

# CONSTITUTIONALISM IN HONG KONG: POLITICS VERSUS ECONOMICS

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## 1. INTRODUCTION

The substantive content of China's Hong Kong policy reveals stark changes over time between the mid-1980s and the 1990s. In 1984, China and Britain signed the Sino-British Joint Declaration for the return of Hong Kong to China.<sup>1</sup> The Joint Declaration, covering a period of fifty years after 1997, provides for Hong Kong to become a capitalist Special Administrative Region ("S.A.R.") in China. Under this agreement, there is to be "one country, two systems" with "Hong Kong people ruling Hong Kong" and Hong Kong having a "high degree of autonomy." Written in the early days of China's opening up to the outside world, this agreement articulates a pragmatic policy that aims to protect Hong Kong from interference from the mainland, and provides a policy of democratization, the rule of law, the common law, and human rights. Nearly a decade later, when the euphoria over China's opening-up had diminished and the tragedy of Tiananmen had passed, China's statements on Hong Kong became less magnanimous. In the 1990s, China has been more likely to fret that Hong Kong not be made a "base of subversion." In this more tense atmosphere, China has begun to advocate an economic, rather than a political, Hong Kong. The idea of Hong Kong's people ruling Hong Kong has begun to mean China's hand-picked business elite ruling Hong Kong.

This Article offers a critique of these two competing para-

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<sup>1</sup> See Joint Declaration on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 1985 Gr. Brit. T.S. No. 26 (Cmd. 9543) [hereinafter Joint Declaration].

digns for Hong Kong's future, and assesses what they may mean in practical and contextual terms. The Article first offers an account of what the Sino-British Joint Declaration requires and what many in Hong Kong insist upon: a politically and economically free Hong Kong. The Article then assesses the alternative "economic Hong Kong" policy and its implications. It concludes with a plea to restore the Joint Declaration's vision and its implications for Hong Kong. The Article will focus on Hong Kong's evolving constitutive process on a conceptual level, rather than on the level of political dynamics.<sup>2</sup>

This Article's constitutional economy assessment does not aim to take Asian neo-authoritarian economic development strategies as a serious option for present-day Hong Kong, but rather aims to point out their inapplicability and the likely detrimental effects of attaching baseless authoritarianism to Hong Kong's continued economic strategy. The economic developmental model is wrong for Hong Kong because (1) Hong Kong's success was not built on this model and there is no credible reason to change course, and (2) other developed Asian countries have largely abandoned this model, instead embracing democratization and liberal reform. At this critical juncture in Hong Kong's history, there is a real danger that Asian values and developmental rhetoric will be used to mask policies that are totally inimical to Hong Kong's interest.<sup>3</sup>

## 2. THE PROMISE OF A LIBERAL CONSTITUTIONAL PARADIGM

### 2.1. *An Overview of the Theoretical Underpinnings*

This Section will highlight the liberal democratic paradigm of the Hong Kong promise. In evaluating the promises made in the Joint Declaration and the Basic Law,<sup>4</sup> this Section employs as the

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<sup>2</sup> For a recent article that discusses the evolving politics of constitutionalism in Hong Kong, see Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301 (1996). This article affords a more elaborate factual background for the present article.

<sup>3</sup> This Article will not take seriously any alleged danger that six million unarmed Hong Kong people could overthrow the mainland government, though the merits of Hong Kong policies and practices should be considered where appropriate on the mainland.

<sup>4</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Apr. 4, 1990 (P.R.C.), translated in 29 I.L.M. 1520 (1990) [hereinafter Basic Law].

basis for comparison the notion of a liberal democratic constitution. In simple terms, this Section emphasizes the three key ingredients of such a system: (1) democratic elections with open multi-party contestation; (2) liberal human rights, including freedom of expression; and (3) the rule of law, notably judicial review of legislation under a constitution or basic law.<sup>5</sup> Moreover, these ingredients should be looked at in terms of a constructive understanding of what constitutional democracy does. The vision here is not merely one of constitutional constraint, but one of constructing a dynamic venue for contestation. Viewed in this way, constitutionalism not only limits government, but also provides a venue for engendering discourse about basic political commitments and values.<sup>6</sup>

## 2.2. *The Sino-British Joint Declaration*

The Joint Declaration largely conforms to the liberal constitutional paradigm, requiring a degree of democratization, as well as liberal human rights and the rule of law.<sup>7</sup> The relevant provisions relating to democracy require the legislature to be “constituted by elections,” but allow the future Chief Executive to be chosen by “elections or through consultations held locally.”<sup>8</sup> The idea that the Chief Executive can be chosen by elections or consultations reflects the key respect in which the Joint Declaration, on its face, falls short of the liberal constitutional ideal. Otherwise, the provisions for democratization in the Joint Declaration call for a new development in Hong Kong, as Hong

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<sup>5</sup> See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 223 (1989).

<sup>6</sup> See Michael C. Davis, *Democracy, Rights and Relativism* 13-14 (Dec. 13, 1996) (unpublished manuscript, University of Hong Kong Conference on Trends in Contemporary Constitutional Law, on file with author).

<sup>7</sup> See Joint Declaration, *supra* note 1, para. 3(3), (5) & annex I §§ I-III, XIII.

<sup>8</sup> *Id.* para. 3(4) & annex I § II. One school of thought posits that China was resistant to democratization, even favoring consultation for choosing the legislature, and that therefore meaningful democratization was not intended in the Joint Declaration. See Mark Roberti, *The Betrayal of a Democratic Dream*, S. CHINA MORNING POST, Jan. 26, 1997, at 12. I contest this view. There is little doubt that China is not predisposed toward democratization. But the fact that this issue was directly discussed and that China opted to embrace election of the legislature tends to verify that such limited democratization was knowingly agreed upon and is therefore required by the Joint Declaration. This was a wise and conscious decision.

Kong in 1984 was not significantly democratic.<sup>9</sup> Moving from no elections in 1984 to full elections for the legislature in 1997 made changes inevitable. That the agreement was reached in the face of public demands and various local official proposals calling for democratization left little doubt that Hong Kong would need to take up democratic reform to prepare for its future.<sup>10</sup>

There is little ambiguity as to the appropriateness of the liberal constitutional paradigm when it comes to human rights and the rule of law. The Joint Declaration makes clear that there is to be, as the supreme law of Hong Kong, a written Basic Law. The Joint Declaration and Annex I are stipulated into its content.<sup>11</sup> This content includes the formal guarantee of a long list of liberal rights, nearly half of which relate to freedom of expression in one form or another. The latter aspect suggests that it was contemplated that Hong Kong's vigorous tradition of press and associational freedom is to be maintained. There is actually to be an enhancement of Hong Kong's human rights guarantees, as there had previously been no written legislative or constitutional guarantee of basic human rights. Convergence with this anticipated written rights regime was achieved early in 1991 with the passage of the Bill of Rights Ordinance<sup>12</sup> and the amendments to the Letters Patent to incorporate the International Covenant on Civil and Political Rights ("ICCPR").<sup>13</sup> The Joint Declaration also explicitly assures that socialism will not be practiced and that the capitalist system and way of life will remain unchanged for fifty years.<sup>14</sup>

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<sup>9</sup> The exception to this was a system which allowed direct election with universal suffrage (with some seats filled by appointment) to District Boards, which had been created about three years earlier, but these bodies were strictly advisory. See *The Districts Look for New Direction*, S. CHINA MORNING POST, Nov. 10, 1996, at 13.

<sup>10</sup> The Hong Kong Government issued both a Green Paper and a White Paper on Representative Government in 1984. See Hong Kong Government, *The Further Development of Representative Government in Hong Kong* (Green Paper, July 1984); Hong Kong Government, *The Further Development of Representative Government in Hong Kong* (White Paper, Nov. 1984).

<sup>11</sup> See Joint Declaration, *supra* note 1, para. 3(12).

<sup>12</sup> Hong Kong Bill of Rights Ordinance, Ordinance No. 59 (1991).

<sup>13</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 (1967) [hereinafter ICCPR]. The Letters Patent and Royal Instructions, issued by the Queen in the United Kingdom, constitute the current written constitution of colonial Hong Kong.

<sup>14</sup> See Joint Declaration, *supra* note 1, annex I § I.

The Joint Declaration also requires the rule of law, including constitutional judicial review. Not only is the Basic Law to be supreme, but the existing common law system is to be maintained. The courts are to be independent and final, and Hong Kong's people are guaranteed the right to challenge the acts of the executive in the courts.<sup>15</sup> Furthermore, the Joint Declaration expressly provides that the laws enacted by the future legislature are required to be submitted to the Standing Committee of the National People's Congress ("NPC") "for the record." There is no mention of NPC review, probably because the agreement envisioned this power to be within the scope of the local courts. The notions of independence and finality appear not to permit the local courts to refer matters out for review. Finally, the requirement that the ICCPR continue to apply signifies a strong commitment to legality and the rule of law.

Overall, it is difficult to make any sense of the Joint Declaration, except as a treaty providing for a liberal constitutional system in Hong Kong. When the Joint Declaration was signed, the people of Hong Kong, many of whom had escaped communism in China, were seriously concerned about the prospects of communist rule. Their continued confidence in the future could be maintained with nothing less than the strongest assurances. Chinese officials understood this when they offered the Joint Declaration as an inducement to "put their hearts at ease." The internationalization of this guarantee, through an international treaty, was a measure of the earnestness of China's commitment. In this regard, extensive provisions allowing Hong Kong to conduct its own relations in the economic, social, and cultural spheres enhanced Hong Kong's autonomous self-rule.<sup>16</sup> In making these assurances, Chinese officials openly acknowledged the general anxiety in Hong Kong. Official awareness was aided by China's own political trauma on the heels of the Cultural Revolution. The people of Hong Kong awaited the expected execution of these guarantees in the Basic Law.

### 2.3. *The Basic Law*

Early on in the Basic Law drafting process China took rather

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<sup>15</sup> See *id.* para. 3(3) & annex I §§ I-III, and VIII.

<sup>16</sup> See *id.* para. 3(9) & annex I §§ VI-XI.

seriously the need to reassure the people of Hong Kong. The engaging quality of this process, involving a Consultative Committee of 180 members, all from Hong Kong, and a Drafting Committee of 59 members from Hong Kong (23 members) and China (36 members), suggests this much.<sup>17</sup> The former hard-line communist regime's selection of such a large contingent of capitalists, as well as lawyers and former activists, for these committees reinforces this impression. This was to be the longest Basic Law drafting processes in the annals of constitution-making, taking some six years. The Joint Declaration, which was incorporated into the Basic Law, represents a substantial liberal democratic upstream constraint.<sup>18</sup> The drafting process became a rear-guard action by a few liberal-minded drafters (notably Martin Lee and Szeto Wah) on the Drafting Committee to restrain any erosion of these upstream commitments contained in the Joint Declaration.

Judging the final Basic Law with respect to democracy, there is some success and some failure. Beginning in the mid-1980s, the Hong Kong democracy movement, led by Mr. Lee and Mr. Szeto Wah, pushed for full democracy both under British rule and with respect to the then ongoing Basic Law drafting process.<sup>19</sup> As discussed below, this resulted in some democratic reform allowing for functional electoral constituencies in 1988 and eighteen and twenty directly elected seats, respectively, in 1991 and 1995, as well as complex formulas for greater democracy under a 1992 democracy plan.<sup>20</sup> During the Basic Law process, China resisted

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<sup>17</sup> See Frank Ching, *Toward Colonial Sunset: The Wilson Regime, 1987-1992*, in *PRECARIOUS BALANCE: HONG KONG BETWEEN CHINA AND BRITAIN, 1842-1992*, 173 (Ming K. Chan ed., 1994) [hereinafter *PRECARIOUS BALANCE*].

<sup>18</sup> See Joint Declaration, *supra* note 1, para. 3(12). In his recent article on constitution-making, Jon Elster uses the notions of "upstream" and "downstream" constraints to refer to prior and subsequent limitations imposed on the constitution drafting body. See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364 (1995). I must thank Victoria Hui for drawing my attention to the comparative length of this drafting and pre-implementation process, the time allotted to drafting and preparations for implementation totalling a dozen years.

<sup>19</sup> See Ching, *supra* note 17, at 173; Ming Sing, *The Democracy Movement in Hong Kong, 1987-1990* (1993) (Ph.D. dissertation, Oxford University, Nuffield College).

<sup>20</sup> In 1988 the British Hong Kong Government held an election allowing for 26 indirectly elected seats out of 57 seats in the Legislative Council. See *PRECARIOUS BALANCE*, *supra* note 17, at 208 (providing a chronology of major

democratic development, but ultimately, under a last minute deal struck with the British in 1990, allowed for the graduated system of democratization now contained in the Basic Law.<sup>21</sup> The erosion here is substantial, as this system (twenty directly elected seats anticipated for 1997 and twenty-four for 1999) falls far short of the notion of the legislature being constituted by elections, as specified in the Joint Declaration. As discussed below, the electoral provisions were finalized after the Tiananmen tragedy, when China's resistance to democracy was at its peak and the British policy of accommodation was still in place.

The Basic Law's human rights guarantees in Chapter III appear reasonably adequate on their face. All of the rights listed in the Joint Declaration are included, as is a provision requiring implementation of the international human rights covenants. An earlier, much broader restrictions clause, in what is now Article 39, raised concerns that rights would be severely limited in the name of some vaguely defined public interest. However, this language was substantially improved by the final draft in early 1989. The restrictions clause now appears to say that any restrictions on rights must not violate the specified international

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events in the history of Hong Kong). Eighteen directly elected seats were allowed in 1991, of which pro-democracy candidates won 16. *See id.* at 212. For the 1995 Legislative Council elections, 20 seats were allotted for direct election, with 10 for a broad-based electoral committee and 30 from functional constituencies, of which 10 were broad-based under Governor Chris Patten's 1992 electoral proposal discussed below. *See* Governor of Hong Kong Christopher Patten, *Our Next Five Years: The Agenda for Hong Kong*, Address at the Opening of the 1992-93 Session of the Legislative Council (Oct. 7, 1992) (transcript available at the Chinese University of Hong Kong). As discussed below, a dispute arose when China objected to the democratizing character of the Patten proposal, a proposal in which he sought to conform (and seemingly did conform) to an electoral agreement with China regarding the constituency makeup of the first S.A.R. Legislative Council, which had originally been anticipated to serve from 1995 through 1997 to 1999.

<sup>21</sup> The Basic Law provides for progressive democratization with respect to the Legislative Council as follows: 1999, 24 directly elected, 6 chosen by an Election Committee, and 30 by functional constituencies; 2003, 30 by direct election and 30 by functional constituencies. *See* Basic Law, *supra* note 4, annexes I-II. Throughout this period the Chief Executive is to be chosen by an Election Committee, whose 800 members are chosen largely by functional sectors. *See id.* annex I. The Basic Law declares the ultimate goal to be full universal suffrage. *See id.* arts. 45, 68. In this respect the Basic Law allows for amendment of the electoral structure in 2007 if endorsed by two-thirds of the Legislative Council and the Chief Executive and approved by the NPC Standing Committee. *See id.* annexes I-II.

covenants, thereby incorporating them by reference. The largest substantive threat to rights is embodied in two provisions in Chapter II added or enhanced after Tiananmen: The first provides an opportunity for the NPC Standing Committee, in case it judges that there is "turmoil" in the region, to declare the application of the "relevant" national laws;<sup>22</sup> the second requires the local S.A.R. government to enact laws to prevent acts of "treason, secession, sedition, subversion . . . or theft of state secrets" and to prevent foreign political organizations from operating in the region or having ties with local political organizations.<sup>23</sup>

As is generally the case with rights guarantees, their ultimate force depends on enforcement in the courts. The question of constitutional judicial review is therefore of key importance. In this regard, the degree of erosion of the Joint Declaration's commitment is considerable, though the Basic Law should be interpreted as granting substantial power of constitutional judicial review to the local courts. While Article 158 vests the power of interpreting the Basic Law in the Standing Committee of the NPC, it also authorizes the local courts to interpret the Basic Law "on their own, in adjudicating cases" for issues that fall "within the limits of the autonomy of the Region."<sup>24</sup> The courts are to refer "affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region" to the Standing Committee of the NPC, which is in turn to be advised by a Committee for the Basic Law.<sup>25</sup> Article 17 provides that, when laws are enacted, the Standing Committee, after consulting the Committee for the Basic Law, if it considers any law to fail to conform with the Basic Law "regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the region," may invalidate them.<sup>26</sup> A certain symmetry implies that the courts should do the same if a law is

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<sup>22</sup> See *id.* art. 18.

<sup>23</sup> See *id.* art. 23.

<sup>24</sup> See *id.* art. 158.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.* art. 17.



challenged and is within the scope of autonomy.<sup>27</sup>

Having the Standing Committee interpret and review laws appears to violate the Joint Declaration's specific provisions requiring maintenance of the common law and specifying that laws be submitted to the Standing Committee "for the record." Having the courts refer matters to the Standing Committee for interpretation also violates the Joint Declaration's requirements of independence and finality. During the drafting phase, Chinese officials stated that the Standing Committee would rarely exercise powers of review, but is this promise of non-interference reliable? The courts of Hong Kong should understand that they have the power of constitutional judicial review under the Basic Law, and they should exercise that power. Any exceptions should be construed very narrowly.<sup>28</sup> Overall, the Basic Law allows for an interpretation that preserves human rights and the rule of law. But if the interpretation of the rights provisions themselves or of words like "turmoil," "subversion," and "political organizations" is left to mainland officials or their supporters in Hong Kong, there is reason for concern. It is therefore imperative that legislators, executive officials, and judges not be intimidated in carrying out their duties under the Basic Law.

Recognizing that the Basic Law was troubled by considerable ambiguity and cross-purposes in interpretation, in 1991 the Hong Kong British Government enacted a Bill of Rights and amended the current constitution, the Letters Patent, to incorporate the ICCPR. It is noteworthy that these reforms created considerable opportunity for the Hong Kong courts to gain experience with judicial review under a written bill of rights. If this jurisprudential experience is left in place and allowed to continue in the future, considerable hope exists for Hong Kong to live up to international human rights standards.<sup>29</sup> Basic Law provisions

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<sup>27</sup> Note further that Article 19 of the Basic Law restricts the courts' jurisdiction over acts of state. This may be a very broad exception or simply roughly parallel to the political question doctrine in the United States. Further concern arises out of the Standing Committee's power under Article 160 to review all laws upon the transfer of sovereignty.

<sup>28</sup> I propose that judges suggest opinions to the Standing Committee, thereby insuring the drafting integrity of legal opinions.

<sup>29</sup> See Michael C. Davis, *Adopting International Standards of Human Rights in Hong Kong*, in *HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL AND POLITICAL PERSPECTIVES* 168 (Michael C. Davis ed., 1995) [hereinafter *HUMAN RIGHTS AND CHINESE VALUES*].

respecting democratization, on the other hand, simply fail to meet the requirements of the Joint Declaration and should be amended accordingly. The struggle for Hong Kong is essentially taking place within the venue, sometimes a battlefield, constructed by these documents.

### 3. THE STRUGGLE FOR HONG KONG

#### 3.1. *The Struggle: An Overview*

Both the promises of the Sino-British Joint Declaration and the reality of present-day Hong Kong reveal the potential it has to be a vibrant emerging constitutional democracy, that is both politically and economically free. It is this freedom which is at stake in the fight for Hong Kong. This Section considers how the above-noted foundational requirements are reflected in the emerging reality. This emerging reality may be organized around three contextual stages: (1) Hong Kong before the 1991-92 reforms, (2) Hong Kong after such reforms, and (3) China's transition policies and practices. It must be kept in mind that the constitutional documents alone do not create a political transition. It is the combination of the above constitutive founding processes and actual practice that will comprise the post-1997 Hong Kong.

This Section focuses on those factual developments which bear directly on the constitutive process. The last of the three phases discussed in this Section, China's transition policies, will serve as a transition topic to the next Section, which introduces China's likely alternative paradigm, economic Hong Kong. If such a paradigm is taking shape, it reflects a considerable tension with the liberal democratic promises in the Sino-British Joint Declaration and Hong Kong's current state of development. After 1989, this tension began to appear in the substance of the numerous Sino-British disputes.<sup>30</sup>

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<sup>30</sup> The tragic developments surrounding the 1989 Democracy Movement in China had a tremendous impact on China's policy toward Hong Kong and on the Hong Kong people's anxiety over their future. These issues, as discussed in the companion article noted above, produced or strongly effected the institutional developments that took shape in 1991 and 1992. See Davis, *supra* note 2, at 307-11. These policy shifts and public anxieties likewise remain as a force on the eve of the transition.

### 3.2. *Hong Kong Prior to 1991*

Although China signed the Joint Declaration in 1984, agreeing that the people of Hong Kong would rule Hong Kong under a regime of democracy, human rights, and the rule of law, no constitutional guarantee of basic human rights was achieved until 1991. Prior to 1991, Hong Kong had a colonial authoritarian regime that languished between constitutive paradigms. Its constitutional personnel under the Letters Patent and Royal Instructions most significantly included an appointed British Governor, who on paper had largely unlimited powers as determined in London; appointed Legislative and Executive Councils, made up largely of select elites, especially business elites and high officials; a fairly autonomous career civil service; and an independent judiciary.<sup>31</sup> The constitutional order reflected a fairly simple colonial authoritarian structure, but one with substantial common law protection of rights, freedom, and the rule of law. On paper, however, such protection was not evident. There was no formal bill of rights, nor any other written constitutional guarantees of rights (this despite the fact that the United Kingdom had acceded to the ICCPR on behalf of Hong Kong). Constitutional judicial review was conceptually allowed, given the local subordination of laws to acts of the British Parliament and to the constitutional documents, but had not been significantly practiced in the absence of a formal bill of rights. During most of the years of colonial rule, the system was highly discriminatory in practice, a preserve of British privilege.<sup>32</sup> In addition, many of the laws on secrecy, corruption, emergencies, association, and matters of security afforded draconian powers, though such powers were rarely exercised to the full extent.<sup>33</sup>

Nevertheless, the common law tradition practiced in Hong

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<sup>31</sup> There were some elected members of the Legislative Council from so-called functional constituencies and local boards in 1988, but this ingredient was essentially elite-based as well, since most of the functional constituencies were business and professional groups. See generally NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 63-75 (3d ed. 1984).

<sup>32</sup> See Peter Wesley-Smith, *Anti-Chinese Legislation in Hong Kong*, in *PRECARIOUS BALANCE*, *supra* note 17, at 91.

<sup>33</sup> See MICHAEL C. DAVIS, *CONSTITUTIONAL CONFRONTATION IN HONG KONG, ISSUES AND IMPLICATIONS OF THE BASIC LAW* 90-113 (1990) [hereinafter *CONSTITUTIONAL CONFRONTATION*].

Kong came to provide a reliable level of legality and the rule of law. British common law practices also provided limited protection of many basic rights and allowed for a reasonably vigorous free press. In the post-war period, with slowly decreasing levels of official discrimination against the Chinese populace and increased public accountability, this regime began to take on other liberal components of openness and social equality. The government in recent decades was also known for a considerable degree of restraint. The kind of harsh authoritarian practices evident elsewhere in the region were less visible in Hong Kong. A free press and the rule of law have been matters of fundamental importance to Hong Kong's success.<sup>34</sup>

On the economic front, Hong Kong's early development model also seems to have been positioned between paradigms, conforming in some ways to the Asian capitalist development model and in other ways being distinct. Some argue that it was characterized by a *laissez-faire* approach with minimum government interference.<sup>35</sup> There is considerable truth in this, but it is an exaggeration to say that Hong Kong relied only on *laissez-faire* policies. Hong Kong, unlike Japan, Singapore, Taiwan, and South Korea, has not carried out a program of micro-incentives for business activities.<sup>36</sup> It has, however, maintained a policy of nurturing business through macro-incentives, such as government appointments to advisory bodies, and general support of structural and fiscal policies that are favorable to export-led growth. These policies have included a low tax policy, labor importation policies that assure a cheap labor force, labor regulation policies that discourage labor activism, minimalist laws on worker safety, huge housing and medical services subsidization that make low wages possible, minimum regulation of business in general, and minimum social welfare for the unemployed.<sup>37</sup> At the same time, the entrepreneurial initiative arose from the private sector and not the government. Success at economic development eventually led Hong Kong to shift to services and finance, while production

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<sup>34</sup> See generally Davis, *supra* note 29, at 168-84; STEPHEN CHIU, THE POLITICS OF LAISSEZ-FAIRE: HONG KONG'S STRATEGY OF INDUSTRIALIZATION IN HISTORICAL PERSPECTIVE 7 (1994).

<sup>35</sup> See, e.g., CHIU, *supra* note 34.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

shifted to Southern China, where similar policies on labor and social welfare further facilitated Hong Kong-controlled export-led growth.

### 3.3. *Post-1991 Hong Kong*

The first direct elections to the Legislative Council, the passage of the Bill of Rights Ordinance, and the amendments to the Letters Patent to incorporate the ICCPR, all in 1991, marked a dramatic change in Hong Kong's constitutional mix. The system of elite advisory colonial government and minimalist rights protection gave way to an emergent democracy and an entrenched bill of rights. As of the 1995 elections, all of the Legislative Council is elected, though only a third of these seats are gained by direct election through universal suffrage. Although functional constituencies for half of the seats insure substantial representation for conservative business interests, various grass-roots democratic forces hold half of the seats in the chamber.<sup>38</sup> As a further liberalization, the Hong Kong Bill of Rights Ordinance was passed in 1991, allowing for direct judicial enforcement of numerous rights; the language of this ordinance is taken largely verbatim from the ICCPR.<sup>39</sup> At the same time, the Letters Patent was amended to incorporate the ICCPR by reference, thereby establishing a full-blown system of constitutional judicial review under an entrenched Bill of Rights. The use of the ICCPR in both cases was aimed to match the requirements of both the Joint Declaration and the Basic Law, both of which require enforcement of the ICCPR.<sup>40</sup>

The political movement for an increased pace of democratization started in the mid-1980s with the push by democratic activists, led by Martin Lee and Szeto Wah, for direct elections in 1988.<sup>41</sup> As discussed earlier, the Sino-British Joint Declaration had presaged a need for Hong Kong to develop its own political

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<sup>38</sup> See *Jubilant Democrats Eye Legco*, S. CHINA MORNING POST, Mar. 7, 1995, at 1; *Democrats Dominate Legco*, S. CHINA MORNING POST, Sept. 19, 1995, at 1.

<sup>39</sup> See Hong Kong Bill of Rights Ordinance, Ordinance No. 59 (1991).

<sup>40</sup> See Davis, *supra* note 29, at 168-84.

<sup>41</sup> This movement was lead by the Joint Committee on the Promotion of Democratic Government, formed in 1986, which was the precursor of the United Democrats of Hong Kong (later the Democratic Party) that won most of the seats in the 1991 first direct election. See Sing, *supra* note 19.

institutions if Hong Kong was to have self-rule by 1997. Yet in the late 1980s, the British Hong Kong Government was dragging its heels over this issue as the British foreign policy team pursued a policy of appeasement with China and convergence with China's post-1997 plans, which emerged in the Basic Law then being drafted. After the tragedy on June 4, 1989, in Tiananmen Square, Britain and the British Hong Kong Government developed a greater sense of urgency, proposing both the first direct democratic elections to the Legislative Council for the 1991 elections and the enactment of the Bill of Rights.<sup>42</sup> At the same time China became more resistant, vociferously attacking proposed democratic reforms, the bill of rights proposal, a concurrently proposed plan to build a new airport, and the British Nationality Act.<sup>43</sup>

Under these conditions, on the eve of concluding the drafting of the final Basic Law, a Sino-British secret deal was struck allowing for eighteen directly elected seats in 1991, with a cap of twenty for 1997. The remaining seats in the sixty-seat legislature for the 1997 transition were to be made up of thirty from functional constituencies (ten new ones added to the existing twenty) and ten to be chosen by a election committee.<sup>44</sup> As China continued to drag its heels on the airport and other points of contention, the British changed their negotiating team, replacing Governor David Wilson with Chris Patten. A storm erupted in 1992 when Patten presented his plan for the 1995 elections, conforming to the 1997 requirements noted above but calling for the ten new functional constituencies to include the entire working population in the territory, and for the ten election committee seats to be based on the choices of directly

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<sup>42</sup> There was also a proposal for construction of a new airport and, in Britain, a British Nationality Act allowing full British passports for fifty thousand Hong Kong residents and their families. See *PRECARIOUS BALANCE*, *supra* note 17, at 209-14 (providing a chronology of the history of Hong Kong).

<sup>43</sup> The British Nationality Act allowed 50,000 Hong Kong heads-of-household to gain full British nationality without actually residing in Britain. See Michael C. Davis, *To Go or Not to Go*, *FAR E. ECON. REV.*, Apr. 18, 1991, at 20.

<sup>44</sup> See Basic Law, *supra* note 4, annex II; Chris Yeung et al., *Secret Deal on Pace of Reform*, *S. CHINA MORNING POST*, Feb. 15, 1990, at 1. Note that functional constituencies are a form of constituency developed initially by the British Hong Kong government for the 1988 election, whereby people from various functional sectors of the economy (for example lawyers, accountants, etc.) elect representatives to the Legislative Council.

elected district and regional boards.<sup>45</sup> After a diplomatic storm and seventeen rounds of negotiations, Britain went forward with its separate plans, as did China.<sup>46</sup> The electoral results of both the 1991 and the 1995 Legislative Council Elections, as well as of the District Board and Regional Council elections, heavily favored liberal democratic forces.<sup>47</sup> The climate of these developments has also favored higher levels of public welfare and regulatory protection, though these are still relatively low by the standards of developed economies.

The end result of the above developments is that on the eve of the transition, Hong Kong, with the exception of the appointed Governor, has key elements of a constitutional democracy: an elected (though not fully by direct election) legislature, an entrenched Bill of Rights with substantial press freedom, and a system of constitutional judicial review for rights enforcement. At the same time, due to the numerous developments, there is greater public awareness of political issues. A substantial civil society has developed, with greater capability for self-government. These social developments are also reflected in institutional and political changes, including, most prominently, more civic education in the schools, expanded levels of academic publication on local political and legal issues, dramatic expansion of tertiary education, the development of several political parties, the formation of several new civic and human rights groups, expansion of the arts and of artistic commentary on public affairs, more aggressive media coverage of public affairs, and increased translation of laws and public announcements into Chinese. At the same time, with respect to implementation of the Bill of Rights, concerns that judicial enforcement of rights would be at the expense of law and order were largely dispelled, as the courts took a very conservative approach to their role.<sup>48</sup> In the face of these

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<sup>45</sup> See *PRECARIOUS BALANCE*, *supra* note 17, at 210-14 (providing a chronology of the history of Hong Kong).

<sup>46</sup> See *REPRESENTATIVE GOVERNMENT IN HONG KONG* (1994) (presenting the British account of the negotiations); *UK Accused of Breaching Confidential Details*, *S. CHINA MORNING POST*, Mar. 1, 1994, at 12-13 (containing China's report on the breakdown of the negotiations).

<sup>47</sup> See *Jubilant Democrats Eye Legco*, *S. CHINA MORNING POST*, Mar. 7, 1995, at 1; *Democrats Dominate Legco*, *supra* note 38, at 1.

<sup>48</sup> A 1995 study of the 247 cases that raised the Bill of Rights, addressing the period from its enactment in June 1991 until December 1995, revealed the following: of the challenges, 73 were successful, 129 rejected the claim, 19

democratically spirited institutional developments, mainland Chinese policies on Hong Kong have come to reflect a degree of official anxiety over China's ability to control future developments.

### 3.4. *China's Transition Policies*

On the Chinese side, the transition began in the mid-1980s with the Basic Law drafting process. In the Joint Declaration, the notions of "one country, two systems," a "high degree of autonomy," and "Hong Kong people ruling Hong Kong" aimed to protect Hong Kong from being swamped by the mainland communist system. The people of Hong Kong were encouraged to "put their hearts at ease."<sup>49</sup> Though some cracks began to appear early on, this general attitude seemed to pervade the early Basic Law drafting process. Though early drafts revealed a mainland effort at containment, evidence shows that liberal minded drafters succeeded in pushing the drafting body to shore up several key guarantees, again with democracy being the most substantial exception.<sup>50</sup> This was the state of affairs up until the final Basic Law draft in February 1989. The provisions discussed above, ambiguously allowing for judicial review and rights protection under the international covenants, were already in place, while several conservative electoral models were under consideration.<sup>51</sup>

The events of mid-1989, when up to a million people marched on the streets of Hong Kong in support of the democracy movement in China, produced a fundamental shift in China's

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raised the issue but did not decide it, and 26 still had an unknown outcome; only 55 legal provisions were found to be inconsistent with the Bill of Rights and 43 of these were repealed, while 84 provisions were found consistent; 74% of all challenges were in criminal cases; after an initial flurry of challenges, there were about 50 per year. See Johannes Chan, *The Hong Kong Bill of Rights 1991-1995: A Statistical Overview*, in HONG KONG BILL OF RIGHTS: TWO YEARS BEFORE 1997, 7-8, 38-76 (Johannes Chan & George Edwards eds., 1995).

<sup>49</sup> See James T.H. Tang & Frank Ching, *The MacLehose-Youde Years: Balancing the "Three-Legged Stool," 1971-86*, in PRECARIOUS BALANCE, *supra* note 17, at 149, 155.

<sup>50</sup> See MARTIN LEE & SZETO WAH, *THE BASIC LAW, SOME BASIC FLAWS* (1988); BASIC LAW, BASIC QUESTIONS (William McGurn ed., 1988).

<sup>51</sup> See The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft, Feb. 1989), *reprinted in* CONSTITUTIONAL CONFRONTATION, *supra* note 33, at 173-215 app. II.



Hong Kong policy. It was at this point that China more clearly began to promote the idea of an economic, not political, Hong Kong. China's policy also appeared to shift from protecting Hong Kong from China's socialist system to protecting China from Hong Kong. In this process, the idea of "one country" gained prominence over "two systems." Hong Kong was not to be a "base of subversion," and Chinese leaders asserted that "the well water does not interfere with the river water."<sup>52</sup> When the post-June 4th, 1989, Basic Law drafting process, earlier suspended, was resumed, a conservative model on the pace of democratization was adopted.<sup>53</sup> This was partly the product of the last-minute secret deal with the British over the pace of democratization, both before and after 1997 (aiming at convergence).<sup>54</sup> The British policy at the time this deal was struck was largely one of appeasement,<sup>55</sup> a policy about which Britain would soon become disillusioned. After the Tiananmen tragedy, harsh provisions respecting subversion, mainland interference in public security, and foreign political involvement were added to the final Basic Law in April 1990.<sup>56</sup>

When Hong Kong passed its current Bill of Rights in 1991, and in 1992, Patten put forth his democratization proposals for the final years of British rule, the Chinese position hardened even further.<sup>57</sup> After seventeen rounds of negotiations over these electoral proposals, the notion of convergence was abandoned and both sides decided to go it alone in implementing their preferred policies.<sup>58</sup> As noted above, Patten's policies were actually carried

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<sup>52</sup> See *PRECARIOUS BALANCE*, *supra* note 17, at 208-210 (providing a chronology of the history of Hong Kong).

<sup>53</sup> See Basic Law, *supra* note 4, annexes I-II.

<sup>54</sup> See Yeung, *supra* note 44, at 1.

<sup>55</sup> The British foreign policy view, as articulated by its government's leading adviser at the time, Sir Percy Cradock, was that Britain must inevitably give in to China's demands. See Sir Percy Cradock, *Argument Does Not Hold Water*, S. CHINA MORNING POST, Sept. 30, 1996, at 27; Sir Percy Cradock, *A Time for Realism*, S. CHINA MORNING POST, Jan. 21, 1996, at 10.

<sup>56</sup> See Basic Law, *supra* note 4, arts. 18, 23, & annex III.

<sup>57</sup> See Hong Kong Bill of Rights Ordinance, Ordinance No. 59 (1991); see also REPRESENTATIVE GOVERNMENT IN HONG KONG (1994) (presenting the British account of the negotiations); *UK Accused of Breaching Confidential Details*, *supra* note 46, at 12-13 (containing China's report on the breakdown of the negotiations).

<sup>58</sup> See *id.* The NPC later formally abandoned convergence. See Chris Yeung & Linda Choy, *NPC Votes to End HK Political Structure*, S. CHINA

out in elections at various levels (again largely dominated by the democratic camp) in 1994 and 1995. China vowed to throw out the current elected legislature.<sup>59</sup> In late 1996, China carried out this vow, employing an appointed Selection Committee to select an appointed Provisional Legislature.<sup>60</sup> Though the legality of this body is in question, China has determined that it can pass legislation even before the handover.<sup>61</sup>

China's practices in this late transition period reveal a clear pattern of rewarding loyal supporters and excluding those who support democracy or otherwise challenge China's policies, which seem to be aimed at insuring Beijing's control over developments after 1997. When the 1993 negotiations over elections broke down, China set about constructing its so-called "second stove," including appointing various Hong Kong and district affairs advisers; setting up, in 1994, a Preliminary Working Committee ("PWC") as a vehicle for Chinese policy initiatives; and, as called for in the earlier NPC legislation enacted along with the Basic Law at the end of 1995, replacing the PWC with the Preparatory Committee ("PC"). In November 1996, the PC chose a 400-member Selection Committee, which, in December 1996, chose the future Chief Executive and a Provisional Legislature.<sup>62</sup> All of these committees and advisory bodies have been loaded with members of the business elite and pro-China supporters, to the

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MORNING POST, Sept. 4, 1994, at 1.

<sup>59</sup> See Yeung & Choy, *supra* note 58, at 1.

<sup>60</sup> See Clarence Tsui & Louis Won, 'Darkest Hour' for Democracy, S. CHINA MORNING POST, Dec. 22, 1996 (special section), at 1; *Incumbents and Legco Losers Win Selection Fight*, S. CHINA MORNING POST, Dec. 22, 1996, at 1 (highlighting that many of the appointees are people who lost the previous election); Martin Lee, *The Wrong Message from China*, S. CHINA MORNING POST, Jan. 13, 1997, at 19.

<sup>61</sup> See Chris Yeung, *Tung Vows to Work Towards NPC Decision*, S. CHINA MORNING POST, Dec. 20, 1996, at 4; *Handover Body Will Pass Laws*, S. CHINA MORNING POST, Jan. 26, 1997, at 4; Linda Choy & No Kwai-Yan, *Tung in Talks Pledge as Laws Voted Down*, S. CHINA MORNING POST, Feb. 2, 1997, at 1. It appears that the body could not be made legal by NPC action as it violates the Joint Declaration provision that the legislature be chosen by elections. See Lee, *supra* note 60, at 19.

<sup>62</sup> See Chris Yeung, *The Obligations of Office*, S. CHINA MORNING POST, Dec. 14, 1996, at 21; *Incumbents and Legco Losers Win Selection Fight*, *supra* note 60, at 1; Chris Yeung & Linda Choy, *Tung Leads the Way*, S. CHINA MORNING POST, Dec. 12, 1996, at 1.

exclusion of democrats.<sup>63</sup> The first S.A.R. members of the Executive Council are also from the so-called pro-China camp.<sup>64</sup> The pro-China leanings of the future Chief Executive, the Executive Council, and the Provisional Legislature will insure strong support for China's transition policies in the first S.A.R. government. The heavy representation of the business sectors is indicative of China's efforts to control politics and emphasize Hong Kong's economic role. Beyond the politics of this situation, it is important to emphasize that the appointed Provisional Legislature clearly fails to conform legally with either the Joint Declaration or the Basic Law.<sup>65</sup>

The other area where recent Chinese policy has been of concern has been the legal system. This includes most prominent-

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<sup>63</sup> While the advisory bodies were made up of local Hong Kong residents, the PWC and the PC were made up of both local and mainland members, in some respects mimicking the structure of the Basic Law consultative and drafting committees of the 1980s. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRITIQUE: REVIEW OF THE U.S. DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, 1993 392-93 (1994). The powerful PC has also been rather secretive, adhering to rules of confidentiality and collective responsibility regarding its proceedings. See Linda Choy & Fung Wai-Kong, *Race for Chief Executive Down to Eight Runners*, S. CHINA MORNING POST, Nov. 3, 1996, at 1, 4-5; Chris Yeung & No Kwai-Yan, *Rules to 'Avoid Confusion'*, S. CHINA MORNING POST, Jan. 28, 1996, at 1.

<sup>64</sup> The Chief Executive Designate has recently chosen the members for his first Executive Council, the body of advisors to the Chief Executive; again, appointees are made up of business elite and pro-China figures. See Chris Yeung, *Tung Reveals His Top Team*, S. CHINA MORNING POST, Jan. 26, 1997, at 1. In a concession to Hong Kong sensibilities, the Chief Executive Designate has allowed all of the existing policy secretaries in the civil service to continue in their existing positions. See Chris Yeung, *Tung opts for Continuity with Through-Train Team*, S. CHINA MORNING POST, Feb. 21, 1997, at 1-2. An added problem is that the PC has taken it upon itself to pass the first electoral laws for the first S.A.R.-elected legislature which will replace the Provisional Legislature. See No Kwai-Yan, *Preparatory Body Has Last Word on Voting*, S. CHINA MORNING POST, Feb. 24, 1997, at 6. It is expected that, in addition to the required functional constituencies, such electoral law will embody proportional representation and/or multi-seat districting so as to dilute the status of the Democratic Party in any future elections, reducing them to an opposition role. See Fung Wai-kong, *Pro-China Party Leader Calls for Proportional Representation*, S. CHINA MORNING POST, Feb. 17, 1997, at 1.

<sup>65</sup> The Bar Association has been particularly emphatic about this illegality. See *Barristers Ready to Defy Lu over Provisional Legco*, S. CHINA MORNING POST, Apr. 13, 1996, at 1. One of China's own appointees even voted against the provisional legislature. See Catherine Ng et al., *Final Verdict on Legco: China Retaliates After 'No' Vote on 'Black Day for Democracy'*, S. CHINA MORNING POST, Mar. 25, 1996, at 1.

ly the attack on the Hong Kong Bill of Rights and other rights protections, initially orchestrated through the PWC. The Chinese government threatened to set aside the Bill of Rights Ordinance when it was originally passed in 1991.<sup>66</sup> This idea was resurrected in late 1995 in the PWC in a more moderate form as a part of a process of reviewing Hong Kong's laws for conformity to the Basic Law. Rather than setting aside the entire Bill of Rights Ordinance, the PWC sought to emasculate it by recommending that the implementing provisions be stricken, arguing that they violated the Basic Law. At the same time, they recommended reversing human rights reforms in other legislation, and renewing six draconian colonial laws restricting freedom of expression, press, and assembly.<sup>67</sup> The Hong Kong Legislative Council and the Bar Association strongly defended the Bill of Rights and other law reforms from this onslaught.<sup>68</sup> The Preparatory Committee ("PC"), set up in 1996, largely adopted the PWC recommendations, voting to repeal parts or all of some twenty-five laws as violative of the Basic Law.<sup>69</sup> Essentially, they voted to set aside the democratic and human rights law reforms instituted in recent years. No convincing case has been made that these laws actually violate the Basic Law.

In addition to attacking the Bill of Rights, China also indicated that it would not carry out the reporting requirements under the ICCPR, though it appears bound to do so under the Joint

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<sup>66</sup> See Davis, *supra* note 29, at 175.

<sup>67</sup> See Connie Law & Chris Yeung, *PWC Asks China to Bury Bill of Rights*, S. CHINA MORNING POST, Oct. 18, 1995, at 1.

<sup>68</sup> The Legislative Council passed a condemning resolution by a substantial majority. See Chris Yeung & No Kwai-Yan, *Legco No to China Assault on Rights*, S. CHINA MORNING POST, Nov. 16, 1995, at 1; see also *The Hong Kong Bar Association's Views on the Status and Effect of the Bill of Rights Ordinance* (Cap. 383), reprinted in HONG KONG BILL OF RIGHTS: TWO YEARS BEFORE 1997, *supra* note 48, at 187.

<sup>69</sup> In addition to striking the operative provisions of the Bill of Rights Ordinance, the most prominent revisions are the striking of the existing electoral laws put through by Governor Chris Patten and the recently reformed Societies Ordinance and Public Order Ordinance. See Choy & Kwai-Yan, *supra* note 61, at 1. Instead of restoring the draconian colonial laws, the PC simply charged the Provisional Legislature with enacting new laws to replace offending sections. These PC recommendations were later formally endorsed by the Standing Committee of China's National People's Congress. See Chris Yeung, *NPC Approves by Overwhelming Majority Resolution to Abolish or Amend Territory's Legislation, China Ignores UK to Change Laws*, S. CHINA MORNING POST, Feb. 24, 1997, at 1.

Declaration.<sup>70</sup> A further cause for public human rights concern lurks in the proposition that the non-elected Provisional Legislature will be charged with enacting not only new versions of the aforementioned laws, but also new laws against subversion and sedition, the latter as required under Article 23 of the Basic Law.<sup>71</sup> Finally, the recent admonition from the Chief Executive designate, Mr. Tung Chee Hwa, that the people of Hong Kong should not think of rights, but of duties, does not bode well for the future of rights protection in Hong Kong.<sup>72</sup>

At the same time that the PWC and PC sought to undermine the Bill of Rights and other legislation by carrying out its own system of review for conformity to the Basic Law, leading Chinese officials took up a frontal attack on constitutional judicial review. They sought to highlight that then Chief Justice of Hong Kong, Sir Ti Liang Yang, had alleged in private conversation that the provisions allowing for judicial review under the Bill of Rights had undermined Hong Kong's legal system.<sup>73</sup> After his conversation was exposed, in November of 1995, the Chief Justice (later Chief Executive candidate) argued in a formal submission to the government that the Bill of Rights was a threat to Hong Kong's legal system, in that judges carrying out the judicial review function to overturn laws were allegedly performing a legislative function.<sup>74</sup> Both China's views and the views of the former Chief Justice and his colleagues on the Court of Appeals have

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<sup>70</sup> See David Wallen, *UN Ponders Options on Rights*, S. CHINA MORNING POST, Oct. 23, 1996, at 1.

<sup>71</sup> See Martin Lee, *A Threat to Our Rights*, S. CHINA MORNING POST, Nov. 6, 1996, at 17.

<sup>72</sup> See Chris Yeung, *Tung in a Legal Tangle*, S. CHINA MORNING POST, Jan. 25, 1997, at 17.

<sup>73</sup> See No Kwai-Yan, *PWC Doubts Remain*, S. CHINA MORNING POST, Oct. 28, 1995, at 2; Chris Yeung, *The War over Sir Ti Liang's Words*, S. CHINA MORNING POST, Nov. 18, 1995, at 17.

<sup>74</sup> Yang actually had leaked his views to Chinese officials over dinner, and when they reported this indiscretion, a scandal ensued in which Yang ultimately raised further concerns about judicial independence by filing a report on his views with the executive branch of the Hong Kong government. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRITIQUE: REVIEW OF THE U.S. DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, 1995 (1996) (report on Hong Kong); *The Statement*, S. CHINA MORNING POST, Nov. 18, 1995, at 6; see also May Sin-Mi Hon, *Sir Ti Liang Calls for 'Truth' over Rights Bill*, S. CHINA MORNING POST, Oct. 14, 1996, at 4.

caused concern over the future of human rights and constitutional judicial review.<sup>75</sup> The further fact that by virtue of a Sino-British deal, the new Court of Final Appeal will not be established until the date of the handover (with S.A.R. appointees being reported to the Standing Committee of the NPC "for the record") raises considerable concern over the future of the rule of law.<sup>76</sup>

The above developments reflect a hardening of China's attempts to control Hong Kong at the very time when Hong Kong is undergoing a rather successful process of democratization. The notion of a politically inert and economically dynamic Hong Kong also began to take shape in China's policy pronouncements. In May 1994, China's chief policy spokesman on Hong Kong and Director of the Hong Kong and Macao Affairs Office, Mr. Lu Ping, warned against attempts to turn Hong Kong into a "political city."<sup>77</sup> In 1995, early drafts of China's Ninth Five-Year Plan (1996-2000) spoke of an independent economic partnership, while referring to the political relationship as that "between a parent and a child."<sup>78</sup> By 1996, Chinese officials were instructing Hong Kong on the limits of its free speech and press, at various times reportedly indicating taboo expression to include memorial marches to commemorate the tragic loss of life at Tiananmen Square on June 4, 1989;<sup>79</sup> any personal attacks on Chinese leaders

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<sup>75</sup> Other members of the court have expressed similar reservations, raising considerable concern over whether the court will take its duties to defend human rights seriously after 1997. The Chair of the Local Judges Association, a member of the Court of Appeals, issued a statement attacking the Hong Kong Bill of Rights Ordinance on Nov. 16, 1995. See Benjamin Liu, *The Past, the Present, and the Future of the Hong Kong Bill of Rights Ordinance*, in HONG KONG BILL OF RIGHTS: TWO YEARS BEFORE 1997, *supra* note 48, at 183; see also Connie Law, *Top Judge Condemns Rights Bill*, S. CHINA MORNING POST, Nov. 14, 1995, at 2; Margaret Ng, *These Men Must Guard Our Liberty*, S. CHINA MORNING POST, May 31, 1996, at 21.

<sup>76</sup> This concern over judicial appointments has been heightened by the failure of Chinese officials to agree to the continued service of members of the body charged with the selection of judges, the Judicial Service Commission. See Gren Manuel, *Through Train Hope for Judicial Body Fades*, S. CHINA MORNING POST, Feb. 1, 1997, at 1. If this problem persists, the hope for a strong human rights commitment by the highest court will fade.

<sup>77</sup> See Linda Choy, *Lu Warns Against Meddling*, S. CHINA MORNING POST, May 7, 1994, at 1.

<sup>78</sup> See Willy Wo-Lap Lam, *Economy to Remain Separate After '97*, S. CHINA MORNING POST, Sept. 8, 1995, at 1.

<sup>79</sup> See Chris Yeung, *Britain to Take Action on Qian's June 4 Ban*, S. CHINA MORNING POST, Oct. 18, 1996, at 1 (stating that China's Vice-Premier, Qian

and any "rumors and lies";<sup>80</sup> demonstrations against the Chinese government; and articles in the press advocating Taiwan independence, with little clear indication about when comment becomes advocacy.<sup>81</sup> China's Chief Executive designate, Mr. Tung Chee Hwa, has added vision to this policy by warning against "international forces" using Hong Kong in a campaign to isolate China.<sup>82</sup> In his political platform, he emphasizes looking to consensus rather than confrontation, the importance of Chinese values, and that people should "talk more about our duties rather than our rights."<sup>83</sup>

A disturbing aspect of China's emerging position is official ambivalence about the importance of the rule of law and human rights in contributing to Hong Kong's success. While the 1984 Joint Declaration, issued at a time when China was initiating its own reforms, showed a healthy appreciation for Hong Kong's success formula, recent statements and propaganda suggest a revision of this view. China's President, Jiang Zemin, is reported to have disagreed that Hong Kong's success be attributed, either wholly or in part, to its independent judiciary and rule of law; he stressed that it was creativity and China that created Hong

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Qichen, announced the prohibition of these marches).

<sup>80</sup> See Chris Yeung, *Contradictions Cast a Shadow*, S. CHINA MORNING POST, Oct. 19, 1996, at 19.

<sup>81</sup> The latter points were announced in Japan by the Director of China's Hong Kong and Macao Affairs Office, Lu Ping. See Chris Yeung, *Anger as Qian Bans June 4 Protests*, S. CHINA MORNING POST, Oct. 17, 1996, at 1; Chris Yeung, *Anti-Beijing Protests to Be Banned, Says Lu Ping*, S. CHINA MORNING POST, June 5, 1996, at 1; Chris Yeung, *Lu Clarifies Position on Press Freedom*, S. CHINA MORNING POST, June 6, 1996, at 1; Chris Yeung, *Lu Sets Out Ground-rules for Press Freedom After 1996*, S. CHINA MORNING POST, June 1, 1996, at 1.

<sup>82</sup> See Chris Yeung, *Anti-China 'Forces' Out to Use HK, Warns Tung*, S. CHINA MORNING POST, Oct. 28, 1996, at 1; Chris Yeung, *Tung on Brink of Victory*, S. CHINA MORNING POST, Nov. 16, 1996, at 1. Tung has further attacked the Democrat's leader for "badmouthing" Hong Kong overseas. See *Tung Blasts 'Bad Mouth' Lee*, S. CHINA MORNING POST, Feb. 14, 1997, at 1.

<sup>83</sup> See Fung Wai-Kong & Linda Chory, *Tung Stresses Consensus, Not Confrontation*, S. CHINA MORNING POST, Oct. 23, 1996, at 1; Chris Yeung, *Tung Wants Focus on Daily Life, Not Politics*, S. CHINA MORNING POST, Oct. 28, 1996, at 4; Chris Yeung & Linda Choy, *Tung Manifesto Preaches Chinese Cultural Virtues*, S. CHINA MORNING POST, Oct. 23, 1996, at 4; see also *Hong Kong's Freedoms Imperiled*, N.Y. TIMES, Nov. 21, 1996, at A28.

Kong.<sup>84</sup> The barrage of mainland media propaganda preparing the nation for China's recovery of Hong Kong also paints a grim picture of British rule.<sup>85</sup> While the communist regime has always spared no praise for colonialism, the kind of grudging respect for British Hong Kong's success evident in the Joint Declaration is now, at the critical transition moment, little in evidence. These policy perspectives and statements raise questions as to what kind of structural vision Chinese political leaders harbor for Hong Kong.

#### 4. THE NEO-AUTHORITARIAN ECONOMIC MODEL

##### 4.1. *Contrasting Paradigms*

It is apparent that there are contrasting paradigms in the present Chinese policy calling for an economic Hong Kong and the liberal vision evident in the Joint Declaration and current Hong Kong practice. It is worthwhile to speculate as to the specific conceptual content of China's current paradigm, in order to evaluate its soundness in terms of overriding goals. China appears to be promoting in Hong Kong a form of economic liberalism with quasi-authoritarian political control, which is a vision quite different from that promised in the Joint Declaration and demanded by democratic forces in Hong Kong.

No particular plan has been put forward as to what an economic Hong Kong means. There are only indications, evident in the above noted events and statements, that there will be less democracy, less emphasis on rights, and more emphasis on economic success. These indications were seen initially in China's reaction to the developments in Hong Kong surrounding the 1989 democracy movement in China, and in China's reaction to Patten's 1992 political proposals. The image emerging from the developments in China's Hong Kong policy is of a kind of "guided democracy" or "neo-authoritarianism" with less tolerance

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<sup>84</sup> See Chris Yeung, *Jiang Gives No Credit to Free Press and Law*, S. CHINA MORNING POST, Sept. 7, 1996, at 6.

<sup>85</sup> See Jasper Becker, *Living Under a Colonial Cloud*, S. CHINA MORNING POST, Nov. 10, 1996 (Agenda), at 2. At the same time, contrary to its international obligations under the Joint Declaration, China has sought to emphasize that Hong Kong will be its internal affair totally. See Jasper Becker, *Don't Pressure Us, Christopher Told*, S. CHINA MORNING POST, Nov. 21, 1996, at 9.



for dissent and media criticism. Contextual factors signal the two likely components of this vision to include: (1) a values component evident in persistent Chinese arguments about Asian values and patriotism; and (2) an economic component evident in the above policy pronouncements, China's own single-track economic reform policies, and a generally favorable view of authoritarian Asia's economic development strategies. The Asian values argument and the Asian economic miracle developmental model, rather than being ends in themselves, are being advanced in an attempt to achieve legitimacy in a context where increasing control and appointed legislators are displacing recent openness and democratically elected legislators.<sup>86</sup> The subsections that follow briefly present the likely content of China's emerging model and its theoretical weaknesses.

#### 4.2. *Asian Values*

The claims regarding Asian values and human rights have been often discussed in official and academic circles in East Asia. This Section will only highlight and critique what these claims might mean in the present context.<sup>87</sup> In the Hong Kong context, the Asian values argument generally advances two concerns: (1) an essentially negative claim that the society lacks certain cultural prerequisites for democratization; and (2) a claim that existing "Asian values" represent a positive alternative to the values associated with Western liberal democracy. The first of these claims is usually advanced by political culture theorists. The second is more often part of an official polemic to resist forces for democratization.

The cultural prerequisites argument is now largely discredited in the Hong Kong case (and is therefore only briefly addressed here) because a substantial degree of democratization has already been achieved. Rooted in earlier arguments about republican government, this argument is most recently associated with a generation of scholars, beginning in the 1950s, who took up the

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<sup>86</sup> This problem of legitimacy is set to become even more complex if the promised elections are later introduced for the legislature but not for the Chief Executive. An appointed Chief Executive would then be confronted with an even greater need to legitimize his executive-led government in the face of direct legislative challenge.

<sup>87</sup> For a more expanded and general critique of the Asian values argument, see Davis, *Democracy, Rights and Relativism*, *supra* note 6.

task of identifying and measuring the political culture characteristics thought to be conducive to democratization.<sup>88</sup> While some of the early euphoria about the potential of this research project has worn out, empirical research on civic culture has produced valuable evidence charting social evolution in the context of democratization. Hong Kong has been the subject of similar empirical work.<sup>89</sup> The prerequisites argument has, however, suffered criticism due to its tautological character.<sup>90</sup> How could a society without democratic institutions possibly develop a democratic culture? But as democracy actually developed in many countries, attention within the field of culture inquiry shifted to the question of democratic consolidation and to the study of institutions as vehicles of change.<sup>91</sup> What seems apparent in the case of Hong Kong is that democratic institutions are largely in place, including the constitutional underpinnings for a free press and elections, political parties, substantial educational support, and electoral experience, as well as favorable economic factors. On this line of reasoning, any argument that the democratization genie needs to be put back in the bottle is not credible.

The second argument, advancing a positive Asian values claim favoring authoritarianism as an alternative, is equally lacking in credibility in the Hong Kong context. Essentially, the Asian values argument in relation to politics embodies the contention that Asian cultures, Confucian culture in particular, are undemocratic or positively anti-democratic and that alternative Asian

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<sup>88</sup> See, e.g., GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE* (1963); ROBERT A. DAHL, *POLYARCHY, PARTICIPATION, AND OPPOSITION* (1971).

<sup>89</sup> While social surveys have been the subject of almost daily media attention through the transition period, there have been academic efforts as well. See SIU-KAI LAU & HSIN-CHI KUAN, *THE ETHOS OF THE HONG KONG CHINESE* (1988); Hsin-chi Kuan & Siu-kai Lau, *The Partial Vision of Democracy in Hong Kong: A Survey of Popular Opinion*, 34 CHINA J. 239, 239-264 (1995). While Kuan and Lau argue a degree of ambivalence in Hong Kong regarding democratization, their interpretation may understate the intimidatory effect of China in the Hong Kong democratic equation. See Jane Lee, *Transition to Communist Rule: The Limits of the Democratic Movement in Hong Kong, 1984-1990*, 17 POL., ADMIN. & CHANGE 1, 1-23 (1991).

<sup>90</sup> See, e.g., Carol Pateman, *The Civic Culture: A Philosophical Critique*, in *THE CIVIC CULTURE REVISITED* 67 (Gabriel A. Almond & Sidney Verba eds., 1980).

<sup>91</sup> See Juan J. Linz & Alfred Stepan, *Toward Consolidated Democracies*, 7 J. DEMOCRACY 14 (1996).

forms of authoritarian governance are more suitable to Asian soil. Confucian society, according to Samuel Huntington, is said to advance the group over the individual, authority over liberty, responsibility over rights, and values such as harmony, cooperation, order, and respect for hierarchy.<sup>92</sup> This claim is evident in the mainland official position that Hong Kong not be a political city but, as noted above, has been more directly put forth by the Chief Executive designate, Mr. Tung Chee Hwa, who urges that the people of Hong Kong think not of rights, but of duties. At the same time, he frets about foreign forces seeking to undermine China in Hong Kong, and about an excessively confrontational attitude toward China. His alternative of less confrontation is associated with Chinese culture. The Senior Minister of Singapore, Lee Kuan Yew, has added fuel to the fire by pointing out that only Hong Kong is the right size to make use of the "Singapore model," though he has diplomatically suggested that Singapore might follow Hong Kong when it comes to entrepreneurship.<sup>93</sup>

The problem with this positive Asian values argument on a general level is that the evidence to date does not bare out its claims. The most serious challenge has been the successful development of democracy in several Chinese or historically Confucian societies, including Taiwan, Japan, South Korea, and Hong Kong. Classical Chinese scholars and political theorists have also challenged the claim associating modern Asian authoritarianism with Confucianism.<sup>94</sup> Even if one associates authoritarian characteristics with so-called neo-Confucianism, it is difficult to find a current authoritarian Asian regime that can claim such lineage. Francis Fukuyama argues that the political Confucianism of the type described by Huntington was characteristic of pre-

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<sup>92</sup> See Samuel P. Huntington, *Democracy's Third Wave*, in *THE GLOBAL RESURGENCE OF DEMOCRACY 3* (Larry Diamond & Marc F. Plattner eds., 1993).

<sup>93</sup> See Richard Vines, *Lee Tempers His Roar, Enter the Singapore Model*, *S. CHINA MORNING POST*, Nov. 27, 1993, at 12.

<sup>94</sup> See Gangjian Du & Gang Song, *Relating Human Rights to Chinese Culture: The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence*, in *HUMAN RIGHTS AND CHINESE VALUES*, *supra* note 29, at 35; Wejen Chang, *The Individual and the Authorities in Traditional Chinese Legal Thought* (Feb. 24, 1995) (unpublished manuscript presented for the Constitutionalism and China Workshop, on file with Columbia University).

democratic Japan and is now discredited.<sup>95</sup> The impetus for the extreme contemporary practices of North Korea, China, and Vietnam is more likely Karl Marx than Confucius. It is interesting that when Singapore wanted to promote Confucian political values (as distinguished from moral values), the government had to import eight Confucian scholars to teach the rudiments.<sup>96</sup> In regard to these Asian values arguments, Beng-Huat Chua criticizes Asian intellectuals and policy makers for adopting the discourse of "orientalism," which originally aimed to suppress them, as a self-defining discourse.<sup>97</sup>

More significantly, none of this seems to fit contemporary Hong Kong. Order and harmony are not the first things that come to mind on the streets of Hong Kong. The democratic and even confrontational values of a sizeable proportion of the Hong Kong electorate have been borne out by their consistent electoral choice to support the more confrontational Democratic Party. The danger is that a regime seeking to impose pervasive restraints on political democracy and liberty will seek moral authority in alleged traditional political values that, in fact, have to be imported and imposed. One would expect that this will initially be articulated benignly through a greater emphasis on patriotism, coupled with a bit of civic virtue. As noted above, such claims are already being advanced. But in the long run, in the face of resistance to the diminution of rights and democracy, one would expect China's chosen Hong Kong leaders to employ a more affirmative model.

As suggested by Senior Minister of Singapore Lee Kuan Yew, the most obvious presently available model will likely be the kind of neo-conservative so-called communitarianism practiced in Singapore. In Singapore, some notion of collective well-being is used to justify state intervention in all spheres of social life, under a legal regime that subordinates individual rights and inhibits public discourse.<sup>98</sup> China, likewise, employs a collective conception of human rights, rooted in Marxism, which seeks to subordi-

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<sup>95</sup> See Francis Fukuyama, *Confucianism and Democracy*, 6 J. DEMOCRACY 20 (1995).

<sup>96</sup> See BENG-HUAT CHUA, COMMUNITARIAN IDEOLOGY AND DEMOCRACY IN SINGAPORE 159 (1995).

<sup>97</sup> See *id.* at 147.

<sup>98</sup> See *id.* at 187.

nate the rights of the individual to that of the collective state.<sup>99</sup> The strange twist of China extending this conceptualization to its capitalist S.A.R. may be that we will have an officially Marxist regime promoting Confucianism under an ostensibly Singaporean model. To do this, the free spirited Hong Kong society would have to be suppressed, and the sense of personal well-being associated with freedom and the rule of law would be seriously undermined. With this development might go the loss of the entrepreneurial spirit that fuels Hong Kong's economy, which Lee Kuan Yew so admires.

#### 4.3. *The Asian Economic Miracle*

The notion of an economic Hong Kong that seems to animate the current rhetoric of Chinese leaders appears to take its spirit from the economic models said to be responsible for the Asian economic miracle. The paradox is that these models are being promoted after Hong Kong's economic miracle has occurred (without use of the developmental policy usually associated with this Asian model) and at the stage where the other most successful Asian newly industrialized countries ("NICs") have moved on to institute democratic reform. The grand model is Japan. There are variations on the Japanese theme used to justify harsher authoritarianism because Japan is a democracy. It must be borne in mind that given Hong Kong's already highly developed economy, the burden is on those who want to impose a substantially different economic model to justify the validity of such an approach. Therefore, it is not necessary to rehash all of the contextual nuances of the Asian economic development argument to justify a degree of skepticism about this alternative paradigm. The advancement of the Hong Kong model appears to involve a kind of "guided democracy" in which Beijing controls the results along with Hong Kong's historic free-wheeling capitalism. This should be contrasted with the guided capitalist planning usually credited to the other Asian NICs — a model from which such NICS increasingly are moving away.

The Asian miracle has usually been characterized by a

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<sup>99</sup> This is most prominently articulated in Article 51 of the P.R.C. Constitution and is more fully developed in a recent White Paper. See INFORMATION OFFICE OF THE STATE COUNCIL, HUMAN RIGHTS IN CHINA (1991).

combination of export-led growth ("ELG") and a domestic developmental economic model. The ELG that is common in Asia is usually contrasted with a more protectionist import substitution industrialization ("ISI") model especially common in Latin America.<sup>100</sup> ELG emphasizes production for outside markets rather than the ISI strategy of producing local products to displace those historically supplied by outsiders. As noted above, Hong Kong has historically shared the ELG component but has had little interest in the concurrent domestic developmental economic model.<sup>101</sup> While colonial bureaucratic policy makers have been autonomous, they have not been engaged in the micro-level industrial planning that this model usually entails.

The developmental economic model, which is said to justify authoritarian government, has been characterized by such terms as "governed market," "market-preserving authoritarianism," "plan rationality," and the "developmental state."<sup>102</sup> In its various forms, it usually involves a tripartite framework of a highly autonomous technocratic bureaucracy, a politically authoritarian regime or ruling party, and a connected or compliant business elite.<sup>103</sup> The relationship between the bureaucracy and the business sector is also characterized by a degree of embeddedness, what Peter Evans calls embedded autonomy.<sup>104</sup> The bureaucratic elite provides business a high degree of planning or guidance within the context of the capitalist market to insure the specific kinds of industrial developments that have been targeted, based on

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<sup>100</sup> See STEPHAN HAGGARD, *PATHWAYS FROM THE PERIPHERY: THE POLITICS OF GROWTH IN THE NEWLY INDUSTRIALIZED COUNTRIES* 1-22 (1990).

<sup>101</sup> See *id.* at 25-27.

<sup>102</sup> See CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975* 17-23 (1982); ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* 26-29 (1990); Shuhe Li & Peng Lian, *On Market-Preserving Authoritarianism — An Institutional Analysis of Growth Miracles* (May 8, 1996) (unpublished manuscript on file with the Chinese University of Hong Kong).

<sup>103</sup> See, e.g., JOHNSON, *supra* note 102, at 50; Chalmers Johnson, *Political Institutions and Economic Performance: The Government-Business Relationship in Japan, South Korea, and Taiwan*, in *THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM* 136-64 (Frederic C. Deyo ed., 1987); Li & Lian, *supra* note 102, at 19.

<sup>104</sup> See PETER EVANS, *EMBEDDED AUTONOMY, STATES AND INDUSTRIAL TRANSFORMATION* 12 (1995).

anticipated competitiveness in the targeted outside market.<sup>105</sup> Special government agencies staffed by the most elite and best trained bureaucrats may be charged with major planning responsibility (for example, MITI in Japan). This system embodies an industrial policy which offers economic incentives (for example, loan guarantees, monopoly privileges, land use, and subsidies) at the micro-level, rather than relying solely on general economic regulation and infrastructural support.<sup>106</sup> Developing and implementing such micro-level guidance may entail an encompassing coalition of business and government elites.<sup>107</sup>

The authoritarian regime is relied upon to deal with crisis, maintain political stability, and repress particularistic distributional claims that may interfere with the economic development plan.<sup>108</sup> The political side of this equation may include the usual range of authoritarian techniques employed around the world, including, for example, repression of opposition groups and the press, declarations of states of emergency, corporatist control of interest groups, formal and informal political pacts, co-optation via patronage, emasculation of legislative bodies, and rule by decree.<sup>109</sup> The Japanese post-war "soft authoritarian" model described by Chalmers Johnson evidenced none of the harsh techniques but, under a democratic framework, employed a tripartite coalition of the Liberal Democratic Party, the bureaucracy, and the business elite, along with various pacts, co-optation, and technocratic guidance.<sup>110</sup> Prior to democratization, Korea and Taiwan employed nearly all of the above harsh and soft techniques.<sup>111</sup> Singapore historically has emphasized the corporatist methods of pacts and co-optation, along with selected harsher

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<sup>105</sup> See, e.g., JOHNSON, *supra* note 102, at 22-23; Johnson, *supra* note 103, at 136-64; Li & Lian, *supra* note 102, at 19.

<sup>106</sup> See WADE, *supra* note 102, at 26-29; Johnson, *supra* note 103, at 136-64.

<sup>107</sup> See Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567, 567 (1993).

<sup>108</sup> See HAGGARD, *supra* note 100, at 259-62.

<sup>109</sup> See Thomas M. Callaghy, *Political Passions and Economic Interest: Economic Reform and Political Structure in Africa*, in HEMMED IN: RESPONSES TO AFRICA'S ECONOMIC DECLINE 473 (Thomas M. Callaghy & John Ravenhill eds., 1993).

<sup>110</sup> See JOHNSON, *supra* note 102, at 50-51.

<sup>111</sup> See Johnson, *supra* note 103, at 136-64; see also HAGGARD, *supra* note 100, at 51-100, 130-46.

methods, used especially to control opposition and the press.<sup>112</sup>

By contrast, Hong Kong, with a system that is usually characterized as non-interventionist or laissez-faire, has historically had an authoritarian, colonial regime with little government intervention on the economic front and a high degree of political and personal freedom.<sup>113</sup> Hong Kong historically shared two main characteristics with the other Asian NICs: reliance on ELG, and an autonomous bureaucracy under an authoritarian-colonial government.<sup>114</sup> As discussed above, however, the autonomous Hong Kong bureaucracy focused its attention on infrastructure and macro-level developmental support, in lieu of the micro-level industrial incentives that generally characterize the East Asian model.<sup>115</sup> There has been neither government industrial planning nor government financing. There has been macro-level support for setting technical design standards and allocating land for industrial development and infrastructure development; supporting labor (in the form of cheap public housing and medical services); and maintaining a reliable legal environment for business, including vigorous corruption control and a free press.<sup>116</sup> It is the latter elements that are most threatened by emerging transition developments, and at which both the Joint Declaration and the Basic Law are ostensibly targeted.

Unfortunately, some of the milder co-opting techniques have already been introduced into Hong Kong's emerging China-related politics, with select business elite being appointed to Chinese advisory and political bodies in exchange for their loyalty. One may also expect rewards from the huge China business interest for compliant press organizations, resulting in self-censorship.<sup>117</sup> Of course, as noted above, Chinese officials have been promising

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<sup>112</sup> See HAGGARD, *supra* note 100, at 100-26, 146-50.

<sup>113</sup> See *id.* at 100-26, 150-57; CHIU, *supra* note 34; Mee-Kau Nyaw, *The Experiences of Industrial Growth in Hong Kong and Singapore: A Comparative Study*, in INDUSTRIAL AND TRADE DEVELOPMENT IN HONG KONG 185-222 (Edward K.Y. Chen et al. eds., 1991).

<sup>114</sup> See HAGGARD, *supra* note 100, at 116.

<sup>115</sup> See *id.* at 122; CHIU, *supra* note 34, at 8.

<sup>116</sup> See generally CHIU, *supra* note 34.

<sup>117</sup> There already have been rumors of mainland Chinese banks publishing a media black list of newspapers in which banks should not advertise. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRITIQUE, REVIEW OF THE U.S. DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, 1993 394 (1994).



harsher controls of the press and political groups, presumably to be implemented under the promised future subversion and sedition laws, to be passed by their appointed S.A.R. Provisional Legislature and Chief Executive. Since there is little economic incentive for this controlling and overbearing behavior, it may ultimately prove to be the shell of authoritarianism without the substance of an economic development strategy.

#### 4.4. *The Weaknesses of the Authoritarian Economic Model*

There are several levels of challenge to this authoritarian economic model, both general and specific. On a general level, offering authoritarianism to a society that is already economically developed and substantially liberalized risks creating increased political conflict. In relating industrialization to democracy, Dietrich Rueschemeyer, Evelyne Huber Stephens, and John D. Stephens argue that the relationship is not merely one of the concurrence of the free markets of goods and ideas, but rather that industrialization transforms society in a way that empowers subordinate classes and makes it difficult to exclude them politically.<sup>118</sup> Hong Kong has both highly educated productive classes in a service-oriented economy and a diverse formally empowered civil society. Where such classes are both economically and formally empowered, attempting to put the genie back in the bottle seems certain to invite dissatisfaction and confrontation. It is true, as many scholars predict,<sup>119</sup> that the business elite in Hong Kong have generally tried to exclude the subordinate classes from the political process and seem intent on supporting China's post-1997 model, which seeks to renew the same tradition.

Whether or not democracy is difficult at the early stages of economic development is a debatable proposition, but there is no credible evidence that authoritarianism will improve the prospects for further development at a more advanced stage.<sup>120</sup> While acknowledging that a good dictator is better than anarchy, Mancur

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<sup>118</sup> See DIETRICH RUESCHMEYER ET AL., *CAPITALIST DEVELOPMENT AND DEMOCRACY* vii (1992).

<sup>119</sup> See *id.* at 8; HAGGARD, *supra* note 100, at 260.

<sup>120</sup> See Adam Przeworski et al., *What Makes Democracies Endure?* 7 J. DEMOCRACY 39 (1996); Robert H. Bates & Anne O. Krueger, *Generalizations Arising from the Country Studies*, in *POLITICAL AND ECONOMIC INTERACTIONS IN ECONOMIC REFORM POLICY: EVIDENCE FROM EIGHT COUNTRIES* 444-72 (Robert H. Bates & Anne O. Krueger eds., 1993).

Olson argues that such a system is relatively unstable beyond one or two such leaders.<sup>121</sup> Olson asserts that the same conditions necessary for maximum economic development — human rights, freedom of speech, and the rule of law — are necessary for democracy.

The fact that nearly all of the former economically successful authoritarian regimes in Asia have now gone through democratic reform tends to bare out the attraction of these elements. Many who have lauded the specific achievements of the authoritarian models employed elsewhere in Asia have emphasized that, in each case, these systems had evolved slowly over years of trial and error specifically responsive to the particular institutional conditions of the country under discussion; and they now also laud reform.<sup>122</sup> All of the Asian NICs except Singapore have since embarked on a policy of political reform and opening up their formerly protected economies to global forces. In order to achieve orderly and open processes of interest representation in complex developed societies, such reform seems essential. In the absence of reform, the inevitable particularistic claims generated in highly developed countries will achieve expression only through corruption and back-room dealing.<sup>123</sup>

Specifically, the most striking objection is that Hong Kong has never relied on the developmental state model. As noted above, commentators have almost uniformly characterized the Hong Kong economic development model as *laissez-faire* or non-interventionist.<sup>124</sup> For Hong Kong to start copying these authoritarian models would be a big step backwards. This talk of an economic rather than a political city aims at rationalizing authoritarian political practices, with all the attendant risks of corruption and influence peddling, and without the economic developmental benefits which usually are said to justify such practices. Historically, the key elements under Hong Kong's non-interventionist model have been vigorous competitiveness and

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<sup>121</sup> See Olson, *supra* note 107, at 572.

<sup>122</sup> See, e.g., HAGGARD, *supra* note 100, at 158; Peter Evans, *The State as Problem and Solution: Predation, Embedded Autonomy, and Structural Change*, in THE POLITICS OF ECONOMIC ADJUSTMENT 139, 165 (Stephan Haggard & Robert R. Kaufman eds., 1992).

<sup>123</sup> See Evans, *supra* note 122, at 139, 165, 179.

<sup>124</sup> See CHIU, *supra* note 34, at 1; HAGGARD, *supra* note 100, at 101; Nyaw, *supra* note 113, at 203.

high levels of entrepreneurship. The latter aspect has been the envy of the world, with even Senior Minister of Singapore Lee Kuan Yew lauding Hong Kong's superiority in this regard.<sup>125</sup> Mainland official suggestions to sanitize local political discourse through censorship and orthodoxy may operate to deprive Hong Kong of essential vitality. These suggestions should be reexamined.

It is important, at this transition stage, to take a serious look at the type of community that is evolving in Hong Kong and to get ahead of, rather than behind, the curve. Beyond its historical laurels, we must consider Hong Kong's role in the twenty-first century, the period to which the transition is directed. In this regard, Yue-man Yeung and Fu-chen Lo have characterized Hong Kong as an emerging world city.<sup>126</sup> By this term, they are describing a city that goes beyond the megalopolis, a city which ties a region to the global economy. Such a city may have a global role in bringing information and financing to an entire region and beyond. Such a city relies on a highly educated population with access to the latest information and requires reliable support systems, especially the rule of law. Individual dignity and freedom must be respected, so that individuals and the organizations they serve will fully realize the vast potential afforded by these emerging circumstances.<sup>127</sup> There seems little room at the helm of such a city for a controlling authoritarian regime. Singapore will have to confront problems of this nature as it enters the twenty-first century. There is no reason for Hong Kong to take up this cross. Under such circumstances, the luster would soon be lost. The Joint Declaration appears to recognize this imperative. We can only hope that such vision has not been lost.

## 5. CONCLUSION

The Joint Declaration promised Hong Kong the road to a vibrant and free twenty-first century. This was to be sustained under a democratic system with human rights and the rule of law.

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<sup>125</sup> See Vines, *supra* note 93, at 12.

<sup>126</sup> See Yue-man Yeung & Fu-chen Lo, *Global Restructuring and Emerging Urban Corridors in Pacific Asia*, in EMERGING WORLD CITIES IN PACIFIC ASIA 17, 17-47 (Fu-chen Lo & Yue-man Yeung eds., 1996).

<sup>127</sup> See Olson, *supra* note 107, at 572.

In the waning days of British rule, a different vision of authoritarian control has become evident in China's transition policies. The shell of an alleged Asian values and Asian economic miracle model is being imported to justify authoritarianism (or, at best, liberal oligarchy) in a society where mobilized subordinate classes and an entrenched civil society have already demanded and tasted democracy. That this is a shell is evident by the fact that the so-called Asian economic model offers nothing to Hong Kong, a city which clearly has achieved its success without the assistance of such a developmental model.

The economic risks of employing this authoritarian shell are enormous. They include loss of the system's information base, diminution of entrepreneurial spirit, loss of the contractual reliability and personal dignity insured by the rule of law, emigration of creative talent, and increased corruption and influence peddling. This is all being offered under the framework of political architecture that promises the opposite in a society that has had little historical reason to trust the new regime. That an ostensibly Marxist regime is turning Hong Kong over to a bourgeois elite is an apparent paradox if one discounts the fact that this elite has proven most amenable to the emerging policies. In Marxist lexicon, as recent mainland media propaganda suggests, this may enable the central government to portray Hong Kong as less, rather than more, privileged in comparison to the mainland.

All of this is being done in a society in which subordinate classes and civil society in general have just begun to taste the benefits of their economic success and of limited democracy and freedom. Unless these policies are moderated and the promise of the Joint Declaration is restored, this appears to be a recipe for increased confrontation and ultimate repression. By sponsoring an unpopular leftist and business elite, the central government risks driving more support into the democratic camp, which it has isolated historically. This creates a volatile situation that undermines the authority of Hong Kong's anointed political leaders. The confrontation between the business elite, who have sought to limit the participatory rights of the masses, and pro-democracy forces has already been evident, as has been the tensions between other pro-China leftist forces and the democrats. When the full weight of official power is brought into this equation, the likely disaster is evident. All of this is being done in an era when the other newly developed countries of the region have already

completed policies of democratization. In this context, such harsh policies could have both national and regional implications.

As a global financial center, Hong Kong relies on precisely the opposite conditions for its success and survival. Hong Kong's economic success has relied on neither the tripartite framework (of party, bureaucracy, and business) and micro-incentive based industrial policy of Japan, nor the hard authoritarian industrial policy of South Korea and Taiwan, nor the authoritarian corporatist industrial policy of Singapore. Its non-interventionist policies had long been supported by influential business elites in leading British conglomerates and banks. Recent democratic reforms have reduced the influence wielded by such elites under previous colonial practices. To reintroduce rule by business elites at a time when the rule of law and freedom, as checks on the system, are already under threat may (especially in the face of China's own problems with corruption) produce the unintended consequences of corruption and influence peddling. At the same time, it must be remembered that, like Hong Kong, the successes of the other Asian NICs were produced under unique historical circumstances. Their historical authoritarian policies have no practical application in Hong Kong. Under such circumstances, to introduce the rhetoric of "Asian values and economics" is a poorly disguised attempt to assert political control, and to introduce the costs of authoritarianism without the alleged benefits.

China's reliance on Hong Kong's success makes a more prudent policy even more imperative. Throughout the long years of the Cold War and the Cultural Revolution, leaders in Beijing had the wisdom to stay out of Hong Kong's affairs. For China to attempt to control Hong Kong's political leadership, censor political discourse, and offer orthodox interpretations of political events, hardly seems calculated to foster the type of global vibrant city that Hong Kong has become. We can only hope that historical prudence with respect to Hong Kong will be rediscovered.