

POST-1997 HONG KONG: A COMPARATIVE STUDY OF THE MEANING OF "HIGH DEGREE OF AUTONOMY"

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INTRODUCTION

Pursuant to the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China (PRC) on the Question of Hong Kong,¹ the PRC will resume the exercise of sovereignty over Hong Kong effective on July 1, 1997. Under the Joint Declaration, Hong Kong "will enjoy a high degree of autonomy, except in foreign and defense affairs which are the responsibilities of the Central People's Government of the People's Republic of China."² An essential part of this autonomy is the vesting of Hong Kong "with executive, legislative and independent judicial power, including that of final adjudication."³ The Declaration also preserves Hong Kong's current social and economic systems.⁴ Hong Kong will remain a separate customs territory, it will have an independent finance and taxing system, and it will be allowed to "maintain and develop economic and cultural relations" on an interna-

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1. A copy of the Joint Declaration is reprinted in 7 *LOY. L.A. INT'L & COMP. L.J.* 141 (1984).

2. Joint Declaration, *supra* note 1, § 3(2), at 142-43, which states:

(2) The Hong Kong Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence [sic] affairs which are the responsibilities of the Central People's Government.

3. *Id.* § 3(3), at 143, which states:

(3) The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.

4. *Id.* § 3(5), at 143, which states:

(5) The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.

tional level.⁵

To one degree or another, each of the above characteristics is a loosening of the traditional binds of sovereignty rather than an assertion. The Declaration on the one hand establishes the PRC's sovereignty over Hong Kong, and on the other hand limits the exercise of this sovereignty. This act of self-interested benevolence on the part of the PRC is in a sense a reconfirmation of its power. One must own something in order to give it away.⁶ And the act of giving implies that it can be taken back.

The Hong Kong Basic Law, which will serve as a constitution for Hong Kong and will implement the Joint Declaration, is scheduled for enactment by the PRC in 1990. The first two drafts of the Basic Law have revived fears that the PRC does not intend to allow Hong Kong the full degree of autonomy indicated under the terms of the Joint Declaration.⁷ Most alarming, Article 157 of the Basic Law states: "The power of interpretation of this Law is vested in the Standing Committee of the National People's Congress." Article 158 adds: "The power of amendment of this law is vested in the National People's Congress." Together, these two articles take away from Hong Kong ultimate control over the content and meaning of the document which is to be the foundation of its separate existence.

Understandably, there is much concern about the future of Hong Kong, and more specifically, about how truly autonomous it will be. No definition of autonomy is contained within the Joint Declaration. Absent a shared understanding of what is meant by autonomy, the debate on this crucial issue will continue unabated. Thus far, no effort has been made to look to other similar situations or interna-

5. *Id.* 3(6), 3(8), and 3(10), at 143-44, which state:

(6) The Hong Kong Special Administrative Region will retain the status of a free port and a separate customs territory.

(8) The Hong Kong Special Administrative Region will have independent finances. The Central People's Government will not levy taxes on the Hong Kong Special Administrative Region.

(10) Using the name of "Hong Kong, China," the Hong Kong Special Administrative Region may on its own maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organisations.

6. Article 2 of the Hong Kong Draft Basic Law Adopted by NPC (February 24 1989)(hereafter referred to as Basic Law) emphasizes this point through its phraseology of the autonomy to be enjoyed by Hong Kong: "The NPC *authorizes* the HKSAR to exercise a high degree of autonomy . . ." (emphasis added).

7. See generally *Hong Kong—Basic Problems of Law*, FAR E. ECON. REV. 18 (Aug. 11, 1988).

tional law to help define or set a standard for autonomy.⁸ Perhaps one reason for this omission is there is no other situation quite like Hong Kong, where capitalism and socialism are to co-exist as two systems within one country. Indeed, there appears to be nothing even close. Another reason for this omission may be that the international treatment of autonomy in many respects has been less than clear.⁹ Despite its indistinct core, however, the parameters of the concept of autonomy are relatively well defined.

This paper will first explore the concept of autonomy under international practice and identify whatever norms may exist. The degree of autonomy provided to Hong Kong by the Joint Declaration and draft Basic Law will then be measured against other examples of autonomy to assess whether in fact Hong Kong will be accorded a "high degree" of autonomy. Modifications will be suggested where appropriate to achieve a level of autonomy commensurate with comparable situations. Finally, this paper will describe another recently created political relationship, the Commonwealth of the Northern Mariana Islands. This comparison will indicate how a critical issue relating to protection from interference by the central government was resolved to the satisfaction of both parties.

I. AUTONOMY

"Autonomous areas are regions of a state, usually possessing some ethnic or cultural distinctiveness, which have been granted separate powers of internal administration to whatever degree, without being detached from the state of which they are a part. For such status to be of present interest, it must be in some way internationally binding on the central authorities."¹⁰ Autonomy is difficult to define because there exists under international law a whole continuum of such statuses, ranging from territorial,¹¹ to free association with citizenship¹² or without citizenship,¹³ to protectorates,¹⁴

8. See Mushkat, *The International Legal Status of Hong Kong Under Post-Transitional Rule*, 10 HOUS. J. OF INT'L L. 1, 20 (1987). Mushkat briefly mentions international norms of autonomy as they may apply to Hong Kong.

9. See Hannum & Lilich, *The Concept of Autonomy in International Law*, 74 AM. J. OF INT'L L. 858 (1980).

10. J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 211-12 (1979).

11. See, e.g., Rodriguez-Orellana, *In Contemplation of Micronesia: The Prospects For the Decolonization of Puerto Rico Under International Law*, 18 U. MIAMI INTER-AM. L. REV. 1 (1987). Other territories in this category include Guam, the U.S. Virgin Islands, and the Netherland Antilles.

12. See Clark, *Self Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust*, 21 HARV. INT'L L. J. 1, 54-60 (1986) (describing the Cook Islands, where islanders retain New Zealand citizenship and foreign relations are han-

each with lesser or greater amounts of autonomy.¹⁵ In each instance, the primary entity is vastly more powerful than the secondary entity. The degree to which the secondary entity is self-governing and the amount of control over external affairs possessed by the primary entity determines where on this continuum the relationship will be placed. At the near end of this continuum the secondary entity is completely subsumed within the primary entity. In the center, the secondary entity enjoys a quasi-sovereign status with certain limited characteristics of a state under international law. At the far end, the secondary entity in most respects has full sovereign status. "Autonomy" in modern usage is generally applied to describe those entities on the near side of the center of the continuum.¹⁶

Significantly, "self-government" means more than just affirmative control over internal affairs. There is also a protective aspect to this term which assures non-interference by the principal entity within the sphere of self-government.¹⁷ Non-interference is a critical attribute of autonomy because frequently the secondary entity obtains its special status as a way of protecting cultural, religious,

dled by New Zealand); Broderick, *Associated Statehood—A New Form of Decolonization*, 17 INT'L & COMP. L.Q. 368 (1968).

13. See Macdonald, *Termination of the Strategic Trusteeship: Free Association, the United Nations and International Law*, 7 BROOKLYN J. OF INT'L L. 235 (1981) (Micronesians form new nations with their own citizenship and power to conduct foreign relations, while the United States controls security and defense).

14. See, e.g., B. GILSON, SOVEREIGN EQUALITY 383-86 (1984) (two sovereign states agree by treaty for the stronger one to provide military protection and perhaps other aid, and manage major aspects of international relations, i.e., the relationship between France and Morocco).

15. Using a broad sense of the term autonomy, even states within a federal union would qualify for consideration. In practice confederacies are excluded because the relationship between such states is one of co-equal entities. The points identified on the continuum are merely points. Many variations and gradations exist between these points. In a comprehensive survey published in 1919, the following types were identified: semi-sovereign states, protected independent states, guaranteed states, vassal states, protected dependent states, administered provinces, autonomous colonies and dependencies, members of federal union and confederacy. See W. WILLOUGHBY & C. FENWICK, TYPES OF RESTRICTED SOVEREIGNTY AND OF COLONIAL AUTONOMY (1919).

16. See Procedural Aspects of International Law Institute, *The Theory and Practice of Government Autonomy* (Final Report of the Dept. of State 1980) ("PAIL Report") at 3. Autonomy is generally understood to refer to independence of action on the internal or domestic level, as foreign relations and defense are normally in the hands of the central or principal government, but some power to conclude international agreements concerning economic or cultural matters also may reside with the autonomous government. See also L. BERNIER, INTERNATIONAL LEGAL ASPECTS OF FEDERALISM 72 (1973).

17. MODELS OF AUTONOMY 5 (Y. Dinstein ed. 1981), "The concept of self-government implies that for important political or economic reasons a particular area will remain within the territorial jurisdiction of another political entity but will possess political freedom to regulate certain of its own affairs without any interference by that entity."

ethnic, language, or other institutions, from the overwhelming majority of the primary entity.¹⁸ "They are interested in excluding State and majority interference as far as their specific background, tradition and way of life are concerned. Because a certain group is, and feels, different from the majority of the population, it longs for different rights."¹⁹

Another attribute of autonomy is that it is "often granted and guaranteed by treaty under international law."²⁰ Autonomous regions created by treaty consequently enjoy an internationally sanctioned assurance of their status. The significance of this aspect of autonomy depends on the viability of enforcement, which varies greatly. At the very least, the fact that the relationship comes under international purview implies that the central government does not have an unfettered right to unilaterally alter the nature of the relationship.

A comprehensive survey of autonomous entities was conducted in 1980 for the United States Department of State by the Procedural Aspects of International Law Institute (PAIL).²¹ The PAIL Report categorized these entities into four groups: federal states, internationalized territories, associated states, and miscellaneous.²² Autonomy in the modern sense, as defined in preceding paragraphs, applies primarily to the associated states category, and therefore only this category will be discussed.²³ This category covers the Cook Islands, Niue, Tokelau, Puerto Rico, Guam, the Trust Territories of the Pacific Islands, Netherland Antilles, and non-self governing territories under the United Nations in general.²⁴ The PAIL Report examined the allocation of power between the primary state and

18. *Id.* at 26.

19. *Id.*

20. *Id.*

21. PAIL Report, *supra* note 16.

22. "Federal states" are equal entities joined in a union. "Internationalized territories" are entities created under international supervision in response to political considerations. "Associated states" are those relatively recent territories which have entered into a primary state-secondary state relationship. The miscellaneous category encompasses several idiosyncratic situations. See Hannum, *supra* note 9, at 859-60 n.11, 12, 13, 14.

23. Most of the entities examined in the other three categories are useful as historical models of autonomy, and generally do not fit well within the model of autonomy described earlier. However, several of the entities in the federal states category have isolated characteristics which do qualify for consideration. This overlap occurs because the categorization is somewhat arbitrary, as the authors of the Report admit. *Id.* at 859. A separate reason for not including the federal states in the comparison is the PRC's insistence that it is a unitary state and does not have a federal system. See 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. OF CHIN. L. 65, 73-74 (1988).

24. Hannum, *supra* note 9, at 859-60 n.13.

secondary state in relation to executive, legislative, and judicial authority.

Four of the six associated states select their own Chief Executive.²⁵ Police powers are held locally in all but one of the associated states.²⁶ In all of these states, except for one, the primary or central government has virtually complete authority over foreign relations and defense.²⁷

All but one of the associated states has a locally elected legislative body.²⁸ In half of the states residual power rests with the central government.²⁹ Also, in half of the states, the central government has veto power over local legislation. However, in two of the three cases where such power exists, the primary government right to veto was either limited or had never been exercised.³⁰ With regard to the right of the secondary entity to amend its own constitution, three states have the right and three do not.³¹ There is a strong correlation between these three categories. Those areas with control over their constitution also tend to possess residual legislative power and are not subject to veto by the central government.³²

"A free and independent judiciary forms a part of the governmental structure of all the politically autonomous entities surveyed. However, this independence does not necessarily imply total separation from the central sovereign judicial authorities."³³ Members of the highest local court in four out of five of the associated states are selected by the central government.³⁴ In four out of five of the associated states appeals on local matters are allowed to the central

25. PAIL Report, *supra* note 16, at 11-12.

26. *Id.*

27. *Id.* The Trust Territories, upon termination of the Trust, will have authority over foreign relations, while the United States controls defense matters.

28. *Id.* at 19. The exception is Tokelau.

29. *Id.*

30. *Id.* at 19-20.

31. *Id.* The PAIL Report concluded that, "if there is a determining factor in many of these cases, it seems to be whether the autonomous entity was an independent state (nation) prior to the creation of the new relationship in concert with another state." *Id.* at 15-16. Those entities which were independent retain greater residual government powers than those which were not.

32. *Id.* at 16-19.

33. Hannum, *supra* note 9, at 869.

34. PAIL Report, *supra* note 16, at 26. Only five states were included in this category because at the time the Report was drafted the future relationship of the Trust Territories in this regard had not been finalized. Under the terms of the Compact of Free Association now in effect, the local entities appoint their own judges, no appeals are allowed to the U.S., and ultimate constitutional jurisdiction (excluding cases involving the Compact itself) remains with the local high court.

government.³⁵ And in all five cases ultimate constitutional jurisdiction is vested in the central government.³⁶ “[I]n questions concerning the constitutionality of local actions or the relationship between the autonomous and principal governments, decisions of the local court, when they can exercise original jurisdiction, can generally be appealed to a higher court responsible to the central government authorities.”³⁷

Several conclusions can be drawn from the PAIL Report. Modern forms of autonomous entities enjoy more executive and legislative independence than judicial.³⁸ The independence they do possess uniformly relates to internal matters. Constitutional independence, as a combined legislative and judicial matter, does not exist.³⁹ Information from the Report verifies the statement made earlier about the concept of autonomy; it is muddled at its core but relatively clear at the outer boundaries. To the extent that a pattern of practice establishes a standard meaning of autonomy under international law, the foregoing information provides a basis for evaluating the concerns raised regarding the future status of Hong Kong.

II. HONG KONG

Post-1997 Hong Kong easily satisfies the descriptive criteria of an autonomous entity under international law. The Joint Declaration is an international agreement which creates and guarantees Hong Kong’s special status, preserving its right of self-government. The Basic Law will serve as the document which sets forth Hong Kong’s internal “constitutional” structure as an entity distinct from the PRC. The purpose of the arrangement is to maintain Hong Kong’s separate nature and to insure that it is not overwhelmed by the PRC. Hong Kong’s political and economic institutions will be preserved for at least fifty years, insulated from the PRC’s very different systems. It cannot be disputed that the Joint Declaration

35. *Id.*

36. *Id.*

37. *Id.* at 25.

38. A review of the PAIL Report also indicates that no clear distinction emerges as between the federal states and associated states categories with regard to executive and legislative power. On the allocation of judicial power, the federal states are more independent, though not considerably so. In most instances, ultimate constitutional jurisdiction remains with the central government. *Id.* at 26.

39. This generalization is not correct when applied to the Federated States of Micronesia and the Republic of the Marshall Islands, created after the PAIL Report was completed. Both are fully independent with regard to their own constitution, although they are constrained by the terms of the Compact.

and the draft Basic Law provide Hong Kong with a substantial degree of autonomy; the argument is over the amount of autonomy. Whether the degree of autonomy now contemplated is enough can be measured against the survey of autonomous entities and the reasons for creating such entities.

A. Executive

Under the Joint Declaration, the Chief Executive is to be appointed by the PRC based on the results of local elections or consultations.⁴⁰ The draft Basic Law sets out three different methods for selection of the Chief Executive: the first Chief Executive will be recommended by an Election Committee (whose members are elected by various designated sectors of the Hong Kong populace) following a method yet undetermined; the second and third Chief Executives will be nominated by the Election Committee and elected by the Committee following a secret ballot; the method of selection for later Chief Executives will be determined by the third Legislative Council.⁴¹ Police powers are vested in the Executive.⁴² Foreign affairs and defense matters are the responsibility of the PRC,⁴³ though Hong Kong may maintain foreign relations in a few areas, including business, culture, and sports.⁴⁴

Most autonomous entities select their Chief Executive without participation by the central government. Through its appointment power the PRC has ultimate control over who becomes Chief Executive, even if the person is selected by a democratic power. Insofar as the appointment power implies that approval can be withheld at will by the PRC, Hong Kong has less independence than other autonomous entities. If the appointment power is wielded by the PRC with no restrictive guidelines or justification, the primary allegiance of the Chief Executive will inevitably be directed toward the PRC rather than Hong Kong.⁴⁵ A provision in the Basic Law which

40. Joint Declaration, sec. 3(4) *supra* note 1, at 144. This same provision gives the PRC appointment power over the principal officials of the executive office, upon nomination by the Chief Executive.

41. Basic Law, Annex 1 and Annex 2.

42. Joint Declaration, *supra* note 1, § 3(11)(maintenance of public order is the responsibility of Hong Kong SAR); Basic Law, art. 63 ("The prosecuting authority of the Hong Kong Special Administrative Region shall institute criminal prosecutions independently, free from any interference.").

43. Joint Declaration, *supra* note 2, § 3(2).

44. Joint Declaration, *supra* note 1, Annex 1, § XI, arts. 149-56.

45. See *The Law Takes Shape*, FAR E. ECON. REV. (December 18, 1986)(discussing Chief Executive accountability to the PRC).

makes the Chief Executive "accountable" to the PRC⁴⁶ removes any doubt about the PRC's intention to strictly control Hong Kong's titular head. A Hong Kong Chief Executive with divided loyalties may also compromise the independence of the legislative and judicial branches. The Chief Executive has the power to dissolve the legislature,⁴⁷ and appoints the members of the court.⁴⁸ Self-government simply cannot be achieved when the head of the secondary entity is beholden to the central government.⁴⁹

Objections to the draft Basic Law have not focused on this problem, presumably because the PRC's appointment power was included in the Joint Declaration. Nevertheless, since the Basic Law is intended to implement the terms of the Joint Declaration, omission of a necessary provision is as significant as inclusion of an improper provision. For self-government to be a reality, a paragraph should be added to the Basic Law to the effect that:

The PRC shall appoint the person selected by election unless by clear and convincing evidence the PRC determines that the person selected is not fit to hold office. The determination of fitness shall be made in good faith, and is limited to finding of mental or physical incapacity or lack of moral integrity suitable for the office. No person shall be found unfit solely on the basis of expressed policies or opinions.

True autonomy will exist only if the power to withhold approval is strictly circumscribed in the fashion described above. This proposed restriction is consistent with modern forms of autonomy and with the Joint Declaration's promised high degree of autonomy.

B. Legislative

Annex 1 to the Joint Declaration provides that Hong Kong shall have its own legislature, to be constituted by elections.⁵⁰ The legislature has the power to enact laws not inconsistent with the Basic

46. Basic Law, art. 43.

47. *Id.* art. 50, Hong Kong.

48. *Id.* art. 48(6) and 87; Joint Declaration, *supra* note 1, Annex 1, art. II, at 146-47.

49. See *Red Cards on the Table*, FAR E. ECON. REV. 21-22 (July 7, 1988) ("Quoting from comments made by China's supreme leader Deng Xiaoping in 1984, Zhang said the criteria for determining who would rule Hong Kong was that such people must be patriotic.").

50. *Supra* note 1. See also Basic Law art. 67. Allowing local elections is in some respects a remarkable concession by the PRC, considering that at the time the Joint Declaration was drafted Hong Kong's Legislative Council was made up entirely of appointed members. See generally N. MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG 126-90 (1981).

Law.⁵¹ A provision in the draft Basic Law gives the PRC authority to invalidate any law “regarding affairs within the responsibility of the Central Authorities or the relationship between the Central Authorities and the region” which it determines to not be in conformity with the Basic Law.⁵² A separate article acknowledges the PRC power to enact laws which apply in Hong Kong.⁵³ There is no clear indication in the Joint Declaration or the Basic Law regarding residual legislative power. The legislature may propose amendments to the Basic Law, but the power to amend is vested exclusively in the PRC’s National People’s Congress.⁵⁴ In addition, the draft Basic Law imposes the requirement that “No amendment to this [Basic Law] shall contravene the established basic policies of the PRC regarding Hong Kong.”

As indicated earlier, the survey showed that the more autonomous of associated states share the characteristics of (1) possessing the power to amend their own constitution without approval of the central government, (2) holding residual legislative power, and (3) not being subject to veto of legislation by the central government. Even those entities with less autonomy generally possess at least one of these characteristics.⁵⁵ Yet, Hong Kong appears to be deprived of all three. Using international practice as a standard, in the legislative area Hong Kong clearly does not enjoy a “high degree” of autonomy.

The PRC may respond that these issues were settled in the Joint Declaration. Such an argument would have some merit. The Joint Declaration gives the PRC the power to “enact and promulgate” the Basic Law.⁵⁶ In effect, the Basic Law will be a statute of the PRC. An obvious alternative would have been for the residents of Hong Kong, through a convention and referendum, to draft and adopt the Basic Law.⁵⁷ With the power to create goes the power to

51. Joint Declaration, Annex 1; Basic Law, art. 72(1).

52. Basic Law, art. 17.

53. *Id.* art. 18.

54. *Id.* art. 158. For a proposed amendment from Hong Kong Special Administrative Region to even qualify for consideration, it must first obtain the “consent of two-thirds of the deputies of the Region to the National People’s Congress, two-thirds of all the members of the legislature of the Region, and the Chief Executive of the Region.” *Id.*

55. See PAIL Report, *supra* note 15, at 19-20. Tokelau and Guam, the least autonomous of all the associated states, were the only areas to lack all three characteristics, and in Guam the central government veto power had never been exercised.

56. Joint Declaration, *supra* note 1, Annex 1, art. 1, at 145.

57. This would also have meant that some degree of self-determination would be accorded to the people of Hong Kong. See generally Amber, *Self-Determination in Hong Kong: A New Challenge to an Old Doctrine*, 22 SAN DIEGO L. REV. 839 (1985).

amend. The PRC was given the former power by the Joint Declaration and the latter naturally, though not inevitably, follows therefrom. Nevertheless, no justification exists for the added substantive limitation on amendments—consistency with PRC policies. “Policies” are by nature vague and transitory. Moreover, this provision potentially conflicts with the Joint Declaration’s assurance that “socialist policies shall not be practised” in Hong Kong.⁵⁸ The only limitations on the Basic Law anticipated by the Joint Declaration are the Joint Declaration itself and the PRC Constitution.⁵⁹

There is less support for the PRC on the issue of the power to declare legislation invalid. The Joint Declaration requires that all Hong Kong laws be reported to the PRC Standing Committee, after which it adds: “Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid.”⁶⁰ Apparently, the PRC interprets this sentence to vest in the Standing Committee the right to invalidate laws. However, an equally plausible alternative, and one more consistent with other entities granted a high degree of autonomy, would be for the judiciary of Hong Kong to decide whether legislation is consistent with the Basic Law and legal procedures.⁶¹

Of particular concern from the standpoint of autonomy is the PRC’s assertion of power to enact legislation applicable in Hong Kong. The Basic Law provision asserting this power is circular and ambiguous, extending to laws “relating to defence and foreign affairs as well as other laws outside the limits of the autonomy of the region as specified by this Law.”⁶² But the autonomy granted to Hong Kong by the Joint Declaration is phrased in the negative—it encompasses everything not related to defense and foreign affairs.⁶³ The wording of this Basic Law provision expands PRC authority in

58. Joint Declaration, Annex I, art. I. In any event, as the draft now reads this limitation is superfluous; considering that the PRC controls the amending process, it is unlikely that any successful amendment will contravene PRC policies regarding Hong Kong.

59. Joint Declaration, Annex I, art. I.

60. Joint Declaration, *supra* note 1, Annex I, art. II, at 146-47.

61. See generally Davis, *A Common Court in a Marxist Country: the Case for Judicial Review in the Hong Kong SAR*, 16 DEN. J. INT’L L. & POL. 1 (1987). But see Chu, *Interpretation and Review of the Basic Law of the Hong Kong Special Administrative Region*, 2 J. OF CHIN. L. 49, 55-56 (1988)(arguing that if Hong Kong SAR judiciary is given power of final adjudication over constitutionality of SAR legislation, it would amount to power over the central government).

62. Basic Law, art. 18.

63. Joint Declaration, *supra* note 1, Annex I, art. I, at 146. “Except for foreign and defence affairs which are the responsibility of the Central People’s Government, the Hong Kong Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication.”

violation of the very limits of autonomy the Basic Law is supposed to preserve. The very power to impose legislation on Hong Kong is itself a limitation on autonomy.⁶⁴ Since the division of authority in the Joint Declaration is phrased as a limitation on the PRC's power, the PRC's power to legislate over the area is limited, and all those powers not explicitly provided to the PRC should vest with Hong Kong.

Clearly, measured against models of autonomy, Hong Kong does not have a high degree of autonomy in the allocation of legislative power. On this score, the PRC has violated one of the most basic premises underlying the principle of autonomy: freedom from interference by the central government.⁶⁵

C. Judicial

Judges are appointed by the Chief Executive with the endorsement of the legislature.⁶⁶ The Joint Declaration provides that Hong Kong shall have "independent judicial power, including that of final adjudication,"⁶⁷ free from any interference.⁶⁸ Hong Kong courts will have jurisdiction "over all cases in the region," except those relating to executive acts of the PRC.⁶⁹ Whenever such questions arise in the context of a given case, the courts are required to seek the advice of the Chief Executive, and are bound by the response provided.⁷⁰ In turn, the Chief Executive must "obtain a certificate"

64. The Joint Declaration lists the laws to apply in Hong Kong SAR as the Basic Law, laws previously in force, and laws enacted by the Hong Kong SAR legislature. Joint Declaration, *supra* note 1, Annex 1, Part II. By omission, this may be interpreted to exclude PRC laws.

65. *But see* Jianfan, *supra* note 23, at 74-80 (arguing that it is proper for the PRC to review laws and for national laws to apply).

66. Joint Declaration, *supra* note 1, Annex 1, art. II, at 146-47; Basic Law, art. 87.

67. Joint Declaration, *supra* note 1, § 3(1); Basic Law, art. 19.

68. Joint Declaration, Annex 1, art. III, at 147-48; Basic Law, art. 84.

69. Basic Law, *supra* note 41, art. 18.

70. *Id.* Article 19 is far too sketchy in regard to the approach to be followed in determining jurisdiction when acts of state are at issue:

Courts of the HKSAR shall have no jurisdiction over cases relating to the acts of state. Courts of the region shall obtain a statement from the Chief Executive on questions concerning the facts [sic] of state whenever such questions arise in any legal proceeding. . . ."

The ambiguity rests in the distinction between a case an issue within a case. There is no concrete way to distinguish when a case "relates" to an act of state from when a "question concerning" an act of state arises in a case. This difficulty is further complicated because a determination of jurisdiction must be made at the outset. The Basic Law does not indicate whether a case that later turns out to "relate" to an act of state will be divested from the court or will be declared null if the case has already been completed, nor does it indicate who is to make this determination. These are serious questions which must be addressed.

from the PCR prior to issuing the requested statement.⁷¹ Power to interpret the Basic Law is vested in the Standing Committee of the National People's Congress.⁷² In the course of adjudicating a case, the court may interpret the Basic Law.⁷³ However, where an interpretation of the Basic Law would concern matters of defense, foreign affairs, or other affairs which are the responsibility of the PRC, prior to rendering a final judgment, the court must seek an interpretation from the Standing Committee.⁷⁴

It is difficult to compare the degree of judicial autonomy provided to Hong Kong against the PAIL survey of autonomous entities because the categories of power are not parallel. The survey indicated that in most autonomous entities, the central government selects members of the highest court, appeals are allowed to the central government on local matters, and the central government has ultimate constitutional jurisdiction. Hong Kong judges are selected by the local Chief Executive, the Hong Kong court has exclusive jurisdiction in local cases with the power of final adjudication, and no appeal may be taken to the central government.⁷⁵ Superficially, it would seem that Hong Kong has greater judicial autonomy than the norm. In some respects it does have more autonomy, but in important respects it does not.

Although judges in Hong Kong are selected locally by the Chief Executive, selection of the Hong Kong Chief Executive, unlike most autonomous entities, is approved by the central government. Thus, the central government's control over the selection of judges exists through its control over the Chief Executive.

Comparison of the power of adjudication is more subtle. The Basic Law divides two ordinarily linked aspects of judicial power—interpretation and application—allocating the former to the PRC and the latter to Hong Kong. The PRC's power of inter-

71. Basic Law, Article 19.

72. Basic Law, art. 157. Standing Committee interpretations will not overturn any judgment previously rendered.

73. *Id.*

74. *Id.*

75. Basic Law, art. 87. Similar to the provision for election of the legislature, granting to Hong Kong SAR the power of final adjudication is arguably more than it possessed under British rule. See Jianfan, *supra* note 23, at 71 ("Presently, the Hong Kong courts are not vested with the power of final adjudication. The court of final adjudication is the Judicial Committee of the Privy Council. . . . When compared to the present situation, this provision will greatly increase the judicial power vested in the Hong Kong SAR."). But see *Breach of Promise*, FAR E. ECON. REV. 34 (May 12, 1988) ("This clause could be said to be a breach of the 1984 accord because China's legislature would have the power to interpret the post-1997 constitution, whereas it is the Hong Kong courts which now interpret the Letters Patent and the Royal Instruction, under which the British have governed the colony since 1842.").

pretation is further bolstered by mandatory certification. Although Hong Kong courts have the power of final adjudication, in a given case this power is severely undercut by the fact that the court is required to certify certain issues involving the PRC and the Basic Law to the Chief Executive or the PRC Standing Committee, and must adhere to the answer provided. This mandatory certification procedure threatens the court's independence both within the autonomous region, because it must follow the dictates of the executive branch on an interpretation of law, and in relation to the PRC, because it must follow the dictates of a political organization of the central government. Both paths lead directly back to the PRC.

Mandatory certification is potentially more disruptive to judicial independence than taking an appeal from a final decision. Cases will literally be interrupted and delayed pending an answer. Silence in the Basic Law on who will decide when a certification is necessary raises further questions. If the PRC claims the power to decide, it may halt a case in mid-course or, more likely, it may *ex post* declare a decision void where it decides certification "should have" occurred but did not. The latter approach would render empty the court's power of final adjudication. Consistent with autonomy, two companion restrictions on the certification procedure must be explicitly added to the Basic Law: 1) the Hong Kong court alone will decide in a given case when certification is necessary, 2) certification is necessary only when the issue certified is "material," that is, will effect the outcome of the case. In addition, to restore internal balance between the branches, certification to the Chief Executive should be abolished.

The above restrictions are consistent with the PRC's separation between application and interpretation, as both are within the sphere of application. These are not mutually exclusive categories and there may be some overlap. Although Hong Kong partisans may disagree, the division between application and interpretation, with the PRC taking the latter power, is not inconceivable under constitutional theory and does not of itself infringe upon the power of final adjudication.

The survey of autonomous entities lends support to the PRC's claim of power to interpret the Basic Law on certain issues. In virtually all of the autonomous entities, the central government has final jurisdiction, whether appellate or original, for judicial decisions regarding the relationship between it and the secondary entity, and exclusively controls decisions relating to its power over

foreign affairs and defense matters. The PRC's power of interpretation, which operates as a substitute mechanism of control since it has no appellate jurisdiction, is therefore consistent with general practice. It would also be consistent with general practice, however, to limit the PRC's power to interpret the Basic Law to those questions regarding the relationship between Hong Kong and the PRC, and those questions regarding foreign affairs and defense. This limitation should be explicitly included in the Basic Law. Accordingly, interpretations of the Basic Law dealing solely with internal matters should remain with the Hong Kong judiciary. Again, there is the issue of who will decide. Since these questions inevitably will intrude upon the PRC's area of authority, the PRC should ultimately decide whether a given interpretation is internal only or affects the relationship between the PRC and Hong Kong.

Judicial autonomy is often examined at only one level. This analysis suggests that two different levels exist within the PRC's distinction between interpretation and application. These two levels are institutional autonomy on the application level and substantive autonomy on the interpretation level. Institutional autonomy covers the independence of the court, and freedom from mandatory certification except in restricted circumstances necessary to preserve compelling interests of the PRC. Substantive autonomy covers the subject areas carved out for Hong Kong alone to control, internal self-government with exclusive and final say on anything other than foreign affairs or defense. The PRC may act to control its legitimate interests outside these areas of institutional and substantive autonomy, even if such actions include final interpretation of certain provisions of the Basic Law and restricted mandatory certification of questions. The principle of non-interference underlying all autonomous entities, and promised in the Joint Declaration, supports this proposed distribution of power.

Much of the concern about the draft Basic Law focuses on the Standing Committee's power to interpret the Basic Law. Unquestionably, this is a valid concern, though the power does not inevitably threaten the judiciary's right of final adjudication. Of greater concern should be the Standing Committee's power to amend the Basic Law. Assuming, *arguendo*, Hong Kong courts are given final say over interpretation of the Basic Law, if the PRC does not like a particular interpretation it can simply amend the law to circumvent the interpretation.

D. Basic Law Committee

The draft Basic Law creates an entity with the ponderous title Committee for the Basic Law of the HKSAR of the Standing Committee of the NPC (Basic Law Committee),⁷⁶ and vests this entity with potentially extraordinary power. This Committee is to be comprised of twelve members appointed by the Standing Committee of the NPC, six members from Hong Kong and six from the mainland.⁷⁷ Pursuant to Article 17 of the Basic Law, the Standing Committee must consult the Basic Law Committee before it concludes that a law enacted by the Hong Kong legislature is invalid.⁷⁸ Likewise, under Article 18 the Basic Law Committee must be consulted when the Standing Committee decides which national laws are to apply to Hong Kong.⁷⁹ The Basic Law Committee must also be consulted before the Standing Committee issues an interpretation of the Basic Law.⁸⁰ Finally, the Basic Law Committee must submit its views on all proposed amendments to the Basic Law.⁸¹

On the surface the Basic Law Committee appears to possess no real power, limited as it is to a body for consultation. It can even be argued that the existence of the Committee benefits Hong Kong because it is comprised in half by persons from Hong Kong, presumably to insure that the voice of Hong Kong will be heard. Yet, this body, made permanent and institutionalized in the Basic Law, poses a threat to the autonomy of Hong Kong. Over time there will unavoidably be an accumulation of power if a single group is consulted on so many essential issues relating to legislative and judicial acts of both the Hong Kong and National governments. If the Basic Law Committee, its membership controlled by the PRC, is deferred to with any regularity, it will in effect become a supra-legislature and supra-judiciary for Hong Kong. The only purpose the Basic Law Committee can serve is as a legitimizing mechanism for the Standing Committee when imposing its will contrary to the will of the government of Hong Kong. The views of Hong Kong can be better represented when directly solicited from the affected branch

76. Basic Law, Annex III, Proposal by the Drafting Committee for the Basic Law of the HKSAR on the Establishment of the Committee for the Basic Law of the HKSAR of the Standing Committee of the NPC.

77. The Hong Kong members are to be nominated jointly by the Chief Executive, the President of the Legislative Council, and the Chief Justice of the final appellate court. Members are appointed for five year terms. *Id.* at paragraph 4.

78. Basic Law, Article 17.

79. Basic Law, Article 18.

80. Basic Law, Article 157.

81. Basic Law, Article 158.

or branches of government. If the Standing Committee wishes to create an internal advisory body which specializes on questions relating to Hong Kong, it can do so on its own without express incorporation in the Basic Law.

E. Findings

Hong Kong, under the Joint Declaration and draft Basic Law, will be an autonomous entity as the term is understood under prevailing norms of international law. On a comparative scale, however, post-1997 Hong Kong cannot be said to possess a "high degree of autonomy." As the preceding sections indicate, Hong Kong's anticipated executive, legislative, and judicial independence will be significantly restricted, and in many respects more so than other autonomous entities. This observation, though correct, may not be entirely fair to the PRC. The degree of autonomy intended cannot be taken out of the context provided by the Joint Declaration. The Joint Declaration is the international agreement that defines the relationship. It gives the PRC control over two significant aspects of the relationship: appointment of the Chief Executive and promulgation of the Basic Law which is equivalent to the "constitution" of Hong Kong.⁸² Thus, at the outset, Hong Kong had less autonomy than other similar arrangements.

Nevertheless, it seems fair to conclude that, within the constraints of this initial allocation and the substantive reservation of power over foreign affairs and defense to the PRC, a "high degree of autonomy" means that all other allocations of authority should favor the independence of Hong Kong. This guiding principle is consistent with the language and spirit of the Joint Declaration, and the expressed intent of the PRC prior to its drafting: "We guarantee that absolutely nothing will change in Hong Kong. The freedoms, the systems and your way of life will be preserved."⁸³ From a functional standpoint, favoring Hong Kong independence is a necessity. The concept underlying Hong Kong's autonomous sta-

82. A PRC representative on the Basic Law drafting Committee convincingly argues that the Basic Law should not be considered a "mini-constitution," but rather is merely statutory law of the PRC. 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. OF CHIN. L. 5, 7-8 (1988). On the relationship between the Basic Law and the PRC Constitution, see generally Chen, *Further Aspects of the Autonomy of Hong Kong Under the PRC Constitution*, 14 HONG KONG L.J. 341 (1984) and Clarke, *Hong Kong Under the Chinese Constitution*, 14 HONG KONG L.J. 71 (1984).

83. *This Year, Next Year*, FAR E. ECON. REV. 11-12 (July 7, 1983) (statement of Chinese Communist Party Politburo member Xi Zhongxun).

tus, and indeed, underlying all autonomous entities, is non-interference from the central government. More particularly, autonomy is necessary to preserve Hong Kong's thriving economy. Outsiders, as well as the people of Hong Kong, must be assured that Hong Kong will be stable and will be insulated, in a real way, from the socialist system.

Consistent with the foregoing, the PRC should consider implementing the following suggested changes to the Basic Law:

- 1) automatic appointment of Chief Executive, unless determined unfit for non-political reasons;
- 2) elimination of PRC power to declare invalid Hong Kong SAR legislation, except for those that directly conflict with Basic Law provisions on foreign affairs and defense, and the Hong Kong/PRC relationship;
- 3) elimination of the provision requiring that amendments to the Basic Law be consistent with PRC policies regarding HK;
- 4) explicitly giving residual legislative power to Hong Kong SAR, and limiting PRC power to enact legislation applicable to Hong Kong SAR;
- 5) limiting mandatory certification to "material" questions, and letting Hong Kong courts decide when certification is necessary;
- 6) elimination of Standing Committee power to interpret Basic Law on issues other than foreign affairs and defense, and the Hong Kong/PRC relationship.
- 7) elimination of the provisions regarding the Basic Law Committee.

Each of these suggestions will have the effect of making Hong Kong more autonomous, and more consistent with the constraints of the Joint Declaration and the intent of the parties. A number of compromises are involved, but clearly the PRC will be called upon to exercise greater restraint than it currently manifests in the draft Basic Law. Whether the PRC would be willing to do so is more a question of politics and bargaining power than law. Following the June 4 massacre in Peking Hong Kong residents view with increasing skepticism the value of the Basic Law as an effective restraint on the PRC.⁸⁴ China must take concrete actions to convince Hong Kong that it intends to abide by the spirit of the Joint Declaration's

84. See Far. E. Econ. Rev. 26 (October 12, 1989) ("Since the 4 June massacre in Peking, emigration has been the hottest and almost the only topic in town. Very few people bother to discuss the draft Basic Law, which will serve as a mini-constitution for Hong Kong after 1997."); Far E. Econ. Rev. 20, 21 (July 20, 1989) ("... in the wake of the massacre, people have woken up to the flimsy nature of the Joint Declaration, the hollowness of British and Chinese promises and the lack of mechanisms to enforce compliance.").

assurance of autonomy for the region. Hong Kong should be able to draw upon other models of autonomy and the standards set by these models to argue persuasively that the above changes are necessary to insure true self-government for Hong Kong.

Noticeably absent from this list is the PRC's power to amend the Basic Law, which is arguably the most important aspect of the allocation of power. This has been set apart because it is also the most difficult issue to resolve equitably. It is the point at which the PRC's power to enact and amend laws as a sovereign nation directly conflicts with Hong Kong's need to be free from interference. Fortunately, on this very point there is a parallel model of autonomy which is of value.

III. COMMONWEALTH OF NORTHERN MARIANA ISLANDS (CNMI)

The Marianas are a group of islands in the Western Pacific, situated within Micronesia. Following World War II the United States administered the islands of Micronesia pursuant to a strategic trusteeship created by the United Nations, known as the Trust Territory of the Pacific Islands.⁸⁵ The trusteeship was created for the protection of non-self governing territories, to promote the independence and advancement of the inhabitants, and to maintain international security.⁸⁶ Beginning in 1969 the United States negotiated with representatives from each of the island groups of the Trust Territories to arrange for a new status.⁸⁷ The ultimate goal of the new status was termination of the Trust.⁸⁸ In the course of these discussions the islands divided into four entities. Three chose the status of free association with the United States,⁸⁹ and the fourth, the Northern Mariana Islands, opted to join political union with the United States as a Commonwealth.

For a variety of reasons, the Northern Marianas desired a close relationship with the United States, in contrast to the other three

85. Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189.

86. See generally Note, *Self-Determination and the Security in the Pacific*, 9 N.Y.U. J. INT'L L. & POL. 277, 279-82 (1976).

87. See generally Clark, *supra* note 12.

88. Substantial criticism has been directed at the United States for the way it handled the Trust Territories. See, e.g., D. MCHENRY, *MICRONESIA: TRUST BETRAYED* (1975); Mink, *Our Bungled Trust*, 6 TEX. INT'L L.J. 181 (1971).

89. These three entities are the Republic of Palau, the Republic of the Marshall Islands, and the Federated States of Micronesia. See generally *The Compact of Free Association: An End to the Trust Territory of the Pacific Islands*, 5 B.U. INT'L L.J. 213 (1987).

entities, which preferred a more independent status. Negotiations resulted in the drafting of the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States" (Covenant).⁹⁰ Inhabitants of the Mariana Islands approved the Covenant by a vote of 78% in a United Nations approved plebiscite held in mid-1975.⁹¹ The Covenant was then enacted into law by the United States Congress and signed by President Ford.⁹²

The Covenant, which sets forth the basic nature of the relationship between the United States and the Marianas, is not a treaty or international agreement. It has been described as a "federal relations act with certain international aspects to it."⁹³ Under the Covenant, CNMI exercises "local self-government excepting the handling of foreign relations and military affairs."⁹⁴ The United States is sovereign over the area and residents are entitled to United States citizenship.⁹⁵ The CNMI remains outside the U.S. customs territory, it controls immigration, and it may join international organizations.⁹⁶ The Covenant required the people of the Marianas to formulate a Constitution which provides for a republican form of government, with separate executive, judicial, and legislative branches, and a bill of rights.⁹⁷ The CNMI Constitution was approved by referendum on March 6, 1977.⁹⁸ Together, the Covenant and the Constitution provide CNMI with a status unique in the United States: greater self-government than previous U.S. territories, but less autonomy than freely associated states.⁹⁹

The basic structure settled upon falls within the range for auton-

90. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States, Feb. 15, 1975, H.R.J. Res. 549, 94th Cong., 1st Sess. (1975), S.J. Res. 107, 94th Cong., 1st Sess. (1975), Pub. L. No. 94-241, 90 Stat. 263 (1976) ("Covenant").

91. See *Recent Developments*, 18 HARV. INT'L L.J. 204, 207 (1977).

92. Covenant, *supra* note 90.

93. Sen. Rep. No. 596, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 448, 455 ("The Administration considers that the Covenant helps fulfill American international obligations under the United Nations Charter and the Trusteeship Agreement"). Courts have held that the Covenant is to be considered federal law. See *Taisacan v. Camacho*, 660 F.2d 411 (9th Cir. 1981).

94. Covenant, *supra* note 90, Preamble.

95. *Id.* art. I, § 101, and art. III, § 301; see generally *Com. of Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir. 1984).

96. *Id.* art. VI, § 603; art. V, § 503; art. IX, § 904(c).

97. *Id.* art. II, §§ 201, 203.

98. Willens & Seimer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373, 1387 (1977).

99. See *Atalig*, *supra* note 95, at 685 n.5, 687.

omous entities. The Governor and Legislature are locally elected.¹⁰⁰ Judges are appointed by the Governor with the advice and consent of the Legislature.¹⁰¹ The Legislative power extends "to all rightful subjects of legislation,"¹⁰² and the U.S. has no veto power over legislation: CNMI may amend its constitution without approval of the U.S.¹⁰³ The judicial power vested in the local courts is similar to that provided to the several states of the United States, with U.S. District Court jurisdiction in federal matters, and appeals from final decisions of the CNMI highest court allowed only where issues are raised relating to the federal constitution, laws, or treaties.¹⁰⁴

The crucial issues in negotiating the terms of the Covenant were limiting application of the United States Constitution and restricting federal legislative authority over CNMI. CNMI is culturally and geographically distinct from the United States and the people of the Marianas wished to have more protection from federal interference than that accorded to Guam, Puerto Rico, American Samoa, and the Virgin Islands. They were partially successful in achieving this goal. Article V of the Covenant lists the individual provisions of the U.S. Constitution which apply to CNMI. Those provisions of the U.S. Constitution not listed have no effect in CNMI.¹⁰⁵ Article V further adds that other provisions of the U.S. Constitution "will be applicable within the Northern Mariana Islands only with approval of the Government of the Northern Mariana Islands and the Government of the United States."¹⁰⁶ As a result of Article V, the CNMI Constitution contains provisions which directly violate the U.S. Constitution.¹⁰⁷

A similar approach was used to designate in the Covenant which existing federal laws would apply to the CNMI and which would not.¹⁰⁸ A provision in the Covenant created a Commission consist-

100. Covenant, *supra* note 90, art. II, § 203(b) and (c).

101. CNMI CONST. art. IV, § 4.

102. *Id.* art. II, § 1.

103. Covenant, *supra* note 90, art. II, § 202. There is an indirect review in the sense that U.S. courts may determine in a given case whether an amendment is consistent with the Covenant and applicable U.S. laws. *Id.*

104. *Id.* art. IV, § 402. The Covenant provides for a brief transition period during which the U.S. District Court will continue to exercise appellate jurisdiction.

105. Fleming v. Dept. of Public Safety, 837 F.2d 401, 405 (9th Cir. 1988).

106. Covenant, *supra* note 90, art. V, § 501(a).

107. See generally Willens, *supra* note 98 (non-proportional voting and restrictions on land alienation violate U.S. Constitution); Branch, *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?*, 9 DEN. J. INT'L L. & POL. 35 (1980); see also Atalig, *supra* note 95 (6th Amendment right to jury trial of U.S. Constitution does not apply to CNMI).

108. Covenant, *supra* note 90, art. V, §§ 502 and 503.

ing of seven members, comprised of at least four persons from CNMI, to survey the laws of the U.S. and report to Congress which laws should and should not apply.¹⁰⁹ The Commission was to “take into consideration the potential effect of each law on local conditions within the Northern Mariana Islands[.]”¹¹⁰ The Commission was required to issue a final report within one year of the termination of the Trusteeship.

Finally, the Covenant contains a provision limiting the future exercise of federal legislative power. The Territorial Clause of the U.S. Constitution gives the federal government broad discretion and power over territories.¹¹¹ Representatives of the Marianas “questioned whether the principle of maximum self-government could be reconciled with the plenary powers of Congress under the Territorial Clause.”¹¹² Initially, the U.S. opposed any limitation on federal power, arguing that as a practical matter the federal government had seldom interfered in the internal affairs of the territories.¹¹³ The compromise they settled upon was mutual consent, whereby fundamental provisions of the Covenant “may be modified through federal legislation only with the consent” of both governments.¹¹⁴ This is a unique limitation on the power of Congress under the Territorial Clause, the significance of which is more apparent when one considers that the Covenant is merely a federal statute. In effect, Congress enacted a statute which limits its ability to directly or indirectly amend the statute in the future, by requiring the approval of an outside entity. The express purpose of this extraordinary limitation is to respect the Marianas’ right of self-government,¹¹⁵ or more specifically, the Marianas’ right to be free from interference.

IV. CNMI AND HONG KONG

The differences between CNMI and Hong Kong are so evident that comparison initially seems nonsensical. Nonetheless, there are obvious similarities. Like CNMI, on the continuum of autonomous entities, Hong Kong falls in an intermediate status between a terri-

109. *Id.* art. V, § 504.

110. *Id.*

111. Leibowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT’L L.J. 19, 23, (1981).

112. *Id.* at 26.

113. *Id.* at 27.

114. Covenant, *supra* note 90, art. I, § 105.

115. *Id.*

tory and an associated state. Both CNMI and Hong Kong are in danger of being overwhelmed by their association with a dominant central government which has very different traditions. They both rely upon two related documents, one in the form of an agreement and the other a "constitution," to set up their government structure and to define their relationship with the central government. Perhaps they are most alike in their fear of central government interference in internal affairs. The United States and the PRC also shared certain characteristics in their approach to the problem. Both were willing to allow a limited degree of autonomy, primarily internal self-government. However, the relationship had to exist coherently within their own constitutional scheme with ultimate control clearly in the central government. Both the U.S. and the PRC approached the respective negotiations with an adversarial attitude, hoping to concede only what must be conceded. They shared the concern that if too much was given other similar regions less well off would agitate for equal treatment. Considering this confluence of fears and motivations, it is not surprising that similar issues were faced. At least in response to one problem a similar approach has already been taken. In both instances, the national laws to be applied to the autonomous region were surveyed by a Committee and explicitly listed.

The PRC and Hong Kong will benefit by examining the way the U.S. and CNMI dealt with the difficult issue of allowing certain violations of the U.S. Constitution in CNMI. Many commentators have observed that Hong Kong's capitalist economic system will violate the requirement in the PRC Constitution of a socialist economic system. Setting out in the Basic Law which provisions of the PRC Constitution would not apply to Hong Kong (or setting out those which would apply) will help clarify the boundaries of the relationship, will avoid future disputes, and will provide greater security to Hong Kong.

Most important, however, is the compromise made by the U.S. and CNMI on the restriction of federal legislative power to amend the Covenant. As argued in an earlier section, the greatest danger to Hong Kong's internal self-government is the PRC's power to unilaterally amend the Basic Law. Although such amendments cannot violate the Joint Declaration, the Declaration is bare and in many respects ambiguous, allowing the PRC substantial flexibility. The PRC also has the power under international law to amend the Joint Declaration with Britain's consent, regardless of the wishes of

Hong Kong. However, practically speaking, Britain would probably consider the interests of Hong Kong. In contrast, the United States has no power to amend CNMI's Constitution and may not modify fundamental provisions of the Covenant without CNMI's consent. Because the underlying circumstances were different, the Covenant is not directly parallel to the Joint Declaration, and the Basic Law is not directly parallel to CNMI's Constitution. The Joint Declaration served as a brief outline to be filled in by the Basic Law on both the political relationship and internal matters. The Covenant focused more in depth on the political relationship, and the CNMI Constitution deals exclusively with internal matters. On the critical element, national legislative power, the Covenant is actually comparable to the Basic Law. Both the Covenant and the Basic Law are statutes enacted by the respective central governments. As such, each of these statutes are linked to the exercise of sovereign legislative power, which gives the central government the inherent right to unilaterally change the fundamental base of the autonomous entity.

The Marianas and the United States (albeit the latter only after insistence of the former) recognized that true autonomy could not exist under this condition. Self-government and non-interference would be precarious in the absence of some restraint more concrete than assurances of good faith. To resolve this problem, the parties identified the fundamental provisions of the Covenant: those setting out the political relationship, the internal structure of the CNMI government, and citizenship, and those limiting the application of federal laws and the federal constitution. These provisions are necessary to insure self-government, and were set apart as untouchable by the federal government without consent of CNMI. All other provisions of the Covenant can be modified by the U.S. in the same manner any statute is subject to modification.

The application of this compromise to the PRC's power to unilaterally amend the Basic Law is obvious. The fundamental provisions of the Basic Law should be identified, including those on general principles, political relationship, fundamental rights, and political structure. The controlling principle should be identification of those provisions essential to self-government, and the PRC should explicitly give up its power to amend these provisions without first obtaining the consent of the government of Hong Kong. All provisions not so identified may be amended by the PRC as it would any other statute.

The PRC would not be giving up much in terms of scope because the provisions set aside will inevitably coincide with the basic provisions of the Joint Declaration, which the PRC also cannot unilaterally amend. Thus, the PRC would restrict its power to change the Basic Law to the extent that the law fills in the gaps of the Joint Declaration in the areas of self-government. However, the boundaries of what the PRC may unilaterally control would not be affected. The benefit to Hong Kong would be great, both psychological and concrete, giving the people a sense of stability and control over the very foundation of their government and separate existence, and that most important of intangibles, they would have a say that matters. Foremost, the principle of non-interference would be given effect.

CONCLUSION

It would be rather easy to take apart the draft Basic Law section by section and to suggest changes that would make Hong Kong more autonomous. The difficulty comes in offering support for the changes based on reasons other than philosophical objection to the PRC's political and economic system, and sympathy for Hong Kong's plight. Too much of the opposition to date has come from this direction. What is needed is a more balanced analysis which takes into account the legitimate interests of the PRC as well as the fears of Hong Kong. This paper has attempted to take a more balanced approach by measuring the draft Basic Law and the Joint Declaration against other models of autonomy to lend some meaning from external sources to the crucial phrase "high degree of autonomy." A high degree, by definition, is a relative concept, which can be understood only by comparing what is intended in a particular situation with what exists in other situations. Once a standard is identified, a more productive evaluation of the merits of each side can occur. Another value of comparison is the discovery that similar problems have previously been dealt with in ways which may be of some use.

Perhaps the most controversial aspect of this paper is the suggestion that the PRC's assertion of power to interpret the Basic Law, within the limits proposed, is legitimate. The paper also suggests that the PRC's power to amend the Basic Law, within limits, is legitimate. The key to this analysis, of course, is the limits, which are based on the principle of non-interference. To be effective, any suggestion must be acceptable to the parties involved in the context

in which it is to be applied. Therefore, this paper has taken a quintessentially Asian approach: pragmatic compromise.