by the British Crown and leased to individuals and businesses. This Annex authorizes the British Hong Kong Government to extend leases beyond the 1997 transfer date to June 30, 2047. *Id.* The fifty year extension corresponds to the PRC's intention to retain the present social and economic system in Hong Kong for the next fifty years. See *supra* notes 6, 8 and accompanying text.

15. *Id.* Exchange of Memoranda.

of "Chinese nationality" and what will be the position of Hong Kong's non-Chinese residents? This comment will explore the meaning of the Joint Declaration in light of each party's nationality law history and evaluate possible solutions to the deficiencies in the agreement.

II. BACKGROUND TO THE JOINT DECLARATION

Hong Kong has been under British rule since the mid-1800's when Britain defeated China in the Opium Wars.¹⁶ In the Treaty of Nanking, signed in 1842 after the first Opium War (1839-42), China ceded the Island of Hong Kong to Britain in perpetuity.¹⁷ Kowloon Peninsula and Stonecutters Island were subsequently ceded in perpetuity in 1860 under the Convention of Peking, which followed the second Opium War (1856-60).¹⁸ At the 1898 Convention, China leased the New Territories to Britain for a period of ninety-nine years, beginning on July 1, 1898.¹⁹ It is from this lease that the July 1, 1997, date derives its meaning.

As the 1997 expiration of the lease grew nearer, uncertainty surrounding the Colony's political future translated into economic insecurity, threatening the stability of the world's third most important banking and financial center.²⁰ This anxiety prompted the 1982 Sino-British negotiations on the future of Hong Kong.²¹ After two years of discussion, the United Kingdom and PRC governments produced the Joint Declaration.

Focusing on the paramount goal of "maint[aining] the prosperity and stability of Hong Kong,"²² both sides made important concessions during the negotiations. Britain forfeited its legal rights

16. For a more in-depth study of the Opium Wars, see M. COLLIS, *FOREIGN MUD* (1947); I. HSU, *THE RISE OF MODERN CHINA* 168-219 (3rd ed. 1983); A. WALEY, *THE OPIUM WAR THROUGH CHINESE EYES* (1958).

17. Treaty of Nanking, Aug. 29, 1842, China-Great Britain, 30 Brit. For. St. Pap. 389, 93 Parry's T.S. 465.

18. Convention of Peking, Oct. 24, 1860, China-Great Britain, 50 Brit. For. St. Pap. 10, 123 Parry's T.S. 71.

19. For more on this lease, see P. WESLEY-SMITH, *UNEQUAL TREATY, 1898-1997: CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES* (1980).

20. Karamanian, *Legal Aspects of the Sino-British Draft Agreement on the Future of Hong Kong*, 20 TEXAS INT'L L. J. 167, 169 (1985). See also Bonavia, *Socialist Balancing Act*, 130 FAR E. ECON. REV. 36, 59, 79 (1985). Wesley-Smith, *China and Hong Kong '87, '88*, in *NEW ZEALAND AND CHINA: THE PAPERS OF THE TWENTY FIRST FOREIGN POLICY SCHOOL 1986* (ed. Ann Trotter) (discussing the significance of 1982 in relation to 1997 because of the mortgage situation: banks routinely lend money for fifteen year terms).

21. When Mrs. Thatcher visited Beijing in September, 1982, she initially asked for an extension of the New Territories lease. For a brief consideration of this idea, see Comment, *The Reversion of Hong Kong to China: Legal and Practical Questions*, 21 WILLIAMETTE L. REV. 327, 333 & nn.39-42. The PRC, however, clearly rejected this request. *Id.* at 334 & n.43.

22. Joint Declaration, *supra* note 2, preamble.

(pursuant to the post-Opium War treaties)²³ to Hong Kong Island and the Kowloon Peninsula. In return, the PRC agreed that Hong Kong would be exempt from "the socialist system and socialist policies"²⁴ governing the mainland. The PRC had previously argued that China's cession of the Hong Kong territories was ineffective because the post-Opium War treaties were void due to unfairness. However, because the parties' common aim of peacefully transferring governmental control could be accomplished without resolving the validity conflict, they agreed to disagree on the issue.²⁵ Thus the Joint Declaration begins with a non-compromising statement by each side, one declaring its resignation, the other its resumption of sovereignty.²⁶

III. THE SINO-BRITISH AGREEMENT²⁷ ON NATIONALITY

Nationality and its appurtenances—right of abode, travel documents, freedom of travel into and out of the country, and consular protection—are addressed in both the Joint Declaration (Annex I, section XIV) and in the Exchange of Memoranda.

A. The Joint Declaration: Annex I, Section XIV

Annex I, section XIV, defines who has a right of abode in the Hong Kong SAR, what identification and travel documents will be issued, and what emigration and immigration authority the Hong Kong SAR government will wield.²⁸ The right of abode is not a grant of any type of nationality or citizenship. Rather, it constitutes a separate right granted to those meeting the residency requirements. The right of abode in the Hong Kong SAR, and correspondingly, qualification to obtain a permanent identification card, will be conferred upon:

- (a) all Chinese nationals either born in Hong Kong or who

23. See *supra* notes 16-18 and accompanying text.

24. Joint Declaration, *supra* note 2, Annex I.

25. Although this issue has been superseded by the Joint Declaration, several commentators have addressed the argument. See, e.g., Mushkat, *The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues*, 14 DEN. J. INT'L L. & POL'Y 171, 189-90 & nn.84-96 (1986); Note, *Hong Kong's Future: Can the People's Republic of China Invalidate the Treaty of Nanking as an Unequal Treaty?*, 7 FORDHAM INT'L L.J. 534 (1983-84); Comment, *supra* note 21, at 329-30.

26. "The Government of the People's Republic of China has decided to resume the exercise of sovereignty over Hong Kong. . . ."

"The Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China. . . ." Joint Declaration, *supra* note 2, ¶¶ 1, 2 (emphasis added).

27. See *supra* note 2.

28. Joint Declaration, *supra* note 2, Annex I, sec. XIV.

- have lived there continuously for seven years and their children if they are also of Chinese nationality;
- (b) all others who have both resided in Hong Kong continuously for seven years and taken the colony as their permanent place of residence and their children, if under twenty-one and born in Hong Kong;
 - (c) any other person with a right of abode *only* in Hong Kong before the establishment of the Hong Kong SAR.²⁹

The PRC government will authorize the Hong Kong SAR government to issue passports to all Chinese nationals holding permanent identity cards. Only travel documents will be issued to all other persons lawfully residing in the Hong Kong SAR.³⁰

B. Exchange of Memoranda

1. The United Kingdom Position

Currently, Hong Kong residents holding passports issued by the British Hong Kong Government have British Dependent Territory Citizenship (BDTC). BDTCs are British citizens entitled to British passport use and consular protection.³¹ Their status, however, provides no right of entry into the United Kingdom.³²

Under the United Kingdom Memorandum, Hong Kong's BDTCs will lose their status as such on July 1, 1997, when the changeover takes place. Those losing their BDTC status will then be eligible to acquire a newly created status, British Nationals Overseas (BNO). Like the BDTC status, the BNO status does not include a right of abode in the United Kingdom.³³ BNOs will be entitled to continued use of their British passports and consular protection in third countries. However, the BNO status is not transferrable by descent,³⁴ unlike British citizenship, which can be transferred to the first generation.³⁵

Prior to 1981, the British government considered all persons born in Hong Kong or living in Hong Kong at the time of the British takeover to be Citizens of the United Kingdom and Colonies (CUKC).³⁶ In 1962 the enactment of the Commonwealth Immi-

29. *Id.*

30. *Id.*

31. Karamanian, *supra* note 20, at 180.

32. *See infra* notes 36-40 and accompanying text.

33. Mushkat, *supra* note 25, at 204.

34. Joint Declaration, *supra* note 2, United Kingdom Memorandum, sec. b.

35. Note, *The Legal Implications of the Sino-British Treaties Regarding Hong Kong*, 4 LOY. L.A. INT'L & COMP. L.J. 111, 132 (1981).

36. Chen, *The Nationality Law of the People's Republic of China and the Overseas Chinese in Hong Kong, Macao and Southeast Asia*, 5 N.Y.L. SCH. J. INT'L & COMP. L. 281, 313-14 (1984). The British Nationality Act 1948 announced CUKC status and allowed citizenship to be passed on indefinitely through descent. The British Nationality Act 1981, however, limited passing citizenship by descent to the first generation. Note, *supra* note 35, at 132.

grants Act strictly limited the rights of CUKCs to seek abode in Britain. The Act subjected all British citizens to immigration control "except those who were born in the United Kingdom and those citizens of the United Kingdom and Colonies who held passports issued by the United Kingdom."³⁷ Most Chinese Hong Kong residents hold passports issued by the British Hong Kong Government.

The British Nationality Act 1981 further restricted access to the United Kingdom by creating three categories of citizenship: full British Citizenship, British Dependent Territory Citizenship, and British Overseas Citizenship.³⁸ Under the 1981 Act, only those with full British citizenship have a right of abode in the United Kingdom.³⁹ BDTC status applies to all persons born in a British Dependent Territory, such as Hong Kong. Their right of abode depends on each territory's immigration laws.⁴⁰ Consequently, BDTCs' right of abode is abrogated by the Joint Declaration.

The 1981 Act seeks to confine British citizenship to "those persons having a real and close personal connection with the United Kingdom, persons 'belonging' to the United Kingdom."⁴¹ The British government justifies the classification scheme on the bases of the "immense diversity of the Commonwealth"⁴² and the need to control increasing immigration to the United Kingdom.⁴³

Critics, however, have rejected the immigration control rationale and have accused the government of racial discrimination. For example, one commentator discerns a racially discriminatory motive in British legislative amendments which facilitate access by BDT citizens to full British citizenship. The criticized amendments all favor colonies whose citizenry is comprised solely of people of European ancestry, such as Gibraltar, the Falkland Islands, and St. Helena.⁴⁴ Given the timing of Britain's actions—the British Nationality Act was concluded in 1981, the Sino-British negotiations commenced in 1982—one could easily surmise that the "double lock' on Britain's door" (i.e. the 1962 Commonwealth Immigrants Act bolstered by the British Nationality Act 1981)⁴⁵ was promul-

37. Karamanian, *supra* note 20, at 179 n.121. See also Clarke, *Hong Kong and the Law of British Nationality*, 13 HONG KONG L.J. 1 (1983) (criticizing Britain's racial discrimination by enacting immigration and nationality legislation).

38. British Nationality Act 1981, ch. 61.

39. Blake, *Citizenship, Law and the State: The British Nationality Act 1981*, 45 MOD. L. REV. 179, 182 (1982).

40. *Id.*

41. Samuels, *British Nationality Law: The Proposed Legislation*, 130 NEW L.J. 996, 996 (1980).

42. *Id.*

43. Note, *supra* note 35, at 133.

44. Clarke, *supra* note 37, at 2-5. See also Blake, *supra* note 39, at 196-97 (discussing discriminatory effects).

45. Karamanian, *supra* note 20, at 179.

gated in anticipation of the Hong Kong emigration problem resulting from negotiations with the PRC.

2. The People's Republic of China Position

The Chinese Memorandum reiterates the PRC Nationality Law position that all Chinese compatriots, including those in Hong Kong holding BDTC passports, are Chinese nationals. Such Chinese nationals may continue to use British travel documents after the changeover, however, they will not be entitled to British consular protection in the Hong Kong SAR or in other parts of the People's Republic of China.⁴⁶ The Chinese Memorandum does not address Hong Kong's non-Chinese BDTCs.⁴⁷

Nationality in China has traditionally been based on the *jus sanguinis* (right of blood) principle. That is, a person is a Chinese national if he is descended from a Chinese national, regardless of his place of birth.⁴⁸ This follows from the traditional Chinese view calling for and expecting perpetual allegiance by overseas Chinese.⁴⁹

Chinese nationality law was first codified in 1909 by the Qing government. Under the 1909 statute, Chinese nationality was primarily based on paternal *jus sanguinis*. However, *jus soli* (place of birth) was occasionally relied upon to supplement *jus sanguinis*. For example, an infant abandoned on Chinese soil whose parentage was unknown would gain Chinese nationality under the *jus soli* principle.⁵⁰

When the Qing dynasty fell in 1912, the newly formed Republic of China government replaced the 1909 law with its own statute. This law was amended in 1914 and remained in force until 1929 when the Kuomintang (Nationalist) government replaced it with a third nationality law.⁵¹ Like its predecessors, the 1929 law emphasized patriarchal *jus sanguinis*, with *jus soli* as a supplement.⁵²

When the Chinese Communist Party (CCP) came to power in 1949, it repudiated "all laws, decrees, and judicial systems of the Kuomintang reactionary government that oppress the people."⁵³

46. Joint Declaration, *supra* note 2, Chinese Memorandum.

47. *But see* Joint Declaration, Annex I (discussing granting traditional residence rights to non-Chinese BDTCs); *see also* notes 29-30 and accompanying texts.

48. Chen, *supra* note 36, at 315. Nationality based on place of birth follows the *jus soli* principle.

49. *Id.* at 286.

50. Sheng, *China's Nationality Law and Principles of International Law*, in SELECTED ARTICLES FROM CHINESE YEARBOOK OF INTERNATIONAL LAW 204, 205-06 (1983).

51. Chen, *supra* note 36, at 282-83.

52. Sheng, *supra* note 50, at 207. Under all three laws, non-Chinese women married to Chinese men tended to acquire Chinese nationality while Chinese women marrying non-Chinese men tended to lose their birthright. *Id.* at 208.

53. Ginsburgs, *The 1980 Nationality Law of the People's Republic of China*, 30 AM.

Since the government of the PRC did not implement its own nationality law until 1980, there is some question whether or not the 1929 Kuomintang law applied from 1949 until 1980.

Proper interpretation of the CCP's rejection of the Kuomintang laws has fallen into controversy. One side continues to argue that *all* of the laws enacted by the Nationalist government, including the nationality law, were abolished.⁵⁴ The other side maintains that only those laws *oppressing the people* were abolished. In fact, the PRC government refused to acknowledge any reliance on the Kuomintang law and explicitly refuted the law several times. However, their treatment of the various citizenship issues which actually arose seems to have followed the principles enunciated by the 1929 statute.⁵⁵

The PRC had two purposes in enacting the 1980 Nationality Law: to improve foreign relations, particularly with Southeast Asia, and to aid its modernization.⁵⁶ The enumerated principles underlying the new legislation are:

- (1) unitary (one single class) nationality;
- (2) *jus sanguinis* combined with *jus soli*;
- (3) non-recognition of dual nationality;
- (4) an open-door policy with regard to acquisition and restoration of Chinese nationality; and,
- (5) equality between the sexes.⁵⁷

Jus sanguinis has long formed the basis of Chinese nationality law.⁵⁸ The PRC government, while acknowledging the *jus soli* principle used by other nations, adheres to the traditional blood tie policy as the basis for nationality.⁵⁹ Under the 1980 Nationality Law, a person will not acquire Chinese nationality solely by virtue of having been born in China. Rather, *jus soli* applies only where the parents are stateless or of uncertain nationality and have settled down in China.⁶⁰ Despite the PRC's recognition of the need for legal progressiveness, its 1980 statute is in some respects more conservative

J. COMP. L. 459, 459 (1982) (quoting from the 1949 Common Program of the Chinese People's Political Consultative Conference which served as the interim government charter until 1954).

54. *Id.* at 459-60.

55. *Id.* at 460. *See also* Chen, *supra* note 36, at 302 (discussing the difficulty of solving current problems based on events occurring during the gap in enunciated legislation).

56. Chen, *supra* note 36, at 281.

57. The first four principles come from Sheng, *supra* note 50, at 214-15. The fifth comes from Wang, *Basic Principles of the Nationality Law of the People's Republic of China*, in SELECTED ARTICLES FROM CHINESE YEARBOOK OF INTERNATIONAL LAW 220, 221 (1983).

58. *See supra* notes 48-52 and accompanying text.

59. Wang, *supra* note 57, at 226.

60. *Id.* at 227.

with regard to *jus soli* than its 1929 predecessor.⁶¹

The legitimacy of the 1980 Nationality Law to foreign nations lies in its policy of non-recognition of dual nationality. Previously, the strong *jus sanguinis* basis for nationality created tension with countries harboring large overseas Chinese populations, especially in Southeast Asia where Chinese immigrants have been conspicuously successful in the economic area.⁶² By adopting the non-recognition principle, the PRC brought its nationality policy more in line with customary international law despite its continued reliance on *jus sanguinis*. The policy particularly affected the 1982 Sino-British negotiations concerning Hong Kong by reducing any possibility of continued British citizenship for Hong Kong residents.⁶³

3. Analyzing the Sino-British Agreement

Recognizing the importance of the nationality issue, the United Kingdom and PRC governments attempted to solve the dual nationality and statelessness problems during the pre-Agreement negotiations. These problems occur because of the differences between each country's law. For example, ethnic Chinese born in Hong Kong currently have dual citizenship: BDTC status confers British nationality and the PRC law based on *jus sanguinis* confers Chinese nationality.⁶⁴ Although the PRC refuses to recognize dual nationality, few steps have actually been taken to implement this policy.

The United Kingdom Memorandum reduces the dual nationality problem as of July 1, 1997, by withdrawing BDTC status and replacing it with the non-transferrable (by descent) BNO status on that date.⁶⁵ However, it creates a corresponding problem of statelessness for the non-Chinese, Hong Kong-born offspring of BNOs. Because of the 1980 PRC Nationality Law's restrictive *jus soli* principle, Hong Kong's non-Chinese, while possibly enjoying a right of abode in the Hong Kong SAR pursuant to Annex I of the Joint Declaration, are not included in Chinese nationality.

One of the most disturbing aspects of the Sino-British Agreement provisions is that the lines drawn by both sides are based on race. For example, in Annex I, section XIV, discussed above, Chinese nationals holding permanent identity cards will be eligible for

61. "[U]nder the terms of the 1929 statute, the plain fact of birth on Chinese soil of stateless parents is adequate to vest the child with Chinese nationality. By contrast, the current law further requires that the parents be settled in China. . . ." Ginsburgs, *supra* note 53, at 473.

62. Chen, *supra* note 36, at 289.

63. Mushkat, *supra* note 25, at 204.

64. Chen, *supra* note 36, at 316.

65. Joint Declaration, *supra* note 2, United Kingdom Memorandum. See also *supra* notes 32-34 and accompanying text.

passports, while "all others" (i.e. non-Chinese) holding identity cards will be eligible only for travel documents.⁶⁶ No explanation is given for the disparate treatment. In addition, the right of abode is more readily granted to "Chinese nationals" and their children than to "all others."⁶⁷ Ethnic Chinese born in Hong Kong have a right of abode but there is no corresponding *jus soli* provision for non-Chinese. "All others" (i.e. non-Chinese), in addition to residing in Hong Kong for seven years, must take the colony as their permanent place of residence. This requirement is not made of Chinese nationals.⁶⁸

While the Joint Declaration reduces homelessness by absorbing all persons with a right of abode only in Hong Kong,⁶⁹ it does not resolve the statelessness problem. Clearly, the right of abode alone does not amount to citizenship. Caught between respecting China's objection to extending BNO status to future generations of non-Chinese and the international policy of eliminating statelessness, the United Kingdom has devised an additional status, British Overseas Citizen (BOC) to handle post-1997 babies and those BDTCs who for some reason fail to obtain BNO status.⁷⁰ Like BNOs, BOCs will be entitled to British passports and consular protection. Again, however, this status does not confer nationality; and its validity in third countries is unclear.⁷¹ Judging from Britain's 1981 "double lock" on immigration, it is evident that the United Kingdom's concern for the future stateless children of non-Chinese BNOs will not extend to opening its doors to these people.

The nationality problem is not limited to the statelessness of future generations of non-Chinese in Hong Kong. Many ethnic Chinese residents left the mainland for political and economic reasons. These people may not want to have Chinese nationality thrust upon them.⁷² By dint of being Chinese nationals, they will not be entitled to British consular protection in the Hong Kong SAR or other parts of the PRC even if traveling under a British passport.⁷³ Future BNOs also have cause for concern since their citizenship

66. Joint Declaration, *supra* note 2, Annex I, sec. XIV. The difference between passports and travel documents is that "a passport represents the issuing state's willingness to receive the holder." Chen, *supra* note 36, at 319. A person holding a travel document and wishing to reenter Hong Kong will have to depend on his right of abode in Hong Kong SAR, pursuant to the Joint Declaration and the PRC's regulations regarding entry and exit rights. *Id.*

67. See *supra* notes 28-30 and accompanying text.

68. See Joint Declaration, *supra* note 2, Annex I, sec. XIV.

69. *Id.*

70. Mushkat, *supra* note 25, at 204. Possible reasons that BDTCs might fail to obtain BNO status within the prescribed period include: "[being] in prison, hospitalization] or . . . some other unforeseen reason." *Id.*

71. *Id.*

72. Note, *supra* note 35, at 133.

73. Joint Declaration, *supra* note 2, Chinese Memorandum.

status derives from two sources. Their travel documents and consular protection issue from the United Kingdom, while their right of abode issues from the PRC.

IV. POSSIBLE SOLUTIONS

Several commentators have suggested solutions to the nationality problems created by the Sino-British Agreement. One proposal concerned with the statelessness problem looks to the 1980 PRC Nationality Law for an answer. It suggests that expansive application of the 1980 Law's naturalization provisions should be used to provide relief to the stateless.⁷⁴ This idea, however, leaves too much discretion to the shifting administration of the PRC government. Naturalization depends on a governmental decision rather than on a set of enumerated criteria.

Another commentator believes third countries should facilitate Hong Kong emigration by opening their doors.⁷⁵ Clearly, it is unlikely that the United Kingdom will unlock its entryway. Whether other countries do so remains to be seen. This solution, by asking the international community to absorb Hong Kong's malcontents, could be drastic if taken to its logical extreme: it potentially seeks to distribute Hong Kong's millions among outside nations.

The difficulty in solving the various nationality problems lies in the nature of the changeover itself. Transferring the administration of Hong Kong's free-wheeling economy from the capitalist United Kingdom to the socialist PRC cannot fail to arouse insecurity and hostility. Already, many Hong Kong citizens have expressed a strong desire to implement direct representation and an independent government. Although the PRC has promised some form of elective representation, self-government is definitely not in Hong Kong's future.

The PRC's discretion over government matters blocks possible solutions to the nationality crisis. For example, one commentator suggested then rejected granting Hong Kong's citizens freedom to choose their own nationality.⁷⁶ The possibility of an embarrassing outcome for the PRC and massive flight of capital and talent from Hong Kong clearly undermined the feasibility of this plan.⁷⁷ In reality, for the changeover to be at all meaningful, the authority of the PRC government must be fully supported. This includes the PRC's sovereignty over the Hong Kong people.

Conversely, the PRC must assume responsibility over those it

74. Note, *The Nationality Crisis of Hong Kong's Non-Chinese Residents—Scholarly Myth or Harsh Reality*, 12 BROOKLYN J. INT'L L. 369, 384-87 (1986).

75. Mushkat, *supra* note 25, at 205.

76. Chen, *supra* note 36, at 318.

77. *Id.*

governs. Although many people in Hong Kong have citizenship and a right of abode outside of Hong Kong, most of Hong Kong's people lack this choice and must submit to the PRC's sovereignty. Ambiguity arises because the PRC does not seem to want responsibility over all of Hong Kong's residents. As noted before, the provisions of the Joint Declaration and the 1980 Nationality Law demonstrate a marked reluctance by the PRC to accord non-Chinese equal status with ethnic Chinese.⁷⁸ Even though many non-Chinese Hong Kong residents will have a right of abode under the Joint Declaration, the PRC's refusal to grant nationality based solely on *jus soli* denies these people citizenship in the territory they may call home.

One critic of Britain's "double lock" on immigration remarked on British shortsightedness: "the British are mistaken in perceiving people as a liability rather than an asset. An infusion of a large number of industrious and entrepreneurial Chinese would have done much to revitalize their sagging economy."⁷⁹ The same argument applies to the PRC's attitude towards non-Chinese. If the PRC is serious about retaining Hong Kong's economic and social system for at least fifty years following 1997,⁸⁰ there is no reason to deny citizenship to non-Chinese. They certainly comprise a vital and integral part of Hong Kong life. Disparate treatment based on race may deter non-ethnic Chinese who would otherwise be an important resource. This practice might likewise pave the way for further prejudicial treatment.

V. ONE COUNTRY, TWO CITIZENSHIPS?

A viable solution may lie in applying the PRC's "one country, two systems" strategy to the nationality issue by creating a Hong Kong SAR citizenship distinct from PRC citizenship. The PRC's current response to the issue, as set forth in its Memorandum, disregards the necessary differences between Chinese citizenship for a resident of the mainland and Chinese citizenship for a Hong Kong SAR resident. Clearly, the rights and freedoms stemming from each territory's social and economic systems will be different and possibly conflicting.⁸¹

When negotiating the terms for preserving Hong Kong's present lifestyle and economy, the PRC recognized that certain principles which ordinarily guide policy-making in the PRC had to be

78. See *supra* notes 66-69 and accompanying text.

79. Mushkat, *supra* note 25, at 205.

80. Joint Declaration, *supra* note 2, ¶¶ 3(5), 3(12) & Annex I, sec. I.

81. For example, the Joint Declaration ensures continued freedom of choice of occupation. Joint Declaration, *supra* note 2, ¶ 3(5). In contrast, jobs in the PRC are created and allocated by the state. See ZHONGHUA RENMIN GONGHEGUO XIANFA (Constitution) art. 42 (China) (1982).

abandoned with regard to Hong Kong. It recognized the need to establish an independent governing body and thus authorized creation of the Hong Kong SAR Government.

This approach could be beneficially applied to the nationality issue as well. If it is agreed that residents of the Hong Kong SAR will necessarily have different rights from residents of the mainland,⁸² the logical next step is to create a citizenship based on different principles for Hong Kong SAR residents. Rather than conforming to the restrictive provisions of the PRC's 1980 Nationality Law,⁸³ the SAR citizenship could embrace a more expansive view based truly on *jus soli* in addition to *jus sanguinis*. SAR citizenship would thereby be extended not only to Hong Kong's Chinese nationals but also to its non-Chinese residents.

The biggest advantage to this proposal is that it clarifies the position of Hong Kong's non-Chinese residents and ensures them the right to citizenship. Their citizenship would not depend on the PRC's fickleness and piecemeal application of the 1980 Nationality Law's discretionary naturalization provisions.⁸⁴ It would also signal a good faith effort by the PRC toward Hong Kong's promised "high degree of autonomy."⁸⁵

In addition, provision of such citizenship would not conflict with either the PRC's Memorandum in the Sino-British Agreement or its 1980 Nationality Law. The 1980 statute leaves much open to interpretation. By creating a separate SAR citizenship embodying the above requirements, the PRC would not be creating new law, it would simply be mandating expansive construction of its Nationality Law when applied to Hong Kong. Unfortunately, at this stage in the proceedings, the PRC government will probably be unwilling to delegate such a major portion of its powers to the Hong Kong SAR Government.

VI. CONCLUSION

The 1984 Sino-British Agreement ended speculation as to how the 1997 termination of the New Territories lease would be resolved. It nevertheless created a new set of questions concerning how sovereignty over Hong Kong will be transferred and what Hong Kong's future will be under the PRC's control. Underlying

82. At a minimum, Hong Kong SAR residents' travel rights will differ from those of China's mainland residents. While SAR residents are guaranteed freedom of travel under the Joint Declaration, Joint Declaration, *supra* note 2, ¶ 3(5), the PRC does not grant this right to citizens of the mainland.

83. See *supra* notes 56-61 and accompanying text.

84. See *supra* note 74 and accompanying text.

85. Joint Declaration, *supra* note 2, ¶ 3(2).

both of these concerns are more crucial and controversial issues regarding nationality: how will it be granted and what will it mean?

The Joint Declaration, its Annexes and the Exchange of Memoranda address nationality. However, the provisions of all three are ambiguous on this issue, leaving disturbingly expansive room for interpretation in the future. Moreover, the people of Hong Kong bear the burden of this uncertainty rather than the PRC and the United Kingdom, the negotiating governments.

This uncertainty problem is exacerbated by two realities. First, no room exists for freedom of choice if the PRC is to assume meaningful control of Hong Kong. Second, due to changes in British policy leading up to the Agreement in 1984, most of Hong Kong's citizens have been left without citizenship or a right of abode in outside countries. Therefore, most are unable to evade the prescriptions of PRC control. Furthermore, the PRC, in a manner comparable to that of the United Kingdom, has excluded ethnic minorities from Chinese citizenship despite their established affiliations with Hong Kong.

Hong Kong's future depends on whether the PRC will honor the intent of the Joint Declaration. This intent is embodied in Deng Xiaoping's "one country, two systems" idea, of which he remarked: "There are two ways to settle the issues: peacefully and non-peacefully."⁸⁶ In resolving the volatile nationality issues, it is to be hoped that the PRC will respect its own advice and look to the model of "one country, two systems" to arrive at a logical, peaceful result.

86. *A Significant Concept*, *supra* note 9, at 16.