

OPINION OF A SCHOLAR

HONG KONG'S FUTURE: THE VIEW OF A HONG KONG LAWYER

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ABSTRACT

This opinion discusses the fate of Hong Kong after 1997. The Joint Declaration between the British and the People's Republic of China ceding Hong Kong to mainland China is outlined, as well as the Basic Law that will be used to implement the declaration. The author reviews the definitions found in these documents and their possible interpretations using two countries' cultural and legal histories. The realities of the existing legal system, socio-economic system and the collective capacity of the people of Hong Kong is also pondered. The tenor of the opinion is positive regarding the continued growth and function of Hong Kong's existing institutions and commends cultivation of closer relations between the People's Republic of China and the Hong Kong Chinese.

I. HONG KONG: A BORROWED PLACE ON BORROWED TIME

Hong Kong has been described as a borrowed place on borrowed time.¹ In many ways it is an enigma. Until 1985, when the Hong Kong Act² was enacted by the British Parliament, Hong Kong was to remain indefinitely in the eyes of British law, a British Crown Colony despite a British policy dating back to the first postwar labor Government of Prime Minister Clement Atlee of allowing Britain's colonial possessions self-determination. Today

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1. R. HUGHES, *HONG KONG: BORROWED TIME, BORROWED PLACE* (2d ed. 1976).

2. The Hong Kong Act 1985 was passed by Parliament to execute the Sino-British Joint Declaration in Hong Kong, ratified by the PRC and the United Kingdom in May 1985. The Act states that: "As from 1st July 1997, Her Majesty shall no longer have sovereignty or jurisdiction over any part of Hong Kong" (Section 1 (1)). Hong Kong Act, 1985, ch. 15 (Eng.).

Hong Kong's population is predominantly Chinese (estimated at 98%). However, it is a place governed by a British Governor with British appointed colonial administrators working under British laws. In this regime Hong Kong has prospered.

It is an important international financial center, second only to Tokyo in the Pacific region, having 165 licensed banks of which 76 are among the top 100 banks in the world.³ Hong Kong is among the top twelve traders in the world.⁴ Its Gross Domestic Product Per Capita in 1989, was H.K. \$85,325 (U.S. \$11,000), one of the highest in Asia.⁵ It achieved this prosperity in a milieu of capitalism amidst minimum government intervention and the Rule of Law.⁶

In 1997, Hong Kong will, after 155 years of British rule, revert to Chinese rule. However, during the 155 years of British rule, both the people of Hong Kong and the government of China have drastically changed. Like a child who has lived all his life with foster parents, Hong Kong must now face the prospect of returning to its natural parents. They are natural parents who are very jealous of their parental rights, parents who are very strict with their children and who are not beyond using guns and tanks on them. One thing will not change, Hong Kong will never be able to determine its own fate. One former chairman of the Hong Kong Stock Exchange described the change as one from a British Colony to that of a Chinese Colony.⁷ While many would consider this a somewhat distasteful analogy, the sentiment behind it characterizes the stark realism with which the business community greets the coming of 1997. It may also explain why many are leaving Hong Kong in search of a foreign passport and the present malaise which can only come from a sense of powerlessness. The people of Hong Kong are not helpless. Within the constraints set by the current institutional arrangements and those being made for the transition to Chinese rule, the people of Hong Kong can play a critical role in the determination of their own future.

The legal system is the cornerstone for building a vision of the future. However, in the course of a search for an answer, it is impossible to ignore the cultural, political, social and economic factors which affect the future of Hong Kong. To start with, it is necessary to understand who the Hong Kong Chinese are, what culturally defines them, what their attitudes towards government are, and what would move them to action.

3. GOVERNMENT OF HONG KONG, 1990 GOVERNMENT OF HONG KONG ANNUAL REPORT 67, 73 (David Roberts ed., 1990).

4. *Id.* at 84.

5. *Id.* at 376.

6. *See infra* note 149.

7. Mr. Ronald Li expressed this view in a television interview in 1987 (before the Stock Market Crash of October 1987). He also gave a similar statement at an international investment conference. *See* SOUTH CHINA MORNING POST, June 17, 1987, Business Post, at 3. Mr. Li has since resigned from the chairmanship of the Stock Exchange.

A. *The Hong Kong Man*

Every year, the Hong Kong Government publishes an Annual Report. The publication is aimed at both the local and overseas markets. Its objective is to put Hong Kong's best face forward. It always chooses for its frontispiece, a photograph of an event which captures the spirit of Hong Kong for the year being reviewed. The editors seldom fail to find an appropriate though generally bland subject. For 1989, however, they succeeded brilliantly. The frontispiece was a photograph of the largest demonstration by the people of Hong Kong ever held in Hong Kong. The demonstration was held in May 1989, to protest the establishment of Martial Law in Beijing. This was a demonstration not only in protest, but also in hope; hope that the leaders in Beijing would seek a peaceful solution at Tianamen and act on what everyone in Hong Kong, including many of the staff of the People's Republic of China (PRC) organizations, thought were reasonable demands of the students in Beijing. This demonstration captured the spirit of Hong Kong in 1989. It was a spirit of pride in being Chinese. It was also a spirit of naivety in the belief that the Chinese leadership would act in the liberal traditions of the Hong Kong Colonial Administration or of an enlightened leadership. The result is a matter of historical record. It is not part of this opinion to make any judgment. It is, however, my contention that the demonstrations both in Hong Kong and Beijing in May and June 1989, awakened in the Chinese people of Hong Kong that they are part of one Nation and that their destiny is closely tied with the people of China.

This spirit does not wholly define the Hong Kong Chinese. Writing in 1983, Hugh Baker,⁸ a social anthropologist noted for his studies of Hong Kong life, stated:

something unique has been emerging from Hong Kong's cities: it is Hong Kong Man. He is go-getting and highly competitive, tough for survival, quick-thinking and flexible. He wears western clothes, speaks English or expects his children to do so, drinks western alcohol, has sophisticated tastes in cars and household gadgetry, and expects life to provide a constant stream of excitement and new openings. But he is not British or western (merely westernized). At the same time he is not Chinese in the same way that the citizens of the People's Republic of China are Chinese. Almost alone in the Chinese world Hong Kong has not adopted Putonghua (Mandarin) as the lingua franca: instead Cantonese holds sway. Admiration for and empathy with his compatriots Hong Kong Man certainly has, but he also now has pride in and love of the society which he has

8. Hugh Baker, *Life in the Cities: The Emergence of the Hong Kong Man*, 95 CHINA Q. 469, 478-79 (1983).

created through his own determination and hard work. He gives little credit to the Union Jack under which his success has been nurtured, and he is not necessarily happy at the prospect of the five-starred red flag presiding over his activities. Hong Kong Man is *sui generis* and *the problems of the territory's future are more difficult to resolve because of it.*⁹

In a more hopeful note, Siu-lun Wong, Professor of Sociology at Hong Kong University, wrote in 1986:

Will Hong Kong lose its developmental momentum as it approaches 1997? My analysis above would indicate that as long as the institutional principles essential to its past economic success are upheld, the relevant cultural factors can be expected to continue to fuel the engine of development. In the pursuit of modernity, is Hong Kong a model for the rest of China? The debate is open, but at least one thing is clear. Hong Kong stands as a concrete example of how modernization with distinctive Chinese characteristics can be attained.¹⁰

Siu-lun Wong referred to three institutional characteristics: (1) the large component of refugees from China with entrepreneurial skills and attitudes, this entrepreneurial outlook has continued to the present generation of Hong Kong Chinese; (2) the non-interventionist approach of the Colonial Government practicing low taxation and minimal involvement in commercial activities enabling upward social mobility by way of commercial rather than scholastic or political success; and (3) urbanism by default, enabling a controlled flow of immigrants into the colony without the problems of regional social and resource dislocation (problems faced by China but not Hong Kong) and being small, it requires a much smaller share of the international market to make it economically viable.¹¹

In their study of the cultural and attitudinal characteristics of the Hong Kong Chinese,¹² Siu-kai Lau and Hsin-chi Kuan expanded on the institutional characteristics of Hong Kong as follows: (1) While the Hong Kong Government lacks the secure ideological legitimation of traditional and modern Chinese Governments, it still enjoys a degree of legitimacy increased over time through the process of sheer habit and the fact that the colonial

9. *Id.* (emphasis added).

10. Siu-lun Wong, *Modernisation and Chinese Culture in Hong Kong*, 1806 CHINA Q. 306, 324-25 (1986).

11. *Id.* at 321-24. These views were the first two characteristics in a lecture given by Ezra Vogel, *Industrialization in Japan and the Four Little Dragons of Asia*, speech at the Reischauer Lectures (1990) (copy on file with author).

12. SIU-KAI LAU & HSIN-CHI KUAN, *THE ETHOS OF THE HONG KONG CHINESE* 19-20, 28-29 & 34-37 (1988).

government can claim credit for the miraculous post-war economic prosperity of Hong Kong; (2) The rational and efficient administration of the Hong Kong Government and the generally honest civil service also contribute to the acceptability of the government to the people; (3) The law administered by judges and lawyers trained and therefore endowed with the liberal temperament of the common law tradition, restrained political abuse and ensured that colonial rule was benign and enlightened; (4) Although the colonial system afforded little scope for positive political participation by the people, they enjoyed a great deal of negative political freedom in the form of minimal interference by government and a relatively free press despite draconian press laws which were used only during crisis situations in 1967 when the Cultural Revolution spilled into Hong Kong; (5) Unlike elites in traditional China, or in the more politicized society of socialist China, the elite in Hong Kong forms an open, non-exclusive group, unable to prevent intrusions into its ranks or the falling out of members.¹³ Within the elite, there is no sense of a cultural or moral mission and thus unencumbered, the floodgates for modernization were unleashed, allowing materialism, utilitarianism, and the creation of a heroic image in the economically successful.

The Hong Kong Man has come to depend on a basically non-interventionist, efficient and honest government whose actions are checked by judges and lawyers steeped in the liberal traditions of the common law, and on economic development which is dependent on the retention and opening of overseas markets. Lau and Kuan observe that dependence on foreign markets and foreign direct investment as a means of technology transfer, increases the sense of helplessness in the growing tide of international protectionism.¹⁴ Further, rapid economic growth has brought about a deeply felt uneven distribution of income.

The economy of Hong Kong is undergoing a restructuring by a number of forces: competition by the newly industrialized countries (NICs), principally the other three "little dragons" of Singapore, Taiwan and South Korea; the availability of cheap labor in China; the need to strive for high technology export products; and the need to court foreign capital for industrial as well as infrastructure development.¹⁵ With no possibility of independence, Lau and Kuan state that the impossibility of conversion of economic power into political power in the past, present, and in the future, is likely to produce a feeling of political frustration which may be channeled

13. *Id.*

14. *Id.* at 37-39.

15. In October 1989, the Governor of Hong Kong announced a massive Port and Airport Development Project that would cost HK\$127 billion in 1989 prices. It was intended that some 40-60% of the project would be financed privately. See *Government of Hong Kong, 1989 Gateway to New Opportunities*, and verbatim record of October 12, 1990 briefing to the General Chamber of Commerce (copy kept by author but will be available on request from the Port and Airport Development Information Unit of the Hong Kong Government).

into an even more conspicuous display of wealth and consumption patterns.¹⁶ Any study of the future of Hong Kong must take account of these factors. At the same time, it will be necessary to understand the PRC perspective of Hong Kong.

B. *The PRC Perspective*

From the point of view of a resident citizen¹⁷ of the People's Republic of China, the Hong Kong Man is a venal character indeed. He has no sense of historical mission, as befits any good Marxist, or moral or cultural worth, as befits any good Chinese. His one goal in life seems to be the pursuit of personal wealth as opposed to the welfare of the Nation, and he flaunts his wealth as if to taunt his much poorer neighbor. In such circumstances, one should certainly expect the thinking PRC resident citizen to assume a posture of cultural superiority: what China lacks in material wealth is more than made up for by its spiritual wealth in the form of superior Chinese ideology and a cultural heritage which the Hong Kong Chinese seems to have lost and certainly does not display. More than a physical border separates the Hong Kong Man and the PRC Man. It is a lack of understanding which, unless remedied, will continue to be a stumbling block in the building of a harmonious relationship between the nations.

In light of this lack of understanding, the influence exerted by Hong Kong in fostering a Hong Kong sub-culture in China, cannot fail to be looked upon with suspicion by the leadership in China. Much of the southern most province of mainland China, Guangdong province, can receive radio and television signals from Hong Kong. Although the broadcasting media is subject to the tight standards exercised by Hong Kong authorities, it still fosters ideas of consumerism, personal pursuit of wealth and individualism, ideas which pervade the whole Hong Kong ethos. The popularity of pop songs, particularly Cantonese pop songs, and rising consumerism in China attest to the potency of this constant infusion of ideas. A plethora of Hong Kong publications are being legally and illegally imported into China. Campaigns in recent years in China against pornography or moral pollution, have pointed the finger at Hong Kong as being the prime culprit. Worse still, the pro-democracy movement in China received

16. *Id.* at 37-38.

17. Under the Nationality Law of the PRC promulgated in 1980 a Hong Kong resident of the Chinese race is also a citizen of the PRC. PEOPLE'S REPUBLIC OF CHINA, 1984 LEGAL COMMITTEE OF THE STANDING COMMITTEE'S REPORT 200 [hereinafter Legal Committee]. To describe a person with a true PRC orientation, he or she must therefore be both a citizen and a resident of the PRC. On issues of Nationality laws relating to Hong Kong Chinese, see Robin M. White, *Nationality Aspects of the Hong Kong Settlement*, 20 CASE W. RES. J. INT'L L. 225-51 (1968); Robin White, *Hong Kong: Nationality, Immigration and the Agreement with China*, 36 INT'L & COMP. L.Q. 483, 483-503 (1987). See also Christine Chua, *The Sino-British Agreement and Nationality: Hong Kong's Future in the Hands of the People's Republic of China*, 8 PAC. BASIN L.J. 163 (1990); Ching, *Chinese Nationality in the Basic Law*, in THE BASIC LAW AND HONG KONG'S FUTURE (Smith & Chen eds., 1988).

both material and moral support from a vast proportion of the Hong Kong populace.

Under these circumstances, it would not be unreasonable to expect a future Chinese leadership bent on exercising as much control over Hong Kong as possible, so that its influence on the mainland can be kept within acceptable bounds. This attitude is reinforced by something far more important: the leadership's sense of historical mission as leaders of modern China. Here lies, in my belief, the key to understanding Chinese behavior towards the question of Hong Kong.

This sense of historical mission has been felt by every leader of modern China, irrespective of their political persuasion. Many of the current senior leaders and leading intellectuals of China recall or personally experienced the May 4 movement when students and intellectuals demonstrated against the shabby treatment meted out to the Chinese delegation and to China at the Versailles Peace Conference,¹⁸ when the powers assembled refused to end extraterritorial privileges in China. While the May 4 movement marked a high point in nationalistic feelings against foreign domination, feelings of national humiliation have long been felt. Thus, every leader of modern China beginning with Sun Yat-sen (1866-1925),¹⁹ regarded it as their historical mission to end extraterritorial privileges in China and to abolish unequal treaties.

To understand the depth of the feeling of national humiliation, one must go back to its historical roots. Extraterritoriality came to China as a product of the Opium War. It was a war brought on by China's actions in proscribing the importation of opium into her territory. British traders had been trading in a specially created enclave known as the "Hong System."²⁰ Before any action was taken against British traders in Canton, Lin Tse-Hsu, the Chinese Special Commissioner, asked by the Imperial Court to root out the evils of opium, addressed a letter to Queen Victoria, in which he stated this proposition: "Suppose there were people from another country who carried opium for sale to England and seduced your people into buying and smoking it; certainly your honorable ruler would deeply hate it and be

18. When the Chinese request for the abolition of extra-territoriality was adjourned to the Washington Conference of 1922, bitter anti-foreign sentiments erupted into demonstrations in Beijing and other cities, notably Shanghai. See bibliographical references in Van Meter, Jr., *The Washington Conference of 1921-1922: A New Lock*, 46 PAC. HIST. REV. 603 (1977). After a series of violent incidents, including the May 30 incident in Shanghai, the Chinese Communist Party (then under the control of Chen Du Xiu and Comintern Advisers) first publicly committed itself to the struggle against unequal treaties. LANGER, *ENCYCLOPEDIA OF WORLD HISTORY* 957-58 (1984); Anthony Dicks, *Treaty, Grant Usage or Sufferance?*, 95 CHINA Q. 427, 451-53 (1983); MICHAEL U.L. LUK, *ORIGINS OF CHINESE BOLSHEVISON* 99, 156 & 185 (1990).

19. The abolition of unequal treaties was one of the exhortations by Sun Yat-sen to the Chinese People in his last testament commonly known to the Chinese people as the "Jungli Yi Zhou". See LEE FUNG & LEE YI, *SUN YAT-SEN AND THE KOUMINGTONG* 454-57 (1987).

20. For a description of the Canton trading enclave, see Randle Edwards, *The Old Canton System of Foreign Trade*, in *LAW AND POLITICS IN CHINA FOREIGN TRADE* 360-78 (V. Li ed., 1977).

bitterly aroused."²¹ Her Majesty's Government clearly did not consider this persuasive, for not only did they not dignify the letter with a reply, but instead, they sent an expeditionary force led by Captain Eliot to China. Subsequent action taken sparked the Opium War which resulted in the Treaty of Nanking 1842.²² It was the Treaty of Nanking from which the seeds of extraterritoriality were sown. The treaty contained three of the four principal ingredients of extraterritoriality: the opening of Chinese ports to foreign trade; the extension of a privileged position to foreign residents in China under the protection of extraterritorial rights exercised by consular authorities; and the conduct of foreign relations as equals.²³ The quartet of principal extraterritorial privileges was completed by granting freedom of activity for Christian missionaries.²⁴ By the same treaty, Hong Kong was ceded to Britain. The connection of Hong Kong to the national humiliation of extraterritorial privileges is more than coincidental.

Under the concept of "most favored nation" treatment, all foreign powers shared whatever privileges any of them could squeeze out of China.²⁵ Ostensibly, extraterritoriality was established because of the vast difference between European and Chinese standards of justice and punishment. In Western eyes, there may have been a certain justification because of the corruption and bias in the administration of the law which was rampant among Ching dynasty officials, a state of affairs which persisted to the Republican days.²⁶

However, there was far more to seeking justice in the resolution of disputes between subjects of China and the subjects of foreign powers. Under the cloak of extraterritoriality, a system of treaty ports entrenched itself on Chinese soil. In the treaty ports, foreign power and foreign laws held sway. The Imperial Customs were run by foreigners and the "most favored nation" clause ensured that low import tariffs applied uniformly,

21. W. ALFORD, *COMPARATIVE LAWS: CHINA* 278-80 (1990).

22. Treaty of NanKing, Aug. 29, 1842, Eng.-China, 93 Consol. T.S. 465.

23. For the historical background to the Treaty of Nanking, see 10 *THE CAMBRIDGE HISTORY OF CHINA 1800-1911*, chs. 4, 5 (J.K. Fairbanks ed., 1968). The last ingredient (dealing at equal level with foreign powers) drastically changed the world view of the Chinese Court. Traditionally, the Chinese throne regarded itself as the Son of Heaven towards whom all states should act as tributaries. See Dicks, *supra* note 18, at 444; and J.K. FAIRBANKS, *THE CHINESE WORLD ORDER: TRADITIONAL CHINA'S FOREIGN RELATIONS* (1968) (citing Dicks, *supra* note 18, at n.61) [hereinafter FAIRBANKS, *CHINESE WORLD ORDER*].

24. Dicks, *supra* note 18, at 441.

25. J.K. FAIRBANKS, *THE UNITED STATES AND CHINA* 169 (4th ed. 1979). "Most Favoured Nation" clauses appeared in all British treaties with China from 1843 and became entrenched in Chinese foreign treaties from the time of the 1858-1860 Tientsin Treaties after China's defeat by the Franco-British Expeditionary Force. See H.B. MORSE, *INTERNATIONAL RELATIONS OF THE CHINESE EMPIRE* 310-418 (1910-1918).

26. WESLEY FISHEL, *THE END OF EXTRATERRITORIALITY IN CHINA* 217, 218 (1952).

making it difficult for domestic industries to flourish.²⁷ The final humiliation came with the Boxer Indemnity,²⁸ a debilitating outflow of public revenue, collected by the foreign controlled Imperial Customs Service. The Indemnity continued after establishment of the Republic, straining China's resources and thus its efforts to modernize, until after World War I when America took the lead followed by Britain and France to reserve part of the indemnity for higher education of the next generation of Chinese. The Boxer Indemnity came at a time when Japan, which wrung the Island of Formosa (now Taiwan) from China by the Treaty of Shimonoseki in 1898, was able to shake off the yoke of extraterritoriality.²⁹

In the eyes of revolutionaries with their vision of a new China, China's humiliation must have been complete. The weak position that China found itself in was the result of official corruption and the total lack of national unity. China was to constantly receive the short-end of the bargain in the international power politics of the first half of the twentieth century, as was shown by the treatment accorded at the Versailles Peace Conference.³⁰ There was almost universal procrastination in the rendition of ceded or leased territories, or the abolition of extraterritorial rights. Intellectuals and revolutionaries thus set about to find ideologies and revolutionary strategies to unite the nation and make it strong.³¹

27. FAIRBANKS, CHINESE WORLD ORDER, *supra* note 23, at 168. Robert Hart was Inspector-General of the Imperial Customs from 1860-1911. Under Hart, the Imperial Customs Service was administered by a series of foreign commissioners with western management methods. However, from 1860 onwards, with the indemnities exacted by France and Britain in 1860 and later by Japan in 1898, the service became seen as 'debt collector' for foreign powers.

28. The Boxer Indemnity came to 450 million taels of silver, payable with interest at 4% p.a. in forty years. The total sum worked out at 980 million taels. See MORSE, *supra* note 25, vol. 3, at 352-54.

29. The ostensible reason for the withdrawal of extraterritorial privileges from Japan was the reform of its legal system. See JEROME COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW 11 (1974). Although, in a series of bilateral treaties in the early 20th century, China was offered similar treatment provided it would "reform its legal system and bring it into accord with western nations." One cannot help but note that Japan by the early 20th century had won major wars with China and Russia, and had distinguished itself in quelling the Boxer Rebellion. *Id.* To the western world it was a military power to be reckoned with. China was in the throes of revolution, and soon, as most western powers must have seen, it would be torn asunder by internal strife. This too could not have been lost on the hot-blooded revolutionaries of the New China. National humiliation could only be avoided by national unity.

30. After the 1917 Revolution, the Lenin Government unilaterally abolished all Russian extraterritorial rights. This provided the perfect overture for Russian influence in the development of Chinese politics. At this stage, in the 1920s, Russian Advisors worked with both the Kuomintang and the Chinese Communist Party when there was a short-lived alliance between the two parties. See *China and the West*, in POLITICS AND LAW (Jerome Ch'en ed., 1979).

31. Sun Yat-sen espoused the San Min Chu I for his task of nation building, establishing five institutions for the governance of the country, together with a period of political tutelage of the populace to prepare them for democratic participation in his Jian Guo Da Gang (Outline of National Reconstruction). See excerpts from San Min Chu I, in FRANK PRICE, THE THREE PRINCIPLES OF THE PEOPLE 306-10 (1927) (reprinted 1975); ALFORD, *supra* note 21. Mao Tse Tung's recipe for nation building lies in the concept of Leninist democratic centralism. See M. MEISNER, MAO'S CHINA AND AFTER ch. 6 (1986); and JAMES WANG, CONTEMPORARY CHINESE

It was not, therefore, surprising that in the twentieth century, Chinese legal scholars revived the idea of the invalidity of unequal treaties³² taking as their starting point the pre-nineteenth century views of Jean Bodin, which were adopted by many of the classical jurists until the end of the 17th century.³³ In 1929 and 1931, the government of Chiang Kai-shek made unilateral declarations of its intention to abolish all extraterritorial jurisdiction in China. While it might have been mere gesture,³⁴ it was important because it underlined the need to put the best face on the fragile unity which Chiang Kai-shek had achieved by his Northern Expedition of 1927.³⁵ With the advent of World War II, the structure of international power politics changed and what was left of extraterritorial rights ended in China in 1943.³⁶ This left the question of certain ceded and leased territories, principally the question of Hong Kong and Macao, unresolved.³⁷

The founding of the People's Republic of China followed the end of World War II. As part of their program to forge a new nation, the leaders of the PRC declared in Article 55 of the Common Program of the Chinese People's Political Consultative Conference that "[t]he Central People's Government of the People's Republic of China shall examine the treaties and agreements concluded between the Kuomintang and foreign governments, and shall recognize, abrogate, revise, or renegotiate them according to their respective contents."³⁸

Intrinsic in the idea of the invalidity of unequal treaties was the concept of the absence of bargaining on an equal footing, both economically and politically, which often results in a treaty containing inequitable terms. To common law lawyers steeped in the contractual doctrine distinguishing legal sufficiency from equitable adequacy of consideration, the idea of invalidity of treaties containing inequitable terms held no intellectual appeal. Furthermore, international law underwent a qualitative change in the nineteenth century to accommodate colonial expansion³⁹ and a treaty brought about by war was not considered illegal. Indeed it was not until the

POLITICS 17-19 (1980).

32. Dicks, *supra* note 18, at 434-35; and Hungdah Chiu, *Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties*, in CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES at 239-67 (Jerome Cohen ed., 1972).

33. Dicks, *supra* note 18, at 432.

34. Ch'en, *supra* note 30, at 321-24.

35. LANGER, *supra* note 18, at 1118-19.

36. FISHEL, *supra* note 26, at 207-15.

37. At the end of the Second World War, Chiang Kai-shek insisted on taking the surrender of the Japanese Commander in Hong Kong giving the perfectly justifiable reason that Hong Kong was in the China War Theater. It was thought by the British that his true intentions were to retake Hong Kong and Admiral Harcourt was ordered by Lord Mountbatten, Commander-in-Chief, or the Far East Theater, (himself under instructions from the British Government) to steam into Hong Kong with all due speed and reclaim British sovereignty over the territory. See generally G.B. ENDACOTT, HONG KONG ECLIPSE (1978).

38. Reproduced in COHEN & CHIU, *supra* note 29, at 214.

39. Dicks, *supra* note 18, at 432-33.

General Treaty for the Renunciation of War, an instrument of National Policy in 1928⁴⁰ (commonly known as the Kellogg Briand Pact), subsequently adopted in the United Nations Charter of 1945,⁴¹ that war was considered to be an unlawful means of resolving international disputes. It is not surprising therefore, that the concept of the invalidity of unequal treaties attracted little acceptance in the West.

China's interest in the theory of invalidity of unequal treaties rose again, in part precisely because of her isolation by the West in the wake of the Korean War and the strident anti-communism of the West. China felt even more obliged to persist in her path both from its own historical perspective and from a need to bolster national unity at a time of internal strife and external isolation. In 1954, when the task of nation building was bearing fruit and China's leaders felt more secure, they were able to reformulate the somewhat truculent views on unequal treaties in a more measured tone.⁴² In the Pancha Shila, Sino-Indian Friendship Treaty of 1954, the Five Principles of Peaceful Co-existence were coined: (1) mutual respect for territorial integrity and sovereignty; (2) mutual non-aggression; (3) non-interference in the internal affairs of the other state; (4) equality and mutual benefit; and (5) peaceful co-existence. A year later, the Bandung Conference attended by twenty-nine Asian, African and Middle Eastern countries, adopted these five principles and added another five.⁴³ The adoption of the Five Principles of Peaceful Co-existence was a tribute to the diplomatic flair diplomacy of Chou En Lai. Carlos Romulo, who attended the Conference as Foreign Minister of the Phillipines, in reviewing the Bandung Conference in his noted lecture, "The Spirit of Bandung," spoke in glowing terms of Chou En Lai's flair for making friends and engineering consensus.⁴⁴ One can only lament that had China not isolated itself after the Bandung Conference, its position in the world may have been different with

40. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 59.

41. *Id.*

42. Lee Wei, *Five Principles of Co-existence and International Law*, in CHINA YEARBOOK OF INTERNATIONAL LAW 237-52 (1985)

43. Carlos Romulo, The Spirit of Bandung, speech at the Weil Lecture, appendix (Apr. 24, 1955). The Ten Principles of the Bandung Declaration were the following: (1) Respect for fundamental human rights and for the purposes and principles of the Charter of the United Nations. (2) Respect for the sovereignty and territorial integrity of all nations. (3) Recognition of the equality of all races and of the equality of all nations, large and small. (4) Abstention from intervention or interference in the internal affairs of another country. (5) Respect for the right of each nation to defend itself singly or collectively in conformity with the Charter of the United Nations. (6) a. Abstention from the use of arrangements of collective defense to serve the particular interests of any of the big powers; b. Abstention by any country from exerting pressures on other countries. (7) Refraining from acts or threats of aggression or the use of force against the territorial integrity or political independence of any country. (8) Settlement of all international disputes by peaceful means such as negotiation, conciliation, arbitration, or judicial settlement, as well as other peaceful means of the parties' own choice in conformity with the Charter of the United Nations. (9) Promotion of mutual interest and cooperation. (10) Respect for justice and international obligations.

44. *Id.*

the goodwill and respect which Chou En Lai was able to create for his country at the conference.

The Five Principles of Peaceful Co-existence became the cornerstone of Chinese foreign policy because it embodied the entire historical outlook of her leaders. This historical outlook coincided with that of their predecessors. Furthermore, embedded in these principles, was the concept of invalidity of unequal treaties.

At this point, it is opportune to ask why, despite the deep sense of historical mission felt by modern Chinese leaders, did China not demand the return of Hong Kong but chose to wait for the British to make the first move. The Chinese government has never explicitly put forth its position on this question. The conventional wisdom in the West is that China truly needed Hong Kong as an enclave to deal with foreigners and for the foreign exchange Hong Kong brings to China.⁴⁵ Looking back in time, the facts certainly show that Hong Kong provided, and continues to provide, substantial benefit to China. During the Korean War, Hong Kong businessmen engaged in a smuggling trade, effectively running the U.N. Blockade, which opened a life-line to China. Since 1985, China has been Hong Kong's largest trading partner. Imports from China represent 35% of the value of all imports into Hong Kong, but exports to China represent only 20% of the value of all exports from Hong Kong.⁴⁶ In 1989, the total value of merchandise traded between Hong Kong and China amounted to HK \$343 billion.⁴⁷ Since 1979, Hong Kong domestic exports to China have increased an average of 85% a year, re-exports, have increased at an average annual rate of 84%, and imports from China have increased at an average annual rate of 31%.⁴⁸ In 1989, 29.9% of Hong Kong's re-exports were routed to China.⁴⁹ Furthermore, Hong Kong provided a convenient gateway to China for business and tourism. Hong Kong's entrepreneurs provided 70% of the foreign direct investment in China.⁵⁰ Some 25-30% of all Chinese foreign exchange came through Hong Kong and, as well as, most of China's technology purchases and managerial advice.⁵¹

At the same time, China is making huge investments in Hong Kong. China Resources, China's largest trading firm in Hong Kong has over 7,000 employees, the Bank of China building has recently opened in Hong Kong, and China has brought in substantial stakes in Hong Kong companies such

45. See WILLIAM OVERHOLT, 1990 HONG KONG AFTER TIANAMEN SQUARE: A COUNTER-CYCLICAL VIEW (Apr. 23, 1990), BTB 398/1.

46. 1990 GOVERNMENT OF HONG KONG ANNUAL REPORT, *supra* note 3, at 389.

47. *Id.*

48. *Id.*

49. BUILDING PROSPERITY: A FIVE PART STRATEGY FOR HONG KONG 66 (Hong Kong Economic Survey Ltd. 1989) [hereinafter BUILDING PROSPERITY]; 1990 GOVERNMENT OF HONG KONG ANNUAL REPORT, *supra* note 3, at 389.

50. BUILDING PROSPERITY, *supra* note 49, at 56-57.

51. See OVERHOLT, *supra* note 45; BUILDING PROSPERITY, *supra* note 49, at 64-65.

as HK Telecom and Cathay Pacific Airways.⁵² The economic mutual dependence is further underlined by the fact that in 1989, Hong Kong received nearly three times as much water from the Guangdong Province than Hong Kong had in its reservoirs.⁵³ The major electricity supplier of Hong Kong is China Light and Power, a Hong Kong company, which is connected to the Guangdong grid and supplies three million kilowatts of electricity daily to Guangdong Province, representing about 7% of the electricity generated in Hong Kong.⁵⁴ This trend is increasing rapidly as supply agreements with the Special Economic Zone of Shekou⁵⁵ are further implemented. The Guangdong Nuclear Power Joint Venture Company, a joint venture company formed between the PRC Ministry of Nuclear Industry and China Light and Power, will commission the Daya Bay Nuclear Power Station in 1992-1993, providing 1,800 megawatts of power, 70% of which will be sold to Hong Kong.⁵⁶

The synergy between Hong Kong and the Guangdong Province has only begun to be exploited and Hong Kong has the financial, technological and managerial infrastructure to make a highly significant contribution to the modernization of China. One commentator argues that Hong Kong's role as an "airlock"⁵⁷ (an entry point for technology, capital, management skills and ideas) is extremely useful for the Chinese. Hong Kong is important because it is a major financial banking center, has fund management and capital raising capability, is a regional headquarters for multi-nationals, and is the tourist center and the press center for Asia. Although China can limit press freedom and bureaucratized Hong Kong, Hong Kong could continue to prosper even if there was severe political strife in China.⁵⁸

While it is right to recognize that Hong Kong has distinctive economic attributes which are of considerable importance to China, it is impossible to ignore the political dimension in China. It would appear that it was the political dimension that determined the decisions of the leadership in the Tianamen Incident of 1989.⁵⁹

52. *Id.*

53. 1990 GOVERNMENT OF HONG KONG ANNUAL REPORT, *supra* note 3, at 209-10. In 1989, Hong Kong had 230 million cubic meters of water stored in its reservoirs. On the other hand, it piped 610 million cubic meters from China. Under an existing Agreement with the Guangdong authorities, planning is underway to increase the distribution and reception system to enable 1,100 million cubic meters to be piped from Guangdong to meet the planned water supply needs for Hong Kong beyond the year 2000.

54. 1990 GOVERNMENT OF HONG KONG ANNUAL REPORT, *supra* note 3, at 214.

55. Shekou is one of the three PRC Special Economic Zones adjacent to Hong Kong. The other two are Shenzhen and Zhu Hai.

56. 1990 GOVERNMENT OF HONG KONG ANNUAL REPORT, *supra* note 3, at 214.

57. OVERHOLT, *supra* note 45, at 11.

58. *Id.* at 11-13.

59. *Id.* Indeed to be fair to Mr. Overholt, he does not disregard the political dimension. In the concluding part of his paper, he argues (correctly, in the writer's view) that China at this point had even a greater confidence crisis than Hong Kong. It might be as well, Mr. Overholt argues, to recognize that Hong Kong will never be a democracy and it will have to refrain from

Unless pushed into an extreme position, the leadership may still be able to trade off doctrinal purity against economic gains to attain political equilibrium. The concept of "one country, two systems" is an articulation of this trade off but long before the coining of this phrase,⁶⁰ accommodation between doctrine and economic reality had already existed.

On March 10, 1972, the Chinese Ambassador to the United Nations addressed a formal statement to the chairman of the Special Committee on Colonialism with the object of removing Hong Kong and Macao from the list of territories falling within the Special Committee's terms of reference. The communication contained the following observations:

As is known to all, the question of Hong Kong and Macao belong[s] to the category of questions resulting from the series of unequal treaties left over by history, treaties which the imperialists imposed on China.

Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the question of Hong Kong and Macao is entirely within China's sovereign right and does not at all fall under the ordinary category of colonial territories.

Consequently, they should not be included in the list of colonial territories covered by the declaration on the granting of independence to colonial countries and people.

With regard to the question of Hong Kong and Macao, the Chinese government has consistently held that they should be settled in an appropriate way when conditions are ripe. The United Nations has no right to discuss these questions.

For the above reasons, the Chinese delegation is opposed to including Hong Kong and Macao in the list of colonial territories covered by the declaration and requests that the erroneous wording that Hong Kong and Macao fall under the category of so-called colonial territories be immediately removed from the documents of the special committee and all other United Nations documents.⁶¹

overt subversion of the system in China, although Hong Kong's influence will be immense and it will subvert by example.

60. The concept of "one country, two systems" has popularly been attributed to Deng Xiao Ping.

61. 1 PEOPLE'S CHINA AND INTERNATIONAL LAW, A DOCUMENTARY STUDY 384 (Jerome Cohen & Hungdah Chiu eds., 1974). See also Dicks, *supra* note 18, at 436, 437, n.29. Dicks points out that while the Chinese Ambassador's request was accepted, it is doubtful if the Ambassador's position regarding Chinese Sovereignty is accepted generally by other countries having treaty relations with Great Britain affecting Hong Kong. That must be so, because if the Ambassador's position on sovereignty is adopted by any country having treaty relations with Britain affecting Hong Kong, then it cannot logically recognize that part of the treaty relating to Hong Kong. This in fact is the position that Hong Kong is faced with upon the transfer of sovereignty under the Sino-British Joint Declaration in 1997 and special steps had therefore to be taken to ensure that treaties presently applicable continue to be applicable. A more crucial

When the time for settlement of the Hong Kong question came in 1982, it was not surprising that the Foreign Ministry in Beijing issued the following statement in response to Mrs. Thatcher's remarks that the treaties relating to Hong Kong should be kept:

Hong Kong is part of Chinese territory. The treaties concerning the Hong Kong area signed between the British Government and the government of the Qing dynasty of China in the past are unequal treaties which have never been accepted by the Chinese people. The consistent position of the government of the People's Republic of China has been that China is not bound by these unequal treaties and that the whole Hong Kong area will be recovered when conditions are ripe.⁶²

China's attitude toward unequal treaties meant that it could not logically accept that the people of Hong Kong comprised a distinct entity in any process of discussion leading to the Sino-British Joint Declaration of 1984. De facto, however, the Hong Kong establishment had an input in the process.⁶³ It is worthy of note that Article 1 of the International Covenant on Economic, Social and Cultural Rights declares that "all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁶⁴ The United Kingdom in accepting the International Covenant expressly reserved the right not to acknowledge various paragraphs relating to an elected legislature, employment of women, and the deportation of women. However, no reservations were made concerning the right of the people of Hong Kong to self-determination.⁶⁵ Nonetheless, the acceptance by the U.N. Special Committee of China's request to delete Hong Kong from the list of colonies covered by the U.N. Self-Determination Declaration⁶⁶

point, however, is the deletion by the Special Committee of Hong Kong and Macao from the list of colonies covered by the declaration on the granting of independence to colonial countries and peoples. This foreclosed any chance of self-determination by Hong Kong's people.

62. Dicks, *supra* note 18, at 8 (citing Frank Ching, *China Repudiates Thatcher's View on Key Treaties*, ASIA WALL ST. J., Oct. 1, 1982).

63. The former Governor of Hong Kong, the late Sir Edward Youde, was on the British negotiating team, and the Executive Council was kept abreast of developments, at the same time their views were forwarded to the British Negotiating Team. A delegation of Hong Kong Government appointed unofficial Executive and Legislative Councillors went to Beijing but were received by Deng Xiaoping in their private capacities.

64. U.N. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. 16, at 49.

65. Peter Wesley-Smith, *Settlement of the Question of Hong Kong*, 17 CAL. W. INT'L L.J. 116, 117-120 (1987).

66. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 594 (3d ed. 1979). Wesley-Smith, *supra* note 65, at 119. Roda Mushkat, *The International Legal Status of Hong Kong Under Post-Transitional Rule*, 10 Hous. J. INT'L L. 1, 4-8 (1987). Mushkat suggests that self-determination need not always result in full independence and may be accomplished by free association with an independent State or an integration with such a State provided it followed an informed and democratic process, paying due regard to the freely expressed will of the

meant that any right of self-determination of Hong Kong was foreclosed for all practical purposes. As a right in international law, the right to self-determination is almost impossible to establish until a population grouping is recognized as being distinct. A settled colonial territory may be reorganized as a district, but a ceded colonial territory, where there are continuing cultural and ethnic ties with the ceding power will, probably not be reorganized.

The psychology of the Hong Kong Chinese is one which contains many internal contradictions. If asked whether they felt that China had suffered national humiliation as a result of the unequal treaties of the past, they would probably answer 'yes'. Despite their western orientation, the Chinese of Hong Kong have not lost their Chineseness. The Lau and Kuan study found that while a high proportion, up to 85.9%, of those under thirty considered themselves, "Hong Kongese" and an equally high proportion, up to 82%, of the same age group believed that it was difficult for "Hong Kongese" and "Mainland Chinese" to get along, over 80% of all but the under 20 year old respondents believed that the fate of the "Hong Kongese" and Chinese was the same, and 78% of all respondents said they were proud to be Chinese.⁶⁷

It was difficult to fault the compromise solution, the concept of one country, two systems, by which a degree of autonomy was promised to Hong Kong in the Joint Declaration. Yet the track record of the Chinese Communist Party is such that it has not inspired much confidence in the Hong Kong Chinese. The practical Hong Kong Chinese therefore, while giving approval to the compromise solution, began to plan for their foreign passports. In 1985-1986, the Lau and Kuan study showed that over 50% of the under 40 age group said that they will emigrate if given the opportunity.⁶⁸ Since the Tianamen Square incident, it will not be surprising if these percentages have increased.

people. The British Government in fact published a White Paper which commended the Joint Declaration to the people of Hong Kong and an office was set up to collect public views. The work of this office was monitored by Patrick Naim, a former senior British civil servant and Mr. Justice Simon Li who after his retirement, became a member of the Hong Kong Basic Law Drafting Committee. The office collecting public views produced a report which stated that the public generally supported the Joint Declaration. There were vocal accusations that the report did not fairly present public views. However, the writer believes that the report probably represented a fair assessment of the public reception of the Joint Declaration as being the best that could be achieved under the circumstances. The Stock Market and Real Estate Market subsequently recovered which might be an indication of renewed confidence after the Joint Declaration. The economy has however slowed down since June 1989 due to a general slowing down of the PRC and the world economy.

67. LAU & KUAN, *supra* note 12, at 180-83.

68. *Id.* at 182.

C. *The Sino-British Joint Declaration*

The Sino-British Joint Declaration on the Question of Hong Kong⁶⁹ was ratified on May 27, 1985. The first distinctive feature of the Joint Declaration is its form. While the three international agreements conferred sovereignty over Hong Kong to the British government⁷⁰ by way of cession or lease of territory, the Joint Declaration declares that the government of the People's Republic of China will resume the exercise of sovereignty over Hong Kong beginning July 1, 1997.⁷¹ It represents the respective positions of the parties with regard to the validity of the pre-existing treaties but achieves the objective of restoring both the territory of Hong Kong and the exercise of sovereignty over it to China.⁷² This represents a pragmatic solution to two diametrically opposed views. In addition, China's pragmatism has enabled it to defer demanding the return of Hong Kong until the matter was raised by the British government.⁷³ Despite its position

69. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of People's Republic of China on the Question of Hong Kong with Annexes, May 27, 1985, G.B.T.S. No. 26 (Cmd. 9543) [hereinafter JOINT DECLARATION].

70. The three treaties which by their terms conferred sovereignty of the three component parts of Hong Kong to Britain were concluded between the British Government and the Qing dynasty Government of China. These were the following: the Treaty of Nanking 1842, ceding the Island of Hong Kong in perpetuity to Britain, the Convention of Peking 1860 ceding Kowloon Peninsula in perpetuity to Britain, and the Convention of Peking 1898 leasing the New Territories to Britain for 99 years. See Dicks, *supra* note 18, at 441-51, for his very interesting analysis of the terms of these three treaties.

71. JOINT DECLARATION, *supra* note 69, art. 2.

72. As already stated in this article, the British position is that the pre-existing treaties are valid and binding, whereas the PRC view is that the treaties are unequal treaties. The Chinese position is based on the circumstances under which these treaties were concluded as well as their unequal terms, favoring Britain with nothing of equivalent value moving to China from Britain. The Chinese position on unequal treaties has in part been recognized by Article 52 of the 1969 Vienna Convention on the Law of Treaties, Gr. Brit. T.S. 58 (1980), Amend. 1984, 8 I.L.M. 679, which states that a "treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." What in fact constitutes "force" has been a matter of controversy, though there is general agreement that it includes the threat or use of military force. Article 4 of the Convention however declares that the Convention is not retroactive. The International Law Commission which proposed the draft convention opted for non-retroactivity on the basis of the intertemporal rule formulated by Judge Huber. See Katherine Greenberg, *Hong Kong's Future*, 7 FORDHAM INT'L L.J. 539-60 (1984); Hungdah Chiu, *Chinese Views on Sources of International Law*, 28 HARV. INT'L L.J. 289, 306-07 (1988).

73. As the new territories lease was due to expire on June 30, 1997, the business community began agitating from about 1981 onward for a solution to be sought. This resulted in lobbying by the business community both in Britain and Beijing. In January 1982, Peking intimated to a visiting British Junior Minister that the CPG would soon be ready for talks. Then came the famous "One country, two systems" phrase from the lips of Deng Xiao Ping during Margaret Thatcher's visit to Beijing in September 1982. In December 1982, the PRC passed its fourth Constitution, Article 31 of which contained the provision that SARs may be established by the National People's Congress. See Duncanson, *The Anglo-Chinese Negotiations*, in HONG KONG: A CHINESE AND INTERNATIONAL CONCERN (Domes & Shaw eds., 1986). Mr. Duncanson suggested that the British side had in effect been "steam rolled" by the Chinese side by first not recognizing that sovereignty was not negotiable and secondly, by allowing the Chinese to

regarding the unequal treaties relating to Hong Kong, China has enacted a sizeable body of domestic Chinese law which treated Hong Kong as a foreign territory.⁷⁴

The second distinctive feature is that the Joint Declaration is not self-executing,⁷⁵ Chinese domestic legislation is required to implement Annex I. Annex I contains an "Elaboration by the Government of the People's Republic of China of its basic policies regarding Hong Kong."⁷⁶ These basic policies are summarized in the twelve points of the Joint Declaration.⁷⁷

dictate the time table. For similar comments relating to the PRC's negotiation tactics in relation to the Macao Joint Declaration. See Jaw-ling Chang, *Settlement of the Macao Issue: Distinctive Features of Beijing's Negotiating Behavior*, 20 CASE W. RES. J. INT'L L. 252 (1988).

74. Dicks points out that in relation to bilateral and multilateral treaties, the U.K. has represented Hong Kong for years without protest by China. Also for certain fiscal and administrative purposes, Hong Kong is treated as a separate territory. Dicks, *supra* note 18, at 439-41.

75. Treaties under British law are never self-executing. Domestic legislation by an Act of Parliament or an Order-in-Council issued under the Royal Prerogative, is invariably required for their implementation. The position under Chinese law is unclear. See JAMES CHIEH HSIUNG, *LAW AND POLICY IN CHINA'S FOREIGN RELATIONS: A STUDY OF ATTITUDES AND PRACTICE* 250-51 (1972).

76. See JOINT DECLARATION, *supra* note 69, Annex I, at 14.

77. These twelve points are:

1. That Hong Kong ("HK") shall be established as a Special Administrative Region ("SAR") of the People's Republic under Article 31 of the Constitution.
2. That the HKSAR will enjoy a high degree of autonomy except in foreign and defense affairs which are the responsibilities of the Central Government.
3. That the HKSAR will be vested with executive, legislative and independent judicial power, including that of final adjudication and that laws currently in force will remain basically unchanged.
4. That the HKSAR Government will be composed of local inhabitants. The Chief Executive will be appointed by the Central Government on the basis of elections or consultations to be held locally. Principal officers nominated by the Chief Executive will be appointed by the Central Government.
5. That the current social and economic systems in Hong Kong will remain unchanged and so will the life style. Rights and freedoms will be protected by law as will private property.
6. That the HKSAR will retain the status of a free port and a separate customs territory.
7. That the HKSAR will retain the status of an international financial center with its foreign exchange, gold and securities markets, a free flow of capital and a freely convertible Hong Kong dollar.
8. That the HKSAR will have independent finances which will not be taxed by the Central Government.
9. That the HKSAR may establish mutually beneficial economic relations with the United Kingdom and other countries.
10. That the HKSAR may, using the name, "Hong Kong, China," maintain on its own, economic and develop cultural relations and conclude relevant agreements with states, regions and relevant international organizations.
11. That the HKSAR will be responsible for maintenance of public order within the SAR.
12. That the above principles and their elaboration in Annex I shall be

The Joint Declaration has been accepted by each side. The Joint Declaration and its Annexes have been declared to be equally binding. By its terms, therefore, the Joint Declaration is intended to be a document binding in international law.⁷⁸ The United Kingdom passed the Hong Kong Act 1985 which provided that "as from 1st July 1997, Her Majesty shall no longer have sovereignty or jurisdiction over any part of Hong Kong."⁷⁹

The real questions regarding the restoration of Hong Kong to China are as follows: what are the obligations undertaken by the government of the PRC and how can disputes over interpretation or enforcement of the terms of the Joint Declaration be resolved. First, the primary obligation of the PRC was to enact the "Basic Law" incorporating the policies of the PRC and their elaboration in Annex I of the Joint Declaration. The Basic Law has now been enacted and it will be necessary to examine if it complies with the terms of the Joint Declaration. Second, even if the Basic Law complies with the terms of the Joint Declaration, there is the question of continued compliance during the fifty year period stipulated. It should be noted that disputes over interpretation and implementation are to be resolved at the level of the Joint Liaison Group,⁸⁰ and failing that, by consultations between the British and Chinese governments.⁸¹ The Hong Kong government is represented in the Joint Liaison Group by two senior civil servants. The Hong Kong government's position is therefore transmitted by two representatives who, though members of the British-side, constitute de facto, the voice of Hong Kong. This voice is a limited one, the real leverage the Hong Kong government can exert is that a smooth transition requires the full cooperation of Hong Kong civil servants.⁸² If the PRC and British governments are

enacted in a Basic Law and that they will remain unchanged for fifty years.

Id.

78. Article 2(1)(a) of the Vienna Convention on the Law of treaties defines "treaty" as: "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Apart from the express declaration that the instrument is binding, the parties have been meticulous in attending to formalities, accreditation of persons who conducted the negotiations and initialling of the text, ratification and entry into force, and finally, registration with the U.N. in accordance with Article 102 of the U.N. Charter.

79. Hong Kong Act, 1985, ch. 15 (Eng.), at sec. 1(1).

80. Annex II of the Joint Declaration which set out the working arrangements of the Joint Liaison Group, 1984 Gr. Brit. T.S. No. 20, 23 I.L.M. 1366. The Group will function until January 1, 2000. Its work will roughly be divided into two halves, the first half to be spent in maintenance of Hong Kong's position in the General Agreement on Tariffs and Trade and the Multifibre Arrangement and other international arrangements, and the second is devising procedures to be adopted for the smooth transition in 1997, as well as assisting Hong Kong in maintaining and developing economic and cultural relations and to conclude relevant agreements with states, regions and international organizations.

81. See JOINT DECLARATION, *supra* note 69, Annex III, para. 3.

82. The items to be put in the agenda for the Joint Liaison Group meetings are discussed between the Hong Kong Government and the U.K. Government beforehand. See Sir David Wilson, Address of the Governor to the Legislative Council, at 27 (Oct. 11, 1989) (on file with

sincere in their Joint Declaration that the Hong Kong settlement should be "conducive to the maintenance of the prosperity and stability of Hong Kong,"⁸³ then they must take seriously the role of the Hong Kong government and public opinion. Although to Hong Kong residents, this is a self-evident proposition, the ambiguities of the Joint Declaration have not only undercut Hong Kong's position but also given rise to much recrimination among the British, the Chinese and the people of Hong Kong.

After it was enacted, the Joint Declaration was commended to the people of Hong Kong by the British government,⁸⁴ through the White Paper, however, no attention was drawn to the fact that key questions have remained unresolved. Those questions are: (1) the definition of "high degree of autonomy," (2) the extent that Hong Kong may enjoy the right to final adjudication to interpret the Basic Law⁸⁵ under Article 67 of the Constitution of the PRC⁸⁶ and the powers of the NPC Standing Committee to annul laws which in their opinion does not comply with the Basic Law, (3) the meaning of "elections or consultations to be held locally"⁸⁷ to choose the Chief Executive, and the definition of the phrase that the "[l]egislature shall be constituted by elections," and (4) the extent that Chinese would be used in the law. These are problems which have not yet manifested themselves but which Hong Kong will eventually have to confront. It was apparent on the face of the Joint Declaration that the parties have not been able to come to any agreement as to nationality. There has been an exchange of memoranda regarding the respective positions of the parties on this question.⁸⁸ Further, it was apparent that both the United Kingdom and the PRC will have to work in cooperation to ensure the continued application of existing international agreements applicable to Hong Kong and Hong Kong's continued participation in international organizations.

One ambiguity in the Joint Declaration which continues to threaten harmonious relationships is that "the Government of the United Kingdom

the author).

83. JOINT DECLARATION, *supra* note 69, preamble.

84. GOVERNMENT OF GREAT BRITAIN, 1984 WHITE PAPER [hereinafter WHITE PAPER].

85. Under Article 3(12) of the Joint Declaration, the PRC was obligated to enact in a Basic Law, the basic policies stated in Annex I to the Joint Declaration.

86. The current PRC Constitution was passed by the National People's Congress on December 4, 1982. See 1984 PUBLICATION OF PRC LAWS BY THE NPC STANDING COMMITTEE'S LEGAL COMMITTEE 1-36, art. 67, at 20-22.

87. JOINT DECLARATION, *supra* note 69, Annex I, § 1, at 3.

88. The Chinese position is that all Hong Kong Chinese compatriots, whether they are holders of "British Dependent Territories Citizens Passport" or not, are Chinese nationals and are therefore not entitled to British consular protection in the HKSAR. Although Britain accepts dual nationality, it will have to accept that under Article 4 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws (Apr. 12, 1930), Gr. Brit. T.S. 33 (1937), "[a] state may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses." In any event, a Hong Kong British Dependent Territory Citizen will have such tenuous ties with Britain that it may be difficult for Britain to extend diplomatic protection on the basis of the International Court of Justice's opinion in the *Nottebohm Case (Liechtenstein v. Guatemala)* I.C.J. Rep. 4 (1955).

will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability; and the Government of the People's Republic of China will give its cooperation in this connection."⁸⁹ Left out of this formulation is the Hong Kong government's autonomy which existed prior to the Joint Declaration and continues to exist today. In recent years, Hong Kong had to make some very important decisions of its own, notably: the reforms in representative government, the enactment of a Bill of Rights,⁹⁰ the seeking of a British right of abode for Hong Kong citizens,⁹¹ and the Port and Airport Development Project.⁹² The Chinese government has seen fit to publicly protest unilateral action of the Hong Kong government and was seen to be interfering in Hong Kong affairs and denying Hong Kong, the "high degree of autonomy"⁹³ which it currently enjoys and which the Joint Declaration promised for the HKSAR.

In retrospect, the British government should have admitted that key questions have yet to be resolved in the Joint Declaration and it would have been better for both the Foreign Secretary and the Prime Minister not to have promised the people of Hong Kong that a democratic government would be developed in Hong Kong in the years leading up to 1997. It would be fair to say that few in Hong Kong called into question the ambiguities in the text at the time the Joint Declaration was published. It was possible to give a liberal interpretation to the ambiguities in the Joint Declaration and in light of the British government's encouraging remarks,⁹⁴ the people of Hong Kong should be disposed to believing that the future would be bright, and democratic. Unfortunately, the PRC took a different view and it would be surprising if this was not known to the British government officials at the negotiating table.

Since the Basic Law was enacted, there have been angry protests that it does not comply in key respects with the Joint Declaration.⁹⁵ If more realistic expectations had been engendered much of this recrimination would have been avoided. In view of the nebulosity with which the key concepts have been formulated, and the wide gulf which separated the negotiators in their interpretation of these concepts, there was no alternative on the part of the British but to try to resolve the issue by further discussions. Further

89. JOINT DECLARATION, *supra* note 69, art. 4.

90. Sir David Wilson, Governor's Speech to Legislative Council 45-47 (Oct. 1989) (on file with the author).

91. *Id.* at 13-17.

92. *Id.* at 79-90.

93. JOINT DECLARATION, *supra* note 69, art. 3(2).

94. WHITE PAPER, *supra* note 84, at 30. There it stated in bold print that: "Her Majesty Government is confident the agreement provides the necessary assurance about Hong Kong's future to allow the territory to continue to flourish, and to maintain its unique role in the world as a major trading and financial centre."

95. See, e.g., Gladys Li, *A Convenient Scapegoat*, FAR E. ECON. REV., Nov. 1, 1990, at 17-18.

discussions inevitably left the door open to accusations by the Chinese that Britain was not abiding by its bargain, however unpropitious it may have been.

D. *The Basic Law*

As the Joint Declaration left key questions unanswered, it was inevitable that there would be different interpretations of these key questions among the British, Chinese and the people of Hong Kong and that the arguments arising from these differences would publicly manifest themselves in the course of later drafting. The next round of drafting was an exercise in politics and partisan interests were anxious to promote their own visions of the Basic Law. Perhaps this is no different than any constitutional convention where controversial issues are aired in public. It is a feature of earnest debate that feelings run high and the final result invariably disappoints one or more groups of the participants. That was exactly what happened in the drafting process, with the result that the Hong Kong community became deeply divided, some calling the drafting process of the Basic Law a sham.⁹⁶

The controversy centered on the interpretation of the most malleable of phrases: a high degree of autonomy, and consequently, the extent to which the people of Hong Kong may choose its new system of government. In this debate, a wide spectrum of partisan interests strongly made their views known. It must not be forgotten that the drafting and the enactment of the Basic Law was an exercise of the sovereign power of the People's Republic of China, its power under Article 31 of the 1982 Constitution to establish special administrative regions where the systems to be instituted shall be prescribed by law.⁹⁷ Thus the Basic Law Drafting Committee (BLDC) was appointed in June 1985 by the National People's Congress. In March 1990, it submitted the Final Draft of the Basic Law.⁹⁸ The BLDC was a fifty-eight member body, with twenty-three of its members drawn from a cross-section of the Hong Kong community. However, after June 4, 1989, two of its members resigned outright and two others did not attend the proceedings, so that the Hong Kong contingent was reduced to nineteen. It is no surprise that the four who left the Committee, Bishop Kwong, Louis Cha, Martin Lee and Szeto Wah, were among the liberal wing of the Hong Kong contingent leaving Hong Kong's representation weighted in favor of the business community.⁹⁹ The BLDC then set up a consultative committee in

96. *Id.*

97. PRC CONST. (1982), art. 31 states that: "[w]here necessary, the State may establish Special Administration Regions. In these regions, the National People's Congress may prescribe by law the systems to be applied in accordance with local conditions."

98. CHANG D. LI & XIAO H. GONG, HONG KONG BASIC LAW IN PERSPECTIVE 297-98 (1990) for a list of meetings of the Basic Law Committee. Professors Li and Gong were members of the Secretariat of the Basic Law Committee.

99. *Id.* at 296.

Hong Kong comprised of one hundred and fifty members, drawn from a cross-section of Hong Kong. Their appointments were made by the chairman of the BLDC, Mr. Ji Peng Fei, a State Councillor and the Head of the Hong Kong and Macao Office in the State Council.¹⁰⁰ From the start the drafting and consultative processes were orchestrated by the Chinese government.

In fairness, the members of the BLDC worked hard both in their internal deliberations and in their efforts to collect local views. However, local views extended over a wide spectrum, extending from the very conservative which did not want any democratic government, to the most optimistically liberal who wanted universal suffrage long before 1997. The conservative camp appeared to have been more effective in their lobbying efforts with the Chinese leadership who showed a distinct penchant for institutional arrangements similar to that of the colonial government.¹⁰¹ This would obviously favor the conservatives in the eventual exercise of control by the central government. The liberal camp, failing to get their conservative colleagues in the BLDC to agree to their proposals to elect the chief executive and the legislature by universal suffrage, sought alliances with British members of Parliament and made submissions to the British Parliamentary Foreign Affairs Committee whose members came to Hong Kong for a hearing. This hearing received much publicity, many people in Hong Kong hoped that the British Government would honor its commitment to establish democracy in Hong Kong before 1997.¹⁰²

When the June 4 resignations took place,¹⁰³ it infused the liberal camp

100. See *id.* at 302-07 for a list of members.

101. Deng Xiaoping, who received the BLDC on April 16, 1987, was reported to have said that he doubted whether elections by universal suffrage could produce patriots who loved both Hong Kong and China and that the concept of separation of powers was unsuitable to Hong Kong because it was not a country. See Emily Lau, *Now, Down to Basics*, FAR E. ECON. REV., Apr. 30, 1987, at 12; Emily Lau, *Structure of the SAR Government*, 20 CASE W. RES. J. INT'L L. 51, 59 (1988).

102. The Foreign Affairs Committee of the House of Commons (FAC) held five days of hearings in Hong Kong. It subsequently published a report in two volumes. Foreign Affairs Committee, *Hong Kong Second Report, 1989-1990*, H.C. 281-I. In their report, the Committee stated: "We believe that full democracy must be introduced . . . as soon as possible." *Id.* at xiii-xiv. In the Legislative Council debate in July 1989, the principal proponent of democratic government in Hong Kong, Mr. Martin Lee., Q.C., was moved to state that he agreed with the FAC. Hon. Martin Lee, Q.C., Motion Debate on the Report of the Foreign Affairs Select Committee, draft speech to Legislative Council, July 5, 1989 (on file with California Western International Law Journal). The British Government's response was, however, a guarded one. It merely stated that it has taken careful note of the Committee's recommendations but "as far as the decisions which the Government must take about the election in 1991 and 1995 are concerned, our guiding principles will be to take full account of Hong Kong opinion, and to try to ensure that the system which we establish before 1997 is durable and able to serve Hong Kong well in the years thereafter." SECOND REPORT OF THE FOREIGN AFFAIRS COMMITTEE, HONG KONG 1988-89, (presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs, on file with California Western International Law Journal).

103. Immediately after the June 4 incident came through the Hong Kong media, Mr. Louis Cha and Bishop Kwong announced their resignation from the Basic Law Drafting Committee.

with renewed vigor after receiving much public support.¹⁰⁴ However, Martin Lee and Szeto Wah, who were the stalwarts of the liberal camp, indicated that they would stay away from the work of the BLDC in view of the June 4 resignations leaving no proponent for the liberal vision in the Committee. The British government was then pressed by the Hong Kong government and a constant stream of lobbyists from Hong Kong to seek an accommodation with the Chinese government.¹⁰⁵ In the process the Hong Kong government had to adjust its own pace of democratization of the legislature to converge with the final model of the Basic Law.¹⁰⁶ The more vocal regarded the accommodation reached between the British and Chinese governments as a sell-out by the British.¹⁰⁷

In 1990, Britain held few, if any, bargaining chips. The Chinese held the upperhand in getting an agreement interpreted in their favor. Despite the strong words expressed by the British government against the deeds perpetrated on June 4, the final form of the Basic Law did accommodate the liberal camp by acknowledging the election of both the chief executive and the legislature by universal suffrage. The year 2007 was set as the year that the Hong Kong Legislature may by a two thirds majority, vote to determine its own future.¹⁰⁸ In its final form the Basic Law enables the colonial legislature to continue to function after 1997, thus allowing a smooth transition.¹⁰⁹ This shows yet again a degree of pragmatism which has historically characterized the Chinese leadership's attitude toward Hong Kong. Hong Kong now has bargaining power. But, it also needs an effective voice by which the feelings of the people of Hong Kong can be articulated independently of the British government. Now that the Basic Law is enacted, the stage is set for finding this voice.

E. A High Degree of Autonomy

With the Basic Law enacted, it is possible to take stock of the meaning of the phrase "high degree of autonomy" in the context of the municipal law of the HKSAR. A plain language interpretation of the word "autonomy"

104. The Liberal camp was led by Martin Lee and Szeto Wah who were at the forefront of the mass demonstrations held in Hong Kong in protest against the June 4 incident. The resignations of their colleagues (Mr. Cha and Bishop Kwong) accorded with their own position of abstaining from the meetings of the Drafting Committee. This also served to legitimize their stand.

105. See, e.g., the HK Standard's report of a call by Lo Tak-shing, a prominent conservative political figure and Vice-Chairman of the Basic Law Consultative Committee. Lo, *Go Slow on Reform*, HONG KONG STANDARD, July 21, 1989.

106. The final model of representative Government is contained in Article 68 and Annex II to the Basic Law. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990) [hereinafter BASIC LAW].

107. See, e.g., Li, *supra* note 95, at 17-18.

108. BASIC LAW, *supra* note 106, Annex II, § III, at 60.

109. The 1995 Legislative Council make-up will follow the make-up of the first SAR legislature as shown in Annex II to the Basic Law to allow for the 1995 Legislative Council to become the first SAR legislature. BASIC LAW, *supra* note 106, Annex II, § I, at 59.

suggests the ability to make decisions independent of any external influence. If it were not qualified, there would be little argument over interpretation. However, the qualifying words "high degree" now invest the phrase with a sense of indeterminacy. It is necessary to examine the Basic Law for a definition of "high degree of autonomy" in this context.

First one must realize that there is no complete autonomy. The HKSAR is a creation of the National People's Congress under Article 31 of the 1982 Constitution.¹¹⁰ It is especially true in the PRC, what is created by one law can be struck down by another. The Chinese Constitution itself has undergone many revisions since 1954, underlining the ease with which basic legal norms can be changed within the PRC.¹¹¹

On the other hand, Article 159 of the Basic Law provides that before any amendment is made, the Committee for the Basic Law shall study the amendment bill and submit its views to the National People's Congress and no amendment shall contravene the "established basic policies of the People's Republic of China regarding Hong Kong."¹¹² The established policies are those set out in the Joint Declaration which the preamble of the Basic Law purports to implement.¹¹³ The Basic Law Committee was set up by the National People's Congress by a resolution on April 4, 1990, as a working committee under the Standing Committee of the National People's Congress.¹¹⁴ It consists of twelve members, six from the PRC and six from Hong Kong, who are jointly nominated by the chief executive, president of the Legislative Council and the chief justice of the Court of Final Appeal of the HKSAR.¹¹⁵

110. PRC CONST. art. 31 (1982).

111. The first Constitution (P.R.C. CONST.) was enacted on September 20, 1954, the second on January 17, 1975, the third on March 17, 1978, the fourth on December 4, 1982, the fifth and most recent change was made in 1988. Article 64 of the 1982 Constitution provides that "[a]mendments to the Constitution are to be proposed by the Standing Committee . . . or by more than one-fifth of the deputies to the National People's Congress and adopted by a majority vote of more than two-thirds of all the deputies to the Congress." P.R.C. CONST. art. 64, at 50 (1982). Considering that the National People's Congress vote with near unanimity, it is not difficult at all to change the Constitution given a strong leadership.

112. BASIC LAW, *supra* note 106, art. 159, at 55.

113. In essence, the Preamble states that the Basic Law was enacted by the National People's Congress in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong. The Preamble defines "basic policies" as the basic policies of the People's Republic of China regarding Hong Kong which were elaborated by the Chinese Government in the Sino-British Declaration. Thus, Sino-British Declaration is imported into the domestic law of the PRC for the purpose of the future HKSAR. BASIC LAW, *supra* note 106, Preamble at 5.

114. Decision of the Third Session of the Seventh National People's Congress of April 4, 1990, appended to the Basic Law published by the Consultative Committee for the Basic Law (BLCC). BASIC LAW, *supra* note 106, at 68.

115. Appendix to Decision of National People's Congress entitled "Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special administrative Region under the Standing Committee of the National People's Congress." BASIC LAW, *supra* note 106, at 69.

Apart from foreign affairs and defense, the Central People's Government has no control over the HKSAR except in extreme circumstances. Article 18 provides that if war is declared, or turmoil within endangers national unity or security beyond the control of the government, a state of emergency may be declared.¹¹⁶ In that case, the Central People's Government may issue orders applying the relevant national laws. The national laws that would be used are set out in Annex III.¹¹⁷ These would provide a final legal sanction against an unruly Hong Kong. However, national laws will have to be enforced in Hong Kong, and will inevitably be subjected to the judicial examination in Hong Kong. With the outlook of common law judges, interpretation and application of these socialist laws may surprise the Central People's Government.¹¹⁸

Laws made by the SAR Legislature may not contravene the Basic Law,¹¹⁹ but insofar as relations with the Central Government goes, a right of review is reserved to the Standing Committee for all legislation regarding affairs within the responsibility of the Central Authorities or regarding the

116. Last paragraph of Article 18 reads:

In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil with the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.

BASIC LAW, *supra* note 106, art. 18, at 11.

117.

The following national laws shall be applied locally with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong special Administrative Region: (1) Resolution on the Capital, Calendar, National Anthem and National Flag of the People's Republic of China; (2) Resolution on the National Day of the People's Republic of China; (3) Order on the national Emblem of the People's Republic of China Proclaimed by the Central People's Government; . . . (4) Declaration of the Government of the People's Republic of China on the Territorial Sea; (5) Nationality Laws of the people's Republic of China; (6) Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities.

BASIC LAW, *supra* note 106, art. 18, at 61.

118. Common law judges traditionally interpret statutes presuming that the civil liberties of individuals are preserved unless there is clear and unequivocal statutory language to the contrary. *See, e.g.,* JULIUS STONE, LEGAL SYSTEM AND LAWYER'S REASONING 348-54 (1964). It is also important to note Article 39 of the Basic Law which states that the International covenant on Civil and Political rights as applied to Hong Kong shall be implemented through the laws of the Hong Kong SAR. It further states that "[t]he rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of the Article." BASIC LAW, *supra* note 106, art. 39, at 17. A Hong Kong SAR judge will thus have to interpret all national laws in a manner consistent with the ICCPR.

119. "No law enacted by the Legislature of the Hong Kong Special Administrative Region shall contravene this [basic] law." BASIC LAW, *supra* note 106, art. 11, at 8.

relationship between the SAR and Central Authorities.¹²⁰

The difficulty in defining "high degree of autonomy" is that in the context of the Chinese system of government, it is in the end, a political rather than a legal concept. In Hong Kong, as in the West, the government power is limited by the laws; in China, governmental power easily supercedes the law. In the preamble to the 1982 Constitution, it was stated that "[u]nder the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong thought, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and follow the socialist road . . . and gradually turn China into a socialist country with a high level of culture and democracy."¹²¹

Article 1 states that "[t]he People's Republic of China is a socialist state under the peoples' democratic dictatorship led by the working class and based on the alliance of workers and peasants."¹²² Viewed against the four cardinal principles¹²³ which stipulate that all PRC Citizens must uphold the pursuit of the socialist road, the proletarian dictatorship, Communist Party leadership and adherence to the Marxist-Leninism-Mao Zedong Thought repeatedly espoused by the communist leadership, it is clear that the Communist Party and its ideology reins supreme in China. Notwithstanding the fact that in 1982, the Charter of the Chinese Communist Party was amended to provide that the Party and its members must abide by the laws of the State, the Communist Party remains the prime moving force in the formulation of the laws.¹²⁴ Laws in the PRC are traditionally seen as the instruments of State policy. Deng Xiaoping stated:

'One country, two systems' must be discussed on two levels. On one level is the fact that within a socialist country we will be permitting a specially privileged area to be capitalist not just for a short period of time, but for decades or a full century. On another level, we must affirm that the principal system throughout the country is socialist. . . .

That we uphold the socialist system and the 'four cardinal principles' was determined long ago, and is inscribed in our

120. Article 17 of the Basic Law empowers the NPC Standing Committee to review HKSAR laws regarding affairs within the responsibilities of the Central Authorities and the Region. The Standing Committee, in finding that the relevant law contravenes the Basic Law, return the law but may not amend it. Any law returned by the Standing Committee shall immediately be invalidated but the invalidation shall not have retroactive effect, unless otherwise provided for in the laws of the Region. BASIC LAW, *supra* note 106, art. 17, at 10.

121. PRC CONST. at 5 (1982).

122. PRC CONST. art. 1, at 11 (1982).

123. 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. 9, n.14 (1988).

124. Perry Keller, *Legislation in the People's Republic of China*, 23 U. BRIT. COLUM. L. REV. 653, 657-60 (1989).

Constitution. The policies we formulate, including our policies toward Hong Kong, Macao and Taiwan, are also determined on the basis of upholding the four cardinal principles. Without the Chinese Communist Party, and without China's socialism, who could formulate this type of policy?¹²⁵

Deng Xiaoping's attitude was further explained by his speech to the Basic Law Drafting Committee in April 1987.¹²⁶ In this speech he reiterated his position that if the basic interests of his Central Government were to be threatened, then the Central Government would act to protect itself.¹²⁷ In the light of the June 4 incident, the present Chinese leadership may well feel uneasy about Hong Kong. Its functionaries, such as the Deputy Director of the Hong Kong and Macao Affairs Office or the Head of the Hong Kong Branch of the NCNA, have felt obliged to berate the press over recent moves by the Hong Kong government in an exercise of the high degree of autonomy presently allowed it by the British government.¹²⁸ If that is a foretaste of what the PRC meant by "high degree of autonomy," then they ascribe the narrowest possible meaning to the phrase at present. Whether or not a higher degree of flexibility will be given will depend on the political winds of the future and the dexterity with which the future leaders of the SAR are able to operate links with the Central Government to the advantage of Hong Kong. They will have to acquire an instinct for dealing effectively with the Chinese leadership. This instinct will be completely different than the instinct acquired over the past 155 years in dealing with successive British governments. Hong Kong has had much experience in identifying and dealing with the key players in British bureaucracy and politics. This experience will not be comparable to dealings with the bureaucracy and the political leaders of the Chinese People's Republic.

Although the operation of the institutional arrangements for the future HKSAR must be seen against a political background, and some have argued that Hong Kong should depend more on pure political considerations rather

125. Youyu, *supra* note 123, at 9.

126. LEE & GONG, *supra* note 98.

127. Youyu, *supra* note 123, at 10-11.

128. In what became known as the "Yang Yang incident," the Hong Kong government refused to hand over a Chinese athlete to the PRC. He had been involved in demonstrations in Hong Kong after the June 4 incident. Instead he was allowed to leave for the U.S. Further, it became public knowledge that many Chinese dissidents came through Hong Kong on their way to the West. To teach Hong Kong a lesson, the PRC refused to take back illegal PRC immigrants resulting in a massive back log and only relented after consultations with the British government. The publication of the Hong Kong government's infrastructural plans received public calls for consultations by the Chinese government. The Chinese were totally dissatisfied with briefings and the supply of information, but insisted upon consultation. The Hong Kong government on the other hand, rightly in the writer's view, took the position that the plans were for Hong Kong to decide upon on the basis of the present high degree of autonomy granted to it by the British government. See *Political Feud Clouds Hong Kong Airport*, ASIAN WALL ST. J., Oct. 1, 1990, at 1. See also *Hong Kong's Shift on Airport Raises Doubt*, ASIAN WALL ST. J., Oct. 8, 1990, at 1.

than on the Basic Law,¹²⁹ it is still important to ensure that Hong Kong is able to control its own future. Arrangements should be strengthened now because all Hong Kong institutions will have to operate under a socialist umbrella. The three essential areas that should be looked at now are: (1) the legal system, (2) the institutions of government, and (3) Hong Kong's international relations.

F. The Hong Kong Legal System in a Socialist Setting

It should be noted that the Basic Law is only seen by the Chinese leadership as a tactical step in furthering their vision of one country, two systems, and despite the legal reforms of the past decade, China cannot be said to possess a legal system close to what Hong Kong would regard as a system where the Rule of Law prevails. It has been observed that:

China's leaders, none of whom has had formal training in Chinese or foreign law, have assumed that the emulation of foreign laws will better enable China to advance economically even as these same individuals have hindered the development of conditions and institutions—such as an independent judiciary—central to the effective operation of such law abroad.¹³⁰

The June 4 resignations served to underline a great and pressing need to examine the existing legal system in Hong Kong and to devise means by which its best features may be preserved after 1997, but at the same time acknowledge that no system can remain static. It must not be forgotten that one of the institutional characteristics which made Hong Kong prosper was its legal system. The fact that the Chinese leadership is prepared to allow the Hong Kong legislation continued existence in preference to the socialist legal order in China accounts for their acknowledgement that it contributes to maintaining Hong Kong as an economic dynamo. Any overt tinkering by the PRC in the Hong Kong legal system would most probably involve a cost in terms of withdrawn foreign investment or flight of local capital. The most likely line will be the exertion of maximum control with the lowest cost. This would mean exerting control behind the scenes. If Hong Kong is to retain its autonomy, it must ensure that any overt interference would result in high cost to those interfering, while ensuring that its own systems cannot be eroded from within. This strategy will ensure that Hong Kong's legal system is fully able to function with its present vitality beyond 1997.

129. Joseph 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 (1988).

130. William Alford, "Seek Truth from Facts"—Especially When They are Unpleasant: America's Understanding of China's Efforts at Law Reform, 8 PAC. BASIN L.J. 177, 194-96 (1990).

At this point, one may well ask why the legal system is so important. At its most basic level, its importance must lie in the deeply felt need in modern times to protect the individual against an omnipotent state. Lau and Kuan, in their study of the ethos of the Hong Kong Chinese, have shown that despite difficulties in understanding the law, 75.4% of their respondents regarded the legal system of Hong Kong to be just.¹³¹ Also significant was that despite the fact that the legal system was a foreign legal system in the sense that its language was English and that it was imported from England, 47.6% of their respondents did not regard the legal system as being foreign.¹³² Their studies further suggested that those who are distrustful of the Chinese government are "more likely to regard the present common law system as not alien."¹³³

The apparent acceptance of the legal system by the Hong Kong Chinese is not a cause for complacency. The Lau and Kuan study further suggests that the common law system in Hong Kong society has proceeded largely on a utilitarian or instrumental basis, "whereas the philosophical and ethical foundations on which the legal system operates still contain traces of . . . Confucian and familistic considerations."¹³⁴ Thus, while 68.1% agreed that the protection of freedom is the major objective of law, and the support for freedom of speech was overwhelming 97.6%, only a minority 22.8% believed that such a right is inborn or inalienable.¹³⁵ Only 77.2% would only allow the press the right to free expression if they did not publish false news and there was a nearly 50-50 split on whether or not there should be a right to privacy.¹³⁶ Further, nearly 40% agreed to the admissibility of illegally obtained evidence and nearly 80% thought that the government should enact laws to penalize those who failed to take care of their parents.¹³⁷ Lau and Kuan observe that the Hong Kong Chinese tend to share the same lack of concern for procedural fairness as their Confucianist forefathers where determination of criminality was not based on the common law principle of no punishment without law, but depended on whether the suspect had acted in a manner in which he brought damage to society.¹³⁸

131. LAU & KUAN, *supra* note 12, at 124.

132. *Id.* at 127.

133. *Id.* at 129.

134. *Id.* at 143.

135. *Id.* at 136-37.

136. *Id.* at 137.

137. *Id.* at 137, 139.

138. *Id.* at 132-33. Lau and Kuan observe that Confucian justice is substantive rather than procedural. Citing Ch'u Tung-tsu, they point out that the practice of deciding cases according to the Confucian classics not only occurred in ancient times, but persisted well into the Ching dynasty. This principle of analogy, proceeding on the basis that doing what one ought not to do harms society, is generally referred to as jingyi jueyu (judging crimes by analogy with the Classics). *Id.* (citing C'HU TUNG-TSU, LAW AND SOCIETY IN TRADITIONAL CHINA 275-76 (1965)); Chang Wei-jen, Traditional Chinese Attitudes Towards Law and Authority (1986) (unpublished paper presented to the Symposium on Chinese and European Concepts of Law held in Hong Kong on March 20-25, 1986, at 7, on file with California Western International Law

Despite the fact that the Hong Kong Chinese are becoming more willing to take their cases to court,¹³⁹ the attitude of the Chinese population to the legal system is neither coherent nor stable. The designers of the legal system of the future should therefore ensure that public support for the legal system is strengthened by reducing public alienation and improving its efficacy.

The legal system in Hong Kong was derived entirely from the British Crown. The basic constitutional documents are the Letters Patent.¹⁴⁰ Also set forth are the Royal Instructions to the Governor,¹⁴¹ promulgated by the Queen as advised by Her Government. The legislative power of Hong Kong is also derived from the Letters Patent. The laws of Hong Kong are presently comprised of the following: (1) statutes made by the Governor by and with the consent of the Legislature,¹⁴² (2) the common law of England and rules of equity except insofar as they are oppressive,¹⁴³ (3) Act of Parliament specifically incorporated by reference in local legislation,¹⁴⁴ (4) act of Parliament which either expressly or by necessary implication applies to Hong Kong,¹⁴⁵ and (5) Orders-in-Council made by the Queen on the advice of her Privy Council.¹⁴⁶

Journal).

139. The number of civil cases rose from 3.2 per 1000 population in 1961 to 11.7 per 1000 population in 1986. LAU & KUAN, *supra* note 12, at 141-42.

140. The Letters Patent contain the Governor's Commission to govern Hong Kong and set out the institutions he is to govern. HONG KONG LETTERS PATENT 1982, app. I (L.N. 201/91).

141. The Royal Instructions give the Crown's general instructions to the Governor for the governance of the Colony. HONG KONG ROYAL INSTRUCTIONS 1991, app. I (L.N. 202/91).

142. The Hong Kong statutes comprise at present 26 loose-leaf volumes. They are called Ordinances to show their local nature and their subordination to Acts of Parliament, which in Colonial parlance are called "imperial legislation." *See, e.g.,* the Colonial Laws Validity Act 1865 (28 & 29 Vict. c 63) which declares local legislation contrary to an Act of Parliament, applicable expressly or by necessary implication to the Colony in question, to be void. The Hong Kong legislature is called the Legislative Council, which presently consists of sixty members. In 1991, eighteen seats of this Legislative Council will be elected by universal suffrage.

143. *See* Section 4, Application of English Law Ordinance, Chapter 88, Laws of Hong Kong. So far, only the English law of domestic relations and succession have been held by the local courts to be oppressive. In those areas, instead of applying the English common law, the courts have applied Chinese customary law, held to be the Ta Tsing Lu Li, in relation to marriages, adoptions, divorce, and succession prior to 1971 when Hong Kong passed its own statutes dealing with domestic relations and succession. However, in relation to New Territories land, the New Territories Ordinance provides that the courts shall have power to apply Chinese laws and customs which again, have been held to be the Ta Tsing Lu Li.

144. *See* Schedule to the Application of English Law Ordinance, Chapter 88, Laws of Hong Kong. The Hong Kong legislature has found it convenient to incorporate certain ancient British statutes such as the Statute of Frauds and the Prescription Act.

145. Many nineteenth century British statutes were enacted for the empire, notably the Merchant Shipping Acts. Also, acts implementing bilateral or multilateral treaties are made applicable to Hong Kong (e.g. the Carriage of Goods by Sea Act and the Carriage of Goods by Air Act) by Acts of Parliament either directly or by Orders-in-Council made thereunder.

146. Orders-in-Council, being prerogative Orders, have legislative effect in Hong Kong. The most famous Order-in-Council relevant to Hong Kong is the New Territories Order-in-Council of 1899 which extended the application of all Hong Kong laws to the New Territories which was leased to Britain for 99 years by the Convention of Peking 1898.

From this it can be seen that Hong Kong has very little formal autonomy although it has de facto autonomy. The de facto autonomy lies in the exercise of restraint by the British Parliament and the British Executive in legislating for Hong Kong. Acts of Parliament are made applicable to Hong Kong only where such laws are necessary and helpful to Hong Kong's development internationally, e.g. acts dealing with air and sea transport for which the United Kingdom had undertaken treaty obligations and then only after consultation with the Hong Kong government. Furthermore, the legal tradition, embedded in the British system of government, ensured that colonial governance abided by well-known and generally accepted normative standards. Little interference by the government in Britain was considered necessary. Until recent years, when Hong Kong felt it had sufficient legal personnel, all colonial administrators had to undergo legal studies and had to pass a law examination before confirmation to their posts.¹⁴⁷ While the examination was originally intended to give a degree of legal training to administrators who acted as district officers and who had to undertake magisterial as well as administrative duties, it meant that there were both knowledge and respect for the law within the administration. It was a mistake to abolish the law examinations for Administrators,¹⁴⁸ especially since with the advent of 1997, some form of in-service legal training will be greatly desirable.

The legal tradition has often been stated as the Rule of Law. As stated by Dicey, the Rule of Law consists of three concepts: the absolute supremacy of regular law as opposed to the influence of arbitrary power so that a man may only be punished for a breach of law, that no man is above the law, which excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary courts of the land, and that general constitutional principles of the rights of private persons are developed by judicial decisions.¹⁴⁹

These concepts have been subsequently expanded by Wade in recent times as comprising five different aspects: (1) all governmental action must be taken according to law in the sense that all administrative acts that infringe individual rights must be authorized by law; (2) that the government should be conducted within a framework of recognized rules and principles which restrict discretionary power and prevent abuse of discretionary power; (3) that disputes as to the legality of acts of government are to be decided by courts which are wholly independent of the executive; (4) government

147. Colonial administrators who acted as district officers had to act in addition as magistrates. This duty was subsequently taken over by legal professionals in the 1950s, but law examinations continued to be compulsory until the late 1970s.

148. The examinations were abolished in 1979, the year the writer left the Administrative Service to begin practice at the private bar.

149. A. V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188, 195 & 202 (1973). See also ALLAN R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW 37-40 (1989).

officials should not enjoy unnecessary exemptions or privileges; and (5) the rule that no one should be punished except for legally defined crimes should equally apply to administrative sanctions.¹⁵⁰ Complementing Wade's formulation are principles put forward by Raz: that all laws should be prospective, open and clear; laws should be relatively stable; the making of laws should be guided by open, stable, clear and general rules; the independence of the judiciary should be guaranteed; the principles of natural justice should be observed and over which the courts should have review powers; the courts should be accessible; and the discretion of the crime prevention agencies should not be allowed to hinder the law.¹⁵¹

All of these formulations came together in the Declaration of Delhi 1959 by the International Commission of Jurists¹⁵² which defined the Rule of Law as comprising the following elements: the right to a representative and responsible government, the law should apply certain minimum standards or principles, including those contained in the Universal Declaration of Human Rights¹⁵³ and the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁵⁴ delegated legislation should be subject to judicial control by applying the doctrine of ultra vires, a citizen who is wronged should have a remedy against the state or government, the criminal process should ensure a 'fair public trial' which involves such elements as presumption of innocence of the accused, independence of the judiciary, responsibility of an organized and autonomous legal profession in aid of enforcement of the foregoing requirements.

The Rule of Law requires recognition not only of minimum procedural standards but of minimum substantive standards of conduct on the part of all the actors in the legal system: legislators, administrators, law enforcers, judges, and the general public. A general public who is either not aware of or is unable to articulate its rights, is less likely to find an administration committed to the Rule of Law. Equally, a public aware of its rights is more likely to become frustrated with an administration with less than true commitment to the Rule of Law.

At the core of the Rule of Law is the common law. Common law judges developed the bulk of the procedural standards required by the Rule of Law, for example, that laws should be passed by the legislature in accordance with its rules of procedure and assented to by the governor and that the rules of natural justice¹⁵⁵ be observed in all proceedings of a judicial or quasi-judicial character. There is a large and growing body of procedural common

150. H. W.R. WADE, *ADMINISTRATIVE LAW* 23-25 (6th ed. 1984).

151. Joseph Raz, *The Rule of Law and Its Virtue*, 93 L.Q. REV. 197, 198-202 (1977).

152. *Declaration on the Rule of Law* by the International Commission of Jurist, Conference at New Delhi, India, 2 J. OF INT'L COMMISSION OF JURISTS 7-43 (1959).

153. U.N. G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948).

154. Nov. 4, 1950, Europe T.S. No. 5, 213 U.N.T.S. (entered into force Sept. 3, 1953).

155. The "rules of natural justice" comprise two rules: (1) that no one should judge in his own cause; (2) that each party to a hearing should have an opportunity to adjudicate his case fairly.

law concerning the investigation of crimes and pre-trial and trial procedure, including rules of evidence, which ensure that the individual is not subjected to the arbitrary use of state power and to ensure that an accused person is given a fair trial. There is also a growing body of administrative common law that dictates public administration must be conducted within legally acceptable procedural and substantive standards. The temperament of common law judges has been to interpret the law on the side of civil liberty unless absolutely compelled to do otherwise by clear and unequivocal legislation. Thus, along with judicial activism, it is important to develop minimum substantive standards beyond which legislation cannot tread. The Hong Kong government is promoting a Bill of Rights incorporating the International Covenant on Civil and Political Rights and trying to entrench the Bill of Rights in the constitutional documents of Hong Kong so that it becomes the yardstick by which the legality of other laws is determined.¹⁵⁶

The development of the Rule of Law depends upon perceptions of present and future needs. The Lau and Kuan study shows that the designers of the future legal system cannot count on coherent or stable support from the general public. This is a salutary reminder to all legal professionals that they cannot assume that the fundamental ideas and mores of the common law underpinning the Rule of Law are commonly shared by the community in Hong Kong. To strengthen the legal system they therefore cannot rely upon self-perpetuation of the Rule of Law. Without community support, learning the common law will in time become no more than the learning of a set of rules with no spirit to propel it from behind and thus, the law gives way to the dogmas and expediencies of the day. The designers of the legal system must realize that the Rule of Law is at its most basic level, a frame of mind which is commonly shared by the community.¹⁵⁷ Law is a participative process which demands that all actors in the process are not only aware of, but are ready to fulfill their respective roles. No perception of present and future needs will be complete without recognition that law is a participative process. If this is correct, then every legal professional will have to ask whether the present legal system provides sufficient scope for participation. Is the present legal system sufficiently intelligible for the public to be able to appreciate and internalize its fundamental ideas and then act as responsible participants in the process of its development in the courts, in the legislature,

156. The Bill of Rights 1990 is beyond the scope of this opinion, it examines the application of human rights in Hong Kong. Perry Keller, H.L.S L.L.M., will be producing a paper on the subject. Mr. Keller is now lecturer at the University of Manchester.

157. Roscoe Pound ended his book *The Spirit of the Common Law* with a statement which bears constant repetition. He states that the ideas of the common law constitute realities as compared to ephemeral rules and dogmas and that these realities are "so much part of the mental and moral make-up of our race, that much more than legal and political revolutions will be required to uproot them." ROSCOE POUND, 1 *THE SPIRIT OF THE COMMON LAW* 216 (1931). G.W. Bartholomew, *The Singapore Legal System*, in *SINGAPORE: SOCIETY IN TRANSITION* 84, 100 (Riaz Hassan ed., 1976); stated that the common law system resides "in the mental attitudes and habits of legal thought that historically evolved in England and which are still used and followed by lawyers and judges in those systems which are still referred to as common law systems."

and in all fora of public debate? This raises two immediate issues: the issue of language of the law, and the extent to which all legal professionals take seriously their educative role.

Although 98% of the Hong Kong population is Chinese, all court proceedings are conducted in English. Witnesses and defendants may use the services of interpreters.¹⁵⁸ A working party appointed by the Chief Justice in 1989 to consider the greater use of Chinese in the courts had suggested the greater use of Cantonese in oral proceedings and in the translation of civil proceedings, but the implementation of these suggestions is presently bogged down by opposition from the expatriate sector of the legal profession. Since 1989, all bills passed by the Legislature are passed in both English and Chinese. A committee charged with the duty of advising the government on the rendering of the remainder of the statutory laws into Chinese has been working since 1988, but has not passed any legislation.¹⁵⁹ The Law Drafting Section of the Attorney-General's Chambers has less than twenty bilingual lawyers working on Chinese legal drafting. It seems there is insufficient determination on the part of the government to promote the use

158. The Court Interpreter Service comprises over 150 professional interpreters, many of whom can speak and interpret from multiple Chinese dialects to English and vice versa. The writer believes that their services are grossly under-rated, which is a reflection on the commitment of the Colonial Government to the use of the Chinese language in the courts.

159. This is the Bilingual Laws Advisory Committee set up in October 1988 under the Official Language Ordinance, of which this writer is a member. The slow pace of the Committee's work has been due in large part to the tremendous scope for argument as to the appropriate Chinese equivalents for English legal terms. Notwithstanding the existence of a number of Chinese-English legal dictionaries, the Committee has had to deliberate long and hard on all drafts put before it. It took, for example, one year, with the Committee meeting three hours every fortnight, to consider the Chinese version of the Interpretation and General Clauses Ordinance which comprises some seventy clauses. From October 1990, the membership of the Committee was expanded by eight persons but as of July 1991, no Chinese legislation emanating from the Committee has been passed by the Legislature. See Michael Thomas, *Development of a Bilingual Legal System in Hong Kong*, 18 HONG KONG L.J. 15 (1988). The plans outlined by the Attorney-General have been very slow in implementation and the slow pace has recently been the subject of criticism by the Editor of the Hong Kong Law Journal, see Editorial, *The Bilingual Legal System in Hong Kong: A Gloomy Future*, 21 HONG KONG L.J. 14 (1991). However, in response to this writer's views expressed in this article, the incumbent Attorney General, Jeremy Mathews, had this to say:

In response to your assertion that the Government lacks commitment to the bilingual laws programme, may I take this opportunity of re-stating our unswerving commitment to what is undoubtedly a project of great historical significance. It is, I suggest, a measure of that commitment that about one-half of my law draftsmen are now working on the bilingual laws programme. We have just embarked on a pilot project using the services of Chinese Language Officers in other parts of the Government in an effort to improve further our productivity in this area. Wherever possible, our already over-stretched resources are deployed towards this historical undertaking. I fully understand your concerns over an apparent lack of progress, but I should not like you to think that there is any indication that we are losing heart—far from it. But I take great encouragement from the fact that this project has your whole-hearted support.

of Chinese in the law.¹⁶⁰ The general retort to this proposition is that Hong Kong is an international city and English, being the lingua franca of international commerce, should be preserved. But, it is also argued that the legal process should be sufficiently intelligible to the community. With the reunification of Hong Kong with the PRC, where the only official language is Chinese, the political legitimacy of a common law system operating principally in the English language is bound to be eroded. It cannot be assumed the concept of one country, two systems will shield the common law from change. The Basic Law itself states that “[i]n addition to the Chinese language, English may also be used as an official language.”¹⁶¹ It is arguable that there is an implied primacy of Chinese and there is every chance that this will become a political rather than a practical issue. Frequent and more open discussion of the problems of application of bilingualism in the courts is needed so that the majority of the community can participate in the justice system. Any solution should focus on the existing training in the law schools. It should be possible to invite those legal experts from the PRC and Taiwan with exposure to the common law system to participate in the formulation of solutions and an implementation plan.

We now come to the second issue, the extent to which legal professionals take seriously their educative role. Education does not lie in just imparting knowledge but in educating by example. In the Lau and Kuan study, they found that nearly all of their respondents felt that officials should be setting moral examples.¹⁶² As the legal process is part of the process of governance, examples set by professional actors in the process are of prime importance in departing the values which are needed for the survival of the Rule of Law. This would involve a critical re-examination of the role of law teaching in the law schools to see if in fact the next generation of lawyers are given the necessary training and the outlook to play their part in this participative process. Questions will have to be asked as to whether law schools merely teach law as an internal system or a social relevance where lawyers of the next generation go forth into society with values which the community is ready to identify with and adopt. Questions will also have to be asked whether this next generation of lawyers will have the communication skills in both English and Chinese to perform this crucial role. Among the present generation of legal professionals, it must be asked whether what

160. Tomasz Vyejski, *The Future of the English Language in Hong Kong Law*, in *THE FUTURE OF THE LAW IN HONG KONG* 164-85 (Raymond Wacks ed., 1989). Mr. Vyejski traces language issues in other common law countries which were formerly British colonies, such as Sri Lanka and Malaysia, and finds that despite nationalistic factors, English has continued to be the dominant language of the law. He believes that this was so because the common law became entrenched in these countries but it remains to be seen whether the common law system will survive in Hong Kong. The issue of bilingualism must now be addressed with speed and in a spirit of practicality before it becomes politicized and political expediency then dictates the pace, resulting in a possible dilution of the legal order.

161. BASIC LAW, *supra* note 106, art. 9, at 7.

162. See LAU & KUAN, *supra* note 12, at 153.

they are doing is sufficiently intelligible and attuned to the needs of the public and whether they have taken every opportunity to discuss openly problems besetting the legal system. Important in this process is the existence of a free and well informed press able to consider problems critically and then comment with accuracy and candor. It must not be forgotten that the Rule of Law depends for its survival upon a frame of mind based on common acceptance of its fundamental ideas. This is the mental outlook that Hong Kong should arm itself with in greeting the future.

Article 18 of the Basic Law provides that the laws in force in the HKSAR shall be: (1) the Basic Law; (2) the laws previously in force in Hong Kong, i.e., the common law, rules of equity, ordinances and subordinate legislation and customary law; (3) National laws listed in Annex III, and to which the Standing Committee of the NPC may add but only in respect to laws relating to defense and foreign affairs and matters outside the limits of the autonomy of Hong Kong and then, only after consultation with the Basic Law Committee under the Standing Committee; and (4) relevant national laws applied to Hong Kong by order of the Central People's Government in the event of a declaration of war.¹⁶³ Paraphrasing Hart,¹⁶⁴ Article 18 contains a core of certainty, which is that Hong Kong can continue with the common law system with its fundamental ideas and values, and a penumbra of doubt as to whether any further national laws will be added to the eight on the list and how the NPC Standing Committee will act in interpreting the laws of Hong Kong in the areas of defence and foreign affairs which are reserved to the central government.

The SAR's autonomy in legislation will be somewhat affected as the Basic Law reserves to the Standing Committee the right to return and thus invalidate legislation contravening the Basic Law regarding affairs within the responsibility of the central authorities or regarding the relationship between the central authorities and the region.¹⁶⁵ Judicial autonomy is also affected by the Standing Committee's power to interpret the Basic Law. The power to interpret the laws in adjudicating cases is delegated to the judiciary except in those cases which concern affairs within the responsibility of the central authorities or the HKSAR where the court shall consult the NPC and shall be bound by its interpretation.¹⁶⁶ The NPC shall give its opinion only *after* consultation with the Basic Law Committee.¹⁶⁷ The Chinese government would argue that the Basic Law gives Hong Kong more formal autonomy

163. BASIC LAW, *supra* note 106, art. 18, at 11.

164. See H.L.A. HART, CONCEPT OF LAW (1962) (referring to the open texture of the law which contains a core of certainty and a penumbra of doubt).

165. BASIC LAW, *supra* note 106, art. 17, at 10.

166. BASIC LAW, *supra* note 106, art. 158, at 54.

167. *Id.*

than what it presently has as a colony.¹⁶⁸ The British Crown currently has reserved the right to legislate for Hong Kong and to disallow legislation and the judgment of the Privy Council which is the Colony's final court of appeal.¹⁶⁹ One must not overlook the high degree of de facto autonomy. For example, there has been no case since the end of World War II where a Hong Kong Ordinance has been disallowed¹⁷⁰ and appeals to the Privy Council were heard by the Lords of Appeal in Ordinary of the House of Lords whose advice was invariably accepted by the Queen when she gave her judgment by way of the Order-in-Council, thus disposing of the appeal. Denis Chang has argued in two articles¹⁷¹ that for the concept of one country, two systems to have any credibility, it will be important to give Hong Kong the same degree of de facto autonomy as it presently enjoys and the same conventions of restraint as presently apply. It remains to be seen whether the PRC will be prepared to exercise this same degree of restraint. However, as the legal traditions of the two systems are so different, restraint by convention can only be hoped for in the realms of realpolitik rather than on the level of principle. If it suits the PRC, the NPC Standing Committee may issue its own interpretations of the Basic Law to limit the autonomy of the SAR, but it is difficult to see what practical results this would achieve for the PRC without creating yet another confidence crisis. For the time being, there is a core of certainty in legal autonomy in that only rare cases delve into the penumbra of doubt caused by the open texture of the phrase "defense and foreign affairs." It is perhaps here, because common law judges have traditionally acted with the greatest of restraint by characterizing acts of sovereignty, typically falling within the defense and foreign affairs arena, as

168. Xiao Weiyun, *A Study of the Political System of the Hong Kong Special Administrative Region Under the Basic Law*, 2 J. CHINESE L. 95 (1988); Wu Jianfan, *Several Issues Concerning the Relationship between the Central Government of the People's Republic of China and the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 65 (1988).

169. An appeal to the Privy Council is provided for by an Order-in-Council setting out the conditions under which an appeal may be brought and the procedures for doing so. Once leave to appeal is given and the procedures are complied with, the appeal is listed for oral argument before the Judicial Committee of the Privy Council. The Judicial Committee is made up of Lords of Appeal in Ordinary of the House of Lords who deliver their judgment, normally in the form of a judgment of the court (a dissenting judgment being highly unusual since the Committee is advising the Queen, it normally strives for consensus), in the form of advice to the Queen. A convention has built up since the eighteenth century that the Queen (or King) invariably accepts the advice of the Judicial Committee and disposes of the appeal by way of an Order-in-Council, which is a legislative act.

170. N.J. Miners, *Disallowance and the Administrative Review of Hong Kong Legislation by the Colonial Office, 1844-1947*, 18 HONG KONG L.J. 218 (1988) (noting that between 1844-1913, there were twenty pieces of legislation disallowed, but none since then, though some were sent back by the Colonial Office for the Governor for further examination).

171. Denis Chang, *Towards a Jurisprudence of a Third Kind—'One country, two systems'*, 20 CASE W. RES. J. INT'L L. 99 (1988); Denis Chang, *The Basic Law of the Hong Kong Special Administrative Region: Economics and Norms of Credibility*, 2 J. CHINESE L. 21 (1988).

acts of state which are not justiciable by the courts,¹⁷² that any potential for conflict between the HKSAR and the central government is minimized.

On a more hopeful note, Article 39 of the Basic Law provides that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law, but such restrictions shall not contravene the provisions of the International Covenant on Economic, Social and Cultural Rights, and International Labor Conventions as applied to Hong Kong.¹⁷³ This means that the Bill of Rights, soon to be passed by the Hong Kong legislature will provide some of the minimum procedural and substantive standards intrinsic to the Rule of Law.

Before leaving this section, it must be pointed out that although the Basic Law provides that judges will be appointed for their judicial qualities by the future chief executive and on the advice of an independent commission comprised of judges, lawyers and eminent persons, they may not be removed save for misconduct and only upon due inquiry.¹⁷⁴ A future government wishing to mold the judiciary in its own image will most probably use incipient means to control its judges and sap the vitality of the legal system. Sadly, we have seen this happen in Singapore, the common law jurisdiction most similar to Hong Kong, where the government never loses a case. It is therefore more urgent than ever that all legal professionals should take their role seriously to ensure that the fundamental ideas and values of the Rule of Law are so deeply entrenched in the Hong Kong consciousness that it would take only the highest possible cost for any future government to erode, let alone eradicate.

G. Governmental Institutions

One of the foundations of the Rule of Law was stated by the International Commission of Jurists in its 1959 New Delhi Declaration, as being a representative and responsible government.¹⁷⁵ This raises the question whether before 1997 and beyond, Hong Kong can fulfill this criterion. As

172. Peter Wesley-Smith, *Settlement of the Hong Kong Question*, 17 CAL. W. INT'L L.J. 116, at 127-132 (1987). The classic definition of English law was given by Fletcher Moulton, L.J. in *Salaman v. Secretary of State for India* [1906] K.B. 613, at 639, as an exercise of sovereign power which the court must accept as being conclusive. Thus, a statement by the Executive as to "the status of a body claiming to be a foreign government, the individual sovereign or a diplomat; whether a state of war . . . exists; the boundaries of foreign states or the extent of [national] territory," are considered to be acts of state which the courts will accept without question. *Id.* The English act-of-state doctrine proceeds upon the acceptance of the separation of powers between the courts and the executive and is not unlike that of the American doctrine as stated by the U.S. Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and more recently in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corporation*, 110 S. Ct. 701 (1990).

173. BASIC LAW, *supra* note 106, art. 39, at 17.

174. BASIC LAW, *supra* note 106, arts. 80-98, at 31-35.

175. Declaration on the Rule of Law by the International Commission of Jurist, Conference at New Delhi, *supra* note 152.

previously observed in this opinion, Hong Kong's success so far has been based generally on a non-interventionist government system which provides the basic infrastructure for the community to provide for its own economic and cultural needs. Non-interventionism cannot, however, be an absolute term. In order to provide an environment in which the plurality of interests which exist in Hong Kong may be reconciled, the government has in fact had to intervene by way of regulation and social welfare and education policies. The growing body of law ranging from environmental protection to securities and financial regulation represents the government's attempt to reconcile growing conflicts. The public housing program which presently houses roughly 50% of the population,¹⁷⁶ and the social security program,¹⁷⁷ represent social policies aimed at resolving conflicts caused by the uneven distribution of wealth which grew out of rapid economic development. The education policies for the next decade are aimed not only at meeting both present and future perceptions of the manpower needs of economic development,¹⁷⁸ but a reflection of growing community feeling that there is a right to education.

The power to formulate and implement public policy presently lies with a colonial governor aided by colonial civil servants. The colonial governor obtains his appropriations and has his laws passed by a legislature, half of which is indirectly elected and half appointed by him.¹⁷⁹ But this colonial governor and his civil servants get a constant barrage of views expressed in the press, through a system of advisory committees,¹⁸⁰ through active debate in the legislature, and through views expressed by a multiplicity of interest groups. This constant barrage of views shapes their perceptions and inclines public policy towards a consensual mode. Although the government is not representative, it may have some claim to being responsive.

In 1991, for the first time in Hong Kong's history, there were direct elections for eighteen seats in the Legislative Council. By 1995, there will be no more appointed members and the Legislative Council will be composed of members who are poised to make the transition into the era of the HKSAR.¹⁸¹ This means that of the sixty seats in the Legislative Council

176. HONG KONG ANNUAL REPORT 1990, *supra* note 3, at 40.

177. HONG KONG ANNUAL REPORT 1990, *supra* note 3, at 166-69.

178. Sir David Wilson, Governor, Address at Opening of the 1990-91 Session of the Legislative Council 20-24 (Oct. 10, 1990).

179. HONG KONG ANNUAL REPORT 1990, *supra* note 3, at 24-26.

180. Presently the Governor appoints some 5,000 members of the public to serve on 437 boards and committees to advise the government on a regular basis on a host of subject areas. See HONG KONG ANNUAL REPORT 1990, *supra* note 3, at 33.

181. *Decision of the National People's Congress on the Method for the Formation of the First Government and First Legislative Council of the HKSAR*, appended to the Basic Law in BASIC LAW, *supra* note 106, at 65-67. The procedure is that within the year 1996, the NPC will establish a Preparatory Committee with a 50-50 mainland China/Hong Kong composition. The Committee will formulate arrangements for the selection of a Selection Committee of four hundred members who will, by a method to be formulated by the Preparatory Committee, nominate and then elect the first Chief Executive. The first Legislative Council may be made

in 1997, twenty seats will be filled by direct elections from geographical constituencies by universal suffrage, ten by electoral colleges made up of district board members who are themselves elected by universal suffrage, and thirty members who are elected from functional constituencies.¹⁸² The Basic Law gradually changes this composition to thirty directly elected and thirty functionally elected representatives by the year 2004, and by 2007, the Legislative Council by a two thirds majority, may with the consent of the Chief Executive, make such amendments as it thinks fit, the hope as expressed in the Basic Law, being to have a fully directly elected Legislature.¹⁸³

Hong Kong has been put on the road to representative government within the limits of the autonomy allowed to the SAR. It is a gradual road which some would say is too slow. However, it should be pointed out that there is public support for gradualism as shown by the Lau and Kuan study which showed that nearly all of their respondents favored gradual political reform.¹⁸⁴ With the Legislative Council becoming more representative, it is in the nature of politicians to debate more actively and the government will be assailed by sectional interests whose views will be vociferously articulated. This is, therefore, a time for the government to show its leadership by exuding a definite vision of the future, and also continuing with the consensual mode of public decision making. In the two addresses by the Governor of Hong Kong in October 1989 and October 1990, there were plans for a new airport and expanded port facilities, expansion of higher education, greater contact with the PRC, technological research and a Bill of Rights.¹⁸⁵ These plans seem well thought out and were articulated with sincerity. However, these are the plans of a Colonial Governor who will disappear from the scene by 1997. A vision extending beyond 1997 must be articulated by persons who will form part of the post-1997 leadership. There is no one who is publicly seen as willing and able to carry on with this vision beyond 1997. Therefore, long before 1997, the most senior government officers should be persons who have made a credible public commitment to stay in office after 1997, otherwise the public can have no confidence for smooth transition.

up of the members of the former Legislative Council provided they would uphold the Basic Law and pledge allegiance to the HKSAR and provided they fulfill the requirements of the Basic Law. The Hong Kong government's policy for representative government is therefore geared to make this transition as smooth as possible.

182. Functional constituencies comprise groupings of various professional, trade, labor, finance, and industrial interests.

183. *Method for the Formation of the Legislative Council of the HKSAR and its Voting Procedures*, in BASIC LAW, *supra* note 106, Annex II, at 59-60, arts. 66-79, at 26-30.

184. LAU & KUAN, *supra* note 12, at 164. It may be that after the June 4 incident, there will be a shift towards wanting a quicker pace of political reform. This appeared to the writer to have been the popular sentiment, fueled perhaps by the disappointment expressed by certain groups over the Basic Law.

185. Address by the Governor, Sir David Wilson, *supra* note 178.

A smooth transition will be possible except in the case of the governor who will be replaced by the chief executive, elected by a four hundred member Selection Committee. Although Article 48(5) of the Basic Law empowers the chief executive to nominate principal officers for appointment by the Central People's government,¹⁸⁶ the Joint-Declaration allows existing government officials to retain their positions provided this is not prohibited by the Basic Law.¹⁸⁷

On July 1, 1997, provided the principal officers are not disqualified under the Basic Law, and that they are local permanent residents who have no right of abode in any foreign country, the newly elected chief executive will have no alternative but to nominate them for appointment. This means the current right to remain as given to British civil servants,¹⁸⁸ may deter persons of talent from taking on the most senior positions, unless some accommodation with the Chinese People's government could be reached.¹⁸⁹

H. *International Relations*

An important part of Hong Kong's legal system derives from international treaties, for example, extradition treaties and multi-lateral conventions on judicial matters. Treaties are made applicable to Hong Kong by their terms or by British legislation. With the transfer of sovereignty to the PRC, the application of these treaties to Hong Kong will lapse. At the same time, absent special arrangements, treaties entered into by the PRC will apply automatically to Hong Kong.¹⁹⁰ Article 153 of the Basic Law provides that the Central People's Government will decide to which treaty the PRC is or will become a party, and this treaty will in turn be applicable to the HKSAR

186. Principal officers are defined in Article 48(5) as "Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration and Commissioner of Customs and Excise." BASIC LAW, *supra* note 106, art. 48, at 21.

187. JOINT DECLARATION, *supra* note 69, Annex I, Section IV.

188. After the June 4 incident, there was a widespread call for the British government to give right of abode in Britain to all Hong Kong residents. This was rejected outright by the British government, but active lobbying in the U.K. by both the Hong Kong government and pressure groups in Hong Kong resulted in agreement to give the right of abode to 50,000 families. A points system has been worked out and applications will be processed from December 1, 1990. For a description of the points system, see Julia Onslow-Cole, *Hong Kong Blues*, NEW L.J., Apr. 27, 1990, at 584-85.

189. It has been suggested that one way of dealing with the problem, if both the Chinese and British governments agreed, was for civil servants promoted to the principal officer rank in the SAR to renounce their British nationality on an undertaking by the British government to regrant the same upon application by that officer.

190. "It is generally accepted that a territory which undergoes a change of sovereignty passes from the treaty regime of the preceding state to that of the acquiring [state]." Roda Mushkat, *The International Legal Status of Hong Kong Under Post-Transitional Rule*, 10 HOUS. J. INT'L L. 1, 14 (1987).

upon consulting the SAR Government.¹⁹¹ This article also provides that international agreements which are implemented in Hong Kong will continue to be in force.¹⁹² As a result of the change of sovereignty, the work to ensure continued application of existing treaties has in fact started under the auspices of the Joint Liaison Group set up under Annex II of the Sino-British Joint Declaration.¹⁹³ So far Hong Kong has become a full member of the General Agreement for Trade and Tariffs (GATT) by virtue of its position as a separate customs territory and thereby is able in its own right to enter into bilateral fibre export restraint¹⁹⁴ agreements under the Multi-Fibre Arrangement.¹⁹⁵ Hong Kong took an active part in the Uruguay Round of GATT negotiations and a leading role in the Geneva negotiations for a services agreement under the umbrella of GATT. Although not well publicized, this is one aspect of the Joint Declaration which is handled by professionals on both the British and Chinese sides¹⁹⁶ and which is proceeding smoothly, although there are still obstacles ahead, notably in the area of extradition and rendition.¹⁹⁷

Article 151 of the Basic Law enables Hong Kong, using the name "Hong Kong, China" to maintain and develop relations and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping communication, tourism, cultural and sports fields.¹⁹⁸ Although

191. The first paragraph of Article 153 states: "The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstance and needs of the Region, and after seeking the views of the government of the Region." BASIC LAW, *supra* note 106, art. 153, at 52.

192. The second paragraph of Article 153 states: "International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements." *Id.*

193. HONG KONG ANNUAL REPORT 1990, *supra* note 3, at 50.

194. Preserved by Article 116 of the Basic Law. BASIC LAW, *supra* note 106, art. 116, at 40.

195. HONG KONG ANNUAL REPORT 1990, *supra* note 3, at 86-87.

196. The continued application of existing treaties and the continued participation of Hong Kong in international organizations is handled by an Export Sub-Group of the Joint Liaison Group. The British side has been represented by Fred Burrows, Law Officer (International Law Division) of the H.K. Attorney-General's Chambers, and Sun Yenhong of the PRC. Mr. Sun is also the PRC representative to the Land Commission set up under Annex III of the Joint-Declaration and whose work is also progressing smoothly. Sun's predecessor in the Export Sub-Group was Sy Jiuyong who is now a member of the International Law Commission in Geneva.

197. On the continued application of extradition and rendition treaties see Janice M. Brabyn, *Extradition and the Hong Kong Special Administrative Region*, 20 CASE W. RES. J. INT'L L. 169 (1988). On the question of rendition, one of the basic stumbling blocks is the lack of reciprocity of many crimes both in their legal definition and their punishment between the Hong Kong and PRC system of criminal justice. In the end, an agreement will probably be struck on a rather small list of crimes.

198. HONG KONG ANNUAL REPORT, *supra* note 3, at 50.

this kind of formulation has not yet acquired popular usage in international law, its form clearly constituted Hong Kong as an entity with the capacity to enter into internationally binding relations within the specified fields. This should enable Hong Kong to play a full role in regional affairs in these fields.¹⁹⁹

A particular objective of the present and SAR Governments should be to keep a close relationship with Taiwan in these fields in view of the growing economic interdependence between Hong Kong and Guangdong, Fujian, and Taiwan.

I. The Continuing Story

There is no conclusion to this opinion as this represents just the beginning of a search for an answer; but let us take stock of the journey so far. Perceptions of Hong Kong's future lie in a spectrum extending from the ponderable to the imponderable. The existing legal system, the socio-economic system, the collective capacity and intelligence of the people of Hong Kong are realities which could be pondered and from which positive solutions for the future could be formulated. Equally, the terms of the Basic Law enable existing institutions to continue to function under most, but not the worst circumstances. In time it will be possible to fashion solutions which will minimize the worst of the worst case scenarios. The extent to which the PRC Government will interfere with Hong Kong life is an imponderable, but we may obtain illumination of what is presently unclear, by assiduous study and cultivation of closer relations and understanding of our compatriots across the border. Once one starts from the proposition that Hong Kong and China are one nation and yet Hong Kong has a special position which could make a special contribution both presently and in time to the PRC, then one embarks upon a journey with more meaning and conviction. This is the attitude that this writer will commend to all future leaders of Hong Kong.

199. See Hurst Hannum, *The Hong Kong Accord as a Model for Dealing with Other Disputed Territories*, Remarks at Proceedings of the 80th Annual Meeting of the American Society of International Law 362-366 (April 11, 1986) where he suggested that Hong Kong's position in international law may be equated to that of an Associated State (transcript available at California Western International Law Journal).