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Constitutionalism under Chinese Rule: Hong Kong after the Handover

Keywords

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CONSTITUTIONALISM UNDER CHINESE RULE: HONG KONG AFTER THE HANDOVER

MICHAEL C. DAVIS*

I. INTRODUCTION

With nearly two years having passed since the founding of the Hong Kong Special Administrative Region (HKSAR) it is a good time to assess Hong Kong's constitutional and human rights prospects. The 1984 Sino-British Joint Declaration set Hong Kong aside for a unique Chinese experiment with the fundamentals of modern liberal constitutional government.¹ In the 1984 agreement providing for the return of Hong Kong to China, Hong Kong was promised democracy, human rights and the rule of law, along with a "high degree of autonomy" under China's "one country, two systems" formula.² With the July 1997 handover, after thirteen years of preparation, the final phase of executing this agreement commenced. The people of Hong Kong and the world are watching to see if China's solemn commitments to set up a regime of liberal human rights and democracy within an authoritarian national system are carried out. While the transfer of sovereignty in Hong Kong on July 1, 1997 went relatively smoothly, tension between real power, reflected in China's perceived national imperatives, and the aspirations of liberal constitutionalism and autonomy remain and will shape the Hong Kong constitutional experiment. This tension is examined in the current essay.

The Hong Kong project highlights the demanding task of con-

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1. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Sept. 26, 1984, 23 I.L.M. 1371, UK—PRC [hereinafter Joint Declaration]. The promises of the Joint Declaration were stipulated in Article 3 (12) to be included in the HKSAR's constitution, the Basic Law. *Id.* at 1372.

2. *Id.* at 1371; People's Republic of China: the Basic Law of the Hong Kong Special Administrative Region of the Peoples' Republic of China, Apr. 4, 1990, 29 I.L.M. 1511, 1529 [hereinafter Basic Law].

structing an adequate regime to secure autonomy and liberal human rights in a hostile national environment. In this regard, it is important to note that the nature of that national environment has changed from that envisioned in the Joint Declaration. The original design of the Joint Declaration seemed fundamentally concerned with the theoretically worthy task of separating a local liberal capitalist system from a Marxist national system. The advent of the free market in China means this project now may simply distinguish an authoritarian capitalist system on the mainland from an aspiring liberal capitalist or even soft-authoritarian one in Hong Kong.

The success of Hong Kong's model will have enormous implications for both Hong Kong and China. A successful Hong Kong, under the commitments in the Sino-British Joint Declaration, would alone be a sufficient basis for this demanding constitutional effort. However, it is important to remember that this success will not only work to China's economic benefit, but may also afford a laboratory for China's ongoing political reform process. The Joint Declaration will certainly raise the high water mark for securing the benefits of human rights, liberty and democracy in Chinese society. Hong Kong's money and its rule of law, as well as its political and social values, are already traveling across the very porous Sino-Hong Kong border. Viewed internationally, Hong Kong is a major player in the global economic order and will be watched by its many trading partners. They will be watching to see if Hong Kong is a truly autonomous open community, which can be relied upon in the conduct of external relations. This is the high hope of the Hong Kong promise and of Hong Kong's service to China.

This essay consists of three substantial parts. The first part addresses the basic constitutional order and its evolving commitments. After concluding that the Sino-British Joint Declaration includes a commitment to liberal constitutionalism, this part assesses the health of three key liberal constitutional elements, including sections on democracy, human rights and the rule of law. Both the Hong Kong Basic Law and subsequent transition and post-handover policies and practices are addressed. The remaining parts of this essay offer analysis of two key areas of concern, or what might be considered the main challenges facing Hong Kong in the implementation of its promised liberal constitutional order. These include the emergence of a competing political model evident in a "Singaporean" vision for Hong Kong, and the challenges associated with autonomy. The first of these relates to an economic paradigm, offered in competition to the liberal one discussed herein, that may animate current government policies and undermine this constitutional commitment. The final part analyzes the constitutional politics of autonomy, both in terms of Hong Kong's domestic relationship with China and its international personality.

II. THE BASIC CONSTITUTIONAL AND HUMAN RIGHTS COMMITMENTS

The 1984 Sino-British Joint Declaration, in addition to providing for the return of Hong Kong to China in 1997, essentially promised Hong Kong a future with a liberal constitutional order and a high degree of autonomy under the Basic Law.³ As a general proposition, the basic structural elements of liberal constitutionalism are thought to include (1) democracy with multi-party competition, (2) liberal human rights protection, including freedom of speech, and (3) the rule of law, including adherence to principles of legality.⁴ With the exception of some limitations on the level of democracy, the Joint Declaration promises all of these elements. In 1984, it was understood that anything less would fail to secure adequate confidence in Hong Kong's future. At that time a substantial portion of Hong Kong's people had escaped from the brutality of totalitarian communism, and the Chinese leaders themselves had just escaped the national trauma of the Cultural Revolution. While the Joint Declaration is general in character, it leaves little interpretive space for vitiating the liberal capitalist intentions of its drafters.⁵ While the Chinese leaders may have been naive about the political implications of the great social experiments embodied in their open policy at home and in their Hong Kong policy, they left little ambiguity as to the nature of their Hong Kong commitment. Their commitment was for liberal constitutional government. Respecting democracy, the Joint Declaration promises that the Chief executive is to be chosen by "elections or consultations" held locally and that the legislature is to be chosen by "elections."⁶ Regarding human rights, the Joint Declaration lists the full panoply of liberal rights, of which more than half relate to freedom of expression.⁷ It also guarantees the application of the international human rights covenants.⁸ The rule of law is expressly secured by the continued application of the common law, the independence and finality of the local courts, the supremacy of the Basic Law (which is stipulated to include the content of the Joint Declaration), and the right to challenge executive actions in the courts, which presumably includes the right to challenge the actions legal basis under the Basic Law.⁹ By implication, this promised nothing less than a full system of constitutional judicial review to enforce a substantial bill of

3. Joint Declaration, *supra* note 1, at 1371-75.

4. See ROBERT A. DAHL, *DEMOCRACY & ITS CRITICS* 223 (1989).

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

6. See *id.* at para. 3(4) & Annex I, art. I.

7. See *id.* at para. 3(5) & Annex I, art. XIII.

8. *Id.*

9. *Id.* at para. 3(3), (5), (12), & Annex I, arts. I-III, XIII.

rights. In tandem with a degree of democracy and a high degree of autonomy, the Joint Declaration committed China to liberal constitutional government in Hong Kong.

The HKSAR Basic Law, enacted in 1990, lives up to these commitments in many respects but falls ambiguously short in others.¹⁰ As a constitutional document, the Basic Law is the product of an extraordinary five year drafting process.¹¹ After multiple drafts and endless discussions a constitutional road map for the future HKSAR took shape. While these discussions, engaged a wide range of ideas, Chinese officials did seek to constrain the outcome. They were cautious about democratic development from the start.¹² But at the final stage, before approving the final Basic Law in April 1990, the 1989 Tiananmen demonstrations in Beijing and the enormous supporting demonstrations in Hong Kong left their mark. Although many key provisions were already finalized in the February 1989 final draft¹³ and remained unaffected by Tiananmen, the 1989 demonstrations in Hong Kong shifted the paradigm of China's Hong Kong policy from protecting Hong Kong from China to the other way around.

China's basic political instincts to maximize control and this "Tiananmen effect" combined to produce the conservative Hong Kong policy evident in the final Basic Law and China's transition practices. Both in the Basic Law and in subsequent transition policies, a degree of erosion from the Joint Declaration commitments has occurred. The following sections consider each of the key liberal constitutional components discussed above as they have emerged in the Basic Law, the transition process, and the post-handover politics of the first couple years of Chinese rule.

A. *Democracy*

The erosion of the Joint Declaration commitments is especially evident with regard to democracy, where the Tiananmen effect was most pronounced. The relevant provisions respecting democracy were not finalized in the first draft of the Basic Law published in 1988.¹⁴ The

10. Basic Law, *supra* note 2, at 1520-50.

11. This process included China's appointment of a 180-member Basic Law Consultative Committee (all Hong Kong residents), and a 58-member Basic Law Drafting Committee (of which 23 members were Hong Kong residents). *Id.* at 1511.

12. See MICHAEL C. DAVIS, CONSTITUTIONAL CONFRONTATION IN HONG KONG, ISSUES AND IMPLICATIONS OF THE BASIC LAW, 28-29 (1989) [hereinafter CONSTITUTIONAL CONFRONTATION].

13. *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (Draft) [hereinafter Draft Basic Law], reprinted in DAVIS, CONSTITUTIONAL CONFRONTATION, *supra* note 12, at 175-215.

14. DAVIS, *supra* note 12, at 28-29.

1989 Draft Basic Law then adopted a very conservative model.¹⁵ After the 1989 demonstrations, as Chinese leaders worried about Hong Kong becoming a base of subversion, they sought to tighten the noose on democracy, insisting on retaining this very conservative evolutionary model in the final Basic Law.¹⁶ This model, respecting the election of the first post-handover Legislative Council, allows the sixty-member body to have only twenty directly-elected geographical seats, ten Selection Committee seats and thirty functional constituency seats (from various professional and commercial sectors).¹⁷ It is noteworthy that this figure was worked out with the British as part of a convergence plan to allow for the pre-handover Legislative Council to have only eighteen such directly elected geographical seats in 1991 and twenty in 1995. With convergence, it was anticipated that those elected in 1995 would remain in office through 1997 until 1999.¹⁸ For the second and third term, under the Basic Law, there will be an evolutionary process expanding the number of directly elected geographical seats to thirty (along with thirty functional seats) by 2004.¹⁹ For the period after 2007 a two-thirds contingent of the Legislative Council and the Chief Executive can amend the Basic Law providing for greater democracy in election of the Legislative Council.²⁰ The Chief Executive, after the first appointment, is to be selected by an 800 member Election Committee.²¹ The Basic Law declares that the "ultimate aim is . . . universal suffrage."²² By the late drafting stage as the leading democrats were eliminated from the post-Tiananmen process finalizing the Basic Law, this conservative model was adopted with little resistance.²³

15. See Draft Basic Law, *supra* note 13, at Annexes I and II.

16. Basic Law, *supra* note 2, at Annexes I and II.

17. Basic Law, *supra* note 2, at Annex II; Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, 1550-51 [hereinafter First Government Decision].

18. *Id.*

19. Basic Law, *supra* note 2, at Annexes I and II.

20. Basic Law, *supra* note 2, at Annex II.

21. *Id.* at Annex I. The process for electing the Election Committee, largely through functional constituencies, insures that conservative business and pro-China forces will hold the controlling vote.

22. *Id.* at arts. 45, 68.

23. Martin C. M. Lee and Szeto Wah, the two leading democratic activists of the 1980s, served on both the Basic Law drafting and consultative committees. After leading more than a million demonstrators under the banner of the Alliance in Support of the Democratic Patriotic Movement in China in 1989, after the June 4, 1989 Beijing massacre, they withdrew from these Basic Law committees. They attempted to resume their positions when the temporarily suspended drafting process resumed in late 1989 but they were refused entry. See *Chronology of Major Events in PRECARIOUS BALANCE: HONG KONG BETWEEN CHINA AND BRITAIN, 1842-1992* 209-211 (Ming K. Chan ed., 1994) [hereinafter *Chronology*].

Any hope that democratic forces can use their foothold to expand democracy is also tightly controlled by other provisions in the Basic Law. Not only is there the two-thirds vote requirement to institute full universal suffrage after 2007, but there are a plethora of other constraints on democracy.²⁴ As the Legislative Council is to take the lead in democratization, these constraints mostly relate to legislative powers.²⁵ For example, for local legislative action members of the Legislative Council are required to get the Chief Executive's approval before they can introduce bills involving expenditure or government policy.²⁶ Additionally, amendments to government bills and motions or bills introduced by individual members of the Legislative Council require majority approval by each of two different groups of legislators: thirty from functional constituencies and thirty made up of members directly elected from geographical constituencies, and those chosen by the Election Committee.²⁷ As if this obstacle course for democratic initiative were not enough, the government argued, in challenging the newly enacted Rules of Procedure of the first post-handover elected Legislative Council, that even amendments to government bills, proposed by legislators, require the Chief Executive's approval.²⁸ The chance of avoiding these constraints through amendment of the Basic Law is also blocked. The power to amend the Basic Law is vested in the National People's Congress (NPC).²⁹ Even the submission of local proposals for amendments requires a two-thirds vote in the Legislative Council, the consent of two-thirds of the local NPC deputies, and the approval of the Chief Executive.³⁰

After promulgating the Basic Law in 1990, China's policy of resisting democracy persisted in the 1990s processes of transition and in post-handover politics. By the early 1990s, influenced by the initiation of direct election for eighteen geographical seats to the Legislative Council in 1991, Hong Kong, under colonial rule, began to develop a democratic political system, with numerous political parties across a broad spectrum, an informed public and a vibrant press attuned to political coverage.³¹ In October 1992 the then new Hong Kong Governor, Chris Patten, put forth a controversial proposal for the last British

24. Basic Law, *supra* note 2, at art. 74 and Annex II.

25. *Id.*

26. Basic Law, *supra* note 2, at art. 74.

27. *Id.* at Annex II.

28. Angela Li, *Justice Chief to Challenge Bill in Court; To Apply a Judicial Review Shows Disrespect for the Legislature's Unanimous Decision*, S. CHINA MORNING POST, July 8, 1998, at 6; Margaret Ng, *Restrictions Will Clip Legco's Wings*, S. CHINA MORNING POST, July 17, 1998, at 17.

29. Basic Law, *supra* note 2, at art. 159.

30. *Id.*

31. It is noteworthy that, Martin Lee and Szeto Wah, after leading the protest in 1989, went on to form and lead the political parties (now the Democratic Party) which won the most popular votes in the elections at various levels held in the 1990s.

Hong Kong election in 1995.³² This proposal aimed to further strengthen the foundation for democratic political development by maximizing the space allowed by the Basic Law electoral ratio.³³ His proposal allowed for nine appointed seats from the 1991 Legislative Council to be replaced by broad-based functional constituencies that included all working voters.³⁴ It further provided that the Selection Committee, anticipated in the Basic Law, for selecting ten seats in the first post-handover Legislative Council, be made up of directly elected members of the district and regional boards.³⁵ This substantially broadened the franchise for two-thirds of the seats in the Legislative Council.

Chinese officials attacked this proposal aggressively.³⁶ They seemed set to exclude certain elected democrats, who had been active in the 1989 demonstrations, from the 1997 through-train.³⁷ After failing to resolve the ensuing impasse through seventeen rounds of negotiations, both sides decided to go it alone.³⁸ The Patten proposal was enacted and followed in the 1995 election, setting the high point, to date,

32. The Right Honorable Governor Christopher Patten, *Our Next Five Years, The Agenda for Hong Kong*, Address at the Opening of the 1992/93 Session of the Legislative Council (Oct. 7, 1992).

33. *Id.*

34. *Id.*

35. His proposal expanded elections and eliminated appointed seats to various sub-Legislative Council district boards and regional councils. These elected bodies then made up his Selection Committee for the selection of ten legislators, as specified in China's transition legislation. By matching China's basic formula Patten hoped his full Legislative Council would ride on the through-train to serve beyond the 1997 handover. There was an interesting development after the handover, in addition to eliminating the Board members prominent electoral role in the Legislative Council, China's Hong Kong government re-introduced into Hong Kong Government some appointed seats to district boards and even abolished one level of councils. Angela Li, *Five Walk Out as Appointed Seats Secure Approval*, S. CHINA MORNING POST, Mar. 11, 1999, at 6.

36. See *Representative Government in Hong Kong* (Hong Kong: Government Printer, 1994)(reproducing the text of the White Paper presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty on 24 February 1994) (representing the British account of the negotiations and their breakdown) [hereinafter *Representative Government in Hong Kong*]; *UK Accused of Breaching Trust By Leaking Confidential Details*, S. CHINA MORNING POST, Mar. 1, 1994, at 12-13 (containing China's report on the breakdown of negotiations).

37. Democratic party members Martin Lee and Szeto Wah were excluded from the Basic Law drafting and consultative committees. Both had led the 1989 demonstrations in Hong Kong and were founders of the alliance in support of the Patriotic Democratic Movement in China, which China has branded as subversive. *Chronology*, *supra* note 23, at 208-10. In the course of the 1993 Sino-British negotiations over elections, Chinese officials repeatedly proposed a review formula that would allow them to exclude both Mr. Lee and Mr. Szeto from the through-train. See *Representative Government in Hong Kong*, *supra* note 36; *UK Accused of Breaching the Trust by Leaking Confidential Details*, *supra* note 36.

38. *Representative Government in Hong Kong*, *supra* note 36; Linda Choy, *Calls to Release Minutes for Fair Analysis*, S. CHINA MORNING POST, Mar. 1, 1994, at 4.

for democracy in Hong Kong.³⁹

Objecting to the British Hong Kong actions, China started to roll back these democratic developments.⁴⁰ China created a "second stove" by appointing its' supporters to a large number of transition bodies.⁴¹ These appointed bodies included several local advisory groups, and ultimately, for the transition process, a Preliminary Working Committee and its successor, the Preparatory Committee.⁴² The Preparatory Committee was charged with several transition functions, including the selection of a 400 member Selection Committee.⁴³ This Selection Committee then chose both the first Chief Executive and a Provisional Legislature.⁴⁴ The appointed Provisional Legislature, took office on July 1, 1997 and remained in power until April of 1998. The Provisional Legislature was never mentioned in the Basic Law or the transition legislation, concurrently enacted by the National People's Congress (NPC), which specifies the electoral make-up of the first HKSAR Legislative Council.⁴⁵ Though it survived a judicial challenge raised immediately after the handover, the Provisional Legislature appeared to clearly violate the NPC transition legislation's specific electoral requirements and the more general requirement that the legislature be chosen through elections, specified in both the Basic Law and the Joint Declaration.⁴⁶

During its one year tenure, the Provisional Legislature enacted the electoral law, under which the current Legislative Council was elected

39. See *Jubilant Democrats Eye Legco*, S. CHINA MORNING POST, Mar. 7, 1995, at 1. Fung Wai-Kong and Lok Wong, *Democrats Dominate Legco*, S. CHINA MORNING POST, Sept. 19, 1995, at 1.

40. Representative Government in Hong Kong, *supra* note 36; *UK Accused of Breaching the Trust by Leaking Confidential Details*, *supra* note 36.

41. *Beijing Names New Advisers*, S. CHINA MORNING POST, Apr. 26, 1999, at 1.

42. Chris Yeung, *Players in the Power Game*, S. CHINA MORNING POST, Dec. 2, 1995, at 17.

43. *Id.*

44. *Incumbent and Legco Losers Win Selection Fight; Qian's Pointer to Smooth Transition in Martin Lee's 'darkest day' since '89, While Governor Sickens*, S. CHINA MORNING POST, Dec. 22, 1996, at 1; Chris Yeung, *The Obligations of Office*, S. CHINA MORNING POST, Dec. 14, 1998, at 21; Chris Yeung & Linda Choy, *Tung Leads The Way; 'We are Finally Masters of Our Own House . . . We Must Put Aside Our Differences and Find Common Ground to Build Hong Kong Together'*, S. CHINA MORNING POST, Dec. 12, 1996, at 1.

45. First Government Decision, *supra* note 18.

46. Since the court held that the Basic Law preserved the law in question, being challenged by a criminal defendant, without need of the Reunification Ordinance, the ruling upholding the legality of the Provisional Legislature was *orbiter dicta*. *HKSAR v. Ma Wai Kwan David & Ors*, Court of Appeal, No. 1, 1997 330-31. See also Cliff Buddle, *Handover Body Facing New Court Test; Appeal Judges Ready to Review Landmark Ruling on Validity of Provisional Legislature*, S. CHINA MORNING POST, Mar. 6, 1998, at 8; Cliff Buddle, *Same Judges to Hear New Challenge to Legislature*, S. CHINA MORNING POST, Feb. 19, 1998, at 5; Margaret Ng, *Decision that Resonates*, S. CHINA MORNING POST, Aug. 8, 1997, at 19.

on May 24, 1998.⁴⁷ The electoral method for this election was an extremely conservative version of the post-handover model specified in the Basic Law, and the NPC Decision respecting the first government, consisting of thirty functional constituency seats, ten Selection Committee seats and twenty directly elected geographical seats.⁴⁸ This conservative quality was evident in the narrowing of the nine functional constituencies that Chris Patten's model had broadened to include all working voters; functional constituencies were considerably narrowed, such that only 230,000 voters from elite sectors made up the potential size of the functional constituencies.⁴⁹ The Selection Committee, to fill ten seats, required that the 400 members be selected by approximately 140,000 functional constituency voters, plus other designated local and national political figures.⁵⁰ The twenty directly elected geographical seats were structured through a proportional representation scheme to limit the role of the democratic camp in the Legislative Council.⁵¹ The directly elected seats were formerly based on one seat, one vote districts where the candidate with the most votes prevailed.⁵² The new model provides for three to five seat districts with one vote per voter, and then employs a complex formula to distribute the seats to ensure some seats for less popular candidates.⁵³ The end result is a government made up of an appointed Chief Executive and a Legislative Council where an elite minority of about 230,000 individual and corporate voters select two thirds of the legislators.⁵⁴ In this model the electoral process seems to have considerably drifted from the Joint Declaration's liberal promises.

47. Legis. Council Ordinance, CAP 542 (Sept. 28, 1997).

48. *Id.* at arts. 19, 21 and 23.

49. Linda Choy & Chris Yeung, *Uneven Response as Voter Drive Ends*, S. CHINA MORNING POST, Jan. 17, 1998, at 1. Registration of 2.77 million geographical voters (70% of those eligible) and 148,000 functional individual and group voters (about 60% of those eligible) occurred. No Kwai-Yan, *290,000 New Voters Register in Campaign*, S. CHINA MORNING POST, Jan. 18, 1998, at 4.

50. *Week-long Nominations for Poll Body Set to Begin*, S. CHINA MORNING POST, Mar. 9, 1998, at 6.

51. Quinton Chan & Linda Choy, *'List Voting' Lets Candidates Run as Independents*, S. CHINA MORNING POST, July 9, 1997, at 8; *Greater Uncertainty for Key Candidates*, S. CHINA MORNING POST, Mar. 2, 1998, at 6.

52. Margaret Ng, *Democrats the Losers in Tung's Game Plan*, S. CHINA MORNING POST, Sept. 19, 1997, at 29; Fung Wai-Kong, *Pro-China Party Leader Calls for Proportional Representation*, S. CHINA MORNING POST, Feb. 17, 1997, at 1.

53. In addition to favoring less popular pro-China candidates, this system has had the effect of pitting pro-democracy candidates, both from different parties and within the same party, against each other. *Historic Poll a Fight Among Friends Revamped Multi-Seat Battlegrounds Pit Allies Against Each Other in Scramble for Votes*, S. CHINA MORNING POST, Feb. 23, 1998, at 6.

54. The use of corporate votes in functional constituencies has been cited as a potential source of abuse of this functional system, with some in the Real Estate and Construction sector being accused of setting up shelf companies which become corporate voters. Gren Manuel, *Tycoons Buy Extra Ballots*, S. CHINA MORNING POST, Feb. 22, 1998, at 2.

The design of this model seemed clearly aimed at keeping the democratic camp in the minority; it successfully accomplished its' mission. With a relatively high voter turnout of fifty-three percent, the various democrats, including members of three parties and some independents, were given over sixty percent of the vote at the May 24, 1998 Legislative Council elections.⁵⁵ Despite this resounding victory, democrats were able to secure only one-third (twenty) of the sixty seats in the Legislative Council.⁵⁶ Given that the ten Selection Committee seats were a virtual give-away to the pro-China camp, and that ten functional seats were awarded uncontested (nine to pro-business candidates and one to a democrat), one might conclude that conservative and pro-China politicians were practically given, through this conservative electoral model, as many seats as democrats won through their landslide victory.⁵⁷ After their victory, the democrats' attempt to secure passage of a Legislative Council motion for a quicker pace of democratization was predictably scuttled by split voting and other Basic law requirements.⁵⁸

All of this offers little optimism for democratization efforts. The democrats are effectively left with only the moral force of their argument directed at highly resistant national and local governments, the latter of which faces consequent legitimacy problems. Some have urged that in the context of this legitimacy gap, and China's resistance to liberalizing the formula for its so-called executive led local HKSAR government, it is wise to institute a ministerial system, thereby engaging elected legislators in the government.⁵⁹ Given the moderate nature of the democratic camp in Hong Kong this might work, though it is doubtful that democrats will accept it as a substitute for democratization. In the face of very moderate and responsible democrats the current confrontational approach by the government seems unwarranted.⁶⁰ One

55. *Record Turnout Poised to Give Democrats Sweeping Victory*, S. CHINA MORNING POST, May 25, 1998, at 1.

56. *Lessons of the Poll*, S. CHINA MORNING POST, May 26, 1998, at 18.

57. Jimmy Cheung & Joice Pang, *Ten Take Office in Polls Walkover*, S. CHINA MORNING POST, Apr. 25, 1998, at 1.

58. Chris Yeung, *Democracy Debate Scuttled by Sparring*, S. CHINA MORNING POST, July 16, 1998, at 4. It is noteworthy that one leading democrat has even proposed that the Chief Executive call a constitutional convention to address the demand for an increased pace of democracy, a demand that seems unlikely to gain an affirmative response. No Kwai-Yan, *Call for Forum on Pace of Democracy*, S. CHINA MORNING POST, July 10, 1998, at 6.

59. C.K. Lau, *A Search for Harmony*, S. CHINA MORNING POST, May 25, 1998, at 19; Siu-kai Lau, *Ministers in the Making*, S. CHINA MORNING POST, Apr. 3, 1998, at 25. The current system employs various high-ranking civil servants to run government departments and an Executive Council, made up of private sector appointees that advises the Chief Executive. Such a ministerial system might become a kind of bandage to lend legitimacy to the government in the absence of substantial democratization.

60. The moderate quality of the democratic camp is evident even in their willingness to participate in this biased electoral system. Beyond that, their moderateness was demonstrated after their election when they joined hands with conservative forces to form a

can only hope that when political difficulties arise the wall of resistance to democracy does not result in increased political conflict.

B. *The Human Rights Structure*

Considering human rights on a constitutional level, the rights chapter in the Basic Law, on its face, appears adequate because it includes various rights specified in the Joint Declaration, and specifies that any restrictions on rights are subject to the requirements of the international human rights covenants.⁶¹ This chapter, along with provisions respecting interpretation and review, was finalized in the February 1989 draft of the Basic Law, and was thus not a product of the Tiananmen effect. It was the product of substantial debate and revision of earlier, less satisfactory drafts. Where rights took a hit in the Basic Law were in provisions beyond the rights chapter allowing for application of national law in cases of emergency or where the central government determines there is "turmoil" in the region and in provisions which require the enactment of local laws against "sedition" and "subversion."⁶² These provisions had the imprint of Tiananmen. With an adequate rights chapter and such ambiguous terms in other sections, rights protection will ultimately depend on interpretation in the processes of enacting and enforcing laws, especially in the exercise of review power.⁶³

Looking beyond the Basic Law, when considering the current evolving human rights regime in Hong Kong, one discovers a surprising vitality, though a plethora of threats.⁶⁴ The vitality is a product of rich public discourse and is evident in both cases and in the legislative proc-

united position on a six-point proposal to address the effects of the Asian economic crisis in Hong Kong. Chris Yeung & Jimmy Cheung, *Coalition, Donald Tsang Set for Show-down*, S. CHINA MORNING POST, June 6, 1998, at 6.

61. Basic Law, *supra* note 2, at arts. 24-42.

62. *Id.* at arts 18, 23.

63. Any mainland role in delineating the boundaries of Hong Kong's rights protections is of concern. The mainland Chinese rights regime, is ideologically opposed to the liberal one promised Hong Kong. It is said to have the following characteristics: 1) rights are juxtaposed with duties; 2) rights are not considered inherent in humanhood but are treated as the creation of the state; 3) welfare rights are emphasized over political rights; and 4) instead of rights being a limit on the state, the state's interest are a limit on rights. See generally R. RANDLE EDWARDS ET AL., *HUMAN RIGHTS IN CONTEMPORARY CHINA* (1986). (stating that the contradiction in the respective systems is the basis for the "one country, two systems" model for Hong Kong).

64. Under the Hong Kong Bill of Rights Ordinance enacted in 1991, the level of human rights litigation has been substantial. Hong Kong Bill of Rights Ordinance, No. 59 (June 8, 1991) reprinted in 30 I.L.M. 1310 (1991). See generally Johannes Chan, *The Hong Kong bill of Rights 1991-1995: A Statistical Overview in HONG KONG'S BILL OF RIGHTS: TWO YEARS BEFORE 1997* (George Edwards & Johannes Chan, eds. 1995)(discussing various aspects of the Hong Kong Bill of Rights and the Basic Law).

ess.⁶⁵ In many respects, the 1984 Joint Declaration, and later, the tragic events at Tiananmen, stimulated a great deal of self-reflection about human rights in Hong Kong's political culture.⁶⁶ With the handover on the horizon, there was a degree of urgency, and Hong Kong's people rose to the occasion. Though there were many menacing actions by Chinese officials before the handover, and recent retrograde steps by appointed Hong Kong officials, Hong Kong's evolving rights tradition may survive such pressures. Certainly if vitality is a measure of the survivability of this rights tradition, there is room for hope.

The international character of the emerging rights regime is its most striking quality.⁶⁷ Hong Kong is at a veritable crossroads of international human rights forces. China stimulated much of this energy by including substantial human rights guarantees, the international human rights covenants, and maintenance of the common law in the Joint Declaration.⁶⁸ Because of this, the 1991 Bill of Rights Ordinance (which remains in force after the handover, minus certain key provisions) copies almost verbatim the International Covenant on Civil and Political Rights (ICCPR).⁶⁹ When the Bill of Rights Ordinance was enacted, the colonial constitution, the Letters Patent, was amended to include the ICCPR.⁷⁰ Under this rights regime the courts were called upon in the last five years of colonial rule to exercise substantial constitutional judicial review power.⁷¹ Here again, the international character of the rights regime was enhanced by frequent judicial reference to overseas common law and European Union precedent.⁷² After the enactment of the Bill of Rights Ordinance the government, and the increasingly democratic Legislative Council, in the last years of colonial rule, reformed many non-conforming colonial laws to better protect human rights.⁷³ Many of these reforms were especially important to secure

65. *See id.*

66. *Id.* *See also* HUMAN RIGHTS IN HONG KONG 1-2 (Raymond Wacks, ed., 1992).

67. *See generally* Michael C. Davis, *Adopting International Standards of Human Rights in Hong Kong*, in HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES 168 (Michael C. Davis, ed., 1995) (discussing the impact of international standards, practices and values on human rights legislation).

68. Joint Declaration, *supra* note 1, art. 3(5) and Annex I, art. XIII.

69. Hong Kong Bill of Rights Ordinance, No. 59 (1991) *reprinted in* 30 I.L.M. 1310 (1991); International Covenant on Civil and Political Rights, 6 I.L.M. 368 (1967).

70. Hong Kong Letters Patent, No. 2 1991, *reprinted in* PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK 19 (Andrew Byrnes and Johannes Chan eds., 1993).

71. *See* Chan, *supra* note 64.

72. *See* R v. Sin Yau Ming [1992] 1 H.K.C.L.R. 127, at 141-42 (CA) (specifying at length the various foreign sources to be considered, including other common law jurisdictions and the European Union cases under the European Convention on Human Rights).

73. The amended laws included the: 1) Societies Ordinance (1992); 2) Television Ordinance (1993); 3) Broadcast Ordinance (1993); 4) Public Order Ordinance (1995); and 5) Emergency Regulations Ordinance (1995). *See* Lawyers Committee for Human Rights, 1995 Critique, 235-36 (1996).

equal protection and freedom of speech.⁷⁴

This reform process engendered a rather positive political environment for human rights protection, with substantial media coverage and legislative consultation over proposed bills. During the last years of colonial rule the largest local threat to rights development was the rather conservative character of the evolving human rights jurisprudence and the ominous open hostility of several members of the then highest local court, the Court of Appeals, to the Bill of Rights Ordinance.⁷⁵ In spite of this, there was a surprising vitality both in political discussion and in the courts.⁷⁶ In some respects, the court's conservative character may have served to reduce Chinese official hostility to the rights regime. Subsequent to the handover, the Chinese government announced it would continue to file reports on behalf of Hong Kong under the international human rights covenants. Though it appears that the local producers of these reports will follow a policy of keeping them secret and not consulting with the Hong Kong public until after they have been reviewed by officials in Beijing.⁷⁷

There is, however, considerable cause for pessimism about human rights, evident in developments following the final handover process. The initial flurry of activity relating to interpretation and implementation of human rights under the HKSAR regime has been disheartening. The initial actions arose out of the Basic Law stipulation in Article 160

74. Several laws were passed or amended in this period to address the issue of discrimination against women, including a 1994 ordinance allowing the inheritance of land by women in the new territories, the 1995 sex discrimination ordinance, the 1995 equal opportunities ordinance, and extension of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to Hong Kong. Lawyers Committee for Human Rights, 1996 Critique, at 260-61. Despite these steps forward, more comprehensive equal opportunity law proposals suggested by then legislator Anna Wu, were rejected by the government. See Anna Wu, *Why Hong Kong Should Have Equal Opportunities Legislation and a Human Rights Commission*, in HUMAN RIGHTS AND CHINESE VALUES 185-202 (Michael C. Davis, ed., 1995).

75. In a 1995 survey of Hong Kong court cases that raise the Bill of Rights issue, well under one-third of the challenges were successful. See Chan, *supra* note 64, at 7. In the last years of colonial rule, several members of the highest local court, the Court of Appeal, expressed reservations about the Bill of Rights Ordinance, one even going so far, as the Chair of the Local Judges Association, to file a critical report. Connie Law, *Top Judge Condemns Rights Bill*, S. CHINA MORNING POST, Nov. 14, 1995, at 2; Benjamin Liu, *The Past, the Present, and the Future of the Hong Kong Bill of Rights Ordinance*, reprinted in CHAN, *supra* note 64, at 183; Margaret Ng, *These Men Must Guard Our Liberty*, S. CHINA MORNING POST, May 31, 1996, at 21.

76. On the popular front, tens of thousands of Hong Kong people continued after the handover to attend the June 4th Tiananmen memorial demonstrations in a public park. Linda Choy & No Kwai-Yan, *Tiananmen Sorrow Undimmed*, S. CHINA MORNING POST, June 5, 1998, at 1.

77. Jane Moir, *Secrecy Over Rights Report Condemned*, S. CHINA MORNING POST, Apr. 19, 1998, at 2. China has signed both of the two leading international human rights covenants, though neither has been ratified. *Beijing to Sign UN Rights Pact in Autumn*, S. CHINA MORNING POST, June 22, 1998, at 1.

that the Standing Committee of the National People's Congress (NPC) could determine existing laws to be in contravention of the Basic Law, and therefore invalid. Assisted by its transition Preliminary Working Committee, and later the Preparatory Committee, China proceeded to review all of Hong Kong's laws under this provision.⁷⁸ This became a vehicle to reverse the most important parts of the above noted law reforms, especially respecting reform legislation which Chinese officials had earlier opposed.⁷⁹ The use of Article 160 review to take away rights, rather than protect them, became a source of Hong Kong anxiety about future rights security.

Several of the Beijing handover reversals had serious implications for Hong Kong. The most serious reversal related to the 1992 electoral proposal discussed above. At the handover, Beijing set aside the moderately democratic electoral law for the 1995 election and established an appointed provisional legislature.⁸⁰ The Beijing appointed Preparatory Committee also recommended deleting several implementing provisions of the Bill of Rights Ordinance and setting aside the reforms in the public order and societies ordinances; this recommendation was formally carried out by the Standing Committee of China's NPC.⁸¹

The actions of the local government and the Provisional Legislature immediately after the handover further heightened concern among rights advocates.⁸² Laws were pushed through by this appointed provisional body with little regard for the deprivation of the rights presuma-

78. See Connie Law & Chris Yeung, *PWC Asks China to Bury Bill of Rights*, S. CHINA MORNING POST, Oct. 18, 1995, at 1. Ultimately approximately twenty-five laws, including the electoral laws and key rights guarantees, were recommended for abolition or revision. Linda Choy & No Kwai-Yan, *Tung In Talks Pledge as Laws Voted Down*, S. CHINA MORNING POST, Feb. 2, 1997, at 1; Chris Yeung, *China Ignores UK to Change Laus*, S. CHINA MORNING POST, Feb. 24, 1997, at 1.

79. See Michael Davis, et al., *Human Rights in Hong Kong: The Year of Transition*, in CHINA AND HONG KONG IN TRANSITION CH. 12 (Joseph W. Dellapena, ed., forthcoming 1999).

80. Legis. Council Ordinance CAP 542 (Sept. 28, 1997). See Davis, et al., *supra* note 79.

81. Yeung, *supra* note 78, at 1.

82. On July 1, the provisional legislature passed the reunification bill, which gave legal effect to 13 bills that had been drafted by the appointed provisional legislature over the border in Shenzhen in the months prior to the handover. These bills included amendments to the 1992 Societies Ordinance and the 1995 Public Order Ordinance, reducing protection of the freedom to assemble and to protest. The reunification bill was followed by the legislative provisions (suspension of operations) bill, which froze and eventually scrapped pre-handover labor laws, including a bill protecting the right to collective bargaining as stipulated in International Labor Organization Conventions 87 and 88. Furthermore, the bill removed key elements of the 1991 Bill of Rights Ordinance, claiming that it violated the Basic Law. This alleged violation was never explained. The Bill of Rights Ordinance is a nearly verbatim adoption of the International Convention on Civil and Political Rights, which is guaranteed in the Basic Law. See Davis, et al., *supra* note 79.

bly secured under the Basic Law. While most rights and freedom of speech are still protected in Hong Kong, there is cause for concern about the roll-back of reform.⁸³ As noted above, this Beijing appointed Provisional Legislature also passed a very conservative electoral law that guaranteed to reduce the democratic camp to a minority position. Because such electoral law deprives Hong Kong residents of substantial democratic rights, the isolating of the democratic camp throughout the transition is especially troubling.⁸⁴

The post-handover period saw a whole list of other retrograde legislative steps. The Provisional Legislature enacted new laws regarding public order and societies. These laws contain ominous provisions with respect to "national security".⁸⁵ The provisional Legislature also en-

83. While free speech rights are generally protected in Hong Kong, areas of emerging concern still arise. For example, empowering police to protect "national security" has given rise to some ambiguous areas under vague guidelines. Sharon Cheung & Angela Li, *Ousted Legislators Express Concern at Protest Rules*, S. CHINA MORNING POST, July 19, 1997, at 6; Stella Lee & Angela Li, *Security Ban on Freedom Rallies*, S. CHINA MORNING POST, July 19, 1997, at 1. There has been a noticeable increased aggressiveness of the police as they enforce public order during demonstrations. Yulanda Chung & Clifford Lo, *Qiao Protestors Try to Storm Barricades*, S. CHINA MORNING POST, Feb. 12, 1998, at 8; Stella Lee, *Democrat Criticises 'Hard-line' Policing*, S. CHINA MORNING POST, Feb. 26, 1998, at 4. A primary concern for the police is to protect mainland officials from protests. An example of one method occurred when the police played loud music to drown out protest noise. Stella Lee, *'No Penalty' for Beethoven Protest Officer; Complaint Initially Backed but Council Recommends Against Punishment Say Sources*, S. CHINA MORNING POST, May 6, 1998, at 2; Stella Lee & No Kwai-Yan, *Police Clash with Anti-Jiang Demonstrators*, S. CHINA MORNING POST, July 2, 1998, at 2. Pro-Beijing political figures have also occasionally raised cause for concern. The recent situation where leading pro-Beijing politician Xu Simin verbally attacked the local public broadcaster, RTHK, is a case in point. Specifically, in March, 1998, Mr. Xu used the occasion of the meeting of the Chinese People's Political Consultative Committee in Beijing to express concern that RTHK was too critical of the government. *Chiefs 'Failed' RTHK in Free Speech Debate*, S. CHINA MORNING POST, Mar. 6, 1998, at 6; Linda Choy & Chris Yeung, *Tung Sparks RTHK Autonomy Fears; Government Policies Used to be Positively Presented Says Chief*, S. CHINA MORNING POST, Mar. 5, 1998, at 1. It is noteworthy that officials in Beijing indicated that this is a matter for Hong Kong and encouraged Hong Kong NPC and CPPCC deputies not to meddle in Hong Kong's local affairs. Linda Choy, *Xu's Attack on RTHK Dismissed*, S. CHINA MORNING POST, Mar. 8, 1998, at 4; Linda Choy, *HK Deputies Warned Not to Meddle; Jiang Tells NPC Delegation They Must Stay Out of SAR Government Affairs*, S. CHINA MORNING POST, Mar. 10, 1998, at 1. A similar criticism was leveled by Beijing at local NPC delegates when they criticized a court decision in 1999. Kwai-Yan No, *'Keep Quiet' Call to Local NPC Deputies*, S. CHINA MORNING POST, Mar. 11, 1999, at 4.

84. Leading democrats continue to be refused the right to enter the mainland that is accorded all other Hong Kong Chinese. Angela Li & Genevieve Ku, *Twelve Still Face Travel Ban on Mainland*, S. CHINA MORNING POST, July 6, 1998, at 9.

85. Margaret Ng, *Threat to Our Civil Rights*, S. CHINA MORNING POST, Apr. 11, 1997, at 23; Joice Pang, *National Security 'Knife Hanging Over Us', Activists Tell of Fears SAR Government Could Use Changes In Laws As Pretext to Bar Those It Dislikes*, S. CHINA MORNING POST, May 16, 1997, at 3; Chris Yeung, *Restraints on Protests and Political Finding Relaxed; 11 Changes But Future Government Stands Firm on National Security*, S. CHINA MORNING POST, May 16, 1997, at 1. The only positive event relating to national

acted a law that deprives mainland children of local Hong Kong permanent residents of their immediate right of entry into Hong Kong, that guaranteed reducing the Basic Law right of residence; this law applied retroactively.⁸⁶ In addition, the Provisional Legislature voted to suspend (for further study) labor rights ordinances and provisions extending the Bill of Rights Ordinance to include private violations.⁸⁷ These laws were enacted by the previous elected Legislative Council in its final days.⁸⁸ The "study" ultimately resulted in the full suspension of nearly all of the labor rights protections and the right for private actions under the Bill of Rights provided by pre-handover legislation.⁸⁹ All of this adds up to a rather crass disregard of rights protection and portends a rather ominous future.

C. Rule of Law

Whether the Basic Law falls short of the Joint Declaration's requirements regarding human rights depends a great deal on interpretation and the institution of constitutional judicial review. On their face the Joint Declaration and the Basic Law implicitly require the exercise of constitutional judicial review under the Basic Law.⁹⁰ Both documents require supremacy of the Basic Law, maintenance of the common law system, and independence and finality in the local courts.⁹¹ These general requirements, now fully embodied in the Basic Law, would not

security is that the government has not yet carried out the Basic Law Article 23 requirement to enact a subversion law. May Sin-Mi Hon, *Subversion Law Will Not Be Rushed*, S. CHINA MORNING POST, June 30, 1998, at 1.

86. Sin-Mi Hon, *supra* note 85, at 1; May Sin-Mi Hon & Angela Li, *Abode Status Bill Gets Vote of Approval; Legislators Ignore Growing Fears of Court Challenge to Endorse Government Move*, S. CHINA MORNING POST, July 10, 1997, at 1.

87. The elected Legislative Council enacted several laws in the final hours of the pre-July 1, 1997, session, but the provisional legislature suspended them for further study until October 31, 1997. The suspended laws included labor laws that protect workers rights to collective bargaining; forbid discrimination against workers for union activities; and a general law that extends the Bill of Rights to include private actions. Genevieve Chan, *Activists in Last-ditch Bid to Save Labour Laws*, S. CHINA MORNING POST, July 15, 1997, at 6; Angela Li, et al., *Protestors Invade Gallery But Fail to Thwart Snub to Disbanded Legco; Pre-July 1 Laws Frozen*, S. CHINA MORNING POST, July 17, 1997, at 1.

88. See Davis, et al., *supra* note 79.

89. Jimmy Cheung, *Vote Overturns Amendments to Bill of Rights*, S. CHINA MORNING POST, Feb. 26, 1998, at 6. See also Margaret Ng, *Wrong Way on Rights*, S. CHINA MORNING POST, Jan. 23, 1998, at 21.

90. The Joint Declaration guarantees the maintenance of the common law system, the independence and finality of the local courts and the right to challenge the executive in the courts. Joint Declaration, *supra* note 1, at Annex I, arts. 2, 3 and 13. The Basic Law includes the same requirements in addition to various detailed requirements common to common law systems respecting the judiciary. Basic Law, *supra* note 2, at arts. 2, 8, 17, 80-96 and 158.

91. *Id.* See also *id.* at art. 11.

allow less.⁹² Article 158 of the Basic Law specifically vests the power of interpretation of the Basic Law in the Standing Committee of the NPC. However, the Article further specifies that the Standing Committee shall authorize local courts, when adjudicating cases, to interpret those provisions which are "within the limits of the autonomy of the Region" and "other provisions."⁹³ Under further provisions in Article 158, if courts are confronted with the interpretation of provisions, which are the responsibility of the Central People's Government or concern local/central relations, then they must refer the matter to the Standing Committee of the NPC.⁹⁴ The Standing Committee, upon such referral, then decides the matter with the advice of the Committee for the Basic Law.⁹⁵

Basic Law Article 17 further specifies that the Standing Committee can review newly enacted local legislation for conformity to the Basic Law, again within the scope of central authority or local/central relations, and with the advice of the Committee for the Basic Law.⁹⁶ Symmetry and common law practice suggest that courts have such review power within the scope of autonomy, or in any other case where the court determines that such referral is not required.⁹⁷ As a further limitation, under Article 19 courts have no jurisdiction over "acts of state such as defense and foreign affairs."⁹⁸ These are the two areas where China retains power over the HKSAR.⁹⁹ The breadth of the HKSAR act of state doctrine is yet to be determined.¹⁰⁰ Other than the Basic Law,

92. *Id.* at arts. 2, 8, 11.

93. *Id.* at art. 158. The reference to "other provisions" in the third paragraph of Article 158 is not limited by the scope of autonomy.

94. *Id.*

95. The Committee for the Basic Law is provided for in NPC legislation enacted along with the Basic Law. It is made up of six local and six mainland members. Decision of the National People's Congress to Approve the 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, Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 (published with the Basic Law). The Basic Law Committee was already appointed and in place upon the handover. Linda Choy & May Sin-Mi Hon, *Airport Boss Gets Senior Basic Law Job*, S. CHINA MORNING POST, June 28, 1997, at 6.

96. Basic Law, *supra* note 2, at art. 17.

97. In that the Joint Declaration requires independence and finality in the local courts and the Basic Law assigns some review power, especially concerning matters of central authority or local/central relations to the NPC Standing Committee, the Basic Law appears to fall somewhat short of the Joint Declaration's requirements in this area.

98. Basic Law, *supra* note 2, at art. 19.

99. *Id.* at arts. 13 and 14.

100. One would hope that this exclusion of court jurisdiction will be rather narrowly defined, perhaps with a scope roughly equivalent to the United States act of state or political question doctrines. However, this hope might be misplaced in light of a Sino-British deal on the Court of Final Appeal which added the word "etc." to the phrase "defense and foreign affairs."

the only mainland laws that ordinarily apply, through local enactment, in the HKSAR are those specifically listed in Annex III to the Basic Law.¹⁰¹

In the 1998 landmark judgment in the Ng Ka Ling case, the Hong Kong Court of Final Appeal (CFA) declared quite clearly that it has the power of constitutional judicial review over local Hong Kong legislation and that it has the right to examine acts of the mainland's NPC for conformity to the Basic Law.¹⁰² The Ng Ka Ling judgment arose out of a challenge to a local Hong Kong immigration statute which severely inhibited the Basic Law guaranteed right of abode in Hong Kong for children born to Hong Kong resident parents.¹⁰³ In exercising the power of constitutional judicial review to overturn several provisions which heavily burdened that right, the Court declared it would take a purposeful and generous approach to interpreting constitutional rights guaranteed in the Basic Law.¹⁰⁴ In the judgment, the Court also explicitly declared that the CFA would have to determine when, in deciding disputed cases, to refer provisions respecting local-central relations or matters of central authority to the Standing Committee of the NPC.¹⁰⁵ The court took a narrow view of when such referral was required and concluded it was not required in this case.

While this decision was widely applauded in Hong Kong for its firm and unambiguous defense of human rights and the rule of law, there was a very severe response on two occasions. Immediately after the judgment was issued, leading mainland officials and "legal scholars", as well as their local pro-China supporters attacked the part of the judgment where the court articulated its right to "examine" acts of the NPC, claiming the Court was putting itself above the NPC.¹⁰⁶ They claimed

101. Basic Law, *supra* note 2, at art. 18.

102. Ng Ka Ling v. Director of Immigration, Court of Final Appeal, Final Appeal 14 of 1998 (January 29, 1999) [hereinafter Ng Ka Ling I].

103. Article 24 of the Basic Law (the first Article in the chapter entitled "Chapter III: Fundamental Rights and Duties of the Residents) provides that Hong Kong residents include "persons of Chinese nationality born outside of Hong Kong" of Hong Kong residents. Under the Article, such residents are entitled, as are other Hong Kong residents, to the right of abode and a permanent identity card. The suit was brought by several such children claiming a denial of their basic right of residence under a newly enacted immigration ordinance which required them to apply on the mainland for an exit permit. The practical effect of such application process was likely to cause a lengthy delay, even years, of their entry into Hong Kong. See Basic Law, *supra* note 2, at art. 24.

104. While the courts assertive approach to protect the rule of law was widely applauded in Hong Kong, there was considerable public concern over the dangers of a flood of mainland born people with this right which would result from the decision. Lau Siu-Kai, *Verdict Tips the Political Balance*, S. CHINA MORNING POST, Mar. 2, 1999, at 17.

105. The standing committee would then be advised by the Basic Law committee when rendering such interpretation. Basic Law, *supra* note 2, at art. 158.

106. Mark O'Neill, *Beijing Says Abode Ruling was Wrong and Should be Changed*, S. CHINA MORNING POST, Feb. 9, 1999, at 1.

the judgment had to be "rectified".¹⁰⁷ The HKSAR government filed an unprecedented motion for the CFA to "clarify" the orbiter dicta in its judgment declaring its power to examine acts of the NPC.¹⁰⁸ This clarification was granted in a second brief judgment in which the Court explicitly stated that it did not hold itself above the NPC, a judgment in which the Court essentially restated its original position.¹⁰⁹ A second, more serious attack on the Judgment and the Rule of Law occurred in May 1999 when the government, after issuing a Report claiming the Judgment would produce a flood of 1.67 million migrants into Hong Kong, made a request to the Standing Committee of the NPC to interpret the relevant provisions of the Basic Law, effectively overturning the CFA Judgment.¹¹⁰ As a result of the latter action, the finality of judgments of the CFA in Hong Kong has clearly been called into question and the Rule of Law has been seriously undermined.

107. See Margaret Ng, *The Legal Perils of 'Rectification'*, S. CHINA MORNING POST, Feb. 26, 1999, at 19.

108. Cliff Buddle, et al., *Judges Asked to Clarify Right of Abode Decision*, S. CHINA MORNING POST, Feb. 25, 1999, at 1.

109. Ng Ka Ling v. Director of Immigration, Court of Final Appeal, Final Appeal No. 14 of 1998 (Feb. 26, 1999) [hereinafter Ng Ka Ling II]. In the original judgment the Court had really not held itself above the NPC, but had merely indicated that it would implement the Basic Law as required by the NPC; it had not denigrated the NPC Standing Committee's power to interpret the Basic Law. In the second clarifying judgment, the CFA simply made this more explicit while continuing to uphold the pre-eminence of the Basic Law. The Court concluded, "nor did the court's judgment question, and the Court accepts that it cannot question, the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein." *Id.* It appears that a Court created under the Basic Law was merely upholding the priority of the Basic Law as required on its face. The overturning of local legislation implicates the standard separation of powers concerns of constitutional judicial review. In addressing its relationship to the NPC, the Court appeared to be merely giving priority, as a source of law, to the sovereign instructions of the NPC reflected in the Basic Law. In the Second clarifying judgment, the Court explicitly sought only to respond to confusion over "interpretations (which) have been put on part of the court's judgment", and not to amend the judgment.

110. In late April the government eventually estimated the likely migration figure to be 1.67 million. Chris Yeung, *Court Gives 1.67 m Right of Abode*, S. CHINA MORNING POST, Apr. 29, 1999, at 1. The government asked the Standing Committee to re-interpret Articles 22 (which relates to Mainland control of people from other parts of China) and 24(3) (which specifies the residence rights of children born to Hong Kong residents) to effectively overturn the CFA Final Judgment. Chris Yeung, *NPC Will be Asked to Revoke Abode Rights for 1.5m Migrants*, S. CHINA MORNING POST, May 19, 1999, at 1. In doing this, the government targeted for exclusion the children of Hong Kong residents who were born before their parents became residents. The CFA previously upheld the right of such children under Article 24. The government explicitly rejected the more legally acceptable alternative of amending the Basic Law. The government's decision to undermine a Final Court Judgment has produced strong condemnation from the Democratic camp, the Bar and leading constitutional scholars. Michael C. Davis, *Home to Roost*, S. CHINA MORNING POST, May 16, 1999, at 10; Angela Li, *Uproar Sweeps Democracy Camp*, S. CHINA MORNING POST, May 19, 1999, at 3.

When it comes to the rule of law in Hong Kong, there are several troubling aspects of the circumstances surrounding this case. The most blatant damage is reflected in the simple reality that final judgments in Hong Kong, at least where constitutional rights are concerned, are simply not final. They are subject to being overturned by a combination of local government and Mainland interference. This will certainly have a chilling effect on courts.¹¹¹ There is reason for real concern that the Hong Kong courts will be faced with further political attacks by mainland and pro-China forces in the future. This may lead to intimidation and timidity in the Courts. There is specific concern that several of the political attacks on the court's judgment were articulated by members of the Basic Law Committee, the very committee which would be called upon to advise the Standing Committee of the NPC when issues of Basic Law interpretation are referred.¹¹² The members of this committee showed little concern to maintain a judicial demeanor, leading to suspicion that any future advice forthcoming from this committee will be of a political, rather than legal, nature. The government's motion for clarification raises further concern about the court's independence and finality. The only positive aspect of this procedure and the resultant extraordinary judgment is that the Court appeared to stick to its substantive position in articulating its clarification.

111. Article 158 of the Basic Law designates the Hong Kong CFA to determine when a matter must be referred to the Standing Committee. For the Standing Committee to be asked by the government to offer an alternative interpretation in reaction to a final judicial decision violated the guaranteed independence and finality of the local courts and the procedures outlined in Article 158. Basic Law, *supra* note 2, at arts. 19 and 158. The governments sidestepped the problem of a lack of specified power in the government to make such referral by seeking an endorsement from the Legislative Council (which was assured, given the process by which the majority of the Legislators were selected) and asking the State Council to make the referral on its behalf. In referring the right of abode case to the Standing Committee, the government took the position that the right of the Standing Committee to interpret the Basic Law has no limits. The government's submission emphasized that the Standing Committee has the best grasp of the true legislative intent. This emphasis on the privileged knowledge of the drafters appears to empower Mainland leaders and their local Hong Kong supporters in a perverse use of a rather questionable original intent doctrine. Under this view, neither independence and finality in the courts, the provisions in Article 159 respecting Basic Law amendment, nor Hong Kong's autonomy appear to constrain NPC Standing Committee action. Mainland leaders and their appointed Hong Kong supporters, among local NPC delegates and the Basic Law Committee, will take up the central role of giving meaning to the Basic Law. Such interpretation of the Mainland NPC Standing Committee's power would seemingly, in the face of local or Mainland government dissatisfaction, render the Basic Law a nullity, and cannot be right.

112. Basic Law, *supra* note 2, at art. 158; Decision of the National People's Congress to Approve the 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, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 (Apr. 4, 1990) [hereinafter Basic Law Committee Decision].

Though the Court of Final Appeals has seemingly taken a firm stand on constitutional judicial review there is plenty of room for timid judges to shirk this responsibility and for the government to continue to threaten the judicial bedrock of Hong Kong's stability. In addition to a generally conservative human rights posture, judges may avoid their responsibility through several routes by: 1) claiming to avoid sensitive political issues;¹¹³ 2) too readily referring matters to the Standing Committee under the above noted articles;¹¹⁴ or 3) simply giving in to official political pressure or intimidation.¹¹⁵ The President of the Legislative Council (and the then Beijing appointed Provisional Legislature), Rita Fan Hsu Lai-tai, soon after the handover, had even argued that legislation that has not been overturned by the Standing Committee of the NPC under Article 17 of the Basic Law was presumptively constitutional.¹¹⁶ The concern with this negative presumption theory is that it would undermine the entire system of common law review and represents a serious hazard to the rule of law in Hong Kong. Another hazard would be for the Standing Committee to all too frequently interfere by reviewing laws or overriding final judicial judgments, as has been requested in the Ng Ka Ling Case.

Finally, the Rule of Law in Hong Kong has been continuously threatened by the rather passive approach of the Hong Kong Secretary for Justice, the government official charged with upholding the Rule of Law and prosecutorial functions. The government has been rocked by a series of criticisms concerning its commitment to the Rule of Law.¹¹⁷

113. When a member of the Democratic Party was denied leave for judicial review to challenge the legality of certain actions of the Provisional Legislature prior to the handover, the judge is reported to have described him as a pawn of the Democratic Party and to have indicated that the court would not get involved in a political wrangle between the Chinese and British governments. See Audrey Eu, *Keep Politics Out of the Law*, FAR E. ECON. REV., July 10, 1997, at 34.

114. Michael C. Davis, *Threat to Integrity*, S. CHINA MORNING POST, July 20, 1997, at 10.

115. In this regard it is ominous that the mainland Public Security Bureau already got into the debate on the law respecting the residence rights of mainland children of Hong Kong residents by indicating its view that the law did not violate the Basic Law. Chris Yeung & Linda Choy, *Beijing Backs Bill Deporting Thousands of 'II' Children*, S. CHINA MORNING POST, July 15, 1997, at 1.

116. Specifically, she noted the legislative obligation under Article 17 to report all new ordinances to the Standing Committee; if the Standing Committee did not object to the ordinance, (in that case the ordinance restricting the residence rights of Mainland children of Hong Kong permanent residents) then she argued it was presumptively constitutional. May Sin-Mi Hon, *Public 'Can Judge Attempts for Help'*, S. CHINA MORNING POST, July 14, 1997, at 6.

117. These included the failure to prosecute Xinhua for allegedly violating the privacy act; the failure to prosecute Sally Aw, a prominent business executive and CCPCC member, after she was implicated as a co-conspirator in the Hong Kong Standard corruption scandal in which several others were convicted (the Secretary of Justice argued in part that "the public interest" demanded that Ms. Aw not be prosecuted because she was the head of a large corporation in financial trouble); the big spender case, in which the gov-

The government appears to continually take a passive approach to defending the Rule of Law and seems determined to shy away from any challenges to central authorities.¹¹⁸ The risk of further hazards await additional post-handover experience. To the government's credit, it has put in place a highly respected Chief Justice and the Court of Final Appeal that provided the excellent judgment in the right of abode case discussed above.¹¹⁹ But even good judges, in a politically unsupportive environment, may not save Hong Kong's human rights and rule of law regime from the many potential hazards on the horizon.¹²⁰

ernment remained silent while a Hong Kong citizen was executed for crimes committed in part within Hong Kong's local jurisdiction; the related case of the Telford Gardens murder, where the government again remained quiet while a Mainland court tried and convicted a suspect for crimes committed entirely within Hong Kong's jurisdiction; and finally, with regard to the right of abode case, pushing for a clarification and the ultimate overturning of the decision by the Court of Final Appeal, after speaking to leaders in Beijing. The Secretary of Justice was reported to have actually discussed her plans to file the clarification motion with the Chief Justice of the Court before the decision to seek clarification was made public. As a result of the Sally Aw case and these various circumstances, the Legislative Council held a vote of no-confidence in the Secretary of Justice on March 12, 1999, but the motion failed to pass after heavy government lobbying. Chris Yeung, *Doubts Planted Over Rule of Law*, S. CHINA MORNING POST, Feb. 6, 1999, at 5; Chris Yeung & Rhonda Lam Wan, *Justice Secretary Survives Vote Despite Attacks on Competence*, S. CHINA MORNING POST, Mar. 12, 1999, at 1.

118. In one of the last ordinances proposed by the government for enactment by the Provisional Legislature in April 1998 - the Adaptation of Laws Ordinance - the review of certain acts of Mainland bodies was delivered a severe blow when certain Mainland organizations were exempted from the application of any laws that did not explicitly or by necessary implication apply to them. This law exempts both mainland official bodies and the local HKSAR government. The bill was widely criticized for exceeding the powers of the Provisional Legislature, for violating Basic Law provisions specifying that Mainland organs are subject to the HKSAR laws, and for essentially putting Mainland official bodies above the law. The Mainland bodies to which this law applies seemingly include the local branch of the New China News Agency (Xinhua), the Chinese Foreign Ministry, the local PLA Garrison and the Chinese side of the Joint Liaison Group. Gren Manuel, *Legal Experts Fear Bill Will Make Mainland Organs Immune to at Least 14 Pieces of HK Legislation: State Bodies 'Exempt for Laws'*, S. CHINA MORNING POST, Mar. 29, 1998, at 1; Gren Manuel & Felix Chan, *Rights Monitor Fears 'Two Systems of Law,' Bar Lashes Out Over Transfer of Privileges*, S. CHINA MORNING POST, Apr. 7, 1998, at 1; Gren Manuel & Angela Li, *Courts Decide on Exempt State Bodies*, S. CHINA MORNING POST, Apr. 8, 1998, at 6.

119. May Sin-Mi Hon & Patricia Young, *Continuity in Choice of Top Appeal Judges*, S. CHINA MORNING POST, June 13, 1997, at 1; Chris Yeung, *Andrew Li Named as Top Judge*, S. CHINA MORNING POST, May 21, 1997, at 1. The Court of Appeal (under the CFA) has also recently gained some credit by overturning local ordinances that prohibit flag desecration. *HKSAR v. Ng Kung-Siu*, Court of Appeal, Magistry Appeal No. 563 of 1998, Mar. 23, 1999. This case is now on appeal to the CFA. With the recent intimidation in the Ng Ka-Ling case there is cause for concern that the CFA may shy away from ruling that flag desecration is protected as a matter of Freedom of Speech. Cliff Buddle, *Defiling Flags No Crime: Judges*, S. CHINA MORNING POST, Mar. 24, 1999, at 1.

120. To the current court's credit, it has recently demonstrated a serious commitment to open justice by adopting a report requiring a large number of civil proceedings, that were previously held in chambers without public access, to be open to the public. Cliff Buddle, *Judges Unlock Doors of Closed Court Hearings*, S. CHINA MORNING POST, Feb. 11,

III. A COMPETING POLITICAL PARADIGM—THE SINGAPOREANIZATION OF HONG KONG

To make constitutional sense out of the above policies and practices it is important to consider the objectives that may underlie China's plans for Hong Kong and to evaluate their internal consistency. This section considers the political and economic ideas that shape China's evolving Hong Kong human rights policies. The long-standing Chinese official admonition that Hong Kong is to be an "economic," not a "political" city, suggests the ideological source of Hong Kong's current human rights tensions, and the political risks on the horizon.¹²¹ There appears to be a kind of Singaporean vision—authoritarianism plus liberal economic policies and some commitment to the rule of law—evident in official circles in China and the HKSAR.¹²² For the present analysis, I will just briefly focus on some of the evidence of this vision and the difficulties it offers for human rights purposes.¹²³ The general idea of this vision is that Hong Kong people should just concentrate on making money and leave politics to China's chosen Hong Kong leaders. The purveyors of this vision would have Hong Kong people avoid political agitation and criticisms that might trouble the mainland regime and concentrate on business and material wealth formation. That is, the business of Hong Kong is business; politics should not distract people from that. This view is consistent with the views of the local business elite, who are being asked by mainland officials to run Hong Kong. Yet, this view creates a considerable challenge to those who value democracy and freedom.

The most striking evidence of the attempted Singaporeanization of Hong Kong is purposeful concentration of political power in Hong Kong in the hands of the business elite. Appointed Chief Executive Tung Chee Hwa is one of the most successful businessmen in Hong Kong. He has surrounded himself in the chief government deliberative body - the Executive Council - with a predominance of conservative business and pro-China people.¹²⁴ Similar appointees make up the local NPC delegation and the Basic Law Committee that have seized center stage in the

1998, at 1; Cliff Buddle, *Top Judges Back Changes in Full*, S. CHINA MORNING POST, Feb. 25, 1998, at 1.

121. Warnings that Hong Kong not be turned into a political city were made by China's then chief policy spokesman on Hong Kong, Mr. Lu Ping. Linda Choy, *Lu Warns Against Meddling*, S. CHINA MORNING POST, May 7, 1994, at 1.

122. See generally Beng-Huat Chua, *Communitarian Ideology and Democracy in Singapore* (1995) (discussing Singapore's political development).

123. A more thorough analysis of this aspect of China's Hong Kong Policy is taken up in my recent article. Michael C. Davis, *Constitutionalism in Hong Kong: Politics Versus Economics*, 18 U. PA. J. INT'L ECON. L. 157 (1997).

124. Chris Yeung, *Tung Reveals His Top Team*, S. CHINA MORNING POST, Jan. 25, 1997, at 1.

right of abode row. A similar concentration of political power was also reflected in the defunct appointed Provisional Legislature.¹²⁵ This rule by tycoon is the rather stunning product of political appointments by Beijing's allegedly Marxist regime. In the transition, both the Chief Executive and the Provisional Legislature were chosen by a 400 member Selection Committee which was itself chosen by the business sector dominated, and Beijing appointed, Preparatory Committee.¹²⁶

By insuring a predominance of business elite in the now defunct Selection Committee and Preparatory Committee, China insured a like-minded first HKSAR government.¹²⁷ Throughout the closing years of colonial rule, Chinese officials worked energetically to exclude the more grass roots oriented Democratic Party from its various appointed advisory bodies, though it allowed another grass roots oriented pro-China party to have a minor role.¹²⁸ As noted above, China has been especially concerned with ensuring that popular democracy does not take hold. This was the basis for objecting to Chris Patten's democratization formula. The continued concentration of power in the conservative business elite seems assured under the above noted electoral model slated for the coming years. A legislative majority agreeable to Beijing is essentially assured through the combination of narrow business oriented functional constituencies and proportional representation in direct geographical polls.¹²⁹

This Singaporeanization is more widely evident on the rhetorical

125. With a makeup of 33 of the then incumbent legislators mostly from conservative functional constituencies and parties, minus the democrats, plus eleven mostly pro-China losers of the 1995 elections, the Provisional Legislature reflected a sharp swing to the right and the pro-China camp in comparison to the previous elected Legislative Council. *Incumbents and Legco Losers win Selection Fight; Qian's Pointer to Smooth Transition is Martin Lee's 'Darkest Day' since '89, While Governor Sickened*, S. CHINA MORNING POST, Dec. 22, 1996, at 1.

126. Linda Choy and Fung Wai-Kong, *Four Lesser Known Candidates Declared After Selection Body Finalized: Race for Chief Executive Down to Eight Runners*, S. CHINA MORNING POST, Nov. 3, 1996, at 1.

127. In the 150-member appointed Preparatory Committee, only about 15 (many of which are from the pro-China camp) would be considered grassroots representatives. *The Preparatory Committee - The List of Members*, S. CHINA MORNING POST, Dec. 29, 1995, at 6; Fung Wai-Kong, *Committee 'Full of China Puppets'*, S. CHINA MORNING POST, Mar. 14, 1996, at 7 (reporting a Legislative Council motion condemning this). The Selection Committee, which was selected by a vote of the Preparatory Committee, had 400 members, of which 100 were listed as grassroots, with the balance being business and professional. *Full List of Winners in the Beijing Ballot*, S. CHINA MORNING POST, Nov. 3, 1996, at 4.

128. The popular Democratic Party was completely excluded from appointment to the Preparatory Committee, which served as the foundation for the subsequent chain of selection processes culminating in the formation of the HKSAR government. Connie Law & Louis Won, *Warning of Threat to Autonomy*, S. CHINA MORNING POST, Dec. 29, 1995, at 5.

129. See Chris Yeung, *Keeping a Tight Rein on Legco; It Will Be a More Fragmented Body With No Single Political Party Able to Snap Up a Sizeable Majority of Seats*, S. CHINA MORNING POST, July 12, 1997, at 15.

plane, in the rhetoric of mainland officials and their Hong Kong appointees. This rhetoric began to emerge in 1989 when mainland officials began worrying about Hong Kong being a "base of subversion."¹³⁰ Many of the above noted efforts to cut back on democracy, human rights and the rule of law followed in the early 1990s.¹³¹ But this rhetoric acquired a more concrete "Asian values" and economic developmental message in the late transition period. The notion of a politically inert and economically dynamic Hong Kong began to take shape in Chinese policy pronouncements. A sampling of this rhetoric includes the following situations. In May 1994, China's then chief policy spokesman on Hong Kong, Lu Ping, warned against attempts to turn Hong Kong into a "political city;" China's Ninth Five-Year Plan in 1995 introduces an economic partnership, while characterizing the political relationship as "between a parent and a child."¹³² By 1996 Chinese officials were warning against commemorative marches to remember June 4, 1989, personal attacks on Chinese leaders, the spreading of rumors and lies, demonstrations against the Chinese government or the advocacy of Taiwan independence.¹³³ Although some of the latter warnings were later retracted, the main emphases of these comments have persisted in the post-colonial HKSAR government.¹³⁴

China's appointed HKSAR leaders, charged with passing laws on public order, subversion and sedition, have shown an alarming tendency to pick up on some of these politically charged themes to advance "national security" and restrain hostile international forces.¹³⁵ The

130. In July 1989 the new Chinese Communist Party General Secretary Jiang Zemin warned that "the well water does not interfere with the river water" and the People's Daily accused democrats Martin Lee and Szeto Wah of "subversive activities." See *Chronology*, *supra* note 23, at 209 (providing a chronology of the history of Hong Kong).

131. See *id.* at 211-14.

132. See Willy Wo-lap Lam, *Economy to Remain Separate After '97*, S. CHINA MORNING POST, Sept. 8, 1995, at 1.

133. See Chris Yeung, *Anti-Beijing Protests to Be Banned, Says Lu Ping*, S. CHINA MORNING POST, June 5, 1996, at 1; Chris Yeung, *Britain to Take Action on Quian's June 4 Ban*, S. CHINA MORNING POST, Oct. 18, 1996, at 1; Chris Yeung, *Contradictions Cast a Shadow; They (The Media) Can Put Forward Critic, But Not Rumors or Lies (or) . . . Personal Attacks on Chinese Leaders*, S. CHINA MORNING POST, Oct. 19, 1996, at 19; Chris Yeung, *Lu Clarifies Position on Press Freedom*, S. CHINA MORNING POST, June 6, 1996, at 1.

134. John Ridding, *Tung Denies Plan for Crackdown on Dissent*, FIN. TIMES, May 1, 1997, at 6. After the Handover, Mainland Foreign Ministry Officials said that the June 4, 1998 commemorative demonstrations posed no threat and would not affect Hong Kong-Mainland relations. Linda Choy & No Kwai-Yan, *Tiananmen Sorrow Undimmed*, S. CHINA MORNING POST, June 5, 1998, at 1.

135. The 1997 Public Order Ordinance allows police to object to demonstrations on "national security" grounds, which is defined as "safeguarding the territorial integrity and independence of the People's Republic of China." They are also allowed to take into consideration whether Tibetan or Taiwanese independence was advocated. See Davis, et al., *supra* note 79. In August 1998, fears over "foreign speculators" were marshaled to support government intervention in the stock market and to give the Chief Executive greater

above noted attack by local CPPCC delegate Xu Simin on the failure of public broadcaster RTHK to support the government position is just a more blunt recent local manifestation of this political line. The Chief Executive has often emphasized alleged Chinese values to avoid confrontation, encouraging people to "talk more about our duties rather than our rights."¹³⁶ In early 1998, the Chief Executive reemphasized that Hong Kong should not be an "anti-Beijing base."¹³⁷ The passage by the Provisional Legislature of a law to set aside the protection of various workers' rights in the first weeks of the HKSAR, further suggest the intention of China's appointed Hong Kong leaders to impose a strong business orientation on the new Hong Kong regime.¹³⁸ Likewise, the elevation of expediency over the principles associated with the Rule of Law in the right of abode row demonstrates the ascendancy of the Singaporean vision. This intention is also evident in the increased emphasis on the need to plan Hong Kong's economy.¹³⁹ This emphasis became evident when the government established a new high-powered advisory Commission on Strategic Development.¹⁴⁰ In the face of the East Asian economic crisis, one would hope the movement would be away from the East Asian developmental model. These various developmental arguments have thus far been confronted by a well developed democratic movement and a sophisticated free press.

The disturbing aspect of this ostensibly Singaporean orientation is the lack of a coherent vision that may have animated some of the earlier Asian developmental models, and the utter inapplicability of this

decision-making power. *Tsang Plea for Global Purge of Speculators*, S. CHINA MORNING POST, Sept. 9, 1998, at 1.

136. Fung Wai-Kong, et al., *Tung Stresses Consensus, Not Confrontation*, S. CHINA MORNING POST, Oct. 23, 1996, at 1; Chris Yeung, *Tung Wants Focus on Daily Life, Not Politics*, S. CHINA MORNING POST, Oct. 28, 1996, at 4; Chris Yeung and Linda Choy, *Tung Manifesto Preaches Chinese Cultural Virtues*, S. CHINA MORNING POST, Oct. 23, 1996, at 4. See also *Hong Kong's Freedoms Imperiled*, N.Y. TIMES, Nov. 21, 1996, at 28.

137. Jimmy Cheung, *Anti-Beijing Base Warning by Tung*, S. CHINA MORNING POST, Mar. 9, 1998, at 4; Fung Wai-Kong et al., *Tung Stresses Consensus, Not Confrontation*, S. CHINA MORNING POST, Oct. 23, 1996, at 1.

138. The Provisional Legislature set aside several laws to protect workers rights and rights under the Bill of Rights Ordinance enacted in the last week of the elected Legislative Council. See Angela Li et al., *Pre-July 1 Laws Frozen*, S. CHINA MORNING POST, July 17, 1997, at 1.

139. The influential Chair of the Hong Kong General Chamber of Commerce has emphasized that Hong Kong should move away from the colonial laissez faire economic policy toward more planned business-friendly anti-labor policies. James Tien Pei-chun, *Bright Prospects*, S. CHINA MORNING POST, June 8, 1997, at 10.

140. Tung Chee-Hua, *Policy Address 97*, S. CHINA MORNING POST, Oct. 9, 1997; Chris Yeung, *Public to Help Forge Long-term Strategy*, S. CHINA MORNING POST, Jan. 17, 1998, at 6. In addition to the Commission on Strategic Development, the Government also established a Council of International Advisors, comprised of fourteen foreign business leaders. *Offering a New Perspective*, S. CHINA MORNING POST, Jan. 20, 1999; *Win Friends and Influence People*, S. CHINA MORNING POST, Oct. 16, 1998.

Singaporean model to Hong Kong. Asian developmental models seek to capitalize on certain alleged Asian values¹⁴¹ and a form of capitalist planned economy.¹⁴² The more substantial micro-planning component tends to target certain industries for external competition under an export-led growth paradigm.¹⁴³ This might be combined with certain forms of social welfare, especially housing and health care, to afford the regime legitimacy based on success relating to livelihood issues.

There are two apparent problems with this idea in the Hong Kong context. First, Hong Kong, as distinguished from the other Asian Newly Industrialized Countries (NICs), has not traditionally relied on this micro-planning model to achieve its enormous economic success. Second, even those Asian NICs that have relied on such a model have, in recent years, recognized the need for political and economic reform to allow greater openness and competition. This recognition has been especially encouraged by the current economic crisis. With regard to the first issue, political economists have generally characterized the Hong Kong model as embodying *laissez faire* competition and macro-structural support.¹⁴⁴ The *laissez faire* component has relied on the rule of law and freedom to insure a level playing field; the infra-structural support has included substantial housing and transportation subsidy, as well as substantial public health care.¹⁴⁵

Regarding the second point, the other Asian rapid-developers have

141. Samuel Huntington argues that Confucian society advances the group over the individual, authority over liberty, responsibility over rights, and values such as harmony, cooperation, order, and respect for hierarchy. Samuel P. Huntington, *Democracy's Third Wave*, in *THE GLOBAL RESURGENCE OF DEMOCRACY* 3 (Larry Diamond & Marc F. Plattner, eds. 1996). Some scholars have attacked this brand of "orientalism" and have accused East Asian authoritarian leaders of adopting it as a self-defining discourse. See CHUA, *supra* note 122, at 159; Francis Fukuyama, *Confucianism and Democracy*, 6 *J. DEMOCRACY* 20 (1995).

142. The prototype Asian authoritarian developmental model is usually characterized by a tripartite framework of a highly autonomous technocratic bureaucracy, a politically authoritarian regime or ruling party, and a connected or compliant business elite. See PETER EVANS, *EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION* 12 (1995); CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975* 17-23 (1982); ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* 26-29 (1990).

143. See Stephan Haggard, *Pathways from the Periphery: The Politics of Growth in the Newly Industrializing Countries* 9-22 (1990).

144. See STEPHEN CHIU, *THE POLITICS OF LAISSEZ-FAIRE: HONG KONG'S STRATEGY OF INDUSTRIALIZATION IN HISTORICAL PERSPECTIVE* 7-8 (1994); HAGGARD, *supra* note 143, at 25-27. A recent study characterizes the role of government in the Hong Kong model as one of positive non-intervention: "The clear separation in Hong Kong between the role of government as referee, and the role of private companies as active players in the economy, is unique in Asia, and rare world-wide." MICHAEL J. ENRIGHT ET AL., *THE HONG KONG ADVANTAGE* 30 (1997).

145. *Id.* at 29-32.

discovered that their success has produced more demands for representation of diverse social interests, inspiring political reforms; at the same time, the increased costs of production and the globalization of the economy have required Asian companies to compete with each other on a global scale.¹⁴⁶ Many blame the East Asian economic crisis beginning in late 1997 on the business/government alliance evident in this East Asian developmental model, a model which is said to have spawned what many now call crony capitalism.¹⁴⁷ The critical point here is the increased recognition of the pernicious qualities inherent in business decisions made in such incestuous ways. In the face of these developments, the rolling back of civil liberties in Hong Kong becomes merely a poorly disguised attempt to control political opposition. So-called authoritarian Asian political values have no role to play in contemporary Hong Kong. Any attempt to stifle freedom and access to information in Hong Kong would be a retrograde step detrimental to Hong Kong's competitiveness.

IV. SUSTAINING HONG KONG'S AUTONOMY

In addition to the difficulties relating to the competing paradigm discussed in the previous section, Hong Kong's status as an HKSAR in China presents problems of sustaining its autonomy on both domestic and international levels. The two sections in this part address respectively Hong Kong's domestic and international autonomy. This analysis raises several serious implications for Hong Kong's constitutional order, including maintenance of democracy, human rights and the rule of law. Under the "one country, two systems" formula, in the face of a dramatically contrasting mainland system, autonomy is the key to the success of the Hong Kong model. On the domestic level, the absence of true autonomy will result in the undermining of Hong Kong's constitutional and human rights regime, a dramatic increase in corruption and the full integration of Hong Kong into the mainland system. This represents a serious threat to both Hong Kong's way of life and its livelihood. This threat may disadvantage both Hong Kong and China. On an international level, true autonomy can be the source of investor confidence in Hong Kong and empowerment in Hong Kong's international affairs and its relationship with the mainland.

146. See Michael C. Davis, *The Price of Rights: Constitutionalism and East Asian Economic Development*, 20 HUM. RTS. Q. 303, 303-37 (1998). Dietrich Rueschemeyer and colleagues have described the ways that economic development transforms societies and creates needs for diverse representation. DIETRICH RUESCHEMEYER ET AL., *CAPITALIST DEVELOPMENT AND DEMOCRACY* (1992).

147. See David E. Sanger, *Bailout Time: The Stock of 'Asian Values' Drops*, N.Y. TIMES, Nov. 23, 1997, at §4, p. 1. See also Donald K. Emmerson, *Americanizing Asia?*, FOREIGN AFF., May/June 1998, at 46.

A. *Establishing Domestic Autonomy*

It is sometimes useful to think of Hong Kong's late colonial constitutional and human rights order in terms of a tripartite framework.¹⁴⁸ One may visualize this as an inverted triangle with Britain and China represented by the vertices on the top and the Hong Kong community the vertex on the bottom. Political discourse along any boundary or axis has often been related to activities or the cessation of activities along the other axes. During the late colonial period the people were not confronted directly with Chinese rule, though the resumption of Chinese sovereignty at some point in the future, as specified in the Joint Declaration, represented the primary human rights concern.¹⁴⁹ Nevertheless, at various times, especially in the Basic Law drafting process in the late 1980s, and in the late transition period in the mid-1990s, Hong Kong people engaged in a direct human rights dialogue with Chinese leaders.¹⁵⁰ At other times, especially during the post-1989 Tiananmen crisis and in the 1992-94 debate over democratic reform, the Hong Kong political and human rights culture was permitted to grow in an environment largely sheltered from rather menacing Chinese government actions.¹⁵¹ There were similar hot and cold periods in the relations between the two governments. In spite of the increasing Chinese involvement in Hong Kong affairs, pre-handover Hong Kong achieved a degree of genuine autonomy. Before the handover, when conflicts arose there was still the possibility of saying no to or resisting China's demands over democracy, human rights and other issues that may arise.

This pre-1997 period also experienced an emerging dialogue between Hong Kong people, Britain and China, over the substantial

148. A detailed analysis of such tripartite framework is provided in a recent article. Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301 (1996).

149. Joint Declaration, *supra* note 1.

150. In the late 1980s the Basic Law drafting process was in full bloom and even the leaders of the democracy movement participated in this more hopeful dialogue with China. This largely came to an end with the development of the Tiananmen crisis. But, again, in the immediate pre-handover period substantial numbers of business and pro-China elite became party to China's second stove operations, which by 1996 had largely displaced British policy machinery. NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 14-42, 228-38 (5th ed. 1998).

151. After the Tiananmen massacre even Chinese contact with the substantial pro-China community ground nearly to a halt, as the Basic Law process was itself suspended. At this stage Britain began to question its earlier policy of accommodation; it then advanced initiatives on nationality and human rights, while still holding out on democracy. Limited democracy became the subject of an agreement with China. Britain was more forthcoming in its 1992 democracy initiative, and again a storm ensued, this time producing polarization between the democratic and pro-China forces in Hong Kong. *Id.*

mainland intrusion into Hong Kong affairs. The political establishment in Beijing developed substantial formal mechanisms for monitoring developments in Hong Kong and reviewing the actions of the British Hong Kong government.¹⁵² The Beijing government demanded and seized veto power over developments set to extend beyond the handover date.¹⁵³ Large infrastructure projects, such as the airport and port facilities, required Beijing approval for financing.¹⁵⁴ China likewise demanded the same for political and legal developments that would extend beyond the handover date.¹⁵⁵ Due to the radically different ideological perspectives of the parties, these developments, relating to democracy, human rights and the court system, became the focus of almost all conflicts along all axes.¹⁵⁶ For any institutional change to be allowed, they ultimately required China's approval. In response, Hong Kong people either contested China's policies directly or pressured Britain to do so.¹⁵⁷ Yet all the while, moderate political reforms were allowed to take place under the shelter of British rule, producing an evolution of Hong Kong's political and legal skills, in the civil society, the media and legal institutions.¹⁵⁸ On a structural level the tripartite

152. In Beijing the Hong Kong and Macau affairs office took primary responsibility for Hong Kong Policy. In Hong Kong the local branch of the New China News Agency served as China's representative in Hong Kong. After Governor Patten introduced his election model for 1995, Xinhua and the Hong Kong and Macau affairs office seized every opportunity to "undermine the authority and prestige of the government, and create unrest, in order to persuade Britain to recall Patten and appoint a more amenable Governor." MINERS, *supra* note 150, at 237. A Sino-British Joint Liaison Group (JLG) was established for consultation over transition matters, as provided for in Annex II of the Joint Declaration. In the Basic Law drafting process, there were the Basic Law Drafting and Consultative Committees and, as the handover neared, the various Mainland transition bodies noted above, emerged. The preliminary working committee, in particular, was set up in 1993 to bypass the JLG altogether and prepare for the transition without British and Democratic Hong Kong participation. *Id.* at 237-38.

153. Frank Ching, *Toward Colonial Sunset*, in PRECARIOUS BALANCE, *supra* note 23, at 187-88. Britain and China disagreed over the purpose of the JLG, China arguing that the Joint Declaration compelled Britain to use the JLG to obtain Chinese permission on all important matters, effectively giving China veto power. MINERS, *supra* note 150, at 232.

154. Ching, *supra* note 153, at 187-88.

155. See Representative Government in Hong Kong, *supra* note 36; Ching, *supra* note 153, at 189-91; *UK Accused of Breaching the Trust by Leaking Confidential Details*, *supra* note 36, at 12-13.

156. Ching, *supra* note 153, at 189-91.

157. After Britain caved in to Chinese demands that only one overseas judge sit on the Court of Final Appeal, the newly elected Legislative Council voted to reject this proposal. This was the first time that the Legislature opposed an agreement between Britain and China involving Hong Kong. *Id.* After Chris Patten became Governor, the British government became more responsive to Hong Kong concerns, resulting in the 1995 election proposals that sped up the democratization time-table and increased local participation in government decisions. See MINERS, *supra* note 150, at 228-38. See also Davis, *supra* note 148, at 310-11.

158. Most noteworthy in this regard were the 1991 and 1995 elections to the Legisla-

framework grew to reflect aspects of the emerging constitutional character of this changing society.

At the same time, China learned to play the Hong Kong political game, cultivating its own supporters to promote its preferred policies. At the transition's end, in 1996-1997, through the complex system of appointments to various mainland committees and previously discussed rewards, China put in place a post-1997 political regime occupied almost entirely by its loyal lieutenants. This process began with drafting the Basic Law, and reached its zenith in the late transition, by which time the Hong Kong-British axis was almost entirely eclipsed by the axis of discourse between China and its chosen Hong Kong supporters. In the late transition stage China refused nearly all contact with electorally popular democratic forces in Hong Kong. Upon the handover, the Chinese government expelled remaining democratic forces in the Legislative Council. Within the pro-China camp was a well worn path to Beijing, as China focused on the minutia of the transition. For Hong Kong's elite willing to play this game, Beijing was the venue for important political and economic rewards.

The post-1997 period shows a confrontation between two forms of power: the forces of a liberal democratic society and the forces of power and influence achieved through the national regime. Both power sources have enjoyed some success. Hong Kong decision-makers ignore both popular opinion and powerful Beijing connected business interests at their peril. In many respects, some success in both aspects suggests the tripartite relationship that developed during the transition period will likely continue as the fundamental character of Hong Kong's constitutional politics. Britain's position in the pre-handover triadic relationship is being taken up by a partially responsive Hong Kong government and the pre-handover Hong Kong vertex occupied by an emergent civil society. This tripartite structure is not as attractive as true autonomy in Hong Kong, but it is more attractive than direct Beijing rule. With a substantial level of political and economic development already achieved in Hong Kong, any attempt to rule too closely by Beijing would almost certainly be noticed and invite strong public protest. The maintenance of tight control requires heavy-handed tactics and Hong Kong would almost certainly be destroyed in the ensuing conflict.

Even a looser attempt by Beijing to control outcomes in Hong Kong, perhaps under a *de facto* tripartite model, invites erosion of Hong Kong's distinct character. Through interfering too readily in Hong

tive Council and the 1991 passage of the Bill of Rights Ordinance, bringing in an era of active public debate on politics and human rights. Political, educational, legal and media institutions have developed in this vibrant environment, presenting political leaders who have endeavored to roll back these developments with a formidable challenge. See MINERS *supra* note 150, at 196-213, 256-60. See generally Ching, *supra* note 153, at 188-89 (discussing the 1991 elections).

Kong's domestic issues, Beijing may invite a corruption of Hong Kong's political and economic systems, and an intrusion by the mainland's system into Hong Kong. Any attempts by either locally influential people or highly placed mainland officials to cut around local political decisions will directly corrupt Hong Kong's political and constitutional systems. This would create a system where cultivating influence in Beijing will be important, and invite further corruption. Mainland institutions that offer avenues to invite intrusion by Beijing leaders include Hong Kong's appointed delegations to China's NPC and CPPCC, the Basic Law Committee (especially local members), the local branch of the New China News Agency (an agency which historically has been China's de facto embassy in Hong Kong), Beijing's Hong Kong and Macao Affairs Office, the newly instituted branch office of the Mainland Foreign Ministry in Hong Kong, the local People's Liberation Army Garrison Command, and the local underground cell of the mainland Chinese Communist Party.¹⁵⁹ Perhaps the most important channel is through the Hong Kong elite that can directly approach mainland leaders.¹⁶⁰ Democratic processes and openness are the only reliable security for local autonomy.

In the initial phase of the HKSAR there was a noticeable diminution in mainland public official comment on Hong Kong. It is not clear whether mainland interference diminished or went behind closed doors, given that mainland chosen local officials are now in place.¹⁶¹ It is clear that China's locally appointed business and pro-China leaders and offi-

159. The local cell of the Chinese Communist Party has historically been the Hong Kong Macao Work Committee, but recent rumors suggest this committee may be replaced by the Party Organization of Hong Kong-Based Chinese Enterprises. Willy Wo-Lap Lam *Cadres and Tycoons Jockey for Position*, S. CHINA MORNING POST, July 30, 1997, at 17.

160. In this regard several examples of such influence are evident in local developer Li Ka Shing going directly to Beijing to get a mainland prosecution in the Big Spender case; local complaints regarding the local public broadcaster RTHK's criticisms of government policy made by Local NPC delegate Xu Simin; and local Basic Law Committee member Raymond Wu attacking the recent landmark Court of Final Appeal judgment (encouraging Beijing to overturn it). See Linda Choy, *Xu's Attack on RTHK Dismissed: Local Delegates Told CPPCC Has No Role in SAR*, S. CHINA MORNING POST, Mar. 8, 1998, at 4; No Kwai-Yan, *Beijing Adviser Rejects Calls for His Resignation*, S. CHINA MORNING POST, Feb. 5, 1999, at 4; Willy Wo-Lap Lam, *Beijing's Answer to Tycoon's Lament*, S. CHINA MORNING POST, Jan. 6, 1999, at 15.

161. There were some attempts by local NPC deputies (who, by virtue of their appointment process, tend to be pro-China business elite) to have a direct role in the HKSAR but these were seemingly rebuffed by Beijing. Linda Choy, *NPC Deputies Want to Give Tung Views on Policy*, S. CHINA MORNING POST, May 6, 1998, at 2; No Kwai-Yan, *'Keep Quiet' Call to Local NPC Deputies*, S. CHINA MORNING POST, Mar. 11, 1999, at 4. Others have accused local officials of attempting to "second-guess" Beijing. Stella Lee, *Officials 'Second-guess' Beijing*, S. CHINA MORNING POST, June 30, 1998, at 6. The Chief Secretary Anson Chan was once quoted as saying that Beijing officials give policy hints, but this was later denied. Genevieve Ku, *Beijing May Have Given Policy Hints, Says Anson*, S. CHINA MORNING POST, June 18, 1998, at 4; Genevieve Ku & Jimmy Cheung, *Anson Denies Job Hints From Beijing*, S. CHINA MORNING POST, June 19, 1998, at 4.

cials offer little challenge to well-known mainland policies, leaving mainland officials with little reason to openly interfere. These local leaders appear very accommodating of favored mainland policies, to the extent of sometimes exceeding the conservative policies of mainland officials. The example of local NPC Deputy Xu Simin's comments about RTHK's failure to support the HKSAR and Chinese governments is a case in point, where even the mainland officials seemed disapproving of Mr. Xu's conservative position.¹⁶²

Recent examples of seeming favoritism toward mainland entities and pro-China figures from within the HKSAR government include the failure of Hong Kong's Department of Justice to prosecute the New China News Agency for violating privacy laws and the failure to prosecute a leading pro-China publisher for distorting circulation figures, though she was charged as an unindicted co-conspirator with three of her prosecuted colleagues.¹⁶³ If allegations of favoritism were substantiated, this calls into question the degree of autonomy from mainland influence, and, as discussed above, delivers a severe blow to popular conceptions of human rights and the rule of law in Hong Kong. To their credit, mainland officials have often reiterated that Hong Kong issues are for Hong Kong officials to determine.¹⁶⁴ It is not clear whether this attitude will persist as the democratization process proceeds and Hong Kong officials are under more severe pressure to be less accommodating.¹⁶⁵

Another possible source of corruption and threat to liberty and property interests could arise from the large mainland business contingency in Hong Kong. The perception that mainland companies are fully subject to local autonomy and laws, and that local officials are fully committed to enforcing such laws, is vital to Hong Kong's future. The improper offering or withholding of business privileges on the mainland should also be of concern to mainland officials. Local companies relin-

162. See Linda Choy, *Xu's Attack on RTHK Dismissed Local Delegates Told CPPCC Has No Role in SAR*, S. CHINA MORNING POST, Mar. 8, 1998, at 4.

163. *Fear of One Law for Rich, One for Poor*, S. CHINA MORNING POST, Mar. 19, 1998, at 3; *Row Over Aw Decision; Justice Boss Urged to Explain Why Publisher was not Prosecuted*, S. CHINA MORNING POST, Mar. 19, 1998, at 1.

164. It is noteworthy that the mainland government has even attempted to rein in local NPC Deputies, rejecting calls that they be given separate offices within the territory, an arrangement which surely would have contributed to the establishment of a separate power base. Linda Choy, *Local NPC Base Ruled Out*, S. CHINA MORNING POST, Mar. 4, 1998, at 4. See also Linda Choy, *supra* note 161.

165. Annexes I and II of the Basic Law allow for the possibility of reforming the method for selection of the Chief Executive and Legislative Council in 2007, allowing for the possibility of universal suffrage and full direct elections in geographical constituencies. But since this requires the approval of two-thirds of the Legislative Council (which at that stage will only have half of its members directly elected) and the Chief Executive, it seems unlikely such reform will be approved if China and the pro-China camp fear a loss of control. Basic Law, *supra* 2, at Annexes I and II.

quishing substantial interest to mainland companies to gain favor raises cause for concern in this latter regard. Without strict control, mainland practices can intrude across the border and local attempts to curry favor with powerful mainland investors could intrude upon free market practices and decisions in Hong Kong. The ability of mainland companies' to influence local markets is also of concern. Occasionally stock market and property increases in Hong Kong are supported, in part, by the perception that the mainland government is a quasi-guarantor of sustained growth. The mainland government should clearly recognize the local boundary and be reluctant to over-react to every hiccup in Hong Kong markets.¹⁶⁶ There should also be concern over any reluctance of local business advisers to offend prominent mainland companies.¹⁶⁷ This phenomenon raises important liberty issues for business advisers and the related media. Overall, the security of property rights is at stake if mainland companies are allowed to avoid the same legal standards as others, and flex their muscles in the local economy. Though the attempt was later abandoned, a group of mainland enterprises attempted to be assigned a functional constituency under the Electoral law that governed Hong Kong's 1998 election for the Legislative Council.¹⁶⁸ This open channel may have been preferable to numerous possible back-door channels to power.

B. External Autonomy and the Global Process

A final concern when it comes to Hong Kong's autonomy and ultimately the security of human rights and the rule of law is the preservation of Hong Kong's international status. Any properly constituted community must have a fully recognizable external projection if it is to survive. It has been argued in this regard that external effectiveness translates into internal effectiveness.¹⁶⁹ As hinted by the previous section, internal effectiveness also translates into external effectiveness. The international community was told in the Joint Declaration that it could rely on Hong Kong's high degree of autonomy when dealing with Hong Kong. Any perception that Hong Kong is merely a front for the Chinese government would destroy any confidence in this promise to

166. The East Asian economic crisis is believed to have spawned increased corruption, such that the dangers of mainland companies under economic pressure being pulled into corruption is realistic. Niall Fraser, *'Economic Turmoil to Blame' for Graft Surge*, S. CHINA MORNING POST, July 9, 1998, at 5.

167. There is some evidence that local investment advisers may shy away from criticizing influential companies in an Asian environment where official approval is critical. Mark Landler, *Asian Dilemma: Can 'Guests' Advise?*, INT'L HERALD TRIB., Mar. 12, 1999, at 13.

168. Chris Yeung & Quinton Chan, *Mainland-funded Firms Dropped Bid for New Seat*, S. CHINA MORNING POST, Sept. 7, 1998, at 8.

169. W. MICHAEL REISMAN, *PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION* 53-67 (1975).

the fatal detriment of Hong Kong. The price for China of any confidence in its commitments is to fully allow Hong Kong, without interference, to conduct its internal affairs, as discussed above, and its external relations, as discussed in this section. China's policies in this regard are not without concern.

The Joint Declaration and the Basic Law are quite generous in granting Hong Kong the right to conduct its own external affairs.¹⁷⁰ The present essay need only highlight the contours of this authority. While retaining control over Hong Kong's foreign and defense affairs the mainland government has granted Hong Kong almost complete autonomy in nearly all areas of external relations with respect to commercial, cultural and social affairs.¹⁷¹ This includes the right to participate in most international organizations, with the proviso that if such organization is confined to states then Hong Kong must participate as part of the Chinese delegation.¹⁷² Hong Kong has its own overseas trade offices and may issue its own visas.¹⁷³ It is also allowed to sign international agreements on its own within the scope of these permitted areas.¹⁷⁴ Again, China is required to assist Hong Kong in this regard where necessary. On paper this is an extraordinary degree of autonomy for a non-state community, but a degree that is essential to the kind of constitutional community that Hong Kong is expected to be.

The present analysis of the tensions running through the Hong Kong model concerns the degree of compliance. The above sections already consider the degree of compliance with the Joint Declaration on the domestic front. The question for the present section is the degree of external compliance or Hong Kong's degree of effectiveness in complying with its own commitments. In this regard, Hong Kong runs up against some serious difficulties inherent in China's world view. There seems little doubt that the current world order would generally be welcoming of an autonomous community like Hong Kong. Historically statist world views have generally given way to views that favor local self-determination and participation by a wide range of territorial communities. Exclusive control by nation-states has generally given way to an inclusive order regulating vast areas of human endeavor.¹⁷⁵ Hong Kong already belongs to several international organizations and is party to many international agreements.¹⁷⁶

170. Basic Law, *supra* note 2, at arts. 150-57.

171. Basic Law, *supra* note 2, at arts. 2, 13, 39, 114-18, 148-57; Joint declaration, *supra* note 1, at art. 3(6)-(10), and Annex I arts, VI-IX.

172. Basic Law, *supra* note 2, at art. 152.

173. *Id.* at arts. 154-57.

174. *Id.* at arts. 151 and 153.

175. See Myres McDougal et al., *The World Constitutive Process of Authoritative Decision*, in MYRES McDOUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS* 191 (1981).

176. As of early 1996, the Joint-Liaison Group, which under the Joint Declaration co-

The problem for Hong Kong is that China's world view has been far less accommodating of flexible approaches to sovereignty. Under nineteenth century views of sovereignty China has been more likely to admonish others to not meddle in its internal affairs and has specifically taken the view that both its human rights practices and Hong Kong are internal affairs.¹⁷⁷ This legal positivist view may be further colored by a nationalistic view that the world is out to contain China; of particular concern in the present context is China's concern that Hong Kong not be employed in the service of this containment.¹⁷⁸ In this regard, sustaining real autonomy for non-nationalistic Hong Kong may be the best strategic option. Such seems preferable to a less autonomous Hong Kong which would have incentives of its own to meddle in China's affairs and would, at the same time, be a subject of suspicion regarding foreign meddling. Any attempt to disempower Hong Kong internationally is clearly contrary to the Joint Declaration and the expectation of international reliance on Hong Kong's autonomy.

In addition to the formal channels offered to territorial communities. The other channel, beyond the exclusive control of nation-states, increasingly available to international actors, is what is now referred to as the global order. Globalization, the tendency to move areas of international power and effectiveness beyond state control, has opened up vast areas of influence to non-state actors. This non-territorial global space is concerned with a wide range of topics from human rights, information and the arts to science and business. In the commercial area John Gerald Ruggie describes a world of "transnational microeconomic links."¹⁷⁹ As a non-state international commercial center Hong Kong is a very effective player in this latter global space. However, global effectiveness, while beyond state control, depends a great deal on territorial communities to provide a hospitable environment for global actors.¹⁸⁰

ordinates transition matters between China and Britain, had already agreed on Hong Kong's continued participation in thirty international organizations; others were anticipated. RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 6 (1997).

177. China's claims that, despite the Sino-British Joint Declaration, Hong Kong is China's internal affairs have persisted after the handover. Glenn Schloss, *West Warned to Stop Meddling*, S. CHINA MORNING POST, Aug. 1, 1997, at 4. An early twentieth century case expresses this 19th century positivist view of sovereignty, arguing for the "principle of the exclusive competence of the state in regard to its own territory in such a way to make it the point of departure in settling most questions that concern international relations." *Island of Palmas Case (United States v. Netherlands)*, 2 R.I.A.A. 829 (1928). A month after the handover, China's Commissioner of the Ministry of Foreign Affairs in Hong Kong, Ma Yuzhen, hit out at Britain's first six-monthly report on Hong Kong by warning that Hong Kong was now an internal affair. Schloss, *supra*.

178. See SAMUEL S. KIM, & LOWELL DITTMER, CHINA'S QUEST FOR NATIONAL IDENTITY 258 (1993).

179. John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Business*, 47 INT'L ORG. 139 (1993).

180. See Davis, *supra* note 146, at 303-37.

Communities which provide democratic processes, human rights and the rule of law are more likely to attract global commercial and other activities.¹⁸¹ Such communities, in the present world, are also likely to provide a better quality of life and a wealthier environment for their inhabitants.¹⁸² Hong Kong is such a community, and as a global city, has served as a conduit for vast amounts of mainland Chinese business that seeks participation in this global economy.¹⁸³ In this regard, destroying Hong Kong's autonomy and constitutional order would operate to destroy Hong Kong as a venue for global enterprise. Destroying Hong Kong as such a venue would be a great detriment to both China and Hong Kong. Even the leader of the largest mainland enterprise in Hong Kong, Larry Yung, argued that the mainland government must not interfere with Hong Kong's autonomy or its rule of law, that to do so would destroy Hong Kong.¹⁸⁴

V. CONCLUSION

This article described a new type of territorial community for which the assurances of constitutional order and human rights are vital. The analysis seeks to contextualize human rights in the processes of community construction and survival. Autonomous functioning is vital to these processes. Smaller territorial communities, including nation-states, in a world marked by a rapidly expanding international order and globalization, are constantly called upon to defend their autonomy and political integrity, while pursuing greater integration in the wider global order. The Hong Kong case of a highly autonomous community within a much larger and more powerful state highlights the complexity of this effort. In the context of Hong Kong, it is important to see that constitutionalism and human rights are both constructive of and dependent on autonomy, both domestic and external. In focusing our attention on competing concerns surrounding constitutional developments prior to the handover and during the first two years of the HKSAR this paper seeks to highlight the complex tensions inherent in this constitutional process and the attendant risks of failure.

In the face of China's contrarian system, protection of Hong Kong people's liberty, human rights and way of life, as valuable ends in themselves, is dependent on political will, both in terms of ideological

181. *Id.*

182. See GERALD W. SCULLY, CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH 12-14, 183-84 (1992); Adam Przeworski, et al., *What Makes Democracies Endure?*, 7 J. DEMOCRACY 1, 39-55 (1996).

183. See ENRIGHT, ET AL., *supra* note 144, at 53-83; Yue-Man Yeung and Fu-Chen Lo, *Global Restructuring and Emerging Urban Corridors in Pacific Asia*, in EMERGING WORLD CITIES IN PACIFIC ASIA 17-47 (Yue-Man Yeung and Fu-Chen Lo, eds., 1996).

184. Larry Yung, et al., *Risk, Guanxi and 40% Luck—An Interview With CITIC Pacific Chief Larry Yung*, TIME, June 30, 1997, at 22-23.

aspirations and in respect of autonomous space. With respect to Hong Kong's role in China, three prominent hazards are identified and addressed with the following conclusions: (1) the attempted Singaporeanization of Hong Kong, with the attendant loss of liberty and rights, would likely lead to serious diminution in the entrepreneurial effectiveness of Hong Kong as a developed commercial center; (2) failure to respect Hong Kong's autonomy within China and preserve its liberal constitutional order will lead to the integration of Hong Kong into China's under-developed economy, with the attendant risk of corruption, loss of confidence and diminution of wealth to the detriment of both Hong Kong and China; and (3) failure to respect Hong Kong's autonomy in external affairs will deprive it of the ability to confidently represent its own interest in both formal international arenas and the global economic space. As a consequence, any failure to fully comply with the Joint Declaration's commitments to liberal constitutional government and a high degree of autonomy in a generous spirit that is protective of basic human rights and the rule of Law will result in a tragic loss to both Hong Kong and China.