

A Leg To Stand On? Post-1997 Hong Kong Courts as a Constraint on PRC Abridgment of Individual Rights and Local Autonomy

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Introduction

In 1984 Britain and the People's Republic of China (PRC) entered into an agreement providing for termination of Hong Kong's status as a Crown Colony and "resum[ption of] the exercise of sovereignty" over the territory by China in 1997.¹ Under the terms of the Joint Declaration (Declaration), China bound itself to limit its exercise of sovereignty in the interest of "maint[aining] the prosperity and stability of Hong Kong."² The Declaration promises local autonomy and the perpetuation of the current economic and social systems. It also includes a "bill of rights" which, if effective, would preserve for Hong Kong residents personal and economic freedoms still unknown on the Mainland.

The Declaration represents a creative attempt to solve the familiar problem of decolonization in a unique set of circumstances. In contrast to other decolonized territories, Hong Kong is a wealthy and modern city. Its soon-to-be "parent" country is a major world power which has for decades emphasized its intent to recover what it considers to be its territory. These characteristics create a basis for the argument, consistently put forward by China, that the established norms of decolonization have no relevance for Hong Kong. In addition, state practice has shown that the international legal framework governing decolonization, which requires self-determination for colonized peoples, has been ineffective in the face of resolute opposition by an interested state. Britain and China have ignored the United Nations' procedures for decolonization, and structured a purely bilateral solution to the Hong Kong problem.

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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, Dec. 19, 1984, United Kingdom-People's Republic of China, art. 1, 1984 Gr. Brit. T.S. No. 20, *reprinted in draft form in* 23 I.L.M. 1366 (1984) [hereinafter Declaration].

2. *Id.* Preamble.

Hong Kong residents played no role in choosing the policies and legal structure that will determine their future. During the talks between China and Britain leading up to the Declaration, China refused to allow the people of Hong Kong a formal voice. China insisted that, as the Chinese motherland, it already represented the wishes of the Chinese residents of Hong Kong. It scorned the call for some measure of self-determination as an attempt to convert a bilateral process into a "three-legged stool."³ Britain and China therefore presented Hong Kong residents with a *fait accompli*. At present, residents of Hong Kong are participating in the drafting of the Basic Law that will implement the Declaration's provisions, but the process is structured to leave them incapable of blocking decisions made in Beijing.⁴

This limited participation by Hong Kong residents does not mean that Hong Kong's distinctive society will inevitably wither under PRC sovereignty. China has agreed in the Declaration to allow Hong Kong residents to control their own destiny, albeit subject to China's sovereignty. Such an allocation of power would, if realized, reflect the international norm that decolonized peoples have some control over their fate.⁵ The likelihood of this promise being fulfilled is the subject of wide debate, and the precedents are not encouraging.⁶ One thing is certain, however: if Hong Kong does not make wise, determined use of the institutions China has agreed to in the Declaration, the phrase "one country, two systems"⁷ will prove an empty slogan.

3. *Xianggang Motion Causes Concern*, 27 BEIJING REV. 6, 6-7 (Mar. 12, 1984); see also Amberg, *Self-Determination in Hong Kong: A New Challenge to an Old Doctrine*, 22 SAN DIEGO L. REV. 839, 840, 844 (1985) (focusing on Hong Kong residents' lack of input into the process of determining their future status).

4. See Lau, *Unequal Voices*, FAR E. ECON. REV. 40 (Dec. 18, 1986) [hereinafter *Unequal Voices*].

5. See *infra* text accompanying notes 27-36.

6. For a discussion of international precedents in which neighboring states claim sovereignty over decolonizing territory, see *infra* text accompanying notes 43-48. The precedents most obvious to Hong Kong residents are those of Shanghai after the communist victory, where many of Hong Kong's leading entrepreneurs "burnt [their] fingers . . . when the political situation changed," Wong, *Industrial Entrepreneurship and Ethnicity: A Study of the Shanghaiese Cotton Spinners in Hong Kong* (D. Phil. thesis, Oxford University, 1979), quoted in Wong, *Modernization and Chinese Culture in Hong Kong*, 106 CHINA Q. 306, 321 (1986) [hereinafter Wong, *Modernization*], and China's governance of its five "autonomous regions," S. GOLDSTEIN, K. SEARS & R. BUSH, *THE PEOPLE'S REPUBLIC OF CHINA: A BASIC HANDBOOK* 10 (4th ed. 1984). In the autonomous regions, despite constitutional guarantees of "regional autonomy" and "freedom . . . to preserve or reform their own ways and customs," XIANFA (Constitution) art. 4 (People's Republic of China) [hereinafter PRC CONSTITUTION], the central government has at times brutally repressed local customs and lifestyle. See, e.g., Lin, *Tibet: Life Returns to an Anguished Land*, MACLEAN'S, Aug. 12, 1985, at 22.

7. The "much trumpeted 'one country, two systems' solution," Iyer, *Hong Kong: A Colony's Uncertain Future*, TIME, Oct. 8, 1984, at 38, 51, appeared early in the Sino-British nego-

Since the signing of the Declaration, Hong Kong has largely ignored, and to some degree misunderstood, one institution—the judiciary—that could be a valuable tool in preserving its autonomy. Though the Declaration's language is sometimes ambiguous, it provides a framework—an “independent”⁸ judiciary with institutional authority and a pre-existing organizational culture—that could allow that institution to monitor and publicize China's compliance with the Declaration. Authoritative review could serve to constrain China's actions in Hong Kong by ensuring that any abridgment of the promised autonomy and rights occurs openly. This constraint could be augmented if international institutions in which Hong Kong will participate as an autonomous entity condition China's double representation, in many cases as much a benefit to the Mainland as to Hong Kong, on the *fact* of continuing autonomy.

Hong Kong courts, if they fulfill the promise of the Declaration, can serve as the lens through which the world community monitors China's performance with regard to international norms of self-determination and human rights. In its judiciary, Hong Kong could find a “leg” to stand on, an independent institution that could ensure that, unless China openly abrogates its pledge to Britain, Hong Kong residents will continue to enjoy rights and freedoms not experienced by residents of today's China.

This article explains how Hong Kong's judiciary can act, within the framework laid out in the Declaration, to preserve the territory's liberties and lifestyle. Part I presents the Declaration in historical context with regard to both the Sino-British relationship and the international order surrounding decolonization. Part II examines the legal structure of post-colonial Hong Kong and the basic policies that the Declaration promises will govern China's treatment of the territory. Part III analyzes the executive and legislative organs of the Hong Kong Special Administrative Region (HKSAR) as the Declaration envisions them, and explains why neither will be effective in preserving Hong Kong's autonomy and basic freedoms. Part IV contends that the judiciary can be an important constraint on Mainland interference in local affairs: through the review function implicit in the Declaration the courts can increase the cost to China of deviating from promised policies, and thus make compliance more likely. Finally, Part V suggests practical steps that Hong Kong and Britain can take to prepare the judiciary for the difficult task before it, and explains how the international community can act to make the prin-

tations as a slogan encapsulating China's desired outcome. See, e.g., *A Great Event of Historic Significance*, 27 BEIJING REV. 14, 15 (Oct. 1, 1984).

8. Declaration, *supra* note 1, art. 3, para. 3; see also *infra* text accompanying notes 142-63.

ciples of human rights and self-determination relevant in post-1997 Hong Kong.

I. Background to the Sino-British Joint Declaration

A. *The Legal History of British Hong Kong*

Britain acquired Hong Kong through a series of treaties with China's decaying Qing dynasty in the 19th century.⁹ China resented this incursion into its territory from the outset, and throughout the twentieth century has maintained that the British presence was the result of "unequal treaties" that were "illegal and invalid."¹⁰ Since its founding in 1949, the PRC has consistently argued that "Hong Kong . . . [is] Chinese territory occupied by British . . . imperialism on the strength of unequal treaties . . . [which t]he Chinese people will recover . . . without fail at an appropriate time."¹¹

Although Hong Kong has been a potent symbol in China for arousing nationalistic sentiment and criticizing Western imperialism, in practice Britain and China long ago settled into a *modus vivendi*. Hong Kong's role as an entrepot for the "China trade," initially based on opium and secured by British gunboats, grew and diversified, and came eventually to be tacitly accepted by China's rulers as a useful evil. By the beginning of World War II, Hong Kong vied with Shanghai for the role of the most important center for China's international trade.¹² Since the war, and particularly since 1949, the growth of local manufacturing and the steady inflow of refugees from China have transformed the colony from a backward port city serving the needs of the British Empire to a modern territory producing for and trading with the world.¹³

9. Under the Treaty of Nanking, signed after Britain defeated China in the Opium War of 1842, China ceded Hong Kong Island to Britain in perpetuity. In 1860, the Convention of Peking ceded the tip of Kowloon Peninsula and Stonecutters Island to Britain in perpetuity. Finally, China granted Britain a 99-year lease on the New Territories, beginning July 1, 1898, in the Convention of 1898. Karamanian, *Legal Aspects of the Sino-British Draft Agreement on the Future of Hong Kong*, 20 TEX. INT'L L.J. 167, 168 (1985). In this article the term "Hong Kong" will refer to the territory conveyed by all three treaties.

10. *Commentaries on Xianggang Issue*, 26 BEIJING REV. 13 (Oct. 17, 1983). The legal history of Hong Kong can be gleaned from, *inter alia*, Karamanian, *supra* note 9, at 168-70; Day, *The Recovery of Hong Kong by the People's Republic of China—A Fifty Year Experiment in Capitalism and Freedom*, 11 SYRACUSE J. INT'L L. & COM. 625, 629-33 (1984).

11. *Khrushchev Group Turns World Youth Forum into Anti-China Forum*, Sept. 25, 1964 [hereinafter *Khrushchev Group*], reprinted in 1 PEOPLE'S CHINA AND INTERNATIONAL LAW 381, 382 (J. Cohen & H. Chiu eds. 1974) [hereinafter COHEN & CHIU].

12. Shaw, *An ROC View of the Hong Kong Issue*, 22 ISSUES & STUD. 13, 18 (June 1986).

13. For a succinct description of Hong Kong's "economic miracle," see Jao, *Hong Kong's Future as a Free Market Economy*, 22 ISSUES & STUD. 111, 111-12 (June 1986).

During these years, millions of Chinese sought and found refuge in Hong Kong from civil war, privation, and political persecution. The relative attractiveness of life under British rule, despite its offensive features, is reflected in Hong Kong population statistics. In 1841, some 15,000 people lived in Hong Kong.¹⁴ On the eve of the Japanese occupation in 1941 this number had grown to 1.7 million.¹⁵ Though many residents fled inland during the war years to escape the Japanese, by 1951 the number had reached 2.4 million,¹⁶ with most of the increase consisting of people fleeing Mao Zedong's new government.¹⁷ Since then, China's various political movements, such as the Anti-Rightist Campaign, the Great Leap Forward, and the Cultural Revolution,¹⁸ have driven hundreds of thousands more to Hong Kong; its inhabitants today number approximately 5.5 million.¹⁹

The fact that the majority of Hong Kong's residents voluntarily sought to live under colonial rule highlights the fact that Hong Kong is an atypical colony. Indeed, the most widely agreed-upon description of colonialism, United Nations Resolution 1514, seems grossly out of step with conditions in Hong Kong. This resolution declares that "peoples of the world ardently desire the end of colonialism in all its manifestations," that "colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples," and "constitutes a denial of fundamental human rights."²⁰ In contrast, the majority of Hong Kong residents apparently prefer continuation of the political status quo to PRC displacement of the colonial government.²¹ Far from lagging behind in international economic cooperation, Hong Kong under British rule has developed one of the world's most vibrant international economies.²² Further, few would contest that, however pompous and insensitive the British rulers might

14. D. BONAVIA, HONG KONG 1997: THE FINAL SETTLEMENT 23 (1985).

15. *Id.* at 28.

16. *Id.*

17. Shaw, *supra* note 12, at 16.

18. For a description of these political movements, see J. TOWNSEND & B. WOMACK, POLITICS IN CHINA 113-41 (1986).

19. D. BONAVIA, *supra* note 14, at 28.

20. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961) [hereinafter Resolution 1514].

21. See Jao, *supra* note 13, at 120 n.15 and accompanying text; J. TOWNSEND & B. WOMACK, *supra* note 18, at 422.

22. Hong Kong, with its minute population, is among the top twenty trading countries in the world. Its exports equal China's. Prybyla, *The Hong Kong Agreement and Its Impact on the World Economy*, 22 ISSUES AND STUD. 92, 97-98 (June 1986). In 1984, its gross domestic product (GDP) per capita was US\$5,951, compared to China's US\$443. Jao, *supra* note 13, at 129.

have been, Hong Kong's record of respecting "fundamental human rights" compares very favorably with China's.²³

China agrees that Hong Kong "does not at all fall under the ordinary category of colonial territories," though for different reasons.²⁴ China's position reflects a desire to prevent the international norm of self-determination for decolonized peoples²⁵ from impeding its long-term goal of reunifying the nation as historically constituted.²⁶ Given Hong Kong residents' relative prosperity and demonstrated preference for the colonial bureaucracy over that of the Mainland, China's concern for the result should the self-determination principle be rigidly applied is not unfounded. However, its decision to opt out of the formal machinery that the world community has established to manage decolonization does

23. On human rights in the PRC, see generally H. LIANG & J. SHAPIRO, *INTELLECTUAL FREEDOM IN CHINA AFTER MAO: WITH A FOCUS ON 1983*, at 3 (1984) (describing abuse of citizenry by government and party during Cultural Revolution); H. LIANG & J. SHAPIRO, *SON OF THE REVOLUTION* (1983) (autobiographical account of growing up in the PRC); J. COOPER, F. MICHAEL & Y. WU, *HUMAN RIGHTS IN POST-MAO CHINA* 47-53 (1985) ("[N]ew legal procedures did not guarantee . . . basic rights. Equally impotent . . . was the constitution." *Id.* at 48.). In 1982, still 4,237 pre-1949 Kuomintang (KMT) members continued to be held as political prisoners. *Id.* at 52. See also AMNESTY INTERNATIONAL, *CHINA: VIOLATIONS OF HUMAN RIGHTS* (1984).

24. Although China has consistently championed the rights of Third World peoples to be free from imperial domination, it has resisted international interest in the recovery of the colonies carved out of its own territory. When the People's Republic replaced Taiwan in the U.N. in 1972, it requested the General Assembly's Special Committee on Colonialism to remove Hong Kong and Macao from its list of colonial territories. China insisted that "settlement of the questions of Hong Kong and Macao is entirely within China's sovereign right and does not at all fall under the ordinary category of colonial territories. . . . The United Nations has no right to discuss these questions." Letter from Chinese Ambassador Huang Hua to Chairman of U.N. General Assembly Special Committee on Colonialism (Mar. 10, 1972), reprinted in COHEN & CHIU, *supra* note 11, at 384; see also *Commentaries on Xianggang Issue*, *supra* note 10, at 13.

25. See M. POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS* 27 (1982).

26. In 1964, for example, the PRC strenuously objected to a USSR-inspired resolution at a World Youth Forum calling for the "elimination of colonies in Asia":

The resolution put Hong Kong and Macao, which are China's territory, on a par with Timor Island, Papua, Oman, Aden, and South Arabia and demanded "independence" for the two places in accordance with the UN declaration.

The Chinese delegate . . . sternly condemned the erroneous approach. . . . He pointed out that Hong Kong and Macao are Chinese territory occupied by British and Portuguese imperialism on the strength of unequal treaties. The Chinese people will recover them without fail at an appropriate time. To demand "independence" for the two places . . . means in fact to demand their detachment from China.

Khrushchev Group, *supra* note 11, at 382.

China's greater fear is that Taiwan could potentially claim a right to self-determination. Even though it has not been subjected to non-Chinese domination since the Japanese left at the end of World War II, its society has been functionally separate from that of the Mainland since 1949, and an incipient independence movement exists on the island. See Christiansen, *Self-Determination for the People of Taiwan*, 14 CALIF. W. INT'L L. REV. 471 (1984); Chen & Reisman, *Who Owns Taiwan: A Search for International Title*, 81 YALE L.J. 599 (1972).

not mean that international legal norms are irrelevant to the Hong Kong problem, nor that international institutions can have no oversight role in post-1997 Hong Kong. A brief examination of the development of the "norm" of self-determination suggests that the international community has legitimate interests in how China reasserts its sovereignty over Hong Kong.

B. *Hong Kong in the Era of Decolonization*

When Great Britain resumed control over Hong Kong at the end of World War II, the international order was changing rapidly. Empires dissolved as the weakened Western powers yielded to demands for national independence throughout Asia and Africa. The United Nations was founded amid hopes that the transition to a new order could be managed peacefully.

1. Positive International Law

The United Nations has devoted a great deal of time and energy to codifying internationally agreed-upon norms governing decolonization. The thrust of these efforts has been to give content to the basic policy of "respect for the principle of . . . self-determination of peoples."²⁷ In 1960, the General Assembly unanimously passed Resolution 1514, adopting the principle of self-determination as the central norm governing decolonization: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."²⁸ The primacy of this principle has been restated in both the International Covenant on Civil and Political Rights²⁹ and the International Covenant on Economic, Social and Cultural Rights,³⁰ repeated in numerous General Assembly resolutions,³¹ and embodied in rulings of the International Court of Justice (I.C.J.).³²

27. U.N. Charter art. 1, para. 2.

28. Resolution 1514, *supra* note 20.

29. International Covenant on Civil and Political Rights, art. 1, para. 1, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967).

30. International Covenant on Economic, Social and Cultural Rights, art. 1, para. 1, 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360 (1967).

31. *See, e.g.*, G.A. Res. 2105, 20 U.N. GAOR Supp. (No. 14) at 3, U.N. Doc. A/6014 (1965); G.A. Res. 2189, 21 U.N. GAOR Supp. (No. 16) at 5, U.N. Doc. A/6316 (1966); Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 462 (1971) (citing Resolutions 2105 and 2189, *supra*, as examples of "the annual catch-all anti-colonial self-determination resolutions").

32. *See* Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution, 1971 I.C.J. 14 (Advisory Opinion of June 21), at 31, para. 52 [hereinafter *Namibia*]; Western Sahara, 1975 I.C.J. 1 (Advisory Opinion of May 22) at 31, para. 55.

Many commentators consider self-determination a “basic right of contemporary international law.”³³ There is general agreement that this right is “available to all peoples who are . . . functionally subjected to colonialism.”³⁴ Moreover, the I.C.J. has held that where the principle of self-determination conflicts with the maintenance of “national unity and territorial integrity,”³⁵ the “freely expressed will and desire” of peoples is to be the determining factor.³⁶ In short, to judge from prescriptive formulations of international law, the right of dependent peoples to determine for themselves their post-colonial political order is one of the most cherished norms of the modern world.

2. The Realities of State Behavior

Self-determination has played an important role in post-World War II international relations. The United Nations has successfully overseen the transition of a number of colonies either to full independence,³⁷ or to

33. Reisman, *The Case of Western Somaliland: An International Legal Perspective*, HORN OF AFRICA 13 (1978), reprinted in M. McDOUGAL & W. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 164 (1981); see also Fenet, *The Eritrean People and the Principle of Self-Determination Within the Framework of the United Nations*, in THE ERITREAN CASE 280, 281-83 (Proceedings of the Permanent Peoples' Tribunal of the International League for the Rights and Liberations of Peoples, 1982). *Contra* Emerson, *supra* note 31.

34. Reisman, *supra* note 33, at 166; see also Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Art. 73(e) of the Charter, G.A. Res. 1541, discussed in Reisman, *supra* note 33, at 164.

35. Resolution 1514, *supra* note 20, art. 6.

36. Western Sahara, 1975 I.C.J. at 68, para. 162 (discussing Resolution 1514, art. 5); see also Reisman, *supra* note 33, at 166. In a more recent case, the I.C.J. considered the potential conflict between “the right of peoples to self-determination,” Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali), 1986 I.C.J. __, para. 25 (Judgment of Dec. 22, 1986) (preliminary release), and the principle of *uti possidetis juris*, the “essence of [which] . . . lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved.” *Id.* at __, para. 23. In relying upon *uti possidetis* to determine the boundary dispute submitted to it through the Special Agreement of the parties, the Court makes clear that it intended to strengthen rather than derogate the principle of self-determination:

At first sight this principle conflicts outright with . . . the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples. *Id.* at __, para. 25. In a separate opinion concurring in the operative provisions of the judgment, Judge Luchaire asserted that the principle of self-determination takes precedence over the principle of maintenance of colonial boundaries: “[T]he frontiers of an independent State emerging from colonization may differ from the frontiers of the colony which it replaces, and this may actually result from the exercise of the right of self-determination.” *Id.* at __ (separate opinion of Judge Luchaire).

37. Libya, for example, was “the first independent state born under United Nations aegis.” R. NYROP, J. ANTHONY, B. BENDERLY, W. COVER, N. PARKER & S. TELEKI, *AREA HAND-*

freely-chosen incorporation into a neighboring state.³⁸ Where the superpowers have been willing, either the moral force of the norm or the perceived benefits flowing from compliance have led to self-determined change in political systems³⁹ or to association with another state on a more equal footing.⁴⁰ Where the superpowers' perceived security interests are at stake,⁴¹ however, or the complexity of competing historical claims is too great,⁴² the claims of dependent peoples to change their political status have proven ineffectual.

BOOK FOR LIBYA 31 (1973). The question of how Libya, an Italian colony before World War II, should be governed was turned over to the U.N. by the Allied powers after the war. These powers administered the territory until the U.N. decided its fate. M. KHADDURI, *MODERN LIBYA: A STUDY IN POLITICAL DEVELOPMENT* 127 (1963). The General Assembly, after studying the matter, resolved that Libya should be constituted as an independent nation, and appointed a commissioner to oversee this process and ensure that foreign domination of Libya ended by 1952. *Id.* at 134-36. On December 24, 1951, Libya duly proclaimed its independence. *Id.* at 213.

38. British Togoland, for example, opted by majority vote in a U.N.-supervised plebiscite to unite with the independent Gold Coast nation. This union formed the state of Ghana on March 6, 1957. Chen & Reisman, *supra* note 26, at 662 n.236. See also Burkina Faso v. Republic of Mali, 1986 I.C.J. — (separate opinion of Judge Luchaire) (discussing additional examples of exercises of self-determination resulting in integration with neighboring states).

39. The Soviet Union's surprising decision to accept an end to Allied occupation of Austria in exchange for a declaration of Austrian neutrality presents such an example in the context of "alien domination," also covered by Resolution 1514. See *DAS NEUE ÖSTERREICH: GESCHICHTE DER ZWEITEN REPUBLIK* 110-15 (E. Weinzierl & K. Skalnik eds. 1975). The USSR's decision made possible the May 15, 1955, signing of a "State Treaty for the Reestablishment of an Independent Democratic Austria," the subsequent withdrawal of all occupying forces, and today's independent, neutral Austria. See Kohn, *The Future of Austria*, *HEADLINE SERIES/FOREIGN POL'Y A.* 44-49 (July-Aug. 1955).

40. United Nations' oversight of Puerto Rico arguably falls into this category. In 1953 the General Assembly certified that Puerto Rico's "commonwealth" status with the United States "represented a 'free and democratic' expression of the will of the population of Puerto Rico, that the Puerto Rican people had 'effectively exercised their right to self-determination,' and that the territory was no longer to be considered 'non-self-governing.'" M. POMERANCE, *supra* note 25, at 93 n.141 (quoting Cessation of the Transmission of Information under Article 73(e) of the Charter in Respect of Puerto Rico, G.A. Res. 748, 8 U.N. GAOR Supp. (No. 17) at 25, U.N. Doc. A/2630 (1953)).

41. The USSR's inclusion of distinct ethnic groups within its national territory and its domination of its Eastern European satellites have both been attacked as denying the right of distinct peoples to self-determination. See, e.g., Meissner, *The Right of Self-Determination After Helsinki and Its Significance for the Baltic Nations*, 13 CASE W. RES. J. INT'L L. 375 (1981) (criticizing the Soviet Union for denying Estonia, Latvia, and Lithuania a say in determining their political futures). The USSR has defended its actions on national and collective security grounds. Kovalev, *Sovereignty and the Internationalist Obligations of Socialist Countries*, *Pravda*, Sept. 26, 1968, reprinted in M. McDUGAL & W. REISMAN, *supra* note 33, at 175, 176 (defending Soviet invasion of Czechoslovakia on ground that self-determination by Eastern bloc nations "must damage neither socialism in their own country nor the fundamental interests of the other socialist countries nor the worldwide struggle for socialism"). The United States has also been criticized for denying self-determination rights to territories in which it perceives vital security interests. See Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1, 4-7 (1980).

42. This is the situation of the Palestinian people. See, e.g., Collins, *Self-Determination in International Law: the Palestinians*, 12 CASE W. RES. J. INT'L L. 137 (1980); Weiler, *Israel*

More important for the Hong Kong problem, where a neighboring state has desired to incorporate the decolonizing territory, the United Nations has been ineffective in enforcing the right to self-determination.⁴³ Even where international bodies have authoritatively stated that a people is entitled to determine its own future, this has not constrained expansionist states.

In the *Namibia* case, for example, the International Court of Justice, in ordering South Africa out of Namibia, noted that the "development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them."⁴⁴ South Africa has ignored both the Court's decision and a U.N.-ordered embargo, however, and continues to administer Namibia today. In *Western Sahara*, the International Court considered the claims of two contending nations, both of which could demonstrate "legal ties" based on historical connections, to territory that had been colonized by Spain.⁴⁵ The Court found these ties inadequate to "affect the application . . . of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory."⁴⁶ Yet Morocco ignored the Court and the United Nations and has occupied the Western Sahara to this day.⁴⁷

This brief review suggests that the "universal right" to self-determination, though effective at encouraging Western nations to give up their colonies, has been of little assistance to decolonizing peoples bordered by states seeking to annex their territory. While the classification of self-determination as a "right" may have encouraged dependent peoples to aspire to recognition of their distinct status, the fact that the international system lacks an effective mechanism for monitoring and sanction-

and the Creation of a Palestinian State: The Art of the Possible and the Impossible, 17 TEX. INT'L L.J. 287 (1982).

43. Decolonization of the Italian colony of Eritrea, for example, was accomplished under U.N. auspices by declaring Eritrea "an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown." G. TREVASKIS, *ERITREA: A COLONY IN TRANSITION: 1941-52*, at 113 (1960) (quoting the U.N. General Assembly). Because Eritrea was weak relative to the neighbor with which it was federated, it was recognized from the outset that Ethiopia's "temptation to subject Eritrea firmly under her own control will always be great." *Id.* at 131. In fact, Ethiopia has yielded to this temptation. The promised autonomy did not materialize, and the government of Ethiopia has dominated Eritrean politics and culture. There have also been persistent claims of brutal persecution of Eritreans. See Dines, *Ethiopian Repression in Eritrea*, in *THE ERITREAN CASE*, *supra* note 33, at 308; Permanent Peoples' Tribunal, *Advisory Opinion on Eritrea*, in *id.* at 357, 375-76. The international community has done nothing to compel Ethiopia to honor its promise, and the country is currently engulfed in civil war.

44. *Namibia*, 1971 I.C.J. at 31, para. 52.

45. *Western Sahara*, 1975 I.C.J. at 40, para. 85.

46. *Id.* at 68, para. 162.

47. See Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694, 711-17 (1976).

ing states that subjugate decolonizing peoples has severely curtailed the fulfillment of those aspirations.⁴⁸

3. International Norms Governing Hong Kong's Decolonization

Two international legal norms are implicated in the transfer of Hong Kong from British to Chinese sovereignty: self-determination—a legitimate aspiration of Hong Kong residents as a group—and the protection of human rights, which involves the treatment of individual residents. Thus even in the context of a bilateral agreement such as the one concluded between Britain and China, compliance with these international norms merits world attention.

a. *Self-Determination*

China's refusal to allow Hong Kong residents to play a formal role in the negotiations that produced the Declaration violated the norm of self-determination for decolonizing peoples.⁴⁹ China's sheer power, its importance in the world order, its historical claims to the territory, and its devotion to the ideology of national reunification have enabled it to opt out of the formal decolonization structure.⁵⁰ Other nations, apparently recognizing the futility of opposing China on this point, have rarely challenged its claim.⁵¹

The British initially argued for a role for the people of Hong Kong in the decision-making process. They eventually yielded to China's determination to recover sovereignty and concentrated instead on structuring

48. For a critical discussion of the U.N.'s "shopping mart" approach to reconciling the "inherently conflicting" principles of self-determination and territorial integrity, see M. POMERANCE, *supra* note 25, at 46-47.

49. The applicability of the norm of self-determination to the Hong Kong problem has been partially discussed in Amberg, *supra* note 3. Amberg argued, however, that "[t]he essence of self-determination is the method, not the result," *id.* at 855, and recommended "[d]iscussions within the General Assembly regarding self-determination in Hong Kong . . . before the treaty is formalized [in 1985]." *Id.* at 858. Given China's past insistence that Hong Kong's decolonization was *not* a matter within the U.N.'s jurisdiction, and the U.N.'s acceptance of this contention (see *supra* notes 24-25 and accompanying text), this suggestion was unrealistic. Not surprisingly, the U.N. has made no moves toward taking on a role in supervising Hong Kong's transition. More importantly, focusing exclusively on the "method" of decolonization obscures the legitimate interest that the international community has in the post-1997 result of Hong Kong's transfer to the PRC. See *infra* notes 53-56 and accompanying text.

50. See *supra* notes 24-26 and accompanying text; Mushkat, *The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues*, 14 DEN. J. INT'L L. & POL'Y 171, 176-77 (1986) (discussing China's "rigid" view of sovereignty as the source of its persistent criticism of "international interference in domestic affairs" of sovereign nations).

51. See Chiu, *The Hong Kong Agreement and American Foreign Policy*, 22 ISSUES & STUD. 76, 78 (June 1986) (describing U.S. attitude as "hands off"); COHEN & CHIU, *supra* note 11, at 381 (China's rebuff to Soviet attempt to address decolonization of Macao).

a post-1997 order that promised Hong Kong the maximum autonomy consistent with Chinese sovereignty. The PRC, to its credit, agreed to govern Hong Kong according to a "one country, two systems" formula.⁵² If faithfully implemented, this formula could afford Hong Kong residents a substantial degree of autonomy and the opportunity to maintain the distinctive culture and lifestyle they have developed over the last century.

Although the PRC's agreement is in the form of a bilateral treaty to which Hong Kong residents are not a party,⁵³ these residents have a separate right, based on the international law of decolonization, to demand PRC compliance with the Declaration's provisions for a "high degree" of autonomy.⁵⁴ The norm of self-determination entitles Hong Kong—which is, after all, a colony⁵⁵—to some measure of control over its own destiny. Though China would hotly dispute this assessment, insisting that "Hong Kong compatriots" are an integral part of Chinese society, its position is belied by China's resistance to allowing the question of their identity to be put to them directly. The international community, therefore, has a responsibility to do all it can to see that China lives up to the terms of the Declaration and that Hong Kong residents enjoy as many of their substantive international legal rights as possible.⁵⁶

52. See *supra* note 7.

53. See *infra* text accompanying note 88.

54. Declaration, *supra* note 1, art. 3, para. 2.

55. Britain has, where possible, referred to Hong Kong as a "territory" rather than a "colony" in recent years, apparently in deference to China's sensitivity regarding this term. See *supra* notes 24, 26. Nevertheless, Hong Kong remains a "British Dependent Territory." D. BONAVIA, *supra* note 14, at 29.

Because Hong Kong residents have lived under "alien domination," they fit the U.N. definition of a "distinct people." Resolution 1514, *supra* note 20; G.A. Res. 1541, *supra* note 34; see also Reisman, *supra* note 33, at 166 (concluding that right to self-determination is available to all peoples "functionally subjected to colonialism"). They are distinct from the people of the PRC as well as from the British. This does not mean that residents of Hong Kong are any more or less "Chinese" than residents of the PRC, but only that they have developed, through living in distinct circumstances, a distinctive culture. See Wong, *Modernization*, *supra* note 6. This is precisely the focus of the international standard. The "core" of the self-determination norm is the insistence that a people historically subjected to alien domination must not be, in the attempt to correct this historical wrong, "hand[ed] about from sovereignty to sovereignty as if they were property." THE NEW DEMOCRACY: PRESIDENTIAL MESSAGES, ADDRESSES, AND OTHER PAPERS 411 (1926), quoted in Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 1, 2 (1976) (statement of President Wilson). Self-determination is no less violated by transfer and subsequent domination by an ethnically related nation than by continued foreign domination. See Franck, *supra* note 47, at 694 ("Morocco's . . . denial of self-determination to the Sahrawi people radically departs from the norms of decolonization . . .").

56. The fact that international interest in Hong Kong has not been formally expressed through the United Nations decolonization framework does not mean that the world does not consider the norm to be applicable to this colony in transition. Rather, it could suggest the difference between U.N. formulations of the self-determination norm and the "moral and political desideratum" which is "held more widely today than ever before." M. POMERANCE, *supra*

b. *Human Rights*

Human rights, "the idea of our times,"⁵⁷ imposes on the world community an additional obligation to oversee the implementation of the Declaration. Both the Universal Declaration of Human Rights⁵⁸ and the International Covenant on Civil and Political Rights⁵⁹ list the right to leave one's country as a basic human right. Many, perhaps most, Hong Kong "compatriots" availed themselves of this right when they chose to leave China. Returning those Hong Kong residents without their consent to the control of the country they left effectively violates this norm.

An even less palatable feature of the Hong Kong plan is the return to PRC control of those who came to Hong Kong as refugees from that country. While no estimate is available of the number of Hong Kong residents who fled China because of a "well-founded fear of being persecuted for reasons of . . . religion, . . . membership of a particular social group or political opinion,"⁶⁰ and who therefore meet the internationally accepted definition of refugee,⁶¹ no one familiar with China's turbulent history can doubt that the number is very large.⁶² Returning these refugees to Chinese control could violate a basic principle of international

note 25, at 73-76. Pomerance distinguishes these two approaches in a way that has obvious relevance to the Hong Kong problem. She believes that, as put forward by the U.N.:

[S]elf-determination has become, not a continuum of rights, but an "all or nothing" proposition: maximal rights, including independence, to the meritorious "selves"; no rights at all to those whose claims to self-determination are rejected as unworthy. . . .

[T]he exercise of the right of self-determination is generally seen as a "one-shot affair." Once validly exercised—in the form, preferably, of full independence—the right ceases to exist for all those trapped within the new "legitimated" borders.

Id. at 74-75. She concludes that the U.N. framework is not law, but "imposture," *id.* at 76, which "stands in opposition to a more realistic, flexible, and universal concept of self-determination." *Id.* at 74. Her assertion that self-determination is a "continuing" right, *id.* at 75, expressible through "a plethora of possible solutions, rather than as a rigid absolute right to full 'external' self-determination in the form of complete independence," *id.* at 74, may have relevance for self-determination even where, as in Hong Kong, a people has been denied input into the process of planning their political future.

57. R. EDWARDS, L. HENKIN & A. NATHAN, *HUMAN RIGHTS IN CONTEMPORARY CHINA* 1 (1986).

58. Universal Declaration of Human Rights, art. 13, para. 2, G.A. Res. 217, U.N. Doc. A/810, at 74 (1948), reprinted in L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW: CASES AND MATERIALS* 320, 321 (1980).

59. *Supra* note 29, art. 12, para. 2.

60. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1(A)(2), 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter Protocol]. See generally G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1983).

61. Until 1980 the Hong Kong government followed a "touch base" policy toward Chinese immigrants, automatically granting residence permits to those who crossed into Kowloon undetected. See D. BONAVIDA, *supra* note 14, at 50-51. Consequently there exists no formal record of an immigrant's reason for coming to Hong Kong.

62. Non-technical sources regularly refer to "half" of Hong Kong's population as refugees. Iyer, *supra* note 7, at 51.

refugee law: a refugee may not be returned to the nation he has fled if he is likely to face further persecution.⁶³

These individual rights norms give the international community a legitimate interest in ensuring that Hong Kong residents are not mistreated after 1997. China has pledged to Britain that it will respect these norms. The Declaration provides that the International Covenant on Civil and Political Rights will remain in force in the HKSAR⁶⁴ even though China itself is not a party.⁶⁵ It also enumerates a comprehensive list of rights that, if respected, will satisfy international standards.

The interest of the international community remains legitimate despite China's success at removing the transfer process from the formal decolonization scheme. This international concern does not mean that Hong Kong residents can reasonably rely on international enforcement of their rights; indeed, the review of prior decolonization cases suggests just the opposite. Rather, the applicability of international norms in post-1997 Hong Kong might be a source of additional leverage in the efforts of Hong Kong residents to preserve their own rights. China has agreed, by sovereign act and equal treaty, to grant Hong Kong the core element of self-determination—autonomy—and basic human rights. It has accepted a potential framework for international oversight: international organizations in which Hong Kong may maintain a separate membership after 1997.⁶⁶ To benefit from this leverage, as well as to focus its own efforts on maintaining autonomy, Hong Kong needs an independent institution that can both call on China to respect the rights of its residents and authoritatively report to the local and international communities on PRC compliance with the Declaration.

The next three sections examine the governmental structure that Britain and China have imposed on Hong Kong and identifies the judiciary as the institution most capable of ensuring that Hong Kong residents retain their promised rights and autonomy. The final section considers how this institution, combined with functional international oversight, can augment the efforts of Hong Kong residents to determine, to the greatest possible extent consistent with Chinese sovereignty, their own destiny.

63. This principle is known as *non-refoulement*. G. GOODWIN-GILL, *supra* note 60, at 69-100; *see also* Protocol, *supra* note 60, art. 33.

64. Declaration, *supra* note 1, Annex I, art. XIII, para. 4 [hereinafter Annex I].

65. Mushkat, *supra* note 50, at 177.

66. *See infra* text accompanying notes 192-96.

II. The Legal Status and Basic Policies of the Declaration

The Declaration sets out the framework under which China will (re)assume sovereignty over the British colony in 1997. It obligates Britain to "restore Hong Kong to the People's Republic of China"⁶⁷ and China to "establish . . . a Hong Kong Special Administrative Region [HKSAR] . . . [that] will enjoy a high degree of autonomy."⁶⁸ China has pledged in the Declaration to limit the exercise of its sovereignty in a number of ways: "The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms . . . will be ensured by law. . . . Private property . . . will be protected by law."⁶⁹ In addition, "the socialist system and socialist policies shall not be practised in the [HKSAR] and . . . Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years."⁷⁰

Virtually all commentators reviewing the Declaration's likely impact have glossed over the specific provisions in favor of more general pronouncements about its historical, economic, or political context. Optimists believe that, because China (1) earns much hard currency through Hong Kong, and (2) wants to set a precedent that will entice Taiwan toward eventual reunification, it will voluntarily abide by the agreement's general tenor rather than strictly interpret or ignore it.⁷¹ Pessimists focus on the PRC's record of erratic and often violent political change, and view the possibility of China following *any* consistent course for the fifty years prescribed in the Declaration as unlikely.⁷²

67. Declaration, *supra* note 1, art. 2.

68. *Id.* art. 3, paras. 1, 2.

69. *Id.* art. 3, para. 5.

70. Annex I, *supra* note 64, art. I, para. 1.

71. This appears to be the view of the U.S. government. In an address at Yale University, Burton Levin, U.S. Consul General to Hong Kong from 1981-86, expressed a "leaning toward optimism," predicting that China would leave Hong Kong alone as long as it needed hard currency for internal development and an enticing example for Taiwan. Address by Burton Levin, Yale University (Feb. 9, 1987) (notes on file with the *Yale Journal of International Law*); see also, e.g., Day, *supra* note 10, at 648 (footnote omitted):

If the PRC honors the agreement, it . . . will demonstrate to the world that it has become a respectable member of the international community. It will earn great economic rewards from the capital exchange inflows and increased contact with the capitalistic society. This recent agreement also lessens military tension in the region and may lay the foundation for a special reunion with Taiwan.

See also Karamanian, *supra* note 9, at 187-88; Cheng, *An Economic Analysis of Capital Flight in Hong Kong*, 17 N.Y.U. J. INT'L L. & POL. 683 (1985).

72. The Nationalist government on Taiwan sees "no possibility of success for the 'one country, two systems' formula outlined in the Declaration." Shaw, *supra* note 12, at 29. Domes, *The Impact of the Hong Kong Problem and the Hong Kong Agreement on PRC Domestic Politics*, 22 ISSUES & STUD. 31, 51 (June 1986), concludes, based on an analysis of internal elite dynamics in the PRC, that "there is only a rather limited room for optimism about Hong Kong's future." Mushkat, though not wholly pessimistic, notes that "willingness . . . on the

These writers are undoubtedly correct that the “macro” context is ultimately more important than the details of the agreement. If China remains stable and adheres to the “one country, two systems” ideal, then the document will be seen as an unnecessary excess of British legalism. If China descends once again into political chaos, the document will be a useless piece of paper, incapable of restraining naked power.⁷³

Between these extremes, however, lies the political and legal arena in which Hong Kong residents are most likely to live in the near future. These people, who must implement and make the best of the system prescribed in the Declaration, are well aware that it will not protect them from catastrophic change in China. They also doubt that China’s modernization and liberalization, the trends uppermost in the minds of optimistic commentators, will proceed without interruption.⁷⁴ For Hong Kong residents, the important question is what role they can play in realizing the Declaration’s promises in the event that China does attempt to conform its conduct to the Declaration.

Before speculating on whether *any* international treaty can constrain China’s treatment of its own territory, it is important to understand precisely what China has committed itself to on paper. The next sections explore the constitutional framework of the HKSAR and how the Declaration provides for its governance.

A. *The Declaration, the Basic Law, and the PRC Constitution*

It must be mentioned at the outset that any discussion of the PRC Constitution as a constraint on central government activity has a certain never-never-land quality. The PRC has changed constitutions frequently,⁷⁵ and these documents can be more accurately characterized as descriptions of prevailing policy aspirations than as embodiments of un-

part of the PRC to tolerate an autonomous Hong Kong may not be matched by its ability to achieve this in practice.” Mushkat, *supra* note 50, at 184.

73. The former U.S. Consul General to Hong Kong suggested that the British were overly legalistic in insisting on such a detailed document, since no mere agreement could constrain a nation intent on asserting its own interests: “What country wouldn’t abrogate a treaty when that treaty ceased to be in its interest?” Levin, *supra* note 71.

74. See, e.g., Kronholz, *Jittery Colony: Few in Hong Kong Still Trust Promises of Britain and China*, Wall St. J., Apr. 13, 1987, at 1, col. 1.

75. The present constitution, adopted by the National People’s Congress (NPC), December 4, 1982, was the fourth in the PRC’s thirty-eight years of existence. Hsia, Haun, Hambley & Johnson, *The People’s Republic of China*, in 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1 (A. Blaustein & G. Flanz eds. 1986). The NPC has the power to amend the constitution by two-thirds majority vote. PRC CONSTITUTION, *supra* note 6, art. 62, para. 1 & art. 64.

changing principles binding on the government.⁷⁶ A correct understanding of the HKSAR's theoretical place in the PRC legal system is nonetheless important: it can indicate the sources from which local authority will stem and the manner in which Hong Kong residents may effectively frame and pursue complaints arising from any PRC abridgment of their autonomy or rights.

The Declaration is an international agreement between Britain and China.⁷⁷ It is not a self-executing agreement, but rather binds "the Government of the People's Republic of China . . . to implement"⁷⁸ the principles agreed upon by adopting a "Basic Law" of the HKSAR.⁷⁹ China has promised that the National People's Congress (NPC), its legislature, will pass implementing legislation.⁸⁰ Authority to govern one part of the nation under a separate legal structure comes from article 31 of the PRC Constitution, which provides that China "may establish special administrative regions when necessary."⁸¹

Since both China and Britain agree that at least this part of China's Constitution will apply to the HKSAR,⁸² there is concern that China might assert "the priority of the general provisions in the constitution of the PRC over those of the 'Basic Law.'"⁸³ The relation between the national constitution and the Hong Kong "mini-constitution" has been a topic of debate among legal scholars in Hong Kong.⁸⁴ Of particular concern is whether article 67(4) will apply to Hong Kong. This article gives the Standing Committee of the NPC power to "interpret statutes." The

76. Gellhorn, *China's Quest for Legal Modernity*, 1 J. CHINESE L. 1, 20 (1987); see also Cohen, *China's Changing Constitution*, 76 CHINA Q. 794 (Sept. 1978).

77. Calling the agreement a "declaration" instead of a treaty does not make it any less a binding obligation. See Mushkat, *supra* note 50, at 191-92; Recent Developments, 26 HARV. INT'L L.J. 249, 250 n.8 (1985).

78. Declaration, *supra* note 1, art. 7.

79. *Id.* art. 3, para. 12.

80. *Id.*

81. *Id.* art. 3, para. 1.

82. Annex I, *supra* note 64, art. I, para. 1, can be read to require the entire Basic Law to conform to China's Constitution: "The National People's Congress . . . shall enact and promulgate a Basic Law . . . in accordance with the Constitution of the People's Republic of China" (emphasis added). The Chinese text is equally ambiguous.

83. Domes, *supra* note 72, at 51.

84. See, e.g., Clarke, *Hong Kong Under the Chinese Constitution*, 14 HONG KONG L.J. 71 (1984) (suggesting that article 31 is "controlled" by article 5, which provides that "[n]o law or administrative or local rules and regulations shall contravene the Constitution"). A Conference on Constitutional Law and Basic Laws, held at the Chinese University of Hong Kong from November 28 through December 2, 1986, discussed this issue at length. See Davis, *The HKSAR Basic Law and the Concept of Constitutional Judicial Review 4* (text of address presented at Conference) (copy on file with the *Yale Journal of International Law*); Fung, *Interpretation of the Basic Law 11* (text of address presented at conference) (copy on file with the *Yale Journal of International Law*); see also *The Law Takes Shape*, FAR E. ECON. REV. 38 (Dec. 18, 1986) [hereinafter *The Law Takes Shape*].

Basic Law will be a statute, albeit one implementing an international obligation. By announcing interpretations of the Basic Law that contradict opinions of the HKSAR high court, the Standing Committee could sharply limit the value of the power of "final adjudication" that the Declaration vests in HKSAR courts.⁸⁵

Applying article 67(4) in this manner would, however, violate China's agreement with Britain. The Chinese Constitution allows the creation of Special Administrative Regions with systems "prescribed by law . . . in light of the specific conditions."⁸⁶ By signing the Declaration, China has undertaken to use this authority to set apart one part of the nation—the HKSAR—in which an "independent judiciary" would have the power of "final adjudication."⁸⁷ Although, as a *constitutional* matter, the Standing Committee could overrule Hong Kong courts under article 67(4), such an action would render them neither independent nor final, in violation of China's obligation to Britain.

Hong Kong residents cannot, even as a purely theoretical matter, look to China's Constitution as a constraint on national government authority to interpret, amend, or even abolish the Basic Law as it sees fit. A basic attribute of sovereignty is the power to break international agreements if a state chooses to suffer the international consequences.⁸⁸ Since the Declaration is an agreement between co-equal sovereigns, China is techni-

85. Annex I, *supra* note 64, art. I, para. 2; see also Chiu, *The 1984 Sino-British Agreement on Hong Kong and Its Implications for China's Unification*, 21 ISSUES & STUD. 13, 17-19 (April 1985) (arguing that the greatest threat to HKSAR autonomy is that both the legislative and the interpretive powers of the Basic Law belong to the NPC).

86. Declaration, *supra* note 1, art. 31.

87. Annex I, *supra* note 64, art. I, para. 2.

88. Under certain conditions abrogation of agreements is sanctioned by international law. Article 56 of the Vienna Convention on the Law of Treaties, to which China is not a party, see Mushkat, *supra* note 50, at 177, provides:

(1) A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

...
(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

Reprinted in 8 I.L.M. 679, 699 (1969). The "nature" of the Declaration is "resum[ption] of sovereignty." Declaration, *supra* note 1, art. 1. This implies a right on China's part to terminate if it determines that a different way of ruling Hong Kong would be essential to the security of the city, or of the nation of which it is a part.

The doctrine of *rebus sic stantibus* would provide justification for abandoning the basic policies in many circumstances. The Declaration obligates China to maintain Hong Kong's economy unchanged for fifty years. If conditions beyond China's control—an international recession that dried up export markets, for example—undermined Hong Kong's "prosperity and stability," Declaration (Preamble), *supra* note 1, then China could claim a right to disregard the Declaration and impose new policies under article 62 of the Vienna Convention:

(1) A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the

cally answerable only to Britain if it interprets its implementing legislation in a way that breaks its bilateral pledge. It has made no pact with the people of Hong Kong; thus they have no constitutional claim if the NPC exercises its power to interpret their rights out of existence.

The drafting of the Basic Law has already begun.⁸⁹ Although Hong Kong is currently beset by worries that China is drafting a Basic Law that either does not accurately reflect the Declaration or interprets it so strictly that its promise of "a high degree of autonomy" is rendered illusory,⁹⁰ this article will proceed on the assumption that the Basic Law will initially conform to a strict, but reasonable, interpretation of the words of the Declaration.⁹¹ This assumption could certainly be wrong; the Basic Law Drafting Committee is stacked in China's favor.⁹² Moreover, China lacks an understanding of Hong Kong's skittish market society, and

parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

...

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

Reprinted in 8 I.L.M. at 702.

These formal notions are not likely to be relevant. Britain has never suggested any intent to use force to compel Chinese compliance, and it is highly doubtful that it could do so, whatever its intent.

89. A Basic Law Drafting Committee (BLDC) will produce a first draft in 1988. Fifty-eight people sit on the BLDC, of whom twenty-three are from Hong Kong and thirty-five from the PRC. *Unequal Voices*, *supra* note 4, at 40. The BLDC has established a Basic Law Consultative Committee (BLCC), composed of 180 Hong Kong residents, as a mechanism to allow Hong Kong's concerns to inform the drafting process. *Id.* The NPC will promulgate the Basic Law in 1990.

While Hong Kong residents have a formal vote—though one that, because of their minority status, carries little weight—the British government may in fact have more influence on the eventual form of the Basic Law. Annex II of the Declaration establishes a "Sino-British Joint Liaison Group" (JLG) to "conduct consultations on the implementation of the Joint Declaration." Since the obligation to preserve Hong Kong's rights and lifestyle is owed to Britain rather than to the people of Hong Kong, Britain's input as to what it accepts as meeting the letter and spirit of the Declaration is likely to carry more weight than Hong Kong's protestations regarding what it would like to see in the Basic Law.

90. Declaration, *supra* note 1, art. 3, para. 2. See *Unequal Voices*, *supra* note 4, at 40; *The Peking Machine Carries All Before It*, FAR E. ECON. REV. 44 (Dec. 18, 1986).

91. See Mushkat, *supra* note 50, at 193 (There is "little doubt that China will take the necessary formal steps to implement the Joint Declaration.").

92. In addition, recent events in China could portend political upheaval in the not-too-distant future. Student protests in December 1986 calling for "more freedom and democracy" and the consequent resignation of Hu Yaobang, head of China's Communist Party (see Southerland, *Hu Resigns As Party Chief*, Wash. Post, Jan. 17, 1987, at 1, col. 6), has aroused concerns, not yet dissipated, that China's recent liberalizing trend is about to end. See *id.*; Kronholz, *supra* note 74. China has at best a mediocre record of implementing legal guarantees where the recipients are its own citizens. See Cohen, *supra* note 76, at 827-36. If a Basic Law unacceptable to the people of Hong Kong is promulgated, there will be little for them to do but suffer in silence or "vote with their feet."

often shows a xenophobic distrust of the people of Hong Kong and their suggestions for the future.⁹³

Yet other factors must be considered. China has consistently shown restraint in its treatment of Hong Kong by pursuing a negotiated end to treaties that it denounced as “unequal” relics of an embarrassing past,⁹⁴ despite its power to bring Hong Kong to its knees without even a formal threat of invasion.⁹⁵ In the short term—at least through the Basic Law drafting process—its pride at recovering Hong Kong, the wealthiest and most modern Chinese city in the world, its desire to benefit from Hong Kong’s financial and personnel resources, and its concern for its own international image are likely to cause China to pursue a gentler policy.⁹⁶

One can thus assume that the Basic Law will conform, on paper, to the Joint Declaration. The more important question is what a system of government based on this document will mean in terms of Hong Kong’s ability to preserve its basic civil rights and unique lifestyle over time.⁹⁷

B. *The Basic Policies of the HKSAR*

Three major themes run through the Declaration that must be embodied in the Basic Law: autonomy, continuity, and individual rights.

1. Autonomy

The Declaration states that the HKSAR “will enjoy a high degree of autonomy, except in foreign and defence affairs, which are the responsibility of the Central People’s Government.”⁹⁸ Much of the Declaration

93. This distrust has roots both in Hong Kong residents’ long exposure to foreign ways and in linguistic and cultural differences between the northern and inland Chinese who dominate the PRC and the Cantonese who make up most of Hong Kong’s population.

94. See Day, *supra* note 10, at 629-33 (summary of the history of British acquisition and administration of Hong Kong); D. BONAVIA, *supra* note 14, at 19-27.

95. China supplies most of Hong Kong’s water and food. Day, *supra* note 10, at 627. Levin, *supra* note 71, noted that the Chinese have been capable since 1949 of “snuffing out” Hong Kong, but “consistently put their interests ahead of their emotions.” See also Jao, *supra* note 13, at 121.

96. See *supra* note 71 for sources detailing the reasons for optimism.

97. Because this article describes the system that would result from a strict but *reasonable* interpretation of the Declaration, it also provides a reference point with which to compare the Basic Law when it is issued. A Basic Law that does not permit the minimal safeguards for the rights and lifestyle of the people of Hong Kong herein described will both violate the Declaration and, more likely than not, herald unpleasant change.

98. Declaration, *supra* note 1, art. 3, para. 2. This article also states that the HKSAR “will be directly under the authority of the Central People’s Government of the [PRC].” At first blush these sentences appear contradictory. Indeed, the examples of Tibet, Xinjiang, and other “Autonomous Regions” to which the PRC purports to grant a large measure of autonomy chill hopes for Hong Kong. The first sentence, however, means only that the HKSAR will not be part of Guangdong Province, and thus will not be answerable to provincial government authorities. See Hong Kong Government, Explanatory Notes accompanying the Declaration, *supra* note 1, para. 5, reprinted in D. BONAVIA, *supra* note 14, at 197.

is devoted to explaining how, and over what subjects, the HKSAR will exercise this autonomy. For example, the HKSAR is to exercise fiscal,⁹⁹ monetary,¹⁰⁰ legislative,¹⁰¹ judicial,¹⁰² customs,¹⁰³ and police¹⁰⁴ powers without direction from the central government.

The autonomy clause¹⁰⁵ contains one glaring exception: "foreign and defence affairs." The need for China to take over responsibility for Hong Kong's defense is not debatable; who would defend Hong Kong if China did not? It must be recognized, however, that this clause gives China a ready-made justification for far-reaching interference in the city's internal affairs. "Foreign affairs" could cover many aspects of life in Hong Kong, one of the most cosmopolitan cities in the world. People, goods, and information flow through Hong Kong from around the world. China could regulate or interfere in a variety of legal and personal relationships in the name of foreign affairs, and the Joint Declaration offers no avenue of local review or even protest against a policy imposed by invoking this right.¹⁰⁶ Should China enter another period of xenophobia and paranoia, this clause could provide legal justification for pervasive interference with Hong Kong's autonomy.¹⁰⁷

2. Continuity

Permeating the Declaration is the fundamental policy requiring that reversion of sovereignty to China in 1997 have virtually no impact on the daily lives of Hong Kong residents. Article 3(5) provides that "[t]he current social and economic systems in Hong Kong will remain unchanged,

99. Declaration, *supra* note 1, art. 3, para. 8.

100. *Id.* art. 3, para. 7 (Hong Kong currency is to be distinct from that of the PRC).

101. *Id.* art. 3, para. 3; Annex I, *supra* note 64, art. II.

102. Declaration, *supra* note 1, art. 3, para. 3; Annex I, *supra* note 64, art. III.

103. Declaration, *supra* note 1, art. 3, para. 6.

104. *Id.* art. 3, para. 11.

105. *Id.* art. 3, para. 2.

106. Annex I, *supra* note 64, art. XII draws a distinction between the internal affairs of the HKSAR and China's defense affairs:

The maintenance of public order in the [HKSAR] shall be the responsibility of the [HK-SAR] Government. Military forces sent by the Central People's Government to be stationed in the [HKSAR] for the purpose of defence shall not interfere in the internal affairs of the [HKSAR].

See also Declaration, *supra* note 1, art. 3, para. 11. "Defence" is not defined, however, and the determination of what is necessary to the national defense is one that nations typically insist falls within their sole and unreviewable discretion.

107. Such irrationality might have to be on an even grander scale than the Cultural Revolution. During those years Hong Kong was allowed to prosper, except for a brief period of leftist-inspired riots in 1967, apparently because of its function as China's window to the world. Levin, *supra* note 71. See also Domes, *supra* note 72, at 49 (contending that the course of the Hong Kong riots was determined by factional confrontation between the "Cultural Revolutionary Left" and "remnants of the State administrative machine" which, as quickly as possible, countermanded the leftist policy of promoting turmoil in Hong Kong).

and so will the lifestyle.” Annex I elaborates at article VI(1): “The [HKSAR] shall maintain the capitalist economic and trade systems previously practised in Hong Kong.” Article 3(3) of the Declaration applies the principle of continuity to Hong Kong law: “The laws currently in force will remain basically unchanged.”

These provisions obligate China to maintain the status quo for fifty years.¹⁰⁸ To keep its promise, China will have to refrain from imposing on Hong Kong obviously intrusive social policies¹⁰⁹ or centralized economic directives that other parts of the Declaration expressly disavow.¹¹⁰ The uncompromising language of the Declaration, however, leaves the boundary of permissible Chinese action less than clear. Without interpretation, the rigid requirement that Hong Kong’s “social and economic systems, and . . . lifestyle” remain “unchanged” is so plainly unfulfillable as to be nearly meaningless. Flexibility and change are, in some ways, the very essence of Hong Kong society; not a decade has gone by since World War II in which major changes did not take place. Sixty years from this writing, even without the resumption of Chinese sovereignty, Hong Kong would probably be unrecognizable to those who know it only in its present form. “[M]aintain[ing] the capitalist economy and trade systems previously practised” and keeping Hong Kong’s laws “basically unchanged”¹¹¹ similarly require interpretation. If the policy of continuity is to be of practical use in post-1997 Hong Kong, some mechanism that takes into account the city’s inevitable evolution must be developed to measure PRC and HKSAR government practice against the Declaration’s provisions.

108. “The above-stated basic policies of the [PRC] regarding Hong Kong and the elaboration of them in Annex I . . . will remain unchanged for 50 years.” Declaration, *supra* note 1, art. 3, para. 12.

109. Mandatory family planning, which might be contemplated because of Hong Kong’s crowded conditions, is one example of such an intrusive policy. The government of Singapore, one of the more “modern” Chinese territories, has shown a willingness to meddle in this area—albeit with the opposite intent. See Liu, *His Brave New World: Lee Kwan Yew Gets Singapore Ready for the Future*, NEWSWEEK, Feb. 4, 1985, at 40 (discussing government programs to improve the genetic make-up of the population through incentives for highly educated women to reproduce and for uneducated women to be sterilized). Mandatory “political study,” see H. LIANG & J. SHAPIRO, *INTELLECTUAL FREEDOM IN CHINA AFTER MAO*, *supra* note 23, at 34-39, would be another example.

110. Declaration, *supra* note 1, art. 3, paras. 5, 7.

111. Even in the United States, where stability based on predictable law is widely perceived as a national strength, some would argue that changes in “basic” law have occurred in a timespan of less than fifty years. The civil rights movement, for example, which abolished legal segregation and transformed the meaning of the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, began only in 1954.

3. Individual Rights

The Declaration contains what might be called a "bill of rights" for Hong Kong residents:

Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the [HKSAR]. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.¹¹²

This section pledges both that the enumerated rights "will be ensured by law" and that the HKSAR government "shall maintain" these rights.¹¹³

The list of rights to be protected is noteworthy for two reasons. First, it contains all the rights typically associated with "free" societies.¹¹⁴ Second, it is a thorough rendering of the rights that China's government has denied to its own citizenry, either continuously or for long periods, since 1949.¹¹⁵ China's current Constitution contains a lengthy section on the "Rights and Duties" of citizens.¹¹⁶ Article 35, for example, states that "citizens of the [PRC] enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration." On the other hand, citizens' "freedom and rights may not infringe upon the interests of the state, of society and of the collective"¹¹⁷ If the rights granted Hong Kong residents are no more a constraint on government authority than

112. Declaration, *supra* note 1, art. 3, para. 5. Annex I formulates the guarantee differently, and contains several additional rights:

The [HKSAR] Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person, of speech, of the press, of assembly, of association, *to form and join trade unions*, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, *inviolability of the home, the freedom to marry and the right to raise a family freely*.

Supra note 64, Art. XIII, para. 1 (rights not mentioned in art. 3, para. 5 of the Declaration are emphasized).

113. Annex I, *supra* note 64, art. XIII, para. 1. These rights apply to both "inhabitants [of the HKSAR] and other persons in the [HKSAR]." *Id.*

114. Compare with U.S. CONST. amends. I-XIV; Universal Declaration of Human Rights, *supra* note 58.

115. See *supra* note 23 and accompanying text. This is not meant as a comparison between the PRC and the pre-1949 Nationalist government, a topic beyond the scope of this article. Before the establishment of the PRC, civil war and foreign occupation so disrupted China that individual rights were trampled from all sides, not least by the KMT government. See generally, L. PYE, CHINA: AN INTRODUCTION 121-50 (3d ed. 1984). For an analysis of the KMT's limited ideological commitment to individual rights, see Greiff, *The Principle of Human Rights in Nationalist China: John C.H. Wu and the Ideological Origins of the 1946 Constitution*, 103 CHINA Q. 441 (1985).

116. PRC CONSTITUTION, *supra* note 6, arts. 33-56.

117. *Id.* art. 51.

those granted by the PRC Constitution, Hong Kong will face a grim future.

The above analysis shows that China has contracted, by treaty, to respect Hong Kong residents' individual rights and distinct society. The next section examines the institutional structures through which the Declaration's basic policies are to become reality.

III. The Executive and the Legislature

The Declaration provides that the government of "Hong Kong, China,"¹¹⁸ will consist of three branches: "[T]he [HKSAR] will be vested with executive, legislative and independent judicial power. . . ."¹¹⁹ Each branch will have different responsibilities, and each is endowed with institutional characteristics from which one can predict its level of autonomy from the Mainland.

The legislature is envisioned as a counterweight to the chief executive, who will be appointed by the Central Government and can be expected to pursue its policies.¹²⁰ The Declaration promises that "executive authorities shall abide by the law and shall be accountable to the legislature."¹²¹ A crucial issue is therefore whether the Declaration's legislative provisions will allow that branch to function as a meaningful constraint on executive (i.e., central government) action.¹²²

118. Declaration, *supra* note 1, art. 3, para. 10.

119. Declaration, *supra* note 1, art. 3, para. 3. The Declaration cannot be described without "separation of powers" rhetoric. The use of American terminology should not, however, distract the reader from the true issue, which is not the checks and balances among co-equal "branches," but the checks on the national government's desire to govern the city with too heavy a hand.

120. "The chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally." *Id.* art. 3, para. 4; *see also* Annex I, *supra* note 64, art. I, para. 3 ("principle officials" must also be appointed by Beijing). There is debate in Hong Kong over which option—election or consultation—will be implemented. In either case, the power of appointment will give the National Government veto power over the local choice. The chief executive and top government officials can thus be expected to follow Beijing's line, as they have for decades followed London's. *See The Law Takes Shape*, *supra* note 84, at 38 (the third plenary session of the BLDC held in Beijing from November 29 to December 2, 1986, made clear that Beijing had veto power over the appointment of the chief executive, who would have substantial power and would be accountable to the Beijing government as well as to the SAR.). This analysis will therefore proceed under the hypothesis that, after 1997, executive actions in the HKSAR will express the policies of the Central People's Government.

121. Annex I, *supra* note 64, art. I, para. 3. "Accountable" is not defined; an important task of the BLDC will be to design an impeachment procedure for formal legislative sanction of executive performance.

122. A second issue, considered in the following section, is whether the express legislative power to hold the executive accountable means that the judiciary is foreclosed from exercising this function. *See infra* text accompanying notes 141-91.

Annex I provides that "[t]he legislative power of the [HKSAR] shall be vested in the legislature of the [HKSAR]."¹²³ This power is limited, as are the executive and judicial powers, by the "foreign and defence affairs" exception.¹²⁴ Outside of this undefined area,

[t]he legislature may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People's Congress for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid.¹²⁵

The Declaration does not delineate the substantive areas in which the legislature may pass statutes. The legislature's "power of the purse" will be the same as that of Hong Kong's present legislature, which shares this authority with the colonial government.¹²⁶ Other defined powers of the HKSAR are to be exercised by the "government," meaning the executive branch.¹²⁷ Since the executive authorities must "abide by the law and shall be accountable to the legislature," however, government action must be within the reach of the legislature's law-making authority.

Because the legislature must report its actions to the NPC "for the record," the question arises whether the NPC has veto power over HKSAR legislative action. For example, the NPC might refuse to enter into the record a law it regarded as violating the Basic Law or proper procedure. Since laws must be "in accordance with" both the Basic Law and "legal procedures" (whatever these are), the Declaration clearly envisions a power of review to make this determination, and does not explicitly exclude the NPC from this role.¹²⁸ Review by the NPC, however, would diminish both the appearance and the substance of the legislature's autonomy. If applied to attempts to hold the executive "ac-

123. Annex I, *supra* note 64, art. II, para. 2.

124. *Id.* art. I, para. 2; *see supra* text accompanying notes 105-07.

125. Annex I, *supra* note 64, art. II, para. 2.

126. *Id.* art. V, para. 2. Currently the Finance Committee of the Legislative Council "must approve all proposals involving the expenditure of public funds. . . . The standard view of this committee . . . is that its members work hard . . . but typically defer to the government's expenditure proposals." A. RABUSHKA, HONG KONG: A STUDY IN ECONOMIC FREEDOM 38 (1979). The Finance Committee has no power to initiate or increase expenditure proposals, nor to raise revenue. Its only power is to "approve, reject or reduce expenditure proposed by the government." H. HO, THE FISCAL SYSTEM OF HONG KONG 14 (1979); *see also* Davies, *Fine Hopes Fade to Fears*, FAR E. ECON. REV. 52, 55 (May 29, 1986).

127. Annex I, *supra* note 64, art. I, para. 3, distinguishes between "the government and legislature of the [HKSAR]." *See supra* text accompanying notes 99-104 (listing areas of authority).

128. *See supra* text accompanying notes 82-88 for a discussion of the power to interpret statutes under art. 67, para. 4 of the PRC Constitution.

countable," it would wholly remove this promised power from the legislature, in violation of China's obligation to Britain.¹²⁹

The legislature, unlike the executive branch, will "be constituted by elections."¹³⁰ This provision has aroused perhaps more comment and speculation in Hong Kong than any other, since elected representatives have not played a significant role in Hong Kong government in the past.¹³¹ The Declaration does not specify who will be eligible to vote or to run for office, or whether elections will be direct or through an intermediary "electoral college." The Basic Law will address these questions, and Hong Kong is currently awash in rumors concerning how they will be decided.¹³² There is widespread hope that the Basic Law will permit a legislature that can "represent authoritatively the views of the people of Hong Kong"¹³³ and, by holding executive authorities "accountable to the legislature,"¹³⁴ protect Hong Kong's lifestyle and liberties.

These hopes are likely to be disappointed for three reasons. First, legislatures are unwieldy institutions even in the best of circumstances. The necessarily large number of disparate voices, all determined to be heard

129. In view of the PRC's likely ability to manipulate the legislature, see *infra* text accompanying notes 133-38, however, the more important issue is whether the Declaration authorizes a local institution to act as a check on legislation which would infringe promised freedoms, continuity, or autonomy. See *infra* text accompanying notes 141-91 for discussion of that institution, the judiciary.

130. Annex I, *supra* note 64, art. I, para. 3.

131. Hong Kong's government now consists of an Executive Council (Exco), a Legislative Council (Legco), an Urban Council, and District Boards. Exco consists of seventeen members, all appointed by the governor. Six are members of the bureaucracy ("officials"), and eleven are professional or business leaders ("unofficials"). Less influential is Legco, of whose fifty-seven members (including the governor) thirty-two are "officials or local worthies appointed by the governor. Twelve are elected by businessmen, lawyers, teachers and other professional groups. The remaining twelve are indirectly chosen through a complicated system of electoral colleges—which include a role for individual voters." *Sir David and the Goliath*, *ECONOMIST*, Mar. 28, 1987, at 43, 46. For a detailed description of the Legislative Council's composition, procedures and power, see N. MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 126-90 (1981). Since the signing of the Declaration, Britain has taken steps to make Hong Kong's government more "representative." See Hong Kong Government, *White Paper: The Further Development of Representative Government in Hong Kong* [hereinafter *White Paper*], reprinted in D. BONAVIDA, *supra* note 14, at 209.

132. *The Law Takes Shape*, *supra* note 84; *Unequal Voices*, *supra* note 4.

133. *White Paper*, *supra* note 131, para. 2(a). Much of the debate centers on how much power should devolve on the local legislature before 1997. Some argue that "democratizing" Hong Kong is the only way to make it capable of functioning autonomously. See, e.g., Lee, *Hong Kong Needs Democracy to Protect Its Freedoms*, *Wall St. J.*, Nov. 17, 1986, at 35, col. 2. Others, especially business leaders, argue that too much democracy could destabilize Hong Kong and harm its economy. See, e.g., Davies, *supra* note 126, at 54 (Many of Hong Kong's richest entrepreneurs are trying to "persuade Peking that they equate democracy, even representative government, with excessive wage levels, strikes and low productivity—in short, a welfare state."). China has recently asserted its right to veto any major pre-1997 change by making clear that any change in excess of Basic Law specifications will be repealed when that document becomes effective. See *The Law Takes Shape*, *supra* note 84, at 38-39.

134. Annex I, *supra* note 64, art. I, para. 3.

and counted, can be expected to respond together to only the most egregious executive abuses. Even then, executive authorities (and thus, by hypothesis, the PRC) will have certain advantages—for example, media access and streamlined decision-making—which could enable the government to influence both popular opinion and legislators to support violations of promised liberties in the name of short-term goals.

Second, there is no precedent in either China or Hong Kong for a legislature that acts as a check on executive authority. The PRC legislature, which was the only model China's negotiators knew when drafting the Declaration, has apparent power under the Chinese Constitution¹³⁵ to constrain government action. In fact, however, virtually all government action, whether executive or legislative, is orchestrated by the Communist Party, which is not even mentioned in the text of the Constitution.¹³⁶ The NPC has never publicly opposed Party policy. Rather, it has acted as its cheerleader, even in periods of severe abuses of the citizenry.¹³⁷ Hong Kong, as a colony, has no first-hand experience with representative democracy.¹³⁸ To expect a full-blown adversarial congress to emerge in only ten years is unrealistic.

Finally, the legislature will lack the training and experience needed to judge China's performance against a fixed standard. It is unlikely that China will engage in unambiguous, egregious assaults on the rights and freedoms of Hong Kong residents as a group. More probable will be a gradual erosion of the city's autonomy, affecting only small numbers of residents at any one time. Such actions will predictably be accompanied by disclaimers of any intent to change the old order and arguments that the action is in fact consistent with pre-1997 practice. As a new institution, the legislature lacks the experience and institutional history against

135. PRC CONSTITUTION, *supra* note 6, arts. 57-78, (especially arts. 58, 62 & 63).

136. The Party is referred to only in the Preamble:

Both the victory of China's new-democratic revolution and the successes of its socialist cause have been achieved by the Chinese people of all nationalities under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought . . .

Id. Preamble.

137. See J. DOMES, *THE INTERNAL POLITICS OF CHINA: 1949-1972*, at 68 (1973) (NPC served as forum for forced self-criticism which initiated the brutal "Anti-Rightist Campaign" of 1957-58); A. LIV, *HOW CHINA IS RULED* 91-94 (1986). The NPC's weakness as a counterweight to Party power was best demonstrated during the Cultural Revolution; from 1965-75 the Congress was not convened. Cohen, *supra* note 76, at 801.

138. See A. RABUSHKA, *supra* note 126, at 36-38:

To begin with, Hong Kong is not a representative democracy. . . .

Decisions of the legislature are typically consensual, with an occasional holdout or two. . . . The Legislative Council rarely shows an inclination to withhold consent from legislation proposed by the official bureaucracy. . . . The norm has been that official motions are unanimously accepted with little comment. . . .

which to judge such claims. Even if its members can agree on the desirability of resisting executive (PRC) policy, the legislature will have difficulty, because of its size and lack of experience in this task, enunciating a convincing case that China is violating its pledge. Faced with a situation in which China's misunderstanding of Hong Kong could undermine the "one country, two systems" promise just as effectively as intentional interference, the legislature's lack of institutional competence in expressing Hong Kong's viewpoint is likely to make it a disappointment to those who hope it will be a counterweight to PRC authority.

Notwithstanding these weaknesses, the legislature could and should be more than simply a debating society or a rubber stamp. It could provide a forum in which opposition views might be aired. Its power over the budget and taxation¹³⁹ could play a major role in maintaining or increasing the city's prosperity and quality of life—admittedly the issues closest to residents' hearts.¹⁴⁰ Commentators concerned for the future of the city should follow closely the current debate underway in the BLDC about the legislature's composition and procedures. Hopes for protecting *individual* rights and the city's lifestyle, however, should be focused on the judiciary.

IV. The Judiciary of the Hong Kong Special Administrative Region

The Declaration prescribes a judiciary¹⁴¹ that will be independent from both the PRC and the local political apparatus. It envisions courts that review government action for conformity with the Declaration's basic policies of autonomy, continuity, and individual rights. If the government violates these principles, the judiciary has, on paper, the authority to record that fact and order compliance. The following sections examine the Declaration's provisions for an independent judiciary and analyze how this institution is likely to function in practice.

139. The BLDC's political subgroup has proposed that the legislature be empowered to "approve the budget, [the] taxation proposal and [the] public expenditure." *The Law Takes Shape*, *supra* note 84, at 38; *see also supra* note 126 (legislature now can only veto spending proposals, not propose increases).

140. *See* Levin, *supra* note 71.

141. Declaration, *supra* note 1, art. 3, para. 3. Annex I describes the judiciary in far greater detail than it does either of the other departments. Whereas the Declaration devotes only four sentences to the composition and authority of both the executive, Annex I, *supra* note 64, art. I, para. 3, and the legislature, *id.* arts. I, II & V, para. 2, it devotes seven paragraphs to the judiciary. *Id.* art. III.

A. *Independence*

The Declaration explicitly states that the judiciary will have an attribute not conferred upon the executive or legislature: "The [HKSAR] will be vested with executive, legislative, and *independent* judicial power."¹⁴² Other provisions amplify this theme: "The courts shall exercise judicial power *independently and free from any interference*. Members of the judiciary shall be immune from legal action in respect of their judicial functions."¹⁴³

1. Appointment

The Declaration specifies a judicial appointment process that should favor competent, qualified people with potential for independent decision-making:

Judges of the [HKSAR] courts shall be appointed by the chief executive of the [HKSAR] acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons. Judges shall be chosen by reference to their judicial qualities and may be recruited from other common law jurisdictions.¹⁴⁴

The appointment procedure has several flaws which, over time, could reduce the independence of the judiciary. The chief executive (and, by hypothesis, the PRC) apparently possesses a de facto veto power over the appointment committee, since he could presumably decline to appoint any recommended candidate. The "independent commission" might be stacked with "eminent persons" who favored PRC policies, since only judges have to be "local," while the "legal profession[als]" and "eminent persons" making up the commission could be Mainlanders.¹⁴⁵ Finally, "judicial qualities" remain undefined, and thus capable of widely varying interpretation.¹⁴⁶

These weaknesses could, over the long run, enable the PRC to create a pliant judiciary amenable to its policies and susceptible to political pres-

142. Declaration, *supra* note 1, art. 3, para. 3 (emphasis added).

143. Annex I, *supra* note 64, art. III, para. 2 (emphasis added).

144. *Id.* art. III, para. 3.

145. Since the Declaration could easily have specified "members of the *HKSAR* bar" or "eminent *HKSAR* residents," the drafters probably intended this result.

146. Witness the debate in the United States during the Senate Confirmation Hearings of Chief Justice Rehnquist. Whereas Senator Dole felt that Justice Rehnquist had "the sensitivity, the compassion, certainly the integrity and the intellect to be the Chief Justice," Senator Rockefeller opposed the nomination because of an "overall sense that Mr. Rehnquist . . . lacks the sensitivity and potential for growth that the country has a right to expect from its Chief Justice." *Motion on Rehnquist Debate Makes Vote Likely Tomorrow*, N.Y. Times, Sept. 16, 1986, at A19, col. 1. "Judicial qualities" might even be attributed to nonlawyers; the Declaration nowhere requires that judges have legal training.

sure.¹⁴⁷ In the short term they are not serious enough to undermine the judiciary's independence. After 1997, the PRC will confront a body of judges experienced under British rule.¹⁴⁸ The courts will be accustomed to independent decision-making and knowledgeable about standards for measuring individual liberty and political interference in the judicial process.¹⁴⁹ Their "institutional culture" will stress independence from and suspicion of the "party line."¹⁵⁰ Thus, if China wishes to undermine the independence of the judiciary through the appointment process, it will be able to do so only gradually, as current judges leave the bench.

The Declaration's provision allowing appointment of judges "from other common law jurisdictions" could, if any are actually appointed, strengthen Hong Kong's judicial "culture." This provision would permit

147. For example, lower court judges might conform their decision-making to executive standards, since the executive's veto would limit their professional advancement.

148. The Declaration states that such people may remain in office. Annex I, *supra* note 64, art. IV, para. 1.

149. The independence of the judiciary is fundamental to the success of the Hong Kong court system and its justified reputation for impartiality and scrupulous adherence to the rule of law. . . . Through the years, decisions of the courts to protect the rights of individuals and to check abuse of the powers of government have exercised great influence. Thomas, *The Hong Kong Legal System*, 2 ECON. & L. 13, 14-15, 22 (1987) (author is currently attorney general of Hong Kong).

Though there is debate over the extent to which Hong Kong courts currently restrain executive behavior that violates statutory or common law duties, reported cases make clear that judges will, on occasion, rule against the government. One case suggests that such power is routinely exercised. In that case, *Re Ng Wai-chung*, HCt, MP No. 2155 of 1983 (Oct. 12, 1983) (Rhind, J.), *discussed in Notes of Cases*, 14 HONG KONG L.J. 82 (1984) [hereinafter *Ng Wai-chung*], the court confronted the question of whether the government could detain the travel documents of a suspect in a corruption investigation after only an *ex parte* hearing. The statute authorizing such detention was ambiguous. The judge quashed the executive order detaining the documents, commenting:

The Courts in my view are on a slippery slope once they co-operate in relinquishing well-tested safeguards for the liberty of the individual such as the right to be heard in court before a judicial officer who is more than a rubber stamp, unless there are compelling reasons why the normal safeguards do not apply.

Id. at 83. See also *Chu Piu-wing v. Attorney General*, CA, Civ. App. No. 84 of 1984 (Sept. 4, 1984), *discussed in Notes of Cases*, 15 HONG KONG L.J. 399 (1985); *R. v. Li Pak-keung*, Western Magistracy, ICAC prosecution, *discussed in id.* at 384.

Independence is not equivalent to the "activism" of American courts. Compare, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) with *R. v. Chan Keung-lee*, CA, Cr. App. No. 73 of 1983 (no date given), *discussed in Notes of Cases*, 14 HONG KONG L.J. 238 (1984), in which leave to appeal was denied a plaintiff who alleged severe beating and interference with his attorney-client privilege by police during their investigation of rape charges against him. His complaint was supported by credible medical evidence. *Id.* at 239. One of the three judges who denied his petition expressed "doubts" as to whether the conviction should, "in the light of [what] . . . appeared to be gross misconduct by [the police] . . . as a matter of principle, [be] allowed to stand." *Id.* at 240. The petition was denied nonetheless.

150. The Declaration does not allow changes that would diminish the institutional independence of the judiciary: "After the establishment of the [HKSAR], the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the [HKSAR] of the power of final adjudication." Annex I, *supra* note 64, art. III, para. 1.

Hong Kong's local bar to continue to be supplemented with foreign lawyers, a practice that could be crucial if a high percentage of the local bar emigrates before 1997.¹⁵¹ Such appointments would also serve to reinforce the common law tradition of judicial independence through the presence of judicial colleagues whose objectivity would be enhanced by their lack of long-term dependence on the PRC.

2. Removal

The procedure for removing judges constitutes another check on the government's power to undermine the independence of the judicial department:

A judge may only be removed for inability to discharge the functions of his office, or for misbehaviour, by the chief executive of the [HKSAR] acting in accordance with the recommendation of a tribunal appointed by the chief judge of the court of final appeal, consisting of not fewer than three local judges. Additionally, the appointment or removal of principal judges (i.e. those of the highest rank) shall be made by the chief executive with the endorsement of the [HKSAR] legislature and reported to the Standing Committee of the National People's Congress for the record.¹⁵²

"Inability" and "misbehaviour" remain undefined. For all but "principal" judges, this procedure should nevertheless provide substantial protection, since the committee defining the terms apparently will¹⁵³ be made up of judges who might someday be subject to their own definition. The provision for removal of a principal judge is ambiguously drafted: it is not clear whether requiring legislative endorsement is to be the sole check on the chief executive's removal authority, or a second check in addition to the requirement of committee recommendation.¹⁵⁴ Because the judiciary's most controversial activity could be enjoining executive action that the legislature has attempted to legalize,¹⁵⁵ the legislative en-

151. Expatriate lawyers make up a high percentage of the local bar. Of Chinese attorneys, a large number have the necessary documents and academic credentials to resettle abroad fairly easily. See Wesley-Smith, *The Legal System, the Constitution, and the Future of Hong Kong*, 14 HONG KONG L.J. 137, 138 (1984).

152. Annex I, *supra* note 64, art. III, para. 3.

153. The English version of the treaty contains a potentially troubling ambiguity. "[C]onsisting of not fewer than three local judges" could be read to allow for a committee of more than three—for example, of seven—of whom three must be local judges. The Chinese version is no less ambiguous. *Id.*

154. The words "a judge" and "additionally" suggest the latter meaning. If "judge" and "principal judge" are read as the defining terms, however, the former is correct. Another problem could arise if the executive were to cast a de facto veto by declining to follow a committee recommendation. While this might leave some incompetent or scandalous judges on the bench, it is not as serious a threat to judicial independence as the potential to remove judges for political reasons.

155. See *infra* text accompanying notes 183-88.

dorsement requirement would be inadequate to maintain judicial independence. If the Declaration's promise of an independent judiciary is to be fulfilled, the Basic Law must make clear that the removal of principal judges is a two-step process.

The Declaration's silence with regard to judicial salaries could portend an even more significant problem. This silence might leave the executive free to reduce or eliminate judicial salaries without the concurrence of the legislature,¹⁵⁶ and thereby to circumvent the individualized removal process if the judiciary became a serious annoyance to the PRC. On the other hand, the existing Hong Kong policy of non-diminution of salary indicates that the practice is part of "the judicial system previously practised in Hong Kong [which] shall be maintained except for those changes consequent upon the vesting in the courts of the [HKSAR] of the power of final adjudication."¹⁵⁷ The Declaration's emphasis on judicial independence plainly requires the second interpretation.

3. Historical Precedent

In keeping with the "basic policy" of continuity,¹⁵⁸ the judiciary will follow the same procedures as and possess powers at least equal to those of Hong Kong's present judiciary.¹⁵⁹ The British common law courts in Hong Kong today are "independent"; judges impartially apply rules of law and equity, rather than current public policy, to the cases and parties before them.¹⁶⁰ This independence has been an important factor in creating an open and fluid society in which residents of different beliefs, ideologies, and nationalities have been free to better their lot if they are able,

156. See *supra* note 126 (legislature has no power to increase government expenditure proposal).

157. Annex I, *supra* note 64, art. III, para. 1.

158. See *supra* text accompanying notes 108-11.

159. Annex I, *supra* note 64, art. III.

160. See, e.g., Jao, *supra* note 13, at 114 (arguing that a well-established legal system, administered by an independent judiciary, protects personal liberty, other human rights, and private property, and that the rule of law is one of three key factors in Hong Kong's success to date). This description of Hong Kong courts is open to challenge on both factual and definitional grounds. The "facts" of this contention can and should be explored through a review of the words of the judges themselves in reported cases. Such a review, however, would not address the definitional challenge that questions the notion that judges are *ever* independent of their political, cultural, or class background. See, e.g., THE POLITICS OF LAW 3 (D. Kairys ed. 1982) (Judges' "[d]ecisions are predicated upon a complex mix of social, political, institutional, experiential, and personal factors; however, they are expressed and justified . . . in terms of 'facts' . . . and 'law' that ha[ve] been objectively and rationally 'found' and 'applied.'").

For present purposes, however, perfect independence is not required. This article contends only that the judiciary today is thoroughly imbued with a formalistic sense of independence—that is, its judges resent government efforts to dictate to them decisions they are accustomed to making themselves, and take pride in standing up for principles. See, e.g., Ng Wai-chung, *supra* note 149.

untouched by political pressures or the cultural preferences of their leaders.¹⁶¹ Policy choices made in London no doubt had more influence in bringing about this state of affairs than judicial decisions made in Hong Kong. Had the British not recognized the benefits of running their "pearl of the orient" as a laissez-faire trade center,¹⁶² the society would surely have evolved very differently. The courts have also played a role, however, especially in the commercial realm, where their impartial adjudication and enforcement of contract rights have enabled individuals and companies to conduct their private affairs with confidence that public policy would not upset their plans. An independent judiciary, unlike a broadly-empowered elected legislature or a local-resident executive, already exists.

B. Sources of Law

1. Internal

The Declaration specifies three sources of law for the HKSAR: "The laws of the [HKSAR] shall be the Basic Law, and the laws previously in force in Hong Kong and laws enacted by the [HKSAR] legislature."¹⁶³ These sources, however, are not equal in authority. The Declaration provides that the Basic Law trumps contradictory provisions in both local statutes¹⁶⁴ and prior laws.

Prior laws appear at first glance to be subordinate to both the Basic Law and subsequent local statutes:

After the establishment of the [HKSAR], the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) *shall be maintained*, save for any that con-

161. This is not to say that Hong Kong is a model society. It is, after all, a colony, characterized by ethnic and economic tension between the expatriates, who are on average wealthier and occupy more powerful positions, and the Chinese population. In the PRC, however, the zone of individual autonomy remains much narrower. As recently as 1984, the "Spiritual Pollution Campaign" dictated to PRC citizens what music or books they could safely enjoy. During the Anti-Rightist Campaign (1957-58) and the Cultural Revolution (1966-76), various forms of economic behavior and personal association were in and of themselves grounds for legal persecution. See generally H. LIANG & J. SHAPIRO, *INTELLECTUAL FREEDOM IN CHINA AFTER MAO*, *supra* note 23.

162. See A. RABUSHKA, *supra* note 126, at 5-9, 21-24 (describing basic government policy of "non-interventionism" in economy). China, while agreeing that "Britain's policies and administrative methods have . . . played a role" in creating Hong Kong's prosperity, gives credit primarily to the "diligence, wisdom and meticulous management of . . . Xianggang [Hong Kong] residents of whom over 98 per cent are Chinese compatriots. Another very important factor in Xianggang's prosperity has been the long years of vigorous support given by the Chinese mainland in various fields." *Britain's Argument Is Untenable*, 26 *BEIJING REV.* 10, 10-11 (Oct. 10, 1983).

163. Annex I, *supra* note 64, art. II, para. 3.

164. "Laws enacted by the [HKSAR] legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid." *Id.*

travene the Basic Law and *subject to any amendment by the [HKSAR] legislature*.¹⁶⁵

The HKSAR legislature could not, however, amend prior laws protecting personal or property rights, or those essential to maintaining Hong Kong's lifestyle. It is only empowered to enact "laws . . . which are in accordance with the Basic Law."¹⁶⁶ By specifying such a hierarchy, China has both limited the legislature's authority and given Hong Kong a document—though not a constitution¹⁶⁷—against which to measure local statutes. If the basic policies of the Declaration are to be infringed upon under color of law, this can only be done by the national government through amendments to the Basic Law.¹⁶⁸

2. External

The Declaration provides that the courts, in deciding cases in accordance with HKSAR law, "may refer to precedents in other common law jurisdictions."¹⁶⁹ "Refer" is not defined, but must mean that legal developments in other present and former British jurisdictions, while not automatically incorporated into HKSAR law, may be used to supplement Hong Kong's necessarily limited case law.¹⁷⁰ If, for example, Hong Kong's companies law stems from a common root with that of Britain, India, and Australia, Hong Kong judges may seek guidance from the experience of courts in those countries. The Declaration does not address whether Hong Kong may continue to develop its common law through reference to the decisions of courts in other countries, in the limited areas where Hong Kong statutes and the Basic Law will not have already preempted the field.¹⁷¹

165. *Id.* art. II, para. 1 (emphasis added).

166. *Id.* art. II, para. 3.

167. *See supra* text accompanying notes 87-88.

168. This means that the Declaration does not permit its own basic policies to be revised under the guise of "Hong Kong people ruling Hong Kong."

169. Annex I, *supra* note 64, art. III, para. 2.

170. Hong Kong's population of 5.5 million does not generate a large number of lawsuits. *See D. BONAVIDA, supra* note 14, at 28.

171. Because the current legal system is to remain in place, and because evolution based on case law is an integral part of the common law, the courts would appear to be able to continue this process. This is the view of the Hong Kong government. *See Hong Kong Government, Explanatory Notes accompanying the Declaration, reprinted in D. BONAVIDA, supra* note 14, at 196. One commentator, however, "question[s] whether the preservation of the Common Law system is the true intent of the . . . Joint Declaration":

Annex I, Section II . . . provides that "after the establishment of the [HKSAR] the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained . . ." It must be noted that the three sources of law said to govern the Hong Kong SAR are to be the Basic Law, existing law and legislation enacted by the SAR legislature. Further case law is not mentioned as a possible source of law. If judicial creativity be accepted as a hallmark of the

Hong Kong's connection to other common law courts, including their rules of procedure and judicial culture, is meant to endure. Article III (4) of Annex I states that "the court of final appeal in the [HKSAR] . . . may as required invite judges from other common law jurisdictions to sit on the court of final appeal." This provision could be more important for its potential to bring internationally respected judges to the Hong Kong bench than for keeping the Hong Kong legal establishment in touch with developments in substantive common law, a process that will presumably continue through the law schools¹⁷² and legal literature. If outside judges sit on the courts, and these courts are able, as will be argued, formally to consider the issues of compliance with the Declaration and respect for individual rights,¹⁷³ then China has indeed agreed, albeit *sub rosa*, to have its compliance with the Declaration reviewed by foreign, probably British, authority. Even if the courts lack enforcement power, this provision is extraordinary in view of China's historical insistence that its internal affairs are its business alone.

C. *The Courts' Role in Preserving Hong Kong*

The Declaration's provision that "courts shall decide cases in accordance with the laws of the [HKSAR]"¹⁷⁴ raises two questions: (1) what will qualify as a "case" which may come before the court, and (2) what will happen if the various sources of "law" are in conflict?

1. Jurisdiction

The Declaration neither details the jurisdiction of the HKSAR courts nor confers jurisdiction-granting authority upon any other institution. By limiting the judiciary to deciding "cases," the Declaration appears to bar the courts from commenting on executive actions or legislation without an actual plaintiff to bring the case to their attention. This limitation makes it particularly important that the courts speak firmly and independently from the earliest opportunity; to lose the confidence of Hong Kong residents would be to decrease the likelihood that plaintiffs would

common law system, is it not intended that the future legal system of Hong Kong should be part of the common law family?

Fung, *supra* note 84, at 14.

172. There is currently only one degree-granting law school in Hong Kong, located at the University of Hong Kong. Plans to open a second at City Polytechnic were announced in October, 1986, in recognition of a "shortage of locally trained lawyers in Hong Kong." Hong Kong Standard, Oct. 18, 1986. At present there are approximately 1200 practicing solicitors and 250 barristers in Hong Kong, not counting government, in-house, and academic lawyers. Leung, *Book Review*, 15 HONG KONG L.J. 432 (1985).

173. See *infra* text accompanying notes 183-88 for a discussion of the courts' power of review.

174. Annex I, *supra* note 64, art. III, para. 2.

bring cases at all, since a plaintiff might fear reprisal if alleging PRC or executive misconduct. A lack of plaintiffs would prevent the courts from exercising their review as surely as would dismantling them, and would cripple the judiciary as a "watchdog" over adherence to the Declaration.¹⁷⁵

Cases will come before a court by various avenues. Criminal cases will be brought by a prosecutor who "shall control criminal prosecutions free from any interference."¹⁷⁶ Civil and commercial suits will continue to be brought by private parties, with minimal changes expected in either procedural¹⁷⁷ or substantive law. Most important, "[e]very person shall have the right to challenge the actions of the executive in the courts."¹⁷⁸ This provision permits the courts to review actions of the executive branch¹⁷⁹ for conformity both to the laws of Hong Kong and to the Declaration. According to the Basic Law, which is likely to embody the Declaration's fundamental policies, "executive authorities shall abide by the law and shall be accountable to the legislature."¹⁸⁰ A Hong Kong resident whose civil or property rights are denied by the government—for example, by banning a newspaper or closing a "decadent" night-club—could petition the court for an injunction.¹⁸¹ If pre-1997 British law provided no basis for the executive's action and the HKSAR legislature had passed no statute expressly authorizing it, the court should have the power to declare the executive in violation of his duty to "abide by the law."¹⁸²

175. Attorneys will play an important role in strengthening or destroying confidence in the courts. The Declaration pledges that individuals will have a right to "confidential legal advice." *Id.* art. XIII, para. 2. Good lawyering will therefore be essential to make this pledge meaningful.

176. *Id.* art. III, para. 5.

177. *See id.* art. III, para. 1 (regarding the maintenance of the current judicial system).

178. *Id.* art. XIII, para. 2.

179. The Basic Law must clarify that "executive" refers to the government as a whole, not just to the chief executive. *See Declaration, supra* note 1, art. 3, para. 4; Annex I, *supra* note 64, art. I, para. 3 (specifying "chief executive" when referring only to that official). Since art. I, para. 3 of Annex I, however, specifies "executive authorities" when denoting the government as a whole, some ambiguity arguably exists in the Declaration as to the reach of the courts' review power.

180. *Id.* art. I, para. 3.

181. Unfortunately this would not always be the case. Hong Kong's "Public Order Ordinance," enacted in 1951, gives the government "powers to suppress newspapers and suspend their publication, to refuse or suspend their registration, to prohibit the importation of publications, to make it an offence to print or publish anything 'subversive,' to seize printing presses and to search, seize and forfeit printing equipment." Lau, *More Press Freedom*, FAR E. ECON. REV. 10 (Jan. 8, 1987). This ordinance was last used during the 1967 riots, when the government suspended three newspapers for six months. The Hong Kong government, calling the ordinance "outdated," has proposed that it be amended to "greatly soften" its potential to restrain the press. Ironically, the ordinance was first adopted to allow for control of the press in the event that it was being manipulated by communists. *Id.*

182. It would apparently be up to the legislature to enforce the court's judgment, since it alone is given the power to hold the executive authorities "accountable." Annex I, *supra* note

2. Judicial Review

The judiciary is explicitly authorized to decide cases brought by individuals challenging the legality of executive action. Intrusive government action authorized by local statute would conflict with the Basic Law and with prior law; the court would then have to decide to which source it should defer. Since the Declaration states that local laws that conflict with the Basic Law are invalid, it would be the court's responsibility to enforce this provision in any case that brought these two sources into conflict.

Just as the judiciary will be able to review local statutes for compliance with the Basic Law, so, too, will it be able to review the Basic Law, or amendments thereto, for compliance with the Declaration. This authority derives from China's sovereign decision, expressed in the Declaration,¹⁸³ to delegate to the *local* judiciary an independent power of final adjudication over cases that implicate a *national* obligation. Where, for example, a resident challenges a government action that abridges individual rights, the court's decision will necessarily implicate China's performance under the Declaration. A holding that the Basic Law permitted or required the abridgment would constitute a formal finding that China had promulgated a Basic Law that violated its obligation to "implement" the Declaration.¹⁸⁴ As final arbiters of the rights of Hong Kong residents, the courts will have to assert their independence and rule in cases that present such difficult issues. As a local institution empowered to declare violations of the Declaration, however, the judiciary must ensure that its interpretation of the Basic Law does not hold that the national government has authorized violations that it did not in fact intend. Such an interpretation, if erroneous, would improperly intrude upon the authority to abrogate treaties which resides solely in the national government.¹⁸⁵

These considerations suggest that Hong Kong courts should exercise their review power according to the following rules of interpretation. Judges should favor readings of local statutes that bar intrusive executive action.¹⁸⁶ Where this is not possible, courts should declare such laws in

64, art. I, para. 3. The courts may, however, retain the power to cite individuals for contempt of court, which could be a potent factor in encouraging government officials to respect judicial decisions.

183. Declaration, *supra* note 1, art. 7.

184. See *supra* notes 85-88 and accompanying text.

185. See *supra* note 88 and accompanying text (arguing that the right to abrogate treaties is an inherent aspect of sovereignty).

186. See Ng Wai-chung, *supra* note 149, at 93 (The court interprets an ambiguous statute as a bar to executive action that would have impinged on "well-tested safeguards for the liberty of the individual.").

violation of the Basic Law. If the NPC “interprets”¹⁸⁷ the Basic Law itself to allow intrusive government action in Hong Kong, or amends it to create a new statutory basis for such action, the courts’ role is to state, in clear language, what the law was and what it has become. The courts should avoid wherever possible interpreting NPC statutes so as to require or allow violation of the Declaration; however, they must insist that if China is to abrogate its international obligation in fact, it must explicitly announce its intention to do so. In this way the courts can create a barrier—perhaps built only of words, but potentially useful—to PRC activities that diverge from the policies of autonomy, continuity, and individual rights. Explicit denunciation, of course, will always be beyond the power of Hong Kong to prevent or cure.¹⁸⁸

The courts’ role, then, is to enunciate the standards of the Declaration and the Basic Law and to use these standards as a yardstick against which to measure government conduct. By publicly stating that official action conflicts with these standards, and by doing so with institutional authority conferred by the Declaration and, one hopes, the Basic Law, the judiciary can heighten the cost to China—measured in negative publicity and lost investment dollars—of ruling Hong Kong with too heavy a hand. In the short term, the judiciary, as an existing institution composed of a few relatively clear voices, can also play a teaching role in resolving the misunderstandings that will inevitably accompany Hong Kong’s “return” to the motherland. Because they can enunciate *clearly* why certain government actions are unacceptable, the courts will be better placed than the legislature to dissuade China from abandoning in practice what is, on paper, a workable Hong Kong policy.

The role envisioned here for the courts differs markedly from that recently suggested by legal scholars in Hong Kong who have discussed the Declaration’s provisions for the HKSAR judiciary. Two commentators

187. See *supra* text accompanying notes 84–88 (discussion of PRC Constitution’s grant to NPC of a right to interpret all statutes).

188. An example of the courts’ authority to review the Basic Law against the Declaration could well arise the first time the government defends challenged action on the grounds that it is not subject to the courts’ jurisdiction. If the action would have been within the jurisdiction of the pre-1997 chamber of final appeal, the Privy Council—Hong Kong Government, Explanatory Notes accompanying the Declaration, para. 12, *reprinted in* D. BONAVIA, *supra* note 14, at 198—then the Hong Kong courts will have to consider whether the Basic Law in fact constrains them in a way not envisioned by the Declaration. Because answering this question in the affirmative would constitute a finding that China failed to “implement,” Declaration, *supra* note 1, art. 7, its promise to “maintain the judicial system previously practised . . . except for those changes consequent upon the vesting in the courts of the [HKSAR] of the power of final adjudication,” Annex I, *supra* note 64, art. III, para. 1, a court should take jurisdiction over the case, in the absence of an unambiguous statement by China that the Basic Law compels a different result. If China has by that time formally enunciated restrictive jurisdiction rules, the court should decline to hear the case, but note, in doing so, that its lack of jurisdiction is a change from prior practice.

in particular¹⁸⁹ have propounded the interpretation that, because the PRC Constitution gives the NPC the power to interpret statutes, the HKSAR courts' power of final adjudication will not include the authority to determine whether post-1997 statutes conflict with the Basic Law. Both writers advocate the creation of a higher body, composed of both Hong Kong residents and Mainlanders, to which cases that raise the issue of whether government action under color of local law violates the Basic Law would be referred.¹⁹⁰

This proposal would effectively strip local courts of jurisdiction to hear any case in which a HKSAR resident challenged government action. Where a statute authorized the action, or where the executive could claim that it did, judges would refer the issue to a body composed of at least fifty percent Mainland jurists, thus wholly abdicating their role as "final" arbiters of the disputes of Hong Kong residents. Such an institu-

189. Fung, *supra* note 84, and Davis, *supra* note 84.

190. In Interpretation of the Basic Law, Daniel R. Fung, a Hong Kong barrister and member of the BLCC, advocates the creation of a "Constitutional Court . . . outside the framework of the SAR courts." Fung, *supra* note 84, at 16. This court would "be constituted by an equal number of PRC judges and SAR judges with the chairman to be given a casting vote in the event of deadlock. The position of chairman should devolve upon the individual judges under a system of rotation." *Id.* This is a dangerous proposal. Because PRC judges are not independent, this "court" would be unlikely to rule against China during periods of PRC chairmanship. China could thus obtain judicial approval for far-reaching violations of its agreement by simply timing them correctly.

Michael Davis, a lecturer at the Chinese University of Hong Kong, presented the most searching examination of the usefulness of judicial review in post-1997 Hong Kong to date at the November 28, 1986, Conference on Constitutional Law and Basic Laws. Davis, *supra* note 84. He explained, on theoretical and policy grounds, why the judiciary, an "institution committed to the incremental evolution of higher norms and principles in the process of dialogue," *id.* at 29, is well-suited to the job of reviewing laws passed by the HKSAR legislature for conformity with the Basic Law. Like Fung, Davis feels the Declaration is ambiguous as to who has final power to interpret statutes, *id.* at 29-30, and consequently sees a need for a higher authority to resolve this tension. *Id.* at 30-31.

Davis's paper is not a textual analysis of the Declaration. Rather, it addresses the important goal of trying to convince Hong Kong's common law judges, schooled in the notion of parliamentary supremacy, of the value of holding the HKSAR legislature to a fixed set of written principles. Unfortunately, by arguing for "constitutional judicial review," Davis invokes rhetoric inapposite in the Hong Kong context: "A constitution or a basic law is not a mere statute but is instead some indication of the way a given society constitutes itself." *Id.* at 32-33. In this he misapprehends the nature of the Basic Law, and, consequently, the role of the judiciary. The Basic Law is a mere statute. See *supra* text accompanying notes 84-88. It is not an "indication of the way [Hong Kong] constitutes itself," because Hong Kong has not constituted itself, but rather has been constituted by agreement between Britain and China. See *supra* text accompanying notes 3-4, 88. Judges should refuse to give effect to a statute that contravenes a law above it in the legal hierarchy, see *supra* text accompanying notes 163-68, not because "evidence suggest[s] that constitutional review could be employed as an effective motor to drive this system on the level of fundamental values development and stability enhancement," Davis, *supra* note 84, at 33, but because the PRC, in fulfilling its promise to Britain, will have charged them with this responsibility. The mantle of constitutional rhetoric will reduce the stature of the HKSAR courts in China's eyes because it does not fit. To be effective the courts must clothe themselves in the more modest authority granted them by the PRC.

tion, charged with the task of choosing between interpretations arising out of fundamentally different conceptions of the law, would at best add a layer of obfuscation and uncertainty where the real need is for clarity and predictability. For Hong Kong, a mixed court of higher appeal could only serve to weaken the one independent “leg” promised in the Declaration. For China, this untried institution would not add to its power, inherent in the fact of sovereignty, to amend or “clarify” the Basic Law by national statute if divergent interpretations of a truly vital issue arise.¹⁹¹ Happily for Hong Kong, China’s agreement with Britain, otherwise quite specific about the judiciary, contains no mention of such a constitutional court.

V. Suggested Action

There are several practical ways in which Hong Kong residents, Britain, and the world community can increase the incentives for China to give effect to the Declaration’s promises of autonomy and individual rights. These strategies fall into two main categories: (1) strengthening the Hong Kong judiciary, and (2) affording a monitoring role to international organizations.

A. *Strengthening the Judiciary*

Hong Kong’s judiciary will be better equipped to perform the role outlined above if local leaders, scholars, and the British government take the following steps:

1. Reject suggestions, from whatever source, to create a mixed PRC-HKSAR judicial body to sit above the highest HKSAR court. Such an institution would be inconsistent with the letter and spirit of the Declaration, which promises independent courts of final adjudication in the HKSAR. By obscuring the Declaration’s straightforward intent with faulty constitutional reasoning, legal scholars threaten to undermine not only the authority of the Hong Kong judiciary, but, more importantly, judges’ confidence in that authority, without which they are unlikely to fulfill the monitoring role that China has offered them. By acting on such proposals, Hong Kong would unilaterally give up a promising source of leverage against Mainland domination.

2. Formally document, perhaps by government “White Paper,” and publicize both the precedents in which Hong Kong courts have ruled against the government and the procedures followed in such cases. If Hong Kong courts have been open in the past to residents wishing to

191. See *supra* note 88 and accompanying text.

challenge government action, and judges have not been deciding cases based on prevailing government policy, it is necessary to assert this fact openly. Although China might not accept these contentions, a thorough appraisal of the Hong Kong legal system could heighten public understanding of the legal process and raise the status of the courts in the eyes of residents and foreign observers. Furthermore, if the Declaration's promise of continuity with current practice and procedure for fifty years is to have any hope of fulfillment, an authoritative baseline is needed against which the judiciary's performance can be measured long after today's judges and attorneys have passed from the scene.

3. Review and reorganize if necessary the system of publishing court reports, and distribute those reports as widely as possible. The courts' unique attribute is their ability to document China's treatment of Hong Kong in a systematic and reasoned way. Their ability to impose costs on China for violations of basic policies is entirely dependent on their ability to inform Hong Kong residents and international observers about the local situation. Heavy investment in legal "infrastructure," such as international indexing and electronic publishing of Hong Kong case reports, would make it far easier to chart the progress of autonomy and the preservation of individual rights. The knowledge that their opinions would reach a wider audience might also increase the resolve of Hong Kong judges to work to preserve their independence.

4. Improve the size and quality of local law schools. Without a well-trained local bar, legal remedies will be inaccessible to Hong Kong residents. Moreover, a judiciary that is forced to draw from a limited local talent pool or to depend on foreign "mercenaries" is unlikely to have the skill, sensitivity, or commitment to withstand the certain challenges to its authority.

5. Adopt a reciprocal system by which, just as British judges may serve in Hong Kong after 1997, judges in Hong Kong may be chosen to serve in Britain. By allowing service on the Hong Kong bench to count as a step on the career path of a common law judge, Britain could provide an incentive for current Hong Kong judges to remain in the HK-SAR after 1997. Such a system would also increase the likelihood that Hong Kong judges would work independently of Beijing, and add a formal procedure for monitoring that independence.

These suggestions may seem quite academic: study, teach, buy more books. Dramatic solutions do not exist in this context, however, because Hong Kong simply does not have the power to implement them. The HKSAR can work toward autonomy only by maintaining its economic value to China while at the same time doing everything possible to raise

the cost to China of changing course. These modest suggestions could help make the courts an impediment to any PRC inclination to remake Hong Kong in its own image.

B. *A Role for International Organizations*

If Hong Kong courts exercise the independent review function described above, they can offer the world a lens through which to monitor the development of Hong Kong's autonomy and individual rights. The Declaration provides for an institutional structure that gives other nations and international institutions both authorization to oversee Hong Kong's transition to sovereign control by the PRC, and an interest in carrying out this oversight.

China has agreed that Hong Kong may participate as a separate entity in international trade agreements and quota schemes, notably the General Agreement on Tariffs and Trade (GATT) and the Multifibre Agreement (MFA).¹⁹² Hong Kong will also be permitted to retain membership in international organizations in which it currently participates as an autonomous entity.¹⁹³ If Hong Kong maintains its autonomous position in the web of international organizations as promised, China's treatment of it will be subject to continual international oversight. If, as contended above, the world community places value on affording historically distinct peoples maximum control over their political destiny,¹⁹⁴ even where another nation's territorial claims foreclose the preferred formula of independence for these peoples, international organizations will provide a ready means for monitoring Hong Kong's progress.

These ties could do more than provide an observation platform, however. The trade organizations in particular have "teeth," since they could impose costs on China for abridging Hong Kong's autonomy. China itself is seeking to join the GATT¹⁹⁵ and to increase its allotments

192. Annex I, *supra* note 64, art. VI, para. 3.

193. *Id.* art. XI, para. 1. At present these organizations are: the United Nations Conference on Trade and Development, the United Nations Economic and Social Commission for Asia and the Pacific, the Organization for Economic Co-operation and Development, the Asian Productivity Organization, and the Asian Development Bank. Mushkat, *supra* note 50, at 172.

194. *See supra* text accompanying notes 49-66.

195. China became an observer at the GATT in 1984. J. OF COM., Jan. 7, 1984, at 5. Hong Kong became a contracting party of the GATT in 1986. J. JACKSON & W. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 322 (2d ed. 1986). Some of the legal issues raised by China's desire to join the GATT are discussed at *id.* Wang, *China's Membership in GATT*, 2 ECON. & L. 33, 34 (1987), comments on the benefits to China of preferential treatment for its exports by other contracting parties. *See also* Mushkat, *supra* note 50, at 195-99.

in various quota and preferential trade regimes.¹⁹⁶ By maintaining Hong Kong's membership in these regimes as an autonomous entity, China stands to "get two bites at the apple." International organizations and Hong Kong's trade partners, based on their responsibility to further, where possible, Hong Kong's self-determination and human rights,¹⁹⁷ should welcome this opportunity to encourage and oversee the realization of Hong Kong's rights. They should accept this arrangement as long as Hong Kong is in fact autonomous.¹⁹⁸ If Hong Kong becomes just another Chinese city, China should lose its singular privilege of double membership. Hong Kong court judgments will be an important source of information if these organizations adopt formal procedures to review Hong Kong's status at regular intervals after 1997.

C. *If the Promises Are Broken*

The international community and Hong Kong courts will have an important responsibility if China's absorption of Hong Kong does not proceed as promised. If the PRC does not respect Hong Kong residents' rights and lifestyle, many will seek refuge elsewhere. The courts must insist on their prerogative to review China's implementation of the Declaration so that, in the worst-case scenario, Hong Kong residents will have an authoritative record to cite if forced to seek asylum elsewhere. Countries that would act on the much-discussed norm of self-determination for decolonized peoples should monitor post-1997 Hong Kong closely so that their immigration policies can, if necessary, allow as many individual Hong Kong residents as possible to "determine" their destinies elsewhere if their collective autonomy does not materialize.

Conclusion

This analysis may perhaps be criticized as a quixotic effort, an excessively legalistic endeavor in a realm where the cold realities of unequal power make such details irrelevant. China, after all, unquestionably has the power to change the Basic Law, abolish or emasculate the courts, and transform Hong Kong's lifestyle at will. But all power ultimately does not come from the barrel of a gun.¹⁹⁹ National decision-makers rarely act without taking possible reactions of other nations into account, and

196. China was admitted as a party to the Multifibre Agreement on Dec. 15, 1983. *China Admitted to GATT Group*, 27 BEIJING REV. 11 (Jan. 2, 1984).

197. See *supra* notes 49-65 and accompanying text.

198. For an argument that protectionist sentiment will prevent this from occurring, see Mushkat, *supra* note 50, at 196-97.

199. QUOTATIONS FROM CHAIRMAN MAO TSETUNG 61 (Foreign Language Press 1976).

those reactions are shaped in part by convictions about what is right. Where there is wide agreement on a norm, as in the decolonization context, a state can be expected to consider world expectations and avoid policies that it anticipates will violate them.²⁰⁰ Moreover, states arrive at decisions and policies by way of internal political struggles, cost-benefit analyses, institutional and personal rivalries, and other factors which together make up—even for a totalitarian country—the national will.²⁰¹ Individual assessments of how important it is to control Hong Kong, how difficult such control will be to implement, and how costly it will be in terms of international political capital, will determine how China treats the city in all but the most extreme circumstances.

It is at this level that the judiciary can make a difference. The courts have the statutory authority and existing institutional culture to make the intrusive exercise of China's power over Hong Kong costly and troublesome by making it open and explicit rather than gradual and quiet. A truly independent judiciary could not only ensure fair treatment for the individuals who come before it, but also serve as an onsite monitor for the world community, which itself has both a legitimate interest in the situation of Hong Kong residents after 1997 and the potential leverage to encourage China to respect the territory's autonomy and rights. The effectiveness of the judiciary could be a major determinant of Hong Kong's ability to reconcile the promise of continuity with the inevitable social evolution that the fifty years after 1997 will bring. As long as China does not radically change course,²⁰² the Declaration offers the judiciary a central role in the future development of the territory. The question is whether the courts will grasp the significance of the role being offered them, and have the courage and integrity to accept it.

200. "[E]ven those who do not regularly use the word 'law' in their discourse, and even those who snicker when others use it, must make estimates about the subjectivities of allies and adversaries alike. These subjectivities necessarily include what those actors think is right." Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1, 5 (1984).

201. See generally G. ALLISON, *ESSENCE OF DECISION* (1971).

202. For an analysis of the likelihood that China's stability will outlast Deng Xiaoping, see Oksenberg, *China's Confident Nationalism*, 65 FOREIGN AFF. 501 (1986).