Summer 1998

China's Conception of Law for Hong Kong, and Its Implications for the SAR and US-PRC Relations

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SOVEREIGNTY RESUMED:

CHINA'S CONCEPTION OF LAW FOR HONG KONG, AND ITS IMPLICATIONS FOR THE SAR AND US-PRC RELATIONS

BY
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As Hong Kong completes its first year as a Special Administrative Region of the People's Republic of China, the territory's long transition to a new relationship with China continues. The legal framework for the SAR, and China's conception of that framework, have played — and still play — a central role in this process, and in shaping Hong Kong's prospects. The Sino-British Joint Declaration on the Question of Hong Kong, the Basic Law of the Hong Kong SAR, and China's interpretation of those documents' status and meaning, were the principal foci of legal and political controversies in the 1980s, and became the key referents and touchstones for disputes over laws and institutions during the 1990s. They may become even more prominent with the ending of Britain's roles in the territory's governance, the fading of China's strong reversion-era imperative to remain in the background, and the passing of the drama of Hong Kong's reversion-focused legal and institutional controversies.

China's approach to Hong Kong's reversion has implications for US-PRC relations. Narrowly, the US has largely succeeded the United Kingdom as the principal external guardian of the legal promises of autonomy and continuity for post-reversion Hong Kong, and thus made Hong Kong an important factor in US-China relations. More broadly, China's conception of the arrangements for Hong Kong suggests features of China's approaches to law and sovereignty — at home, abroad and beyond Hong Kong — which America's China policy must address.

For China, the "Hong Kong question" has been a matter of sovereignty — of reclaiming and delineating the authority to make laws for, and to govern, the people and territory of Hong Kong. China has consistently approached this project from a perspective that is natural law-like in its idea of sovereignty at international law and positivist in its notion of sovereignty in the domestic realm. On this view, there are fixed principles of what it means to be a sovereign — and, specifically, what it means to sovereign China — as a matter of international law. These principles include the Chinese sovereign's plenary authority to rule all areas and people that are non-derogably part of an almost noumenal China — one that includes Hong Kong. Although many international agreements are acceptable from this "naturalist" perspective, any agreement that claims to remove Hong Kong (or any other part of China) from Chinese sovereignty, or that purports to restrict China's sovereign discretion in ruling such territory and people, is illegitimate. It is not to be accepted in the first place, and may be rejected later as a legal nullity or, at least, not normatively binding.

This view is amply reflected in the 1984 UK-PRC agreement that provides for the transfer of authority over Hong Kong and sketches the legal arrangements for implementing post-reversion policies of "one country, two systems," "a high degree of autonomy," and "Hong Kong people ruling Hong Kong." The Joint Declaration's opening article formally stakes out China's position on the international legal question: "The Government of the People's Republic of China declares . . . . that *it has decided to resume the exercise of sovereignty* over Hong Kong" effective from July 1, 1997. China thus asserts

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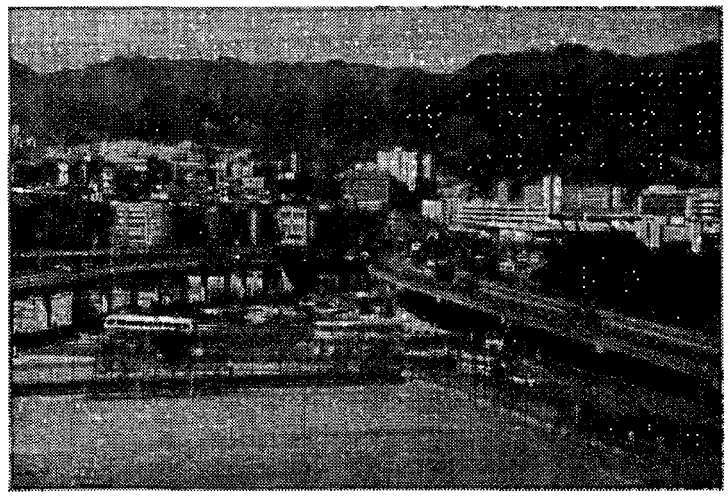
that the Sino-British accord does not, and cannot, transfer sovereignty over Hong Kong because Hong Kong has always been China's, notwithstanding the nineteenth-century treaties purporting to cede sovereignty permanently over Hong Kong Island and Kowloon, and to divide sovereignty temporally over the New Territories. As Chinese leaders and negotiators stressed throughout the talks leading to the Joint Declaration, the June 30, 1997 expiration date of the ninety-nine-year lease on the New Territories was a date of convenience only. Because sovereignty has always resided with China, China has always been free to resume the exercise of sovereignty over all of Hong Kong earlier — or later — if it judged that "conditions were ripe." This determination to avoid any appearance of accepting the nineteenth-century treaties' validity — and thus the need for a new treaty to reconvey sovereignty — also surfaced in China's insistence that the accord is *not a treaty.* The joint declaration format, China's foreign minister explained, is a "fairly special technique" that provides an "appropriate form" for addressing Hong Kong's return.

Other provisions of the Joint Declaration reflect additional aspects of China's claim to inalienable and indivisible sovereignty over Hong Kong. Article 3 states, "The Government of the People's Republic of China *declares that the basic policies of the People's Republic of China* regarding Hong Kong" are the promises of continuity, autonomy, and protection of rights outlined in the remainder of the article. A fuller description of those pledges is consigned to an Annex which, although declared an integral part of the Joint Declaration, is cast as China's "elaborat[ion]" of its policies toward Hong Kong, which are to be implemented through PRC legislation. The perspective underlying these provisions is that the declarations of "basic policies" are binding not as treaty-like promises to the UK, but as self-imposed limits of the Chinese sovereign. (Indeed, they had received their initial public formulation before formal Sino-British negotiations began, in Deng Xiaoping's unilateral pronouncement to Hong Kong's governor that "we will treat Hong Kong as a special region.") The Chinese "naturalist" claim here is two-fold: First, because there is, and can be, no *quo* of China's regaining its undisturbed and nonderogable sovereignty over Hong Kong, there is and can be no *quid* in the PRC's statement of its plans for Hong Kong. Second, the statements about how China will exercise sovereignty over Hong Kong cannot impose irrevocable restrictions (especially ones giving a foreign power enforcement rights) because that would be an attempt to "carve up" sovereignty over Hong Kong, much as the nineteenth-century treaties had purported to do. That the PRC would find any such arrangement unthinkable has been clear at least since Beijing's rebuff of the UK's initial proposal to address the 1997 question by recognizing Chinese sovereignty while continuing British administration, and since Deng Xiaoping's declaration that he would not be another Li Hongzhang — the Qing dynasty official irredeemably tainted by his role in ceding part of Hong Kong to Britain.



This PRC approach has squarely rejected a very different British perspective. The UK's conception of the Joint Declaration, the nineteenth-century treaties and the international legal question of sovereignty over Hong Kong has been strongly positivist: Sovereigns are free to make agreements addressing any number of issues, including the reassignment of sovereignty or restrictions on its exercise, so long as minimal requirements of sovereign capacity and contract law-like formalities are satisfied. On this view, the nineteenth-century treaties lawfully transferred sovereignty over Hong Kong Island and Kowloon to Britain in perpetuity and sovereignty (or at least the exercise of sovereignty) over the New Territories for ninety-nine years. Indeed, it was the very validity of those treaties that created a "Hong Kong problem" because, absent further action, the right to exercise sovereign authority over the vast bulk of the colony would revert to China on July 1, 1997 while Britain would remain sovereign over the remainder — a situation that the British considered unworkable. A new accord of equal dignity was necessary and appropriate to address the problems the old treaties had created.

This British conception of the situation is formally stated in article 2 of the Joint Declaration, which provides: "The Government of the United Kingdom . . . declares that *it will restore* Hong Kong to the People's Republic of China," effective 1 July 1997. This view that the Joint Declaration transfers sovereignty, reversing the nineteenth-century cessions, was underscored in Prime Minister Thatcher's initial — and impolitic — assertion that China's recognition of the validity of the original treaties was a precondition to negotiations over the territory's future, in the Foreign Secretary's description of the Joint Declaration as "a treaty in the most solemn form," and in Britain's insistence that the document be registered in the United Nations treaty series. From this positivist,

contractarian perspective, the provisions setting forth the PRC's basic policies regarding post-reversion Hong Kong are appropriate considerations for Britain's relinquishing sovereignty, and the limits they impose on China are no more problematic than the partial "unbundling" of the "sticks" of sovereignty that are commonplace in the British Commonwealth and the European Union. The UK's embrace of this position has been clear from a senior negotiator's early comment that it was important that China's promises be put in "lawyer's language," to British officials' repeated and continuing declarations that Britain has a right to insist that Beijing fulfill the commitments toward Hong Kong set forth in the Joint Declaration.

While the PRC's naturalist views on the international legal question of sovereignty over Hong Kong have emerged partly in response to the UK's positivist perspective, the PRC's arguments cannot be dismissed as mere negotiating tactics. The PRC's position has roots and resonances well beyond the last few decades of the Hong Kong question. Since well before the establishment of the People's Republic, China has denounced the treaties ceding Hong Kong, and many other agreements granting extraterritorial rights to foreign powers, as "unequal treaties" that are invalid primarily on naturalist grounds. Going beyond contract law-like notions similar to duress or unconscionability, the long-standing Chinese indictment has asserted that the treaties impermissibly granted foreign powers so much while granting China too little in return, refused to recognize China as an equal sovereign, and tried to divide China's sovereignty (along territorial, temporal and other jurisdictional lines). Moreover, the PRC has stuck to its naturalist position on sovereignty at international law even when it seems not to have been the only, or best, way to serve its aim of recovering Hong Kong. In 1973, the PRC refused the UN Special Committee on Colonialism's help in claiming a right to the territory (albeit one China might not want to exercise promptly), declaring that Hong Kong was an internal matter "within China's sovereign right" that the UN had "no right to discuss." During the Joint Declaration negotiations and after, Chinese leaders were willing to rattle confidence in Hong Kong and derail Sino-British cooperation through statements that, at base, were demands that the PRC's position on sovereignty at international law be accepted. (One notorious example is the rhetorical question Deng posed in 1984: "How can Hong Kong be described as Chinese territory if we don't have the right to station troops there?")

China's naturalist position on the international legal issue of sovereignty over Hong Kong has also been part of a broad and coherent — if Janus-faced — vision of the "sovereign empowered." China's international legal claim to non-derogable and indivisible sovereignty over Chinese territory and people provides a principled argument for shielding the sovereign's domestic actions from the risks of lawful treaty-like obligations. Such a position fits comfortably with — indeed, seems to suggest — a claim that the sovereign acts with plenary law-making and governmental authority at home, free from non-procedural constraints and immune from substantive challenges.

This PRC view of the nature of domestic authority over Hong Kong has been positivist, and radically so. Its core claim is that laws for any part of China are exercises of discretionary sovereign authority, and are binding so long as they satisfy formal requirements of enactment by authorized institutions and according to proper procedures. Such laws can be altered, and institutions restructured, by acts of the sovereign that meet these same tests. Within those limits, the sovereign may give the laws whatever substance, and institutions whatever structure, it deems prudent.

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This conception of domestic sovereignty pervades the Basic Law — the elaborate framework legislation that spells out the structures, powers and methods for selecting the membership for the executive, legislative and judicial institutions charged with exercising the SAR's "high degree of autonomy," the substance of the pledges of continuity in Hong Kong's economic, legal and social systems, and the controversial mechanisms for amending and interpreting the Basic Law and accepting or overturning new and preexisting Hong Kong laws. Viewed from Beijing, the Basic Law is a mere statute, the basis of its legitimacy not qualitatively different from that of other positivistically valid exercises of the Chinese sovereign's legislative power. Broadly, the Basic Law is the product of a proper exercise of the general legislative powers that the PRC's constitution confers upon the National People's Congress, in this case by enacting a bill prepared by a legislatively-created and PRC-dominated Basic Law Drafting Committee. More narrowly, the Basic Law reflects the NPC's exercise

June, 1997: Striking the Colors in the dusk of British rule.

of the authority carefully provided in an article added to the PRC's 1982 constitution, which empowers the legislature to create special administrative regions on occasions and with powers and privileges determined by the NPC. During the drafting process, Chinese officials' pointed rejection of Hong Kong references to the Basic Law as a "mini-constitution" for the region (and one that Hong Kong's legislature might debate and reject) reflected and underscored China's position that the Basic Law is nothing more — and nothing less — than a piece of national PRC legislation.[1]

Moreover, the Basic Law implements a strongly positivist vision of the Chinese sovereign's domestic authority with respect to Hong Kong. The general principles section explains that the NPC authorizes — essentially as an act of unilateral and revocable delegation — the SAR to exercise a high degree of autonomy in governmental affairs. The same idea runs through the Basic Law's many institution-creating, power-conferring and rights-defining articles, as well as the provisions governing the reception of prior Hong Kong law and the continuity of the legal system. Several provisions retain a vital core of discretionary sovereign power in the hands of the central authorities, avoiding the alienation of ultimate authority that is anathema to both the domestic and international legal dimensions of the PRC vision of the sovereign empowered. Key sections assign to the NPC or its Standing Committee powers to amend the Basic Law, to interpret the Basic Law (and to bind Hong Kong courts with interpretation of provisions concerning central government-SAR relations), and to reject laws passed by the SAR legislature, or preexisting Hong Kong laws, on the grounds that they contravene the Basic Law.

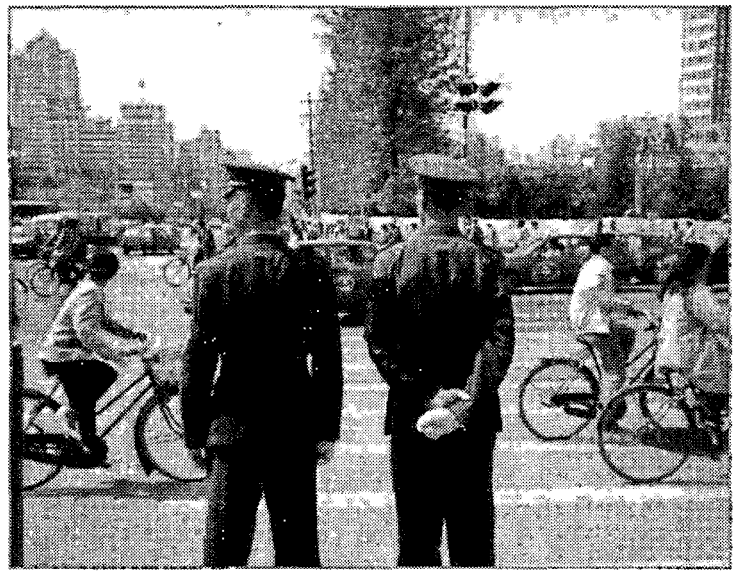
The same perspective has characterized the positions taken by China, and "pro-PRC" groups in Hong Kong, in the controversies over specific SAR laws and institutions that have dominated Hong Kong politics during the 1990s. After the violent suppression of the protests at Beijing's Tiananmen Square, Hong Kong's colonial government adopted a Bill of Rights Ordinance that tracked the major UN covenant and established principles of statutory construction and mechanisms of judicial review to ensure that Hong Kong's laws were brought into conformity with the Ordinance. The PRC and its allies denounced the Bill of Rights and related legislative changes with a grab-bag of positivist arguments: The Basic Law provision authorizing continuation of the "laws previously in force" in Hong Kong did not authorize the survival of radical changes wrought by the Ordinance's substantive provisions, or the new category of near-constitutional law created by provisions directing courts to interpret laws to be consistent with the Ordinance where possible, and to rule them unlawful where not. Moves to liberalize civil liberties-restricting legislation were a British plot to undermine the power and discretion of Hong Kong's government on the eve of reversion. The Ordinance's substantive provisions were superfluous because, through Basic Law articles that track international human rights standards and pledge that local laws will continue in force the requirements of the UN covenants, China has already done all that is necessary, and possible, to provide legal guarantees for such rights. And moves by PRC and SAR legislative bodies to overturn and replace objectionable provisions at the moment of reversion were proper, lawful exercises of China's sovereign power.

The PRC response to Governor Patten's post-Tiananmen introduction of more democratic rules for electing Hong Kong's last colonial legislature met with similar responses: Broadening the so-called "functional constituencies" so that nearly every Hong Konger with a job could vote for a representative of his economic sector (as well as for a representative of his geographic district) was a move that "perfidiously disregarded" the Basic Law — "a dignified document" that was to be "strictly observed" and that contemplated only the narrow electorates of company heads, elite professionals and pro-China unions that had comprised functional constituencies in prior elections. Because Patten's reforms thus contravened the Basic Law's requirements for electing a transi-

[1] Within the framework of the PRC's positivist legislative theory and its naturalist perspective on the international legal status of Hong Kong, the Basic Law's purported mechanisms of "entrenchment" — its designation as a "basic law," its nominal prohibition of amendments inconsistent with the PRC's expressed basic policies, and its status as an instrument implementing promises sketched in the Joint Declaration — cannot substantially constrain China's sovereign discretion.

tional legislature, the members of the last colonial legislature would not be appointed en masse as members of the first SAR legislature, and the "through train" was necessarily and lawfully derailed. The PRC-established Preparatory Committee could lawfully arrange the appointment of a Provisional Legislature, to take office at reversion, because the Basic Law did not prohibit it, because the NPC had authorized the Preparatory Committee to do everything necessary to set up the SAR, and because the NPC's approval of the Preparatory Committee's final report effectively authorized, ex post, the Committee's actions. Post-reversion moves to adopt a narrow franchise for functional constituencies and a proportional representation system for geographic constituencies in the 1998 legislative elections were proper exercises of legislative authority that China delegated to the SAR, and reflect a permissible choice among several potential arrangements compatible with the Basic Law's requirements for constituting the legislature by elections.

China and its Hong Kong allies have also made primarily positivist arguments in defending laws that permitted a lower-than-expected number of foreign judges on the Court of Final Appeal and limited SAR courts' authority to hear cases against the government and state-controlled entities: The arrangement for the CFA provides for four permanent judges and a list from which one temporary judge can be drawn. This arrangement theoretically leaves open the possibility of as many as four foreign judges (or as few as none) on the bench, and is fully compatible with the Basic Law (and the Joint Declaration) provisions allowing jurists from other common law jurisdictions to be invited "as required." Indeed, the PRC has been extremely generous, and accommodating of Hong Kong's interests, in allowing any non-citizens to wield such significant sovereign authority over a part of China. The exclusion of "acts of state such as foreign affairs and defense" from the courts' jurisdiction and the post-reversion extension of immunity to controversial PRC entities (such as the Xinhua News Agency, Beijing's principal outpost in pre-reversion Hong Kong) from certain Hong Kong laws (apparently including an ordinance resembling some features of the US's freedom of information act) are either technical changes incidental to reversion or matters unquestionably within the sovereign's discretion.



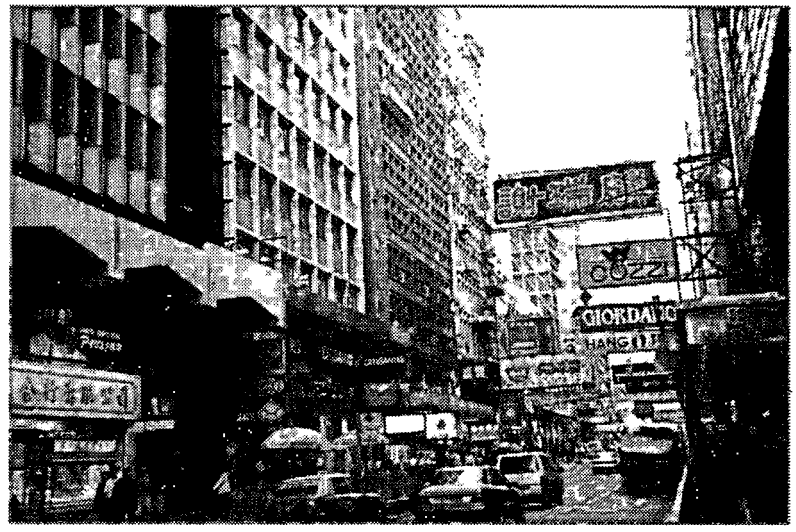
Kunming policemen: the other system in "One Country, Two Systems."

On these issues of domestic law and institutions for the SAR, the PRC's approach has confronted a radically different view advanced by the British authorities and liberals and "pro-democracy" groups in Hong Kong. This latter perspective on domestic sovereignty for Hong Kong has been broadly natural law-like and specifically liberal-democratic: Laws and government institutions for the SAR must satisfy fixed, independently discoverable norms — generally ones compatible with liberalism, democracy and the rule of law — that define the order that a sovereign is obliged to secure for its subjects. Laws and institutions that fail to measure up — a category that, Hong Kong democrats and independents stressed, included much of the legislation and constitutional structure of colonial Hong Kong — may be sources of legal obligation, but are nonetheless defective and properly denounced, even if they enjoy impeccable positivist pedigrees.

On this view, the Basic Law and other laws for the SAR have offered means to fulfill what Thatcher termed Britain's "moral responsibility and duty" toward the people of Hong Kong, and to bring Hong Kong's illiberal and undemocratic colonial laws into line with what many of Hong Kong's emergent politicians have regarded as requirements of just and proper governance. For many of the territory's liberals and democrats, the Basic Law is, or ought to be, a constitution for Hong Kong — not merely in the structural sense of a document that cannot be amended by ordinary legislation, but also in the sense of a charter that declares and secures the liberal, democratic and rule-of-law values that are the hallmarks of legitimate rule. Thus, during the drafting process, critics attacked proposed provisions for requiring the SAR to enact laws to prohibit subversion and foreign political ties, for commingling judicial and political authority in the NPC Standing Committee, and for appearing to replace the principled and transcendent common law foundations of Hong Kong laws with rigid and narrow positivist statutory underpinnings.

In the controversies of the final pre-reversion years and the early post-reversion period, many of the arguments from the British and from Hong Kong's liberal and pro-democracy politicians have continued in this broadly naturalist vein: The Bill of Rights was necessary to fulfill

the sovereign's obligation to subjects whose confidence was deeply and justifiably shaken by the Tiananmen Incident, and to erase illiberal laws-on-the-books that had become little-used in Hong Kong's generally liberal law-in-practice. Post-reversion roll-backs of late-colonial changes to civil liberties laws unacceptably threatened "important universal values." Patten's reforms, rival proposals for more sweeping democratization, the derailing of the through train, the establishment of the Provisional Legislature, and the enactment of laws governing the elections for the first SAR legislature are praiseworthy or condemnable to the extent that they establish a democratic and accountable government, and provide institutional foundations for economic and political liberties and the rule of law. Laws governing the number of foreign judges on the CFA and the jurisdiction of SAR courts are defensible or unacceptable to the degree that they provide, or fail to provide, institutions independent and powerful enough to insure the rule of law and government under law.



Although the PRC's perspective on domestic laws and institutions for the SAR has developed partly to address these British and Hong Kong liberal-democratic arguments, the PRC's approach has not been simply instrumental or narrowly case-specific. The approach to law-making for the PRC has been predominantly positivist, especially during the post-Mao decades. In theory, legislation may be constrained by fixed socialist principles or iron laws of economics, but China's reform-era law-making has been driven primarily by a pragmatism and an experimentalism that are more congenial to positivism. This approach has produced numerous "draft" and "provisional" laws, much legislation for trial or local implementation, and massive revision or supersession of recently adopted major statutes. This perspective also has regarded claims that specific laws are economically unwise or ideologically suspect as arguments for revising them through proper procedures, not for disregarding them by appealing to assertedly transcendent, extralegal norms, in a manner all too evocative of the Cultural Revolution.

Moreover, the PRC's insistence on positivist principles in the controversies over laws for the SAR has been so thoroughgoing that Beijing has often risked serious discontent and costly uncertainty in Hong Kong to make clear its position that political and economic rights and judicial and representative institutions that many Hong Kongers value are ultimately the products of discretionary exercises of China's sovereign power. Strikingly absent, for example, is any serious attempt to ground promises of continuity in Hong Kong's economic and social systems in the non-positivist arguments (about the need for a very long transition to socialism) that have been offered to justify capitalist-style laws in the mainland. Finally, China's positivist conception of domestic sovereignty is symbiotic with its naturalist notion of sovereignty at international law. It suggests or demands a view of sovereignty's external face that protects the sovereign from compromising abroad the discretion and power that positivist principles secure to the sovereign at home.

Properly understood, the PRC's approach to law, sovereignty and the Hong Kong question offers both hopeful and cautionary lessons about the prospects for the SAR and for US-PRC relations (in which Hong Kong is a significant issue). First, China's notions of law and sovereignty have left room for some accords with partners or antagonists who have proceeded from radically different perspectives. Especially as the controversies in Hong Kong have turned to concrete legal and institutional questions (such as the composition or establishment date of the CFA, or the structure of representative districts and functional constituencies for legislative elections), particular visions of sovereignty have not provided clear, determinate answers. There has been considerable scope for the PRC to win support or acquiescence for outcomes it has favored, and to accept — even if only for prudential reasons — some legal changes introduced in late colonial Hong Kong. Prospects for finding additional zones of agreement seem promising in SAR controversies and in Sino-American relations, given that increasingly important actors and alignments in Hong Kong politics (including politically engaged business leaders and a possibly emergent populist coalition) and the US (which is neither a party to the Joint Declaration nor the territory's former colonial ruler) are, by temperament and experience, not deeply committed to the view of law and sovereignty that the UK and Hong Kong's most ardent liberals and democrats embraced and that the PRC has strongly opposed. Nonetheless, many apparent accords will be more fragile than they seem. Just beneath surface agreements, fault lines separate China's perspective on law and sovereignty over Hong Kong from the perspectives that hold sway among the SAR's pro-de-

mocracy politicians, who still command great popular support in Hong Kong, and the US, which has linked US-PRC relations to matters that China considers within its own sovereign discretion (including Beijing's implementation of the Joint Declaration, and human rights conditions in Hong Kong and elsewhere in China).

Second, the perspective that has characterized China's arguments about sovereignty over Hong Kong indicates an additional dimension of an approach to legal and political issues in the PRC's foreign relations that is highly complex, but arguably stable, coherent and, to a degree, principled. China's handling of the Hong Kong question thus suggests the need to supplement a conventional wisdom that regards China's approach to sources of international legal obligation as largely positivist (a position compatible with China's protective, naturalist view of sovereignty at international law) and that stresses the continuing importance of fixed ideological or quasi-scientific principles in PRC domestic law (despite China's positivist understanding of the laws that "ought," as a prudential and political matter, to align with such principles). With China's approach to the outside world and to internal affairs that have been a concern for the US and other countries with significant human rights or pro-democracy components in their foreign relations laws and policies perceived in this way, prospects seem relatively bright for proposed agreements that are crafted with a sense of which elements in China's repertoire of ideas about law and sovereignty are most likely to be implicated. On the other hand, attempts to win China's acceptance of positions that conflict with core elements of China's notion of sovereignty will be extraordinarily difficult to obtain, even with side-payments or concessions on other issues that would seem sufficient to induce compliance in a narrowly interest-based model of China's behavior.

Finally, China's adherence to the particular conception of sovereignty reflected in its positions in the highly public debates over law for Hong Kong has not meant that fidelity to a vision trumps the PRC's interests. It indicates only that principles which are compatible with the PRC's overarching interests, and which usually track its immediate interests, can affect perceptions of those interests at the margin, and encourage behavior that does not rigidly follow simple calculations of marginal gains or losses of wealth or power. To the considerable extent that a prosperous and stable Hong Kong and a stable relationship with the US are in the PRC's interest, China's conceptions of sovereignty and other legal and political principles are unlikely to pose insurmountable barriers to cooperation, and agreements need not unravel if they exact some sacrifices of immediate interests. But this mixing and melding of interests and principles also makes for a complex environment for negotiations concerning Hong Kong or US-China relations. It suggests that seemingly promising appeals to the PRC's interests may fail and China's seemingly plausible invocations of principle sometimes will be disingenuous posturing or bargaining tactics that the US and Hong Kong liberals and democrats will want to discount. ❖