The road to China: Hong Kong's transition to Chinese sovereignty

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I. Introduction

"On Monday June 26, 1843 at 5 o’clock p.m.", the Treaty of Nanking was ratified and Hong Kong was declared a possession of Her Majesty the Queen of Great Britain. "The island of Hong Kong to be possessed in perpetuity by her Britannic Majesty, her heirs and successors..." (Sayer 1980: 215). The Treaty legally transferred sovereignty over Hong Kong Island from the Chinese to the British. Within sixteen years of the ratification of the Treaty of Nanking, during the second China War, the residents of Hong Kong Island looked longingly to the north to secure Kowloon Peninsula. Following China’s defeat and under the terms of the 1860 Convention of Beijing, Britain acquired slightly more than four additional square miles of land comprising the southern tip of Kowloon Peninsula and Stonecutters Island. Again, these lands were ceded in perpetuity to the British Crown. The only leased territory in the Colony was acquired by the British in 1898 under the Convention of Peking, following the Sino-Japanese War. The leased territory is known today as the New Territories, the area north of Boundary Street, and some 235 outlying islands, including Lantau and Lamma islands. The total additional area was 370.4 square miles (Lane 1990). At midnight on June 30, 1997, all this land and its more than five million inhabitants are to be "returned" to China.

This paper examines the future legal structure of Hong Kong as envisioned

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1 This is part of a larger project in collaboration with Drs. Bruce Bueno de Mesquita and Alvin Rabushka, of the Hoover Institution, Stanford University, to examine the future of Hong Kong following the transfer of sovereignty in 1997. The project has been supported by a grant from the Staff Development and Scholarly Activities Committee of Lingnan College. I would like to thank Sebastian Tse, Brian Bridges and David Weimer for their thoughtful comments.
under the Joint Declaration, the Basic Law of Hong Kong (BL), and the Constitution of the People’s Republic of China. It will examine what the parties agreed to regarding the future status and administration of Hong Kong and attempts to highlight some of the problems already encountered and some which may arise.

Following a discussion of the Joint Declaration and Basic Law, the issues of local governance, the legal system, personal rights and freedoms, the economic system, foreign affairs, and Memoranda on Travel Documents are addressed. Each section includes a discussion of the progress to date in the planning for the transfer of sovereignty in 1997.

II. The Joint Declaration and Basic Law

The British first broached the issue of Hong Kong’s future status with the Chinese in 1979 when Sir Murray MacLehose, the then governor of Hong Kong, visited Peking. The matter was essentially swept under the rug by the Chinese and not raised again until Prime Minister Margaret Thatcher’s visit to Peking in September, 1982 (Bonavia 1985: 167). That visit began more than two years of negotiations, involving twenty-two rounds of meetings, culminating in the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong (the Joint Declaration or "JD").

The Joint Declaration, a short document of only slightly more than 1100 words, including the three annexes and two Memoranda, a total of just more than

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2 The complete text of the Joint Declaration can be found in various publications including Chan and Clark (1991) and Bueno de Mesquita, Newman and Rabushka (1984).
8000 words, inalterably changed Hong Kong's future and the fate of its inhabitants. The Declaration addressed: the absolute return by the British of sovereignty over Hong Kong to the Chinese, the status and administration of Hong Kong after 1997, British responsibility for Hong Kong prior to the turnover, the Chinese commitment to cooperate with the British during the period of the transition from 1984 to 1997, the creation of a Sino-British Joint Liaison Group, and land leases.

The Joint Declaration states that China "has decided to resume the exercise of sovereignty over Hong Kong (including Hong Kong Island, Kowloon and the New Territories) with effect from 1 July 1997" and that "the United Kingdom will restore Hong Kong to the People's Republic of China with effect from 1 July 1997."

The British never seriously considered the idea of retaining Hong Kong Island and Kowloon and just returning the leased territories under a claim that sovereignty to those parts of Hong Kong were permanently transferred to the British. Such a carved-up Hong Kong simply would not have been viable as it would have lacked an airport, water supply, and source of fresh agricultural products (Ching 1985: 8). Thus, with several stokes of a pen, the future sovereignty over all of Hong Kong will revert to China on July 1, 1997.

One should keep in mind that this transfer of almost six million people is in some ways unprecedented. For some, this transfer of sovereignty is almost the reverse mirror image of the collapse of the Berlin Wall and Iron Curtain. While boundaries have been adjusted throughout modern history, with some nations

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3 For a detailed discussion of the negotiations between the British and Chinese see Ching (1985); Bonavia (1985) and Roberti (1994).
being absorbed in others and some nations splitting apart, either peacefully or the result of a civil war, in this case, slightly less than six million people, who have been living in a relatively free society and have developed an enviable system of economic prosperity, are being entrusted to the good will of the People’s Republic of China -- a country which one can politely say is a less free society than Hong Kong, whose people have in the past been victims of their own government and which though is now experiencing the throes of economic growth, is likely to again experience the disruptions of political succession.

For the Chinese, sovereignty is "the supreme power of a state to decide independently its internal and external affairs in accordance with its own will (Ying 1960). Hence the often heard Chinese response to Western complaints of human rights, copyright infringement, and other matters, is that the West is interfering in matters which are within the sovereign rights of China. The significance the Chinese attached to resuming sovereignty over Hong Kong cannot be overlooked or overstated. Britain’s foothold in China is a continuing reminder of a period of weakness in China’s history and of the "unequal treaties" China was forced to enter into by what were then militarily stronger powers. The Chinese have never accepted the notion that sovereignty over Hong Kong was ever vested in the British since the Chinese reject the notion that sovereignty can be divided. Under the Chinese notion of sovereignty, sovereignty over a territory can only be vested in a single state. If it were to be allowed to rest in more than one nation, nations would not be equal since one could have shared sovereignty while another would be truly independent. Furthermore, to acknowledge that sovereignty can be divided, in part, provides a basis to justify the "carving up" of China by the
capitalist-bourgeois powers of the nineteenth century (Ying 1960).

a. The Transfer of Sovereignty Under International Law

The transfer of sovereignty over a tract of land and its people is not without precedent nor is it without support under international law. International law has long recognized the right of one state to transfer territory to another state or for one state to exercise partial or complete sovereignty in part of or over the whole of another country. Sometimes the transfer of sovereignty has been the result of a sale, the Louisiana Purchase transferring France’s ownership of a vast area of territory to the west of the Mississippi River to the United States in 1803 or Russia’s sale of Alaska to the United States in the 1860’s, a treaty, the 1910 Treaty between Korea and Japan ceding Korea to Japan (Henkin, et al. 1987: 310) or the Hay-Parilla Convention of 1903 governing the Panama Canal, by conquest, the Indian seizure of Goa in 1961, or by lease, the United States’ lease of a naval base in Guantanamo, Cuba, or by agreement, the Administrative Agreement between the United States and Japan regarding the stationing of American troops in Japan (Henkin, et al. 1987: 860, 867).

These examples, and others, show that there is no lack of precedent and little doubt that under international law the Chinese and the British can enter into an Agreement, such as the Joint Declaration, for the transfer of sovereignty over the territory and people of Hong Kong to the People’s Republic of China. It is certainly the minority view in international law that such transfers require the consent of the populous. However, exactly this position was argued by Hugo Grotius, in On the Law of War and Peace, in which he asserted that “alienating
sovereignty ... [is] subject to the will of the people" (Grotius 1925: Book II, Chap. VI, Sect. VII). While Grotius is the "father" of international law, his offspring have generally rejected the "trite" notion that those most affected should perhaps be consulted. If the Chinese and the British were so inclined as to allow a plebiscite on the future status of Hong Kong, survey results suggest that a majority do not favor the "one country-two systems" model (DeGolyer 1994: 99).

b. The Joint Declaration and Basic Law

The Joint Declaration is a treaty between two sovereign states under international law and it has been registered with the Secretariat of the United Nations pursuant to Article 102 of the Charter of the United Nations. The Foreign and Commonwealth Affairs Office has succinctly stated that:

[t]he Joint Declaration has the status of a treaty in international law. That means that its provisions including the Annexes create rights and obligations binding in international law. It was registered by both Governments with the United Nations under Article 102 of the UN Charter (which requires members of the UN to register every treaty and international agreement entered into by them) and will of course remain binding on both sides for the years following July 1997 (House of Commons 1994: 38).

Pursuant to the terms of the Joint Declaration, Annex I, the People's National Congress shall:

enact and promulgate a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter referred to as the Basic Law) in accordance with the Constitution of the People's Republic of China, stipulating that after the establishment of the Hong Kong Special Administrative Region the socialist system and socialist policies shall not be practiced in the Hong Kong Special Administrative Region and that Hong Kong's previous capitalist system and life-style shall remain unchanged for

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fifty years.

The Basic Law is not an international treaty. Rather it is a law enacted by the National People’s Congress of the People’s Republic of China. The Basic Law was nominally written by the Basic Law Drafting Committee, a majority of whose members were appointed representatives from the mainland, with the actual drafting responsibility borne by a secretariat of legal and political experts drawn from the People’s Republic. The Basic Law Drafting Committee began its work in 1985, released a draft on April 28, 1988, and the final law was promulgated on April 4, 1990 by the National People’s Congress of the People’s Republic of China. It is the Basic Law and Joint Declaration which are designed to guide the conduct of affairs in Hong Kong over the next fifty years.

While international law scholars may want to focus on the distinctions between an international treaty and a domestic law, for our purposes it is important to understand that the Basic Law seemingly had to conform to the terms of the Joint Declaration or else it would provoke a violation of an international treaty. However, the ultimate decision as to just how well they conform, as I will discuss later, is not subject to legal review. It is solely the province of the mainland Chinese government affected.

c. The Joint Declaration Under International Law

Although the Joint Declaration is an international treaty and the Basic Law is a creation of the People’s National Congress, as a practical matter, what does

5 For a detailed discussion of the drafting process see Chan (1991) and Cheng (1988).
this really mean? One optimistic citizen of Hong Kong recently wrote a letter to the
teditor of the *South China Morning Post* arguing that "[t]he Sino-British Joint
Declaration is an international agreement and the International Court would step in
if any violation of the declaration occurs and China would not dare to challenge
such international pressure" (*South China Morning Post*, December 5, 1993). This
interpretation of the International Court of Justice’s jurisdiction could not be further
from the truth. First, international law is a law principally of states and only states
may be parties in cases before the Court. For the International Court of Justice
to hear a case arising from the Joint Declaration, that is for the Court to have
jurisdiction, either both parties must agree to refer the matter to the Court or both
parties must have previously consented to have all of their legal disputes heard by
the Court. In the first instance, the parties did not agree in the Joint Declaration
to bring any future disagreements relating to the treaty before the Court. Hence,
in the midst of a dispute, both sides would have to agree at that time to bring the
matter to the Court. In the second instance, China has not accepted the
"compulsory jurisdiction" of the International Court of Justice and as such, Britain,
or for that matter any other nation alleging a breach, could not drag China before
the Court for failing to abide by the terms and conditions of the Joint Declaration.

The jurisdictional requirements of the International Court of Justice are not
well appreciated in Hong Kong or even among Hong Kong barristers. Martin Lee,
chairman of the Hong Kong Democratic Party, and a barrister, argued that the
British should bring the matter of China’s breach of the Joint Declaration for

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6 Article 34 of the Statute of the International Court of Justice.
refusing to report the human rights situation in Hong Kong after 1997 before the International Court (*Hong Kong Standard*, October 20, 1994). Part of the reason for the lack of appreciation is the fact that the British Foreign and Commonwealth Office, among others, appears to have tried to hide the legalistic requirements concerning the enforceability of the Joint Declaration, both now and following the changeover. In testimony before the Foreign Affairs Committee, and prior to the letter to the *South China Morning Post* and Mr. Lee’s comments, the Foreign and Commonwealth Office was queried on this point by Mr. David Harris, a member of Parliament:

**Harris:** What you are saying, in effect, is that if the present unfortunate dispute between the British Government and the Hong Kong Government on the one hand and China on the other continues over Governor Patten’s proposals for democracy, there is no practical possibility of this being referred to any international body or particularly the International Court, because China would veto it, and say they are not doing it.

Mr. Kevin Chamberlain, Deputy Legal Advisor to the Foreign and Commonwealth Office answered, somewhat obliquely, with the following response:

**Chamberlain:** I think at this stage, while negotiations are continuing it would be wrong to speculate as to what would happen if those negotiations were to fail. We have entered those negotiations in good faith with the object of reaching agreement. I would stress that it is important and of interest to both sides that those negotiations succeed, because that would be the best guarantee of the future stability of Hong Kong and also the need to ensure the so-called “through train”, that is the concept that existing members of the Legislative Council of Hong Kong will become members of the new Legislative Council after 1 July 1997. I think it would be wrong in a public session of this kind to speculate as to what would

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7 I concede that there was a reasonably good chance that Martin Lee was aware of the jurisdictional requirements of the Court and that he was making political statement rather than a legal one.
happen in the event of what, I hope, is a hypothetical situation.

Never was a clear answer provided. That is, in the event of a breach or claimed breach of the Joint Declaration, the parties are limited to seeking consultation among themselves. There is no power for either Britain or China to compel the other to adhere to the terms of the Joint Declaration. This is clearly a more significant problem for the British than for the Chinese since once sovereignty is transferred in 1997, the British burden of safeguarding the guarantees contained in the Joint Declaration and Basic Law will be frustrated by the absence of any mechanism for enforcement.

d. The Basic Law and the Chinese Constitution

Most individuals, even those of us who are not constitutional law specialists, understand that states can adopt different forms of government. Some states, such as the United States, Australia, and Mexico have adopted federal systems with shared responsibility and authority at both the national and state level. Other states, such as France, China, Britain and Japan, have adopted a unitary form of government in which there may be multiple tiers of governmental institutions, but all authority is ultimately vested with the national government. By this, I mean that the national government in a unitary system is free to alter the powers and structures of the local governments as it sees fit. Margaret Thatcher’s reorganization of the local governments in Britain during her tenure as Prime

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8 This discussion is largely based on the arguments found in Chiu (1988) and Cheng (1988).
Minister is a good example of the power of a unitary government. As a general principle, however, regardless of whether a state has adopted a federal system or unitary system, the national constitution is the highest source of legal authority.\(^9\)

This is certainly true under the Chinese Constitution:

[The Preamble to the Chinese Constitution provides that the Constitution] is the fundamental law of the state and has supreme legal authority. The basic laws, ordinary statutes, administrative rules and regulations enacted by the State Council stand next in line. They are followed by the local regulations adopted by the people’s congresses of provinces and municipalities directly under the central government and their standing committees. This hierarchy is strictly defined, and laws of a lower level cannot contravene those of a higher level (Cheng 1988: 12).

That is, in China if a national law prescribes a certain type of behaviour, the inferior units of government cannot alter the prescript. If we look first at other countries, we can see how the superiority of national law is supposed to operate. For instance, if the Parliament of France enacts a law requiring a national minimum wage of 45 francs an hour for all workers, the City of Paris cannot, unless the national law explicitly provides for exceptions, enact an ordinance setting the minimum wage at 40 francs. Similarly, the First Amendment to the United States Constitution provides, in part, that:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; of abridging freedom of speech, press or the right of the people to peacefully assemble.

In the United States, this Amendment restricts both the national government and the fifty states from enacting any law in contravention of the Amendment.

In China this supposed superiority of the national constitution and statutory law over local law does not appear to function as one might expect. For instance,\(^9\)

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\(^9\) It should be noted that some governments such as the United Kingdom, Alberta and New Zealand have functioned quite successfully without constitutions.
Article 5 of the Constitution provides that:

The basis of the socialist economic system of the People’s Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.

But the Joint Declaration and Basic Law grant Hong Kong, after 1997, the right to continue to practice the capitalist system for fifty years. However, the Central Government of the People’s Republic, under the terms of 1982 Constitution of the People’s Republic, does not have the authority to exempt Hong Kong or any other part of the country from the application of the Constitution. If this situation existed in the United States, a nation in which the courts have the ability to declare a law unconstitutional or if the Chinese courts possessed the power of judicial review, such legislation would, in all likelihood, be declared unconstitutional as it violates explicit provisions of the constitution. In China the courts do not have the power of judicial review, and therefore Hong Kong’s legal position within China is even more tenuous since in China political needs sometimes determine judicial/legal outcomes. While the present leadership now regards these inconsistencies between the constitution and the Basic Law as tolerable, there is no guarantee that any future leader will not conclude that the Basic Law violates the national constitution. When the drafting committee of the Basic Law was offered the suggestion that the Chinese Constitution be modified to permit the Constitution to conform with the newly proposed Basic Law, the proposal was rejected (Cheng 1988:14). As such, on any one day the National People’s Congress can decide, subject of course to any self constraint that they wish to impose on themselves as a result of their treaty obligations under the Joint Declaration, that some or all of the guarantees contained in the Joint Declaration and Basic Law are either
unnecessary or inconsistent with the Chinese constitution and simply pass a law altering the status of Hong Kong.

III. The Future Political Structure of Hong Kong

Under the Joint Declaration, the People’s Republic agreed to organize Hong Kong as a Special Administrative Region of China (HKSAR) under Article 31 of the Constitution of the People’s Republic. Article 31 provides:

> [t]he state may establish special administrative regions when necessary, The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in light of the specific conditions.”

Article 31 is the legal mechanism which permits the Chinese government to create "special administrative regions" which was the mechanism conceived of by the Chinese leadership in the 1980’s to unify the country. Their belief was that Taiwan, Hong Kong and Macau could all be joined together, with China, in one nation which would respect the different economic systems and a fair degree of political autonomy. However, ultimately, at the international level, there would be only one government -- that of the national government in Peking. It is very unlikely that the HKSAR model will successfully reintegrate Taiwan into the mainland (Wai 1988).

The Joint Declaration provides that the HKSAR "will be under the direct authority of the Central People’s Government enjoying a high degree of autonomy" (JD, ¶ 3(2)). It will have its own executive, legislature, and independent judiciary,

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10 Reprinted from the *Beijing Review*, 52 (December 27, 1982), 1052. (Adopted on December 4, 1982, by the Fifth National People’s Congress of the People’s Republic of China).
including court of final adjudication (JD, ¶ 3(3)). The SAR will have independent finances and the Central People’s Government will not levy taxes on the SAR (JD, ¶ 3(8)). Moreover, the SAR may issue its own travel documents for entry into and exit from Hong Kong and it shall be responsible for the maintenance of public order (JD, ¶ 3(10, 11)).

In fairness to the Chinese drafters, the proposed form of government designed by the Basic Law Drafting Committee for the future HKSAR is not that different from the form of government imposed by the British as colonial rulers. Both systems involve a strong executive coupled with a weak legislature and limited democratic representation. The real difference between the present colonial system and the future in which Hong Kong is a part of China is to whom the local government is ultimately accountable. Under British rule until 1997, it is to a nominally disinterested colonial power physically six thousand miles away with a reluctance to use the legal powers vested in it in an authoritarian manner against its citizens. The fear after 1997 is that the new sovereign is not as disinterested, is just over the border from Hong Kong, and has demonstrated a greater willingness to use its legal powers in an authoritarian manner against its own citizens.

a. Local Governance - The Chief Executive

The Basic Law provides that the Chief Executive of the HKSAR, shall be a Chinese citizen with no right of foreign abode, over forty years old, who has resided in Hong Kong as a permanent resident for a continuous period of 20 years. The Chief Executive shall serve for a term of five years and shall be accountable to the Central People’s Government and the SAR in accordance with the provisions
Article 45 and Annex I, "Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region" address the process by which the Chief Executive will be chosen from 2002 onwards. The National People's Congress adopted separate legislation providing a "Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region" (the "Decision"). The first Chief Executive of the HKSAR will be selected by a 400 member selection committee comprised of 100 individuals drawn from the industrial, commercial, and financial sectors, 100 individuals drawn from the professions, 100 individuals drawn from labour, grassroots, religious and other sectors, and 100 individuals drawn from former political figures, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference. The exact method to be used by the selection committee is left vague. The committee is to select its candidate either following local consultations or by nomination and election following consultation. It is not specified in the Decision how the committee is to decide which procedure to use or whether the ultimate decision on the method of selection is the Committee's or whether it is to be made by the National People's Congress.

Article 45 says that subsequent Chief Executives of the HKSAR "shall be selected by election or through consultations held locally and be appointed by the Central People's Government." Annex I provides that an election committee will be formed comprising some 800 members -- 200 drawn from the industrial, commercial and financial sectors, 200 from the professions, 200 from labour, social
services, religious and other sectors, and 200 drawn from members of the Legislative Council, representatives of district-based organizations, Hong Kong deputies to the National People’s Congress, and representatives of Hong Kong member of the National Committee of the Chinese People’s Political Consultative Conference. The exact method for selecting these "electors" is left to the HKSAR so long as the process is "in accordance with the principles of democracy and openness". The Basic Law, Article 45, also provides that the "ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures."

While universal suffrage may be stated as the ultimate goal, Annex I implies that the Chief Executive will not be directly elected before the year 2012 since paragraph 7 of the Annex refers to amendments to the selection process after 2007.

b. Local Governance - The Future Legislative Council

The Joint Declaration and Basic Law both anticipate that Hong Kong will have its own legislature comprised principally of Chinese permanent residents of Hong Kong. Non-Chinese residents may hold seats in the legislature so long as their total number does not exceed twenty percent of the seats although no mechanism is provided for in the unlikely event that the number does exceed twenty percent. The procedures for constituting the first and subsequent legislatures are also specified in a Decision of the National People’s Congress and Annex II of the Basic Law. And again, just like the Chief Executive, it is the stated goal of the Basic Law that the Hong Kong legislature will be selected by universal
suffrage.

Under the Basic Law, the legislature is granted the following powers and functions:

1. To enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures;

2. To examine and approve budgets introduced by the government;

3. To approve taxation and public expenditure;

4. To receive and debate the policy addresses of the Chief Executive;

5. To raise questions on the work of the government;

6. To debate any issue concerning public interest;

7. To endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court;

8. To receive and handle complaints from Hong Kong residents;

9. To impeach the Chief Executive for serious breach of law or dereliction of duty; and

10. To summon, as required when exercising the above mentioned powers and functions, persons concerned to testify and give evidence (BL, Article 73).

The power of the SAR legislature is severely restricted as the Basic Law prohibits any member from introducing any bill which relates to public expenditures or political structure or operation of the government (Article 74). Moreover, bills relating to government policies need the written consent of the Chief Executive prior to being introduced. These restrictions, however, on their face, are no greater than those currently imposed by the Royal Instructions, Article XXIV, which provides "that every ordinance, vote resolution, or question, the object of effect of which may be to dispose of or charge any part of Our revenue arising within the Colony, shall be proposed by the Governor, unless the proposal of the same shall
have been expressly allowed or directed by him." This Article is construed to
include almost all legislation since the mere act of introducing a piece of legislation
has financial implications. Hence, the restrictions on the new legislature are no
greater than those on the old one.

The Decision of the National People’s Congress on the
Method for the Formation of the First Government and the First Legislative Council
of the Hong Kong Special Administrative Region provides that:

the first legislative council of the HKSAR shall be composed of 60 members,
with 20 members returned by geographic constituencies through direct
elections, 10 members returned by an election committee, and 30 members
returned by functional constituencies. If the composition of the last Hong
Kong Legislative Council before the establishment of the HKSAR is in
conformity with the relevant provisions of this decision and the Basic Law
of the HKSAR, those of its members who uphold the Basic Law of the
HKSAR of the People’s Republic of China and pledge allegiance to the
HKSAR of the People’s Republic of China, and who meet the requirements
set forth in the Basic Law of the Region may, upon confirmation by the
Preparatory Committee, become members of the first Legislative Council of
the Region.

The scheme was to have the last sitting legislature before 1997 become the first
sitting legislature after 1997. This plan for the legislature became known as the
"through train". Those on board before 1997 would be permitted to stay on board
until the first scheduled elections following the transfer of sovereignty. The
through train was predicated on the 1995 legislature being selected according to
the rules laid out in the Decision.

The through-train was derailed in 1994 when Governor Christopher Patten
pressed his second of two rounds of reforms through the legislature. The first
round lowered the voting age to 18; abolished appointed seats on the District
Boards and Municipal Councils, and introduced a "single-seat, single-vote" electoral
system for all three tiers of government including the legislature.
Following the passage of the first round, the Governor proposed enlarging the franchise to include more than 2.7 million people in the Legislative Council functional constituency elections and to give the directly elected District Boards the sole say in the election of 10 Legislative Council seats. To put these reforms in perspective, in 1981, the total electorate was only 34,381 electing only 15 officials (DeGolyer 1994: 92). The second round of electoral reforms was passed in June, 1994. In response, in late August, 1994, "the National People’s Congress voted unanimously to terminate Hong Kong’s present form of government on July 1, 1997" (South China Morning Post, September 1, 1994)."  

While the British decided to "go it alone" until 1997, the Chinese resolved to go in another direction after 1997. By December, 1994, the Preliminary Working Committee (PWC), a precursor to the Preparatory Committee to be formed in 1996, announced that a provisional legislature would be formed to prevent a vacuum after July 1, 1997. It was proposed that the provisional legislature would sit for a period of six months in order to prepare for the first legislative elections under the Basic Law. Fears regarding the powers of the interim legislature were immediately heard but the proposal was defended by members of the PWC (South China Morning Post, December 7, 1994: 1). The through train was effectively derailed and the first and perhaps subsequent legislatures will be elected/selected under mechanisms not envisioned by the Basic Law.

c. The Legal System

\footnote{11 For a discussion of the Sino-British negotiations over Hong Kong’s political reforms see Lo (1994).}
It is in Annex I of the Basic Law that we begin to get a sense of the proposed legal system for the SAR. Hong Kong will retain its present system of lower courts. However, at this time the Court of Final Appeal for Hong Kong is the Judicial Committee of the Privy Council in London. The Judicial Committee "hears appeals from the superior courts of the Channel Islands, the Isle of Man, colonies (such as Hong Kong) and such independent Commonwealth countries as have retained the appeal from their own courts" (De Smith 1989: 156). Clearly, some mechanism other than the Privy Council and China's National People's Congress was needed. The facial goal of Section 111 of Annex I is to preserve, as much as possible, given the transfer of sovereignty, the pre-July 1, 1997 judicial system for fifty years. "[T]he judicial system previously practiced in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of Hong Kong Special Administrative Region of the power of final adjudication" (JD, Annex I, § 3). Hence, the decision to grant Hong Kong its own Court of Final Appeal.

The make-up of the Court has not been without controversy. The Joint Declaration provided that the Court "may as required invite judges (emphasis added) from other common law jurisdictions to sit on the court of final appeal". The exact number of judges has been a source of continuing debate. Some read the term "judges" to suggest that more than one judge may sit on an appeals panel at any particular time. Others read Article 83 to suggest that the structure of Hong Kong's courts was a matter of Hong Kong law to be determined after the establishment of the SAR (Conner 1991).

In December, 1991, the Joint Liaison Group (JLG) announced that:
the Court, to be established in 1993, will be composed of the Chief Justice, three Hong Kong-based judges (Chinese or expatriate) and a fifth member to be invited alternatively from two panels. Panel A will contain retired and serving Court of Appeal judges in Hong Kong and Panel B will be made up of retired judges from other common law jurisdictions. Under this arrangement, a foreign judge will be present in at most half of the Court of Final Appeal’s quarterly sittings (Far Eastern Economic Review, October 10, 1991).

The JLG proposal clearly showed how the spirit and words of the Joint Declaration and Basic Law could be reinterpreted by both the British and Chinese and still be viewed as consistent with a literal reading of the documents. By the end of 1991, Hong Kong’s Legislative Council, in a rare show of independence, voted 34-11 to reject the JLG proposal. The battle line over the future degree of judicial autonomy was drawn.

In the intervening years, the issue of the Court’s structure has not been easily resolved. The Court was not constituted in 1993, 1994, or 1995. At the writing of this paper, the British are pushing for a Court of Final Appeals to be in place by 1996. Toward this end, in late 1994, the government consulted with the legal community regarding the make up of the Court and the government’s proposed legislation. The exact language of the proposed bill was a secret, not shared with the general public, although it was acknowledged to provide for only one overseas judge. While many in the Law Society, and the Bar Association, believed that the proposed "4-1" system, four local judges and one overseas judge, violated the Basic Law, in a very widely publicized, secret ballot a majority in the Law Society supported the proposed legislation. The Bar Association, by a vote of 247 to 15, passed a resolution opposing the Government’s bill. The Government’s argument that it was critical to have the Court in place before 1997, carried the day in the Law Society and the Law Society reversed its position of four
years earlier.

The Joint Declaration states that "[t]he courts shall exercise judicial power independently and free from interference . . . in accordance with the laws of the Hong Kong Special Administrative Region and may refer to precedents in other common law jurisdictions." Judges of the HKSAR:

. . . 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.

The Basic Law, Article 93, essentially states that judges "judges serving in Hong Kong prior to 1997 shall remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before."

This provision of the Basic Law was seemingly abandoned by the mainland Chinese. In late December, 1994 Mr. Lu Ping, head of China’s Hong Kong and Macau Affairs Office and Peking’s chief spokesperson on Hong Kong affairs said "that the Basic Law gave no details about transitional arrangements for the judiciary . . . the appointment of judges after 1997 would be decided by the legislature and Chief Executive of the Special Administrative Region (SAR), on the advice of an independent Judicial Services Commission" (South China Morning Post, December 11, 1994). The British position, in response to Mr. Lu’s comments ranged from concern on the part of the Governor that "it would have an impact on the whole rule of law" to those, like the Solicitor General, Mr. Daniel Fung, who sought to downplay the Chinese position by suggesting that the transfer of sovereignty gave the new SAR the right and obligation to appoint judges and that the judges would be expected to declare their loyalty to the SAR just like all civil
servants who would be "reappointed following a declaration of loyalty". Regardless of the ultimate direction this issue takes, it is certain to have a strong impact on the willingness of judges to remain in their posts to see what happens. The most immediate consequence of the change in sovereignty, for the judiciary, will be the SAR's difficulty finding and successfully recruiting, both local individuals, and overseas judges, who are willing to serve in the judiciary.

There are many other legal issues which will need to be resolved to ensure the one country-two systems scheme works. For instance, even assuming that Hong Kong can maintain its independent judiciary and the rule of law, what about the enforceability of Hong Kong judgments in China and Chinese judgments in Hong Kong (Keller 1993). As an example, assume that a Hong Kong firm does business with a Chinese firm in Hong Kong and the Hong Kong firm also does business in China. Would a Chinese court have jurisdiction over a contract claim between the Hong Kong and Chinese firms? In the United States, a company accedes to the jurisdiction of a locale by simply doing business there and a New York company could be sued in Maryland by a Maryland resident if the New York company was doing business in Maryland. In the present example involving the Chinese and Hong Kong businesses, the perceived safety of the Hong Kong court's protections may evaporate if a judgment was first reached in China. Again, in the United States, once a court in one state reaches a decision in a matter properly before it, the court's judgment must be given "full faith and credit" in any other jurisdiction in the country. Assuming that these issues are important because many individuals believe, rightly or wrongly, that the mainland's judicial system is or may be susceptible to interference by powerful interest, will the Hong Kong
judicial system be constrained to "enforce" decisions which have a taint of either official or unofficial interference?

Another important legal issue which is certain to take center stage after 1997 is the question of extradition. Hong Kong currently does not have a death penalty but China does. Many countries which do not approve of the use of the death penalty will refuse to extradite a wanted criminal if he would face the death penalty upon his return. Similarly, other countries refuse to extradite suspects of political crimes such as human rights protestors. Will officials in Hong Kong be forced to turn over Hong Kong residents to officials in China to face sentences of death or long periods in jail if convicted of subversion?

While some may argue that China is making progress in areas of the law, adopting laws on property rights and commercial transactions, updating its laws on state secrets, and doing away with extended periods of detention without trial, it is important to keep in perspective the current state of the legal system in China and the one in which Hong Kong will rest after 1997. Mr. James Peng, a successful Australian Chinese businessman, was abducted from Macau by the Shenzhen police in 1993, held for ten months before being charged with corruption. Following a first trial, the Shenzhen Intermediate People's Court threw the charges out but Peng was held until new charges, of embezzling funds, could be brought. As his lawyer noted, "there is no presumption of innocence" and "[i]n many cases outcomes will have been determined prior to the trial" (South China Morning Post, November 6, 1994). Equally important, the new charges expose the lack of protection in China from double jeopardy -- being tried twice for the same crime. Other examples abound. Since the assistance of law enforcement officials
can be bought in China, one Hong Kong resident was held for more than five months by the Public Security Bureau in an attempt to get the man’s son to settle a private financial dispute involving the son.

More ominous in some ways than the above incidents are those involving journalists from both Hong Kong and China as such incidents are likely to lead to self-censureship following 1997. One mainland reporter received a life sentence for leaking state secrets following the reporter’s disclosure of Jiang Zemin’s speech to be presented to the 14th Party Congress. Even the reporter’s wife was sentenced to six years as an accomplice. A reporter for Ming Pao was sentenced to 10 years in jail in China for allegedly stealing state secrets when information supposedly relating to China’s gold sales was published.

The ultimate weapon in the legal arsenal of the Chinese political system is perhaps the Decision of the State Council on Rehabilitation through Labour.

Under this law, a wide range of ‘undesirable elements’, including persons not engaged in proper employment, persons who do not obey work assignments, vagrants, hooligans, trouble-makers, anti-social elements, and counter-revolutionaries, can be sent to labour camps for a period of one to four year without a formal trial before a court and judicial determination of guilt (Chen 1992: 191).

Article 23 of the Basic Law, amended following Tiananmen Square, now provides, somewhat ominously that "[t]he [HKSAR] shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets..." The open question now is how the mainland can ensure that the HKSAR will enact laws which are acceptable to the mainland. However, if it can ramrod such legislation, among other things, through the "interim legislature", the Courts of Hong Kong may have no choice but to enforce the law.
d. Personal Rights and Freedoms

The Joint Declaration and Annex I, Section XIII, provide that:

the SAR shall protect the rights and freedoms of inhabitants and other persons, ... as provided for the laws previously in force in Hong Kong (emphasis added), including those of the person, speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research, of religious belief, inviolability of the home, the freedom to marry, the right to raise a family freely, to legal advice, and access to effective judicial process.

The Basic Law incorporates similar freedoms in Chapter III entitled, "Fundamental Rights and Duties of the Residents". Specifically, it provides that:

* all residents shall be equal before the law (BL Article 25);
* permanent residents shall have the right to vote and stand for elections (BL Article 26);
* residents shall have freedom of speech, press publication, freedom of association, of assembly, of procession, demonstration, labour organization and to strike (HKAR BL Article 27);
* the freedom of the person of residents shall be inviolable and residents shall be free from arbitrary or unlawful arrest, detention, or imprisonment (BL Article 28);
* the homes of residents shall be inviolable and free from arbitrary or unlawful search or intrusion (BL Article 29);
* the freedom and privacy of communications of Hong Kong residents shall be protected and no department or individual may, on any grounds, infringe upon the freedom and privacy of communications of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offenses (BL Article 30);
* residents shall have freedom of movement, conscience, religious belief and practice, choice of occupation and freedom to engage in academic research, and literary and artistic creation (BL Articles 31, 32, 33, and 34); and
* residents shall have the right to legal advise, access to the courts, and choice of lawyers and shall have the freedom of marriage and right to raise a family freely.

Article 39, however, goes on to say that the "rights and freedoms enjoyed
by Hong Kong residents shall not be restricted unless as prescribed by law." This clause fundamentally distinguishes the Chinese view of rights and freedoms from other perspectives. "Rights in such a system are not inherent in the individual, but are granted by the state, that is, by the law, and may be restricted by the law (Clark 1991: 52). Again, during an interim legislature, appointed by the Chinese to serve immediately after the transfer of sovereignty, could lawfully restrict many of the rights and freedoms currently enjoyed by the residents of Hong Kong.

Unlike the United States Constitution, where basic freedoms contained in the Bill of Rights are stated in terms of "Congress shall make no law", the Basic Law uses the phrase "Hong Kong residents shall have freedom of speech..." The guarantee in the Basic Law is not an absolute one. There are many alternatives one could conceive of under which freedom of speech would exist but it would not be an absolute freedom. For even in the United States, as is often commented, one does not have the freedom to yell fire in a crowded theater. Freedom of speech in Hong Kong, like most of the other freedoms outlined in the Basic Law, will be determined, in part, by the other laws which are in force. For instance, in China freedom of the press, guaranteed under Article 35 is constrained by the obligation, under Article 54, "not to commit acts detrimental to the security, honour and interests of the motherland". As such, an individual may be liable for breaching the commands of Article 54 while practicing the freedom of Article 35. As an example, the Chinese, through Weng Xinqiao, an official at Xinhua, the New China News Agency, which fronts as China's unofficial embassy in Hong Kong, have already suggested that celebrations of the "Double Tenth" festival, honoring the founding of the Chinese Republic, should be banned by the HKSAR after 1997.
for violating the principle of "one country" despite the fact that an action would violate the principle of freedom of speech (South China Morning Post, October 10, 1994(b)).

Wai (1988: 76) argues that in the Chinese conceptualization of rights and freedoms, rights need to be respected by others but freedoms do not: "...freedom is not unlimited; one can enjoy his freedom provided that other people's freedoms are not infringed as a result. But a right can never be infringed in any case." The Basic Law, Articles 25 through 42, are generally granting individuals freedoms not rights.

Section XIII of Annex I and Article 39 of the Basic Law further provide that the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force. How they will apply to Hong Kong, however, is still uncertain. The two Covenants were designed to convert the United Nation's Universal Declaration into a binding part of international law. The Covenant on Civil and Political Rights provides, among other things, that "everyone shall have the right to freedom of thought conscious, and religion (Article 18); the right to hold opinions without interference (Article 19); the right of freedom of association (Article 22); the right to be free from torture (Article 7); freedom of movement (Article 12); and the right to take part in public affairs (Article 25). More than 130 countries report to the United Nations, roughly every five years, under the terms of the Covenant on Civil and Political Rights. The United Kingdom, for instance has reported three times to the United Nations on Hong Kong. The reports are to address the measures which have been adopted by "State Parties" to give effect
to the rights recognized [by the Covenant] and on the progress made in the enjoyment of this rights" (ICCPR, Article 40).

China is not a signatory to either Covenant and even though both the Basic Law and Joint Declaration make reference to the two Covenants, China has indicated that it while the two Covenants apply to Hong Kong, it will not report on Hong Kong’s implementation of the Covenants. Hong Kong, not being a State Party, cannot report on itself.

The Covenant on Civil and Political Rights has been enacted into Hong Kong’s legal system, as a Bill of Rights, through legislation passed by the Hong Kong Legislative Council. As such, the guarantees of the ICCPR are also guarantees of the Hong Kong political system. The legislation, intending to be the supreme law of the land on the matters contained therein, specifically provided that "[n]o law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No. 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with the Covenant as applied in Hong Kong." The Chinese, again through Lu Ping, director of the Hong Kong and Macau Affairs Office, have attacked the Bill of Rights now preeminent position in the Hong Kong legal system and have suggested that it may be in conflict with the Basic Law (South China Morning Post, November 4, 1993).

e. The Economic System

On the economic front, the Joint Declaration seeks to perpetuate those qualities of Hong Kong believed to be important to its continued economic

\footnote{12}{See Hong Kong Letters Patent 1991 (No. 2), Article VII(3), § 2.}
prosperity. Explicitly, the protection of private property, ownership of businesses, rights of inheritance, and foreign investment are provided for. Moreover, the HKSAR will remain a free port, a separate customs territory and be allowed to continue to issue its own freely convertible currency. The local stock market will continue to function and markets in foreign exchange, goods, securities and futures will be allowed to continue. The SAR is given the authority to establish mutually beneficial economic relations with other states and in its own name, Hong Kong, China, the SAR may maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organizations.

The Joint Declaration goes on to provide that the "above stated policies of the People's Republic of China regarding Hong Kong and the elaboration of them in Annex I to [the] Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years." The basic law is to provide that the socialist system and socialist practices [of the PRC] shall not be practiced in the Hong Kong Special Administrative Region and that Hong Kong's previous capitalist system and lifestyle shall remain unchanged for 50 years.

Given the over-riding concern on the part of both the mainland and the British to preserve confidence in Hong Kong's economic future, many of the issues surrounding economic policy have not yet emerged on the political agenda. This is not to say that they are not just over the horizon. For instance, the economy will certainly become a major issue if Hong Kong was to run a sizable budget deficit.
prior to the turnover. Similarly, at the border of these economic issues was the debate in Hong Kong over old age pensions. The government was forced in 1995, in face of both local and mainland opposition, to withdraw its proposed income support system for the elderly. Other issues which are likely to arise, include the ability of Hong Kong, after 1997, to actively pursue trade relations with countries which have recognized Taiwan. Similarly, if the Chinese currency was to become fully convertible, would Hong Kong need to maintain a separate currency? Would the mainland allow it? What would become of the reserves now backing the Hong Kong currency? Would the mainland argue that since the country now has a unified currency, Hong Kong’s reserves are China’s reserves?

f. Foreign Affairs

Under Section XI of Appendix I to the Joint Declaration, the parties agreed that:

[s]ubject to the principle that foreign affairs are the responsibility of the Central People’s Government, representatives of the Hong Kong Special Administrative Region Government may participate, as members of delegations of the Government of the People’s Republic of China, in negotiations at the diplomatic level directly affecting the Hong Kong Special Administrative Region conducted by the Central People’s Government. The Hong Kong Special Administrative Region, may on its own, using the name "Hong Kong, China", maintain and develop relations and conclude and implement agreements with states, regions and relevant international organizations in the appropriate fields, including: the economic, trade, financial and monetary, shipping, communications, touristic, cultural and sporting fields.

While this provision, on its face, appears to be trying to distinguish "high politics" from "low politics", it is very likely that many seemingly "low" political decisions will have "high" political implications following 1997 and that this distinction will be difficult to maintain when the interests or desires of the Hong Kong people are
at odds with those of the central government.

Even in the run-up to 1997, the mainland has had difficulty maintaining a "hands-off" approach to Hong Kong's future role as a Special Administrative Region. For instance, despite the text in the body of the Joint Declaration relating to Hong Kong's ability to maintain its role in international organizations pertaining to sport, confusion in this area has been widespread. In the midst of the 12th Asian Games held in Hiroshima in October 1994, China's sports minister, Mr. Wu Shaozu, following earlier remarks by International Olympic Committee President Juan Antonio Samaranch indicating that Hong Kong "would be recognized as a separate sporting entity after 1997", argued that such an outcome was "keeping with Hong Kong's hopes. But China, for its part, has not yet agreed. [China] will make a decision through future consultations" (South China Morning Post, October 5, 1994). Wu's comments were later attributed to some confusion and several days later, Chinese Olympic Committee general secretary, Wei Zizhong, indicated that "China would not interfere in the territory's future sports structure." Following his non-interference comment, Wei went on to "offer his advice" that too much public money was being spent on sports administration (South China Morning Post, October 6, 1994; October 10, 1994(a)). In the future, such advice may look, to some, like interference.

g. Annex II - Sino British Joint Liaison Group

Annex II of the Joint Declaration provided for the creation of a Joint Liaison Group (JLG) to "continue their discussions in a friendly spirit and to develop the cooperative relationship which already exists between the two Governments over
Hong Kong with a view to the effective implementation of the Joint Declaration. The JLG consists of five representatives from each side and first met in July, 1985 and it is slated to continue to meet until the year 2000.

Over the years, the JLG has dealt with: identity cards and travel documents; arrangements for Hong Kong’s continuing participation in international organizations such as GATT, the Meterological Organization and the Universal Postal Union; air service agreements; localization of laws; terms of service for both the judiciary and civil service; defense and public order; the Court of Final Appeal; franchises and contracts extending beyond 1997; and the new airport and related projects.

While the meetings of the JLG are held in secret, during the early years, the British always characterized the progress in a favourable light. In the 1989 Hong Kong Review (Hong Kong Review 1989: 49) it was reported that:

[the JLG has built up a solid record of achievements in the implementation of the Joint Declaration. Its meetings are conducted in a friendly and cooperative atmosphere which assists the two sides in finding practical and flexible solutions to the complex and unique problems with which they are presented. The overriding considerations of the two sides is to find solutions in the best interests of Hong Kong and its future.]

The tone of these statements took a downturn following June 4, 1989 and all such rhetoric disappeared from the annual Review following 1990.

In the years since its initial meeting, one can find some successes in the work of the JLG, some progress, and some failures. One of the most evident successes is the settlement of the military lands issues. The HKSAR will recover valuable Hong Kong land, some of which had previously been used as a naval facility in exchange for building the Chinese Navy a new facility at Stonecutters Island.

Perhaps the most notable failure is the JLG’s efforts to localize laws. Many
laws in Hong Kong are linked to British laws, international treaties, or bilateral treaties and need to be changed prior to 1997. The JLG has identified about 600 such ordinances. In the period between the publication of the Basic Law, in 1990, and the end of 1993, only about ten percent of those laws requiring changes had been dealt with (*South China Morning Post*, October 17, 1993). Other failures have included the airport negotiations, which although at varying times have appeared to be successful, have been a long drawn out process which will ultimately delay, by about a year, the opening of the new airport.

**h. Exchange of Memoranda**

At the time the Joint Declaration was negotiated, the British and Chinese exchanged memoranda on travel documents. These memoranda are technically not part of the Joint Declaration and under international law are not part of the treaty. At the present time, many Hong Kong citizens travel under British Dependent Territory (BDT) passports and enjoy privileges from doing so. While these privileges do not include the right of abode in the United Kingdom, they do include the right to assistance from the British consulate in foreign countries. Following the changeover in 1997, these citizens of Hong Kong will no longer be British Dependent Territory citizens. The British Memorandum provides that citizens of Hong Kong possessing a BDT passport prior to July 1, 1997 can continue to use, and renew, such passports after that date and continue "to receive, upon request, British consular services and protection when in third countries. Hong Kong citizens possessing BDT passports will not have any right to request British protection in China or Hong Kong after June 30, 1997. The Chinese Memorandum
states that under the Nationality Laws of the People’s Republic, "all Hong Kong compatriots, whether they are holders of BDT citizen passports or not, are Chinese nationals. However, holders of BDT passports will be allowed to travel to states and other regions using these passports." As of the end of August 1994, of the eligible cohorts which have been processed, those born between the years 1957 and 1971, more than 78 percent of these eligible individuals have applied for a BN(O) passport -- as they are now called (Shing Pao, September 1, 1994).

An important question is whether the BN(O) passports will be accepted by third party states following 1997. International law suggests that they will not. One principle of international law is that every individual possess a nationality, that is no one becomes stateless; another is that individuals have only one nationality.13 Article 5 of the Hague Convention provides that "[w]ithin a foreign state, a person having more than one nationality shall be treated as if he had only one". Which one depends on either "the nationality of the country in which (s)he is habitually or principally resident, or the nationality of the country with which in the circumstances (s)he appears to be in fact most closely connected."14 A Hong Kong resident travelling on a BN(O) passport would be, in most cases, "habitually or principally a resident" of the SAR and thus, would be treated as if (s)he was a resident of China. Clearly, with a right of abode in Hong Kong, China and no right of abode in the United Kingdom, the individual would have a burden showing that (s)he was more closely connected with the United Kingdom than China. As such,

13 See Article 15 of the Universal Declaration of Human Rights, December, 1948 and the Hague Convention of 1930, Articles 3-6.

14 This section draws principally from Frank Ching, "One Country, Two Nationalities?" in McGurn (1988).
third party states are under no obligation, under international law, to recognize a Hong Kong resident’s claim to be treated as a British subject or to allow any diplomatic intervention by the United Kingdom to protect the interests of a Hong Kong resident in a third country.\textsuperscript{15}

The memoranda do not address either the rights of the wives and widows of ex-servicemen now living in Hong Kong (estimated to be about 52 people in 1993) or those of the ethnic minorities (about 7000 people, the majority originally from India). Following 1997, the ethnic minorities will continue to have a right of abode in Hong Kong, but they will not be citizens of either the United Kingdom or China. Moreover, since children born after June 30, 1997 will not be able to obtain a BN(O) passport, they will either be stateless or be forced to make application to a receptive state (perhaps China) for citizenship.

IV. Implementation of the Joint Declaration

It is meaningful to divide the period beginning with the signing of the Joint Declaration and ending June 30, 1997, into three periods: the honeymoon period from 1985 until 1989; the post-Tiananmen Square period from 1989 until 1994; and the "runaway" train period from 1994 through 1997.

a. The Honeymoon Period:

From the time the Joint Declaration was signed until Tiananmen Square, the British and Chinese were publicly moving in tandem toward 1997. In an series of annual statements in \textit{Hong Kong}, the British presented their public position on

progress toward 1997. In *Hong Kong 1987*, surveying events in 1985 and 1986, the British position was:

Following the ratification of the Joint Declaration, steps were immediately taken by the British and Chinese governments to implement its provisions, the object being that the transition of present day Hong Kong to a Special Administrative Region of China should be smooth and coordinated, causing as little disruption as possible to the social, business, and administrative environment in Hong Kong. The most important steps taken were the formation of the Sino-British Land Commission and the Joint Liaison Group (p. 41).

The work of the Land Commission was described as "having made solid progress despite its short history" (p. 41), and the JLG was described as having made significant contributions towards implementation of the Joint Declaration. Its meetings are conducted in a friendly and co-operative atmosphere. A good working relationship has been established and mutual trust between the two sides is growing steadily. Positive results have been achieved in a number of areas of major importance for the future of Hong Kong (p. 42).

What was not revealed at the time was that at the second meeting of the JLG, in November 1985, the British agreed to hold-off on political reform in Hong Kong until the Basic Law was drafted by the Chinese so to permit a "convergence" between the British and Chinese views of Hong Kong's evolution. The goal of convergence was that for the British to introduce prior to 1997 only those reforms anticipated by the Basic Law to take effect post 1997. To the extent that the British policy converged with the future Chinese policy, the transition would be seamless. As Mark Roberti argues, during this "honeymoon period" the British, eager for progress and calm, secretly conceded control over the future direction and pace of democratic reform in Hong Kong to the Chinese in exchange for a promise of a smooth transition (Roberti 1994: 159). The 1987 report also suggested progress on travel documents, air service agreements, and localization
of laws.

_Hong Kong 1988_ boasts the "solid achievements" of the two sides (p. 41) and 1989 was described as another "fruitful year" with continued progress on air service agreements, localization of laws, travel documents, the Judiciary, international rights and obligations, among others (_Hong Kong 1989_: 49-52).

b. Post-Tiananmen Square: The events of June 4, 1989 had a dramatic effect on Hong Kong. The massacre gave rise to a new politicism in Hong Kong and local demands for greater democracy before 1997. These demands and the British response, put the Chinese and the British on a collision path as the British were now being pressured to abandon their policy of convergence.\(^{16}\)

c. The Runway Train: I characterize the final period as the "runaway train" as it starts with the decoupling of the through train. The British, in response to their stated "moral responsibility and duty to the people of Hong Kong" (_Roberti 1994_: 50 (quoting Margaret Thatcher)) and following Tiananmen Square, embarked on a process of increased democratization in Hong Kong, pursuing the Patten reforms.

The Chinese are now proceeding with plans for their own administration of Hong Kong. News reports are now appearing floating names for the first chief executive. Lo (1994) suggests that economic negotiations will continue over matters like the airport, concessions which straddle 1997, but most, if not all, substantive political matters will now have to await 1997. The orderly transfer of

\(^{16}\) See Roberti (1994).
power will occur without the cooperation of either party.

V. Conclusion

One of the stated goals of the Joint Declaration to the British was "to provide a secure future for all Hong Kong residents -- one in which they can feel confident and can continue to live and prosper" (Walden 1989: 46 (quoting Lord Glenarthur, Parliamentary Under-Secretary for Hong Kong Affairs, addressing the House of Lords, January 20, 1986)). The Joint Declaration, while effectively changing the sovereign, could not, given the significant differences between the policies of the two sovereigns, possibly provide the environment in which the residents of Hong Kong could feel confident. The surprising thing, a credit to the resourcefulness of the people, is that Hong Kong has prospered during this period. With the first part of the transition coming to a close in less than 900 days, political disagreements between the parties will escalate in frequency, but not importance as the Chinese have already fully realized that the British are effectively "lame ducks" for the remainder of their tenure. The second period of transition begins on July 1, 1997 and is the subject of the rest of this project.
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