

DIFFERENCES BETWEEN BRITISH AND CHINESE VIEWS OF LAW FOREBODE UNCERTAINTIES FOR HONG KONG'S PEOPLE AFTER THE 1997 TRANSFER

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I. INTRODUCTION

In 1984, the Government of the United Kingdom of Great Britain and Northern Ireland ("Britain") formally agreed to return its dependent territory of Hong Kong to the People's Republic of China ("China") under the terms of a bilateral Joint Declaration.¹ In this declaration, Britain relinquished sovereignty over Hong Kong in exchange for China's commitment to adhere to various international human rights standards and to refrain from implementing socialist policies or systems in Hong Kong for at least fifty years from the 1997 transfer date.² Because of the tremendous number of differences between Hong Kong and China, the ramifications for this unprecedented return

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1. 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, December 19, 1984, 1985 Gr. Brit. T.S. No. 26 (Cmnd 9543) [hereinafter Joint Declaration]. The bilaterally negotiated Joint Declaration became effective on May 27, 1985. The document was initialed by China and Britain on September 26, 1984, formally signed by both nations on December 19, 1984, ratified by the British Parliament in March 1985 and ratified by China's National People's Congress on April 10, 1985. See Patricia Homan Palumbo, Comment, *Analysis of the Sino-British Joint Declaration and the Basic Law of Hong Kong: What do They Guarantee the People of Hong Kong After 1997?*, 6 CONN. J. INT'L L. 667, 674 (1991).

2. See Joint Declaration, *supra* note 1, Annex I, parts. I, XIII.

are enormous.³ These differences begin at the government level where the ruling Chinese Communist Party (the "CCP") has in many instances committed human rights abuses in order to affirm Socialism and to perpetuate its rule.⁴ In comparison, while the British government in Hong Kong is authoritarian, unrepresentative and undemocratic, it appears that the British administrators have treated its residents fairly.⁵ Britain's difference from China in governing stems from a sharply different view on democracy and elections prompting Britain's Parliament and an independent judiciary to ensure that the colonial government did not abuse its authority.⁶ Another tangible difference is the apparent disparity in levels of income between Hong Kong and China. In

3. Generally, decolonization efforts are encouraged and applauded by activists throughout the world. However, the return of Hong Kong is unprecedented in that never before has a colony been returned to another country that claims it as their territory. Typically, decolonization is a gradual evolution from undiluted autocratic rule, typically by a governor, towards self-government, whereupon the colony is eventually granted its independence from the rule of another sovereign nation. See generally Norman Miners, *The Normal Pattern of Decolonisation of British Dependent Territories*, in *THE BASIC LAW AND HONG KONG'S FUTURE* 44 (Peter Wesley-Smith & Albert H.Y. Chen eds., 1988) (comparing the typical pattern of decolonization with events in Hong Kong). "This is the first time in modern history that you have an entire people who will be delivered to the sovereignty of a state which is not a signatory of the ICCPR . . . and not a democracy as we know it," said Daniel Fung, a prominent human rights attorney. Denise Young, *Fears Mount Over Human Rights in Hong Kong After 1997*, REUTERS, Mar. 31, 1991, available in LEXIS, News Library, Arcnws File.

4. The CCP's ongoing abuses include the use of re-education camps, forced labor, detentions and approximately one thousand executions per year for assorted offenses. See *Hong Kong's Liberties*, ECONOMIST, June 15, 1991, at 18 (U.K. Edition). For a firsthand account of life inside Chinese forced labor camps by a political prisoner, see HARRY WU & CAROLYN WAKEMAN, *BITTER WINDS: A MEMOIR OF MY YEARS IN CHINA'S GULAG* (1994). Although never formerly tried or charged with a crime, Wu was accused of being a counter-revolutionary rightist who had a bad "attitude." See *id.* at 33. Deemed a counter-revolutionary rightist, Wu was sentenced to re-education through labor and forced to sign an arrest warrant. See *id.* at 45-46. Wu remained in prison for the next 19 years, never certain of his release date. See *id.*

5. See INTERNATIONAL COMMISSION OF JURISTS, *COUNTDOWN TO 1997, REPORT OF THE MISSION TO HONG KONG* 6 (1992). The International Commission of Jurists is an international organization of legal professionals which organized a mission to investigate the human rights ramifications of the July 1, 1997 transfer of Hong Kong from Britain to China. This mission was sent to Hong Kong in June 1991 and met with members of the Hong Kong government, British representatives on the Joint Liaison Group (described more fully in note 104 and accompanying text), representatives of the legal profession, the press, the business community, human rights organizations, political parties and other groups. See *id.* at 3. Despite repeated requests by the mission, there was no cooperation or response from any direct or indirect representatives of China. See *id.* The Commission issued a report discussing the human rights situation in Hong Kong as governed by Britain and raised concerns for future rule by China. See *id.*

6. See generally KEVIN RAFFERTY, *CITY ON THE ROCKS: HONG KONG'S UNCERTAIN FUTURE* (1989); *Hong Kong's Liberties*, *supra* note 4, at 18.

1994, the estimated gross domestic product per person in Hong Kong was approximately \$22,000, while in China estimates have ranged from \$454 to \$2,660.⁷

This Article will focus on the ultimate irony of the transfer of Hong Kong; namely, the fact that in post-1997 Hong Kong, China's official view on Hong Kong governance and sovereignty-based claims to Hong Kong all seem to be more legitimate and representative of the Hong Kong people than the equivalent British claims. Yet in reality, the people of Hong Kong will probably have less rights and freedoms under China than under Britain. Both the British government⁸ and the Chinese government espouse similar patronizing attitudes towards Hong Kong, with each respective government claiming that they know what is in the best interest of the people of Hong Kong. While both governments cite the health and well-being of Hong Kong's six million residents as a primary concern, it is the health and well-being of Hong Kong's business community that both governments seem to be most concerned about. China takes the moral and sovereignty-based high ground, emphasizing not its economic interest in Hong Kong, but rather the issues of *gangren zhiqiang*,⁹

7. See Michio Katsumata, *China Bracing for Profound Changes: Post-Deng Era Holds Many Uncertainties*, NIKKEI WEEKLY, Dec. 25, 1995, at 7, available in LEXIS, News Library, Curnws File; *Global Indicators: Population and Gross Domestic Product Part II*, ECONOMIST INTELLIGENCE UNIT CROSSBORDER MONITOR, Aug. 28, 1996, available in LEXIS, News Library, Curnws File. In 1989, the gross domestic product per person in Hong Kong was only \$10,900 and it has progressively risen to the point where it is now ranked thirteenth in the world, second in Asia only to Japan and exceeds that of its colonial master, Britain. See James Allan, *Analysis, A Bill of Rights for Hong Kong*, PUB. L. 175, 176 (1991); *Global Indicators*, *supra*. In comparison, the gross domestic product per person in China has grown from \$375 in 1979 to between \$454 and \$2,660 in 1994. See Katsumata, *supra*; *Global Indicators*, *supra*. The wide range of estimates of China's per capita gross domestic product can be attributed to the difficulty in obtaining accurate economic data in China. This difficulty results from the strong divergence in wealth and development between the inland and coastal provinces, the increasing decentralization of authority from the central government, the existence of enormous and inefficient state-run industries, and the fact that 80 percent of the country's 1.2 billion people still remain in agrarian occupations in rural regions. See generally *China Calls for Halt to Bullying of Farmers*, REUTERS ASIA-PAC. BUS. REP., Oct. 27, 1996, available in LEXIS, News Library, Curnws File (reporting that 80 percent of China's population works in agrarian occupations).

8. See *infra* note 77-92 and accompanying text for a summary of Britain's "three legged stool" concept that included representation of the Hong Kong people as one leg of the "stool."

9. *Gangren zhiqiang*, meaning "Hong Kong people govern Hong Kong," became a popular phrase utilized by China as a way to dispel the fears of the people of Hong Kong regarding their political future. The slogan, along with the "high degree of autonomy slogan" used throughout the drafting process of the Joint Declaration, emphasizes China's delegation of control to the Hong Kong people and Hong Kong government. See KATHLEEN CHEEK-MILBY, *A LEGISLATURE COMES OF AGE: HONG KONG'S SEARCH FOR INFLUENCE AND IDENTITY* 72 n.39 (1995); Peter Wes-

self autonomy for the Hong Kong people and the fact that Britain gained Hong Kong by forcing China to sign a series of "unequal treaties." In comparison, Britain's claims that it acted in the best interest of the Hong Kong people are less believable, given its track record in Hong Kong. Indeed, the impetus for most changes initiated by Britain appears to be solely economic; its autocratic and bureaucratic colonial government resembles the imperial bureaucratic structure of past Chinese dynasties, and it did in fact secure Hong Kong through a series of "unequal treaties."¹⁰

While China may have greater moral rationales for controlling Hong Kong, in practice, Britain has rarely exercised the full extent of its authoritarian powers, and its people have enjoyed relatively unimpeded civil rights and economic wealth. China's rhetoric of *gangren zhigang* and self-autonomy may seem laudable, but its past history of human rights abuses and civil rights violations with its own people raises concerns for the people of Hong Kong in post-1997 Hong Kong. These concerns should have been considered more seriously by the British negotiators to prevent the abuses which China inflicts on its own people from occurring to the Hong Kong people when China takes control of Hong Kong. Britain seemingly does not understand that China's track record indicates that it views law differently from the British and most other Western nations with whom Britain is typically accustomed to dealing. Thus, even if Britain had negotiated measures more protective and representative of the Hong Kong people than under its own administration of Hong Kong, these measures would still be inadequate, given that "the Chinese use law as but one tool in a struggle for influence and position."¹¹ The drafted provisions of the Joint Declaration protective of the human and civil rights of Hong Kong's population lack substantiveness and enforceability in the face of the Chinese use of law. In spite of the public relations propaganda disseminated by the British and Chinese governments, no one should be deluded into thinking that the rights of the people of Hong Kong have been properly protected by either government. This Article will concentrate on various documents and measures governing the transfer which seem to be more protective of the rights of the Hong Kong people on paper than in practice. This Article will

ley-Smith, *The Present Constitution of Hong Kong*, in *THE BASIC LAW AND HONG KONG'S FUTURE*, *supra* note 3 at 5, 15.

10. Britain's economic interest in Hong Kong explains why Hong Kong never evolved according to the typical pattern of decolonization. See *supra* note 3; *infra* notes 32-50 and accompanying text.

11. William Lee, *Time's Running Out: In the Long Run, China's Many Woes Will Destroy its Facade of Capitalism*, *BARRON'S*, Sept. 23, 1996, at 20.

explore the respective inadequacies of these various documents and measures, highlighting the disparate views of Britain and China towards law, and particularly, towards citizenship, civil rights and human rights.¹²

The relevant documents, described in Part II of this Article, are the Joint Declaration¹³ and the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the "Basic Law").¹⁴ As the Basic Law drafting process was coordinated by China without British involvement, many critics pressured the British to use their diplomatic powers to more vigorously represent the Hong Kong people.¹⁵ The most substantive response was Britain's eventual drafting and passage of the Hong Kong Bill of Rights (the "Bill of Rights").¹⁶ For strategic reasons,¹⁷ the Bill of Rights was directly based on the United Nations' International Covenant on Civil and Political Rights

12. Civil rights include such rights "as those to speak, publish, assemble, and associate." ANDREW J. NATHAN, *CHINESE DEMOCRACY* 107 (1985).

13. The Joint Declaration was not self-executing. It specifically required a Basic Law to be drafted to codify the dictates of the Joint Declaration. See Joint Declaration, *supra* note 1, Intro., para. 21.

14. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Apr. 4, 1990, 29 I.L.M. 1511 [hereinafter Basic Law]. The Basic Law underwent a five year drafting process beginning in July 1, 1985, and was formally promulgated by China on April 4, 1990. For a clear overview of the drafting process, see DRAFTING COMMITTEE FOR THE BASIC LAW, *THE DRAFT BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (FOR SOLICITATION OF OPINIONS)*, 1-8 (Apr. 1988) [hereinafter BASIC LAW SOLICITATION OF OPINIONS]; Ming K. Chan, *Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90*, in *THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY?* 3, 4 (Ming K. Chan & David J. Clark eds., 1991).

The Basic Law lays the foundation for the general principles of Britain's transfer of sovereignty and China's administration of Hong Kong. See Joint Declaration, *supra* note 1, Intro., para. 21. The Basic Law acts as a hybrid quasi-constitution by attempting to integrate the capitalist-based provisions of the Joint Declaration within China's socialist-centered Constitution. Compare Basic Law, *supra*, with XI-ANFA [Constitution], (1982) (P.R.C.).

15. See, e.g., Leonard Doyle, *Britain Faces UN Questions on Abuse of Human Rights*, INDEPENDENT, Mar. 30, 1991, at 3 available in LEXIS, News Library, Arcnws File. (reporting that critics included the United Nations Human Rights Commission, human rights organizations such as Amnesty International and various human rights activists). Many debatable issues or uncertainties in the Joint Declaration were seemingly resolved in China's favor upon its drafting of the Basic Law. See William Dullforce, *UK Policy on HK Under Fire*, FIN. TIMES, Nov. 5, 1988, at 2, available in LEXIS, News Library, Arcnws File. Britain merely conceded that many of the details were up to China to resolve. See *id.*

16. Hong Kong Bill of Rights Ordinance of 1991, M.1 LAWS OF HONG KONG, CAP. 383 [hereinafter Bill of Rights].

17. Britain wanted to ensure that the Bill of Rights did not conflict with the Basic Law and become voidable after the Chinese take over in 1997. The British strategy is discussed further in Part IV.C.

(the "ICCPR").¹⁸ Additionally, beginning in 1991, the Legislative Council, the legislative body in Hong Kong, was reformed so that more members were directly elected by the population of Hong Kong.¹⁹ However, China's repeated statements that it would replace the Legislative Council with a provisional legislature upon its resumption of control, in conjunction with its apparent downplaying of a strict adherence to the legal requirements of the various documents in comparison to Britain, has generated enormous uncertainty regarding the future of Hong Kong and the sanctity of its people's human and civil rights. This uncertainty has raised questions of whether the British negotiators truly represented or even cared about the interests of the people of Hong Kong, or whether they did not understand how the Chinese view or use law.

Part II of this Article provides a brief overview of Hong Kong's unique historical background as it pertains to the major issues surrounding the transfer of Hong Kong. Despite being a British dependency since 1841, Hong Kong has increasingly become sensitive to the interests and desires of China, especially as China's influence has grown.²⁰ Aside from the obvious desirability of gaining control of Hong Kong for its material wealth, China has continued to profess a moral and sovereignty-based rationale for Hong Kong's return. Essentially, China argues that the initial treaties giving Britain control of Hong Kong were "unequal" and thus illegitimate.²¹ Although China has continually honored

18. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force, Mar. 23, 1976) [hereinafter ICCPR]. Ratified in 1976, the ICCPR is a non-binding covenant that espouses civil and political rights of citizens that nations should respect. See Perry Keller, *Freedom of the Press in Hong Kong: Liberal Values and Sovereign Interests*, 27 TEX. INT'L L.J. 371, 385 (1992). These rights are guaranteed and became binding, however, once the ICCPR provisions were incorporated into Hong Kong law by the passage of the Bill of Rights. See *Hong Kong's Liberties*, *supra* note 4.

19. See Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANS-NAT'L L. 301, 314 n.37 (1996).

20. Throughout the post-1949 Communist China era, Hong Kong has always been influenced by its much larger neighbor. It absorbed many refugees as the Communists took over, acted as China's conduit to the outside world, and depended on China for infrastructural support. See generally Roda 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 (1986) (noting that the Hong Kong government has concluded several agreements with China's Guangdong Province, including agreements for the supply of water). Hong Kong's role has increased since China's push for modernization in 1979. See *id.*

21. For a more detailed explanation of these treaties, see *infra* Part II.A. There are three treaties that established the current geographical boundaries of the British colony of Hong Kong. See generally PETER WESLEY-SMITH, *UNEQUAL TREATY 1898-1997 CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES* (1980) (detailing the historical events that surrounded the unequal treaties). The treaties

these treaties, China's stance indicates the opposing perspectives and characteristics that separate China from Britain in the application of international law.

Part III of this Article elaborates upon the distinction between Britain, which, like most Western societies, generally stresses the primacy of treaties as international law, as compared to China which stresses other factors that affect its view of legal treaties.²² The British government's inability or unwillingness to counteract these differences has far-reaching ramifications that will affect the outcome of the various negotiated documents prepared for the transfer of Hong Kong.

Part IV of this Article will examine instances where the substance of these documents falls short of the stated objectives of the British and Chinese drafters with regard to protecting the needs of the Hong Kong public whom they purportedly represented. Chinese actions subsequent to the signing of the Joint Declaration that seem to violate the spirit if not the form of the Joint Declaration provide a disturbing preview of their actions once they regain Hong Kong in 1997.

A final consideration present throughout this Article is that actual events have affected the implementation and significance of these documents and responsive measures. Most relevant is the Tiananmen Square incident in Beijing on June 4, 1989. China's dramatic suppression of the student initiated pro-democracy movement in Tiananmen Square transformed the Hong Kong people "almost overnight from apolitical and apathetic residents of a colony to citizens of a threatened community committed to preserve their freedom and fight for their rights."²³ The effects of Tiananmen have pervaded all subsequent measures and discussions regarding the future of Hong Kong. Prior to

originated and derived from the nineteenth century imperialism of European, American and Japanese governments. *Id.* at 3. China feels these treaties are unequal because their terms were essentially forced upon China. *Id.* There was neither mutual recognition of sovereignty between the parties nor reciprocity of rights and obligations. See generally UNITED NATIONS, SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES, LETTER DATED MARCH 8, 1972 FROM THE PERMANENT REPRESENTATIVE OF CHINA TO THE UNITED NATIONS ADDRESSED TO THE CHAIRMAN OF THE SPECIAL COMMITTEE, (Mar. 9, 1972), U.N. Doc. A/AC.109/396 [hereinafter U.N. Mar. 9, 1972 Letter].

22. See Michael D. Landry, Note, *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*, *British White Paper* (Sept. 26, 1984), 26 HARV. INT'L L.J. 249, 253 (1985).

23. Chan, *supra* note 14, at 18. In a rare public demonstration, "more than a million people turned out twice in one month to express solidarity with their compatriots in Tiananmen Square." WILLIAM MCGURN, *PERFIDIOUS ALBION: THE ABANDONMENT OF HONG KONG* 1997, 84 (1991).

Tiananmen, controversy and criticism regarding whether the sum of the documents would provide the Hong Kong people with enough protection from the whims of the Chinese government remained muted.²⁴ The Hong Kong people had barely participated in the negotiating and drafting processes.²⁵ After Tiananmen, apprehension of future Chinese rule finally prompted many in Hong Kong to become skeptical of the various mandates' stated ability to safeguard their rights.²⁶

II. BACKGROUND

This Section will provide a brief overview of the relevant historical events that preceded the events precipitating the 1997 Hong Kong transfer. This Section will also survey the more recent events and documents regarding Hong Kong's transfer to China.

A. THE DEBATE OVER THE UNEQUAL TREATIES

Hong Kong's current existence is a remnant of China's past, where many concessions were made by the ruling Qing dynasty to various Western nations in the 1800s.²⁷ The geography of modern Hong Kong derives from three treaties: the 1842 Treaty of Nanking, the 1860 Convention of Peking, and the 1898 Convention of Peking.²⁸ There exists a fundamental difference of opinion between the British and the Chinese as to the validity of these treaties. The British maintain that these treaties are valid under international law.²⁹ In contrast, the Chinese deemed these treaties unequal because they were "imposed unfairly on China by imperialists for immoral purposes - namely, forcing

24. See, e.g., Chan, *supra* note 14, at 18.

25. The lack of participation by Hong Kong's people in deciding their political future is a tradition characteristic of Britain's rule of Hong Kong and one which China has effectively adopted. See *infra* Part II.B; see generally Miners, *supra* note 3.

26. See Chan, *supra* note 14, at 17-20.

27. See generally JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* chs. 7, 8 (1990) (describing China's interaction with the West in the 1800s). The Qing dynasty was the last of the dynastic empires to rule China. It lasted from 1644 to 1911 and was relatively weak by the 1800s. *Id.* at 33. The Republic of China was officially inaugurated on January 1, 1912, when Sun Yat-sen was elected as provisional President in Nanjing, China. *Id.* at 267. Subsequently, the Guomindang Party sought to solidify its control over China. *Id.* at 281. It was this government under Chiang Kai-Shek that was to lose control of China to the CCP and retreat to the island of Taiwan in 1949. For a narrative of the fall of the Guomindang government, see generally *id.* at ch. 18.

28. See generally *id.* at chs. 7, 8.

29. This viewpoint is typified by Margaret Thatcher's statement, referring to China, that "[i]f a country will not stand by one treaty, then it will not stand by another." DAVID BONAVIA, *HONG KONG 1997*, at 118 (1983).

China to import opium from British drug traders."³⁰ Under the CCP, China has steadfastly stated that the future of Hong Kong and Macao, both considered "colonial territories" by Western governments, is an internal matter to be resolved by China when it deems conditions to be "ripe."³¹

The British military, aggressively protecting British mercantile interests, seized the island of Hong Kong by force in 1839.³² Unlike the typical British colony, Hong Kong was administered from the outset as a trade-based colony rather than as a territorial settlement.³³ Therefore, this bias toward protecting British trade interests would always influence the development of Hong Kong in a way that was unique among British colonies.³⁴ In 1842, the Treaty of Nanking ended the Opium War with China ceding the island of Hong Kong to Britain in perpetuity.³⁵ This cession derived from the confiscation of British merchants' opium as part of a decree in 1838 by the Chinese Emperor banning the opium trade.³⁶ Hong Kong was established as a colony by Letters Patent dated April 5, 1843.³⁷

30. WILLIAM H. OVERHOLT, *THE RISE OF CHINA: HOW ECONOMIC REFORM IS CREATING A NEW SUPERPOWER* 250 (1993). In a letter addressed to the United Nations Chairman of the Special Committee, China's permanent representative to the United Nations said that Hong Kong's future was an internal matter and therefore, the United Nations has no right to discuss Hong Kong's status. He also claimed that Hong Kong was not a "colonial Territory." U.N. Mar. 9, 1972 Letter, *supra* note 21.

31. See U.N. Mar. 9, 1972 Letter, *supra*, note 21.

32. See John Gittings, *Hong Kong's Countdown to a Historic Return*, *GUARDIAN*, May 5, 1992, at 2; IAN SCOTT, *POLITICAL CHANGE AND THE CRISIS OF LEGITIMACY IN HONG KONG* 40-41 (1989) (giving the date of occupation as Jan. 26, 1841).

33. See CHEEK-MILBY, *supra* note 9, at 37. Great Britain intended to use Hong Kong to further its trade with China and provide the stability, contract guaranties and impartial justice needed to further this trade. See *id.*

34. See *id.* Hong Kong was never viewed as a community populated by resident expatriots. Rather, it was seen as a "trading post inhabited by a succession of temporary traders," whose priorities were primarily governed by economic considerations. *Id.* Hong Kong's uniqueness was emphasized in the statement by Lord Stanley, British Secretary of State for War and the Colonies from 1841 through 1845, to the new Governor of Hong Kong, Sir Henry Pottinger, that there was to be "no slavish copying of precedents [referring to other British colonies] . . . methods of proceeding unknown in British colonies must be followed at Hong Kong." *Id.* (citation omitted).

35. See Joint Declaration, *supra* note 1, Intro., para. 3.

36. See SCOTT, *supra* note 32, at 40-41. Moral issues are clearly raised by Britain's imposition of opium on China as over two million Chinese were addicted to opium in 1835. Between 1821 and 1840, the opium trade drained away approximately ten percent of the Qing government's annual reserves. See RAFFERTY, *supra* note 6, at 105.

37. See INTERNATIONAL COMMISSION OF JURISTS, *supra* note 5, at 6. The Letters Patent is Hong Kong's Constitution. For a more thorough discussion, see *infra* Part II.G.

Beginning in 1855, capitalizing on internal rebellion within China, the British used their leverage to force additional territorial concessions from the ailing Qing government.³⁸ In 1860, the Convention of Peking ceded Stonecutters Island and the southern part of the Kowloon peninsula to Britain in perpetuity.³⁹ Still not satisfied, and prompted by Hong Kong's crowded and unsanitary situation, Britain began actively campaigning to expand Hong Kong in the 1890s.⁴⁰ During the negotiation process, China adamantly refused to cede more land and promised only a lease.⁴¹ Agreement was reached in the Convention of Peking in 1898, which leased the New Territories and about 200 small islands near Hong Kong to Britain for 99 years.⁴² Thereafter, a British Governor ruled Hong Kong, which evolved to become a free market capitalist port city, exporting and importing goods to and from China and the rest of Asia.⁴³ This rule was briefly interrupted for three years and seven months beginning on December 25, 1941, as Japan occupied Hong Kong during World War Two.⁴⁴

A worldwide trend towards decolonization developed after World War Two, but Hong Kong was influenced less than one might expect.⁴⁵ The Japanese surrendered Hong Kong to the British military who took it in the name of both the British and

38. See RAFFERTY, *supra* note 6, at 124-29. China was pressured both by foreign imperialists such as Britain, Russia, France, and Germany, and by internal rebellions, most notably the Taiping rebellion. See *id.* Viewing the internal dissent as more dangerous, the Chinese government sought and gained British and French cooperation in quelling this internal strife. See *id.* at 128. While this foreign support was instrumental in preserving the Qing government's power, it came with a price that included the additional Hong Kong land concessions. See *id.* at 127-28; SPENCE, *supra* note 27, at 179.

39. See Joint Declaration, *supra* note 1, Intro., para. 3. This land was deemed a part of the colony of Hong Kong on February 4, 1861. See INTERNATIONAL COMMISSION OF JURISTS, *supra* note 5, at 6. Indicative of the unequal relationship between Britain and China at the time was the fact that this portion of Kowloon Island and Stonecutters Island had previously been leased by the British government for a mere 500 taels of silver. See *id.*

40. See RAFFERTY, *supra* note 6, at 129-30.

41. The British did not press the issue as there was a concurrent explosion of new imperialist nations trying to gain a toehold in China. Fearful of new competitors, Britain moderated its demands to ensure that China was not torn apart by the other nations. See *id.* at 130.

42. See Joint Declaration, *supra* note 1, Intro., para 3; Gittings, *supra* note 32, at 2. The New Territories comprise 350 square miles of land. See INTERNATIONAL COMMISSION OF JURISTS, *supra* note 5, at 6. Two Council Orders dated October 20, 1898 and December 27, 1899 declared the new territories to be part of the colony of Hong Kong. See *id.*

43. See Gittings, *supra* note 32, at 2.

44. See *id.*; CHEEK-MILBY, *supra* note 9, at 57.

45. See CHEEK-MILBY, *supra* note 9, at 57-58.

Chinese governments.⁴⁶ While there were various movements or proposals to grant the Hong Kong population greater representation, grant Hong Kong its independence, or return Hong Kong to China, the administration of Hong Kong was eventually resumed by the British.⁴⁷ The takeover of mainland China by the CCP in 1949 further dampened the incentive for political liberalization.⁴⁸ Hereafter, there was an implicit understanding between Britain and China that no fundamental changes would occur in the political system.⁴⁹ China was fearful that any democratic reforms in Hong Kong "would give people in Hong Kong the impression that they were heading for democratic independence like every other colony."⁵⁰

As the June 30, 1997 expiration date of the 1898 Convention of Peking drew nearer, China and Britain felt increasing pressure to address the future of Hong Kong.⁵¹ China has always said that Hong Kong "belong[s] to the category of questions resulting from the series of unequal treaties leftover by history, treaties which the imperialists imposed on China. . . and has consistently held that they should be settled in an appropriate way when con-

46. *See id.* at 57.

47. *See id.* at 57-58. The British resumed administration of Hong Kong in May 1946 with the return of Governor Mark Young, who proposed several constitutional reforms, collectively known as the Young Plan, designed to provide greater representation for Hong Kong's population. *See id.* Several factors seem to have served as an impetus for the Young Plan, including U.S. President Franklin Roosevelt's suggestion to Soviet Leader Joseph Stalin at the Yalta Conference in February 1945 that Hong Kong should be given back to China or internationalized as a free port. *See id.* During the war, while believing that Hong Kong would probably be returned to China, Britain and the U.S. signed an agreement intended to end the unequal treaty system with China. *See id.* However, as the U.S. shifted its attention to the emerging communist threat of both China and the Soviet Union, the decolonization emphasis of the U.S. became secondary to its strategic concerns. Thus, the British were able to retain Hong Kong as a colony with minimal constitutional changes. *See id.* at 58.

48. *See id.* at 63. The founding of the People's Republic of China was formally announced on October 1, 1949 by Mao Zedong in a formal ceremony in Beijing. *See SPENCE, supra* note 27, at 512. The flood of refugees from China escaping the new CCP regime heightened the British awareness of the transitory nature of both its rule of Hong Kong and the population base of Hong Kong. *See CHEEK-MILBY, supra* note 9, at 61. Accordingly, it felt no stable form of representative government was necessary. *See id.* Additionally, plans for constitutional reforms were abandoned. *See id.* at 63; Miners, *supra* note 3, at 51.

49. *See Miners, supra* note 3 at 51. For example, by the end of 1969, ten Hong Kong district officers were appointed to maintain contact with Chinese organizations in order to explain and assess the impact of Hong Kong government policies. *See CHEEK-MILBY, supra* note 9, at 63 n.112.

50. Speech by Gov. Christopher Patten to the National Press Club in Washington, D.C. (May 8, 1996), in FED. NEWS SERVICE, May 8, 1996, available in LEXIS, News Library, Curnws File.

51. *See Joint Declaration, supra* note 1, Intro., para 3.

ditions are ripe."⁵² As its relations with China improved after the Chinese political upheavals in the 1960s and Mao's death in 1976, Britain saw the opportunity to resolve Hong Kong's future.⁵³ Britain also received pressure from nervous banks and businesses.⁵⁴ Mindful of the fact that fifteen years is the normal maximum mortgage length in Hong Kong and fearful of post-1997 uncertainty, these banks and business entities began pressuring the British government in the early 1980s to resolve the 1997 issue.⁵⁵ These businesses were more concerned with achieving certainty in order to guide their future planning, and were less concerned with whether Britain or China was the post-1997 government.⁵⁶ In 1979, businesses were encouraged by the statements of Deng Xiaoping⁵⁷ to the Governor of Hong Kong, Sir Murray MacLehose, suggesting that Hong Kong investors should set their hearts at ease.⁵⁸

The consensus of most observers was that China would allow some form of British rule to continue so as not to jeopardize the economic benefits that it derives from Hong Kong.⁵⁹ Although the land ceded in perpetuity comprise the major urban and commercial areas of Hong Kong, British Prime Minister Margaret Thatcher stated that these areas could not survive without the infrastructural support of the New Territories, which comprise ninety-two percent of the Hong Kong land area.⁶⁰ Britain initially hoped to convince China either to lease back the New Territories or allow it to continue to administer Hong Kong.⁶¹ It seems that Britain's view of its role in Hong Kong's

52. U.N. Mar. 9, 1972 Letter, *supra* note 21.

53. See RAFFERTY, *supra* note 6, at 384-87.

54. See *id.* at 384-85.

55. See *id.*

56. See *id.*

57. From 1979, Deng was the acknowledged leader of China, with a dominant coalition of support within the CCP until his death on February 19, 1997 at the age of 92. See, e.g., RICHARD BAUM, BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING 63-65 (1994); Deng Xiaoping, *Chinese Leader*, UPI, Feb. 19, 1997, available in LEXIS, News Library, Curnws File. See also *infra* Part II.D.

58. See RAFFERTY, *supra* note 6, at 385.

59. China's obstinacy derives from several sources, including the domestic political fallout from sacrificing ideological sovereignty for economic concerns, the encouragement of Taiwan's independence movement, and the implicit recognition of the unequal treaties of 1842 and 1860. See Hungdah Chiu, *Introduction to THE FUTURE OF HONG KONG: TOWARD 1997 AND BEYOND* 1, 8 (Hungdah Chiu et al. eds., 1987).

60. Margaret Thatcher stated in October 1983 that, "the lease applies to 92 percent of the territory . . . but I think everyone in Hong Kong accepts that you can really only run Hong Kong as a unit." Margaret Thatcher, Reply to the Question on Hong Kong's Future Filed by TVB Reporter Nancy Li (Oct. 31, 1983) in HONG KONG IN SEARCH OF A FUTURE 45 (Joseph Y. S. Cheng ed., 1984).

61. See Gittings, *supra* note 32, at 2.

economic success and its perception of China's perspective was over inflated in comparison to the reality of China's actual viewpoint of Britain's importance.⁶² The British government and most Hong Kong businesses seriously underestimated China's staunch opposition to both British rule and involvement after 1997.⁶³ While Hong Kong has grown to be an economic success under the British, such continued success requires a friendly China, and Britain eventually realized the impracticability of retaining Hong Kong Island and Kowloon in the face of China's intransigence over post-1997 British rule.⁶⁴

In September 1982, Margaret Thatcher traveled to Beijing to begin the Hong Kong negotiations.⁶⁵ Thatcher matched China's tough stance with her own statement, affirming the legitimacy of the treaties and Britain's refusal to concede sovereignty of Hong Kong to China.⁶⁶ The offended Chinese attacked Thatcher's statement and threatened to unilaterally reclaim sovereignty over Hong Kong so as to right "the wrong done by British imperialists more than a century ago."⁶⁷ Afraid of "losing face," the Chinese would not back down from their position.⁶⁸ The British could

62. There is a common belief in the saying, "China would never strangle the 'duck' (Hong Kong) that is laying the 'golden eggs'." Katsuo Hiizumi, *Hong Kong Ponders Its Future After 1997: Territory's Business Tycoon Key To Determining If It Will Keep Democratic Principles, Human Rights*, DAILY YOMIURI, Mar. 17, 1996, at 3.

63. See Chiu, *supra* note 59, at 8.

64. See Thomas Boasberg, *One Country, One-and-a-Half Systems: The Hong Kong Basic Law and Its Breaches of the Sino-British Joint Declaration*, 10 WIS. INT'L. L.J. 282, 284 (1992). Hong Kong has few indigenous resources and depends on other nations, especially China, for the majority of its food, water, raw materials, and fuel. See CHEEK-MILBY, *supra* note 9. Hong Kong utilizes these resources to produce the exports from which it derives its economic wealth. See *id.*

65. See, e.g., GEORGE L. HICKS, HONG KONG COUNTDOWN 99 (1989).

66. See Joseph Y.S. Cheng, *Introduction to HONG KONG IN TRANSITION 1* (Joseph Y.S. Cheng ed., 1986); MCGURN, *supra* note 23, at 35. Given Thatcher's awareness of the Chinese sensitivity to the "unequal" treaties, many analysts speculated over the appropriateness of her brashness and attributed it to her confidence gained from the just concluded Falkland Islands victory. See, e.g., HICKS, *supra* note 65, at 99-100.

67. MCGURN, *supra* note 23, at 36-37. William McGurn provides an interesting account of the Chinese negotiation strategy and the British inability to counter it, foreclosing the possibility of a post-1997 British presence. He even suggests that since 1971 Britain had planned to abandon Hong Kong in exchange for favorable British interests, primarily business-related, which were to be distinguished from the interests of Hong Kong and its people, whom the British negotiators were purportedly representing. See *id.* at 35-43.

68. See *infra*, Part III.A, for a description of the impact which the Confucian "loss of face" concept plays in Chinese society. A study of Chinese, Hong Kong and American managers revealed the strong disposition of the Chinese managers to embrace these Confucian ideals. The ideals were embraced to a lesser extent by the Hong Kong managers and not at all by the American managers. See David A. Ralston et al., *Differences in Managerial Values: A Study of U.S., Hong Kong and PRC*

only retreat in incremental steps as they responded to the dramatic consequences of this stand-off in Hong Kong.⁶⁹ In a full reversal, Prime Minister Thatcher ultimately announced that after 1997, Britain would sever ties with Hong Kong and concede to China complete sovereignty over all of Hong Kong, including the areas ceded in perpetuity.⁷⁰

B. THE NEGOTIATION PROCESS

Most commentators feel that the new British position represented a victory by the Chinese on "all major points of principle and most substantive points of detail."⁷¹ The continued emphasis by Thatcher on the sanctity of the treaties was exactly what the Chinese wanted, as it put Britain on the moral defensive because it highlighted the historical and territorial unfairness of the British occupation of Hong Kong.⁷² Britain's hardline position hampered the British negotiating position with China over the details of the 1997 transfer.⁷³ Newspapers and critics in Hong Kong have commented that the British should have "played the public opinion card"⁷⁴ by emphasizing the moral and human rights as-

Managers, 24 J. INT'L BUS. STUD. 249 (1993). It is not hard to see that this fundamental difference would foster disagreement if the British were to miscalculate the importance that the Chinese place on maintaining "face."

69. See SCOTT, *supra* note 32, at 18-19. William Overholt said the sways in negotiation nearly shattered Hong Kong society in September 1983. "A financial crisis almost destroyed the value of the currency and social panic swept the colony." OVERHOLT, *supra* note 30, at 252. Unlike the British, the Chinese did not seem to care about the resulting economic chaos in Hong Kong. This ambivalence was typified by Deng Xiaoping's statement that even if the Hong Kong dollar dropped to \$20 to US\$1 (as a reference point, the pre-negotiation exchange rate was \$5 to US\$1 and it had already dropped to \$9.5 to US\$1 during this period), China would still not alter its claim of sovereignty. See Chiu, *supra* note 59, at 9; Cheng, *supra* note 66, at 1.

70. See Chiu, *supra* note 59, at 9.

71. SCOTT, *supra* note 32, at 19.

72. See HICKS, *supra* note 65, at 100. Even a vast majority of Hong Kong's Chinese population felt that these treaties were unfair and that, if this were the measuring criteria, then China should have sovereignty over Hong Kong. See Cheng, *supra* note 66, at 4-5; RAFFERTY, *supra* note 6, at 400. While this segment of the population believed that the treaties were unfair, they still preferred the status quo of British rule to the control of the CCP, according to numerous polls. See generally Lau Siu-Kai, *The Political Values of the Hong Kong Chinese*, in THE BASIC LAW AND HONG KONG'S FUTURE, *supra* note 3, at 19. Lau Siu-Kai provides an interesting overview of the Hong Kong people's acceptance of the Hong Kong government and the existing political system amidst their apathetic view of politics. Despite the people's approval of the government, the government never scores highly in opinion polls because its laissez faire style and detached moral and social role has the effect of making its constituency alienated, cynical and suspicious towards it. See *id.* at 42.

73. See Ta-ling Lee, *Hong Kong: The Human Rights Dimension*, in THE FUTURE OF HONG KONG: TOWARD 1997 AND BEYOND, *supra* note 59, at 115, 120.

74. *Id.*

pect of transferring nearly six million people from freedom to Communist rule.⁷⁵ Rather than focusing on legalistic arguments, the British could have tempered the aggressiveness and success of the Chinese negotiators by perhaps invoking the world's conscience.⁷⁶

Throughout the two year negotiation process over the Joint Declaration, Thatcher repeatedly raised her now famous "three-legged stool" analogy - any agreement reached must be based on the consent of the Chinese government, the British Parliament, and the people of Hong Kong.⁷⁷ In practice, however, in the face of Chinese pressure, the British made incremental concessions regarding the third leg, the Hong Kong residents.⁷⁸ Both Margaret Thatcher and Edward Youde, the British Governor of Hong Kong, initially stated that the British government both represented and was responsible for the people of Hong Kong.⁷⁹ In response, China maintained that British participation was solely to represent the interests of the British Government and any representation of the interests of the people of Hong Kong would be done by China, because it believed that this was an internal matter.⁸⁰ Therefore, relying upon the interpretive leeway granted to it within the Basic Law, China could bypass the jointly negotiated intent of the Joint Declaration.⁸¹ Deng quashed the attempt

75. *See id.* This contention is even more compelling when one considers that half of Hong Kong's six million residents fled the 1949 CCP takeover of mainland China and most of the remaining residents are their descendants. *See RAFFERTY, supra* note 6, at 7.

76. *See Lee, supra* note 73, at 120; HICKS, *supra* note 65, at 100. For example, Britain could have capitalized on the sentiments of some critics who analogized the Hong Kong situation to Adolf Hitler's 1938 takeover of Austria, where the people were initially excited over the unification with their Germanic brethren but would later regret the total absorption of their nation into the Nazi empire. *See Lee, supra* note 73, at 124.

77. *See Lee, supra* note 73, at 116. This is a general description of the unique and interdependent relationship among China, Britain and Hong Kong. The British provided stability to enable Hong Kong's growth within a capitalist system, Hong Kong received infrastructural support such as food and electricity from China, and China utilized Hong Kong as its conduit to the outside world. Any agreement ideally should have protected the respective interests of each "leg." *See RAFFERTY, supra* note 6, at 382-83.

78. One writer, Ta-Ling Lee, called the British representation of the third leg "pathetic" and a "mockery." *See Lee, supra* note 73, at 117.

79. *See* Prime Minister Thatcher, Opening Statement at a Press Conference in Hong Kong, (Sept. 27, 1982), *in* HONG KONG IN SEARCH OF A FUTURE, *supra* note 60, at 37-38; *Lee, supra* note 73, at 117.

80. *See* U.N. Mar. 9, 1972 Letter, *supra* note 21; Boasberg, *supra* note 64, at 293.

81. Article 18 of the Basic Law seems to grant the Standing Committee of the National People's Congress *de facto* veto power over any legislation passed by the Hong Kong Legislative Council. *See* Basic Law, *supra* note 14, art. 18. For example, China's repeated statement that it will disband the existing Legislative Council and replace it with a provisional legislature upon resumption of control in 1997 seems

by the British to represent the third leg with a blunt statement that the Hong Kong issue would be resolved bilaterally between Britain and China.⁸² Deng made it clear that the Chinese government knew what decisions would be in the best interest of Hong Kong, and he dismissed any contrary views as relics of the colonial era.⁸³ China's repeated claims for *gangren zhigang* began to seem increasingly hollow as it became more apparent that Hong Kong was headed towards *jingren zhigang* - the governance of Hong Kong by people in Beijing, the capital of China.⁸⁴ On December 19, 1984, Prime Minister Margaret Thatcher of Britain and Prime Minister Zhao Ziyang of China formally signed the Joint Declaration.⁸⁵

The British government set up an Assessment Office to gather the responses and opinions of the people of Hong Kong, but only after the Joint Declaration was completed.⁸⁶ As the Joint Declaration was already ratified by the time Britain solicited feedback, Britain effectively only offered the Hong Kong people two options, either accept the Joint Declaration, or have China takeover in 1997 with no agreement at all.⁸⁷ Not surprisingly, from the Hong Kong citizens' perspective, this solicitation of opinions by Britain was more symbolic than substantive.⁸⁸ Thatcher's response to one reporter's question as to her feelings about the moral issue of delivering nearly six million people to the CCP reflected Britain's fundamental position that any agreement was better than no agreement.⁸⁹ She said:

indicative of its intent to adhere to the technical terms of the Basic Law while violating the spirit of the Joint Declaration.

82. See RAFFERTY, *supra* note 6, at 416. Deng told three Hong Kong representatives chosen by the British government on their visit to Beijing in June 1984 that, "this settlement will not suffer any interference. There are only two legs, not three legs." SCOTT, *supra* note 32, at 207 n.11; Boasberg, *supra* note 64, at 293 n.51.

83. See RAFFERTY, *supra* note 6, at 416-17.

84. See Hiizumi, *supra* note 62, at 3.

85. See Palumbo, *supra* note 1, at 685-86.

86. See Frank Ching, *The Betrayal of Hong Kong*, FAR E. ECON. REV., May 19, 1994, at 36, available in LEXIS, World Library, Allwld File.

87. See Boasberg, *supra* note 64, at 302. The Hong Kong Governor, Edward Youde stated, "the [British] government made quite clear that there is to be a transition in 1997. It can be a transition on the basis of what I believe to be a good and acceptable agreement, or a transition without that agreement. I have little doubt as to which is the best course." *Id.*; see Lee, *supra* note 73, at 134.

88. This solicitation of opinions was accompanied by a massive campaign to convince the people to support the Joint Declaration. Thus, the people were predisposed to accept the document as a foregone conclusion. The people's apathy was manifested in the poor response to the British solicitation; out of a population of nearly six million, only 3,557 submissions were received. See RAFFERTY, *supra* note 6, at 422.

89. See Lee, *supra* note 73, at 118.

What do you think would have happened if we had not attempted to get an agreement? In 1997, 92 percent of the territory would automatically have returned to China without any assurance. . . . I think you would have had great cause to complain had the government of Britain done nothing until 1997, and I believe that most of the people in Hong Kong indeed the overwhelming number of people think the same. You [the reporter] may be a solitary exception.⁹⁰

When pressed, however, Thatcher refused to clarify how Britain would enforce the Joint Declaration against potential Chinese violations.⁹¹ Thatcher's non-responsiveness reflected Britain's general indifference over the Hong Kong issue.⁹²

C. THE JOINT DECLARATION

The Joint Declaration is a carefully drafted document that delicately balances the incompatible claims of sovereignty over Hong Kong of both Britain and China.⁹³ Its careful wording minimizes problems regarding the difference in opinions over the prior unequal treaties.⁹⁴ China has resolutely objected to any British administrative role in Hong Kong after 1997.⁹⁵ As a compromise, Britain relinquished sovereignty, while emphasizing the maintenance of Hong Kong's stability and wealth.⁹⁶ The Joint Declaration expressly requires a Basic Law to be drafted which excludes socialism for fifty years in favor of continuing the current capitalist system and lifestyle.⁹⁷ The Joint Declaration states

90. Thatcher's indignant reply was taken from her widely quoted news conference on December 21, 1984. See Lee, *supra* note 73, at 118-19.

91. See *id.* at 119-20.

92. Two examples indicate the low priority of Hong Kong to Britain. First, when the draft agreement was scheduled to be voted on in Parliament, only 50 out of 635 Members of Parliament were present to approve it; observers in the public gallery outnumbered the Members of Parliament present. Second, parliamentary debate over the future of Hong Kong did not make the front page of a single newspaper in London. See Lee, *supra* note 73, at 118; *U.N. Official Berates Britain Over Hong Kong Human Rights*, REUTERS, Nov. 9, 1988, available in LEXIS, News Library, Arcnws File [hereinafter *U.N. Official Berates*].

93. The Joint Declaration itself incorporates the respective views held by each government regarding sovereignty over Hong Kong. See Joint Declaration, *supra* note 1, Preamble, paras. 1, 2, 3.

94. Whereas paragraph 2 of the Joint Declaration states that Britain will "restore Hong Kong to [China]," paragraph 1 states that China will "recover the Hong Kong area," and paragraph 3(1) states that China will "resum[e] the exercise of sovereignty over Hong Kong." *Id.* Preamble, paras. 1, 2, 3(1).

95. See *id.* Intro., para. 10.

96. Paragraph 3(5) of the Joint Declaration states, "[t]he current social and economic systems in Hong Kong will remain unchanged, and so will the life-style." *Id.* para. 3(5).

97. *Id.* Annex I. "The National People's Congress of the People's Republic of China shall enact and promulgate a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China . . . in accordance with the Constitution of the People's Republic of China, stipulating that after the establishment of

that Hong Kong will be run as a Special Administrative Region (the "SAR" or "HKSAR")⁹⁸ in accordance with Article 31 of the Chinese Constitution.⁹⁹ China agreed to retain basically unchanged the current laws of Hong Kong, and to vest the region with a balanced judiciary, executive, and legislative power.¹⁰⁰ "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 will be ensured by law in the [HKSAR]."¹⁰¹ Also included in Annex I, Article 13 is the United Nations ICCPR and the International Covenant on Economic, Social and Cultural Rights (the "ICESCR")¹⁰² which would thereby apply to Hong Kong after 1997.¹⁰³ Annex II sets out the details regarding the establishment of a Sino-British Joint Liaison Group intended to ensure a smooth transition from the British to the Chinese government in 1997.¹⁰⁴ In an effort to allay the concerned Hong Kong business community, the Joint Declaration created a Sino-British Land Commission to deal

the Hong Kong Special Administrative Region the socialist system and socialist policies shall not be practised in the Hong Kong Special Administrative Region and that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years." *Id.*

98. See *id.* Annex I; XIANFA, *supra* note 14, art. 31. See *infra* note 120 for a reprint of Article 31. A Special Administrative Region ("SAR") is a Chinese concept of how a geographic region should be run. See XIANFA, *supra* note 14, art. 31. Essentially, the Hong Kong SAR ("HKSAR") would be "under Chinese sovereignty, but with an internal political, social and economic regime regulated by an international treaty, the . . . Joint Declaration. . . ." Manfred Nowak, *Interpreting the Hong Kong Bill of Rights: Techniques and Principles*, in THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH 143 (Johannes Chan & Yash R. Ghai eds., 1993). The idea evolved within the context of the modernization drive explained in Part II.D of this Article. The HKSAR is the Chinese solution to incorporating the dictates of the Joint Declaration in a way so as to rectify the vast differences between China and Hong Kong. See *infra* Part I.E, for a further explanation.

99. See Joint Declaration, *supra* note 1, Annex I.

100. See *id.* paras. 3(3), 3(5).

101. *Id.* para. 3(5).

102. International Covenant on Economic, Social, and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force, Jan. 3, 1976). This was a companion covenant to the ICCPR.

103. See *infra*, Part II.F, for details of the application and relevance of the ICCPR.

104. Joint Declaration, *supra* note 1, Annex II. The Joint Liaison Group will be based in Hong Kong and will meet periodically from July 1, 1988 through January 1, 2000. However, it will act as a liaison only and not as an organ of power. See *id.* The Joint Liaison Group is composed of five representatives each from both Britain and China, who are to discuss issues to be forwarded to their respective governments for resolution. See *id.*

with the implementation of land leases which would be entered into before 1997 but extended beyond that time.¹⁰⁵

D. THE RISE OF DENG XIAOPING AND THE PRECURSOR TO THE SAR

Whereas the Joint Declaration expresses China's intention to operate Hong Kong as a SAR for the purpose of maintaining Hong Kong's capitalist nature, the Basic Law incorporates the mandates of the Joint Declaration into local law, thus giving it official validity within the Chinese legal system.¹⁰⁶ As the SAR government framework has never been put into practice, an understanding of the Basic Law requires a basic familiarity with China's ruling system and the Special Economic Zones (the "SEZs"), the precursor to the SAR. When Mao Zedong¹⁰⁷ died in September 1976, a struggle for power resulted for the leadership of China with Deng Xiaoping, a reformist who stressed modernization, emerging as the eventual winner.¹⁰⁸ Deng's goal

105. See *id.* Annex III. Annex III allows the British Hong Kong government to enter into these land leases but provides for a fund to be established for future use by the HKSAR government. See *id.* para. 6. Similar to the Joint Liaison Group, any controversies raised by the Sino-British Land Commission are to be forwarded to their respective governments for resolution. See *id.*

106. See *id.* paras. 3(1), 3(12). "The Joint Declaration itself was largely an exercise in building credibility." Denis Chang, *Towards a Jurisprudence of a Third Kind - "One Country, Two Systems,"* 20 CASE W. RES. J. INT'L L. 99, 117-120 (1988). It served to balance the aims of the major participants: the Chinese, the British, and the Hong Kong business community. Yet, as an international treaty, its legal effect is questionable because it lacks a defined place within the hierarchy of China's legal system. The subsequent Basic Law alleviated this credibility concern because it incorporated the policies of the Joint Declaration in accord with the mandates of Article 31 of the Chinese Constitution. See *Preface to Symposium On the Hong Kong Basic Law*, 2 J. CHINESE L. 1, 2 (1988).

107. Mao is considered the father of Communist China. He ruled China from 1949 until his death in 1976. By the time of his death, his image was badly tarnished due to the negative side effects of some of his policies, such as the Cultural Revolution. See SPENCE, *supra* note 27, at 648-50.

108. For an excellent account of the transition from the paranoid idealism of Mao's Cultural Revolution era to the pragmatism and uncurtailed economic emphasis of Deng Xiaoping's post-1979 era, see generally, BAUM, *supra* note 57, and MAURICE MEISNER, *THE DENG XIAOPING ERA: AN INQUIRY INTO THE FATE OF CHINESE SOCIALISM, 1978-1994* (1996).

Unlike Mao, who ruled as Chairman of the CCP, Deng preferred to rule from a deceptively minor advisory position. See SPENCE, *supra* note 27, at 653. Deng's victory was legitimized by two watershed events in China's parallel party and government structures. See generally *id.* at ch. 23. First, in December 1978, the Third Plenum of the Eleventh Central Committee of the Communist Party reaffirmed the victory of Deng's reform coalition. See *id.* Second, the CCP exchanged Mao's personality cult and previously sacred "two whatevers" ideology (namely, the definition of knowledge, economic theory and laws governing the economy) for Deng's pragmatic approach of "seeking truth from facts" and using "practice as the sole criterion for testing truth." Deng Xiaoping, *Why China Has Opened its Doors*, BANGKOK POST, Feb. 10, 1980, at 5, available in, *Deng Xiaoping Writes on Four Moderniza-*

of modernization incorporated an "open door" policy to the outside world to attract Western technology and investment.¹⁰⁹ In his quest for modernization, Deng also de-emphasized domestic central planning by loosening control over pricing, wages, development and industry, transforming the Chinese economy from 80 percent state owned in 1978 to 50 percent in 1994.¹¹⁰ Tiananmen did not occur in a vacuum; Deng's modernization incurred significant costs along with its benefits.¹¹¹

Nevertheless, despite this new emphasis on economic liberalization, political freedoms remained constrained by the four basic principles: "keeping to the socialist road, upholding the dictatorship of the proletariat, insisting on the [CCP] leadership and adhering to Marxism-Leninism-Mao Zedong thought."¹¹² This balancing between modernization and maintaining political stability led to a cycle between *fang*, which means letting go, and

tions, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-80-030, Feb. 12, 1980, at L1. CCP-based political and ideological campaigns were downplayed and replaced with a pragmatic quest for economic modernization. See *id.* During the Third Plenum, the CCP established the political direction for the economic modernization policies, which were eventually enacted by the government in the Second Session of the Fifth National People's Congress in June 1979. See Lee, *supra* note 73, at 145. The Second Session marked a turning point for China, as it adopted the CCP's new modernization emphasis. See generally SPENCE, *supra* note 27, at ch. 23.

109. See Hungdah Chiu, *Chinese Attitudes Toward International Law in the Post-Mao Era, 1978-1987*, 21 INT'L LAW. 1127, 1164 (1987). Deng stressed that Mao's "two whatevers" were only ways to test policy or ideology, not rationales for leftists to legitimize their destructive rule. Deng, *supra* note 108, at L1. According to Deng, Mao's thoughts were not above this objective evaluative criteria and therefore, were subject to revision. See Stuart R. Schram, *Economics In Command? Ideology and Policy Since the Third Plenum, 1978-1984*, CHINA Q., Sept. 1984, at 417-19. To Deng, a policy position could be correct if it worked. See *id.* Its validity did not have to be determined solely on the basis of its political or ideological soundness; rather, Deng stressed the importance of facts over personality cults or ideology. See PETER N.S. LEE, *INDUSTRIAL MANAGEMENT AND ECONOMIC REFORM IN CHINA, 1949-1984*, at 145-47 (1987). This new focus on "practice as the sole criterion for testing truth" now fostered an environment of pragmatism over ideology which created a frame-work for achievement and universalistic oriented criteria of success over ascriptive and particularistic factors. See Schram, *supra*. It was this new emphasis that was officially unveiled at the CCP deliberations in the Third Plenum. See SPENCE, *supra* note 27, at ch. 23.

110. See BAUM, *supra* note 57, at 57; Jay R. Goldstein, 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, 185 (1986).

111. These reforms caused widespread systemic disorders throughout China, such as rising and uncontrolled regional inequality, rural emigration to urban areas, crime, corruption and political cynicism. See BAUM, *supra* note 57, at 377-80. This fast but uneven growth also caused a severe erosion of traditional and ideological norms and social controls. *Id.* at 380. For a survey of these social controls, see *infra* Part III.A.

112. XIANFA, *supra* note 14, Preamble; see Chiu, *supra* note 109, at 1165.

shou, which means tightening.¹¹³ These *fang/shou* cycles caused each liberalization for economic reform to be followed by an attempt to regain or retain political control.¹¹⁴ This unnatural reform strategy of pursuing economic development while retaining political restrictions came to a crisis point in 1989 during the Tiananmen Square incident, where Deng showed he was willing to sacrifice the former to preserve the latter.¹¹⁵ Deng continued to cling to the supremacy of the CCP even in the face of the worldwide fall of communism precipitated by Mikhail Gorbachev in early February 1990.¹¹⁶

Within the context of the pragmatic emphasis on economic modernization, there developed in 1978 the concept of "one country, two systems."¹¹⁷ This concept was originally conceived as a peaceful solution to unify China and Taiwan; it was later extended to apply to Hong Kong and the Portuguese colony of Macao as well.¹¹⁸ The general idea was to uphold the four principles in China, while temporarily accepting capitalism and allowing special autonomy in these other areas as an inducement for their acceptance of the direct authority of China.¹¹⁹ This idea

113. See BAUM, *supra* note 57, at 5.

114. See *id.* at 6, for an excellent table of six cycles of *fang/shou* along with the key events within each stage of the respective cycle from 1978 to 1989.

115. See *id.* at 16-19.

116. See *id.* at 313. In early February 1990, Gorbachev announced his intention to revise the Soviet Constitution to create a competitive and multiparty electoral system, thus ending the Soviet Communist Party's 72 year monopoly on political control. See *id.* While China did not comment directly on Gorbachev's proposal, multiple articles were subsequently published in the Chinese state-run press attacking "bourgeois multiparty democracy." *Id.*

117. See Joseph Y.S. Cheng, *The Constitutional Relationship Between the Central Government and the Future Hong Kong Special Administrative Region Government*, 20 CASE W. RES. J. INT'L L. 65, 69 (1988).

118. See Ming K. Chan & David J. Clark, *Introduction to THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY?*, *supra* note 14, at xiii; Cheng, *supra* note 117, at 69. Deng said that "the policy of 'one country, two systems' has been adopted out of consideration for China's realities." Deng Xiaoping, *Speech at the Third Plenum Session of the Central Advisory Commission of the Communist Party of China* (Sept. 1, 1982), in *FUNDAMENTAL ISSUES IN PRESENT-DAY CHINA* (1987). He recognized that out of the two options for reunification, negotiation and force, force was unacceptable because of the negative repercussions that China would suffer. See *id.*

A parallel transfer of Macao from Portuguese rule to Chinese rule was initiated on March 26, 1987 after two years of negotiations between China and Portugal. The resulting Sino-Portuguese Declaration of Macao of 1987, which was closely modeled on the Joint Declaration, will restore Chinese sovereignty over Macao on December 20, 1999. It will be run as a SAR in accordance with the policy of "one country, two systems." See Chan, *supra* note 14, at 5; James Miles, *Portugal, China Sign Macao Transfer Accord*, UPI, Mar. 26, 1987, available in LEXIS, News Library, UPI File.

119. See Allan, *supra* note 7, at 176.

was codified in Article 31 of the 1982 Chinese Constitution as the SAR.¹²⁰

Understanding the SEZs is important because they provide tangible evidence of the SAR's potential for success.¹²¹ Deng believed that the SEZs were ideally suited to act as economic "laboratories" for China to test Western methods and gain its benefits.¹²² SEZs were created as a more expansive version of the export processing or free trade zones that were prevalent around the world.¹²³ Deng wanted to avoid the narrow emphasis of these models and enhance their advantages.¹²⁴ On the one hand, these SEZs were conceived by Deng to facilitate foreign investment and expertise, so as to accelerate China's progress towards modernization.¹²⁵ On the other hand, they were an attempt to reassure overseas Chinese¹²⁶ of the workability of the "one country, two systems" policy proposed for the SAR.¹²⁷ The Chinese government wanted to demonstrate that socialism could succeed within a market economy framework, and that China seriously intended to modernize its economy.¹²⁸

120. Article 31 reads, "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions." XIANFA, *supra* note 14, art. 31.

121. See generally MICHAEL WEST OBORNE, CHINA'S SPECIAL ECONOMIC ZONES (1986).

122. See Deng Xiaoping, *On Special Economic Zones and Opening More Cities to the Outside World*, in FUNDAMENTAL ISSUES IN PRESENT-DAY CHINA 44 (1987).

123. In the early 1980s, there were over 350 of these zones in over 70 nations with a total production of approximately \$100 billion in 1979, which was ten percent of total world trade. See Chen Xiangming, *Asian Export Processing Zones and China's Shengzhen Special Economics Zone: An Evolving Development Institution*, Apr. 28-30, 1989, 2 (paper given at XIII Conference of the Political Economy of World System Section of the American Sociological Association, Champaign Urbana, Illinois).

124. China disliked the foreign trade zones' limited emphasis on utilizing cheap labor and relatively low technology. But China also recognized their main advantage rested in their generation of foreign exchange currency which could be used to buy vital imports. See Jan S. Prybyla, *Mainland China's Special Economic Zones*, J. CHINESE STUD. & INT'L AFF., Sept. 1984, 26.

125. Deng felt the SEZs would provide China with four critical "window" functions: to absorb new technology, to use foreign skills and techniques to broaden knowledge of the outside world, to observe and absorb useful foreign management methods, and to test policies not yet intended for the rest of the country. See OBORNE, *supra* note 121, at 155.

126. This refers primarily to those Chinese living in Hong Kong, Taiwan, and Macao, as China is attempting to regain sovereignty over each of these areas with varying degrees of success.

127. See OBORNE, *supra* note 121, at 155.

128. The SEZs allowed more flexible policies than the rest of China, but less than the proposed SAR. The SEZs were established in August 1980 in Shenzhen, Zhuhai, Shantou, and Xiamen; locations that were chosen, in part, because of their close proximity to the areas of potential reunification: Taiwan, Hong Kong, and Ma-

E. THE BASIC LAW AND THE CONCEPT OF THE SAR "ONE COUNTRY, TWO SYSTEMS" POLICY

In addition to invoking the SEZs, in part, as economic role models to reassure those in Hong Kong of China's intention to allow Hong Kong's market economy to continue, the Basic Law also incorporated additional measures of the Joint Declaration.¹²⁹ As such, the Basic Law is specifically tailored to the return of Hong Kong and differs in detail from the return of Macao and the potential future return of Taiwan.¹³⁰ The Basic Law is often referred to as Hong Kong's mini-constitution,¹³¹ but this characterization is technically incorrect as there can only be one constitution in China.¹³² The Basic Law derives its legitimacy as a subset of the 1982 Constitution.¹³³ The Basic Law was specifically drafted in conformance with Article 31 of the 1982 Constitution, which explicitly authorized the creation of the SAR.¹³⁴ The Basic Law serves as the primary administrative guide of the HKSAR, and the 1982 Constitution would only be consulted if the Basic Law was not sufficient.¹³⁵

The Basic Law specifies how the "one country, two systems" approach is to be realistically executed and practiced in the HKSAR.¹³⁶ It contains specific provisions needed to administer Hong Kong as a capitalist society for fifty years with a "high degree of autonomy."¹³⁷ First, Chapter I, Article 4 enunciates a broad provision ensuring that the HKSAR government safe-

cao. See *id.* at 82-83 (referring to excerpts from the Regulations on SEZs in Guangdong Province approved by the Fifth National People's Congress).

129. See Basic Law, *supra* note 14, Preamble.

130. CCP and government officials have repeatedly stated that Taiwan will enjoy greater autonomy after reunification than either Hong Kong or Macao. Many more institutions within Taiwan will be respected and allowed to be preserved. See Xu Guangren, *On Basic Spirit of 'One Country, Two Systems'- On China's Reunification as Viewed From Hong Kong Basic Law*, RENMIN RIBAO, Feb. 19, 1992, at A5.

131. David J. Clark, *The Basic Law: One Document, Two Systems, in THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY?* *supra* note 14, at 36, 41.

132. See XIANFA, *supra* note 14, Preamble. "This constitution affirms the achievements of the struggles of the Chinese people of all nationalities and defiance of the basic system and basic tasks of the State in legal form; it is the fundamental law of the State and has supreme legal authority." *Id.*

133. See Joint Declaration, *supra* note 1, Annex I; XIANFA, *supra* note 14, art. 31. The 1982 Constitution was adopted December 4, 1982 by the Fifth Session of the Fifth National People's Congress.

134. The Joint Declaration outlined the required content for the Basic Law, but the Basic Law still had to comply with the general SAR mandates of Article 31 of the P.R.C. Constitution. See Joint Declaration, *supra* note 1, para. 3(12).

135. See Landry, *supra* note 22, at 177; Basic Law, *supra* note 14, Preamble.

136. See Basic Law, *supra* note 14, Preamble.

137. See *id.* art. 12.

guard individual rights and freedoms.¹³⁸ Second, Chapter III, entitled *Fundamental Rights and Duties of the Residents*, lists specific rights and duties of the Hong Kong residents.¹³⁹ Third, Chapter III, Article 39 states that the ICCPR, ICESCR and international labor covenants "as applied to Hong Kong shall remain in force and shall be implemented through the laws of the [HKSAR]."¹⁴⁰

Drafting of the Basic Law was done unilaterally by China under the guidance of its National People's Congress; neither the British nor Hong Kong governments had any formal role in its drafting.¹⁴¹ Efforts to draft the Basic Law began in 1985 when China established separate Basic Law Drafting and Consultative Committees.¹⁴² The Consultative Committee circulated two drafts of the Basic Law for public commentary and debate; the first was released in April 1988 and the second was released in February 1989.¹⁴³ Despite these releases, this process was

138. See *id.* art. 4; Keller, *supra* note 18, at 396.

139. These rights are enunciated in Chapter III, Articles 24-42 of the Basic Law. Basic Law, *supra* note 14, ch. III, arts. 24-42.

140. *Id.* art. 39.

141. See Joint Declaration, *supra* note 1, para. 3(12).

142. On April 10, 1985, the Third Session of the Sixth National People's Congress established the Basic Law Drafting Committee. See BASIC LAW SOLICITATION OF OPINIONS, *supra* note 14, at 1. The membership list which was approved by the Eleventh Meeting of the Standing Committee of the Sixth National People's Congress on June 18, 1985 consisted of 59 members, 36 of whom were from China and 23 from Hong Kong. See *id.* On December 18, 1985, the Consultative Committee for the Basic Law was established with a membership of 180, composed of a diverse group of Hong Kong residents. See *id.* at 2. The objective of the Consultative Committee was to act as a liaison between the Hong Kong community and the Drafting Committee. See *id.* at 4.

143. For an article by article comparison of the first and second drafts of the Basic Law, see SECRETARIAT OF THE CONSULTATIVE COMMITTEE FOR THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA, REFERENCE PAPERS FOR THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (Draft) 5-87 (Feb. 1989) [hereinafter REFERENCE PAPERS FOR THE BASIC LAW]. The introduction to the draft Basic Law sent out for solicitation of opinions in April 1988 clearly stated that the Consultative Committee's objective should be "[t]o collect opinions and suggestions of all kinds, including the rationales regarding these opinions and suggestions" and "[t]o submit to the Drafting Committee reports that incorporate the views of the Hong Kong public on the draft Basic Law." BASIC LAW SOLICITATION OF OPINIONS, *supra* note 14, at 5. The response to the first draft was fairly significant; approximately 74,000 pieces of opinion on the first draft were collected by October 8, 1988. See REFERENCE PAPERS FOR THE BASIC LAW, *supra*, at 2; Ming K. Chan, *Decolonization Without Democracy: The Birth of Pluralistic Politics in Hong Kong*, in THE POLITICS OF DEMOCRATIZATION: GENERALIZING EAST ASIAN EXPERIENCES, 161, 178 n.3 (Edward Friedman ed., 1994). However, the response to the second draft was much less as only about 7,000 opinions were received. See Chan, *supra* note 14, at 4, 30. China extended the consultation period for the second draft beyond the July 31, 1989 deadline because of the Tiananmen incident on June 4, 1989 and the ensuing political turmoil. See Chan, *supra*, at 162.

plagued with cynicism and criticized as being a mere formality that inspired minimal public response and input.¹⁴⁴ Contributing significantly to the public's apathy and dislike of the Basic Law was China's intolerance of substantive input or representation by the Hong Kong people in the drafting process.¹⁴⁵ 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.¹⁴⁶ This lack of substantive input from the Hong Kong people raised widespread questions over the Basic Law's legitimacy and over the general Sino-British solution regarding the future of Hong Kong.¹⁴⁷ A final version was formally promulgated by China on April 4, 1990.¹⁴⁸

Many people criticized the Basic Law "for permitting too much intervention from the Chinese government, for failing to provide the autonomous and accountable government promised in the [Joint Declaration], and for containing policy state-

144. See Boasberg, *supra* note 64, at 284; Chan, *supra* note 14, at 4. This rising apathy among the Hong Kong population was reflected in the disparate responses to the British solicitation of opinions between the first and second drafts. See *supra* note 143.

145. See Chan, *supra* note 14, at 16.

146. An example of China's intolerance of public input was the removal of Martin Lee and Szeto Wah, who were among the 23 Hong Kong members of the Basic Law Drafting Committee, because of their outspoken criticism of the June 4, 1989 Tiananmen Square massacre. See *Political Stability*, ECONOMIST INTELLIGENCE UNIT, Dec. 1, 1989, available in LEXIS, News Library, Arcnws File; John Elliott, *Suave QC Who Plagues Peking*, FIN. TIMES, Nov. 3, 1989, at 4, available in LEXIS, News Library, Arcnws File; Barbara Basler, *Democracy Backers in Hong Kong Win Election Landslide*, N.Y. TIMES, Sept. 17, 1991, at A1.

147. The public's dislike as well as apathy towards the Basic Law is aptly demonstrated by a survey of 701 respondents taken after the final draft was published in 1990, in which 44 percent found the Basic Law unsatisfactory, 15 percent satisfactory, and the rest either did not know or had no opinion. See Bernard Fong, *Confidence Slumps Over Basic Law Final Draft*, S. CHINA MORNING POST, Feb. 23, 1990, at 1.

The Hong Kong citizens became radically concerned with their future only after the June 1989 Tiananmen Square incident, but by then it was too late to affect the Basic Law as China insisted on adhering to the original timetable for completion by 1990. See Chan, *supra* note 14, at 4-8, 18, 30. A post-Tiananmen poll found that only 15 percent of the respondents favored Hong Kong's SAR status under the Basic Law. See William MacNeil, *Righting and Difference*, in HUMAN RIGHTS IN HONG KONG 86, 87 (Raymond Wacks ed., 1992); John Elliot, *Future of Hong Kong: China Digs Its Heels in and Offers Little in the Way of Concessions*, FIN. TIMES, Apr. 5, 1990, at 8.

148. 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, 29 I.L.M. 1520.

ments."¹⁴⁹ China's insistence on retaining de facto veto power over decisions in Hong Kong via its National People's Congress and its Standing Committee created the most concern.¹⁵⁰ Complementing the Standing Committee's strength is the Basic Law's establishment of a weak post-1997 Hong Kong legislature and an executive branch directly answerable to Beijing.¹⁵¹

F. THE ICCPR AND THE BILL OF RIGHTS

Although adopted by the United Nations General Assembly on December 16, 1966, the ICCPR did not come into force until January 3, 1976, when the requisite number of signatory nations had ratified the document.¹⁵² The signatory nations included Britain who signed the ICCPR on behalf of itself and its dependent territories such as Hong Kong.¹⁵³ China is noticeably absent.¹⁵⁴ The ICCPR itself is relatively weak, functioning only to aid courts with statutory interpretation, law making, and administrative practice.¹⁵⁵ The ICCPR is seen as non-binding customary international law that Hong Kong courts can choose to

149. See SCOTT, *supra* note 32, at 304. See *infra* Part IV.B. for an elaboration of the various problems that critics have raised about the Basic Law.

150. See Clark, *supra* note 131, at 44. A primary example of their retained control is the power of the National People's Congress and its Standing Committee to interpret and amend the Basic Law. See Basic Law, *supra* note 14, arts. 158, 159. The National People's Congress can also extend the laws of China to Hong Kong. See *id.* art. 18.

151. See generally Basic Law, *supra* note 14, ch. II.

152. See Nihal Jayawickrama, *Hong Kong and the International Protection of Human Rights*, in HUMAN RIGHTS IN HONG KONG, *supra* note 147, at 120, 122. The ICCPR is the culmination of an array of United Nations provisions protecting human rights. The United Nations Charter, signed on June 26, 1945, contained general aspirations for each member to respect and observe human rights within each member nation's jurisdiction. See *id.* at 124. This general idea was supplemented with a comprehensive list of rights in the Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948. See *id.* at 121. The ICCPR was adopted on December 16, 1966 along with the ICESCR and the Optional Protocol. See *id.* at 122. It expands the detail of the Universal Declaration of Human Rights and places an obligation on nations, albeit non-binding, to comply with its dictates. See *id.*

153. See *id.*, at 122-23; Nowak, *supra* note 98, at 144. Britain signed the ICCPR on September 16, 1968 and ratified it on May 20, 1976. See Jayawickrama, *supra* note 152, at 122-23.

154. See Jayawickrama, *supra* note 152, at 122-23. As of July 31, 1992, there were 112 states, comprising 3 billion of the world's population, that had ratified the ICCPR. See Torkel Opsahl, *The Practice of the Human Rights Committee Under the ICCPR, the Potential Impact of International Human Rights Law: A Presentation and Assessment*, in THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH, *supra* note 98, at 429, 433.

155. See Keller, *supra* note 18, at 385-86.

incorporate into Hong Kong's common law.¹⁵⁶ The ICCPR does not have a direct effect on the Hong Kong legal system because Hong Kong lacks domestic legislation to implement its provisions.¹⁵⁷ The Joint Declaration continues this limited role for the ICCPR.¹⁵⁸ Article 39 of the Basic Law also implies a continuation of this status quo, stating that the ICCPR "as applied to Hong Kong shall remain in force and shall be implemented through the laws of the [HKSAR]."¹⁵⁹ The concern remains that although Britain has ratified the ICCPR for Hong Kong, China has not ratified it either for itself or for Hong Kong; as such, its post-1997 effect remains highly questionable.¹⁶⁰ Within Article 153 of the Basic Law, China seems to retain discretion to abide by international agreements, regardless of whether China is a party or not.¹⁶¹

Hong Kong's lack of a Bill of Rights appears to be an anomaly in the British trend to extend principles of fundamental rights to its colonies and dependent territories.¹⁶² Many commentators feel that the source for this omission in Hong Kong derives from both Hong Kong's unique trade origins and the transfer of sovereignty issue with China.¹⁶³ Numerous sources, including the

156. See Richard Lillich, *Sources of Human Rights Law and the Hong Kong Bill of Rights*, in THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH, *supra* note 98, at 109, 125-26.

157. See Keller, *supra* note 18, at 385-86.

158. Joint Declaration, *supra* note 1, Annex I, part XIII.

159. Basic Law, *supra* note 14, art. 39.

160. See Keller, *supra* note 18, at 385-86. Despite implying in the Joint Declaration and the Basic Law that the ICCPR would be applied in the HKSAR after 1997, China has repeatedly stated that it would not submit reports on the HKSAR to the United Nations Committees as is required by the ICCPR. See Emily Lau, *Breaking a Promise on Rights Covenants*, S. CHINA MORNING POST, July 8, 1996, at 18; Basic Law, *supra* note 14, art. 39; Joint Declaration, *supra* note 1, Annex I, part XIII. This stance was made clear by Xu Ze, an official of China's Hong Kong and Macau Affairs Office, who stated in *Ta Kung Pao*, a pro-China newspaper in Hong Kong, "[a]fter 1997, Hong Kong will not be a sovereign territory. . . . From China's point of view, China is not a signatory of the ICCPR and so has no obligation to submit any reports (to the UN)." *China Says No Need to Report on Hong Kong Rights after 97*, REUTERS N. AM. WIRE, Nov. 5, 1995, available in LEXIS, News Library, Curnws File.

161. See Basic Law, *supra* note 14, art. 153.

162. Even as early as 1953, Britain extended a precursor to the ICCPR to its 41 colonies with the specific exclusion of Hong Kong. See MacNeil, *supra* note 147, at 90-91. These provisions formed the basis for the Bill of Rights for many of these colonies upon their independence. Examples include Pakistan in 1956, Malaysia in 1957, and various African nations. See *id.* Even remaining dependent territories were granted a Bill of Rights: Montserrat in 1989 and the Falkland Islands in 1985. See *id.*

163. See *id.* at 91-92; CHEEK-MILBY, *supra* note 9, at 37. It seemed that in light of Hong Kong's unique trade oriented origins and apolitical population, Britain never felt the need or pressure to extend the ICCPR to Hong Kong via a Bill of Rights. See MacNeil, *supra* note 147, at 91-92; CHEEK-MILBY, *supra* note 9, at 37. Addition-

United Nations Committee on Human Rights, subjected the British to pressure to ensure that the civil and political rights of Hong Kong's citizens, such as those elaborated upon in the ICCPR, were protected after the 1997 transfer to China.¹⁶⁴ While the Committee's statements had no official or binding effect, these statements embarrassed the British government and aided the efforts of human rights organizations to publicize the Hong Kong situation.¹⁶⁵

The events at Tiananmen created even greater pressure for the British. Britain's initial response to Tiananmen was to state that there was "no way" for Hong Kong's people to move to Britain to escape Chinese rule.¹⁶⁶ In the year following the massacre, 62,000 Hong Kong people found citizenship elsewhere.¹⁶⁷ Those "voting with their feet" represented Hong Kong's "best and brightest," the middle class professionals vital to Hong

ally, Britain has always been sensitive towards offending China with its policies in Hong Kong, even before the 1984 Joint Declaration. See Miners, *supra* note 3, at 51.

164. See, e.g., Doyle, *supra* note 15, at 3. The Committee was disturbed that Britain continued to answer their tough questions regarding the lack of direct elections, problems with self-determination, and restrictions on freedom of the media, with the stock response that it was up to China to decide. See, e.g., Dullforce, *supra* note 15. Rajsoomer Lallal of Mauritius, a Committee member, was quoted as saying, "[y]ou don't return it [referring to Hong Kong] as an empty apartment. There are people in it." *U.N. Official Berates*, *supra* note 92.

165. Human rights groups such as Amnesty International and the International League for Human Rights remain highly skeptical of the ability of both the Basic Law and the Bill of Rights to adequately safeguard human rights in Hong Kong. See, e.g., Doyle, *supra* note 15, at 3.

166. See John Pomfret, *Howe: "No Way" Hong Kong's People Could Move to Britain*, ASSOCIATED PRESS, July 3, 1989, available in LEXIS, News Library, Arcnws File. In a July 3, 1989 speech given by British Foreign Secretary, Sir Geoffrey Howe, he stated, "[t]he plain fact is that there is simply no way that the British Government could grant to several million people the right to come and live in Britain." *Id.* Currently, about 3.3 million of Hong Kong's approximately 6 million residents are eligible for a British Dependent Territories passport, a second class passport, which enables its holders to travel overseas but not to live in Britain. Paul Majendie, *Minister Rules Out Hong Kong Move to Britain*, REUTERS WORLD SERVICE, Sept. 24, 1995, available in LEXIS, World Library, Allwld File. For the official stance on citizenship by the two respective governments, see the Exchange of Memoranda attached to the Joint Declaration, where China and Britain addressed the 1997 transfer of citizenship issue. See *infra* note 170. As China only plans to grant Chinese passports to ethnic Chinese Hong Kong residents, the Exchange of Memoranda does not address the issue of 8,000 non-ethnic Chinese holders of British Dependent Territories passports who will become stateless after the transfer. See Wanda Szeto & Glenn Schloss, *Lobbyist to Take Up Plight of Stateless*, S. CHINA MORNING POST, Oct. 3, 1996; Joint Declaration, *supra* note 1, Exchange of Memoranda, (B) Chinese Memorandum.

167. This figure has risen steadily from 18,300 people per year in 1981, to 45,800 in 1988, to an estimated 62,000 in post-Tiananmen 1990. Chan, *supra* note 14, at 17, 30-31.

Kong's economy.¹⁶⁸ Under pressure from this rising emigration and the local crisis of confidence, in December 1989, the British government announced a plan to grant British passports with the full right of abode in Britain to 50,000 skilled professional workers, civil servants and managers, along with their families.¹⁶⁹ Contributing towards further weakening of the public confidence was China's rising influence in Hong Kong affairs, such as its opposition to the British passport plan and its accusations that pro-democracy groups in Hong Kong were playing a subversive role within China.¹⁷⁰

These Tiananmen-inspired events provided a catalyst for the British to fashion a Bill of Rights for Hong Kong which guaranteed rights for its citizens beyond 1997.¹⁷¹ The drafters hoped that the Bill of Rights would serve to ensure that China's commitments to the ICCPR were enforceable in Hong Kong courts and would provide official Chinese recognition of international

168. See *id.*; *Hong Kong Unveils Final Draft of Human Rights Bill*, REUTERS, July 18, 1990, available in LEXIS, News Library, Arcnws File.

169. See George Jones, *Tory Revolt Over Scheme to Let in 170,000 Chinese*, DAILY TELEGRAPH, Dec. 15, 1989, at 1. This proposal, the British Nationality Selection Scheme, was vocally opposed by Tory Members of Parliament who were fearful that their constituencies would not take kindly to approximately 170,000 Hong Kong Chinese resettling in Britain. See *id.*; *British Citizenship Scheme for Hong Kong Now Fully Allocated*, AGENCE FRANCE PRESSE, Mar. 5, 1997, available in LEXIS, World Library, AFP File. However, this measure was adopted by the British Parliament on July 23, 1990 as the British Nationality (Hong Kong) Act of 1990. Chan, *supra* note 14, at 29.

170. See Chan, *supra* note 14, at 23-24, 29-30; *China Shakes Hong Kong Confidence in U.K. Passport Plan*, REUTERS, July 29, 1990, available in LEXIS, News Library, Arcnws File; *PRC Spokesman on "Unacceptable" British Nationality Act*, XINHUA in BBC SUMMARY, July 30, 1990, available in LEXIS, News Library, Arcnws File. China associated with the Joint Declaration a separate Exchange of Memoranda on the post-June 30, 1997 status of people in Hong Kong who are presently British Dependent Territories citizens. Joint Declaration, *supra* note 1, Intro., para. 25. China claims that the British plan violated the Chinese Memorandum portion of the Exchange of Memoranda. Chan, *supra* note 14, at 29. The Chinese Memorandum states, "[u]nder the Nationality Law of the People's Republic of China, all Hong Kong Chinese compatriots, whether they are holders of the 'British Dependent Territories Citizens' Passport' or not, are Chinese nationals." Joint Declaration, *supra* note 1, Exchange of Memoranda, (B) Chinese Memorandum. The British Memorandum portion of the Exchange of Memoranda states that British Dependent Territories citizen status after June 30, 1997 will not entitle them to the right of abode in Britain. *Id.* at Exchange of Memoranda, (A) United Kingdom Memorandum.

171. See generally Johannes Chan & Yash Ghai, *A Comparative Perspective on the Bill of Rights*, in *THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH* 1,2 (Johannes Chan & Yash Ghai eds., 1993). The drafting of the Bill of Rights is highly technical, requiring a familiarity with the common law system and the existing legal system in Hong Kong. Johannes Chan, *Protection of Civil Liberties*, in *THE BASIC LAW AND HONG KONG'S FUTURE* 196, 198 (Peter Wesley-Smith & Albert H.Y. Chen eds., 1988).

human rights law.¹⁷² Otherwise, since China has never been a signatory to the ICCPR, despite a provision for its use in Article 39 of the Basic Law, the ICCPR would automatically lapse in Hong Kong as the Chinese regained sovereignty in 1997; its implementation would be more voluntary than binding on China.¹⁷³ Additionally, Britain had made certain reservations on the ICCPR's application in Hong Kong when it ratified the ICCPR in 1976.¹⁷⁴ Essentially, Britain hoped to entrench the Bill of Rights by drafting it in such a way as to prevent its repeal or amendment by China in 1997. Britain sought to avoid letting China "diminish the rights and freedoms which it [the Bill of Rights] guarantees."¹⁷⁵ However, a serious drawback to verbatim incorporation of portions of the ICCPR is that this form of "indirect incorporation" gives rise to interpretation and enforcement problems.¹⁷⁶ The practical result of a Bill of Rights would be to enhance the judiciary's power vis-a-vis the legislative branch.¹⁷⁷ Additionally, actions by officials in the executive branch would be reviewable by judges to ensure their compliance with the Bill of Rights.¹⁷⁸ Not surprisingly, China denounced the Bill of Rights as British interference with the terms of the 1997 transfer.¹⁷⁹ Nevertheless, on June 8, 1991, despite China's complaints, an amended version of the Bill of Rights, which incorpo-

172. See Joint Declaration, *supra* note 1, Annex I, part XIII; Basic Law, *supra* note 14, art. 39.

173. See generally Keller, *supra* note 18, at 386.

174. Britain made specific reservations with respect to Articles 13 and 25 of the ICCPR for Hong Kong and general reservations concerning Articles 12, 20 and 24 for all its dependent territories. See Nowak, *supra* note 98, at 144.

175. Nihal Jayawickrama, *The Hong Kong Bill of Rights: A Critique*, in *THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH* 55 (Johannes Chan & Yash Ghai eds., 1993). See the Preamble and Section 2(3) which both state that the purpose of this Ordinance is "to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong; and for ancillary and connected matters." Bill of Rights, *supra* note 16, Preamble, § 2(3). The strategy would be to link the Bill of Rights to Article 39 of the Basic Law via the Bill of Right's emulation of the ICCPR. See Keller, *supra* note 18, at 399; see generally Basic Law, *supra* note 14, art. 39; Bill of Rights, *supra* note 16, Preamble, § 2(3).

176. See Nihal Jayawickrama, *The Content of the Bill of Rights*, in *HONG KONG'S BILL OF RIGHTS: PROBLEMS AND PERSPECTIVES* 44 (Raymond Wacks ed., 1990); Nowak, *supra* note 98, at 146.

177. See Allan, *supra* note 7, at 178.

178. See *James v. Feinerman*, *Bill of Rights for Hong Kong*, 25 INT'L LAW 791, 794 (1991).

179. See Davis, *supra* note 19, at 318-21. Duan Jin, Foreign Ministry spokesman for China stated, "[t]he British side has insisted on making a Bill of Rights in Hong Kong which will adversely affect the implementation of the Basic Law. The Chinese side regrets this and reserves the right to examine at an appropriate time after 1997 all laws in force in Hong Kong including this Bill of Rights." Jonathan Braude, *China Threat to Overrule Hong Kong Rights Bill*, *TIMES*, June 7, 1991; see Chris Leung et al., *China: Beijing Issues Warning on Hong Kong Rights Bill*, *S. CHINA*

rated a majority of the ICCPR's articles, came into operation, and the Letters Patent, Hong Kong's present constitution, was amended to indirectly entrench the Bill of Rights into local law and give it a superior status.¹⁸⁰ Unfortunately, Article 8 of the Basic Law can be interpreted to conclude that amendments to the Letter Patent, such as this Bill of Rights, will not be maintained if it is interpreted by China to contravene the Basic Law.¹⁸¹

G. THE HONG KONG LEGISLATIVE COUNCIL AND RECENT DEVELOPMENTS

The Letters Patent and Royal Instructions form the Constitution of Hong Kong under British rule.¹⁸² Laws in Hong Kong may also be made by the Queen in the exercise of her prerogative power and by the British Parliament.¹⁸³ In practice, the British Parliament has generally left decision making regarding Hong Kong to the Hong Kong authorities, primarily the Governor, who retains central powers that are subject to control by the Foreign and Commonwealth Office in Britain.¹⁸⁴ The Governor, in turn, is advised by an extensive network of both formal and informal structures.¹⁸⁵ The primary formal structures advising the Governor are the Executive Council¹⁸⁶ and the Legislative Council, which is the lawmaking body in Hong Kong.¹⁸⁷ The Governor

MORNING POST, June 7, 1991. China is adamant about being involved in all decision making which will have post-1997 consequences. See Braude, *supra*.

180. See Bill of Rights, *supra* note 16, Preamble, § 2(3). See Article VII(3) of the Letters Patent which states, "[t]he provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 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 the Covenant as applied to Hong Kong." HONG KONG LETTERS PATENT 1917 TO 1991 (No. 1, as amended by No. 2) (LN 226 of 1991), art. VII(3).

181. See Basic Law, *supra* note 14, art. 8.

182. HONG KONG LETTERS PATENT 1917 TO 1991 (Nos. 1 and 2), *supra* note 180; CHEEK-MILBY, *supra* note 9, at 38.

183. See INTERNATIONAL COMMISSION OF JURISTS, *supra* note 5, at 7.

184. See INTERNATIONAL COMMISSION OF JURISTS, *supra* note 5, at 7; Wesley-Smith, *supra* note 9, at 13-14.

185. OVERHOLT, *supra* note 30, at 256.

186. The Executive Council members are chosen by the Governor to provide advise which he is not bound to follow. See Cheek-Milby, *supra* note 9 at 27. In 1984, the Executive Council consisted of six officials and eleven non-officials chosen by the Governor, five of whom were also unofficial members of the Legislative Council. See *id.* at 289 n.10. By 1992, the Governor reformed the Executive Council, mandating no membership overlap with the Legislative Council. See *id.*

187. The composition of the members of the Legislative Council has always been a source of contention for representation between Britain, the Hong Kong government, British business interests and the Hong Kong residents. See *id.* at 38-39. His-

has the power to bypass this advisory network to override the decisions of the Legislative and Executive Councils and ignore local interests.¹⁸⁸ While this constitutional structure has changed very little during the entire period of British rule, the "administrative absolutism" aspect has been de-emphasized in lieu of the consultative aspect.¹⁸⁹ Although the decision-making structure may appear relatively authoritarian, unrepresentative and undemocratic in form, in practice, the Governor has rarely exercised the full extent of his overriding powers, and some segments of Hong Kong's population serve a significant informal advisory role.¹⁹⁰

Prior to 1984, the Legislative Council members were appointed by the Governor and essentially rubber stamped the Governor's decisions, while upholding the legitimacy of the Hong Kong colonial government.¹⁹¹ In the months leading up to the December 19, 1984 signing of the Joint Declaration, the Hong Kong government began to suggest changes in the structure of the government to reflect the views of the people of Hong Kong, in part, to gain the Hong Kong community's initial acceptance of the Joint Declaration.¹⁹² Unfortunately, it seemed that in

torically, the British held the paternalistic belief that they could best represent the interests of the people of Hong Kong and therefore, the Legislative Council served a limited function as an advisory body to the dominant Governor. *See id.* at 40. The Legislative Council is composed of sixty members which as of September 1991, consists of 18 members which are directly elected on the basis of universal adult suffrage, 21 which are elected by restricted franchise by "functional constituencies," 18 members which are appointed by the Governor and three members which are senior officials sitting *ex-officio*. INTERNATIONAL COMMISSION OF JURISTS, *supra* note 5, at 7.

188. *See generally* CHEEK-MILBY, *supra* note 9, at 39.

189. *See id.* at 3-4. Traditionally, this structure effectively served British trade and strategic interests in Hong Kong and the Governor primarily focused on representing the interests of the British merchants. *See id.* at 37-39. This representation essentially ignored the interests of the Hong Kong people as Hong Kong lacked a well established indigenous community with the motivation or leverage to demand political representation. *See id.*

190. *See id.* at 3-4. The British Parliament has generally allowed the Hong Kong Governor to retain quasi-autonomy and in turn, most recent Governors have allowed the people of Hong Kong to retain a high degree of individual freedom. *See* Wesley-Smith, *supra* note 9, at 14-15. The Governor consults with select business leaders and decision-making is typically reached by compromise and consensus. *See* CHEEK-MILBY, *supra* note 9, at 4. This bias towards the business elites with an interest in economic growth is reminiscent of the other Asian miracle economy countries such as South Korea and Taiwan, rather than of the "kinds of populist political pressure that influence economic policy making so heavily in the West." OVERHOLT, *supra* note 30, at 256.

191. *See* CHEEK-MILBY, *supra* note 9, at 185.

192. On July 18, 1984, Hong Kong government issued a consultation Green Paper which invited public comment on the contained proposal of constitutional reform for a more representative government. *See* GREEN PAPER: THE FURTHER DEVELOPMENT OF REPRESENTATIVE GOVERNMENT IN HONG KONG 4 (Hong Kong:

implementing or proposing subsequent reforms, Britain was less responsive to the Hong Kong people's needs than to China's objections. This bias became more apparent with each subsequent Hong Kong government reform proposal.

An initial Green Paper recognized China's determinative role in drafting the Basic Law and determining policy making power after 1997.¹⁹³ The government's issuance of the Green Paper was followed with the issuance of a White Paper which also suggested limited democratization.¹⁹⁴ Within the context of other British decolonization measures, the Green and White Papers were not particularly unusual, but within Hong Kong's static administration, these reforms seemed to be a radical step towards democracy.¹⁹⁵ The Hong Kong government undertook the delicate task of creating representative institutions rooted in popular support and strong enough to stand up to China, but not so strong as to threaten the existing social order or to be incompatible with China's structure of government after 1997.¹⁹⁶ However, in the face of China's demands for "convergence" and its opposition to the reforms proposed in the 1984 Green and White Papers, the Hong Kong government drastically diluted and reduced the substance and number of the reform proposals in a May 27, 1987 Green Paper entitled *The 1987 Review of Developments in Representative Government*.¹⁹⁷ In February 1988, the

Government Printer, 1984); see generally Chan, *supra* note 143, at 163; see CHEEK-MILBY, *supra* note 9, at 72. The purpose of these proposals was to develop a government which is more accountable and representative of its residents, to build the system on existing institutions, to develop the practice of government by consensus and to allow for further development if the public so desires. See CHEEK-MILBY, *supra* note 9, at 72.

193. See CHEEK-MILBY, *supra* note 9, at 73. China's tempering influence was evidenced in the limiting of the Green Paper's focus on how the composition of the Legislative Council's members are chosen, rather than on the more meaningful issue of extending the members' duties or powers. See *id.*

194. WHITE PAPER: THE FURTHER DEVELOPMENT OF REPRESENTATIVE GOVERNMENT IN HONG KONG (Hong Kong: Government Printer, Nov. 1984). This White Paper was issued on November 21, 1984 and contained various proposals for the indirect election of 24 of the 60 seats in the Legislative Council. Chan, *supra* note 143, at 163-64.

195. See CHEEK-MILBY, *supra* note 9, at 77. The tone of the White Paper seemed to be highly reform oriented with proposals to review the representative government system, including proposals to reduce the executive branch's power over the legislature and have constitutional reform by 1987. See Chan, *supra* note 14, at 9.

196. See CHEEK-MILBY, *supra* note 9, at 79. One primary reform emphasis was to transform the Legislative Council into a body which would not only be more representative of the Hong Kong people, but would also possess the power and desire to make the post-1997 government more accountable to the Hong Kong people. See *id.* at 185.

197. See *id.* at 80. China considered any changes in the legislature prior to 1997 to be a violation of the Joint Declaration, and any changes should be provided for within the yet to be published Basic Law. See *id.* China's demand that there be

Hong Kong government issued another White Paper entitled *The Development of Representative Government: The Way Forward*, whose emphasis of "prudent and gradual change" was reflective of China's influence with regards to "convergence" between the reforms and the yet to be finished Basic Law.¹⁹⁸ While unstated, these proposals seem to be more reflective of Britain's responsiveness towards China's opposition to major reforms and less reflective of Britain's responsiveness towards the genuine concerns of the Hong Kong people.¹⁹⁹

It was not until the 1989 Tiananmen Square incident that the British government was both subjected to and responded to large scale public pressure to reform the undemocratic structure of the government of Hong Kong.²⁰⁰ The unprecedented size of Hong Kong's protest raised international outrage and concern over Hong Kong's future as well as repeated warnings from China for Hong Kong's "compatriots to stop subversive activities if they wanted the pledge of autonomy granted in the Joint Declaration to be honored."²⁰¹ Amidst widespread discontent with the Hong Kong government, the British were prompted to implement reforms that included passage of a Hong Kong Bill of Rights, the offering of British citizenship to a number of local British dependent territories passport holders, and allowing greater elected representation within the Legislative Council.²⁰² The September 1991 direct elections of 18 members of the Legislative Council decisively demonstrated the public's new political assertiveness,

"convergence" between any governmental reforms and the Basic Law used the Basic Law drafting process as a tool to slow down the reforms that the Hong Kong government could implement. See Chan, *supra* note 14, at 12.

198. See CHEEK-MILBY, *supra* note 9, at 85. The February 1988 White Paper officially states that the aim of the Hong Kong government is to devise a representative government which enjoys the full confidence of the Hong Kong people, but in a gradual manner to ensure a smooth transition to Chinese rule in 1997. Wesley-Smith, *supra* note 9, at 17. Included is a proposal that 10 out of the 60 seats in the Legislative Council be directly elected by the public. *Id.*

199. Britain was heavily criticized for its kowtowing to China's call for "convergence" by its postponing any definite decision as to direct elections until 1991. See CHEEK-MILBY, *supra* note 9, at 86. Critics said Britain betrayed and misrepresented the interests of the people of Hong Kong in what was seen to be an effort to please China, "allowing diplomatic deference to become political subservience." *Id.*

200. The Tiananmen Square incident united the Hong Kong public into a political collectiveness with 1.5 million Hong Kong people marching in the streets to protest the oppression in China. *Id.* at 93. One newspaper editorial said of China, "ten years of winning confidence through its 'open door' policies and economic reform have been wasted in one night of slaughter." CHEEK-MILBY, *supra* note 9, at 93 n.144 (quoting S. CHINA MORNING POST, June 4, 1989).

201. See CHEEK-MILBY, *supra* note 9, at 93.

202. See *id.* at 94.

as 16 of the 18 elected members were from the pro-democracy party.²⁰³

The new Governor of Hong Kong, Chris Patten, who took office in July 1992 was extremely ambitious and aggressive in accelerating the pace of democratization within the constraints of "the ink of international agreements and the implacable realities of history, geography, and economics."²⁰⁴ Patten's proposals focused primarily on making the Legislative Council more autonomous and proposing electoral reforms for the 1995 Legislative Council elections that would expand the number of directly elected positions and produce a fivefold increase in the number of eligible voters.²⁰⁵ China, extremely upset with Patten for breaking precedent by making public suggestions without prior approval from China, initiated an unprecedented campaign to discredit Patten and his proposals.²⁰⁶ On April 13, 1993, a diplomatic compromise was reached between Britain and China to resume talks on the 1995 electoral plan.²⁰⁷ In the 1995 Legislative Council election, out of the 20 of 60 seats that were directly elected, the pro-China parties won an embarrassingly few four seats, while the two pro-democracy parties won sixteen seats.²⁰⁸

203. See Davis, *supra* note 19, at 314 n.37.

204. CHEEK-MILBY, *supra* note 9, at 98 n.160 (quoting *Shaken and Stirred: Governor Patten Unveils New Political Programme*, FAR E. ECON. REV., Oct. 5, 1993, at 13).

205. See CHEEK-MILBY, *supra* note 9, at 98-99. One commentator raised an interesting point about the impact of Patten's proposals as it affected the future autonomy for Hong Kong. See *id.* at 102. "The struggle, therefore, was over more than just reform for one election; it was over the meaning of a 'high degree of autonomy' and the actual 'extent to which one country, two systems can and will be allowed to actually operate.'" *Id.*

206. See *id.* at 99. China stated that Patten's proposals completely contradicted the Basic Law citing violation of Articles 55, 62, 74 and 97. Basic Law, *supra* note 14, arts. 55, 62, 74, 97; see CHEEK-MILBY, *supra* note 9, at 99. China also mounted multiple personal attacks on Patten. CHEEK-MILBY, *supra* note 9, at 99-100. Additionally, China sought to intimidate the business community by criticizing anyone who publicly sided with Patten and implying that future contracts that extended beyond 1997 might not be honored by China, despite this being a direct violation of Article 160 of the Basic Law. *Id.* at 101; see Basic Law, *supra* note 14, art. 160. China also announced that they would delay approval of financing arrangements needed to build the new Hong Kong airport at Chek Lap Kok and also hinted that it would dissolve the Legislative Council in 1997, thus preventing the members elected in 1995 from completing their four year term. See CHEEK-MILBY, *supra* note 9, at 101. China also created the Preliminary Working Committee. See *infra* Part IV.D.

207. China withdrew its precondition that Patten retract his proposals and Britain withdrew its insistence that Hong Kong participate as a "full partner" during the negotiations. See CHEEK-MILBY, *supra* note 9, at 105-106

208. *Prepared Testimony By Merle Goldman Before the Senate Foreign Relations Committee on Hong Kong*, Federal News Service, July 18, 1996, available in LEXIS, News Library, Curnws File [hereinafter Goldman Testimony]. The pro-democracy candidates won 16 out of the 20 seats of the Legislative Council which were directly elected. Sheila Tefft, *A Red-Faced China Vows to Ignore Hong Kong Vote*, CHRIS-

This result convincingly demonstrates the Hong Kong public's transformation from an apathetic and voiceless constituency to one that supports the movement towards democracy and an acceptance of a participatory political culture.²⁰⁹ China has responded with renewed criticisms of Governor Patten as well as promises to dissolve the current Legislative Council upon its resumption of control in 1997, despite the fact that their terms extend until 1999.²¹⁰

III. PROBLEMS OF PERCEPTION BETWEEN THE BRITISH AND THE CHINESE

Despite the enforcement problem and the lack of consultation with the Hong Kong people, the British did gain the general commitment to capitalism from China for a period of fifty years in exchange for conceding the sovereignty issue.²¹¹ However, it cannot be taken for granted that China will honor these commitments, as there are underlying differences between the Chinese and the British. At the most basic level, China's notion of citizen rights and freedoms has evolved in a very different way from the Western notion of individual rights that the British espouse.²¹² As such, the interpretative latitude that China has taken in enacting the Joint Declaration's mandates may jeopardize the document's stated intention to protect the rights of Hong Kong's people and Hong Kong's capitalist provisions.²¹³ Of central con-

TIAN SCI. MONITOR, Sept. 19, 1995, at 6. Of the remaining 40 seats, 30 were filled by occupation-based functional electorates and 10 were filled by local representative bodies. *Id.* The Democratic Party, the party which is most vocally critical of China, won 12 directly elected seats, compared with only two seats won by the Democratic Alliance for the Betterment of Hong Kong, the primary pro-China party. *Id.* As a result, when factoring in all 60 seats, the Legislative Council is almost evenly split between pro-democracy and pro-China parties. *Id.* The Hong Kong government is said to fear the pro-democracy parties' influence in the Legislative Council in impeding a smooth transition to China. *Hong Kong. Sweetness and Light*, ECONOMIST, Oct. 7, 1995, at 36. The pro-China parties did make inroads in the Legislative Council, raising their seat total from 1 to 7. *Political Outlook*, ECONOMIST INTELLIGENCE UNIT COUNTRY FORECAST, June 10, 1996, available in LEXIS, News Library, Arcnws File. These three parties were the Democratic Alliance for the Betterment of Hong Kong, the Federation of Trade Unions and the Confederation of Trade Unions. *Id.* The pro-democracy group consists of the Democratic Party and the Association for the Democracy in People's Livelihood, the latter of which achieved four seats and while pro-democratic, is willing to work with China as much as possible. *Id.*

209. See, e.g., CHEEK-MILBY, *supra* note 9, at 86.

210. *Id.* at 101

211. See Christine Chua, *The Sino-British Agreement and Nationality: Hong Kong's Future in the Hands of the People's Republic of China*, 8 UCLA PAC. BASIN L.J. 163, 166 (1990); Chan, *supra* note 14, at 3.

212. See, e.g., JOHN F. COPPER ET AL., HUMAN RIGHTS IN POST-MAO CHINA 5 (1985).

213. See Goldstein, *supra* note 110, at 169.

cern is China's role in the drafting of the Basic Law.²¹⁴ China was able to incorporate provisions into the Basic Law that would give China greater control over the affairs of post-1997 Hong Kong than the Joint Declaration had envisioned.²¹⁵ The pervasive role of the CCP in every aspect of China, including its role in Hong Kong, is another major concern because of worries that the CCP's priorities are not necessarily compatible with those of the Hong Kong people or the mandates of the Joint Declaration.

A. DIFFERING VIEWS OF LAW

The origin of China's apparent interpretive latitude lies in the fact that law in China lacks the same definiteness as law in Western societies.²¹⁶ China's "notion of law in general and its assumptions regarding the role, function, validity, and justification of the legal system do not coincide with those prevailing in the West."²¹⁷ Western societies have been quick to codify laws to achieve definiteness and to minimize the type of governmental interpretive leeway that the Chinese have been applying to the Joint Declaration.²¹⁸ The root cause of this difference is that in traditional Western theories, laws derive from the people so that the natural and political rights of the individual are stressed.²¹⁹ In contrast, in China, the needs of the collective take precedence over those of the individual, and laws in China are "political instruments" of the government, designed to achieve some change in societal norm or some specific objective.²²⁰ Thus, political rights are much less important than socioeconomic welfare rights.²²¹

The current Chinese view of law has evolved considerably throughout China's history. Understanding why the current CCP views treaties such as the Joint Declaration differently from

214. See *infra* Part IV.B.

215. Most important was the enormous power that they accorded the Standing Committee of the National People's Congress to both interpret the Basic Law and oversee post-1997 rule in Hong Kong. See Basic Law, *supra* note 14, arts. 17, 18, 20, 21, 158, 159.

216. See Mushkat, *supra* note 20, at 173-74.

217. *Id.*

218. See *id.*

219. See NATHAN, *supra* note 12, at 128-29.

220. See Deborah L. Bayles, *The Reunification of China: An Examination of the Legal Systems of the People's Republic of China, Hong Kong and Taiwan*, 19 DENVER J. INT'L L. & POL'Y 443, 461 (1991); Mushkat, *supra* note 20, at 174; Michael C. Davis, *Where Two Legal Systems Collide: An American Constitutional Scholar in Hong Kong*, 20 CASE W. RES. J. INT'L L. 127, 135 (1988).

221. Examples of welfare rights are rights to work, vocational training, rest, social insurance and help, medical facilities, retirement and education. NATHAN, *supra* note 12, at 128-29. These are considered the highest goals with political rights marginally emphasized only in the context of achieving these goals. See *id.*

Western nations requires a brief overview of influences from China's past. Specifically, the CCP's treatment of law derives from the combined influence of three factors: traditional Confucian ideology, Mao Zedong thought, and post-World War Two Soviet practices.²²²

The first factor of China's view on law is Confucianism, which helped uphold social law throughout the various Chinese dynasties.²²³ "The Confucian emphasis on personal relationships, honesty, high moral standards, and loyalty to one's group affects every aspect of individual and organizational life in China."²²⁴ Confucianism stresses the moral and humanist values of *jen*, a moral feeling towards others, and *i*, a form of integrity (faithfulness, loyalty, and justice) where a person recognizes the moral obligation of one's own ethically correct behavior.²²⁵ Confucius advocated patience to enable continual education to help a person gain this moral foundation.²²⁶ This process fostered a constant struggle between *li*, which is Confucian social harmony, customary norms of behavior, and ruling by example, and *fa*, which is the written or enacted law of the legalists.²²⁷ China has continually leaned towards *li* over *fa* because it includes the normative rules of morality and proper behavior.²²⁸ Due to this bias towards *li* over *fa*, the CCP's attempts to create a formal legal system is still influenced by the Confucian preference for social pressure over the use of force. In explaining the superiority of *li* over *fa*, Confucius said:

If you govern the people by laws [*fa*], and keep them in order by penalties, they will avoid the penalties, yet lose their sense of shame. But if you govern them by your moral excellence, and keep them in order by your dutiful conduct [*li*], they will retain their sense of shame, and also live up to this standard.²²⁹

222. See Goldstein, *supra* note 110, at 174-75.

223. See COPPER ET AL., *supra* note 212, at 41.

224. Ni Chen & Hugh M. Culbertson, *Two Contrasting Approaches of Government Public Relations in Mainland China; Comparison of Public Relations Initiatives Used by the Local Government in Tianjin and by the Central Government in Peking*, 37 PUB. REL. Q. 36 (1992), available in LEXIS, News Library, Archws File.

225. See COPPER ET AL., *supra* note 212, at 11; Chen & Culbertson, *supra* note 224.

226. See COPPER ET AL., *supra* note 212, at 10-11.

227. See Palumbo, *supra* note 1, at 675; Mushkat, *supra* note 20, at 174; COPPER ET AL., *supra* note 212, at 11.

228. See Bayles, *supra* note 220, at 448.

229. THE ANALECTS OF CONFUCIUS WITH HIS DISCIPLES AND CERTAIN OTHERS (Lady Hosie ed. & William Edward Soothhill trans., Oxford Univ. Press, 1937) Volume I, Book II *Concerning Government*, Ch. III, 8. This translation of the Confucian Analects by Professor Soothhill in 1910 was a more modern interpretation of the famous translation by Dr. Legge in 1861, a Protestant missionary to China and the first Chair of Chinese Language and Literature at Oxford University. *Id.* at xlvi.

Li provides a model of proprietary conduct among individuals upon which all important relationships in Chinese society are based.²³⁰ In order to achieve social order, Confucianism accords specific roles and behavioral norms to people based upon their relative positions as determined by status, level of intimacy and situational context.²³¹ There are five major traditional Confucian relationships of which four are predicated on unequal parties and relationships.²³² Because these roles develop such a strong interdependent link among the parties, there is a strong distinction between members and non-members of the group.²³³ Consequently, it is difficult for groups to relate to outsiders, and an intermediary is often used to build a common ground of interests.²³⁴ Another consequence of group loyalty is the Chinese dislike for pure business transactions.²³⁵ "While a relationship may exist for purely business reasons, Chinese prefer transactions to be carried out on a more personal, warm, human level."²³⁶ Thus, the efficiency and contractual business-based relationships that Westerners favor are secondary to interpersonal relationships.²³⁷

An important Confucian relationship that stresses this human factor is that of the emperor to his subjects. The emperor has a moral duty to care and be responsible for his people to the same degree as a parent would care for a child; in exchange, they owe him a duty of loyalty and obedience.²³⁸ The power of the ruler is absolute, and the people are under an absolute duty to obey.²³⁹ Thus, there was no concept limiting government powers by law, or allowing individuals to enforce their rights against authority figures.²⁴⁰ The ruling government's role was elevated to a

230. See Goldstein, *supra* note 110, at 174 n.42.

231. See Chen & Culbertson, *supra* note 224.

232. These power relationships are vertically oriented with the power disseminated from the top-down. The unequal relationships are father to child, elder brother to younger brother, husband to wife, and ruler to subject. The single relationship of equals is friend to friend. See Albert H.Y. Chen, *Civil Liberties in China: Some Preliminary Observations*, in CIVIL LIBERTIES IN HONG KONG 107, 108-09 (Raymond Wacks ed., 1988).

233. See Chen & Culbertson, *supra* note 224.

234. This distrust of outsiders is manifested at all levels from the family or the work group level to the national level. At the national level, China has historically been xenophobic and the current dislike by the CCP of Western influences is not unusual. See *id.*

235. "The calculated, impersonal, strictly contractual approach of most Western business deals is seen as unnatural and distasteful." *Id.*

236. *Id.*

237. See *id.*

238. See Chen, *supra* note 232, at 108-09; COPPER ET AL., *supra* note 212, at 11.

239. See COPPER ET AL., *supra* note 212, at 14.

240. He should care for them, teach them and provide a moral role model for them. See Chen, *supra* note 232, at 108-09.

spiritual level.²⁴¹ This role was accorded the Mandate of Heaven²⁴² wherein it was entrusted with a sacred responsibility to its people that could not be restrained by a man-made legal system.²⁴³ This spiritual basis was believed to keep the ruler's excesses and abuses of authority relatively low because if the people were discontented or suffering, then the ruler might lose the Mandate and the people could claim their right to overthrow the abusive ruler.²⁴⁴ With this spiritual protection for the people, there was no need for *fa*, and China consequently never developed a comprehensive legal system.²⁴⁵

The second source of modern Chinese legal doctrine is Mao Zedong thought, which was practiced in China after the CCP takeover in 1949.²⁴⁶ Mao disliked being restricted by laws of individual protection; instead, he preferred to utilize political campaigns to directly target societal groups.²⁴⁷ This ideology of

241. *See id.* at 108.

242. The Mandate of Heaven predates Confucianism to the beginnings of Chinese recorded history in the thirteenth century. A ruler had to meet certain virtuous moral qualifications that gave him the privilege to hold the mandate or approval of Heaven to be able to rule mankind. *See* COPPER ET AL., *supra* note 212, at 9-11.

243. *See* Chen, *supra* note 232, at 108.

244. COPPER ET AL., *supra* note 212, at 9-11. Many have said that this Mandate of Heaven was lost after the massacre in Tiananmen. In reference to the current government, one student speaker at Beijing University alluded to the Mandate, "[a]s Chairman Mao said, if you let the people speak, the heavens won't fall down. But if you don't let them speak, you yourself will fall." David R. Schweisberg, *Beijing*, UPI, Apr. 26, 1989, available in LEXIS, News Library, Arcnws File. Fearful of the Mandate's implications, Chinese leaders hurriedly tried to minimize the fallout from Tiananmen. *See, e.g.,* Chen & Culbertson, *supra* note 224.

245. Goldstein, *supra* note 110, at 174 n.42. China's traditional legal system was based on the "rule of man" rather than the "rule of law." *See id.* at 175 n.44. The "rule of man" refers to social order maintained by the subjective directives of the ruling government to solve problems as they arise. *See id.* The "rule of law" is akin to Western law of either civil or common law where institutions and codes exist that detail acceptable conduct among members of society. *See id.*

246. Prior to the CCP's rule, the Nationalist regime had established a comprehensive system of Western-type codes and laws, which the CCP abolished upon its takeover. COPPER ET AL., *supra* note 212, at 41. Mao's primary beliefs include the "fierce commitment to eliminate exploitation and property-based inequality; the emphasis on political mobilization, class struggle, and political and ideological transformation and their relationship to economic development; the proclivity to replace the market and the household economy by large cooperative, collective, and state institutions; and the emphasis on self-reliance and the suspicion of intellectuals and technical personnel." Mark Selden, *Mao Zedong and the Political Economy of Chinese Development*, in *MARXISM AND THE CHINESE EXPERIENCE: ISSUES IN CONTEMPORARY CHINESE SOCIALISM* 43, 54-55 (Arif Dirlik and Maurice Meisner eds., 1989).

247. *See* Selden, *supra* note 246, at 54-55; *see generally* MAO TSE-TUNG'S QUOTATIONS: THE RED GUARD'S HANDBOOK (Stewart Fraser intro. 1967). This edition of Mao Zedong's quotations is taken in its entirety from the original English language edition published in 1966 and distributed by the foreign languages press in China. The Chinese edition of this book, commonly known as *Mao's Little Red Book* was distributed on a wide scale basis throughout China beginning in 1965 during the "Great Proletarian Cultural Revolution." MAO TSE TUNG'S QUOTATIONS, *supra*, at

emphasizing social harmony and the collective good was highly compatible with *li*.²⁴⁸ It minimized the importance of rights and freedoms such as the natural law or civil liberties which are so important in Western societies, because the CCP believed that these rights favored the capitalists and that any benefit to the working class was illusory.²⁴⁹

This reliance on ruling by ideology initially seemed contradictory to the implementation of several constitutions throughout the CCP reign.²⁵⁰ But the purpose of China's constitutions was not to establish a rule of law as in a Western society.²⁵¹ Rather, it was to legitimize the bureaucracy while upholding the primacy of the CCP and its professed ideology.²⁵² The current 1982 Constitution²⁵³ still reflects the tendency to promise many freedoms that could easily be limited or taken away in the name of broadly defined "state interests."²⁵⁴ As in the former Soviet Union, the judiciary and bureaucracy are not separate from the CCP.²⁵⁵ The CCP routinely invokes "state interests" to override constitutional mandates.²⁵⁶ Promulgation of laws is seen by the CCP as a political tool to serve its objectives.²⁵⁷ This attitude is

vii. Mao was constantly targeting various social groups as the following excerpt from a 1957 speech demonstrated, "[t]he class struggle is by no means over . . . there are still remnants of the overthrown landlord and comprador classes, there is still a bourgeoisie, and the remolding of the petty bourgeoisie has only just started." *On the Correct Handling of Contradictions Among the People* (February 27, 1957) in MAO TSE-TUNG'S QUOTATIONS, *supra*, at 17-18. Mao departed from orthodox Marxist views, presiding over a unique, "revolutionary process which assumed the form of a war of the backward countryside against the advanced cities, one where the forces of peasant revolt were mobilized to 'surround and overwhelm' the cities, while a politically inactive urban proletariat passively awaited its liberation by armies of peasants." MEISNER, *supra* note 108, at 20. Mao was willing to abandon the cities in favor of the backwards rural areas due to the concentration of what he viewed to be offensive classes in the cities. *Id.* at 21.

248. See Chen, *supra* note 232, at 120-21.

249. See *id.*

250. There were a total of four Constitutions: 1954, 1975, 1978 and the current one, 1982. See COPPER ET AL., *supra* note 212, at 43-44.

251. See *id.* at 43-45.

252. See *id.* Each constitution also contains a formal statement of self image related to the CCP's long struggle to overcome the "rule of imperialism, feudalism and bureaucratic capitalism" on behalf of the "Chinese people." See XIANFA, *supra* note 14, Preamble.

253. The Constitution adopted by the National People's Congress on Dec. 4, 1982 supersedes the three previous CCP Constitutions adopted in 1954, 1975 and 1978. Article 5 establishes it as the fundamental law of the country with supreme authority. XIANFA, *supra* note 14, art. 5.

254. See Palumbo, *supra* note 1, at 674-75; Chen, *supra* note 232, at 123; see generally XIANFA, *supra* note 14.

255. See Goldstein, *supra* note 110, at 175.

256. See *id.*; Palumbo, *supra* note 1, at 675.

257. See Mushkat, *supra* note 20, at 174. In contrast, Western thought accords law a role as reflective rather than as an instrument of societal change. *Id.*

not limited to the application of domestic law, but extends to international law as well.²⁵⁸ A CCP commentator aptly described China's stance:

[I]f [international law] is useful to our country, to socialist enterprise, or to the peace enterprise of the world, we will use it. However, if this instrument is disadvantageous to our country, to socialist enterprises or to peace enterprises of the people of the world, we will not use it.²⁵⁹

Given this background, there has been widespread skepticism over the Joint Declaration's capability to protect the rights and freedoms of the people of Hong Kong if China chooses for whatever reason to override the document's stated protections.²⁶⁰

The third influence on Chinese legal philosophy is the Soviet model. Although Deng would abhor the correlation, his progressive legal reforms resemble a Soviet-type "socialist legality."²⁶¹ In breaking out of the morass of the Cultural Revolution²⁶² and Mao's legacy, Deng undertook astonishing and unprecedented legal reforms that included the 1982 Constitution,²⁶³ the National People's Congress legislature,²⁶⁴ a comprehensive criminal code and civil laws regarding joint ventures with foreigners.²⁶⁵ This new emphasis includes a moderation of China's view on treaties as it recognizes their importance in "governing relations between ideologically diverse nations."²⁶⁶

258. See Goldstein, *supra* note 110, at 175.

259. *Id.*

260. See Joint Declaration, *supra* note 1, para. 3(5) (details the rights and freedoms to which the Hong Kong people are entitled).

261. COPPER ET AL., *supra* note 212, at 46-47.

262. Deng himself was subject to persecution during the Cultural Revolution when violations of the civil and human rights of China's people contributed to one million deaths, 20 million arrests for political crimes and the suffering by 100 million people for political reasons. See Kuan Hsin-Chi, *Chinese Constitutional Practice, in THE BASIC LAW AND HONG KONG'S FUTURE* 55, 60 (Peter Wesley-Smith & Albert H.Y. Chen eds., 1988).

263. See Palumbo, *supra* note 1, at 674-76. This Constitution, unlike its predecessors, provides the legal basis for the widespread changes in China's social and economic institutions. On its face, it provides greater rights and freedoms to the individual citizen than ever before. Chapter Two of the Constitution entitled *The Fundamental Rights and Duties of Citizens* contains a list of these rights. XIANFA, *supra* note 14, ch. 2, arts. 33-56. It also provides a stronger role for the bureaucracy and an independent judiciary vis-a-vis the CCP. *Id.* ch. 3, arts. 57-135.

264. See Palumbo, *supra* note 1, at 674.

265. See COPPER ET AL., *supra* note 212, at 46.

266. Goldstein, *supra* note 110, at 176. Many observers believe that this trend will continue even after Deng's death on February 19, 1997, albeit some unevenness may exist due to the uncertainty of the post-Deng leadership succession. Kathy Chen, *After Deng: A Look at the Men Who Will Run China*, WALL ST. J., Feb. 20, 1997, at A17 (provides a brief account of the various leaders that may gain greater influence after Deng's death).

Despite this trend towards *fa*, the CCP still subjects the written law to continuous re-interpretation. The CCP's actions in Tiananmen Square, for example, ably demonstrate its continued ability to interpret "state interests" broadly so as to ensure public compliance with social order and peace.²⁶⁷ Although it had a higher profile under Deng, the National People's Congress will continue to rubber stamp CCP actions so long as the CCP has no serious factional disputes.²⁶⁸ In addition, the Chinese view of law has heightened China's sensitivity regarding their sovereignty.²⁶⁹ This sensitivity has been manifested in (1) China's unwillingness to become a party to the ICCPR that is included in the Joint Declaration,²⁷⁰ (2) China's indignation over international interference in its domestic affairs such as human rights issues,²⁷¹ (3) China's non-ratification of the Vienna Convention,²⁷² and (4) in a not so subtle reference to the British treaties of 1842 and 1860, China's determination that an entire treaty can be terminated if its terms are substantially unequal.²⁷³

267. See Palumbo, *supra* note 1, at 675. The CCP uses law or *fa* as a tool whereby, if needed, it can even choose a law to use after the fact.

268. See COPPER ET AL., *supra* note 212, at 26. In light of Deng's death and Jiang Zemin's tenuous hold on power, factional disputes may well arise as an important CCP congress will convene in Fall 1997 where many leaders will undoubtedly be jockeying for influence. See Kathy Chen & Marcus Brauchli, *Deng's Death Isn't Expected to Lead to Reversal of China's Political Policies*, WALL ST. J., Feb. 20, 1997, at A3; Chen, *supra* note 266, at A17.

269. See Mushkat, *supra* note 20, at 176-77.

270. *Id.* at 177.

271. *See id.*

272. Becoming effective on January 27, 1980, the Vienna Convention on the Law of Treaties represents thirty years of combining customary treaty principles into a general convention on international treaty interpretation. Goldstein, *supra* note 110, at 170, 178. By not ratifying the convention, China is not bound by it so that it can selectively interpret or adhere to provisions. *Id.*

273. *See id.* at 184.

B. THE INFLUENCE OF THE CCP

Although the most recent 1982 Constitution established parallel government and party institutions as independent bodies,²⁷⁴ the CCP still has a pervasive role in China's legal system.²⁷⁵

According to official [Chinese government] doctrine, law is a mature form of public policy. Although appearing to imply that only [CCP] policy decisions precede legal enactment, in practice this doctrine has enabled party organizations and leading officials to use party directives to amend or frustrate the intent of the law.²⁷⁶

Although the legitimacy of the CCP's power is based on the Constitution's preamble that affirms its leadership, the Constitution does not clearly enunciate the breadth of the CCP's influence, nor does any other law or document.²⁷⁷ It is problematic that the CCP actually does lead, but there are no constitutional provisions which exist to penalize the CCP for poor leadership or to limit its authority.²⁷⁸ Thus, an inquiry into the role of the CCP must accompany any study of China's government structure.²⁷⁹ This role is quite foreign to Western countries such as the United States, where the Constitution maintains the central role around which multiple political parties revolve.

An understanding of the constitutional relationship between the Chinese government and the future HKSAR government requires an appreciation of the CCP's enormous role. Most relevantly, the CCP's role includes an influential, albeit informal position within the technically autonomous National People's Congress and its Standing Committee.²⁸⁰ The CCP's primary in-

274. While the preamble of the Constitution professes the leadership of the CCP, Article 5 states that political parties must respect the Constitution and the law. XI-ANFA, *supra* note 14, Preamble, art. 5. In terms of its focus on law, the 1982 Constitution is already a vast improvement over China's prior constitutions of which three of four had been seen as revolutionary constitutions which "meant no more than another tool for class struggle, for the radical transformation of society, rather than for the establishment of the rule of law." Hsin-Chi, *supra* note 262, at 56. The constitutions that were seen as revolutionary constitutions were the Common Program of 1949, the Constitution of 1975 and the Constitution of 1978. *Id.* The Constitution of 1954 did not have the revolutionary mandate but also did not limit government power in the interest of individual liberties. *Id.* While the 1954 Constitution seemed the most constitutional in nature by Western standards, it still recognized the leadership of the CCP and did not require the CCP to observe the Constitution. *Id.* Therefore, "the supremacy of the constitution was in practice suppressed by the leadership of the [CCP]." *Id.* at 56.

275. See Keller, *supra* note 18, at 389.

276. *Id.*

277. The leadership of the CCP is one of the four main principles that remains supreme to guide the nation. See XI-ANFA, *supra* note 14, Preamble.

278. See Hsin-Chi, *supra* note 262, at 64-65.

279. See Chang, *supra* note 106, at 101.

280. See Palumbo, *supra* note 1, at 679.

fluence is derived from the fact that most of its members are also members of the National People's Congress and its Standing Committee.²⁸¹ The CCP's influence enables it to alter or even override the 1982 Constitution, because the National People's Congress is the only body with the power to interpret and enact enforcement provisions of the Constitution.²⁸² By implication, the CCP's power extends to the interpretation of the Constitution; this non-legal political influence again deriving from the CCP's traditional reliance on the strength of the *li*.²⁸³

The CCP's influence over the Standing Committee of the National People's Congress is the most disturbing aspect for Hong Kong's citizens because Article 67 of the 1982 Constitution specifically grants the Standing Committee exclusive authority to interpret and enforce the Constitution and to assess the constitutionality of any laws.²⁸⁴ The CCP's influence becomes apparent when its positions conflict with the National People's Congress.²⁸⁵ Initial interpretation problems arose because of the incompatibility of certain sections of the Joint Declaration with the Constitution.²⁸⁶ Most significantly, the general concept of "one country, two systems" espoused in the Joint Declaration conflicts with the inherent dictates of the Constitution.²⁸⁷ This conflict affects not only the obvious capitalistic facets of the document, but also the entire two system premise upon which it is based.²⁸⁸ The preamble of the Constitution mandates that the leadership of the

281. See Cheng, *supra* note 117, at 88.

282. See Palumbo, *supra* note 1, at 680. It was only after Deng's reform that the influence of the CCP's arbitrary actions were reduced. See NATHAN, *supra* note 12, at 117. "[U]ntil recently the [CCP] has held that it can legitimately restrict rights through its own decisions or policies rather than only through state law. In this interpretation, party policy have the same effect as law." *Id.* Therefore, people such as Harry Wu were punished or imprisoned "for violating party regulations or policies they did not know existed, or for acts that were judged culpable by local party leaders." See *id.*; see generally Wu, *supra* note 4.

283. NATHAN, *supra* note 12, at 117.

284. Michael C. Davis, *A Common Law Court in a Marxist Country: The Case for Judicial Review in the Hong Kong Special Administrative Region*, 16 DENV. J. INT'L L. & POL'Y 1, 4 (1987). See Part IV.B. for an elaboration of how the CCP's powers are specifically disturbing for Hong Kong.

285. The "leadership" of the CCP means that total state function is subject to the CCP's will. See Palumbo, *supra* note 1, at 683. This power enables the CCP to unilaterally appoint personnel to any government position, overriding the appointment powers granted in the Constitution to the national and local people's congresses. See *id.*

286. Experts were highly skeptical of China's adherence to the "one country, two systems" concept in light of the extremes "between the world's freest economic marketplace and the world's largest socialist economy." Goldstein, *supra* note 110, at 169.

287. In particular, see Articles 1, 5, 6 and the preamble of the 1982 Constitution. XIANFA, *supra* note 14, arts. 1, 5, 6, Preamble.

288. See Goldstein, *supra* note 110, at 169.

CCP be guided by the four principles.²⁸⁹ Although these principles are not technically law, their importance cannot be underestimated.²⁹⁰ These principles seem to provide a loophole for the government to override constitutional provisions in the name of state interests, suggesting the fragility of constitutionally guaranteed freedoms or rights as was exemplified by the army's direct violation of Article 29 of the Constitution in its crushing of the demonstrators at Tiananmen Square in the name of public order.²⁹¹ If sections of the main Constitution can be overridden, it does not bode well for the integrity of the subordinate Basic Law.

IV. ENFORCEABILITY AND DRAWBACKS OF THE DOCUMENTS

At first glance, the extracted conditions of the Joint Declaration seem to provide for the protection of the rights of the Hong Kong people.²⁹² Subsequent developments, however, have made this assumption unclear. A threshold concern is whether China will honor the contents of the Joint Declaration. However, even if China does honor it, concerns still remain because the Joint Declaration as signed in 1984 was not a self-executing document.²⁹³ The Joint Declaration's enforcement and executing provisions were predicated on future acts by the Chinese government, most importantly, the subsequent drafting of the Basic Law in 1990.²⁹⁴ The primary concern is that the Chinese legislature, the National People's Congress, and its Standing Committee will retain an enormous role in the future governance of Hong Kong.²⁹⁵ By retaining such a large role, China has enor-

289. See XIANFA, *supra* note 14, Preamble; MacNeil, *supra* note 147, at 100; *supra* note 112 and accompanying text.

290. See XIANFA, *supra* note 14, Preamble; MacNeil, *supra* note 147, at 100.

291. Article 29 in relevant part states: "[t]he armed forces of [China] belong to the people. Their tasks are to . . . safeguard the people's peaceful labor . . . and work hard to serve the people." P.R.C. CONST., *supra* note 14, art. 29. The army is the "people's" army, it is not authorized to shoot upon the very people it is supposed to protect. See *Jurists Blast Slaying in China*, UPI, June 26, 1989, available in LEXIS, News Library, Arcnws File. *The People's Daily*, the CCP newspaper called the student protests "a planned conspiracy designed to poison people's minds, create national turmoil and sabotage the nation's political stability." Schweisberg, *supra* note 244.

292. See generally Joint Declaration, *supra* note 1.

293. See *id.* para. 3(12).

294. *Id.* para. 3(12); see Zhang Youyu, *The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and its Essential Contents and Mode of Expression*, 2 J. CHINESE L. 5, 15 (1988).

295. Basic Law, *supra* note 14, arts. 158, 159; Joint Declaration, *supra* note 1, Annex I, part I. The National People's Congress is China's "highest organ of state power." XIANFA, *supra* note 14, art. 57. It has been given broad powers to implement the policies of the HKSAR as the Joint Document enumerates. Joint Declara-

mous leeway to formulate Joint Declaration-based enactments.²⁹⁶ In this regard, understanding the Chinese differences of views and the predominance of the CCP is very important.²⁹⁷

A. ENFORCEMENT PROBLEMS WITH THE JOINT DECLARATION

The Joint Declaration is a unique document that reflects the incorporation of multiple objectives. It is not a treaty dealing with rights and obligations that the parties must perform, but is rather a joint declaration to articulate basic policies of the transition of Hong Kong from British to Chinese rule.²⁹⁸ The Joint Declaration seems to be a mere declaration of policy by China towards the Hong Kong people, but one that lacks mechanisms for resolving disputes in implementation or interpretation.²⁹⁹ Its enforceability under international law is limited. As one Chinese official noted, "the British pledged to return Hong Kong to [China], but [China] made no pledge to the British."³⁰⁰ If China was to renege on provisions of the Joint Declaration, Britain would have no legal recourse to enforce the Joint Declaration.³⁰¹ Within the context of this limitation, the Joint Declaration would have much greater influence and enforceability if it were written as an international treaty and not a mere declaration.³⁰² The advantage of a treaty is that it creates legal rights and duties that

tion, *supra* note 1, para. 3(12), Annex I, part I. The Standing Committee is composed of members of the National People's Congress. Its functions go beyond that of the National People's Congress. One of the Standing Committee's responsibilities is to resolve the ambiguity between the capitalistic premised Basic Law as enacted under Article 31 of China's Constitution with the central precept of the sanctity of the socialist system. How it resolves this dilemma will be crucial to the future rights of Hong Kong's citizens. See XIANFA, *supra* note 14, art. 31.

296. For example, in Article 17 of the Basic Law, the Standing Committee of the National People's Congress reserves the right to determine whether a law enacted by the legislature of the HKSAR is in conformity with the Basic Law and "[a]ny law returned by the Standing Committee of the National People's Congress shall immediately be invalidated." Basic Law, *supra* note 14, art. 17.

297. The difference in how the Chinese view certain things might make their interpretation of the Joint Declaration seem inconsistent with how the British might have interpreted it. See *supra* Part III.A. Additionally, the CCP must be understood because its power in China is so pervasive and will undoubtedly affect Hong Kong. See *supra* Part III.B.

298. See Landry, *supra* note 22, at 261; Byron S.J. Weng, *The Hong Kong Model 'One Country Two Systems': Promises and Problems*, in *THE BASIC LAW AND HONG KONG'S FUTURE* 73, 77 (Peter Wesley-Smith & Albert H.Y. Chen eds., 1988).

299. See Weng, *supra* note 298, at 77.

300. *Id.* The Joint Declaration, Annex II establishes the institutional body, the Sino-British Joint Liaison Group, to resolve disagreements, but its role is confined to "liaison, consultation and the exchange of information." Joint Declaration, *supra* note 1, Annex II.

301. See Weng, *supra* note 298, at 77.

302. See Mushkat, *supra* note 20, at 191.

are enforceable under and as part of international law.³⁰³ Viewing the Joint Declaration as an international treaty would help ensure that China's implementation of the unilaterally-drafted Basic Law will be more responsive to the Joint Declaration's mandates to continue the capitalist system and honor human rights in post-1997 Hong Kong.³⁰⁴ Characterization as a treaty will deter and reduce China's temptation to disregard parts of the Joint Declaration because of feared similar reciprocal disregarding of other treaties by other nations.³⁰⁵ In practice, both Britain and China have made various indications that suggest they recognize the Joint Declaration as a treaty.³⁰⁶

Belief in Chinese compliance with the Joint Declaration fluctuates, varying from guarded optimism to despair. Some analysts have noted that despite its domestic bias of *li* over *fa*,³⁰⁷ China has been more careful in honoring its international treaty agreements.³⁰⁸ Explanations for this deference range from Confucian ethics³⁰⁹ to practical considerations.³¹⁰ On the other hand, whereas China outwardly professes a high regard for international agreements, its historical compliance with some treaties

303. See Palumbo, *supra* note 1, at 691-92.

304. See Zhang, *supra* note 294, at 15-16.

305. See Goldstein, *supra* note 110, at 188.

306. Each government has made statements that acknowledges their belief that the Joint Declaration is a treaty that they both intend to honor. See Palumbo, *supra* note 1, at 691-92. The Joint Declaration is also a culmination of careful adherence to established treaty practices by both sides. This adherence included steps of accreditation of negotiating parties on September 26, 1984; authentication, signature and exchange of instruments on December 19, 1984; ratification and entry into force on May 27, 1985; and registration with the United Nations in accord with Article 102 of the United Nations Charter on June 13, 1985. See *id.* Britain required an Act of Parliament to incorporate a treaty such as the Joint Declaration into British law. See *id.* Thus, Parliament passed the Hong Kong Act of 1985 that legitimized the provisions of the Joint Declaration. See *id.* China's enactment of the Joint Declaration's provisions in the Basic Law has a similar effect although its Constitution has no parallel municipal law requirement. See Mushkat, *supra* note 20, at 191-93.

307. See *supra* Part III.A.

308. Since the CCP took control of China in 1949, it has not declared any international treaty that it has signed as being "unequal" as it did for the original three treaties that granted Hong Kong to Britain in the 1800s. See Goldstein, *supra* note 110, at 188. See generally *supra* note 21 and Part II.A.

309. One scholar, Roda Mushkat, cites L. Lee who speculates that the Confucian ideals of *ch'eng*, meaning sincerity, and *hsin*, meaning trustworthiness, "have been extended from inter personal to interstate relations." Mushkat, *supra* note 20, at 194.

310. Practical considerations include China's traditional weakness in relation to other nations or its drive for modernization which prompts it to promote a positive external image. Consequently, it has tried to enhance its reputation by honoring its international treaty commitments. See Goldstein, *supra* note 110, at 192; Mushkat, *supra* note 20, at 194.

has been inconsistent.³¹¹ There also exists a related worry that the ideology of China's political leadership will influence its level of compliance. The Joint Declaration was negotiated while moderate rulers were in power, and at the time, compliance seemed relatively certain.³¹² After the 1989 Tiananmen incident, however, compliance seemed less certain, as various shifts among China's ruling elite have occurred, as well as a decentralization of central control which allowed provinces to gain more influence.³¹³ These hard-liners allow economic reforms, but are wary of political changes that might threaten public order or the sanctity of the four principles.³¹⁴ To these hard-liners, nothing is sacred in the face of public turmoil or threats to Chinese security and sovereignty, and many fear that these priorities will influence any enactment of provisions of the Joint Declaration.³¹⁵ Reminiscent of the Mao era, many leaders often revert to labelling things foreign as counter-revolutionary.³¹⁶ Most observers are uncertain of what stance future rulers of China will take, but most now believe that Deng's recent death, while potentially disruptive, will not precipitate the power struggles and unrest that

311. See Palumbo, *supra* note 1, at 695-97 (for a brief overview of China's erratic compliance with wheat import agreements with the United States and its promise of peaceful liberation of Tibet).

312. See *id.* at 693.

313. See Lee, *supra* note 11, at 19. A major reformer, General Secretary Zhao Ziyang, the head of the CCP, was replaced after Tiananmen because he was too closely linked to the cause of the students. See Palumbo, *supra* note 1, at 693. With his replacement by the fairly non-inspiring Jiang Zemin as President, head of the army and party chief, as well as the continued rule of the hardliner that gave the order to send the army into Tiananmen, Prime Minister Li Ping, the major economic and political reformers are no longer in power. See Beverly H. Earle, *China After Tiananmen Square: An Assessment of its Business Environment*, 23 CASE W. RES. J. INT'L L. 421, 427, 443 (1991); Lee, *supra* note 11, at 19. However, as Li Peng's political future fades, reformers do not exist among the various officials contending for power in the wake of Deng's death. See Chen, *supra* note 266, at A17 (these reformers include Qiao Shi, Tian Jiyun, Lu Ruihuan, and Zhu Rongji).

314. See Palumbo, *supra* note 1, at 693.

315. See *id.* at 694.

316. In a speech, Mao said that, "[w]hoever sides with imperialism, feudalism and bureaucratic capitalism is a counter-revolutionary." Closing Speech at the Second Session of the First National Committee of the Chinese People's Political Consultative Conference (June 23, 1950) in MAO TSE-TUNG'S QUOTATIONS, *supra* note 247, at 14. Even after the Deng reforms, "[t]he crime of counter-revolution is a holdover from the Maoist days and is usually against people accused of trying to overthrow China's communist system." *China Pledges Clemency for Repentant Political Prisoners*, AGENCE FRANCE PRESSE, Oct. 15, 1993. Most of the leaders of the Tiananmen Square incident were tried for counter-revolutionary crimes. Scott Savitt, *Protest Leaders To Be Tried For Counterrevolution*, UPI, Nov. 15, 1989, available in LEXIS, News Library, UPI File. Justice Minister Xiao Yang stated that approximately 3,600 of China's prisoners were serving sentences for counter-revolutionary offenses. *China Pledges Clemency for Repentant Political Prisoners*, *supra*.

just a few years ago many had feared would be certain upon Deng's death.³¹⁷

The political realities of ensuring a smooth transition require Britain to be somewhat more tolerant of China and allow China interpretative leeway.³¹⁸ If the British try to compel China to correct perceived violations of the Joint Declaration, it is unlikely that China will be sufficiently sanctioned for a violation.³¹⁹ Britain simply lacks the substantive means necessary to compel Chinese compliance with its demands.³²⁰ "The British government is restricted to the traditional rights of any sovereign party to an international treaty to issue protests, demand negotiations, and take retaliatory measures in the event of breach."³²¹ While these diplomatic measures are feasible, Britain seems to lack the political will or strength to pursue them, whereas China has repeatedly shown its tenacity in negotiating the transfer of Hong Kong.³²² With its Confucian background and the CCP's ideological inclination, China has not been afraid to take a position based

317. See Sheryl WuDunn, *Deng's Legacy: Finishing Long March to Capitalism*, N.Y. TIMES, Feb. 21, 1997, at A15; Chen, *supra* note 268, at A3. In fact, the Hong Kong stock market's Hang Seng Index rose 2.3 percent on the day following Deng's death in an apparent sign that Deng's death was widely anticipated, a leadership transition had already occurred, and that "Deng had already set in motion an economic revolution in China that stretched far beyond what any one man could control." WuDunn, *supra*. While the market does not anticipate chaos, there will undoubtedly be shifts in power as Deng's successors do not command the same respect that he enjoyed, and they will no longer be able to rely on Deng to prop them into power. See Lee, *supra* note 11, at 19. Deng was uniquely able to balance the various "forces at play in post-Maoist China - left vs. right, center vs. provinces, the old vs. the young." *Id.*

While President Jiang was put in power by Deng, he lacks a support base independent of Deng. *Id.* Jiang's power was extremely fragile despite occupying the top position in all three of China's interlocking institutions of power: the CCP, the army and the government bureaucracy. See BAUM, *supra* note 57, at 384. Since taking office, President Jiang has continually sought to consolidate power, promoting those loyal to him within these institutions; thus, developing an inner support base independent of Deng in anticipation of retaining power once the 92 year old Deng dies. See *id.* In building his support base, Jiang has had to make concessions to hardline constituencies such as the military, major state-run industries, regional leaders and CCP factions. See *id.*; Patrick E. Tyler, *Clinton's Chinese Counterpart: A Weak Old Panda?* N.Y. TIMES, Nov. 25, 1996, at A6. The influence of China's military, the People's Liberation Army, extends beyond defense to encompass significant and extensive corporate and commercial interests. BAUM, *supra* note 57, at 383.

318. See Keller, *supra* note 18, at 388.

319. See Palumbo, *supra* note 1, at 695.

320. See Keller, *supra* note 18, at 388.

321. *Id.* The ability to enforce an international treaty under customary international law in the absence of treaty enforcement measures is notoriously weak. "Except in exceptional circumstances, it is difficult to envision Britain being in a position after 1997 to compel any significant change in Chinese policy towards Hong Kong or being able to enlist the support of other Western powers to do so." *Id.*

322. See *id.*

on principle regardless of whether such a stance is realistic.³²³ China occupied the moral highground, and many residents in Hong Kong were even sympathetic to China's plight vis-a-vis the British over the unequal treaties.³²⁴ Even if Britain did make specific demands now, China could frame these demands as yet another colonial attempt to treat China as an inferior nation.³²⁵

B. PROBLEMS WITH THE BASIC LAW

Although concerns over the enforceability of the Joint Declaration are important, these concerns are more appropriate for the Basic Law, as the Basic Law has integrated the mandates of the Joint Declaration and will be the governing law as of July 1, 1997.³²⁶ Therefore, relying upon the interpretive leeway granted to it within the Basic Law, China could bypass the Sino-British jointly negotiated intent of the Joint Declaration.³²⁷

China remains resolute in insisting that all aspects of the Basic Law, including drafting, enforcing and interpreting, are "an internal matter for China and an expression of national sovereignty and therefore cannot be subject to a Hong Kong veto."³²⁸ Thus, despite China's public showing of *gangren zhigang* and self-autonomy for the Hong Kong people prior to the signing of the Joint Declaration, Hong Kong's actual input in drafting its future constitution, the Basic Law, was minimal, and the general public was never given a direct and substantive role in the drafting process.³²⁹ China's unilateral formation of the Basic Law with token participation by handpicked Hong Kong representatives has prompted criticism of both China and Britain.³³⁰ Crit-

323. See *supra* note 69 (example of how China's priorities can deviate from the more pragmatic concerns of the British).

324. See Cheng, *supra* note 66, at 4-5. See *supra* note 72 and accompanying text.

325. See Goldstein, *supra* note 110, at 187-88.

326. See Basic Law, *supra* note 14, Preamble.

327. Article 18 of the Basic Law grants the Standing Committee of the National People's Congress de facto veto power over any legislation passed by the Hong Kong Legislative Council. Basic Law, *supra* note 14, art. 18. For example, China's repeated statement that it will disband the existing Legislative Council and replace it with a provisional legislature upon resumption of control in 1997 seems indicative of its adherence to the technical terms of the Basic Law while violating the spirit of the Joint Declaration. See *infra* Part IV.D.

328. Chan, *supra* note 14, at 16.

329. See *id.* However, in an attempt to gain public approval and legitimization, China has appointed members from Hong Kong to the National People's Congress and the Chinese People's Consultative Conference. *Political Outlook*, *supra* note 208.

330. Critics of Britain have focused on Britain conceding total drafting of the Basic Law to China and its unwillingness or inability to bring world moral condemnation against China for its heavy handed tactics in light of the Tiananmen Incident. Critics of China have focused on China's repeated attempts to bypass the spirit of the Joint Declaration as it drafted the Basic Law.

ics are most concerned with the interpretative powers that China has reserved for the Standing Committee in the Basic Law.³³¹ By essentially forcing their version of the Basic Law on the Hong Kong people and crushing democratic suggestions, China "unintentionally, but irrevocably, lost the hearts and minds of a great majority of the Hong Kong people."³³² China's loss of legitimacy corresponded with parallel British disfavor as the British were both unable and unwilling to counter China's overbearing influence in the Basic Law drafting process and in pre-1997 politics in general.³³³

Due to the Marxist-Leninist parallel party-state structure, concern over any law in China must always address the effect of the CCP, and the Basic Law is no exception. The power of the CCP extends to Hong Kong via the CCP-dominated Standing Committee, which is the only legislative body with the power to enforce and interpret the Basic Law.³³⁴ Although the Basic Law was created in accordance with Article 31 of the 1982 Constitution and should remain somewhat inviolable, specific provisions within the Basic Law uphold the interpretive powers of the Standing Committee.³³⁵ Because the Basic Law is enacted under the authority of the Chinese Constitution, but not expressly part of the Constitution, how the Standing Committee interprets both the Constitution and the Basic Law is crucial to determining whether the rights of Hong Kong's citizens will be respected. Given the demonstrated priorities and tactics of the CCP, the influence of the CCP makes the Hong Kong people understandably wary.

Adding to both the criticism of the Basic Law and the strength of the CCP is the status of the Basic Law within the hierarchy of China's legal system. While the Basic Law contains provisions for the preservation of many of Hong Kong's current institutions,³³⁶ many people in Hong Kong are unconvinced that

331. Basic Law, *supra* note 14, art. 18; see Liu Yiu Chu, *Interpretation and Review of the Basic Law of the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 49, 55-56 (1988).

332. Chu, *supra* note 331, at 55-56.

333. *See id.*

334. Davis, *supra* note 284, at 4.

335. Basic Law, *supra* note 14, arts. 11, 17; XIANFA, *supra* note 14, art. 31; see Joint Declaration, *supra* note 1, Annex I, part I.

336. China has said that it will take direct control only of Hong Kong's foreign affairs and defense needs. Other aspects of Hong Kong's current system will be run under the "high degree of autonomy" that the Basic Law promises. Basic Law, *supra* note 14, arts. 12-14; see Zhang, *supra* note 294, at 9. Some fear the Hong Kong branch of the CCP, while currently nearly invisible, upon the 1997 takeover, will rise to the influence of the CCP in China itself. Marcus W. Brauchli, *Beijing Offers Its Reassurances On Hong Kong*, WALL ST. J., Dec. 2, 1996. Already, the CCP wields influence in Hong Kong as there were an estimated 6,000 members as of the early

China will honor the Basic Law's "one country, two systems" pledge and its guarantee of individual rights.³³⁷ Hong Kong's distrust of China is well founded given the subordinate nature of the Basic Law to the Constitution.³³⁸

Additionally, Chapter III of the Basic Law, entitled *Fundamental Rights and Duties of the Residents*, seems to grant the Hong Kong residents broad civil rights and freedom of speech.³³⁹ However, the broad rights granted to the Hong Kong residents within Chapter III of the Basic Law should be viewed skeptically, as a parallel Chapter 2 in the 1982 Constitution, entitled *The Fundamental Rights and Duties of Citizens*, provides for similar rights for the citizens of China.³⁴⁰ In China, the purpose of incor-

1980s and many officials at *Xinhua*, the official Chinese news agency, occupy dual roles as leaders in what the CCP refers to as the Hong Kong Working Committee. *Id.*

337. In a pre-Tiananmen poll of Hong Kong residents, 55 percent did not believe that China would honor its "one country, two systems" promise and in a post-Tiananmen poll these results had risen to 70 percent. Chan, *supra* note 14, at 21.

338. Within China's hierarchy of laws, the 1982 Constitution is "the fundamental law of the state and has supreme legal authority." XIANFA, *supra* note 14, art. 31. The basic laws are secondary, and the laws of the lower level cannot contravene those of a higher level. *See id.* art. 5. The Hong Kong Basic Law is on a parallel level as the law to classify Tibet as a National Autonomous Region of the People's Republic of China under Article 30(1) of the 1982 Constitution. *See id.* art. 30(1). Although attributes of the HKSAR are quite different, the laws regarding Tibet provide little comfort to those concerned with Hong Kong's future given China's notorious track record there. *See* Chang, *supra* note 106, at 66; Palumbo, *supra* note 1, at 696.

339. The following Articles within Chapter III of the Basic Law provide examples of the broad rights given to Hong Kong residents: Article 25 speaks of equality before the law, Article 26 allows residents the right to vote and stand for elections, Article 27 allows the freedom of speech, Article 28 states that no resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment, Article 29 prevents arbitrary or unlawful search or intrusion into a resident's home, Article 30 protects the freedom and privacy of communication, Article 31 allows the freedom to move within the HKSAR and the right to emigrate or travel to other countries, Article 32 allows the freedom of religion and Article 39 incorporates the provisions of the ICCPR. Basic Law, *supra* note 14, arts. 24-42.

340. XIANFA, *supra* note 14, ch. 2, arts. 33-56. The following are some examples of Articles within this Chapter 2 of the Constitution which seem to have an equivalent Article contained within Chapter III of the Basic Law. The following comparison will first list the Article from Chapter 2 of the Constitution and then list the respective Article from Chapter III of the Basic Law: Articles 33 and 24 deal with nationality, Articles 33 and 25 deal with equality before the Law, Articles 34 and 26 allow the right to vote and stand for election, Articles 35 and 27 allow the freedom of speech, Articles 36 and 32 allow the freedom of religion, Articles 37 and 28 state that the freedom of the person shall be inviolate and Articles 39 and 29 prevent arbitrary or unlawful search of the home. Some interesting differences are seen in Article 40 of the Constitution which protects the freedom and privacy of "correspondence of citizens" whereas Article 30 of the Basic Law protects the freedom and privacy of "communication of Hong Kong residents," Article 41 of the Constitution states that citizens of China have the right as well as the "duty" to work while Article 33 of the Basic Law states that Hong Kong residents shall have the

porating individual rights in its Constitution "was not to protect the individual against the state, but to enable the individual to function more effectively to strengthen the state."³⁴¹ In practice, as the Tiananmen Square incident readily demonstrates, the broad rights which China grants to its citizens within Chapter 2 and especially Article 41 of the Constitution does not prevent the CCP from easily rationalizing away these protections.³⁴² A strong remnant of Mao Zedong thought in modern China is the catch-all crime of counter-revolution, which was used to restrict freedom of speech in the Tiananmen Square incident.³⁴³ Not only does the Constitution require its citizens to uphold the four basic principals, which include leadership of the CCP, but a 1979 criminal code contains various articles which restrict acts of speech.³⁴⁴ Therefore, the rights granted to the residents of Hong Kong under Chapter III of the Basic Law which are similar to the rights granted to China's own citizens under Chapter 2 of its Constitution would appear to be similarly unenforceable if China so chooses.

Not only do the Basic Law's protections of the rights of the Hong Kong residents seem hollow given the CCP's broad interpretive leeway, but since the Basic Law was promulgated in accordance with Article 31 of the 1982 Constitution, it could be annulled like any other statute.³⁴⁵ Therefore, if Basic Law provisions conflict with the 1982 Constitution, the Constitution technically would take precedence. This conflict is exacerbated by the

freedom of choice of occupation. Compare XIANFA, *supra* note 14, ch. 2, with Basic Law, *supra* note 14, ch. III.

341. NATHAN, *supra* note 12, at 125. This perspective diverges from Western thought of individual rights and has its root in Confucianism. *Id.*

342. Article 41 of the Constitution explicitly states that "citizens of [China] have the right to criticize and make suggestions to any state organ or functionary. Citizens have the right to make to relevant state organs complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary," and yet, the Tiananmen Square incident occurred. See XIANFA, *supra* note 14, art. 41.

343. See NATHAN, *supra* note 12, at 118.

344. See XIANFA, *supra* note 14, Preamble; NATHAN, *supra* note 12, at 118. Article 102 of the 1979 Criminal Code defines counter-revolutionary offenses as "acts undertaken with the purpose of overthrowing the political power of the dictatorship of the proletariat and the socialist system and which harm the Chinese People's Republic." NATHAN, *supra* note 12, at 118; see *Senior Judge Rebuffs Washington Post Report*, XINHUA, Jan. 23, 1990, available in LEXIS, World Library, Xinhua File. In an example of the CCP's use of a law to suit its purpose, it has used this Article 102 of the 1979 Criminal Code to persecute Tiananmen Democracy activists despite the lack of this Article's stated element of an intention, an act and a harmful consequence. See NATHAN, *supra* note 12, at 118-19.

345. XIANFA, *supra* note 14, art. 31. Article 17 of the Basic Law allows the Standing Committee of China's National People's Congress final approval and even veto power on any law enacted by the legislature in Hong Kong. Basic Law, *supra* note 14, art. 17.

inherent philosophical difference between the two documents; as a capitalist-based provision, the Basic Law is fundamentally at odds with the 1982 Constitution and its emphasis on the sanctity of the four principles and socialism.³⁴⁶ Critics fear this dichotomy will lead to future encroachment of socialist ideas into Chinese interpretations of the Basic Law.³⁴⁷ Many experts have suggested that the Basic Law be directly amended to the 1982 Constitution to resolve this dilemma and alleviate the worries of Hong Kong.³⁴⁸ Thus, the Basic Law would gain some protection from changes since it would gain equal authority as the Constitution, rather than its current subordinate status.

Because the Basic Law was unilaterally enacted by China, Britain lacks a legitimate premise under international law under which to challenge violations of the Basic Law.³⁴⁹ Once sovereignty over Hong Kong is transferred, British recourse would be very limited, since the Chinese-drafted Basic Law, not surprisingly, lacks an institutional mechanism to resolve interpretation or implementation of disputes.³⁵⁰ Beyond using diplomatic means to raise its complaints with China,³⁵¹ Britain could try to bring a claim before an international tribunal such as the International Court of Justice.³⁵² Neither option is very strong. Diplomatic pressure has never been particularly effective, especially with a nation such as China that has rarely made concessions on perceived internal matters in the face of international criticism.³⁵³ The effectiveness of a claim before an international tri-

346. Compare generally Basic Law, *supra* note 14 with XIANFA, *supra* note 14, Preamble.

347. These fears are entirely valid. Relevant articles in the 1982 Constitution repeatedly reaffirm the sanctity of the Constitution, the socialist state, and the socialist economy based on collective public ownership by the working class. See XIANFA, *supra* note 14, arts. 1, 5, 6; Cheng, *supra* note 117, at 68.

348. See, e.g., Palumbo, *supra* note 1, at 700-01; Cheng, *supra* note 117, at 70-71.

349. See Palumbo, *supra* note 1, at 695-96.

350. See Keller, *supra* note 18, at 388.

351. Examples of diplomatic means are enlisting international pressure, issuing protests, demanding negotiations and taking retaliatory measures. *Id.*

352. See Palumbo, *supra* note 1, at 695.

353. See Keller, *supra* note 18, at 388. For example, China has been repeatedly subjected to international criticism over its human rights record and yet, it has resolutely rebuffed foreign influence, repeatedly defending its actions to be an internal matter. It seems that the foreign threats and criticisms of China's human rights records are gradually worn down in the face of China's intransigence. Human Rights Watch/Asia, a human rights organization, issued a report in July 1996 that argued that China is using its rising economic clout to resist human rights pressures from other nations. *Choose Human-Rights Principles, Not Profits: Human-Rights Watchdog*, AGENCE FRANCE PRESSE, July 9, 1996, available in LEXIS, World Library, Allwld File. This seems accurate as evidenced by U.S. President Bill Clinton's 1994 decision to delink renewal of China's most favored nation trade status from its human rights record. See *id.* By doing so, Human Rights Watch/Asia felt that the decision "marked the end of effective international pressure on China to improve its

bunal will also be limited as it is doubtful that China will recognize the court's jurisdiction.³⁵⁴ Additionally, given its apathetic track record in Hong Kong, Britain seems to lack the resolve to press for the rights of the Hong Kong people.³⁵⁵ It is only after the post-Tiananmen generated publicity among the Hong Kong people and vocal international organizations that the British have been forced to take affirmative acts on behalf of the Hong Kong people.³⁵⁶

C. PROBLEMS WITH THE ICCPR AND THE BILL OF RIGHTS

Just as the Basic Law implements the Joint Declaration's policies, so too does the Bill of Rights implement the policies of the ICCPR as provided for in Article 39 of the Basic Law.³⁵⁷ Nevertheless, the Bill of Rights' unilateral British origins complicated the drafting process. Its drafters had to deal with the sensitive problem of not drafting a law that would conflict with the Basic Law's status as the exclusive law of the HKSAR so as to prevent it from being annulled by China after 1997.³⁵⁸ Central to their mission of bypassing Chinese scrutiny, the drafters essentially implanted the ICCPR verbatim into the Hong Kong Bill of Rights.³⁵⁹ But in so doing, the resulting Bill of Rights is filled with the ambiguities that are customary to international agreements such as the ICCPR.³⁶⁰ In stressing enforceability, the

human-rights practices and the triumph of commercial diplomacy, with its self-serving premise that free enterprise leads to a free society." *See id.* (quoting China: The Cost of Putting Business First, a report issued by Human Rights Watch/Asia which lists the rise in human rights abuses since Clinton's actions, such as arbitrary detention, crushing of nationalist and ethnic movements in Tibet, Xinjiang and Inner Mongolia).

354. *See* Palumbo, *supra* note 1, at 695.

355. The British efforts on behalf of the Hong Kong people seemed to lack any priority, to be generally half-hearted and to be tainted by their concerns with the interests of Hong Kong's big businesses, which were generally incompatible with those of its people. *See supra* Part II.A. and note 39.

356. The most tangible result of the pressure on the British was the Bill of Rights. *See supra* Part II.G.

357. Basic Law, *supra* note 14, art. 39.

358. They attempted to do this by drafting the Bill of Rights as an extension of Article 39 of the Basic Law so that it is accorded the Basic Law's quasi-constitutional protection after 1997. *See* Keller, *supra* note 18, at 385-99. They also amended and modified Hong Kong's existing constitutional document, the Letters Patent and Royal Instructions, to ensure the Bill of Rights constitutional status up to the 1997 transfer. *See id.* at 395-99; Basic Law, *supra* note 14, art. 39.

359. *Compare generally* ICCPR, *supra* note 18, with Bill of Rights, *supra* note 16.

360. The ICCPR is typical of international agreements that result from multiple compromises needed to obtain consensus among various signatory nations. Its provisions are generalized, ambiguous, restrained and filled with many exceptions. *See* Keller, *supra* note 18, at 399-400. Covenants such as the ICCPR typically lack domestic case law and clear guidelines as to methods to enforce its provisions. Compounding this difficulty, the Bill of Rights "lacks two constitutional features

drafters sacrificed the substantiveness of the Bill of Rights, whose potential effectiveness probably would have been greater if it had been customized for the uniqueness of Hong Kong.³⁶¹ This sacrifice of effectiveness might have been pointless given the opinion of experts that China can still circumvent the various obstacles if it so desires.³⁶²

If implemented successfully, the Bill of Rights will enable courts to review actions by the executive branch in the future HKSAR to ensure that China is complying with the Bill of Rights and the Basic Law.³⁶³ Needless to say, this is a substantive power with which the Chinese are not entirely pleased.³⁶⁴ China is especially concerned that the Bill of Rights mimics the ICCPR because this may lead courts to rely on Western interpretations of human rights as the basis for their common law Bill of Rights-based decisions.³⁶⁵ This bias towards Western interpretation would create problems as the CCP has rejected the Western

normally associated with a Bill of Rights: that the Bill should have supremacy over other laws, and that the Court should have the power to interpret it (the Bill) and declare legislation invalid if it violates the Bill of Rights." Gong Xiang Rui, *Constitutional Protection of Human Rights: The Chinese View Under the Notion of 'One Country, Two Systems,'* in THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH 489, 494 (Johannes Chan & Yash Ghai eds., 1993).

361. See Keller, *supra* note 18, at 402-03.

362. Three possible routes to overturn or eliminate the Bill of Rights have been identified. See Basic Law, *supra* note 14, arts. 39, 159, 160; see also Denise Young, *H.K. Gets Bill of Rights But Lawyers Warn of Post-1997 Abuses*, REUTERS, June 6, 1991, available in LEXIS, News Library, Arcnws File. First, Article 160 of the Basic Law gives the Standing Committee the power to declare any pre-1997 law to be in contravention with the Basic Law and not allow it to be adopted. See Young, *supra*; Basic Law, *supra* note 14, art. 160. Second, Article 39 of the Basic Law only requires the ICCPR to remain in force, which may imply the possible repealing or amending of the Basic Law as redundant or unnecessary. See Young, *supra*; Basic Law, *supra* note 14, art. 39. Third, Article 159 of the Basic Law gives the Standing Committee blanket authority to amend the Basic Law so as to enable it to repeal the Bill of Rights if it so chooses. See Young, *supra*; Basic Law, *supra* note 14, art. 159.

363. See Feinerman, *supra* note 178, at 794; Allan, *supra* note 7, at 178; *supra* notes 171-81 and accompanying text.

364. Comments on the Bill of Rights from Chinese officials were typically negative. One official said that "it's a British plot to sow seeds of disturbances . . . The British are quite good at that at the end of their colonial rules." Another official claimed it was an "anti-communist stance," as he noted that the British ironically did not have a Bill of Rights for their own country. See Peter Lim, *Hong Kong's First Bill of Rights Targets China: Officials*, AGENCE FRANCE PRESSE, June 8, 1991, available in LEXIS, World Library, AFP File.

365. "There is a strong legal bias for interpreting the ICCPR in accordance with the philosophical and legal traditions of Europe and North America" because its drafters modeled their goals upon European and American doctrines of civil liberties. See Keller, *supra* note 18, at 401-02. The same can be said about other international human rights efforts such as the United Nations Charter, the Universal Declaration on Human Rights, the ICESCR and the International Bill of Rights. *Id.* Thus, it is natural for enforcement of these documents to be done in accord with Western, rather than Chinese views. See *id.*

concept of fixed and universal human rights.³⁶⁶ Additionally, this Western-based law raises China's sensitivity towards its sovereignty and perceived foreign intrusions into domestic concerns, thus providing another example of China's distaste for *fa* and an excuse to remove the Bill of Rights.³⁶⁷

Given China's track record regarding its virtual non-enforcement of the civil liberties provisions in the 1982 Constitution for the benefit of its own citizens, it is doubtful that China would make a substantive effort to enforce those civil liberties guaranteed in a Bill of Rights that China did not draft. In fact, prior to its passage, China repeatedly vowed to repeal the Bill after 1997 and has subsequently continued to maintain that the Bill of Rights will be reexamined.³⁶⁸ China has also repeatedly stated that upon its resumption of control in 1997, it will not submit reports to various United Nations committees as required by the ICCPR and the ICESCR.³⁶⁹ While the Bill of Rights is entrenched in current law via an amendment to the Letters Patent, it will cease to have effect once the Letters Patent expires on July 1, 1997.³⁷⁰ The continuity of the Bill of Rights and the incorporated ICCPR after July 1, 1997 is thus dependent upon the interpretive latitude which China retains under Article 153 of the Basic Law to decide whether to entrench the Bill of Rights and

366. See NATHAN, *supra* note 12, at 115. The CCP's journal *Red Flag* explains, "human rights are not 'heaven-given,' they are given and regulated by the state and by law; they are not universal, but have a clear class nature; they are not abstract but concrete; they are not absolute but limited by law and morality; they are not eternally fixed and unchanging but change their nature and proper scope in accordance with the changes in the functions and position of people in the midst of shifting conditions of material production." *Id.* at 115-16. Therefore, the CCP only recognizes civil or citizens' rights that are created by the state and granted to its citizens, and therefore, can vary from country to country. See *id.* at 116. Since the CCP believes that it gives these rights to the people, it also feels it can take these rights away from the people, especially as in Tiananmen where the protestors were deemed to be hostile to the CCP's purposes. See *id.*

367. See Allan, *supra* note 7, at 178.

368. Chinese criticism has centered on its belief that the Bill of Rights has no power over the Basic Law. The Foreign Ministry has issued warnings regarding the Bill of Rights's possible incompatibility with the Basic Law. See Lim, *supra* note 364; Braude, *supra* note 179. The Law Panel of the Preparatory Committee held that certain articles in the Bill of Rights, including the incorporation of the ICCPR, do not conform with the Joint Declaration or the Basic Law, and therefore, will not apply once China resumes control. See *Chinese Discussion of Handling Existing Laws in Hong Kong*, XINHUA, Jan. 19, 1997, available in LEXIS, World Library, Xinhua File (where the Law Panel cites specific articles of the Bill of Rights cannot be adopted in the HKSAR that include Articles 2(3), 3(2), 4); Bill of Rights, *supra* note 16, arts. 2, 3, 4.

369. See Lau, *supra* note 160, at 18. See the quote by Xun Ze, an official of China's Hong Kong and Macao Affairs Office, in the state-run paper, *Ta Kung Pao*, *supra* note 160.

370. INTERNATIONAL COMMISSION OF JURISTS, *supra* note 5, at 24.

the ICCPR within the Basic Law pursuant to Article 39 of the Basic Law.³⁷¹ Recognizing the significance of Chinese criticism, various protective provisions that were either considered or included in initial drafts were deleted from the final version of the Bill of Rights.³⁷² This dilution leads to specific weaknesses in the Bill that hurt the people of Hong Kong.³⁷³ Examples of important sections from the ICCPR that were deleted in the Bill of Rights are provisions protecting human rights,³⁷⁴ provisions for international monitoring of human rights,³⁷⁵ and provisions binding the Bill on private individuals or organizations.³⁷⁶ Additionally, there are certain ICCPR and the equivalent Bill of Rights articles that seem to allow derogations in the event of public emergencies.³⁷⁷ Furthermore, under Article 19 of the ICCPR and the analogous Article 16 of the Bill of Rights, the right of free speech can be restricted if deemed necessary “[f]or the protection of national security or of public order (*ordre public*), or of public health or morals.”³⁷⁸ Similarly, the Basic Law permits a restriction of the fundamental rights to no more than the ICCPR allows and allows the future legislature of the HKSAR to enact more precise restrictions by adopting phrases in the passive tone, such as “unless restrained by law” or “in accordance with law.”³⁷⁹

The weakness of the Bill of Rights is reflected in China’s current stifling of activities in Hong Kong, motivated, in part, by a fear that Hong Kong would become a “base for subversive ac-

371. See Basic Law, *supra* note 14, arts. 39, 153.

372. See Yash Ghai, *Derogations and Limitations in the Hong Kong Bill of Rights*, in *THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH* 161, 163-64 (Johannes Chan & Yash R. Ghai eds., 1993).

373. Some critics fear that the exclusion of certain articles of the ICCPR from the Bill of Rights creates a dichotomy in the legal system whereby certain governmental actions are beyond the review of the courts. See *id.* at 162-63.

374. See ICCPR, *supra* note 18, art. 5(2) which states, “[t]here shall be no restriction upon or derogation from any other fundamental human rights recognized or existing in any state party [China] to the present covenant pursuant to law, conventions, regulations or custom on the pretext that the present covenant does not recognize such rights or that it recognizes them to a lesser extent.”

375. ICCPR, *supra* note 18, Part IV, arts. 28-45. This is not an insignificant concern given the 1989 Tiananmen Square precedent. Amnesty International has reported that in the ensuing two years that human rights abuses in China have risen, including torture of prisoners, summary executions, and unfair trials. See Young, *supra* note 362.

376. There already are instances where companies have ordered their employees to refrain from joining political organizations or participating in political activities. See Young, *supra* note 362. The Bill provides for no recourse to the employees. See *id.*

377. ICCPR, *supra* note 18, art. 4; Bill of Rights, *supra* note 16, art. 5.

378. ICCPR, *supra* note 18, art. 19; Bill of Rights, *supra* note 16, art. 16.

379. See Basic Law, *supra* note 14, arts. 3, 30, 31, 36, 38, 39, 41, 42 (for wording of this nature).

tivities.”³⁸⁰ Business people who have been critical of China have been subject to Chinese reprisals.³⁸¹ Political activists pressing for increased democracy, and sometimes condemning China, have been harassed and wire-tapped by the Hong Kong government.³⁸² Chinese dissidents have been prevented from entering Hong Kong.³⁸³ Anticipating possible post-1997 reprisals, the Hong Kong media has voluntarily begun to censor itself regarding materials that might be offensive to either the Chinese or Hong Kong government.³⁸⁴ The Hong Kong government has also censored the media on political grounds.³⁸⁵ The Chinese government has made clear its intolerance of media that question its legitimacy or policies.³⁸⁶ In addition, school textbooks are

380. Davis, *supra* note 19, at 325 n.84. On July 11, 1989, Jiang Zemin stated, “the well water does not interfere with the river water,” with the river being China. *Id.*

381. Indicative of China’s influence is the treatment of Jimmy Lai, the controlling shareholder of the Giordano clothing chain as well as a Chinese language news magazine entitled *Next*, who is extremely outspoken against the Chinese government. *Political Scene*, ECONOMIST INTELLIGENCE UNIT COUNTRY REPORTS, Nov. 24, 1995, available in LEXIS, World Library, Allwld File. After *Next* published an article highly critical of Chinese Premier Li-Peng, in mid-1995 a Giordano store in Beijing was closed for “licensing irregularities.” *Id.* Mr. Lai was even prompted to sell a portion of his stake in the Giordano chain to reduce what financial analysts termed as “political risk.” *Id.*

382. See Feinerman, *supra* note 178, at 794; Clark, *supra* note 131, at 50; Leonard Doyle, *UN Presses Britain to Secure Better Deal for Hong Kong*, INDEPENDENT, Apr. 5, 1991, at 4.

383. See Feinerman, *supra* note 178, at 794; Clark, *supra* note 131, at 50; Doyle, *supra* note 382, at 4.

384. Academics at the Chinese University of Hong Kong released a February 1996 survey which indicated that Hong Kong journalists increasingly self-censored themselves on matters related to China. *Political Scene*, ECONOMIST INTELLIGENCE UNIT COUNTRY FORECASTS, May 28, 1996, available in LEXIS, World Library, Allwld File. Professors at Hong Kong University of Science and Technology were told by administrators that they could not talk about politics in a public arena. When *The South Morning China Post* was sold to a Malaysian-Chinese pro-China business person, its famous cartoonist, Larry Feigon, noted for satirical caricatures of Chinese and British officials, was fired. Goldman Testimony, *supra* note 208.

385. See Feinerman, *supra* note 178, at 794. In December 1989, the Taiwan film *Mainland China 1989*, was censored when it was shown in Hong Kong because it contained sixteen minutes of footage with prominent exiled Chinese dissidents. See Clark, *supra* note 131, at 50. Lu Ping, Director of Beijing’s, Hong Kong and Macau Affairs Office made it clear that China would restrict press freedom in 1997 and newspapers would no longer be able to advocate independence for Hong Kong or Taiwan. Ivo Dawanay, *Focus - Handing Back Hong Kong: One Year and Counting, on July 1, 1997, Red China Takes Control of Hong Kong. Governor Chris Patten Tells Ivo Dawanay Why Only Democracy Can Preserve the Territory’s Golden Fortune*, SUNDAY TELEGRAPH, June 23, 1996, at 24.

386. Keller, *supra* note 18, at 410. China has reportedly adopted a plan to divide Hong Kong’s press into four categories: the CCP controlled press, the friendly centrist press, the pro-Taiwan centrist press, and the opposition press, which is to be “isolated and attacked.” *Id.* (quoting Emily Lau, *Big Brother’s Blacklist*, FAR E. ECON. REV., Sept. 27, 1990, at 24).

now more sensitive to portrayals of the Communist Chinese government.³⁸⁷

China's influence has even begun to encroach into areas affecting Hong Kong's prosperity and stability, including its involvement in business by various Chinese government entities, its lack of appreciation of an independent judiciary and its politicization of the previously merit based civil service.³⁸⁸ Already seen in Hong Kong are signs of practices used by the Chinese government in mainland China, including government intervention in the economy, the importance of political connections, or *guanxi*, and tolerance of corruption, that are eroding Hong Kong's rule of law and laissez-faire approach to business affairs.³⁸⁹ China's meddling in Hong Kong's civil service has raised concern as the civil service has been seen as the foundation of Hong Kong's stability and efficiency.³⁹⁰ In 1991, China and Britain agreed to establish a Court of Final Appeals to replace Hong Kong's independent Privy Council before the 1997 transfer, so as to allow the people of Hong Kong legal recourse.³⁹¹ However, while Article 85 of the Basic Law says that the courts of the HK-SAR should "exercise judicial power independently, free from any interference" and Article 82 says that the "power of final adjudication of the [HKSAR] shall be vested in the Court of Fi-

387. Some examples of textbook censorship are photographs of the post-Tiananmen Square demonstrations in Hong Kong being blurred beyond recognition so that the protest banners could not be read and a general statement that war broke out on the Korean peninsula, thereby not assigning blame on North Korea for its 1950 attack of South Korea. Clark, *supra* note 131, at 51.

388. See Goldman Testimony, *supra* note 208.

389. See *id.* In separate surveys in 1996 by the Hong Kong Transition Project and the Independent Commission Against Corruption, nearly 80 percent of respondents fear that the rampant corruption in China will undoubtedly spread to Hong Kong after the 1997 handover to China. *Political Outlook*, ECONOMIST INTELLIGENCE UNIT COUNTRY FORECASTS, Oct. 22, 1996, available in LEXIS, World Library, Allwld File. Transparency International, (a Berlin-based anti-corruption coalition of legislators, executives, police and development officials) ranked China as the fifth most corrupt country out of 54 countries rated. *Id.* An example of China's influence in the economy was the pressure that it put on Swire, the British firm which owned Cathay Pacific Airlines, to reduce its share in the airline, using the threat to establish a state run airline in Hong Kong. See Goldman Testimony, *supra* note 208; *Political Outlook*, *supra*. The result was that in a June 1996 Dragonair/Cathay Pacific deal, a People's Liberation Army-affiliated firm gained control from Swire. See *Political Outlook*, *supra*.

390. See Goldman Testimony, *supra* note 208. The civil service has been seen to be confident, honest and politically neutral. See *id.* However, China's selection criteria of political loyalty clashes with Hong Kong's chief criteria of competence. See *id.* Already, in the spring of 1995 China had demanded to interview and see the files of senior civil servants to determine whether they shall retain their post after 1997. *Id.* This has led to morale problems, mass resignations and high apprehension among the civil servants. *Id.*

391. *Id.*

nal Appeals," Article 158 of the Basic Law reserves the final power of interpreting the Basic Law for the Standing Committee of the National People's Congress and any decision by the Court of Final Appeals must be in conformance.³⁹² Subsequently, China has acted to limit justiciable areas and independence of the Court of Final Appeals.³⁹³

D. PROBLEMS WITH THE LEGISLATIVE COUNCIL

China's encroaching influence has extended into the political governance of Hong Kong. While the Joint Declaration states that Britain is responsible for the administration of Hong Kong with China's cooperation in this regard until the 1997 transfer, China has progressively become more proactive in asserting its authority despite British administrative authority prior to July 1, 1997.³⁹⁴ China's increasing influence in Hong Kong matters makes its promise of a "high degree of autonomy" for Hong Kong in the Joint Declaration and the Basic Law seem hollow.³⁹⁵ China voiced its strong opposition to Governor Patten's proposals to make the Legislative Council more autonomous and accountable to the Hong Kong people.³⁹⁶ In the wake of Patten's 1993 reform, China created the Preliminary Working Committee as a "second store," or shadow government to delegitimize the Legislative Council and also to develop the framework for the post-1997 HKSAR government.³⁹⁷ On December 28, 1995,

392. See Basic Law, *supra* note 14, arts. 82, 85, 158.

393. See Goldman Testimony, *supra* note 208. China now wants to establish the Court of Final Appeals only after the July 1, 1997 takeover so that it can better control its form. See *id.* China wants a "post-verdict remedial mechanism" which means that the Court of Final Appeals' rulings could be overturned if China does not like them. China also wants to limit the justiciable issues to commercial and not "state affairs," which it interprets as defense or foreign affairs. See *id.* It seems that China wants to insure that this Court cannot rule on political issues and dissent. See *id.*

394. See Joint Declaration, *supra* note 1, para. 4. "While nominally the Hong Kong and Macau Affairs Office (HKMAO) of China's State Council is responsible for arrangements leading up to the handover on July 1, 1997, since mid-1995 the *New China News Agency (Xinhua)* had taken an increasingly high-profile and vocal role in enunciating China's policies on Hong Kong." *Political Outlook*, *supra* note 208. *Xinhua*, working in conjunction with the Hong Kong and Macao Affairs Office seems to embody and incorporate the views of China's government in guiding 1997 transition issues. *Political Outlook*, *supra* note 389.

395. See Joint Declaration, *supra* note 1, para. 3(2); Basic Law, *supra* note 14, art. 2.

396. See *supra* notes 206-210 and accompanying text.

397. See Jonathan Sprague, *Hong Kong Committee to Prepare China's Sovereignty*, REUTERS, Dec. 29, 1995, available in LEXIS, News Library, Arcnws File. Motivated in part by its deteriorated relations with Britain and Governor Patten, this Preliminary Working Committee made such anti-reform proposals, including diluting the Bill of Rights, which even drew criticism from Hong Kong's pro-China constituency. See *id.*

China created the Preparatory Committee, a 150 member body charged with the task of creating the government structure of the post-1997 HKSAR and determining the method of selecting the Chief Executive of Hong Kong.³⁹⁸

Objecting to the "through-train," where the four year term for the members of the Legislative Council elected in 1995 extended through the 1997 transfer to 1999, China charged the Preparatory Committee with the additional responsibility of selecting a provisional unelected legislature to replace the present, elected Legislative Council upon the 1997 transfer.³⁹⁹ While selecting the Chief Executive of the HKSAR is within the mandates of the Joint Declaration and the Basic Law, the replacement of the Legislative Council with an interim legislature is not.⁴⁰⁰ Although the Preparatory Committee enjoyed better relationships with the Hong Kong government than the Preliminary Working Committee did in 1993, many observers feel that it lacks the political will to reverse the Preliminary Working Committee's anti-reform recommendations.⁴⁰¹ On March 24, 1996, the Preparatory Committee passed a resolution officially establishing a provisional legislature.⁴⁰² This move seems to indicate that the Legislative Council will be disbanded in 1997. Again, China seems to be pursuing its agenda without regard to the Hong Kong people who feel that the Legislative Council better represents its interest than the Preparatory Committee.⁴⁰³ While China's Foreign Minister Qian Qichen in 1996 told British

398. See *id.* Out of the Preparatory Committee's 150 members, 94 are from Hong Kong and 56 are officials from China. See *id.*

399. See *Political Outlook*, *supra* note 208; Davis, *supra* note 19, at 314 n.37.

400. See Joint Declaration, *supra* note 1, para. 3(4); Basic Law *supra* note 14, art. 45, Annex I.

401. See Davis, *supra* note 19, at 328-29. A subgroup of the Preliminary Working Committee proposed to weaken Hong Kong's Bill of Rights Ordinance whereby judges would be unable to strike down laws on the basis that they violate the Bill of Rights. *Political Scene*, *supra* note 381. In comparison, the current Hong Kong government has already amended approximately 50 laws to avoid violating provisions in the Bill of Rights ordinance. *Id.* The debate over the autonomy of the Hong Kong judicial system intensified when Hong Kong's current Chief Justice, Sir Ti-Liang Yang informally expressed similar doubts about Hong Kong's Bill of Rights. *Id.* While Sir Ti-Liang Yang may have strengthened his candidacy with China for the first Chief Executive position of the HKSAR, his comments have led to calls for his resignation and damaged his credibility among many Hong Kong residents. *Id.*

402. *Political Outlook*, *supra* note 208. On April 29, 1996, China's Prime Minister and Chairman of the Preparatory Committee, Qian Qichen stated metaphorically, "the rice is cooked," meaning that China's decision to replace the Legislative Council with a provisional legislature is irreversible. *Id.*

403. In a February 1996 public opinion poll, 48 percent of the Hong Kong people felt that the Legislative Council best protected their interest compared with just 10 percent for the Preparatory Committee. Marcus Eliason, *500 Days Before Handover, A Poll Gives China Some Comfort*, ASSOCIATED PRESS, Feb. 16, 1996, available in LEXIS, News Library, Arcnws File.

Foreign Secretary Malcolm Rifkind and other world leaders that this provisional legislature would not assume its functions before July 1, 1997, more recently Hong Kong and Macau Affairs Office Director Lu Ping stated that the provisional legislature "can start work, including passing some laws . . . so that there won't be a legal vacuum at the time of the handover."⁴⁰⁴ The provisional (prior to July 1, 1997) legislature will meet in Shenzhen, just across the border from Hong Kong.⁴⁰⁵ Critics feel China is doing this to bypass the intense scrutiny that would have resulted had it located the temporary legislature in Hong Kong rather than within its own borders.⁴⁰⁶

The Preparatory Committee selected the first Chief Executive of the HKSAR on December 11, 1996.⁴⁰⁷ While the selection process of the new Chief Executive, Tung Chee-Hwa, was not the democratic example that China professed it to be, "Mr. Tung is [in] the unusual position of receiving the approval of Beijing and of being, at the least, acceptable to the people of Hong Kong."⁴⁰⁸ Tung, a wealthy shipping magnate, is an established figure in the Hong Kong business community, having served in various political and business positions.⁴⁰⁹ In the interim period

404. See Paul Harrington, *Experts Fear China Threatens Hong Kong's Legal System*, AGENCE FRANCE PRESSE, Jan. 12, 1997, available in LEXIS, World Library, AFP File; Martin Lee, *The Wrong Message from China*, S. CHINA MORNING POST, Jan. 13, 1997, at 19.

405. See Graham Hutchings, *Last Hopes Fade for Democracy in Hong Kong*, DAILY TELEGRAPH, Dec. 9, 1996, at 10.

406. See Lee, *supra* note 404, at 19 (detailing why Martin Lee, the leader of Hong Kong's Democratic Party, believes it would be in China's best interest to not implement the provisional legislature).

407. *Political Risk Outlook*, ECONOMIST INTELLIGENCE UNIT COUNTRY RISK SERVICE, Dec. 16, 1996, available in LEXIS, World Library, Allwld File.

408. *Id.* Tung won 320 out of the 398 votes cast by a Selection Committee whose members were appointed by the Preparatory Committee who in turn were appointed by China. See Graham Hutchings, *First Chief Executive Chosen for Hong Kong*, DAILY TELEGRAPH, Dec. 12, 1996, at 14. While *Xinhua* cited commentary touting the selection process as symbolizing that "Hong Kong people are moving towards true democracy through political participation," critics felt that the selection process was essentially decided by Beijing well before the December 11, 1996 election by the Selection Committee. *Hong Kong Papers Hail Selection of Chief Executive Candidate*, XINHUA, Dec. 12, 1996, available in LEXIS, World Library, Allwld File; see *Hong Kong Politics: Outlook For Business Under Tung Chee-Hwa*, ECONOMIST INTELLIGENCE UNIT VIEWS, Dec. 27, 1996, available in LEXIS, World Library, Allwld File. The election process via the Selection Committee was merely a "public relations exercise." *Hong Kong Papers Hail Selection of Chief Executive Candidate*, *supra*. A poll conducted on election day by the University of Hong Kong found that 30 percent of respondents were unhappy with the process China used to select Tung. Satoshi Saeki, *Hong Kong 1997: Changes in Immutability, The Reversion of Hong Kong to China on July 1*, DAILY YOMIURI, Jan. 1, 1997, at 7.

409. See Saeki, *supra* note 408, at 7. Tung's political responsibilities have included serving on the Executive Council, the Preparatory Committee and the panel of Hong Kong advisors appointed by China. Tung's business responsibilities include

leading up to the June 30, 1997 transition date, as Chief Executive designate, Tung must work with the current British administration and Legislative Council to fashion a government that is able to assume power upon China's resumption of control on July 1, 1997.⁴¹⁰ This will be a difficult task as Tung must balance the often incompatible views of the current Hong Kong government with those of Beijing.⁴¹¹

V. CONCLUSION

As Hong Kong nears the June 30, 1997 transfer date, the subsequent developments since the 1984 promulgation of the Joint Declaration are worrisome and disturbing for those concerned with Hong Kong's fate. The British apparently did not negotiate substantive enforcement provisions within the Joint Declaration should China violate any terms of the Joint Declaration. Subsequently, China's appropriating more power for itself is clearly evident both in its drafting of the Basic Law and in its encroaching influence into various social, political, and economic areas of Hong Kong. Given China's socialist orientation, sovereignty emphasis, and flexible interpretation of law, the Hong Kong people have cause to be concerned. The Tiananmen Square massacre in 1989 placed Hong Kong residents on notice of what their future rulers are capable of. The resulting outcry prompted the British to respond with ad-hoc measures aimed at instilling some form of democratic institutions that will survive beyond the 1997 handover. These measures include increasing the number of directly elected members to the Legislative Council and fashioning a Bill of Rights for Hong Kong which was based on the ICCPR, itself, a watered down United Nations human rights aspiration. However, China has been hostile to both of these reforms, and despite the British efforts, these reforms' post-1997 effect remains doubtful.

serving as Chairman of Orient Overseas Container Lines and Orient Overseas International, and as a Director of Hong Kong and Shanghai Banking Corporation. *See id.* However, many are nervous of Tung's ties to China in light of China's instrumental role in the \$120 million rescue of Tung's nearly bankrupt company in 1985. *See id.*

410. Tung is already attempting to gain support from current members of the Hong Kong government. *See id.* Tung has convinced the popular Chief Secretary, Anson Chan Fang On-sang to remain in her position and plans to retain many members of the current Hong Kong government as well as many in the proficient civil service. *See id.*

411. Despite Tung's efforts to convince him otherwise, current Governor Patten is adamant about his opposition to the provisional legislature, calling it illegal. *See id.* However, Patten has agreed to cooperate with Tung in the interim period. *See id.* Tung must also reach out to the pro-democratic politicians and their supporters to reduce their obvious discord with China over its decision to replace the Legislative Council with a provisional legislature. *See id.*

Despite significant justification for pessimism, there remains hope to be guardedly optimistic. The claims of Hong Kong's economic benefit to China probably cannot be underestimated. Yet, the counterclaim that China's unique Confucian and CCP influenced rulers are more concerned with preserving China's sovereignty over its economic well-being still remains. However, given China's renewed pragmatic emphasis and uncertain domestic politics following Deng's death,⁴¹² any attempt at a wholesale overhaul of the administration of Hong Kong on sovereignty grounds will be tempered by the allure of preserving Hong Kong's immense economic benefit. And who is to say that these goals are mutually exclusive? Does asserting sovereignty automatically mean repression of social rights and stifling of economic activity? There are multiple examples of modern economic successes which coexist with authoritarian regimes; in Asia alone, this includes Taiwan, Singapore and South Korea.

Even looking at China, is the fact that China currently enjoys double-digit Gross National Product growth not an indication of the possible compatibility between economic growth and limited political rights? If the answer is yes, then the Hong Kong businesses, whom the British zealously represented, will continue to flourish. If the answer is a pessimistic no, then have the people of Hong Kong been betrayed by their British guardians? The answer is not so clear cut when one considers that many political injustices can be assuaged by economic prosperity and a rising standard of living. After all, Hong Kong under Britain was not exactly a bastion of democracy, yet the people in multiple opinion polls were content. So as this Article goes to press in March 1997, we await the future of Hong Kong with guarded optimism.

412. The current President and CCP Chief, Jiang Zemin's current hold on power remains tenuous and he lacks a clear consensus to initiate bold measures. See Tyler, *supra* note 317, at A6. Additionally, important CCP elections will occur in Fall 1997 at the 15th Congress of the CCP and Jiang is not expected to consolidate power at least until then, if he can at all. See *id.* Until then, "Jiang is left the hapless job of temporizing." *Id.*

