

## Territorial Autonomy as a Tool of Conflict Resolution?

### Lessons from “One Country, Two Systems” in Hong Kong

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#### Abstract

For those who study comparative models of autonomy, Hong Kong has provided a fascinating but increasingly pessimistic case study. On one hand, the Sino-British Joint Declaration promised that Hong Kong would enjoy an exceptionally high degree of autonomy, including a separate currency, a separate customs regime, and an independent judiciary with the power of final adjudication. In practice, however, “One Country, Two Systems” (OCTS) has fallen well short of expectations and Hong Kong has been plagued by escalating conflicts, primarily over Beijing’s refusal to allow local democracy. In 2020, after a sustained period of anti-government protests, the People’s Republic of China (PRC) imposed a sweeping National Security Law, which has profoundly affected Hong Kong’s local press, educational institutions, and civil society. In 2021, Beijing went further and overhauled the election system for Hong Kong’s Legislative Council, reversing the limited democracy reforms that had been achieved. As a result, the British Government has

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Online: <http://publication.iias.sinica.edu.tw/32903022.pdf>.



accused the PRC of violating the Joint Declaration. Many foreign governments have also stopped treating Hong Kong as a separate jurisdiction for the purposes of trade and extradition agreements, reasoning that it is no longer sufficiently autonomous to justify separate treatment from the PRC. All of this has occurred within the first 25 years of what was supposed to be a 50-year period of “no change” in Hong Kong. While it is tempting to attribute the demise of OCTS to the authoritarian nature of the PRC, this article explores an alternative theory — that weaknesses in OCTS as a model of autonomy are also to blame. The article draws upon comparative studies of autonomous regions and argues that the United Nations should have played a greater role in the negotiations for reunification, so as to protect the right of a colonized people to practice at least internal self-determination.

KEYWORDS: Hong Kong, China, “One Country, Two Systems”, territorial autonomy, internal self-determination, decolonization, dispute resolution, national security, human rights.

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## **I. Comparative Perspectives on “One Country, Two Systems”**

The terms “territorial autonomy” and “regional autonomy” are used to describe a wide variety of arrangements that enable a subnational

region to practice self-government and organize its own affairs, without undue interference from the central authorities. Although studies of territorial autonomy can include federal systems, this article focusses on asymmetrical arrangements, in which the “autonomy” is not enjoyed by all regions within the larger state. Asymmetrical autonomy arrangements have been devised for different purposes, sometimes to reorganize the relationship between a colonial power and a former colony and sometimes to accommodate a community that hoped to separate itself from the larger colony at the time of independence. It is often proposed as a tool of conflict resolution.<sup>1</sup> For example, it may be used to resolve disputes over territory or to dampen desires for secession by providing a form of “internal self-determination” to a region without threatening the larger state’s right to territorial integrity.<sup>2</sup>

For those who study territorial autonomy as a tool of conflict resolution, Hong Kong has provided a fascinating case study. The Sino-British Joint Declaration<sup>3</sup> initially appeared to promise an exceptionally high degree of autonomy and Hong Kong was well equipped to exercise it, as an international financial center with its own sophisticated legal system. Indeed, during the transition period (1984-1997), some experts

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1 Marc Weller, *Introduction*, in *ASYMMETRIC AUTONOMY AND THE SETTLEMENT OF ETHNIC CONFLICTS* 1, 1-14 (Marc Weller & Katherine Nobbs eds., 2011) (noting that asymmetric autonomy has been used as a principal mode of settlement of self-determination and ethnic conflicts in the past two decades).

2 See, e.g., Stefan Wolff & Marc Weller, *Self-determination and Autonomy: A Conceptual Introduction*, in *AUTONOMY, SELF-GOVERNANCE AND CONFLICT RESOLUTION: INNOVATIVE APPROACHES TO INSTITUTIONAL DESIGN IN DIVIDED SOCIETIES* 1, 1-25 (Stefan Wolff & Marc Weller eds., 2005).

3 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, China-U.K. [hereinafter Joint Declaration], Dec. 19, 1984, 1399 U.N.T.S. 33.

suggested that “One Country, Two Systems” (OCTS) might provide a model for power-sharing in other disputed territories.<sup>4</sup> Of course, by that time, it was well known that Beijing hoped to apply the model to at least two other territories, Macau<sup>5</sup> and Taiwan.<sup>6</sup> Hong Kong was, therefore, considered a “showcase” in the drive of the People’s Republic of China (PRC) for reunification.<sup>7</sup> In theory, the goal of applying OCTS more broadly would provide Beijing with an incentive to comply with the Joint Declaration.<sup>8</sup>

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- 4 See Herbert J. Hansell, Robert E. Lutz, James V. Feinerman, David H. Popper & Hurst Hannum, *The Hong Kong Accord as a Model for Dealing with Other Disputed Territories*, 80 AM. SOC’Y INT’L L. PROC. 348, 348-68 (1986); and ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 357 (1995) (citing a variety of sources for the proposition that “it has been contended that the solution agreed upon in 1984 concerning Hong Kong constitutes a useful model for dealing with disputed territories”).
  - 5 Macau was reunified with the PRC in 1999 under a model of autonomy that is similar, on paper, to that used for Hong Kong. However, the dynamics of the Macau-PRC relationship have been different. See Paulo Cardinal, *Macau: Transformation of an Historic Autonomy*, in PRACTISING SELF-GOVERNMENT: A COMPARATIVE STUDY OF AUTONOMOUS REGIONS 383, 383-411 (Yash Ghai & Sophia Woodman eds., 2013); and Paulo Cardinal, *Rule of Law Resilience: Comparative Perspectives from Macau*, in CHINA’S NATIONAL SECURITY: ENDANGERING HONG KONG’S RULE OF LAW? 87, 87-100 (Cora Chan & Fiona de Londras eds., 2020).
  - 6 See Byron S.J. Weng, *Mainland China, Taiwan, and Hong Kong as International Actors*, in HONG KONG’S REUNION WITH CHINA: THE GLOBAL DIMENSIONS 40, 40-78 (Gerard A. Postiglione & James T.H. Tang eds., 1997); and Yash Ghai, *Hong Kong’s Autonomy: Dialects of Powers and Institutions*, in PRACTISING SELF-GOVERNMENT: A COMPARATIVE STUDY OF AUTONOMOUS REGIONS 315, 320 (Yash Ghai & Sophia Woodman eds., 2013).
  - 7 Johannes M.M. Chan, *Asymmetry in the Face of Heavily Disproportionate Power Relations: Hong Kong*, in ASYMMETRIC AUTONOMY AND THE SETTLEMENT OF ETHNIC CONFLICTS 121, 121-47 (Marc Weller & Katherine Nobbs eds., 2011).
  - 8 Alvin Y. So, *Social Protests, Legitimacy Crisis, and the Impetus toward Soft Authoritarianism in the Hong Kong SAR*, in THE FIRST TUNG CHEE-HWA ADMINISTRATION: THE FIRST FIVE YEARS OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION 399, 403 (Siu-kai Lau ed., 2002) (describing the “inverted Taiwan factor” as a “blessing” for Hong Kong).

Yet OCTS in Hong Kong has fallen well short of initial expectations. The territory has been plagued by escalating conflicts, primarily over the pace of local democracy reforms. Following the Occupy Central movement of 2014, Beijing began adopting a far more interventionist approach, frequently being accused of stifling civil liberties.<sup>9</sup> On June 30, 2020, after a sustained period of antigovernment protests,<sup>10</sup> the PRC imposed a sweeping National Security Law (NSL) in the territory, claiming that Hong Kong had failed to fulfill its constitutional obligation to enact local legislation to protect national security.<sup>11</sup> The NSL has had a profound impact on the local press, educational institutions, and civil society.<sup>12</sup> Independent human rights experts from the United Nations (UN) now regularly express concerns regarding civil liberties and the right to fair trial in Hong Kong.<sup>13</sup> In

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9 Carole J. Petersen & Alvin Y.H. Cheung, *Academic Freedom and Critical Speech in Hong Kong: China's Response to Occupy Central and the Future of "One Country, Two Systems"*, 42 N. CAROLINA J. INT'L L. 665, 665-727 (2017).

10 For analysis of the anti-government protests, which began as peaceful expressions of opposition to a government proposal to amend Hong Kong's legal framework regarding extradition, see Albert H.Y. Chen, *A Perfect Storm: Hong Kong-Mainland Rendition of Fugitive Offenders*, 49 HKLJ 419, 419-30 (2019); and Cora Chan, *Demise of "One Country, Two Systems"? Reflections on the Hong Kong Rendition Saga*, 49 HKLJ 447, 447-57 (2019).

11 For an unofficial English translation, see HONG KONG GOVERNMENT E-GAZETTE (July 3, 2020), <https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf> (last visited Nov. 20, 2021). See also *Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security*, adopted at the Third Session of the Thirteenth National People's Congress (NPC) on 28 May 2020, <https://www.elegislation.gov.hk/hk/A215>.

12 LYDIA WONG & THOMAS E. KELLOGG, HONG KONG'S NATIONAL SECURITY LAW: A HUMAN RIGHTS AND RULE OF LAW ANALYSIS, GEORGETOWN CENTER FOR ASIAN LAW (Feb. 2021), <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/02/GT-HK-Report-Accessible.pdf>. See Appendix C (listing arrests, including many arising from entirely peaceful speech and political activity).

13 See, e.g., United Nations Office of the High Commissioner for Human Rights, *Hong*

2021, Beijing went further and overhauled the local election system for the Legislative Council, reversing the limited democracy reforms that had been implemented.<sup>14</sup>

As a result of these developments, the British government has accused Beijing of violating the Joint Declaration.<sup>15</sup> Many other foreign governments have also stopped treating Hong Kong as a separate jurisdiction for the purposes of trade and extradition agreements, after concluding that it is no-longer sufficiently autonomous to justify that separate treatment.<sup>16</sup> All of this has occurred within the first 25 years of what Beijing promised would be a 50-year period of “no change” in Hong Kong,<sup>17</sup> greatly damaging the PRC’s international reputation. Commentators now openly question whether the PRC can be trusted to honor its international agreements.<sup>18</sup>

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*Kong: Arrests under Security Law, a Serious Concern*, UN NEWS (Oct. 12, 2021), <https://news.un.org/en/story/2021/10/1102882>.

- <sup>14</sup> For a summary, see *Explainer: How Beijing Cracked down on Hong Kong’s Elections*, HONG KONG FREE PRESS (Mar. 31, 2021), <https://hongkongfp.com/2021/03/31/explainer-how-beijing-cracked-down-on-hong-kongs-elections/>. For links to the NPC Standing Committee’s Decision and the local legislation implementing it, see HONG KONG GOVERNMENT, *IMPROVE ELECTORAL SYSTEM: ENSURE PATRIOTS ADMINISTERING HONG KONG*, <https://www.cmab.gov.hk/improvement/en/home/index.html> (last visited Nov. 15, 2021).
- <sup>15</sup> See, e.g., GOV. UK, SECRETARY FOR STATE FOR FOREIGN AND COMMONWEALTH, *SIX-MONTHLY REPORT ON HONG KONG: 1 JANUARY TO 30 JUNE 2021* (Dec. 14, 2021), <https://www.gov.uk/government/publications/six-monthly-report-on-hong-kong-january-to-june-2021/six-monthly-report-on-hong-kong-1-january-to-30-june-2021>.
- <sup>16</sup> For more details on the NSL and the international community’s reaction, see Carole J. Petersen, *The Disappearing Firewall: International Consequences of Beijing’s Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong*, 50 HKLJ 633, 633-56 (2020).
- <sup>17</sup> Joint Declaration, para. 3(12).
- <sup>18</sup> See, e.g., Robert D. Williams, *International Law with Chinese Characteristics: Beijing and the “Rules-Based” Global Order*, BROOKINGS INSTITUTION (Oct. 2020), <https://www.brookings.edu/research/international-law-with-chinese-characteristics-beijing-and-the-rules-based-global-order/>.

It is tempting to conclude that the demise of OCTS stems from the very nature of the PRC and the Chinese Communist Party.<sup>19</sup> Perhaps it is simply impossible for a small liberal enclave to survive as an “autonomous region” within a large and increasingly powerful authoritarian state. Under this theory, the specific provisions of the Joint Declaration and the Hong Kong Basic Law were largely irrelevant because it was just a matter of time before Beijing would curtail civil liberties, autonomy, and local democracy. If this explanation is correct then the main lesson from the Hong Kong case study is that an authoritarian regime should not be trusted if it promises to grant autonomy to a region. Of course, that would be a difficult lesson to apply in practice because political systems are not static. Countries that are considered liberal democracies today may become authoritarian over time.<sup>20</sup>

This article explores an alternative theory — that the escalating conflicts and ultimate destruction of Hong Kong’s autonomy are not entirely due to the PRC’s authoritarian nature. Rather, the collapse of OCTS can also be attributed to weaknesses in the model of autonomy, which might have been avoided had the UN played a greater role in the negotiations and protected the right of a colonized people to practice at least internal self-determination.

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<sup>19</sup> See, e.g., Keith Richburg, *One Country, Two Systems Was Always Doomed to Fail*, FINANCIAL REVIEW (Aug. 19, 2019), <https://www.afr.com/world/asia/one-country-two-systems-was-always-doomed-to-fail-20190818-p52i9r>.

<sup>20</sup> See, e.g., Tom Ginsburg, Aziz Z. Huq & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism?*, 85 U. CHI. L. REV. 239, 239-55 (2018); ANNE APPLEBAUM, TWILIGHT OF DEMOCRACY: THE SEDUCTIVE LURE OF AUTHORITARIANISM (2020); and LEE MORGENBESSER, THE RISE OF SOPHISTICATED AUTHORITARIANISM IN SOUTHEAST ASIA (2020).

Comparative studies of territorial autonomy can help to identify factors that are associated with the successful practice of autonomy. They confirm what we would expect to be the case — that it is easier for a region to practice autonomy inside a state that has a tradition of democracy and rule of law.<sup>21</sup> But studies have also identified additional factors that correlate positively with the practice of autonomy, which can be summarized as follows: (1) international involvement (during the negotiations for autonomy and thereafter); (2) democratic participation from the autonomous region itself (during the negotiations for autonomy and thereafter); (3) a clear division of powers with constitutional entrenchment; and (4) independent mechanisms for consultation and dispute resolution.<sup>22</sup> The remainder of this article assesses the extent to which OCTS embraced these positive factors, focusing first on the Joint Declaration itself and then on the Hong Kong Basic Law, which is Hong Kong's constitutional instrument and a national law of the PRC.<sup>23</sup>

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21 Sophia Woodman & Yash Ghai, *Comparative Perspectives on Institutional Frameworks for Autonomy*, in PRACTISING SELF-GOVERNMENT: A COMPARATIVE STUDY OF AUTONOMOUS REGIONS 449, 457 (Yash Ghai & Sophia Woodman eds., 2013) (noting that communist states, including the USSR (Union of Soviet Socialist Republics) and the PRC, have a poor record of allowing autonomy to be practiced).

22 These factors are summarized from: Woodman & Ghai, *supra* note 21; see Yash Ghai, *Autonomy as a Strategy for Diffusing Conflict*, in INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR 483, 483-530 (Paul C. Stern & Daniel Duckman eds., 2000); and HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* (rev. ed. 1996).

23 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China [hereinafter Basic Law], Apr. 4, 1990, effective July 1, 1997, <https://www.basiclaw.gov.hk/en/basiclaw/index.html>.

## II. The Joint Declaration: An Inadequate Foundation for Autonomy

Two of the key factors associated with the successful practice of autonomy are international involvement and democratic participation, both during the negotiations for autonomy and thereafter. These factors were largely absent in the development of OCTS, creating significant flaws in the model of autonomy that was ultimately adopted.

As is often the case with autonomy arrangements, OCTS began with a territorial dispute. From the perspective of the UK, Hong Kong was a British colony, which is why it was initially placed on the list of non-self-governing territories maintained by the United Nations (UN).<sup>24</sup> This created an expectation that Hong Kong, as a colonized people, would eventually exercise a right to self-determination.<sup>25</sup> It also meant that the UK, as the colonial power, had a duty to report to the UN on the development of self-government in the territory.<sup>26</sup> According to the principles stated in General Assembly Resolution 1541, Hong Kong should not have been removed from that list until it attained “a full measure” of self-government. Normally, that occurs when a colonized people vote for one of three options: (1) emergence as a sovereign

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<sup>24</sup> See, e.g., Nihal Jayawickrama, *The Right of Self-Determination — A Time for Reinvention and Renewal*, 57 SASK. L. REV. 1, 16 (1993); and Carole J. Petersen, *Not an Internal Affair: Hong Kong's Right to Autonomy and Self-Determination under International Law*, 49 HKLJ 883, 883-904 (2019).

<sup>25</sup> U.N. Charter art. 73; G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960) [hereinafter G.A. Res. 1514].

<sup>26</sup> UN G.A. Res. 1541 (XV), Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter, at Principles I, II and IV (Dec. 15, 1960) [hereinafter G.A. Res. 1541].

independent state; (2) free association with an independent state; or (3) integration with an independent state.<sup>27</sup> Options (2) and (3) are only considered acceptable when consistent with the freely expressed wishes of the territory's peoples, acting with "full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage."<sup>28</sup> According to the International Court of Justice, this right to self-determination for a colonized people was already a crystalized norm of customary international law by 1960, which means that it was binding on all states, including the UK and the PRC.<sup>29</sup>

The conflict arose because the PRC had a very different view of Hong Kong's legal status. From its perspective, Hong Kong was not covered by General Assembly Resolutions 1514 and 1541 because it was located on Chinese territory, which had been unjustly occupied by the British.<sup>30</sup> Arguing that Hong Kong (and also Macau) belonged to "the category of questions resulting from the series of unequal treaties left over by history, treaties which the imperialists imposed on China," the PRC requested, in 1971, that both territories be removed from the UN's list of non-self-governing territories.<sup>31</sup>

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<sup>27</sup> *Id.* at Principles II and VI.

<sup>28</sup> *Id.* at Principles VII-IX.

<sup>29</sup> Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶¶ 150-156 (Feb. 25), <https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf> (noting that G.A. Res. 1514, adopted on 14 December 1960, marked the crystallization of the right to self-determination in customary international law and that G.A. Res. 1541, adopted one day later, specified the "means of implementing" this right).

<sup>30</sup> See generally PETER WESLEY-SMITH, *UNEQUAL TREATY, 1898-1997: CHINA, GREAT BRITAIN, AND HONG KONG'S NEW TERRITORIES* (rev. ed., 1998).

<sup>31</sup> Nihal Jayawickrama, *Public Law*, in *THE LAW IN HONG KONG, 1969-1989*, at 49, 50-51 (Raymond Wacks ed., 1989) (quoting the Letter, dated 10 March 1972, from

Although Beijing's "unequal treaties" claim was always dubious as a matter of international law (due to the intertemporal doctrine<sup>32</sup>), the PRC did have a competing territorial claim because the New Territories section of Hong Kong was only leased to the UK for 99 years (until 30 June 1997).<sup>33</sup> General Assembly Resolution 1514 also provides that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter."<sup>34</sup> While the interpretation of this paragraph is debated,<sup>35</sup> it has been cited for the proposition that a colonized people's right to self-determination must sometimes yield to a sovereign state's right to territorial integrity.

What was disturbing (and arguably a violation of customary international law) was the fact that the UN General Assembly approved Beijing's request to de-list Hong Kong without any legal analysis of its status or consultation with the inhabitants. While this was partly due to the fact that Beijing had strong political allies on the UN's Committee on

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Ambassador Huang Hua, Permanent Representative of the PRC to the UN, to the Chairman of the UN Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples).

<sup>32</sup> According to the intertemporal doctrine, the validity of treaties is assessed by the law that existed when they were entered into (and the treaties by which the UK acquired control over Hong Kong would have been considered valid in the 1800s). *See, e.g.,* Roda Mushkat, *Hong Kong's Quest for Autonomy: A Theoretical Enforcement*, in *HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY* 307, 319-20 (Raymond Wacks ed., 1993).

<sup>33</sup> In contrast, Hong Kong Island and Kowloon Peninsula were ceded "in perpetuity" to the UK.

<sup>34</sup> G.A. Res. 1514, para. 6.

<sup>35</sup> The debate centers on whether this paragraph simply prohibits dismemberment of colonial territories or whether it also protects territorial claims by neighboring states, such as the PRC. *See* JAMIE TRINIDAD, *SELF-DETERMINATION IN DISPUTED COLONIAL TERRITORIES* 21-69 (2018).

Decolonization, the UK (and indeed the UN as a whole) also bears responsibility. The UK could have argued that the obligations owed by a colonial power to a dependent territory were “paramount” (the language used in article 73 of the UN Charter) and must prevail over contradictory obligations under a bilateral agreement, such as the lease of the New Territories.<sup>36</sup> But the UK raised no objections and the recommendation to de-list Hong Kong was therefore never discussed in the General Assembly. Instead, it was buried in a lengthy report and summarily approved. Yet Hong Kong’s status as a British dependent territory continued to be recognized by the UN, right up until 1997.<sup>37</sup>

Of course, even if Hong Kong had remained on the UN’s list of non-self-governing territories, Beijing would have continued to assert its territorial claim and Hong Kong might well have become an autonomous region of the PRC. By 1970, the General Assembly had recognized the possibility of a “fourth option” for colonized peoples, which was “any other political status freely chosen by the people.”<sup>38</sup> This could have included the option of becoming an autonomous region within the PRC. But if the process of decolonization had been overseen by the UN then it would have been a far more open process, with greater participation by the people of Hong Kong and recognition of their right

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36 U.N. Charter arts. 73 and 103 (providing that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”).

37 For example, when UK ratified UN human rights treaties it decided whether to apply the treaties to Hong Kong, along with its other dependent territories. The UK also continued to report to UN treaty monitoring bodies on the implementation of human rights treaties in Hong Kong, until the handover on 1 July 1997.

38 G.A. Res. 2625 (XXV), Annex, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

to practice at least internal self-determination.

Instead, the negotiations leading to the Joint Declaration were conducted in secrecy, outside the supervision of the UN and with no recognition of Hong Kong's status as a "colonized people" with rights under international law. Proposals to structure the negotiations as a "three-legged stool" (so that the UK, China, and Hong Kong would each be represented) were rejected.<sup>39</sup> Beijing insisted that the Joint Declaration would be a bilateral agreement and that Hong Kong could not send representatives to the negotiations. After the Joint Declaration was drafted (but not yet ratified), the British did invite the public to comment on the treaty but the options were limited by that time: Hong Kong could become a part of the PRC in 1997 under the terms of the Joint Declaration or it could become a part of the PRC without any agreement in place. Under this scenario, it is not surprising that the majority of respondents expressed support for the Joint Declaration.<sup>40</sup>

Indeed, as presented to the people, the Joint Declaration promised that Hong Kong would be endowed with many of the powers that we would normally associate with an independent state.<sup>41</sup> In this regard, the treaty appeared to satisfy at least one of the factors associated with successful autonomy: a clear division of powers. For example, the treaty provides that Hong Kong will "be vested with executive, legislative and independent judicial power" and continue to monitor its own border,

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39 See, e.g., JOSEPH Y.S. CHENG ED., HONG KONG: IN SEARCH OF A FUTURE 7, 33, 231-32 (1984); and JOHN M. CARROLL, A CONCISE HISTORY OF HONG KONG 180-82 (2007).

40 YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 55-56 (1997).

41 See, e.g., HANNUM, *supra* note 22, especially 129-50; and Hurst Hannum, *The Foreign Affairs Powers of Autonomous Regions*, 57 NORDIC J. INT'L L. 273, 273 (1988).

issue its own currency and travel documents, and operate its own customs regime.<sup>42</sup> In contrast, Beijing promised to limit its own powers of governance over Hong Kong to the areas of defense and foreign affairs.<sup>43</sup> Even in that arena, the Joint Declaration authorized Hong Kong to enter “on its own” into agreements with foreign states and international organizations,<sup>44</sup> giving the territory a form of international legal personality.<sup>45</sup>

The Joint Declaration is also full of language promising to protect the “rights and freedoms” of Hong Kong residents, including the freedoms of speech, assembly, association, travel, religious belief, academic research, choice of occupation and the right to form trade unions and to strike.<sup>46</sup> It further promised that the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) would remain in force in Hong Kong.<sup>47</sup> This was particularly important because neither treaty had been ratified by the PRC at the time (and the PRC still has not ratified the ICCPR). When combined with the promise to preserve Hong Kong’s common law legal system and its independent judiciary (endowed with the power of final adjudication)<sup>48</sup> these provisions reassured many Hong Kong residents, as well as the international business community.

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42 Joint Declaration, para. 3(6).

43 *Id.* at para. 3(1).

44 *Id.* at para. 3(10).

45 *See generally* RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG (1997).

46 Joint Declaration, para. 5 and Annex I, Section XIII.

47 *Id.* at Annex I, Section XIII.

48 *Id.* at para. 3.

What was missing? The first major weakness is that the Joint Declaration was too vague regarding the plans for developing local democracy. It is well recognized that autonomy cannot be practiced if the inhabitants of the autonomous region are not able to elect the people who are actually exercising the powers allocated to the autonomous region.<sup>49</sup> The Joint Declaration certainly *implied* that this would occur, at least with respect to the local legislature. The treaty states that the local government will be “composed of local inhabitants,” with a local legislature “constituted by elections” and a Chief Executive who is “selected by election or through consultations held locally” prior to being appointed by the Central Government.<sup>50</sup> These clauses were apparently the most that Beijing was willing to agree to during the negotiations and we now know that it had no intention of allowing Hong Kong to develop local democracy. But during the public consultation on the Joint Declaration, the British colonial government actively encouraged Hong Kong residents to believe that a democratic system of government would be in place prior to the handover. A “Green Paper” was distributed in 1984, which proposed to transform Hong Kong into a form of parliamentary democracy before 1997. Under that proposal, a majority of the Legislative Council would be elected, a majority of the Executive Council would be selected by the Legislative Council, and the Governor would be selected by a joint meeting of the unofficial

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<sup>49</sup> See, e.g., Hurst Hannum & Richard B. Lillich, *The Concept of Autonomy in International Law*, 74 AM. J. INT’L L. 858, 865 (1980) (noting that the “great majority of autonomous entities surveyed have a locally elected legislative body as the fundamental source of local governmental power”); and Ghai, *supra* note 22, at 517 (noting that democratic structures in the autonomous region “are necessary for the exercise and protection of autonomy”).

<sup>50</sup> Joint Declaration, para. 3(4) and Annex I.

members of the Legislative and Executive Councils.<sup>51</sup>

Even after it was clear that the democracy reforms would be far more modest than proposed in the 1984 Green Paper (due to the PRC's opposition<sup>52</sup>), the British government continued to assure the UN Human Rights Committee that it was pursuing measures to "establish a fully democratic system in Hong Kong" before 1997.<sup>53</sup> In the end, however, even the reforms that Governor Patten managed to push through in 1995 were undone in 1997 by the Provisional Legislative Council established by Beijing.<sup>54</sup> The conflicts over democracy have plagued Hong Kong ever since.<sup>55</sup>

The second major weakness in OCTS is that Hong Kong's autonomy was not entrenched in a manner that could be enforced against the Central Government. Article 31 of the PRC's Constitution provides

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51 HONG KONG GOVERNMENT, GREEN PAPER: THE FURTHER DEVELOPMENT OF REPRESENTATIVE GOVERNMENT IN HONG KONG (July 1984), <https://ia800200.us.archive.org/22/items/greenpaperfurthe00hong/greenpaperfurthe00hong.pdf>. The term "unofficial members" is a term that was used to refer to members of the Legislative and Executive Councils who were not officials in the colonial government.

52 See Ming K. Chan, *Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90*, in THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY? 3, 3-35 (Ming K. Chan & David J. Clark eds., 1991).

53 UN HUMAN RIGHTS COMMITTEE, ADDENDUM TO THE FOURTH PERIODIC REPORTS OF STATES PARTIES DUE IN 1994, UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, SUPPLEMENTARY REPORT ON THE DEPENDENT TERRITORIES, HONG KONG, CCPR/C/95/Add.5, para. 1 (Aug. 7, 1995), <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ae6b0390&skip=0&query=CCPR/C/95/Add.5>.

54 For analysis, see Albert H.Y. Chen, *The Provisional Legislative Council of the SAR*, 27 HKLJ 1, 1-11 (1997); and Johannes M.M. Chan, *The Jurisdiction and Legality of the Provisional Legislative Council*, 27 HKLJ 374, 374-86 (1997).

55 See Alvin Y.H. Cheung, *Road to Nowhere: Hong Kong's Democratization and China's Obligations under Public International Law*, 40 BROOK. J. INT'L L. 465, 481-504 (2015); and ALBERT H.Y. CHEN, THE CHANGING LEGAL ORDERS IN HONG KONG AND MAINLAND CHINA: ESSAYS ON "ONE COUNTRY, TWO SYSTEMS" 31-56 (2021).

for the creation of Special Autonomous Regions but it gives the National People's Congress free reign to determine the specific arrangements.<sup>56</sup> Moreover, the PRC's Constitution has never been enforceable against the Central Government because the PRC does not have an independent judiciary or any concept of separation of powers. Thus, any entrenchment of Hong Kong's autonomy needed to be accomplished through an international agreement that could be enforced in an international forum.

Unfortunately, the Joint Declaration is weak on this point, providing simply that the policies stated in the treaty "will be stipulated" by the National People's Congress in a Basic Law of the Hong Kong Special Administrative Region (SAR) and that these policies will "remain unchanged for 50 years."<sup>57</sup> Although the Basic Law became the constitutional instrument for Hong Kong (and has been enforced by Hong Kong courts against the local government), it cannot be enforced against the Central Government. The Joint Declaration was also silent on the process for consulting the Hong Kong public regarding the content of the Basic Law (*e.g.*, there was no clause requiring a referendum on the Basic Law before enactment by the National People's Congress) and also on which entity would hold the power to interpret and enforce the Basic Law (issues that are analyzed in Part III of this article).

Moreover, the Joint Declaration never describes "autonomy" as a *right* of the Hong Kong people and it does not even mention the concept

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<sup>56</sup> Art. 31 of The PRC's Constitution provides: "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions."

<sup>57</sup> Joint Declaration, para. 3(12).

of internal self-determination. Legal scholars have analyzed a number of doctrines that support Hong Kong's claim to autonomy and internal self-determination,<sup>58</sup> which is considered particularly appropriate when a colonized people cannot exercise a right to external self-determination due to a competing territorial claim.<sup>59</sup> In such situations, an enforceable right to autonomy could provide a form of "palliative" internal self-determination.<sup>60</sup> But the Joint Declaration itself does not describe autonomy in that rights-based language.

Finally, the Joint Declaration did not provide for an independent mechanism for dispute resolution or for any neutral processes of negotiation and consultation in the event of disputes. There was a Sino-British Joint Liaison Group, which met to ensure a "smooth transfer of government" and to conduct consultations on certain disputes that arose during the transition period.<sup>61</sup> But apart from this transitory mechanism, the Joint Declaration made no provision for dispute resolution. Ideally, there should have been a clause allowing either party to take a dispute on the interpretation and implementation of the Joint Declaration to the International Court of Justice (perhaps with a requirement that mediation be attempted prior to litigation).<sup>62</sup>

While the lack of a dispute resolution clause does not make the Joint Declaration any less binding on the PRC as a matter of

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58 See, e.g., Mushkat, *supra* note 32; and Petersen, *supra* note 24.

59 MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS 74 (1982).

60 TRINIDAD, *supra* note 35, at 243-44.

61 Joint Declaration, Annex II.

62 Although the UK has filed a declaration of recognizing the compulsory jurisdiction of the International Court of Justice (ICJ) the PRC has not done so. Thus, a specific dispute resolution clause, agreeing to the jurisdiction of the ICJ, would be necessary for a contentious case to enforce the Joint Declaration.

international law, it has made enforcement far more challenging. The UK has monitored China's compliance with the treaty, protested against significant breaches, and adopted some countermeasures.<sup>63</sup> For example, the UK has suspended its extradition treaty with Hong Kong, included Hong Kong in the arms embargo that it has applied to Mainland China since 1989 (to prevent it from importing firearms and other potential weapons of repression), and developed a special immigration route for Hong Kong residents who are eligible for British National (Overseas) visas and their dependents.<sup>64</sup> But for the vast majority of Hong Kong's 7 million residents (who have no desire to leave Hong Kong), there is very little that the British government can do to enforce the Joint Declaration. Sanctions targeting officials in Hong Kong and Mainland China are unlikely to change Beijing's approach to Hong Kong.<sup>65</sup> Indeed, some of the sanctions may benefit Xi Jinping domestically, because they appear to "pit China against hostile foreign forces" and generate nationalism, thus deflecting attention from the PRC's substantial economic problems.<sup>66</sup> Sanctions can also be used by those in power to justify an even more authoritarian response in Hong Kong.<sup>67</sup>

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<sup>63</sup> See, e.g., *Six-monthly Reports on Hong Kong*, GOV. UK (July 12, 2013), <https://www.gov.uk/government/collections/six-monthly-reports-on-hong-kong>.

<sup>64</sup> *Hong Kong and China: Foreign Secretary's Statement in Parliament*, GOV. UK (July 20, 2020), <https://www.gov.uk/government/speeches/hong-kong-and-china-foreign-secretarys-statement-in-parliament>. For information on the program for those eligible for British National (Overseas) visas, see *British Nationals (Overseas) Visa*, GOV. UK (July 22, 2020), <https://www.gov.uk/british-national-overseas-bno-visa>.

<sup>65</sup> See Carole J. Petersen, *Sanctions and Human Rights: Lessons from Hong Kong*, 2(5) USALI PERSPECTIVES (Oct. 20, 2021), <https://usali.org/usali-perspectives-blog/sanctions-and-human-rights-lessons-from-hong-kong>.

<sup>66</sup> Andrei Lungu, *The Word Is Falling for China's Hong Kong Trap*, THE DIPLOMAT (July 18, 2020), <https://thediplomat.com/2020/07/the-world-is-falling-for-chinas-hong-kong-trap/>.

<sup>67</sup> For example, Beijing has accused the United States of fomenting unrest in Hong Kong, citing sanctions as support for its claim. The Hong Kong government has

In short, the Joint Declaration provided an entirely inadequate foundation for Hong Kong's autonomy. Many of the most challenging issues were left open and had to be resolved in the Basic Law, a national law over which Beijing would have absolute control. If the PRC had been a liberal democratic state with the rule of law then this might not have been fatal because a good faith interpretation of the Joint Declaration could have provided genuine autonomy and internal self-determination. But given the authoritarian nature of the PRC, it was exceedingly dangerous to give Beijing so much leeway in designing the institutional framework. The implications of doing so are demonstrated in the next section of the article.

### **III. The Basic Law: A Deceptive Institutional Framework**

The Hong Kong Basic Law was drafted by a Basic Law Drafting Committee, enacted by the National People's Congress in 1990, and brought into force on 1 July 1997.<sup>68</sup> The drafting of the Basic Law was slightly more participatory than the drafting of the Joint Declaration. A 180-member Basic Law Consultative Committee was formed and 23 of the 59 seats on the Basic Law Drafting Committee were occupied by

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adopted a similar narrative, insisting that US sanctions are part of a scheme to destabilize Hong Kong and “suppress” China. It uses this version of history to justify strict enforcement of the National Security Law and also Beijing's decision to overhaul Hong Kong's election system. *See, e.g.*, HONG KONG GOVERNMENT, REPORT ON HONG KONG'S BUSINESS ENVIRONMENT: A PLACE WITH UNIQUE ADVANTAGES AND UNLIMITED OPPORTUNITIES (Sept. 27, 2021), [https://www.hkeconomy.gov.hk/en/pdf/Business\\_report\\_2021.pdf](https://www.hkeconomy.gov.hk/en/pdf/Business_report_2021.pdf).

<sup>68</sup> For the history of the drafting process, *see* Chan, *supra* note 52.

local residents. These “representatives” were not, however, elected by the general public. They were appointed by China from various sectors, with heavy representation from Hong Kong’s business community (many of whom were not particularly supportive of popular democracy).<sup>69</sup> Moreover, the majority of the seats on the Drafting Committee were from Mainland China, ensuring that any controversial issues — such as the pace of democratic reform and the power to interpret the Basic Law — would be within Beijing’s ultimate control.

Numerous provisions in the Basic Law were essentially copied from the Joint Declaration, making it appear that Hong Kong would exercise significant powers. For example, the local government was empowered to issue its own travel documents (including a Hong Kong identity card and a Hong Kong passport) and to apply its own immigration controls.<sup>70</sup> It was also authorized to continue to issue its own currency, to formulate its own monetary policy, and to maintain an entirely separate taxation system, with no duty to pay national taxes.<sup>71</sup> The Basic Law also confirmed that Hong Kong could “conclude and implement agreements with foreign states and regions and relevant international organizations” in a variety of fields, including economic, trade, financial, monetary, shipping, and communications.<sup>72</sup> Hong Kong was expected to maintain its separate customs territory and was admitted

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<sup>69</sup> Frank Ching, *Toward Colonial Sunset: The Wilson Regime, 1987-92*, in *PRECARIOUS BALANCE: HONG KONG BETWEEN CHINA AND BRITAIN, 1842-1992*, at 173, 177 (Ming K. Chan ed., 1994) (noting that there was strong resistance from the conservative business community, as well as from China, to the concept of direct elections for all seats in the post-1997 Legislative Council).

<sup>70</sup> Basic Law art. 154 (H.K.).

<sup>71</sup> Basic Law art. 106 (H.K.).

<sup>72</sup> Basic Law art. 151. For further information on Hong Kong’s powers regarding external affairs, see Basic Law arts. 150-157 (H.K.).

to the World Trade Organization (WTO) as a founding member, using the name Hong Kong, China.<sup>73</sup> Thus, in many spheres of law, Hong Kong appeared to be endowed with a legal status that we would normally associate with independent nations.

In addition to these specific powers, Hong Kong was vested with general executive<sup>74</sup> and legislative powers, defined in exceedingly broad terms.<sup>75</sup> The only express limitations are in the areas of defense and foreign affairs<sup>76</sup> and in certain other areas where the Basic Law expressly allocates a power to the Central Government (such as the power to appoint the Chief Executive and the power to amend the Basic Law).<sup>77</sup> Thus, Hong Kong's local legislature should be able to enact laws in virtually every other field that is relevant to local governance, with no need to demonstrate that the legislation falls within some "enumerated power" of the territory. This broad legislative power naturally raised the question of whether the Hong Kong SAR would hold residual powers. The issue was discussed during the drafting process and proved highly controversial. Hong Kong members of the Drafting Committee believed that it would be natural to state that residual powers

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<sup>73</sup> See generally GOVERNMENT OF THE HONG KONG, *World Trade Organization (WTO)*, [http://www.tid.gov.hk/english/ito/wto/wto\\_overview.html](http://www.tid.gov.hk/english/ito/wto/wto_overview.html) (last visited Dec. 17, 2021).

<sup>74</sup> Basic Law art. 16 states that Hong Kong "shall be vested with executive power" and "shall, on its own, conduct the administrative affairs of the Region in accordance with the relevant provisions of this law". For more detailed provisions on the powers of the Chief Executive, see Basic Law arts. 43, 48-53. For provisions relating to the powers of the Executive Council (the closest thing to a cabinet in Hong Kong) and the Hong Kong government generally, see Basic Law arts. 54-65 (H.K.).

<sup>75</sup> Basic Law art. 17 states that Hong Kong "shall be vested with legislative power". For additional provisions relating to legislative powers and the legislative process, see Basic Law arts. 8, 17-18, 66-79 (H.K.).

<sup>76</sup> Basic Law arts. 8, 17-18 (H.K.).

<sup>77</sup> Basic Law arts. 45, 159 (H.K.).

rest with the local government, given the approach and structure of the Basic Law. However, in 1988 (when the public consultation on the first published draft of the Basic Law was about to commence), Wu Jianfan, a Mainland member of the Drafting Committee, rejected the idea, arguing that it would “confuse” China’s unitary system with federal systems.<sup>78</sup> Interestingly, however, Wu did not insist that residual powers must be expressly granted to the Central Government. Rather, he argued that the question of residual powers simply did not arise under the OCTS model and therefore need not be addressed in the Basic Law.<sup>79</sup> (In practice however, the power to interpret the Basic Law, which is discussed below, would give Beijing not only “residual powers” but also the power to amend virtually any clause in the Basic Law.)

Article 8 provides that the sources of law in Hong Kong shall be: the Basic Law; Hong Kong’s pre-existing laws<sup>80</sup> (including ordinances, common law and the rules of equity); and new ordinances enacted by the local legislature. This means that national laws other than the Basic Law are not supposed to be a general source of law for Hong Kong. If the Central Government wishes to apply a national law in Hong Kong it is

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<sup>78</sup> See Jianfan Wu, *Several Issues Concerning the Relationship between the Central Government of the People’s Republic of China and the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 65, 74 (1988).

<sup>79</sup> Basic law art. 73 (H.K.).

<sup>80</sup> Laws already in force in the British territory of Hong Kong on June 30, 1997 were adopted as part of the law of the Hong Kong SAR, provided that they had not been determined by the Standing Committee of the National People’s Congress to be in conflict with the Basic Law. For a list of the ordinances and provisions of ordinances that were not adopted, see *Decision of the Standing Committee of the National People’s Congress on the Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, adopted at the Twenty Fourth Session of the Standing Committee of the Eighth National People’s Congress on 23 February 1997.

supposed to go through a special procedure set forth in article 18, which involves seeking advice from the Committee for the Basic Law (a joint committee with members from both Hong Kong and Mainland China) and then adding the national law to Annex III of the Basic Law.<sup>81</sup> Except in emergency situations, article 18 purports to limit the types of laws that will be applied to those relating to defence, foreign affairs, and other matters “outside the autonomy” of Hong Kong.

The Basic Law also repeats the provisions from the Joint Declaration protecting civil liberties and includes numerous detailed provisions promising to preserve Hong Kong’s independent judicial system and rules of procedural fairness.<sup>82</sup> The previous system of appointment of judges (by an independent commission) was maintained, as is their security of tenure. The Basic Law expressly allowed for the appointment of judges from other common law jurisdictions.<sup>83</sup> Only the Chief Justice of the Court of Final Appeal (CFA) and the Chief Judge of the High Court were expressly required to be Chinese citizens (with no right of abode in any foreign country). In the colonial period, the Privy Council was the final court of appeal for Hong Kong and other British colonies. In preparation for 1997, the CFA was established in Hong Kong. There is no appeal beyond the CFA and no mechanism by which a court in Mainland China (or any other central authority) can overturn its judgment in a specific case. This was considered an important feature of OCTS and one of the reasons that comparative scholars of autonomy

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81 See Basic Law art. 18 (declaring that national laws “shall not be applied” in Hong Kong except for those contained in Annex III to the Basic Law and setting forth the procedure for adding a national law to Annex III).

82 Basic Law arts. 85, 89 (independence of the judiciary); art. 86 (jury trial for serious crimes); art. 87 (right to fair trial and other procedural protections).

83 Basic Law arts. 90-93 (H.K.).

originally viewed Hong Kong as exercising a particularly high degree of autonomy.

Thus, in many respects, the Basic Law appeared to provide a very detailed institutional framework for Hong Kong's exercise of autonomy. In theory, it would have at least temporarily entrenched autonomy because the PRC promised (in the Joint Declaration) not to change the policies stated in the Basic Law for at least 50 years. Indeed, the people of Hong Kong and the international community were encouraged to believe that OCTS might become a permanent arrangement.<sup>84</sup> For example, in 2002, when Hong Kong was admitted as a separate member of the WTO, the Secretary for Constitutional Affairs delivered a speech claiming that "One Country, Two Systems is here to stay" and that the "Basic Law and common law system will always be there to serve Hong Kong."<sup>85</sup>

In fact, the institutional framework for autonomy in the Basic Law is actually very weak. This is because Beijing carefully inserted provisions that enabled it to exercise enormous power over Hong Kong. Most importantly, the power to interpret the Basic Law is vested in the Standing Committee of the National People's Congress. This is one of the issues that was not addressed in the Sino-British Joint Declaration and it was highly controversial during the drafting process for the Basic Law, largely due to the conflicting approaches to legislative interpretation followed in common law and socialist legal systems. Hong

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<sup>84</sup> Danny Gittings, *What Will Happen to Hong Kong after 2047?*, 42 CAL. W. INT'L L.J. 37, 49-51 (2011) (summarizing public statements by Deng Xiaoping to this effect).

<sup>85</sup> *Speech by Secretary for Constitutional Affairs Stephen Lam, Seminar on Legal Landscape of China after Accession to WTO*, GOVHK PRESS RELEASE (Sept. 7, 2002), [www.info.gov.hk/gia/general/200209/07/0907233.htm](http://www.info.gov.hk/gia/general/200209/07/0907233.htm).

Kong members of the Drafting Committee argued that the power of interpretation should rest with Hong Kong's independent judiciary, as the Basic Law serves as Hong Kong's constitutional instrument.<sup>86</sup> But Beijing insisted that the power of interpretation should rest with the NPC's Standing Committee because the Basic Law is a national law (a problem that can be traced back to the Joint Declaration itself).

The final version of article 158 of the Basic Law reflects an awkward compromise between these two positions. The Hong Kong courts are authorized to interpret provisions of the Basic Law in the course of adjudicating cases. But the Hong Kong CFA must seek an interpretation from the NPC Standing Committee before issuing a final judgment that turns on an interpretation of a provision of the Basic Law concerning "affairs which are the responsibility of the Central People's Government" or "the relationship between the Central Authorities and the Region."<sup>87</sup> In contrast, the NPC Standing Committee has a free-standing power to interpret any clause of the Basic Law at any time; there is no need for it to wait for a reference from Hong Kong's CFA. Once the Standing Committee issues an interpretation of the Basic Law it is binding on the courts of Hong Kong in all future cases.

The NPC Standing Committee's power to interpret the Basic Law is particularly problematic because the Standing Committee is not an independent or neutral body (due to the centralized one-party system in the PRC) and it does not follow common law judicial rules of interpretation. This means that Beijing can use the NPC Standing

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<sup>86</sup> Martin Lee, *A Tale of Two Articles*, in *THE BASIC LAW AND HONG KONG'S FUTURE* 309, 309-25 (Peter Wesley-Smith & Albert H.Y. Chen eds., 1988).

<sup>87</sup> Basic Law art. 158 (H.K.).

Committee's powers of interpretation to quickly amend or add to the Hong Kong Basic Law.<sup>88</sup> In theory, the Standing Committee is supposed to consult the Basic Law Committee (which has representatives from Hong Kong) before exercising its powers under article 158 (as well as under articles 17 or 18). Indeed, at one point it was hoped that the Basic Law Committee would hold hearings and evolve into a sort of constitutional court, which would provide reasoned advice to the NPC Standing Committee before it exercised its power of interpretation. But the process of consultation has been shrouded in secrecy and it does not appear to have restrained the NPC Standing Committee in any meaningful way.<sup>89</sup> Indeed, it has been reported that the Hong Kong members of the Basic Law Committee have sometimes been summoned to Beijing at short notice, presented with a draft, and asked only to provide minor comments.<sup>90</sup> Thus, the process of consulting the Basic Law Committee has apparently become a mere formality — a “window-dressing process with no real significance.”<sup>91</sup>

A particularly disturbing incident was the NPC Standing Committee's interpretation of article 104 of the Basic Law, issued in 2016. Unlike previous interpretations, the 2016 interpretation was clearly intended to influence the outcome of a pending case. The judge in the Hong Kong Court of First Instance had already heard the case (on 3 November 2016) and was preparing to deliver a reserved judgement on

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88 Johannes M.M. Chan, *Reconciliation of the NPCSC's Power of Interpretation of the Basic Law with the Common Law in the HKSAR*, 50 HKLJ 657, 657-84 (2020).

89 Eric C. Ip, *Prototype Constitutional Supervision in China: The Lessons of the Hong Kong Basic Law Committee*, 10 ASIAN J. COMP. L. 323, 323-42 (2016).

90 C.L. Lim & Johannes M.M. Chan, *Autonomy and Central-Local Relations*, in *LAW OF THE HONG KONG CONSTITUTION* 37, 68-69 (Johannes M.M. Chan & C.L. Lim eds., 2011).

91 Chan, *supra* note 88, at 659.

the validity of the oath of office taken by two recently elected legislators.<sup>92</sup> Before he could do so, the NPC Standing Committee hurriedly adopted an interpretation of article 104, covering precisely the issues that were pending before the court and making it crystal clear that Beijing wanted the two elected legislators to be disqualified.<sup>93</sup> This was a blatant interference in what is supposed to be Hong Kong's independent judicial branch.<sup>94</sup>

Although Professor Albert H.Y. Chen acknowledges that the 2016 interpretation by the NPC Standing Committee is worrying, he has continued to argue that Beijing has demonstrated “self-restraint” with regard to the power of interpretation because it has only issued five “interpretations” since 1997.<sup>95</sup> In fact, the NPC Standing Committee has used its power to interpret the Basic Law far more often, albeit often under a different label, such as “decision.” The Hong Kong Government's website for the Basic Law categorizes NPC Standing Committee decisions relating to Hong Kong under “Other Instruments”

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92 The Chief Executive of the HKSAR and another v. Yau Wai Ching and others, [2016] 6 H.K.C. 417 (C.F.I.). The court's hearing was held on Nov. 3; the NPC Standing Committee issued its Interpretation on Nov. 7; and the judgement was issued on Nov. 15.

93 *Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress*, adopted by the Standing Committee of the Twelfth National People's Congress at its Twenty-fourth Session on 7 November 2016, unofficial English translation available at [https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext\\_doc27.pdf](https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext_doc27.pdf) (last visited Jan. 10, 2022).

94 For commentary on the unsuccessful request for leave to appeal, see Surabhi Chopra, *Yau Wai Ching v Chief Executive of HKSAR: A Landmark Blow to Liberal Constitutionalism*, IACL-AIDC BLOG (Dec. 15, 2020), <https://blog-iacl-aidc.org/constitutional-landmark-judgments-in-asia/2020/12/15/yau-wai-ching-v-chief-executive-of-hksar-a-landmark-blow-to-liberal-constitutionalism>.

95 CHEN, *supra* note 55, at 71-73.

and treats them as equivalent to the text of the Basic Law.<sup>96</sup> In 2020-21 alone, Beijing used this mechanism to: postpone the Legislative Council elections that were originally scheduled for September 2020 (knowing that pro-government candidates were likely to perform badly, as they did in the November 2019 District Council elections); to disqualify pro-democracy candidates and legislators; and, most recently, to completely overhaul the local electoral system.<sup>97</sup>

In essence, Beijing has used the power of interpretation as a quick way to amend the Basic Law, without having to bother with the amendment process specified in article 159. The Central Government may think that this is an efficient way to settle controversies in Hong Kong. But in its rush to do so, it has often undermined efforts by moderates in Hong Kong to negotiate workable compromises. A good example is the 2014 debate on article 45, which provided for “gradual and orderly progress” toward the “ultimate aim” of selecting the Chief Executive “by universal suffrage upon nomination by a broadly representative nominating committee.” Because Beijing had promised that this could begin in 2017, there was an active debate in Hong Kong in 2013-2014 on how to constitute the nominating committee. Benny Tai and his supporters were convinced that anything less than civic nomination would be “fake democracy” and they were determined to make it impossible for a nominating committee to screen out candidates. However, there were also many moderates in Hong Kong (including Professor Albert H.Y. Chen and Ronny Tong) who were endorsing

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<sup>96</sup> The Hong Kong Government lists these “Other Instruments” together with the Annexes to the Basic Law. *See* BASIC LAW, ANNEX & INSTRUMENT, <https://www.basiclaw.gov.hk/en/basiclaw/annex-instrument.html> (last visited Dec. 18, 2021).

<sup>97</sup> *Id.* at Instruments 28-31.

proposals that would preserve the nominating committee's role while making it reasonably representative of the general public and lowering the threshold of votes necessary for nomination. Had one of these proposals secured sufficient support, it might have provided a way for Hong Kong to elect a Chief Executive with a popular mandate.<sup>98</sup>

Instead of permitting Hong Kong to work through these proposals, the NPC Standing Committee brought the debate to an abrupt halt with its Decision of 31 August 2014.<sup>99</sup> Under its terms, the nominating committee would be no more representative than the “selection committee” that had selected the fourth Chief Executive and it would nominate only two or three candidates, all of whom would require the endorsement of more than half of the members. This would have made it impossible for a member of one of the pan-democratic parties to be nominated, although they had consistently won a majority of the popular vote for the legislative seats from geographic constituencies. This diminished the credibility of moderates in Hong Kong and effectively launched the Occupy Central and Umbrella movements in September 2014. When these movements failed to generate any concessions from Beijing, Hong Kong became further polarized between the pro-

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<sup>98</sup> These proposals were discussed at numerous forums in Hong Kong, including the *Academic Roundtable: “Universal Suffrage and Nomination Procedures: Imperatives from Article 25 ICCPR”*, organized by the Centre for Comparative and Public Law, at the Faculty of Law of the University of Hong Kong on Mar. 20, 2014.

<sup>99</sup> *Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method of Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016*, adopted at the Tenth Session of the Standing Committee of the Twelfth National People's Congress on 31 August 2014, English translation available at [https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext\\_doc25.pdf](https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext_doc25.pdf) (last visited Dec. 18, 2021).

democracy and pro-Beijing camps. One year later, the Hong Kong Government's proposal to elect future Chief Executives by means of "universal suffrage" failed to pass because the pro-democracy legislators objected to the restrictions on the nomination process mandated by the NPC Standing Committee's Decision of 31 August 2014.<sup>100</sup> Without the legitimacy of a local election victory, the Hong Kong government has become almost entirely dependent on Beijing for political support and increasingly disconnected from the general public.

The effects of this situation became painfully clear in 2019 when Carrie Lam proposed to amend Hong Kong's law governing extradition so as to allow for case-by-case extradition to Mainland China (as well as other jurisdictions that had no formal extradition agreement with Hong Kong).<sup>101</sup> An elected Chief Executive would have known better than to make such a proposal, as it was not constitutionally required and was guaranteed to generate huge public opposition. An elected Chief Executive also would have known that she needed to withdraw the bill after the peaceful protests of June 2019, the largest in Hong Kong's history. Instead, Carrie Lam stubbornly defended her proposal, declined to negotiate, and relied on the exhausted local police to maintain order. It was only after violence had erupted that she finally agreed to withdraw the bill, by which time Hong Kong had entered a heartbreaking cycle of escalating conflicts between the police and protesters.

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100 Simon N.M. Young, *Rethinking the Process of Political Reform in Hong Kong*, 45 HKLJ 381, 381-88 (2015).

101 For critique of the local government's stated reasons for introducing the extradition bill (which apparently was not suggested by Beijing), see P.Y. Lo, *The Unprosecuted Taiwan Homicide, the Unaccepted Extradition Law Amendment Bill and the Underestimated Common Law*, 50 HKLJ 373, 374 (2020).

The next section of the article analyzes the difficult area of national security legislation, which was originally considered to be within Hong Kong's realm of autonomy.

#### **IV. Defense, National Security, and Article 23 of the Basic Law**

Article 23 of the Basic Law appeared to endow Hong Kong with even more autonomy than promised in the Joint Declaration. The treaty states that “defense and foreign affairs” would be the responsibility of the Central Government and this is the norm in autonomy arrangements.<sup>102</sup> However, when it came time to draft the Basic Law, the issue became very controversial. This was largely because the Central Government has historically defined national security offences rather broadly, to include “counter-revolutionary” acts that might threaten the Chinese Communist Party's monopoly on political power.<sup>103</sup> Article 23 thus went through several drafts. In its final form, it provides:

The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of

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<sup>102</sup> Hannum & Lillich, *supra* note 49, at 872.

<sup>103</sup> Albert H.Y. Chen, *Hong Kong in China: The Project of “One Country, Two Systems” and the Question of National Security*, in CHINA'S NATIONAL SECURITY: ENDANGERING HONG KONG'S RULE OF LAW? 19, 35-36 (Cora Chan & Fiona de Londras eds., 2020).

the Region from establishing ties with foreign political organizations or bodies.

The references to “subversion” and “foreign political organizations” were inserted in the aftermath of the June 4, 1989 crackdown in Tiananmen Square. This was a time of great tension and the drafting process ceased for a period of time. When the meetings resumed, the Mainland Chinese representatives on the Drafting Committee insisted on strengthening the language of article 23.<sup>104</sup> Nonetheless, because it still empowered Hong Kong to enact this legislation “on its own” (rather than be obligated to enforce the PRC’s national legislation), article 23 was still arguably a strong indicator of Hong Kong’s autonomy.

Unfortunately, the local government’s one and only attempt to fully implement article 23 was unsuccessful. A National Security (Legislative Provisions) Bill was introduced in 2003 and was largely consistent with the ICCPR. But the Hong Kong government insisted on an accelerated timetable for public consultation and legislative scrutiny; it also flatly rejected a number of amendments proposed by legislators.<sup>105</sup> This attitude (an early demonstration of the lack of political skills of Hong Kong’s appointed government) made the public very anxious and created a perception that the terms of the legislation had been pre-negotiated with the Central Government. Eventually, on 1 July 2003, these concerns were expressed in a protest march of more than 500,000 people. Although the Chief Executive at the time, Tung Chee-Hwa,

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<sup>104</sup> See Carole J. Petersen, *Hong Kong’s Spring of Discontent: The Rise and Fall of the National Security Bill in 2003*, in NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG’S ARTICLE 23 UNDER SCRUTINY 13, 13-62 (Hualing Fu, Carole J. Petersen & Simon N.M. Young eds., 2005).

<sup>105</sup> *Id.* at 20-48.

subsequently offered some key amendments, it was too late to regain public support.<sup>106</sup> The local government eventually withdrew the bill and never attempted to re-introduce it.

Despite this failure, Hong Kong has always had a significant body of local law that falls within the scope of article 23, including ordinances restricting the operation of societies<sup>107</sup> and prohibiting acts of treason, sedition, terrorism.<sup>108</sup> Thus it really only lacked local legislation prohibiting the offenses of “secession” or “subversion” against the Central Government (which might well have been covered, in large part, by the offenses of treason and sedition). Nonetheless, the failure to fully implement article 23, together with the sustained unrest of 2019, provided the Central Government with an excuse to act on its own. When it did so, it took the opportunity to fundamentally change Hong Kong’s criminal justice system for political offenses.

On 28 May 2020, the National People’s Congress adopted a Decision authorizing the NPC Standing Committee to draft a law to protect national security in Hong Kong.<sup>109</sup> Less than one month later,

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<sup>106</sup> *Id.* at 50-53.

<sup>107</sup> Indeed, the Societies Ordinance was amended in 1997 to incorporate some of the precise language of article 23 and the Hong Kong government has enforced it; see Carole J. Petersen, *Prohibiting the Hong Kong National Party: Has Hong Kong Violated the International Covenant on Civil and Political Rights?*, 48 HKLJ 789-805 (2018).

<sup>108</sup> Carole J. Petersen, *Balancing National Security and the Rule of Law: Article 23 of the Hong Kong Basic Law*, HONG KONG WATCH (Nov. 1, 2018), <https://www.hongkongwatch.org/all-posts/2018/11/1/new-report-balancing-national-security-and-the-rule-of-law-article-23-of-the-basic-law>.

<sup>109</sup> *Decision of the National People’s Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security*, adopted at the Third Session of the Thirteenth National People’s Congress on 28 May 2020, <https://www.elegislation.gov.hk/hk/A215> (last visited Sept. 20, 2021).

on 30 June 2020, the Standing Committee adopted the NSL. It was added to Annex III of the Hong Kong Basic Law that same day and brought into force before midnight.<sup>110</sup> The police began arresting people for suspected violations the very next day.

It is important to appreciate that the NSL does far more than create new criminal offenses. It has established powerful new security institutions, which are now operating openly in Hong Kong and directly accountable to Beijing. Previously, the investigation of possible crimes in Hong Kong was entirely the responsibility of the local police.<sup>111</sup> This division of power has now been fundamentally changed. Beijing has established an Office for Safeguarding National Security of the Central People's Government in Hong Kong,<sup>112</sup> which is staffed and funded by Beijing. Although its personnel are supposed to abide by Hong Kong laws, there is no mechanism to hold them accountable because they have been expressly exempted from Hong Kong's jurisdiction for acts in the course of duty.<sup>113</sup> Their vehicles are also not subject to search by local law enforcement.<sup>114</sup>

There is also a new "special branch" in the Hong Kong Police Force to investigate NSL offences, which can recruit "qualified professionals and technical personnel" directly from the Mainland.<sup>115</sup> This special branch has been endowed with significant new powers of investigation,<sup>116</sup> including the power to conduct warrantless searches.<sup>117</sup>

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110 Hong Kong Government Gazette, L.N. 136 of 2020.

111 Joint Declaration, para. 3(3) and Annex I (XII); Basic Law art. 14 (H.K.).

112 NSL arts. 48-55 (H.K.).

113 *Id.* at art. 50.

114 *Id.* at art. 60.

115 *Id.* at art. 43.

116 For an introduction to these new powers, *see* the presentation by Professor Simon

A newly created Committee for Safeguarding National Security has promulgated rules for these searches, as well as “operating guidelines and principles” for covert surveillance.<sup>118</sup> These rules would be very difficult to challenge because the NSL appears to exempt acts of the Committee for Safeguarding National Security from judicial review.<sup>119</sup> The NSL also provides for a special prosecution division for NSL offences. The prosecutors are appointed by the Secretary for Justice but only after she has obtained consent from the Committee for Safeguarding National Security, which is directly supervised by the Central Government.<sup>120</sup>

The only positive aspect of the NSL is that articles 4 and 5 of the NSL purport to provide for the continued enforcement of the rights that Hong Kong residents have enjoyed, including those protected in the Basic Law and in the ICCPR. The Hong Kong’s CFA appeared to affirm the significance of these provisions in its first decision under the NSL. In *HKSAR v. Lai Chee Ying*, the government appealed a lower court decision that granted bail to Jimmy Lai, the former publisher of the

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N.M. Young at the University of Hong Kong’s seminar, *Balancing Freedom and Security: the Hong Kong National Security Law*, HKU LAW (July 4, 2020), <https://video.law.hku.hk/balancing-freedom-and-security-the-hong-kong-national-security-law/>.

117 NSL art. 43 (H.K.).

118 English translations are available on the Hong Kong Government’s “SAFEGUARDING NATIONAL SECURITY IN HONG KONG” website, <https://www.isd.gov.hk/national-security/eng/law.html> (last visited Dec. 16, 2021).

119 NSL art. 14. It should be noted, however, that Professor Albert H.Y. Chen has argued that the Committee’s decisions may be judicially reviewable. See Chris Lau, *National Security Law: Decisions of New Committee in Hong Kong Not Above Judicial Review*, *Legal Expert Says*, SOUTH CHINA MORNING POST (July 11, 2020), <https://www.scmp.com/news/hong-kong/politics/article/3092792/national-security-law-decisions-new-committee-hong-kong-not>.

120 NSL art. 18 (H.K.).

Apple Daily (which has been closed down as the result of the NSL). Although the CFA held that article 42(2) is a specific exception to Hong Kong's ordinary bail regime, it also stated that articles 4 and 5 are "centrally important to the interpretation of the NSL" and that "those rights, freedoms and values are to be protected and adhered to" in applying the NSL.<sup>121</sup> Thus, although the CFA made it clear that the courts must enforce clearly worded provisions in the NSL,<sup>122</sup> it appeared to also remind prosecutors and the trial courts to make an effort to interpret any vague clauses so as to comply with the ICCPR, which is preserved in article 4 of the NSL. Article 19 of the ICCPR does permit restrictions on freedom of expression to protect national security but only to the extent that they are necessary and proportionate.<sup>123</sup> The UN Human Rights Committee has repeatedly reminded governments that they cannot simply invoke "national security" as a blanket justification for suppressing political expression.<sup>124</sup> Rather, a restriction adopted in the name of national security must be a proportionate response to a tangible threat. Hong Kong's CFA has developed a similar proportionality test in its own pre-NSL jurisprudence.<sup>125</sup>

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121 HKSAR v. Lai Chee Ying, (2021) 24 H.K.C.F.A.R. 33 (C.F.A.).

122 NSL art. 62 states that this "law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this law".

123 ICCPR art 19(3). *See also* Human Rights Committee CCPR/C/GC/34, General Comment No. 34, Article 19: Freedoms of opinion and expression (Sept. 12, 2011), <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

124 UN Human Rights Committee, Tae Hoon Park v. Republic of Korea, CCPR/C/64/D/628/1995 (Nov. 3, 1998), <https://www.refworld.org/cases,HRC,3f588effe.html>, para. 10.3. For additional examples, *see* Carole J. Petersen, *Article 23 of the Hong Kong Basic Law: International Law and Institutions as Sources of Resilience*, in CHINA'S NATIONAL SECURITY: ENDANGERING HONG KONG'S RULE OF LAW? 231, 231-49 (Cora Chan & Fiona de Londras eds., 2020).

125 *See, e.g.*, HKSAR v. Ng Kung Siu, (1999) 2 H.K.C.F.A.R. 442 (C.F.A.); and HKSAR v. Fong Kwok Shan Christine, (2017) 20 H.K.C.F.A.R. 425 (C.F.A.).

If the Hong Kong government were serious about complying with the ICCPR, then we would expect to see police and prosecutors applying that proportionality test when they enforce NSL provisions. Unfortunately, the local government appears to be doing the opposite, interpreting vaguely defined offenses as broadly as possible so as to stifle critical speech and political activities. A particularly striking example was the decision to charge 47 pro-democracy politicians with “subversion” for organizing and/or participating in a political primary in July 2020, soon after the NSL went into force.<sup>126</sup> The government has also used the “incitement to secession” offense to charge a significant number of people for entirely peaceful speech acts.<sup>127</sup> Many of these defendants are languishing in jail because of the NSL’s presumption against bail. The UN Human Rights Committee will certainly condemn these prosecutions in its upcoming review of Hong Kong’s compliance with the ICCPR.

The first conviction under the NSL — that of Tong Ying Kit — is also worrying, partly because it lacks any analysis of the ICCPR but also because the judges appear to have interpreted the relevant offenses in the NSL as broadly as possible.<sup>128</sup> Tong initially appealed both of his

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126 WONG & KELLOGG, *supra* note 12, Appendix C (listing arrestees and alleged offenses).

127 *Id.* See also Selina Cheng, *Hong Kong Police Confirm 8 Arrested for Unlawful Assembly and “Inciting Secession” during Peaceful CUHK Campus Demo*, HONG KONG FREE PRESS (Dec. 7, 2020), <https://hongkongfp.com/2020/12/07/hong-kong-police-confirm-8-arrested-for-unlawful-assembly-and-inciting-secession-during-peaceful-cuhk-campus-demo/>.

128 For critique of the conviction and the failure to use the ICCPR as a guide to interpreting vague language in the NSL, see Carole J. Petersen, *Hong Kong’s First Conviction for Incitement to Secession: What Role for the ICCPR?*, 25(22) AM. SOC’Y INT’L L. (Oct. 13, 2021), <https://www.asil.org/insights/volume/25/issue/22>. See also THOMAS E. KELLOGG & ERIC YAN-HO LAI, *THE TONG YING-KIT NSL*

convictions, which would have given appellate judges an opportunity to interpret the vague language in the NSL in a way that complies with the ICCPR.<sup>129</sup> However, in January 2022, it was reported that Tong Ying Kit (who has been in prison since his arrest) decided to drop his appeal, apparently without consulting or even informing his lawyers. After being notified of this development by a letter from the court, the Senior Council who had been representing Tong Ying Kit told the press that he had “no idea” why his young client would abandon his appeal.<sup>130</sup>

Moreover, the CFA’s most recent judgment, *HKSAR v. Ng Hau Yi Sidney*, does not inspire much confidence. In that case, the CFA held that the new presumption against bail (contained in article 42 of the NSL) applies even to non-NSL offenses, so long as they concern national security.<sup>131</sup> The impact in this particular case is that defendants charged with distributing “seditious materials” (which the Hong Kong prosecutors are interpreting so broadly as to include children’s picture books) will sit in jail while awaiting trial (although the CFA did remind trial court judges to proceed with these cases as expeditiously as possible). But the case is worrying for two other reasons. First, given that the language in article 42 is ambiguous, one would have expected the CFA to look to article 9 of the ICCPR for guidance and not give

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VERDICT: AN INTERNATIONAL AND COMPARATIVE LAW ANALYSIS, GEORGETOWN CENTER FOR ASIAN LAW (Oct. 20, 2021), <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/10/TongYingKitVerdictGCAL.pdf>.

<sup>129</sup> *Id.*

<sup>130</sup> Kelly Ho, *First Hong Kong Activist Jailed under National Security Law Drops Appeal in “Surprise” Move*, HONG KONG FREE PRESS (Jan. 13, 2022), <https://hongkongfp.com/2022/01/13/first-hong-kong-activist-jailed-under-national-security-law-drops-appeal-in-surprise-move/>.

<sup>131</sup> *HKSAR v. Ng Hau Yi Sidney*, FAMC 32/2021 (C.F.A. Dec. 14, 2021) (Legal Reference System) (H.K.).

article 42 a broader interpretation than necessary. Second, the CFA went further and also held that the extraordinary investigation powers conferred by article 43 could also apply to non-NSL offenses so long as they concern national security. There was no need to address this issue in an appeal relating to a bail application.<sup>132</sup>

Finally, it should be noted that the NSL provides a mechanism for removing a defendant from Hong Kong's jurisdiction, which was not foreseeable from the model of autonomy presented to the Hong Kong people in 1984. Under article 55 of the NSL, the central authorities can now exercise jurisdiction if (1) the case is "complex" due to the involvement of a foreign country or external elements; (2) a serious situation occurs where the Hong Kong Government is unable to effectively enforce the law; or (3) a major and imminent threat to national security has occurred. The procedures for shifting jurisdiction are quite simple: the Central Government only needs to approve a "request" from Hong Kong's Chief Executive, which will certainly be made if Beijing suggests it. There appears to be no procedure by which an individual could ask a Hong Kong court to review the Chief Executive's decision to request that the case be transferred to the Mainland. If the Central Government asserts jurisdiction, then China's Criminal Procedure Law and all other relevant national laws will apply, including those relating to investigations, interrogation, prosecution, trial and penalties.<sup>133</sup> In essence, article 55 provides for the possibility of extradition to Mainland China without even the formality of an

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<sup>132</sup> See Thomas E. Kellogg, *How a Ruling by Hong Kong's Top Court Opens the Door to a More Intrusive Security Law*, HONG KONG FREE PRESS (Dec. 17, 2021), <https://hongkongfp.com/2021/12/17/how-a-ruling-by-hong-kongs-top-court-opens-the-door-to-a-more-intrusive-security-law/>.

<sup>133</sup> NSL art. 57 (H.K.).

extradition hearing — a cruel irony given that the enormous anti-government protests of 2019 were inspired by the Hong Kong public's strong desire to prevent extradition to the Mainland.

## V. Conclusion

Although some commentators now describe Hong Kong as “just another city in China,” that is overstating the situation. For now, Hong Kong residents continue to enjoy a higher degree of religious freedom, press freedom, and access to the internet than exists on the Mainland. Hong Kong's legal profession and judiciary are also still more independent than in the Mainland, although under severe political pressure. But these trappings of Hong Kong's separate common law legal system are not entrenched — they will continue only if Beijing decides that they are useful to it.

It would be a mistake, however, to attribute the failure of OCTS entirely to the PRC's authoritarian system. The fault also lies in the UN's failure to stay involved and in the flawed model of autonomy that was ultimately set forth in the Joint Declaration. Because the conflict was treated as a bilateral territorial dispute, the UK and the PRC were permitted to draft a treaty with elaborate promises but no detailed plan for local democracy and no mechanism for independent dispute resolution. This enabled Beijing to control both the drafting and the interpretation of the Hong Kong Basic Law. Thus, rather than entrenching autonomy, the Joint Declaration and the Basic Law ultimately became vehicles through which Beijing can dominate all three branches of Hong Kong's government and change, at will, the entire

institutional framework for local governance.

Far from serving as a showcase for territorial autonomy, Hong Kong may well be remembered as a classic example of a “bait and switch.” The Joint Declaration appeared to promise Hong Kong far more autonomy than the typical autonomous region enjoys. But that high degree of *formal* autonomy only increased the Central Government’s opposition to local democracy and thus undermined autonomy in practice.<sup>134</sup> With the benefit of hindsight, no neutral observer could suggest that OCTS be adopted elsewhere.

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<sup>134</sup> Professor Albert H.Y. Chen has described this as the “paradox” of Hong Kong’s autonomy. See CHEN, *supra* note 55, at 74.

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