

1997

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Recommended Citation

deLisle, Jacques and Lane, Kevin P., "Hong Kong's Endgame and the Rule of Law (I): The Struggle over Institutions and Values in the Transition to Chinese Rule" (1997). *Faculty Scholarship*. Paper 986.
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HONG KONG'S ENDGAME AND THE RULE OF LAW (I): THE STRUGGLE OVER INSTITUTIONS AND VALUES IN THE TRANSITION TO CHINESE RULE

JACQUES DELISLE* AND KEVIN P. LANE**

1. INTRODUCTION

The fifteen-year struggle over Hong Kong's future has been a struggle over the rule of law. The People's Republic of China ("P.R.C.") and Great Britain agreed at the outset of negotiations over the territory's future to strive to preserve Hong Kong's "stability and prosperity," a task that was seen to depend on preserving the rule of law. Specifically, this meant pledging to maintain the territory's common law legal system and most of its existing laws while also undertaking to construct judicial, law-making, and law-administering institutions adequate to implement a "high degree of autonomy" for the Hong Kong Special Administrative Region ("S.A.R."). In addition, much of the work and many of the conflicts in the preparations for Hong Kong's transition and the establishment of the S.A.R., from the drafting of the Sino-British Joint Declaration on the Question of Hong Kong¹ ("Joint Declaration") and the Basic Law for the Hong Kong Special Administrative Region² ("Basic Law"), to the

* Assistant Professor, University of Pennsylvania Law School. This Article is the first of a two-part series. The second part will appear as *Hong Kong's Endgame and the Rule of Law (II): The Battle Over "the People" and the Business Community in the Transition to Chinese Rule* in volume 18, number 3 of the *University of Pennsylvania Law School Journal of International Economic Law*. The authors thank Richard Sik-Wing Au, Jennifer Shiu-Li Fan, and Beatrice Mohini Schaffrath for their timely and indispensable research assistance, and Rosi Blake and the staff of the *Journal* for excellent and extraordinarily patient editorial work. Support for this Article, and the broader project of which it is a part, was provided by the University of Pennsylvania Research Foundation.

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

² See The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Apr. 4, 1990 (P.R.C.), translated in 29 I.L.M.

disputes over late colonial amendments to Hong Kong ordinances, to the enactment of national and local legislation establishing S.A.R. government organs, have centered on law and legal documents. For the British colonial authorities, the P.R.C., rising political leaders in Hong Kong, and the residents of Hong Kong, much of the discourse over what seem clearly to be political, economic, and social issues has focused on questions about laws, law-making and law-interpreting institutions, and the rule of law.

This "legal" focus has remained as Hong Kong's protracted transition has entered its "endgame."³ In the final years and months leading up to the formal handback of Hong Kong, the focus, however, has turned increasingly to two seemingly disparate yet closely related issues. First, the impending deadline for the territory's reversion to Chinese rule has forced all participants in the politics of Hong Kong's transition to address specific laws and institutions for the S.A.R., which will be the nuts and bolts of a functioning legal system, government, and constitutional order for Hong Kong beyond July 1, 1997. In particular, conflicts over a Bill of Rights Ordinance, a Court of Final Appeal ("C.F.A.") bill, the status of the Legislative Council ("Legco") and a successor Provisional Legislature, and the process for selecting the S.A.R.'s first Chief Executive, have been central controversies in transitional Hong Kong's endgame. Second, the approach of the reversion date has generated an intense political competition over what notions of law and legality will prevail among groups that seem essential to Hong Kong's continued prosperity and stability. Here, the sharpest and most sustained conflicts have concerned the rule-of-law values and related attitudes toward concrete legal and institutional controversies that "the Hong Kong people" and the territory's business elite do in fact hold or could be persuaded to adopt.

1520 [hereinafter Basic Law].

³ The term "endgame" has taken on two quite different meanings, both of which shed light on the battle over laws and institutions in contemporary Hong Kong in ways that this Article and its sequel explain. In the rational choice and game theory literature, "endgame" refers to the last round of a reiterative game, when the (intra-game) reputational incentives to cooperate fall away, increasing the likelihood of "defection" or "cheating," and, therefore, the difficulty of making any bargains (or at least any credible bargains). In a more colloquial sense, the "endgame" refers to a final "push" in which participants scramble to strike bargains against an impending deadline, with the result often being an eleventh-hour "breakthrough" or a flurry of small deals.

These questions of tangible institutions and diffuse values have been the objects of a struggle between two coherent, although not monolithic, camps that have adhered to competing visions of sovereignty and law with respect to Hong Kong. On one side, the P.R.C., together with its Hong Kong allies and surrogates, have approached such issues primarily from a positivist perspective, with proceduralist standards of legitimacy for laws and vast substantive discretion for the sovereign at the core of their conception of "domestic law" for Hong Kong. On the other side, a more loosely defined group of "liberals" or "democrats" among Hong Kong's emergent politicians and its British colonial rulers have been animated by a broadly natural law-influenced view of Hong Kong's domestic legal order. This view accords a central place to the notion that laws and the organs that make and apply the law must comport with specific, substantive standards of what justice demands of a sovereign.

In some respects, this fundamental clash of visions would appear to leave little room for the complex and subtle struggles over rule-of-law values and institutional detail that have been unfolding in contemporary Hong Kong. As the debates centering on the Joint Declaration and the Basic Law during the 1980s and many of the political conflicts of the 1990s have shown, the main protagonists in the drama of shaping Hong Kong's future judge the validity of the legal and institutional arrangements for the S.A.R. according to incommensurable and incompatible standards that emphasize broad and categorical claims about the character of legitimate authority. Each side has seemed determined to assert the exclusive validity of its preferred standard. This polarized conflict has continued to the eve of reversion. It has generated a series of confrontations in which members of the two political camps have made clear their sharply different understandings of the key controversies of the era and their divergent litmus tests for acceptable solutions to them. In a battle thus fought in terms of what is non-negotiably "right" or non-derogably committed to sovereign discretion, what position to take on particular proposed laws or institutions for the S.A.R. would appear to be a matter not open to ambiguity or conducive to ambivalence, and the subjective attitudes of particular Hong Kong communities would seem to be at best peripheral, if not entirely inadmissible, concerns. That has not, however, been the case during the final years of the struggle over the S.A.R.'s legal and institutional order.

As the arrival of the endgame during the past several years shifted the agenda to wrangling over concrete laws and law-related institutions, and despite a sharpening of the basic ideological clashes over the territory's post-1997 order, previously recessive qualities of indeterminacy and flexibility also have come to the fore in the visions of law and sovereignty of both sides. For the P.R.C. side, these key questions of the era have been ones to which its positivist perspective has offered no single answer. Within the boundaries set by the minimal constraint that nothing be allowed to compromise the P.R.C.'s ultimate sovereignty over Hong Kong, there is a considerable variety of plausible answers to the question of how much accommodation of liberal and legalist views is prudent in the quest for specific legal rules and institutional arrangements conducive to a smooth transition. Although newly visible, such tactical flexibility is not new to (nor a departure from) the perspective on law and sovereignty that the P.R.C. and its allies have shared. One of the principal features of a radically positivist conception of domestic law, after all, is the sovereign's discretion to choose among a fairly wide range of laws and institutions.

On the "liberal" or "democratic" side, the central concerns of the era also have been ones to which a generally naturalist perspective offers diverse and conflicting answers. Although the basic vision clearly precludes actions and arrangements incompatible with the fundamental demands of justice, it does not prescribe legal or institutional details to a high level of specificity. Rather, it leaves such matters to be shaped by local circumstance. A general notion that sovereignty ought to be exercised through accountable government institutions that undergird a rule of law, for instance, necessarily leaves much room for interpreting precisely what institutional forms or legal norms are adequate and appropriate in a particular setting. With questions about such "details" having risen high on the agenda, this always-present "space" for different readings of what fixed but abstract principles require simply becomes more relevant than it had been in earlier phases of the process of shaping Hong Kong's post-1997 future.

With the focus thus shifted to issues with respect to which adherents of either relevant conception of sovereignty and domestic law might disagree among themselves or change their positions over time, the connection to the endgame's second shift of focus becomes clearer. In such a context of flexibility and

indeterminacy, the rule-of-law values held by major social groups can matter a great deal. For adherents to a basically "positivist" perspective, they can affect the sovereign's policy preferences and prudential calculations. For proponents of a broadly "naturalist" vision, they may constitute key components of the local circumstances that can shade interpretations of the demands of justice. The ideas that key Hong Kong communities hold thus emerge as factors that will greatly determine where — and perhaps whether — a politically and economically viable set of concrete legal and institutional arrangements for the S.A.R. will fall within the range of options that members of either side in the political clash of visions could find acceptable in principle.

Moreover, the sustainability of any package of legal and institutional arrangements that is acceptable to the P.R.C. and its supporters, or the necessity of any package advanced by their counterparts among the territory's emergent politicians and colonial rulers, seems to depend on the support, or at least acquiescence, of key groups in the territory after 1997. Put simply, an answer to the central questions of the endgame that failed to win acceptance among the ordinary citizenry of Hong Kong, "the Hong Kong people," could jeopardize the territory's political stability, which is itself a precondition to prosperity. An answer to those legal and institutional questions that failed to comport with the views and values of the territory's business community would be hazardous for Hong Kong's prosperity, which is a linchpin of the territory's political stability. An answer that offered something that neither group wanted or needed would be especially likely to fail.

Accordingly, during the last several years of Hong Kong's transition, participants in the ongoing political struggle over the territory's future order worked to claim and to create support among "the people" and business elites in Hong Kong for rule-of-law attitudes that they found relatively appealing, or that were at least minimally acceptable under their broad visions of law and sovereignty. Section 2 of this Article considers those "visions." It sketches the fundamentally conflicting conceptions of the nature and basis of domestic law for the Hong Kong S.A.R. that the principal parties to the political struggle over Hong Kong's post-1997 order have held throughout the process of negotiating the terms of Hong Kong's reversion. Section 3 examines in more detail how the clash of basic perspectives has unfolded in the

struggles over the specific legal and institutional issues that have dominated the agenda in the years after the adoption of the Basic Law. It explains how the positions that key participants staked out on such issues as the Bill of Rights Ordinance, the legislature, the Court of Final Appeal, and the chief executive selection methods fit within either of the two opposed visions, one shared by the P.R.C. and its supporters in Hong Kong and another by their frequent antagonists of a generally liberal or democratic bent.

Section 4 then turns to an assessment of the other side of the apparent paradox of the era. It points to the exposure, of significant room for choice and disagreement over specific legal and institutional prescriptions within the confines of either overarching vision. Section 4 then explains how the rising salience of issues that revealed or permitted such flexibility combined with changes in Hong Kong politics to produce a greater concern with the rule-of-law-related values and attitudes held by vital segments of Hong Kong society. Section 4 then briefly summarizes the strategies that the parties to the political struggles over the shape of S.A.R. laws and institutions deployed in their efforts to elicit and enlist support from the ordinary citizenry and business elites in Hong Kong. (A more detailed analysis of the political battles over the attitudes of “the people” and “the business community” toward the rule of law and the specific legal and institutional issues of the 1990s is undertaken in a separate article which will appear in a subsequent issue of this Journal.)

Section 5 of this Article suggests how different concepts of an “endgame” might help to explain the seemingly odd coexistence of the appeals to principle and interest in the battles over the allegiance of social groups, the emergence of clearer splits and shifts in specific legal and institutional prescriptions advocated by adherents to either vision of law and sovereignty, and the persistence — even escalation — of the clash between visions. Section 5 also suggests how those battles, splits and shifts may manifest “endgame strategies,” in some rather different senses of that term, pursued by adherents to the two visions of sovereignty and domestic law that are, at once, polar opposites and capacious enough to permit the finding of some common ground on some concrete issues.

2. TWO VISIONS OF SOVEREIGNTY AND DOMESTIC LAW FOR HONG KONG

In some respects, there has been a remarkable consensus about the legal and related institutional order for a Chinese-ruled Hong Kong. All participants in the protracted process of shaping Hong Kong's future appear to have accepted the Joint Declaration and the Basic Law as the documents that set the fundamental framework defining that order, with the Basic Law implementing and making specific the general undertakings set forth in the Joint Declaration. All sides also appear to have agreed that establishing the legal underpinnings for the S.A.R. legislature and its top court, and selecting its first chief executive, constituted much of the essential work of the terminal colonial phase. There also seems to have been general recognition that the Bill of Rights question and related issues of the reception of colonial law into S.A.R. law were among the other major items at the top of that agenda. More diffusely, the various participants all saw settlement of such issues as essential to guaranteeing Hong Kong a "rule of law" that would help sustain stability and prosperity.

Still, the two principal groups that were engaged in the political process of addressing these questions divided profoundly on how they should be answered. This division created an ongoing conflict that in some respects has sharpened during the endgame, and that has been, throughout the transitional period, rooted in a clash between radically different notions of what makes any particular legal and institutional arrangement for the S.A.R. either potentially legitimate or unacceptable even in principle.

2.1. *The P.R.C. and "Pro-P.R.C." Vision: Sovereign Discretion and Procedural Legitimacy*

In addressing the S.A.R.'s internal legal and institutional order, the P.R.C. has consistently taken the position that the rules for how Hong Kong's post-1997 laws will be made — as well as some of the laws themselves and the authority of the institutions that make, interpret, and apply those laws — are matters for the P.R.C. alone to determine, through proper exercises of its sovereign legislative power. In making laws, establishing and defining legal and political institutions, and determining the

permissible modes of exercising legal and political authority in Hong Kong, the P.R.C. enjoys the plenary authority of the positivist sovereign fully empowered to act within its domestic realm.

The P.R.C. is free to decide specific content of Hong Kong laws, including what rights of citizens they will offer and protect, how nearly they will approach socialist ideals, how much they will look like legislation in effect elsewhere in the People's Republic, and how far they will depart from the laws on the books in Hong Kong at the end of the era of British rule. The P.R.C. may make these decisions without regard to what the residents of Hong Kong or the British (or anyone else) claim to be the demands of substantive justice, human rights, the requisites of good government, or even the traditions or established practices of Hong Kong's economy and society. The same latitude for choice surrounds the decisions about how autonomous the Special Administrative Region should be, what powers its legislature, chief executive, and courts shall enjoy, and the procedures through which such organs may act and by which their office-holders are to be selected.⁴

Thus, any number of legal and institutional arrangements could be adopted via the Basic Law or other domestic Chinese legislation assigning the exercise of legal and governmental authority in the Hong Kong S.A.R. No principle forbids or requires the Basic Law or other domestic Chinese statutes to delegate substantial law-making, administrative, or adjudicative authority to the S.A.R. government or to mandate that Hong

⁴ One of the most formal indications of this position is China's careful casting of its statements about the status of the arrangements it has accepted for Hong Kong's future order in the Basic Law. A piece of domestic P.R.C. legislation, the Basic Law declares that China "has decided" [*jueding*] to establish the S.A.R., and that it is the P.R.C.'s National People's Congress that "authorizes" [*shouquan*] the S.A.R. to exercise autonomy and enjoy various powers under the Basic Law. See *id.* pmbl., art. 2. At various points during the transition, official Chinese sources have asserted that the Chinese government alone, and not the colonial government, has the authority to speak for the Hong Kong people. See, e.g., Philip Bowring & Emily Lau, *Turning Up the Heat*, FAR E. ECON. REV., Feb. 14, 1991, at 24. More generally, the Chinese official position has long been that Hong Kong has always been subject to Chinese sovereignty. This position is reflected in the statement in the Joint Declaration that China "has decided to resume the exercise of sovereignty over Hong Kong." See Joint Declaration, *supra* note 1, para. 1.

Kong's distinctive "systems" remain unchanged.⁵

More concretely, the Basic Law is to be the constitutive document for the future Hong Kong S.A.R., the source of authority for its legislative, executive, and judicial organs, and the touchstone of validity for its specific laws. The Basic Law itself is a discretionary and proper exercise of the P.R.C.'s sovereign legislative authority by the P.R.C.'s National People's Congress ("N.P.C.") and thus would be no less valid if it had substantially different content. Hong Kong laws predating the establishment of the S.A.R. can be valid after June 30, 1997, but only if they are either incorporated by the provisions of the Basic Law, adopted pursuant to the Basic Law's provisions conferring law-making authority, or enacted in the same general manner as the Basic Law.⁶

As this brief statement of the Basic Law's status and function suggests, the P.R.C.'s vision of domestic law for Hong Kong does not demand discretion for the Chinese sovereign to be so completely unconstrained so as to preclude elements commonly thought necessary for a distinctively legal or law-governed order. Even within the P.R.C.'s rather radically positivist perspective, the force of substantive laws and of organic laws for government institutions depends upon their having been duly enacted by institutions with sufficient formal powers and according to proper legal and constitutional procedures.

Such a proceduralist understanding of the domestic exercise of sovereignty existed throughout the P.R.C.'s handling of questions about Hong Kong's future legal and institutional arrangements even before the Basic Law was drafted. Article 31 of the current (1982) Chinese Constitution carefully creates the legal basis for establishing the S.A.R.⁷ The actions adopting the Basic Law and

⁵ The Joint Declaration complicates this analysis somewhat. Under the U.K.'s highly contractarian conception of the Joint Declaration-as-treaty, China has undertaken a number of very constraining obligations that limit whatever latitude it might otherwise have in legislating domestically for the S.A.R. For China, under its expansive notion of non-derogable sovereignty at international law, the constraining effect of such undertakings was much less clear. In any event, whatever restrictions the Joint Declaration might impose on domestic legislative discretion, they are, from either perspective, matters not of principle but of the practice of bilateral negotiation or unilateral pronouncement. See *infra* note 14 and accompanying text.

⁶ See generally Basic Law, *supra* note 2, arts. 1-11, 18.

⁷ See XIANFA [Constitution] art. 31 (P.R.C.).

implementing legislation have been arranged to conform to requirements of proper legislative or quasi-legislative process, and have been cast as exercises of authority lawfully committed to the issuing organs. Thus the Basic Law itself was duly enacted by the N.P.C., in accordance with the requirements for national legislation set forth in the state constitution, and as an exercise of legislative authority granted to the N.P.C. by that constitution.⁸ The simultaneous decisions concerning the establishment of the initial S.A.R. Legislature and selection of its first Chief Executive were also offered by the N.P.C. as a proper exercise of its legislative authority over a part of the P.R.C.⁹

Moreover, much of the text of the Basic Law itself is devoted to defining the scope of authority and the operating procedures of S.A.R. government institutions, and the relationship between the S.A.R. government and the Central People's Government in Beijing.¹⁰ Such provisions, viewed from the P.R.C.'s perspective, are specifications of the principle that local legislation, judicial interpretations, and other legal rules in the S.A.R. must conform to the processes and fall within the scope of delegated powers that the P.R.C. has authorized in the Basic Law or in national legislation applicable to Hong Kong.

Such minimal proceduralism, however, is still only one aspect of the Chinese conception of the domestic legal enterprise in Hong Kong. In the P.R.C.'s positivist vision, the preservation of the P.R.C.'s substantive latitude in lawmaking remains a necessary accompaniment to the emphasis on procedural legitimacy. No allocation of authority or substantive commitment in domestic law can be permitted to have the effect of irretrievably alienating the Chinese sovereign's discretionary authority in ruling Hong Kong. Put broadly, the P.R.C. cannot undertake lightly any potentially runaway promises of S.A.R. autonomy. Put more narrowly, because one aim of proceduralist legitimacy is to assure

⁸ See *id.* arts. 47, 58, 62; Basic Law, *supra* note 2, pmb., art. 11 (citing article 31 of the constitution).

⁹ See *Quanguo Renmin Daibiao Dahui Guanyu Xianggang Tebie Xingzheng Qu Diyi Ju Zhengfu he Fabui Chansheng Banfa de Jueding* [Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region] (1990), reprinted in Basic Law, *supra* note 2 [hereinafter *N.P.C. Decision*].

¹⁰ See Basic Law, *supra* note 2, arts. 12-23, 43-104, 158-59.

and enhance the sovereign's capacity to make laws that reflect its preferred policies, the P.R.C. cannot countenance binding or irrevocable promises that empower Hong Kong to enact laws or establish institutions that could undermine the P.R.C.'s Hong Kong policies which, as "mere" policies, are potentially malleable.

Examples of the P.R.C.'s adherence to this principle of domestic sovereignty in its approach to issues of S.A.R. laws and institutions are legion. In crafting the S.A.R.'s legal order, the P.R.C. has been careful to retain decisive authority in P.R.C. institutions and P.R.C.-controlled processes. The P.R.C. constitutional provision on special administrative regions preserves flexibility about when and for how long such an entity is established and what its special powers include.¹¹ Under the Basic Law, which some call Hong Kong's "mini-constitution," such vital functions as amending and interpreting the Basic Law, directing judicial interpretation of some of its most sensitive provisions, and appointing the executive-dominated S.A.R. government's Chief Executive, are ultimately and formally left to the N.P.C., its Standing Committee, or the Central People's Government.¹² Because the Basic Law itself is a P.R.C. statute enacted by the N.P.C., under Chinese constitutional theory it is freely amendable by procedurally proper subsequent legislation. The clause in the Basic Law barring amendments inconsistent with the P.R.C.'s "established basic policies . . . regarding Hong Kong"¹³ is presumptively unable constitutionally to preclude contrary subsequent legislative action. Paragraphs 1 and 3 and Annex I of the Joint Declaration, which set forth the key initial statement of those policies, are themselves cast as unilateral Chinese pronouncements, avoiding as much as possible the air of binding international legal commitment.¹⁴

¹¹ See XIANFA art. 31.

¹² See Basic Law, *supra* note 2, arts. 158, 159, and annex I.

¹³ See *id.* art. 159.

¹⁴ The Joint Declaration states that China "*has decided* to resume the exercise sovereignty over Hong Kong." Joint Declaration, *supra* note 1, art. 1 (emphasis added). Article 3 sets forth very general promises about Hong Kong's future autonomy and order in text following a statement that the P.R.C. "*declares that the basic policies of the People's Republic of China regarding Hong Kong are as follows.*" *Id.* art. 3 (emphasis added). A more detailed statement of those "basic policies" is consigned to Annex I, which is also cast as a unilateral "elabor[ation] of the basic policies of the People's Republic of China." *Id.* annex I.

2.2. *The British and Hong Kong Liberal-Democratic Vision: Sovereign Obligation and Substantive Values*

Hong Kong's colonial masters and its emergent group of liberal and pro-democracy politicians have shared a perspective on domestic law and government institutions for the S.A.R. that has been profoundly at odds with that of the P.R.C. and its supporters in the territory. The Basic Law, domestic Hong Kong legislation seeking to survive the transition to Chinese rule,¹⁵ the powers and authority of the law-making and law-applying institutions for the S.A.R., and post-1997 substantive laws for the S.A.R. are, on this view, to be judged on the basis of their conformity to norms of what just and good laws and government institutions must be.

To varying degrees and at various times, many of Hong Kong's most prominent politicians (outside the distinctly pro-P.R.C. and "business conservative" camps), the territory's governor, and officials in London have defined those norms in basically liberal, democratic, and legalist terms. This diverse group of participants in the political struggles over Hong Kong's future have seen the package of sovereign obligations as including at least the reliable and neutral interpretation and enforcement of laws by a professional and independent judiciary and civil service. According to the publicly expressed views of colonial officials and many Hong Kong leaders, the package must also include the economic freedoms and many of the civil and political liberties that Hong Kong residents have enjoyed in practice during the closing years of British rule. In addition, something more is necessary in the way of publicly accountable institutions that are at least broadly democratic in spirit.

The perspective underlying this position has many of the characteristics of a natural law understanding of sovereignty's domestic face. The standards against which the S.A.R.'s domestic laws and institutions are to be measured are ultimately fixed and substantive. As the adherents to this view see it, these standards are more than the transient or contingent values that the British authorities or Hong Kong's new liberals and democrats happen to hold dear and would like to foster; they are more permanent and

¹⁵ See *id.* annex I, art. II; Basic Law, *supra* note 2, art. 160 (permitting the "laws previously in force in Hong Kong" to be adopted as laws for the S.A.R.).

less malleable than mere political preference or social consensus.

Moreover, the proponents of this view have understood these demands not primarily as reflecting the natural "rights" of Hong Kong's citizens (although that argument has surfaced as well), but rather as obligations that a sovereign owes to its subjects. Nothing fundamental turns on the formal or procedural status of arrangements that track or breach those obligations. Promises about Hong Kong's laws and institutions that the P.R.C. has been willing to accept and embody in the S.A.R.'s foundational documents are seen as part of an inseverable bundle of principles, including a number of additional ones that the P.R.C. has been determined to reject. Conversely, the fact that a provision inconsistent with a just and good legal and institutional order has been enshrined in a statute or other instrument applicable to the S.A.R. cannot save it from illegitimacy, and, by some lights, invalidity.

Indications of the British authorities' affinity for this perspective can be found in several aspects of their handling of questions of domestic legal and institutional arrangements for the S.A.R. At the beginning of the Sino-British negotiations on the territory's future, Prime Minister Thatcher announced that Britain had a moral obligation and duty to the people of Hong Kong. Such a duty at least implicitly extended beyond the point at which Britain entered into a treaty to hand Hong Kong to the P.R.C. and in some sense beyond the end of British administration of the territory in 1997 — two watershed dates for the termination of legal duties with respect to Hong Kong (first, that of presumptively permanent sovereign, and second, that of exerciser of sovereign power and provider of laws and governance).¹⁶

Moreover, Britain had backed the inclusion in the Joint Declaration of a number of provisions protecting or promoting liberal, legalist, and democratic values under post-1997 Hong Kong law. That was at least part of the import of passages pledging the continuation of Hong Kong's laws in force, as well as the common law, judicial, social, and economic systems, the applicability of the principal United Nations human rights covenants and a list of specific liberal rights, and the constitution of future

¹⁶ Governor Patten made the point explicitly, stating that "Britain's moral responsibility extends beyond June 30, 1997." *The Long View*, FAR E. ECON. REV., May 30, 1996, at 17 (interview with Governor Patten).

legislatures by election.¹⁷ In addition, British authorities in London and in the colony later pressed for a substantial voice and role in shaping the laws and institutions for post-reversion Hong Kong, despite their formal exclusion from the centerpiece of that process, the drafting of the Basic Law. In addition to supporting a broadly liberal and democratic S.A.R. constitutional order, the British authorities began to undertake compatible changes in areas that remained under their control. They took modest steps toward democratizing the territory's quasi-representative institutions, with such moves beginning years before the endgame gambits of Governor Patten's electoral reforms and the enactment of the Bill of Rights Ordinance.¹⁸

At the very least, such serious and varied efforts (as well as the rhetoric of moral responsibility and duty) suggested a lack of acceptance of the P.R.C.'s positivist vision of domestic sovereignty. If, as the Chinese view sometimes seemed to claim, Hong Kong's local laws were worth little more than the paper they were printed on, to be revoked, amended or overridden freely by a narrowly self-interested or fickle Central People's Government or N.P.C., then there would have been little point to the British concerning themselves with the substance of those laws at all.

For many of Hong Kong's emergent leaders and political activists, there was a still-stronger affection for a viewpoint that was broadly naturalist in spirit and liberal, democratic, and legalist in substance. To the extent that the draft Joint Declaration received a genuinely favorable reaction in politically aware communities in Hong Kong, its promises of continuity in Hong Kong's distinctive legal, social, and economic systems — which to a significant degree embodied strong rule of law and liberal, if not fully democratic, values — were the reason.¹⁹ And some of the

¹⁷ See Joint Declaration, *supra* note 1, para. 3(3), (5), annex I § I-III, XIII. The Joint Declaration and its annexes are equally binding. See *id.* para. 8.

¹⁸ See generally James T.H. Tang & Frank Ching, *The MacLehose-Youde Years: Balancing the "Three-Legged Stool," 1971-86*, in *PRECARIOUS BALANCE: HONG KONG BETWEEN CHINA AND BRITAIN, 1842-1991* at 149, 160-64 (Ming K. Chan ed., 1994); NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 25-28, 36-37 (5th ed. 1995).

¹⁹ See *Background to the Negotiations Preceding the Sino-British Joint Declaration*, reprinted in *THE FUTURE OF HONG KONG* 197, 200-02 (Hungdah Chiu, Y.C. Jao & Yuan-li Wu eds., 1987); *Report of the Assessment Office on Arrangements for Testing the Acceptability of the Draft Agreement on the Future of the Territory*, ch. 3, reprinted in *THE FUTURE OF HONG KONG* 212; *The*

most serious doubts harbored in the territory about the Basic Law, such as its reserving to the P.R.C.'s N.P.C. and its Standing Committee the power to interpret and amend the Basic Law and, in some circumstances, to legislate for the S.A.R., seem to have been driven largely by the fear that such provisions would hinder the continuation and growth of a liberal order with strong rule-of-law norms.²⁰

Members of Hong Kong's emerging liberal and "pro-democracy" political circles were adamant that Hong Kong's future laws and institution were to be judged by their conformity to standards that no government was at liberty to define or redefine. In comparison to the views expressed by British officials, these Hong Kong voices were more openly skeptical and worried that the properly enacted laws and duly established institutions of the future P.R.C.-run S.A.R. would fail to meet the relevant standards of justice.²¹

Even before the return to Chinese rule came to dominate Hong Kong politics, the same general perspective had pervaded local criticisms that some of Hong Kong's long-standing colonial laws were unjust, regardless of their positivist validity. Most visible in this area were, first, criticisms of laws that restricted public meetings and political organizations, permitted film censorship, chilled press freedom, and allowed corporal and capital punishment, and, second, a critique of Britain's failure to take steps to develop democratic government for the colony.²²

Also well in advance of Hong Kong's reversion, the territory's legal community, which was the source of so many of Hong

Future of Hong Kong: Statement Issued by the Unofficial Members of the Hong Kong Executive and Legislative Councils on Nov. 29, 1984, reprinted in THE FUTURE OF HONG KONG 220. See also IAN SCOTT, POLITICAL CHANGE AND THE CRISIS OF LEGITIMACY IN HONG KONG 212-13 (1989).

²⁰ See, e.g., Denis Chang, *In Search of Pragmatic Solutions*, in *THE BASIC LAW AND HONG KONG'S FUTURE* 271 (Peter Wesley-Smith & Albert H.Y. Chen eds., 1988).

²¹ See, e.g., Martin C.M. Lee, *A Tale of Two Articles*, in *THE BASIC LAW AND HONG KONG'S FUTURE*, *supra* note 20, at 309; 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 (Ming K. Chan & David J. Clark eds., 1991).

²² See, e.g., Li Tuet-wah, *Freedom of the Media*, in *FROM COLONY TO S.A.R.: HONG KONG'S CHALLENGES AHEAD* 457 (Joseph Y.S. Cheng & Sonny S.H. Lo eds., 1995).

Kong's liberal and pro-democracy politicians, had developed a powerful belief that the rule of law is one of the most definitive qualities of Hong Kong's system, and that its cultivation and preservation are the ultimate explanation and guarantee of Hong Kong's past and future success.²³ The perceived connection has been repeated so often and for so long that it has become a kind of talisman not just for lawyers but also for public servants, and for substantial segments of the territory's citizenry. The rule of law that is seen as having such power and such potential, and as being so gravely at risk even if the P.R.C. honors many of its promises, is something profoundly different from the sparsely procedural and substantively malleable one envisioned by a P.R.C.-style positivist approach to domestic law for the Hong Kong S.A.R.

3. CONFLICTING VISIONS AND THE LEGAL AND INSTITUTIONAL ISSUES OF THE ENDGAME

The clash of fundamentally conflicting conceptions of domestic sovereignty has continued, and indeed sharpened, as the endgame has arrived, and the process of defining the territory's future order has moved beyond the broad framework of the Basic Law to the details of post-1997 laws and institutions. In each of the key controversies of the era, the P.R.C. and its allies in Hong Kong have insisted that the laws and legislative foundations of S.A.R. institutions must accord protection for sovereign discretion and satisfy proceduralist notions of legitimacy, ideas that are central to the P.R.C.'s positivist perspective. With respect to the same issues, Hong Kong's liberal and pro-democracy elements and, to a significant degree, its colonial government have stuck just as firmly to the notion that the laws and institutions of the S.A.R. must meet demands of substantive justice, a position that is at the heart of their loosely shared naturalist vision.

3.1. *The Bill of Rights*

In 1991, the Hong Kong government adopted a Bill of Rights Ordinance and began a series of amendments to colonial laws that had previously restricted civil and political liberties. The

²³ See, e.g., Martin C.M. Lee, *Need for "Rule of Law"*, S. CHINA MORNING POST, Aug. 1, 1993, at 11.

Ordinance was enacted largely in response to the Beijing leadership's violent suppression of the 1989 Democracy Movement in the P.R.C. and to what the suppression seemed to portend for post-1997 Hong Kong. The Ordinance provided, among other things, for rights to liberty and security of person; freedom of thought, opinion, expression, association, and peaceful assembly; participation in public life; equal protection under the law; criminal due process; freedom from torture; and humane treatment for people deprived of their liberty.²⁴ The Ordinance also decreed that inconsistent preexisting legislation was repealed and that subsequent legislation was to be construed where "it admits of such a construction . . . so as to be consistent" with the International Covenant on Civil and Political Rights, key provisions of which the Ordinance explicitly tracked.²⁵ This provision was further "entrenched" in Hong Kong law by a simultaneous amendment to the Letters Patent, the British law that serves as a principal part of Hong Kong's constitution.

Partly in response to the same sorts of political concerns and pressures that prompted the Bill of Rights Ordinance, and also to implement the broad promises of the Bill of Rights, the colonial government undertook a number of eleventh-hour changes to laws restricting peaceful political activities, including reforms to the Public Order Ordinance (which had imposed license requirements for public demonstrations) and the Societies Ordinance (which had required government permission to establish political parties and other associations and permitted restrictions on links to foreign organizations).²⁶

The P.R.C. and its allies in the territory rejected, primarily on positivist grounds, any notion that the Bill of Rights and reforms to specific legislation had any necessary impact beyond July 1, 1997. Some provisions might be allowed to survive, but they

²⁴ See Hong Kong Bill of Rights Ordinance, ch. 383, § 8 (1991). On the political background of the Bill of Rights, see, for example, Emily Lau, *Confidence Building*, FAR E. ECON. REV., Oct. 26, 1989, at 19 (quoting Hong Kong Attorney General Jeremy Mathews and the British Foreign Secretary).

²⁵ Hong Kong Bill of Rights Ordinance § 4 (1991).

²⁶ See Societies Ordinance, Hong Kong Ordinances, ch. 151 (amended 1992); Public Order Ordinance, Hong Kong Ordinances, ch. 245 (amended 1995). See generally, Diane Stormont, *China Proposes Gutting HK Civil Liberties Laws*, Reuters, Jan. 20, 1997, available in LEXIS, Asiapc Library, Allasi File; C.K. Lau, *Harsh Provisions that Infringe on Freedom*, S. CHINA MORNING POST, June 25, 1994, at 18.

would do so at the sufferance of the Chinese state and its subordinate S.A.R. organs, the entities that would be the real source of such laws' authority. It was, a prominent Chinese spokesman on Hong Kong stressed, the N.P.C. Standing Committee that would declare which laws in Hong Kong should remain in force after 1997.²⁷ Objectionable provisions could be and would be reversed by procedurally proper exercises of the P.R.C.'s sovereign legislative authority over Hong Kong.²⁸ Moreover, the P.R.C. had already made clear through the Basic Law that the rights referred to in the Bill of Rights would be protected under S.A.R. law, thus making the Ordinance's substantive provisions at best superfluous.²⁹

Further, the P.R.C. and its allies warned that the significant changes that the Hong Kong government had sought to make via new legislation could not be entrenched in S.A.R. law by means of the P.R.C.'s unilateral undertaking (in the Joint Declaration and the Basic Law), that the "laws previously in force" in Hong Kong would continue in effect.³⁰ That promise covered only the laws as they stood at the time the P.R.C. made the pledge in 1984.³¹ While some flexibility to allow necessary legislation over thirteen years was implied, the sweeping delegation of authority to change "major laws" implied by the colonial government's

²⁷ See Chris Yeung & Louis Won, *Let S.A.R. Decide on Bill, Says Top Judge*, S. CHINA MORNING POST, Oct. 30, 1995, at 1 (summarizing remarks of Zhang Junsheng, deputy director of the Hong Kong Branch of Xinhua, the New China News Agency, which has been the P.R.C.'s *de facto* embassy in Hong Kong); see also *China Says Reserves Right to Review Hong Kong Laws*, Reuters, June 6, 1991, available in LEXIS, Asiapc Library, Allasi File ("[Beijing] reserves the right to examine at an appropriate time after 1997 the laws currently in force in Hong Kong.") (statement of Foreign Ministry spokesman Duan Jin).

²⁸ See, e.g., Bruce Gilley, *Hold Your Ground*, FAR E. ECON. REV., Nov. 16, 1995.

²⁹ See Basic Law, *supra* note 2, art. 39 (stating that provisions of the International Covenant of Civil and Political Rights are to remain in force in Hong Kong and be implemented through S.A.R. laws), arts. 24-42 (enumerating specific rights). See also *Xinhua Condemns Britain's Stand on Hong Kong Rights*, Agence France Presse, Jan. 29, 1997.

³⁰ See Basic Law, *supra* note 2, arts. 8, 160; Joint Declaration, *supra* note 1, annex I.

³¹ See, e.g., *Article Defends China's Position on Law Changes*, TA KUNG PAO, Feb. 5, 1997, at 10 ("The term 'previously in force' . . . refers to the laws in force at the time of the signing of the Sino-British Joint Declaration."); Tsang Yok-sing, *Repeal Objections are Out of Order*, S. CHINA MORNING POST, Feb. 4, 1997, at 16.

enactment of hundreds of new laws and amendments to key legislation entailed too serious restrictions on the Chinese sovereign's discretion. Such a prior, binding commitment to accept such extensive change was "impossible." It would constitute a "blank check" approach to authorizing pre-reversion legislation with post-1997 effect that was unthinkable from a Chinese-style positivist perspective.³²

In addition, the P.R.C. and its allies in Hong Kong attacked the substance of the late colonial legal reforms as unacceptably constraining of sovereign discretion.³³ Having long enjoyed the benefits of laws empowering them to restrict political activities in the territory (and having repeatedly asserted their conformity with international human rights standards), the colonial government had belatedly moved to exclude such order-supporting and sovereign-empowering assets from the dowry the P.R.C. and the S.A.R. government would receive in 1997.³⁴ That the colonial government had not strictly enforced many of the laws in recent years was of little import to the P.R.C. Especially from the positivist perspective to which the P.R.C. and its supporters adhered, those laws had remained valid legislation available for the government's use.

Worse still, from the Chinese and pro-P.R.C. perspective, the Bill of Rights purported to be a new kind of quasi-constitutional and super-statutory law to which ordinary Hong Kong legislation

³² See Lu Ping *Stresses Partial Abrogation of Some Ordinances Amended by British Hong Kong Government is Intended to Maintain Hong Kong's Prosperity and Stability*, WEN WEI PO, Jan. 26, 1997, at A11; see also *Article Defends China's Position on Law Changes*, *supra* note 31, at 10.

³³ See, e.g., Peter Lim, *Hong Kong's First Bill of Rights Targets China*, Agence France Presse, June 8, 1991.

³⁴ See, e.g., *Article Defends China's Position on Law Changes*, *supra* note 31, at 10 (complaining that "a considerable number of amendments irrationally decentralized the powers of the government, limited the functions of government . . . [and] restricted the powers of the police and law-enforcement organs"); Frank Ching, *UN to Examine Patten Report*, FAR E. ECON. REV., Oct. 19, 1995, at 38 (describing the Chinese view more generally); Stacy Mosher, *Uncertain Rights*, FAR E. ECON. REV., July 4, 1991, at 16 (citing the Chinese government concern that the bill might hinder post-1997 law enforcement); Chris Yeung, *Tung in a Legal Tangle*, S. CHINA MORNING POST, Jan. 25, 1997, at 17 ("Hardliners in Beijing" and Hong Kong's "pro-China circle" see late colonial legal changes as "political plot by Britain to make the S.A.R. ungovernable.").

had to conform.³⁵ In addition to trying to “entrench” substantive principles in a way that prior law had not, the Ordinance and the changes to the Letters Patent assigned legislative and super-legislative authority to the judiciary by means of the provisions that declared pre-existing contrary legislation to be repealed, mandated Bill-of-Rights-compatible interpretation of subsequent statutes, and gave the judiciary the authority to determine the inconsistency of prior ordinances and to undertake “conforming” interpretations of subsequent legislation.³⁶ From this perspective,

³⁵ See, e.g., *Xinhua Criticizes Patten’s “Alarmist Statement” in Bill of Rights Controversy*, Xinhua, Oct. 27, 1995, available in LEXIS, Asiapc Library, Allasi File (“[The] British side . . . unilaterally introduced . . . the ‘Bill of Rights’ and plac[ed] it above all other laws of Hong Kong.”).

³⁶ The criticism was based primarily on the Bill of Rights Ordinance section 3(2), which prescribed that all preexisting legislation not admitting of a construction consistent with the Bill of Rights Ordinance “is, to the extent of the inconsistency, repealed”; implicitly on section 6, which provided for judicial remedies and review for “violations”; on section 4, which directed that subsequent laws be construed so as to be compatible with the U.N. Covenant on Civil and Political Rights. See, e.g., *Article Defends China’s Position on Law Changes*, *supra* note 31, at 10; *China on Safeguarding Sino-British Joint Declaration*, Xinhua, Jan. 29, 1997, available in LEXIS, Asiapc Library, Allasi File. The criticism was also based on the moves to entrench the Bill of Rights’ substantive provisions by section 2(3) of the Ordinance (contrary to established common law practice, pro-China sources claimed) and paragraph 7(3) of the Letters Patent — British Parliamentary legislation that was the Basic Law’s predecessor as a “constitutional” document for Hong Kong that was beyond Hong Kong’s power to amend. See, e.g., *Article Defends China’s Position on Law Changes*, *supra* note 31, at 10. On the Letters Patent, see PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 321-22 (1994).

To understand the objection that the Ordinance gave the courts “legislative” authority, it is important to recall that constitutional judicial review of legislation in the American sense is not a part of Hong Kong’s British-based legal system, much less the P.R.C.’s civil law and socialist system. While criticisms of legislating from the bench are, of course, hardly alien in discussions of the role of the courts in the United States, the notion of a court in effect striking down legislation for nonconformity with a written quasi-constitutional document or undertaking potentially reconstructive interpretations of statutory text looks more radical in the British system, with its norms of parliamentary supremacy and the absence of a written constitution, and in the P.R.C.’s system where principles of parliamentary supremacy and judicial accountability to legislative organs are constitutionally mandated. Hong Kong’s system has been a bit closer to the U.S. system in that the courts have had authority to strike down legislation as beyond the limited, delegated authority of the Governor and Legislative Council, and in that the highest court for colonial Hong Kong has been the Privy Council in London, which is, of course, not subordinate to the Hong Kong legislature. See *generally id.* at 154-63, 186-95. Still, the power that China alleged the Bill of Rights Ordinance

the mandate to the judiciary and the attempts at substantive entrenchment, in effect, sought to make the Bill of Rights, and the international human rights provisions it tracked, a category of law that had not previously existed in Hong Kong and that clearly was meant to restrict the exercise of at least that portion of China's sovereign power that was to be delegated to the S.A.R.³⁷

These "structural" changes to expand judicial powers and to create a new, higher type of law, the P.R.C. and its allies added, had the additional positivist problem of being inconsistent with the Basic Law and its assumptions of legal continuity. Accordingly, they could not be accepted as laws for the S.A.R., given the Basic Law's requirements that all S.A.R. laws conform to the Basic Law and that prior laws that "contravene" the Basic Law would not survive.³⁸

The colonial government and the territory's indigenous liberal and pro-democracy voices defended the Bill of Rights with largely naturalist arguments about what fixed principles required Hong Kong's government to provide to its citizens.³⁹ The Bill of Rights' principles for reforming substantive laws and specific changes to laws were, on this view, simply the right thing to do. Arguments in this vein frequently made reference to international human rights norms, assumedly of universal application (and

conferred on Hong Kong courts would mark a substantial departure from these high baselines of judicial power in Hong Kong. The robust role of the courts in the territory was probably not, in any event, well understood or accepted in P.R.C. circles charged with addressing Hong Kong questions.

³⁷ Comments from Hong Kong legal officials when the colonial government was considering a Bill of Rights added to Chinese concerns, with Attorney General Jeremy Mathews declaring that a Bill of Rights would be "supreme" over other Hong Kong law. See Lau, *Confidence Building*, *supra* note 22, at 19. Later commentary sought to backpeddle, prompting Chinese spokesmen to claim that the Hong Kong government sought to "deceive the Hong Kong people" when it belatedly denied that the Bill of Rights was supposed to be "supreme." See Chris Yeung & No Kwai-yan, *Beijing Slams Bill "Lies"; Officials "Deceiving Hong Kong People and Misleading Public Opinion,"* S. CHINA MORNING POST, Nov. 15, 1995, at 1.

³⁸ See Basic Law, *supra* note 2, arts. 8, 160; see also *Xinhua Criticizes Patten's "Alarmist Statement" in Bill of Rights Controversy*, *supra* note 35.

³⁹ As one Legco member explained during the debates on the Bill of Rights, in a passage later quoted approvingly by Governor Patten, "It is incumbent upon us as legislators . . . to ensure that we will entrench essential freedoms in line with" the human rights standards recited in the U.N. Convention on Civil and Political Rights. Paul Cheng, *No Danger of Making Bill of Rights U-Turn*, S. CHINA MORNING POST, Jan. 27, 1997, at 18.

codified in key United Nations covenants), that the changes in Hong Kong law were meant to reflect.⁴⁰

From this liberal perspective, it was significant that the British colonial government in recent years had acted in ways generally consistent with appropriate standards that were only later adopted as positive law. Indeed, the minimal (but not sole) aim of the Bill of Rights and amendments to specific laws was to *preserve* the generally just (if not fully adequate) legal order that Hong Kong had enjoyed in practice and that seemed vulnerable, given the approaching takeover by a regime with a substantially more checkered record.⁴¹

Tellingly, one aspect of the P.R.C.'s attack on the Bill of Rights that was particularly troubling to liberal lawyer-politicians and legally sophisticated government officials in Hong Kong was the P.R.C.'s objection to the Ordinance as new form of super-statutory law. Beyond establishing a prospective rule of statutory construction, all that the Ordinance did in this area, its defenders insisted, was to provide for statute-based judicial review of challenged laws that not only was utterly conventional in Hong Kong, but was also central to any notion of accountable and law-governed government that accorded any significant role to courts.⁴²

⁴⁰ See, e.g., Louise do Rosario, *No Watchdog*, FAR E. ECON. REV., July 7, 1994, at 26 (quoting human rights activist and academic Nihal Jayawickrama and Legco member Christine Loh). The text of the Bill of Rights Ordinance itself refers specifically to the U.N. Covenants, in section 4, and is, in this respect, presumably meant to track article 39 of the Basic Law.

⁴¹ See, e.g., Emily Lau, *Voice of the People*, FAR E. ECON. REV., June 8, 1989, at 18 (then-reporter and later leading liberal Legco member Lau noting the Hong Kong government's tolerance of local rallies in support of the students at Tiananmen despite such activities being in "direct violation" of the Public Order Ordinance); Christine Loh, *Nothing to Fear from China if We Stand Firm*, S. CHINA MORNING POST, Nov. 6, 1995, at 18 (pro-democracy Legco member, describing Beijing's plans to reverse Bill of Rights as an effort "to prevent Hong Kong people from enjoying the freedoms we have grown used to").

⁴² On this side of the debate as well, the key provisions were sections 3, 4 and 6. See also Loh, *supra* note 41, at 18 (Legco member describing Bill of Rights as "in strict legal interpretation . . . only an ordinary law like any other piece of legislation in Hong Kong. But because it sets minimum standards, the Government and the judiciary are prepared to check other laws against its."); Wang Hui Ling, *HK Blasts Bid to Scrap Parts of Bill of Rights*, STRAITS TIMES (Singapore), Jan. 21, 1997, at 17 (Patten criticizing proposed changes as "bad news" striking "at the heart of Hongkong's civil liberties" and arguing that the Bill of Rights provisions to which China objected did not seek to override the

3.2. *The Legislature*

In 1992, Hong Kong's new governor, Christopher Patten, announced proposals to broaden the democratic base of the last colonial Legislative Council ("Legco"), which was to "ride a through train" to become the S.A.R.'s first legislature. Adding nine new functional constituencies with electorates that collectively took in most of the territory's potential voters, expanding the base for several of the twenty-one existing functional constituencies, providing for the direct election by universal suffrage of members representing twenty single-member districts, and establishing a mechanism of indirect popular election for another ten representatives (by an election committee composed of directly elected members of local government bodies), the reformed laws provided for a Legco in which two-thirds or more of the sixty members would have some claim to a popular electoral mandate.⁴³ Patten's strategy also included increasing the effective role of Legco in the governance of the territory by submitting for its unconstrained debate, and potential rejection, legislation concerning many of the key issues of the transition, including the reforms to the electoral structure for Legco and bills to establish the Court of Final Appeal for the S.A.R.

The P.R.C. and its backers in Hong Kong attacked the Patten reforms and declared that the Legco elected in 1995 under those laws would be dissolved on July 1, 1997.⁴⁴ The arguments again reflected a Chinese-style positivist vision. Some Chinese leaders saw a dark plot to compromise the P.R.C.'s sovereignty over

Basic Law and were standard provisions in common law jurisdictions).

⁴³ For general discussions of the Patten electoral reforms, see Lo Chi-kin, *From "Through Train to Second Stove,"* in FROM COLONY TO S.A.R. 25, 28; Frank Ching, *Cleared for Action*, FAR E. ECON. REV., Oct. 22, 1992, at 20. Patten's reforms effected a number of other changes as well, including lowering the voting age to 18 and democratizing the process for selecting members of lower-level bodies.

⁴⁴ The threat to derail the "through train" was made on numerous occasions, some before Patten formally proposed his reform plan. The most formal statement of China's position came in a September 1994 unanimous resolution by the N.P.C. "to abolish the political structure based on Governor Chris Patten's electoral reform package." Louise do Rosario, *Derailed*, FAR E. ECON. REV., Sept. 22, 1994, at 36; see also Emily Lau, *No More 'Concessions,'* FAR E. ECON. REV., Nov. 30, 1989, at 13 (describing an early warning from Hong Kong and Macau Affairs Office deputy director Li Hou of possible derailment if Britain made too-rapid changes in Hong Kong).

Hong Kong after 1997 by using democratization of the Legco selection process and the less formal expansion of Legco's role in government to create an independent base for subversion.⁴⁵

The most emphasized problem with Patten's electoral law reform, however, was its "non-conformity" with the Basic Law, as well as the Joint Declaration and secret Sino-British agreements concerning the method for selecting members of the transitional era legislature.⁴⁶ The governor had "perfidious[ly] disregarded" the Basic Law, "a dignified document which should be strictly observed" and which could be interpreted only by the N.P.C. Standing Committee, not by "the British side or Chris Patten himself."⁴⁷ Specifically, Patten had introduced broader elections — particularly through the new functional constituencies and expansion of old ones — earlier and for a larger portion of Legco than the framework of positive law and sovereign permission from the P.R.C. allowed. Among its other problems, the Patten package violated the Basic Law's mandate for the development of Legco selection methods "in accordance with the principle of gradual and orderly progress."⁴⁸

For the P.R.C. and its supporters and surrogates in Hong Kong, it followed that the last colonial Legco could not become the S.A.R.'s initial legislature. The relevant positive law did not require it. The N.P.C.'s 1990 "Decision," together with Annex II to the Basic Law, provided for the "through train," but conditioned it upon the last colonial Legco's "composition" being "in conformity" with the Decision's requirements that twenty members be chosen by geographical constituencies, ten by an election committee and thirty by functional constituencies.⁴⁹

⁴⁵ See Li Haiting, "Basic Law" Essentially Ensures Democracy for Hong Kong People, Xinhua, Jan. 9, 1994, available in LEXIS, Asiapc Library, Allasi File; Tai Ming Cheung, *Glacial Thaw*, FAR E. ECON. REV., July 22, 1993, at 13 (quoting Shiu Sin-por, head of the pro-China One Country, Two Systems Economic Research Institute).

⁴⁶ See Tai Ming Cheung, *Pressure Tactics*, FAR E. ECON. REV., Nov. 5, 1992, at 8 (statements of Lu Ping, chief of P.R.C. State Council's Hong Kong and Macau Affairs Office).

⁴⁷ *Does Chris Patten Want Cooperation or Confrontation?*, WEN WEI PO, Oct. 24, 1996, at 2.

⁴⁸ Basic Law, *supra* note 2, art. 68; *Text of Chinese Statement on the Breakdown of Sino-British Talks on Hong Kong*, Xinhua, Mar. 2, 1994, available in LEXIS, Asiapc Library, Allasi File.

⁴⁹ Basic Law, *supra* note 2, annex II.

According to the Chinese and pro-P.R.C. reading, Patten's reforms had meant that the 1995-chosen Legco failed to meet that condition.⁵⁰ Functional constituencies meant narrow, corporate voting, not the broad electorates the Patten reforms would introduce for many of those seats.

Moreover, as the Chinese authorities and their Hong Kong affiliates saw it, the first S.A.R. legislature would have to receive its authority in good positivist fashion from the Chinese sovereign. Even if the "through train" arrangement had held, it would not have meant that the last colonial legislature would have survived the transition, outliving the political entity whose component organ it was. Rather, the people who served in the last Legco would have been reappointed as members of a new S.A.R. institution that would be purely a creature of P.R.C. legislation and could have P.R.C.-established criteria for membership.⁵¹

With the through train derailed, this line of argument continued, the P.R.C. was free to establish a Provisional Legislature for the territory and to invest it with whatever sovereign authority it thought wise (at least within the limits of what the Basic Law mandated). As the P.R.C. and its supporters construed the Basic Law and N.P.C. Decision on the Formation of the First Legislative Council of the S.A.R., there was nothing in the relevant framework of positive law to preclude establishing such a body once the through train was no longer possible. On this view, the N.P.C. Decision, in authorizing the Preparatory Committee to "take care of all matters concerning the prepara-

⁵⁰ See generally *Nomination of Provisional Legislature Candidates Formally Starts*, WEN WEI PO, Nov. 18, 1996, at A2; *Text of Zhou Nan Speech to First Session of the Provisional Legislature for the Hong Kong S.A.R.*, TA KUNG PAO, Jan. 26, 1997, at A2 (speech by Xinhua Hong Kong Director and Preparatory Committee Vice Chairman Zhou Nan).

⁵¹ See, e.g., Frank Ching, *Don't Subvert Hong Kong*, FAR E. ECON. REV., Nov. 18, 1993, at 34 (describing Chinese plans to scrutinize potential reappointees for involvement in "subversive" activities, should the through train model in general survive the conflict over the Patten reforms); David Chu, *Fact and Fiction in the New Legislature*, S. CHINA MORNING POST, Nov. 14, 1996, at 18; *Text of Chinese Statement on the Breakdown of Sino-British Talks on Hong Kong*, *supra* note 48. A key textual basis for part of the P.R.C. position was the N.P.C. Decision provision stating that "those of [the last colonial Legco] members who . . . meet the requirements set forth in the Basic Law . . . may, upon confirmation by the Preparatory Committee, become members of the first Legislature of the Region." (emphasis added).

tions for the setting up” of the S.A.R., had given the Preparatory Committee authority to establish a Provisional Legislature if need be. If there were any doubt, the N.P.C. could simply issue a legislative interpretation of the Basic Law to authorize clearly the temporary body’s creation.⁵²

As a more general matter, a unilateral move to establish a local S.A.R. legislature would be an acceptable action, well within the plenary powers that the P.R.C. enjoyed as Hong Kong’s sovereign.⁵³ The P.R.C. and its Hong Kong allies pressed this point further, in recent months even asserting that the Provisional Legislature meeting in Shenzhen could begin considering proposed laws for post-reversion Hong Kong.⁵⁴

Official Chinese sources and like-minded voices in the territory also suggested that there were good positivist reasons for making sure a Provisional Legislature was in place on July 1, and that there was no legal impediment to doing so. Absent such a body, there would be no local organ to exercise the legislative functions that the Basic Law conferred and to make indispensable laws in the early days of the S.A.R. Such a “legislative vacuum” would be a troubling and untidy state of affairs.⁵⁵

In part, the defense of the Patten reforms and the denunciations of the Provisional Legislature from official quarters in Hong Kong met the P.R.C. side’s arguments on their own terms. Patten declared his changes to the electoral rules for Legco to be

⁵² See *N.P.C. Decision, supra* note 9; *Nomination of Provisional Legislature Candidates Formally Starts, supra* note 50, at A2; see also Linda Choy, *Attempt to Affirm Legislature’s Legal Status*, S. CHINA MORNING POST, Jan. 4, 1997, at 4 (describing arguments from pro-China Hong Kong groups that the N.P.C. should issue a new legislative interpretation of the Basic Law to provide clear authority for the establishment of the Provisional Legislature); *Procedures for Formation of Provisional Legislature Are Impartial and Open*, WEN WEI PO, July 9, 1996, at A2 (summarizing qualifications established for candidates for membership in Provisional Legislature).

⁵³ See, e.g., *Nomination of Provisional Legislature Candidates Formally Starts, supra* note 50, at A2.

⁵⁴ See, e.g., *Provisional Legislature Must Be Set Up as Scheduled*, TA KUNG PAO, Oct. 8, 1996, at A2; *Provisional Legislature Must Operate Before 1997*, WEN WEI PO, Aug. 31, 1996, at A2.

⁵⁵ See, e.g., Dominic Lau, *China Founds 1997 HK Legislature, Defies Britain*, Reuters, Dec. 21, 1996, available in LEXIS, Asiapc Library, Allasi File (quoting Foreign Minister Qian Qichen); *Nomination of Provisional Legislature Candidates Formally Starts, supra* note 50, at A2 (stating that the Provisional Legislature needed to avoid the “legal vacuum”); *Provisional Legislature Must Operate Before 1997, supra* note 54, at A2 (making a similar statement).

consistent with the Basic Law. The colonial government and Hong Kong politicians objected to the establishment of a Provisional Legislature and its claims to pre-reversion authority as, among other things, inconsistent with the arrangements set forth in the Basic Law and the Joint Declaration.⁵⁶

Still, most of the arguments from the colonial government and liberal and democratic circles in Hong Kong sounded a less positivistic note. In principle, what made the Patten reforms defensible, and even obligatory, was their vital contribution to establishing a set of law-making (and other governmental) institutions for Hong Kong that would represent the will of the territory's citizens, provide public accountability and undergird the rule of law. Thus, they would provide, both directly and indirectly, the primary "goods" of a naturalist liberal conception of a proper legal and political order.⁵⁷

In addition, the understanding in these quarters of the through train model for Legco seems to have paid little heed to the P.R.C.'s positivist metaphysics of giving old office-holders new sources of authority. The point, rather, seems to have been that a relatively democratically chosen, and therefore fairly legitimate, group of representatives to a quasi-legislative body would simply

⁵⁶ See Frank Ching, *China Calls a Deer a Horse*, FAR E. ECON. REV., Dec. 8, 1994, at 32 (claiming that the Provisional Legislature is incompatible with the Basic Law); *Policy Address of Governor Patten*, S. CHINA MORNING POST, Oct. 3, 1996, at 4 (stating that democratization efforts have been "in line with the undertakings solemnly accepted by Britain and China"); *Tung Attacks Britain, HK for Refusing to Recognize Appointed Assembly*, Agence France Presse, Dec. 17, 1996 (quoting Martin Lee's "challenge [to] the Provisional Legislature . . . to operate in Hong Kong," which would allow Lee to "take them to the courts [to] decide whether it's constitutional or not" or in violation of the Basic Law and the Joint Declaration).

⁵⁷ See, e.g., Emily Lau, *Letter from Hong Kong*, FAR E. ECON. REV., July 9, 1992, at 24 (describing a Legco member arguing that "speeding up the pace of democracy" was a matter of "necessity and desirability" with a requirement that "at least half of Legco be directly elected in 1995" as "an absolute minimum" in order to make possible the "high degree of autonomy" promised to Hong Kong and to avoid a "morally [in]defensible" result that returning Hong Kong to China threatened to produce); Martin Lee, *Tide of Democracy*, FAR E. ECON. REV., Nov. 26, 1992, at 31 (describing a Legco member arguing that "without democratic and accountable government, we will never be able to maintain the rule of law"); *Policy Address of Governor Patten*, *supra* note 56, at 4 (linking the democracy of 1995 elections with government openness and accountability).

remain in office, undisturbed by the transition.⁵⁸ Indeed, it was the P.R.C.'s new appointive body, the Provisional Legislature, that was "reprehensible," "unjustifiable," and had "a legitimacy problem," not least because it included several failed candidates from the 1995 balloting.⁵⁹ Its lack of real democratic (as well as positivist statutory) legitimacy could not be cured.⁶⁰

3.3. *The Court of Final Appeal*

In 1995, the colonial government enacted a Court of Final Appeal Law which provided, among other things, for a court that would be established only at the transition, that would include, as a "temporary member" only one jurist from a foreign common law jurisdiction on its five-member bench, and that would not have jurisdiction over "acts of state such as foreign affairs and defense" or to interpret Basic Law provisions governing relations between the S.A.R. and the Central People's Government.⁶¹

Generally pleased with the legislation, official P.R.C. sources and like-minded unofficial sources in Hong Kong mounted a less sustained analysis of the court ordinance's status. Still, there are hints of familiar styles of argument. When the colonial authorities threatened to act unilaterally to establish a court, the P.R.C. responded in the same terms as it had to the impasse over the legislature: anything that the outgoing government did on its

⁵⁸ See, e.g., *Patten Behaviour*, FAR E. ECON. REV., Dec. 7, 1995 (British Minister of State with responsibility for Hong Kong declaring, "the British government, like the Hong Kong government, sees no reason why" the 1995-elected Legco "should not serve its full, natural four-year term"; former senior Hong Kong civil servant arguing that "the people of the colony are entitled to have a free say in the shape of the future Hong Kong government" via their elected representatives).

⁵⁹ See *Tung Attacks Britain, HK for Refusing to Recognise Appointed Assembly*, Agence France Presse, Dec. 17, 1996 (quoting Patten); see also Quinton Chan & Clarence Tsui, *Patten Blasts Scrapping of Laws*, S. CHINA MORNING POST, Feb. 2, 1997, at 2; Martin Lee, *The Wrong Message from China*, S. CHINA MORNING POST, Jan. 13, 1997, at 19.

⁶⁰ See, e.g., Martin Lee, *Hong Kong Puppet Play*, N.Y. TIMES, Dec. 21, 1996, at 25.

⁶¹ *Court of Final Appeal: The Text in Full*, S. CHINA MORNING POST, June 10, 1995, at 2 (presenting the text of the Sino-British Joint Liaison Group Agreement on C.F.A.); see also Louise do Rosario, *A Court Too Far*, FAR E. ECON. REV., June 22, 1995, at 20 (describing the C.F.A. agreement and bill of 1995); *Lu Ping on HK's Court of Final Appeal*, Xinhua, May 18, 1995, available in LEXIS, Asiapc Library, Allasi File (quoting the Director of Hong Kong and Macau Affairs Office).

own and without the P.R.C.'s authorization, the P.R.C. would be free to dismantle and replace.⁶² At an earlier impasse in the negotiations leading to the second court deal, the P.R.C. raised the possibility of establishing a review body superior to the C.F.A., a move which could be defended on positivistic grounds that it was not forbidden by the Basic Law (which provided for the S.A.R.'s "judicial autonomy" but was silent on the specific question of a supra-C.F.A. body) and was generally within the P.R.C.'s sovereign discretion to establish.

Regarding more specific issues, there were suggestions that the P.R.C. saw a larger number of foreign judges as potentially threatening to erode the judicial dimension of Chinese sovereignty over Hong Kong. By world standards, the P.R.C. had been uncommonly generous in permitting even one foreign national to serve in so sensitive and powerful a position.⁶³ Moreover, nothing in the relevant positive laws required more than one judge. As a matter of valid statutory construction, the Basic Law article providing for "judges" from a foreign common law jurisdiction did not require more than one. Indeed, the P.R.C.'s top official on Hong Kong affairs explained on the eve of the second C.F.A. deal, the legal arrangement the P.R.C. had in mind would still leave the question of the number of foreign judges open for case-by-case, discretionary determination. The four-to-one ratio, Lu Ping explained, was between "permanent" and "temporary" members of the court. Because both locals and foreigners could be on either list, the number of expatriates could range from zero to four (with the Chief Justice required to be a Chinese citizen and permanent S.A.R. resident).⁶⁴

The fact that the court would not be up-and-running in

⁶² See, e.g., Frank Ching, *Split in Beijing Over Hong Kong*, FAR E. ECON. REV., Apr. 13, 1995, at 34.

⁶³ Cf. *One Foreign Judge is Enough*, S. CHINA MORNING POST, Dec. 6, 1994, at 26.

⁶⁴ See Basic Law, *supra* note 2, art. 82. From this perspective, more textual help was to be found in the equally authoritative Chinese version's use of *faguan*, translated well as "judge" or "judges," and the proviso that foreigners could be invited to serve "as required," which could mean, under appropriate circumstances, no foreign judges. The Joint Declaration language is virtually identical. See Joint Declaration, *supra* note 1, annex I § III. For Hong Kong and Macau Affairs Office Director Lu Ping's argument, see *Lu Ping on HK's Court of Final Appeal*, Xinhua, May 18, 1995, available in LEXIS, Asiapc Library, Allasi File.

advance of the shift to Chinese rule gave no reason for concern. In part a product of Legco's 1991 vote not to support a proposal very similar to the one it endorsed in 1995, the relatively late establishment of the court still avoided the relevant danger from a positivist perspective. As Chinese and pro-P.R.C. commentators stressed, the 1995 law meant that July 1, 1997, would not bring a "judicial vacuum" that the Provisional Legislature would have to scramble to fill by crafting entirely new legislation to set up and staff the top level of the judiciary.⁶⁵

Finally, the jurisdiction-limiting provisions were also acceptable, even necessary, from a Chinese-style positivist perspective. Granting greater powers to a local court, the P.R.C.'s spokesmen and supporters seemed to suggest, would risk a dangerous alienation of central sovereign authority. In any event, the relevant positive laws again permitted such restrictions on the court's power: the Basic Law mandated the limits to the court's power to interpret the Basic Law, and contained "act of state" language identical to that adopted in the C.F.A. Ordinance.⁶⁶ Should the colonial government of Hong Kong fail to enact a law establishing the court, Chinese legal officials argued, the N.P.C. was authorized under the Basic Law (as well as the Chinese constitution) to pass C.F.A.-creating legislation containing the appropriate jurisdictional (and other) limits permitted or required by the Basic Law.⁶⁷

A few of the counter-arguments from Hong Kong critics of the court deal were cast in terms that the P.R.C. and pro-P.R.C. side could find unobjectionable in form, if not persuasive in content. Some, for example, argued that the statutory term "judges" from foreign jurisdictions meant more than one judge.⁶⁸ But, here too, a very different, more naturalist perspective drove most of the analysis by the bills' opponents and by proponents who were not generally part of the pro-P.R.C. camp. For

⁶⁵ See, e.g., *Text of Zhao Jihua Speech on Signing of Court of Final Appeal Agreement*, WEN WEI PO, June 10, 1995, at A2.

⁶⁶ See Basic Law, *supra* note 2, art. 19.

⁶⁷ See Stacy Mosher, *Court of Contention*, FAR. E. ECON. REV., Dec. 19, 1991, at 11 (quoting former Basic Law Drafting Committee member Wu Jianfan, invoking article 82 of the Basic Law as authorization for an N.P.C.-enacted C.F.A. law).

⁶⁸ See, e.g., C.K. Lau, *Judging the Judges*, S. CHINA MORNING POST, Aug. 23, 1995, at 19.

colonial officials and local politicians of a generally liberal or democratic stripe, the principal touchstone of the C.F.A. bills' adequacy was their compatibility with the preservation of Hong Kong's rule-of-law system and values.

A place for one or more foreign common law jurists on the highest bench was important as a means of assuring a degree of insulation from political pressure and, therefore, independence sufficient to defend the transcendent norms of limited and accountable government and individual justice that the common law, at its best, developed and protected.⁶⁹ If the limits on the court's jurisdiction were objectionable, this was primarily because they threatened to undermine the achievement of government accountability and government under law.⁷⁰ The belated establishment of the court was a problem, if at all, because it raised the prospect that the court, in practice, would lack the kind of experience and clout necessary to support the obligatory norms of good and just laws and governance, regardless of the court's composition or formal jurisdiction.⁷¹

3.4. *The Chief Executive*

The legal framework for selecting the S.A.R.'s first Chief Executive, the official who would head the most powerful branch of the S.A.R.'s government, was settled early on.⁷² An Annex

⁶⁹ See Mosher, *Court of Contention*, *supra* note 67, at 10 (describing Legco supporters of the motion to reject the 1991 C.F.A. Bill as concerned that accepting the limitation on the number of foreign judges portended possible curtailment of "other rights and freedoms" that Hong Kong people believed were "cast in iron" by the Joint Declaration and Basic Law); Louise do Rosario, *Cold Shoulder*, FAR E. ECON. REV., June 1, 1995, at 25 (describing Legco members' concern that limiting the court to one foreign judge would "compromise the flexibility and professionalism" of the court).

⁷⁰ See *Courting Disaster*, FAR E. ECON. REV., June 22, 1995, at 5 (noting the P.R.C.'s potentially expansive definition of acts of state).

⁷¹ See, e.g., Stacy Mosher, *Right of Rejection*, FAR E. ECON. REV., Oct. 31, 1991, at 13 (stating that setting up the court as soon as possible would permit the development of "an established international reputation" before reversion); Louise do Rosario, *No Appeal*, FAR E. ECON. REV., May 18, 1995, at 22 (describing the colonial government's push for "rapid establishment of the court, which is designed to protect the rule of law," and local politicians favoring "a truly independent court"); see also Margaret Ng, *Time Runs Out for the Judiciary*, S. CHINA MORNING POST, June 14, 1996, at 21 (articulating the concerns of Legco member representing the legal functional constituency).

⁷² See Basic Law, *supra* note 2, arts. 43-58 (describing the powers and functions of the Chief Executive).

to the Basic Law and a separate N.P.C. Decision provided that a Selection Committee drawn in specified proportions from different segments of Hong Kong society would recommend a candidate through "local consultations or through nomination and election after consultations, and report the recommended candidate to the Central People's Government for appointment."⁷³ In December 1996, the office of Chief Executive became the first of the new S.A.R. posts to have a formally designated initial occupant, with the naming of the members of the Provisional Legislature following shortly thereafter.

Although not fully articulated with respect to a set of issues that were early and securely settled on acceptable terms, the Chinese and pro-P.R.C. position on the Chief Executive selection process was fully in step with a familiar positivist perspective. The filling of this most powerful post for exercising the elements of the P.R.C.'s sovereign authority allocated to the S.A.R. was a matter that the legislation governing the S.A.R. kept fairly firmly in the central Chinese state's ultimate grasp.⁷⁴ Beijing could have kept the process entirely in its hands, one pro-P.R.C. source emphasized, but instead chose to set up a more elaborate mechanism allowing local input.⁷⁵ Whatever criticisms might flow from Hong Kong about a P.R.C.-orchestrated charade of democracy, the P.R.C. had been careful to assure that the Basic Law and other sources authorized the formal process followed in selecting Tung Chee-hwa as Chief Executive-designate. Moreover, official Chinese sources and pro-P.R.C. Hong Kong media argued strenuously that the legally prescribed process had been faithfully observed: there was no "predetermined" result to the selection process, and the method of consultation with local interests contemplated by the Basic Law was being implemented, providing

⁷³ N.P.C. Decision, *supra* note 9, §§ 3-4; Basic Law, *supra* note 2, art. 45, annex I § 6. Subsequent occupants of the office would be chosen by an Election Committee double the size of, but similar in composition to, the initial Selection Committee, with the goal of moving ultimately to a system of universal suffrage. See Basic Law, *supra* note 2, art. 45, annex I §§ 1-5.

⁷⁴ If control over the selection process were not enough, the Basic Law provided additional legal levers of control over the Chief Executive, providing in article 43 that the Chief Executive "shall be accountable to the Central People's Government" as well as to "the Hong Kong Special Administrative Region."

⁷⁵ See Tsang Yok-sing, *Skeptics Off Mark Over Chief Executive*, S. CHINA MORNING POST, Sept. 3, 1996, at 18.

the people of Hong Kong with the legally requisite level of input, and more than the British had ever provided in a century and a half of colonial rule.⁷⁶

As with the legislature and the court, the P.R.C. here too showed its positivist abhorrence of a vacuum. Far more than the court, and more than the legislature, the chief executive has a good deal of work to do before the reversion. An early selection to the office was necessary (and necessarily somewhat undemocratic, given that the P.R.C. could not conduct pre-1997 elections in Hong Kong) if the S.A.R. government was to be ready to exercise the powers and perform the governmental duties that the P.R.C. had assigned to it through the Basic Law.⁷⁷

In addition, Tung's pointed dropping of the qualifying "-designate" from his new title (with the P.R.C.'s acceptance) and his weighing in on the controversy over the propriety of late colonial amendments to civil and political liberties laws echoed the broadly positivist point the P.R.C. was pressing in asserting the Provisional Legislature's pre-1997 authority. Given the premise of the P.R.C.'s longstanding claim to a nonderogable sovereignty over Hong Kong that was not and could not have been transferred to Britain, there was nothing in principle that could stop the P.R.C. from asserting that sovereignty at any time, so long as it did so through procedurally proper, positivist means. According to critics, the P.R.C. saw this as requiring compliance with only the most narrow readings of the Basic Law and the Joint Declaration, interpretations that perhaps forbade the direct and immediate exercise of pre-1997 governmental power, but little else.⁷⁸

Liberal and pro-democracy critics in Hong Kong treated as irrelevant the P.R.C. and pro-P.R.C. side's arguments that the selection process was positivistically valid and statute-regarding.

⁷⁶ See, e.g., Linda Choy, *It's a First for Democracy, Says Qian*, S. CHINA MORNING POST, Nov. 16, 1996, at 3; *The "Predetermination" Theory is Created for Instigating Confrontation with China*, TA KUNG PAO, Nov. 9, 1996, at 10; *Become Masters of Our Own Affairs, Incorporate Different Views*, WEN WEI PO, Aug. 12, 1996, at A2; Wang Hui Ling, *We Have No Favourite for HK Chief Exec: Qian*, STRAITS TIMES (Singapore), Nov. 16, 1996, at 20 (quoting Foreign Minister and Vice-Premier Qian Qichen).

⁷⁷ See, e.g., *Face Reality Squarely, Promote Cooperation*, TA KUNG PAO, Feb. 13, 1997, at A2.

⁷⁸ See generally Bruce Gilley, *Jumping the Gun*, FAR E. ECON. REV., Feb. 6, 1997, at 14.

The problems these critics stressed were, not surprisingly, substantive and normative shortcomings offensive to a liberal and naturalist perspective. Principally, the process had been so controlled by the P.R.C. (with Tung's implicit anointment coming in the form of a February 1996 handshake with Chinese leader Jiang Zemin) that norms of accountability to the governed in Hong Kong had been violated early on with respect to this most significant of S.A.R. offices.⁷⁹ The process was too remote from the avowed longer term goal of universal suffrage-based election to warrant much respect and credibility in democratic quarters.⁸⁰ Moreover, even before Tung's *de facto* selection became clear, the short list of candidates acceptable to the P.R.C. was dominated by those who seemed very unlikely to regard the office as one that carried obligations to uphold the largely liberal and democratic norms that many Hong Kong politicians and the Governor saw as central to just and valid laws and government. From this perspective, it was significant and distressing that former Chief Justice Sir Yang Ti Liang had expressed reservations about the Bill of Rights as a grant of legislative power to the judiciary, and that Tung Chee-hwa, early in his tenure as Chief Executive-designate, had made clear his view that liberal reforms to public order laws endangered social order and should be revised.⁸¹

⁷⁹ See Bruce Gilley, *Playing Favourites*, FAR E. ECON. REV., Feb. 8, 1996, at 22; Bruce Gilley, *The Common Touch*, FAR E. ECON. REV., Nov. 21, 1996, at 34.

⁸⁰ The House of Commons Foreign Affairs Committee had supported this line early on (according to critics, to relieve pressure to permit greater immigration to the U.K. from Hong Kong), calling in 1989 for democratic elections for the chief executive by early 1997. See Emily Lau, *Abide with Me*, FAR E. ECON. REV., July 13, 1989, at 11. Some Hong Kong pro-democracy politicians were quite strident in their critiques of the "sham" election. See C.K. Lau, *A Question of Trust*, S. CHINA MORNING POST, Dec. 12, 1996, at 21; Emily Lau, *Our Duty to Expose Election Charade*, S. CHINA MORNING POST, Nov. 25, 1996, at 26.

⁸¹ See *Chief Executive Says "Colonial Laws" Not to be Adopted*, Xinhua, Jan. 24, 1997, available in LEXIS, Asiapc Library, Allasi File; Bruce Gilley, *Enter the Judge*, FAR E. ECON. REV., Sept. 12, 1996, at 14; Danny Gittings, *The Case for Challenging China*, S. CHINA MORNING POST, Nov. 26, 1995, at 9 (concerning Yang); Peter Lim, *Democrats, Human Rights Groups Slam Hong Kong's Tung on Law Change*, Agence France Presse, Jan. 24, 1997 (concerning Tung); *Tung Says PC Legal Panel Recommendation is Right*, Xinhua, Jan. 23, 1997, available in LEXIS, Asiapc Library, Allasi File.

4. INDETERMINATE VISIONS, HONG KONG POLITICS, AND THE QUESTION OF "RULE OF LAW" VALUES

When the struggle to shape Hong Kong's future shifted to such concrete matters concerning the Bill of Rights Ordinance, the transition era Legislature, the Court of Final Appeal deal, and the selection of the S.A.R.'s first Chief Executive, the change in focus did little to bridge the gap between the notions of domestic sovereignty and lawmaking that divided the principal participants into two camps. As we have seen, each side remained committed to the proposition that the laws and institutions for the S.A.R. had to be legitimate in terms of its vision. Indeed, the conflict in some respects sharpened. With the advent of the endgame, fundamental disagreements about the standards of validity could no longer be hidden in abstractions and generalities or postponed for resolution in a later round of negotiations. At the same time, the P.R.C.'s violent suppression of the pro-democracy movement in the mainland in 1989, and Governor Patten's introduction of political reforms that the P.R.C. deemed provocative in 1992 brought a new air of mutual mistrust to the process. The deepening clash, however, is only one side of a more complex story.

4.1. *Indeterminate Visions*

Seemingly paradoxically, while the endgame thus continued and arguably stiffened each side's insistence upon its own version of the proper basis and minimally acceptable content of S.A.R. laws and institutions, the endgame also brought a shift in focus to questions for which broad visions of law and sovereignty dictated no single answer. In key conflicts over matters of legal and institutional detail, the visions have been indeterminate, and their adherents' positions on specific issues flexible and varied.

From the P.R.C. and pro-P.R.C. perspective, the principle that S.A.R. laws and institutions had to have a proper proceduralist pedigree and could not unduly restrict sovereign discretion often said little about many of the substantive concerns of the moment. Changes in this camp's positions on such matters, and discernible differences among its members's views, reflect the indeterminacy. For example, official Chinese sources sometimes insisted that the Bill of Rights as a whole and all of the substantive changes wrought by the Bill of Rights Ordinance and other eleventh-hour

statutory reforms were ripe for reversal.⁸² At other times, the P.R.C. and its Hong Kong affiliates, while unwavering in their view that the colonial authorities' actions were illegitimate (particularly in trying to create a new, supreme type of law), focused more narrowly on lists of specific legal reforms that had to be reversed. Those lists varied somewhat over time, with the Preliminary Working Committee first emphasizing six offensive laws and later proposing a much longer list that the Preparatory Committee shortened to twelve, and modified again in its formal recommendations to the N.P.C. (which the N.P.C. has accepted).⁸³ Pro-P.R.C. elements in Hong Kong were sometimes relatively circumspect, saying that a broad repeal of the Bill of Rights would be unwise or unnecessary, demanding only that some of its more troubling provisions be removed and the worst of the changes to other ordinances reversed.⁸⁴

Similarly, while Patten's electoral reforms were deemed unacceptable, the P.R.C. and its allies could contemplate any

⁸² See, e.g., *China Softens Its Line*, S. CHINA MORNING POST, Nov. 4, 1993 (describing Lu Ping's retreat from threatening to repeal the Bill of Rights to requiring that it be modified to conform to the Basic Law); Emily Lau, *Better Late Than Never*, FAR E. ECON. REV., July 12, 1990, at 16 (summarizing Chinese official reaction to the initial Bill of Rights proposal).

⁸³ On the proposals of the P.R.C.-established Preliminary Working Committee (the body established to pave the way for the transition-overseeing Preparatory Committee) see, for example, *China Comes Courting*, FAR E. ECON. REV., Nov. 16, 1995, at 7; Bruce Gilley, *Hold Your Ground*, FAR E. ECON. REV., Nov. 16, 1995, at 36. On the Preparatory Committee's approach, see *Lu Ping Stresses Partial Abrogation of Some Ordinances Amended by British Hong Kong Government Is Intended to Maintain Hong Kong's Prosperity and Stability*, *supra* note 32, at A11; *Suggestions of the Preparatory Committee of the Hong Kong Special Administrative Region of the National People's Congress on Handling the Issue of Laws Previously in Force in Hong Kong*, Xinhua, Feb. 4, 1997, available in LEXIS, Asiapc Library, Allasi File.

⁸⁴ See, e.g., Connie Law, *Plea for China to Keep Rights Bill*, S. CHINA MORNING POST, Oct. 17, 1995, at 4 (quoting P.W.C. legal subgroup member's view that it would be better not to repeal the Bill of Rights); Catherine Ng, *Curbing Rights Bill "Bad Precedent"*, S. CHINA MORNING POST, Oct. 22, 1995, at 2 (quoting Democratic Alliance for the Betterment of Hong Kong leader Tsang Yok-sing, "The Bill of Rights is just an ordinary law . . . under the common law system [where] new legislation should be taken into account by all others which were introduced earlier."); *Tung Chee-hwa Clarifies Seven Points in Misunderstanding, Stressed Hong Kong S.A.R. Will Make Laws on its Own*, TA KUNG PAO, Feb. 6, 1997, at A12 (stating that only sections 2(3), 3 and 4 of the Bill of Rights needed to be removed, and the rest of the Bill and substantial portions of the amended Public Order and Societies Ordinances could be retained).

number of positivistically valid arrangements for a transitional-era legislature, including the initial through-train model, an appointive provisional legislature some of whose members could be drawn from the last Legco (as in fact ultimately occurred), a new legislature chosen by fresh elections or, if necessary, no legislature, leaving legislative power to be exercised by the N.P.C. or perhaps by the S.A.R.'s Chief Executive or the Preparatory Committee.⁸⁵ The choice was a matter of sovereign policy and prudential calculation.

Moreover, pro-P.R.C. parties in Hong Kong could field candidates to contest the very elections that the P.R.C. held were illegitimate and vowed would have no post-1997 effect.⁸⁶ Additionally, pro-P.R.C. politicians in the territory argued for retaining some elements of the through train, and cautioned Beijing against precipitous moves to set up a "second stove" — a shadow government well in advance of 1997 — in reaction to the Patten reforms.⁸⁷ Boycotting the elections and establishing pre-1997 institutions to rival or partially displace the colonial

⁸⁵ The N.P.C.'s initial acceptance, and ultimate rejection, of the through train model suggest the range of options acceptable at one time or another to P.R.C. authorities. With the through train derailed, the territory's leading pro-P.R.C. party saw the conceivable recipients of lawmaking authority over Hong Kong on July 1, 1997 as including a provisional legislature, the Chief Executive, the Preparatory Committee (to be established in 1996), or the N.P.C. or its Standing Committee. See Louise do Rosario, *Hollow House*, FAR E. ECON. REV., Nov. 24, 1994, at 27; *Nomination of Provisional Legislature Candidates Formally Starts*, supra note 50, at A2; see also David Chu, *Fact and Fiction in the New Legislature*, S. CHINA MORNING POST, Nov. 14, 1996 (suggesting that post-July 1 elections were impractical, given the legislative vacuum problem, and that pre-July 1 elections for a new legislature raised a mixture of practical and constitutional problems).

⁸⁶ Some sources also pointed to differences within the P.R.C. government about how to react to the Patten reforms and related issues. See Tai Ming Cheung, *Changing Signals*, FAR E. ECON. REV., Mar. 4, 1993, at 13. See also Louise do Rosario, *Board Games*, FAR E. ECON. REV., Sept. 8, 1994, at 19 (noting the pro-China parties' participation in the elections, and pro-China newspaper Wen Wei Po's endorsement of elections).

⁸⁷ See Louise do Rosario, *Stand Up and Be Counted*, FAR E. ECON. REV., Sept. 28, 1995, at 17 (stating that D.A.B. calls for members of the Provisional Legislature to be elected, with members of 1995-elected Legco automatically among the candidates); Bruce Gilley, *Old Game, New Strategy*, FAR E. ECON. REV., May 23, 1996, at 32 (pro-China business leader David Chu's pledge to press China to declare Martin Lee eligible for the Provisional Legislature); Tai Ming Cheung, *Frontal Assault*, FAR E. ECON. REV., Apr. 1, 1993, at 11 (quoting Tsang Yok-sing of the Democratic Alliance for the Betterment of Hong Kong concerning the "second stove" option).

government were doubtless within China's positivist sovereign authority, as such politicians conceived it. But that did not necessarily make such moves obligatory or wise.

In the same vein, some of the specific restrictions on the Court of Final Appeal's jurisdiction and the particular ceiling on its foreign membership were explained primarily as the P.R.C.'s policy choices and not as the necessary implications of Chinese sovereignty over Hong Kong.⁸⁸ Lu Ping's view that the four-to-one ratio could permit zero to four foreign judges certainly implied considerable indeterminacy (and at least feigned flexibility) on a key point. As the P.R.C.'s support for both the 1991 and 1995 C.F.A. bills indicated, there was also a good deal of political flexibility in the P.R.C.'s perspective about when the S.A.R.'s high court properly could be established. The P.R.C.'s raising, and then dropping, the possibility of creating a body superior to the C.F.A., and subordinate to the N.P.C., to review C.F.A. decisions suggests further indeterminacy in the P.R.C.'s notion of an acceptable and permissible structure for S.A.R. judicial institutions.

The kind of indeterminacy that produced such variety had always been present, but not previously so relevant, in the P.R.C. and pro-P.R.C. side's sovereign discretion-protecting, positivist vision.⁸⁹ What was different about the endgame was the character of the issues at stake. The choices that the P.R.C. and its future Hong Kong subordinates faced during this period were ones of policy preference and instrumental calculation. With the focus thus shifted, the values that key Hong Kong communities hold or might be persuaded to hold also began to matter a great deal. How much could or should the P.R.C. accommodate Hong Kong groups' possibly unpalatable views concerning what future laws and institutions should look like, and what an adequate "rule of

⁸⁸ See generally *Text of Zhao Jihua Speech on Signing of Court of Final Appeal Agreement*, *supra* note 65, at A2. Also notable in this regard is China's having pushed for, and then dropped, a provision to establish a "post verdict remedial mechanism" that threatened to undermine the finality of the C.F.A.'s decisions and thus its credibility as the principal organ of a "high degree of judicial autonomy" for Hong Kong.

⁸⁹ Protecting sovereign discretion was also the point of the constraints the positivist perspective imposed on the sovereign — prohibitions on alienating or destroying the sovereign's discretionary authority and requirements that the sovereign act through procedural mechanisms that were as much empowering as they were constraining.

law" should require? How much could the P.R.C. and its allies in the territory hope to change those views and reduce the need for prudential accommodation or, in the event of vastly divergent views, close the gap to a point where accommodation might be possible?

For the British colonial authorities and Hong Kong's "liberal" or "pro-democracy" elements, the endgame has had a similar effect. From the broadly naturalist perspective that they share, the principle that the laws and institutions of the S.A.R. should meet the standards of a just and good order did not dictate precisely what all of those laws and institutions should look like. In other words, it did not generate unique answers to many of the questions at issue in transitional Hong Kong's endgame.

Again, publicly expressed differences within the loosely knit camp illustrate the scope for diversity, or at least claims of diversity, within the vision. For example, the shared notion that Hong Kong's government must be publicly accountable and sufficiently democratic meant different things to different people when it came to specific questions about the territory's transitional legislature. Although substantially bolder than his predecessors, Governor Patten painted a relatively modest vision of what was required. What was necessary was a government that represented the will of the Hong Kong people, "accountable to a broadly based legislature," providing both "sufficient democracy to help secure Hong Kong's way of life" and "laws democratically enacted and rooted in the community."⁹⁰ That goal could be meaningfully advanced by electoral reforms that, by Patten's own account, were far from radical.⁹¹

Legco members Martin Lee and Emily Lau and others among the territory's more ardent democrats, in contrast, insisted that Hong Kong needed an indigenous democratic legislature, preferably one with universal suffrage for all seats.⁹² As Lee saw it, a

⁹⁰ *Interview: Chris Patten*, FAR E. ECON. REV., Oct. 22, 1992, at 22.

⁹¹ *See Question of Honour*, FAR E. ECON. REV., Apr. 1, 1993, at 12 (quoting Patten, "I freely confess that my proposals are not a great step forward towards democracy for Hong Kong. They aren't even a small step.").

⁹² *See Louise do Rosario, Patten's Progress*, FAR E. ECON. REV., July 14, 1994, at 21 (describing Emily Lau's proposal, one that came close to winning a majority in Legco, calling for universal suffrage for all seats in the 1995 Legco elections); Lee, *Tide of Democracy*, *supra* note 57, at 31 (criticizing Patten reforms for making only one-third of Legco seats subject to direct elections).

substantially democratized Legco with a greater role in government was necessary to provide a replacement for the vicarious democratic accountability that the British Parliament had been providing.⁹³ Under the colonial regime, a lack of local legislative democracy was perhaps acceptable. Absent such true democratic oversight after 1997, government accountability and legality were, on this view, at risk.

A similar dynamic characterized the debate over the Court of Final Appeal. The colonial government defended the C.F.A. bills as creating an arrangement that would preserve the rule of law and guarantee adequate judicial independence.⁹⁴ In contrast, leading democratic politicians denounced the arrangement as a betrayal of the same core substantive values, insisting that a viably independent court that protects the rule of law could not be so constrained in its membership and jurisdiction.⁹⁵ Even within the narrower group of "pro-democracy" Hong Kong politicians, there was substantial division over whether the statutory provisions precluding review of "acts of state" posed a serious threat to law-governed and judicially accountable government.⁹⁶

Finally, shared notions that justice demanded accountable and

⁹³ See Tai Ming Cheung, *Advance to the Rear*, FAR E. ECON. REV., Mar. 18, 1993, at 11 (describing the concern of pro-democracy Legco members Martin Lee and Christine Loh that negotiations for compromise between Patten proposals and Chinese demands could be a "sell-out" of democracy for Hong Kong); Lee, *supra* note 23, at 11 (making the argument about Parliament).

⁹⁴ On British enthusiasm for the 1991 package that received unenthusiastic responses from the Hong Kong bar, see Stacy Mosher, *Local Justice*, FAR E. ECON. REV., Oct. 10, 1991, at 12. With regard to the 1995 bill, it is, of course, possible that the argument in favor of the bill was disingenuous, a face-saving effort by a colonial government that knew it had failed. If so, it is still telling that the British authorities made the argument. It suggests that they thought it at least sounded plausible. And it stands in contrast to more uncompromising stances they took toward China regarding issues on which the colonial authorities' position was equally unlikely to prevail (including several controversies over the legislature).

⁹⁵ See Martin Lee, *The Courtship of Mr. Hoare*, FAR E. ECON. REV., July 27, 1995, at 4 (Democratic Party leader and Legco member's charging that the colonial government-supported C.F.A. bill achieved a court that China would accept "at the cost of the rule of law itself after 1997"); Louise do Rosario, *Down But Not Out*, FAR E. ECON. REV., July 27, 1995, at 27 (describing Democratic Party and Legco member Cheung Man-kwong's denunciation of the C.F.A. bill as Patten's "burying the common-law system").

⁹⁶ See Louise do Rosario, *Future Imperfect*, FAR E. ECON. REV., Aug. 10, 1995, at 27 (citing the views of Martin Lee and legal academic Raymond Wacks).

law-governed government also seemed to produce no unanimity with respect to the selection of the S.A.R.'s first Chief Executive. Many of Hong Kong's most prominent and partisan politicians attacked the P.R.C.'s manipulation and control of the selection process, impugning the claim to authority of an official chosen by methods that in practice departed so far from minimally democratic bases. As Tung's statements on rolling back legal reforms amply demonstrated to such critics, Tung was likely to be a puppet of the Beijing authorities who had controlled the selection process (and who had engineered a bail-out of Tung's troubled shipping firm in the 1980s).⁹⁷ The colonial government, in contrast, saw no such fundamental principles at stake. Having initially refused executive branch contact with the P.R.C.'s *ad hoc* Preliminary Working Committee and having rejected out of hand cooperation with the Provisional Legislature, the Governor and his administration moved to cooperate closely with a Chief Executive-designate whose appointment was no more beyond Hong Kong's control than the selection of colonial governors had been, and whose successors, the Basic Law promised, were to be chosen by properly democratic methods.⁹⁸ As the British authorities saw it, working with the incoming executive to assure a well-prepared new administration and a smooth transition was precisely the sort of collaboration that the Joint Declaration contemplated and that norms of responsible government demanded.

Such room for differing interpretations of what, precisely, the principled norms of sovereign obligation required in practice was newly salient, but not new, in the broadly naturalist and liberal-democratic vision embraced by the diverse band of the P.R.C.'s antagonists in the struggle to shape Hong Kong's future order. In the context of the endgame, the key questions had become the

⁹⁷ See, e.g., C.K. Lau, *A Question of Trust*, S. CHINA MORNING POST, Dec. 12, 1996, at 21; Emily Lau, *Tung Must Be Able to Act with Autonomy*, S. CHINA MORNING POST, Jan. 6, 1997, at 18; Peter Humphrey, *HK's Next Leader Called China Yes-Man*, Reuters, BC Cycle, Dec. 10, 1996, available in LEXIS, Asiapc Library, Allasi File (quoting Legco member Martin Lee); Tan Ee Lyn, *HK Democrat Emily Lau Dragged Away, 29 Arrested*, Reuters, Dec. 11, 1996, available in LEXIS, Asiapc Library, Allasi File.

⁹⁸ See Bruce Gilley, *Facing Up to Reality*, FAR E. ECON. REV., May 9, 1996, at 16; Chris Yeung, *Tung Fails to Win over Governor*, S. CHINA MORNING POST, Dec. 24, 1996, at 1; *Policy Address of Governor Patten*, *supra* note 56, at 4.

intramurally debatable ones about what presumably fixed and true general principles required in the particular, complex, and changing circumstances of Hong Kong on the eve of reversion. And the values major groups in Hong Kong already embraced or might be convinced to adopt were an important part of those circumstances. Most obviously, lawmaking and law-interpreting institutions that represented the will and values of Hong Kong's residents and that were accountable to the territory's citizenry might look rather different if Hong Kongers embraced, for example, values supportive of the Democratic Party's agenda rather than values in step with the colonial government's positions, much less those espoused by Hong Kong's pro-P.R.C. parties.

4.2. Hong Kong Politics

In addition to the emergence of the inherent indeterminacy of broad visions of domestic law and sovereignty, more immediately practical features of the endgame also pressed participants in the political wrangling over Hong Kong to pay more attention to the values Hong Kong citizens hold or might hold. For reasons at most loosely related to differences between the principal political participants' broad conceptions of law and sovereign authority, the issues and conflicts that dominated Hong Kong's last years as a colony often involved the territory's residents more directly than they had been in earlier phases.

The Joint Declaration had dealt with abstract questions of sovereignty and sketchy representations of a legal and constitutional order that would not be fully implemented until nearly fifteen years later. Moreover, Hong Kong had been excluded from negotiations that, the P.R.C. insisted, could be conducted only between the two sovereigns with interests in the territory. The Basic Law, to be sure, addressed issues that were of increasingly immediate concern in the territory, and did so through a process that involved Hong Kongers. After all, the Basic Law established a framework for Hong Kong's post-reversion domestic laws and government institutions, and did so in part through a Basic Law Drafting Committee and a Basic Law Consultative Committee that included Hong Kong citizens. Nonetheless, the Basic Law remained a relatively skeletal document that provided a constitution for a political entity that would not come into being for almost a decade. And, formally (and certainly in

practice), it was a P.R.C. document, its provisions securely beyond Hong Kong's power to change and, in some respects, even to interpret.

During the 1990s, however, the key controversies concerned the specific characteristics of the laws and institutions under which Hong Kongers would have to live and work in the near term. The process of addressing those issues and conflicts involved considerable numbers of Hong Kong residents as constituents for an increasingly democratic Legco membership that was given an opportunity to weigh in on colonial legislation to amend relevant laws or structure key institutions, as members of the ever larger and more influential advisory, preparatory and nominating bodies that the P.R.C. established to help manage the transition, or as participants in the mass street demonstrations that became a staple of Hong Kong politics after the Chinese authorities crushed the Democracy Movement on the mainland in 1989. In this context, it became perilous, and perhaps impossible, to slight the attitudes that people in Hong Kong held, or might come to hold, toward "rule of law" questions in general and in relation to the laws and institutions that were the focus of the period's politics.

In addition, two major political events made such actual or potential values in Hong Kong still more pressing concerns for the political elites, of whatever stripe, who were working to shape the details of the S.A.R.'s key laws and core government institutions. First, in 1989, the pro-democracy protests at Tiananmen Square electrified Hong Kong, prompting mass rallies in the territory to support the movement and supportive comments from some of the territory's leading tycoons.⁹⁹ The violent suppression of the protests in China triggered shock, additional mass demonstrations and growing public pressure in Hong Kong to take steps, through local legislation and in the on-going discussions with the P.R.C. over the territory's future laws and institutions, to reduce the risk that Hong Kong would face an equally repressive, and seemingly lawless, future under Chinese rule.

These events brought sustained higher levels of political engagement and mobilization in the territory. The immediate consequence was broader and more ardent public support for the liberal, legalist and democratizing agenda that some of the territory's emergent political leaders and, to a lesser degree, the

⁹⁹ See, e.g., Lau, *Voice of the People*, *supra* note 41, at 18.

colonial authorities were advocating. Indirectly, the disorder that mass protests seemed to portend, and the adverse economic consequences that a likely harsh P.R.C. reaction to such activities surely would threaten, prompted reactions in some more conservative or previously apolitical circles. The concern manifested in those quarters suggested potential support for a very different approach to the legal and institutional issues of the endgame, one more in keeping with the P.R.C.'s notion of a tolerable legal and institutional order.

Second, in 1992, the installation of Christopher Patten as Hong Kong's last colonial governor brought a greatly increased commitment by the Hong Kong government to expand the role of the territory's residents in the territory's government. Patten's reforms accelerated a previously creeping process of democratizing the electoral process for Legco and other bodies, and he accorded the increasingly democratic Legco a greater voice in the vital legal and policy debates of the era. Drawing on experience in electoral politics that his predecessors had lacked, Patten also introduced a bit of British-style campaign politics to his own dealings with the citizenry, seeking to measure their mood and rally their support in a way, and to an extent, that no prior colonial governor had.¹⁰⁰

As with Tiananmen, the direct effect here also was to bring forth constituencies supportive of the liberal or pro-democracy agenda and its underlying vision of sovereignty and the rule of law. The democratic parties and pro-democracy independents were the big winners in the elections held under the expanded franchise and became the most prominent voices in Legco. And Patten's message, sometimes rousing and sometimes temperate, was consistently rooted in a liberal and naturalist conception of how the issues of the endgame should be addressed. Here too, however, the indirect effect was also to make more politically relevant Hong Kong groups that were committed, or at least open, to very different perspectives and values. Pro-P.R.C. and conservative business interests formed parties, both to contest the elections and more generally to increase their effectiveness in the newly partisan and mass-oriented politics that the reforms had

¹⁰⁰ For a brief description of Patten's political background, see James Bartholomew & Stacy Mosher, *Last Viceroy*, FAR E. ECON. REV., May 7, 1992, at 15.

introduced. On both sides, it had become necessary to worry about how proposed answers to the legal and institutional questions dominating the era played, or might be made to play, with key elements in an expanded world of Hong Kong politics.

4.3. *Battling over "the People" and the Business Community: A Synopsis of Strategies*

Britain, the colonial government, Hong Kong's liberal and democratic political leaders, the P.R.C., and its agents and allies in the territory have responded to the broadening scope of Hong Kong politics, and its shift in focus to concrete questions that immediately concern Hong Kongers and that do not have determinate answers under the visions of law and sovereignty long embraced by the two major political camps. On both sides, this response has included complex and shifting strategies to find and to build support — or at least acquiescence — among key segments of Hong Kong society for general positions on rule-of-law values and specific solutions to the legal and institutional issues of the era. While these strategies have targeted a number of groups (including, for example, Hong Kong's civil servants), the primary addressees have been "the people of Hong Kong" and the business community.

Although clearly explicable in terms of recent changes in Hong Kong politics and the pressures of the reversion date's approach, the focus on "the people" in the battle over the territory's political and legal future is ironic and slightly odd. Long excluded from Hong Kong politics and accorded an inferior status under its laws, they have finally become a central concern, but only in the context of a political conflict that ignores their considerable diversity. In addressing "the people" (implicitly limited to the middle and lower economic classes of the overwhelmingly ethnic Chinese population), both sides in the political struggle have ignored vast differences in wealth, education, rootedness in Hong Kong, and even ideological orientation among their target group. They have addressed an undifferentiated "people of Hong Kong" with strategies that mix appeals to principle, inclination, and interest.

The "liberal" or "democratic" argument to, and about, "the people" has claimed that the interests and preferences of the territory's ordinary citizens demand the preservation of the values embodied in Hong Kong's late colonial rule-of-law system,

including its institutions of government accountability. According to the more sweeping version of this argument pressed by some pro-democracy politicians, the people also require the liberalizing and democratizing reforms of recent years, and perhaps more. Asserting that the people strongly embrace such norms and views, the colonial authorities and the territory's most popular politicians have made descriptive claims about mass public attitudes. At the same time, they have also sought to persuade a "people" whom they at times admitted was not yet ardently enough committed to the liberal and democratic agenda, especially in its more radically reformist versions.

Such claims about popular normative orientations, and such efforts to cultivate them, have coexisted with more direct appeals to "the people's" immediate and material interests. Rolling back the Bill of Rights and civil liberties legislation and dismantling the elected legislature would not only fly in the face of popular preference; it would also harm the territory's stability and prosperity, either by unravelling the rule of law upon which Hong Kong's success depended, or by so angering "the people" (and foreign investors as well) that they would forcefully reject such moves, with disastrous consequences for stability and prosperity. Many of Hong Kong's liberal politicians, but not the colonial government, have argued to the people that similar risks flow from the Court of Final Appeal deal and the undemocratic selection of the Chief Executive.

The P.R.C. and pro-P.R.C. camp's approach to "the Hong Kong people" has included a similarly mixed focus on values and interests, but with clearly different content. Accepting that the rule of law is subjectively and objectively important to the territory's citizenry, the P.R.C. and its Hong Kong supporters have argued that what the people need and want is a rule of law that does not so slavishly follow the colonial inheritance or embrace radical and potentially dangerous reforms. Seeking to tap the pride that ordinary Hong Kongers feel in the territory's remarkable accomplishments and the considerable nationalist sentiments that underlie popular ambivalence about colonial rule, such arguments have asserted that the Hong Kong people do, should, or must recognize that their own special (and distinctly Chinese) qualities and values are largely responsible for Hong Kong's success, and that a less fully liberal or Western-style rule of law is what they want and need.

At the same time, the P.R.C. and its Hong Kong allies have argued to the people that accepting the Chinese position on the territory's future rule-of-law regime and on specific legal and institutional issues is a matter of pragmatism as well as principle or preexisting preference. That has been one of the points of the arguments asserting that the British-style rule-of-law has contributed relatively little to Hong Kong's remarkable stability and prosperity, and that Hong Kong's past successes have been achieved despite the absence of the liberal and democratic structures that the colonial authorities and their sometime allies in Legco were trying to instill on the eve of reversion. The P.R.C. and pro-P.R.C. side has cautioned that failure to roll back the government-weakening reforms to civil liberties laws, exclude "subversives" from the initial legislature, or restrict judicial power to overturn government decisions would produce social and political instability in Hong Kong that would be harmful to the preferences and interests of the people. Moreover, Chinese and pro-P.R.C. sources have warned that accepting the line peddled by the territory's "pro-democracy" politicians or its colonial governor would surely bring conflict and problems in S.A.R.-mainland relations. On this view, it simply would not be good for the people of Hong Kong to have a legislature full of people who could not communicate effectively with the P.R.C., a Chief Executive whose authority was under incessant attack locally, and a set of laws conducive to activities inimical to Chinese sovereignty.

That the principal parties to the ongoing battle over the territory's future laws and institutions also would focus on the business community is not surprising, given that group's obvious importance in maintaining Hong Kong's prosperity, and the attention that the colonial government and the P.R.C. leadership have long lavished on business elites and their interests when making policies concerning the territory. Yet, here too, the endgame has brought a more strikingly political battle in which the target group has been addressed as a relatively uniform whole, with little regard for differences between venerable trading houses and fast-rising entrepreneurs, ethnic Chinese tycoons and foreign-based multinational corporations, enterprises dependent on Hong Kong revenues and conglomerates with extensive investments in the mainland. Both sides have addressed and sought to convince "business" with strategies paralleling those they have used with

respect to "the people."

Prominent Hong Kong politicians and senior colonial government officials have asserted that members of the business community do, or should, accept a broadly liberal and democratic version of rule-of-law values and concomitant positions on the legal and institutional questions of the day. Business already knows, or must soon recognize, that it requires strong legal protection of civil liberties, a publicly (and, as some Hong Kong politicians see it, fully democratically) accountable legislature (and executive) to enact and oversee laws, and an independent judiciary with broad jurisdiction to review burdensome government action and to enforce contracts even against well-connected or state-owned Chinese firms. On the liberal or pro-democracy view, these things are goods that business owes it to Hong Kong to support, that are essential to the lifestyle many business elites want, and that provide necessary support for Hong Kong's thriving economy.

Such arguments, of course, shade into straight-forward appeals to business leaders' presumed self-interest. The more "pragmatic" line of argument also has included dire warnings about the economic consequences of acquiescing in the legal and institutional regime (and its underlying "thin" theory of legality and sovereignty) that the P.R.C. prefers.

In response, the P.R.C. and its Hong Kong allies have argued that Hong Kong's business elites do, or at least should, reject much of the liberal agenda as politically destabilizing and economically enervating, and demand nothing from S.A.R. laws and institutions beyond what the P.R.C. has assured them it will provide. Business should and would welcome, the pro-P.R.C. line of argument has continued, a legislature not dominated by radical democrats, a chief executive who shares their concerns and values, and civil liberties and economic laws conducive to social order and Hong Kong's established, and often informal, ways of doing business.

Further, sources on the P.R.C. side have made it clear that business support for the positions urged by the territory's liberal politicians, and sometimes by its colonial rulers, would make it more likely that major questions concerning the reception of prior laws, the legislature, the judiciary, and the executive would remain unsettled up to the reversion date and perhaps beyond. Such "uncertainty" and the prospects of a judicial or legislative

“vacuum” are, the P.R.C. and its supporters have repeatedly reminded their business audience, contrary to the preferences and interests of the business community. Appealing still more crassly to the self-interest of business elites, the P.R.C. has sometimes signalled that those in the business community who backed Patten’s or the Democrats’ agenda faced possible economic retribution.¹⁰¹

This brief sketch of the strategies for claiming and cultivating support among key groups in Hong Kong adds a final piece to the mosaic of political struggles over legal and institutional questions in transitional Hong Kong’s endgame. Naked, cynical, even thuggish appeals to the self-interest of “the people” or “business” coexist with more principled arguments — some asserting or urging preferred rule-of-law values and compatible legal and institutional commitments among the target social groups, and others insisting that proposed solutions to the controversies of the period are, or are not, legitimate in terms of fundamental principles of sovereignty and domestic law. As we have seen, the last of these types of argument has also characterized a conflict among political players that has not explicitly focused on the people or the business community. As this overlapping of “principled” arguments suggests, battles over the concrete implications of basic principles of law and sovereignty and battles for the allegiance of key Hong Kong constituencies are bound together in the broader picture of the conflict over Hong Kong’s future legal and institutional order. The boundaries between the “purely political-legal” struggle and the battle for “social support” are, of course, illusory. Business elites and ordinary citizens have been among the known, and often intended, audiences of ideological debates nominally not addressed to them. At the same time, the principal political players have been addressing one another as much as any popular or business audience when they have argued about socially immanent rule-of-law values and the interests and preferences of social groups.

This Article has explored the first of these two battles and the

¹⁰¹ For a more extensive discussion of the conflict over the business community, see Jacques deLisle & Kevin P. Lane, *Cooking the Rice Without Cooking the Goose: The Rule of Law, the Battle Over Business, and the Quest for Prosperity in Hong Kong After 1997*, in HONG KONG UNDER CHINESE RULE: THE ECONOMIC AND POLITICAL IMPLICATIONS OF REVERSION (Warren I. Cohen & Li Zhao eds., 1997).

broad political and ideological context of both. In doing so, it has explained how the persistence, even the sharpening, of an ideological clash of visions can be consistent with two developments among adherents to the polarized visions of law and sovereignty: first, a growing flexibility and intramural disagreement over specific laws and concrete governmental institutions, and, second, an increasing attention to socially held rule-of-law values and opinions on the issues of the day.

The account of Hong Kong's endgame, however, remains incomplete. It does not yet fully address the significance of the particular strategies the main parties to the political struggles used in addressing and pursuing key social groups. Integrating that part of the story fully into the analysis must await a more detailed inquiry into the political battles over "the Hong Kong people" and "the business community," a project we take up in *Hong Kong's Endgame and the Rule of Law (II)*. Still, at this point, enough of the picture is visible to suggest how the notion of a pre-1997 "endgame" can provide an analytic link between that struggle over social groups and the matters examined in more depth in this Article.

5. STRATEGIES FOR HONG KONG'S "ENDGAME"

Three concepts of an "endgame" suggest coherent ways of understanding this seemingly arbitrary or paradoxical combination of approaches to the legal and institutional issues that have dominated the politics of Hong Kong's last pre-reversion years.

5.1. "Colloquial" Endgames

This period might be thought of as an endgame in the colloquial sense, as typically used in journalistic accounts of legislative or broader political negotiations over controversial issues. The players realize that they face, in effect, a deadline before which they must complete all deals. Where they perceive feasible deals that are superior to the alternative of leaving matters unresolved, the players will scramble to mobilize forces conducive to the agreements they prefer and will try to craft bargaining strategies that avoid both too-ready compromises (leading to less favorable deals than might have been achieved) and excessive "holding-out" (leading to a failure to reach deals that were worth having). The "colloquial endgame" analysis assumes, at least implicitly, a mechanism for deterring parties from renegeing on

such eleventh-hour deals, with costs to reputation, or judicial or political enforcement being among the more obvious and common examples.

For Hong Kong, July 1, 1997 is, of course, the deadline for resolution of such issues as rights-protecting legislation, the legislature, the highest court, and the selection of the highest executive officer for the S.A.R. Unlike the fact of Hong Kong's reversion or the existence and basic structure of the S.A.R. (which had been hashed out in the 1980s), none of these matters was firmly settled well in advance of 1997, leaving them all potentially subject to the dynamics of an endgame in the colloquial sense.

Other essential aspects of an endgame, in this sense, were present as well. The key political participants who might bargain with respect to these issues quite plausibly perceived possible outcomes that were superior to a "no deal" option. For the colonial authorities and the territory's liberal and democratic politicians, a number of conceivable resolutions doubtless seemed better than letting the P.R.C. and the S.A.R. government address them entirely on their own after 1997. Indeed, the P.R.C. and its allies frequently used just that argument, raising the specter of uncertainty and potentially unpalatable results that would attend a failure to reach agreement, to press their negotiating partners and Hong Kong audiences to accept otherwise unappealing proposals.

For the P.R.C. and its allies too, the "no deal" option was surely less appealing than some of the very favorable arrangements in which the P.R.C. could reasonably expect the colonial authorities and many Hong politicians to acquiesce. And, absent a deal, a pre-announced, unilaterally imposed arrangement of the sort that characterized the Provisional Legislature and Bill of Rights issues was a plausible second-best solution, especially if some degree of support in the territory could be obtained. As many in the P.R.C. and pro-P.R.C. camp appeared to realize, a failure to reach an accord or to win acceptance of reasonably clear arrangements before reversion, with attendant prospects of unspecified unilateral resolution after July 1, 1997, could undermine the confidence in Hong Kong's future that Beijing wanted to preserve.

As a "colloquial" endgame also requires, renegeing on last-minute promises after Hong Kong's reversion could plausibly trigger sanctions that the same underlying behavior would not

elicit in the absence of such undertakings. These ranged from the highly juridical if rather implausible (appeals to the International Court of Justice to enforce relevant provisions of the Joint Declaration or to Hong Kong courts or authorized P.R.C. bodies to enforce and apply relevant sections of the Basic Law or other laws) to the conventionally political (reputational costs to the P.R.C. in Hong Kong and globally, and the prospect of political unrest in Hong Kong, on one side, and the costs to Hong Kong liberals' claims to the moral and legal high-ground, and the prospect of a political crackdown in Hong Kong, on the other).

Against this background, the battle over "the people" and "the business community" looks like an endgame strategy in the colloquial sense. In appealing to and pressuring those groups, the participants in a highly political process have been scrambling to mobilize a "blitz" of whatever pressure they can bring to bear to make sure that the deals that do get done at the last minute track as closely as possible the participants' ideological preferences. That both sides in the political struggle to shape Hong Kong's future laws and institutions would intensify efforts and diversify their arguments in trying to build and deploy such socially-based political pressure during the 1990s is, then, hardly remarkable. That they would turn to such strategies (and especially to "threats" and "bribes" alongside appeals to principle) makes sense in the "now or never" atmosphere of an endgame, in the colloquial sense.

The splits and shifts within the two blocks of political players can fit this picture as well. The divisions that emerged between Hong Kong's colonial authorities and the territory's pro-democracy politicians on, for example, the Court of Final Appeal bill and the Chief Executive selection process, and the variety of "pro-P.R.C." approaches to handling Bill of Rights-related questions and the legislative through train, among other issues, reflect precisely the sort of close tactical choices that the endgame poses. Where does an unappealing proposed resolution cross the line and become worse than a "no-deal" option? At what point does pressing for a more appealing deal impose a risk of foregoing a resolution worth having that is greater than its likely benefits in getting the other side to compromise toward the prospective "hold-out's" preferred solution?

In a world of imperfect information, even those who share the same ideological perspective or concrete goals may differ on such

questions. Indeed, such differences in tactical judgment seem to echo loudly in the increasingly testy exchanges between the colonial government and the territory's most ardent democrats during the middle 1990s. Avowals of support for the same ends of government accountability and the rule of law coexisted with charges from Hong Kong's democratic politicians that the British authorities were duplicitous and had betrayed those goals, and responses from colonial government officials that the democrats were being unrealistic, provocative, and risked scuttling the best deals that one could reasonably hope to achieve in pursuit of their shared values.

The same dynamic seems to be reflected, at least obliquely, in the P.R.C. side's shifts between more and less accommodating stances toward reforms of civil liberties laws, electoral laws and other matters, and in the sometimes-public entreaties from pro-P.R.C. Hong Kong sources (and perhaps even the Hong Kong and Macau Affairs Office) to central leaders to take a softer line on the legal and institutional issues of the era. At different times and to different members of this less-than-monolithic block, endorsing flawed but popular expansions of the franchise and acquiescing in some questionable changes to public order legislation could seem to offer a relatively costless path to avoiding a rocky transition and to obtaining concessions on other fronts, or it could seem to declare negotiable issues of sovereignty and control on which the P.R.C. need not, or could not, yield.

5.2. "Technical" Endgames

The final years of the political struggle over Hong Kong's post-reversion legal and institutional order also could be construed as an endgame in the more technical sense, as the term is used in the rational choice and game theory literature. That is, the players understand that they are in the final round of their reiterative dealings and are no longer deterred from "defecting" or "cheating" by the prospect that such behavior will make their other pledges to perform less credible to other players, and, in turn, make it more difficult (that is, more costly) for the defecting party to make reliable, desirable deals later. In such a context, the impediments to making any bargain escalate and the credibility of any bargains nominally struck plummets.

For this concept to apply, the final iteration of bargaining over Hong Kong's post-reversion future has to have been a long one,

with the shadow of July 1, 1997 extending back over much of the 1990s. Such a reading of the period is not farfetched.¹⁰² As we have seen, both sides' discussions on many of the issues of the era, most notably political and electoral reform and the establishment of the Court of Final Appeal, assumed that the parties were already in a final round of negotiations about the territory's future, with little or no talk of trading off compromises on one legal or institutional issue for gains on another, and few remarks about the need to assure continuing cooperation among the parties to ensure a smooth transition. Moreover, the major controversies of the period unfolded simultaneously, with each having surfaced by the early 1990s and all still a subject of conflict and a source of uncertainty during the waning months of colonial rule. Such patterns were a marked departure from Sino-British negotiations during the 1980s that had operated under the understanding that both sides should, and would need to, cooperate in the run-up to 1997 and that the Joint Declaration, Basic Law and lesser, subconstitutional matters would be addressed sequentially.

At least if we focus narrowly on the immediate context of Hong Kong, the notion that parties' incentives not to defect were low after the beginning of the 1990s is quite plausible. Already handing over much *de facto* authority to the territory's future rulers, and within a few years of the formal end of colonial rule, the United Kingdom arguably was already well on its way to not even being present, much less "deterable." Certain to be thrown out of office, and expecting possibly crippling restrictions on their political activities after 1997, liberal and democratic politicians in Hong Kong also arguably faced few incentives to cooperate or compromise and, accordingly, could make few credible promises even if the P.R.C. proved willing to negotiate.

Certainly, many Chinese and pro-P.R.C. statements about the colonial authorities and liberal politicians during the 1990s were consistent with an endgame assumption about the poor possibilities of bargaining. A colonial government painted as bent on unilateral last-minute moves to weaken governmental authority, create a hotbed for sedition, and damage fiscal health — all in

¹⁰² The factual issues about Hong Kong noted in the text aside, many elaborations on the theory of reiterative games note that the prospect of a true endgame can, in effect, "infect" earlier iterations of bargaining, thus spreading the pathologies of the endgame back to preceding rounds.

violation of prior understandings and agreements — was not the fit or credible bargaining partner with which the P.R.C. had earlier seen fit to negotiate elements of a smooth transition. And the P.R.C.'s branding some of Legco's leading democrats as "subversives" suggested that anything cooperative they said was no longer to be believed, even though some of them had been included in earlier rounds of bargaining, through appointment to the Basic Law Drafting Committee or membership in a legislature expected to ride the through train.¹⁰³

From the "liberal" or "pro-democracy" side's perspective, the fact that Hong Kong soon would lose the "protection" of its colonial status which (for all its flaws) had required the P.R.C. to deal with Hong Kong at arm's length and through another sovereign state, made any promises the P.R.C. might make not credible. On this view, with Britain gone, local liberals silenced, and the world likely not paying much attention, the P.R.C. would be free after the endgame to rewrite any arrangements it disliked, much as it had in two events that coincided with the beginning of Hong Kong's endgame: the betrayal of domestic P.R.C. legality in the suppression of the democracy movement at Tiananmen, and the departures from the P.R.C.'s international legal promises of the Joint Declaration that were effected through the Basic Law.

In such a context, the protracted debate and often-futile negotiations over the legal and institutional issues of the era are intelligible in terms of a simple endgame in the technical sense. Most simply, it is certainly plausible to conclude that no real deal was reached, and few if any promises contrary to inclination were made. The rules for the 1995 elections and the enactment of the Bill of Rights and other legislative changes effective before 1997 were, at base, the unilateral acts of the colonial authorities. The

¹⁰³ China's position on the "through train" was, of course, that the Legco elected in 1995 was unacceptable. But some of the members of that body, including Martin Lee, had also served on the 1991-selected Legco, which had clearly been selected in a manner compatible with the degree of democratization permitted under the through train model. And they, or others of their ilk, certainly could have been expected to obtain seats on a 1995 Legco selected in conformity with China's reading of the relevant legal framework. Indeed, several of the Legco members most troubling to the P.R.C. represented some of the twenty geographical constituencies to which the P.R.C. and its allies made no objection in their attack on the Patten reforms, and the universal suffrage election methods for those seats were compatible with the legal conditions for the "through train" that the P.R.C. had prescribed.

questions of the Provisional Legislature, the Chief Executive, and the fate of the Bill of Rights were settled just as unilaterally by the P.R.C. and on the P.R.C.'s terms, subject only to whatever constraints prudential considerations suggested. An essentially "imposed" Court deal to which the British acquiesced was little different. And many participants and observers consider the limited promises that the P.R.C. did make in each of these areas to be of less-than-certain efficacy after July 1, 1997.

The struggles over the people and the business community similarly make sense as strategies for an endgame in the technical sense. In seeking to energize or persuade the social groups who hold the keys to Hong Kong's continued success, the principal participants in the political process have been trying to create substitutes for the agreements and promises that are impossible to reach or impossible to take seriously. That is, they have been trying to assure that Hong Kong's post-reversion political landscape will constrain, or permit, the territory's future rulers to behave in ways that track what their preferred political "deal" would have required. For both the "pro-P.R.C." side and the "liberal" or "democratic" side, finding or fabricating support in important Hong Kong communities for preferred resolutions to the specific legal and institutional questions of the era — and for compatible orientations toward the rule of law more generally — has become an imperative to be pursued by whatever means available, and often quite apart from any process of negotiation between the key participants in the more narrow political process.

The diversity and instability of social-group-targeting strategies may fit the picture of a technical endgame as well. Ideological purity and an intransigent insistence on preferred outcomes may be, at worst, costless since they do not put at risk any worthwhile deals that could be made and relied upon. Moreover, adopting such a stance might seem more promising as a mechanism for creating the post-endgame social and political pressure on which success in achieving preferred outcomes depends in the context of a "technical" endgame. That is, presenting a simple and uncompromising version of one's own position, or that of one's opponents, could be the most effective means to inspire, or frighten, the relevant audience about what a future approximating a "liberal or democratic" agenda or a "pro-P.R.C." alternative might bring.

On the other hand, a more accommodating and moderate-

sounding perspective might seem less likely to alienate or to scare off key communities who have tended to see their interests being served reasonably well by continuity and stability. Such a tactic at least would seem worth trying, for it could always be abandoned simply by failing to honor promises that in retrospect appeared unwise. Alternatively, a more flexible and compromising approach might make it possible to reach nominal resolutions that would be worthwhile despite the problems of defection inherent in an endgame. Even if neither side can do much to make a bargain relatively invulnerable to renegeing immediately after July 1, 1997, the mere fact of a deal or a promise can create popular pressure and elite expectations in Hong Kong that its terms be honored or accepted. And to the extent that an agreement can be partially implemented before the reversion, it can acquire a degree of tangible, institutional momentum that is not lightly reversed despite the absence of an ongoing relationship between the parties and the lack of the conventional non-endgame incentives not to defect from the deal or promise *per se*.

Like the tactical questions of the "colloquial endgame," these too are matters on which judgment might vary over time and among adherents to the same normative perspective and supporters of the same general resolution of the legal and institutional issues of the endgame. It is plausible to see reflections of the former view in the approaches that the territory's most strident "liberal" or "pro-democracy" politicians took, for example, in denouncing the Court of Final Appeal accords as a betrayal of legality and democracy or in calling for democratization far more rapid than the Patten plan contemplated. The same sort of assessment could explain some of the more "hard-line" positions in the pro-P.R.C. side's perspective, such as out-of-hand dismissals of civil liberties legislation as unacceptable and dangerous, and sweeping assertions of the P.R.C. and S.A.R. governments' wide discretion in establishing laws and institutions for post-1997 Hong Kong. The latter view, in contrast, seems more in step with the methods adopted by the colonial authorities in accepting the court deals (especially the 1991 arrangement which might have permitted the C.F.A. to be set up in 1993), and the Chief Executive selection process. It may also explain the decision to press only for a modest degree of democratization for the 1995 elections, under a set of rules that could be defended as compatible with the P.R.C.-established conditions for a through train and that, once in

place, could be expected to command broad popular support. The same perspective may also help to make sense of the more moderate aspects of the arguments pursued by the P.R.C. and its allies in the territory, including those that pledged substantial continuity in some civil liberties-protecting laws and a system permitting a considerable degree of electoral democracy. Sometimes quite explicitly, proponents of such positions presented them as prudent, perhaps shrewdly preemptive, tactics for dealing with Hong Kong preferences that would surely persist beyond reversion and have to be addressed then.

5.3. *The End of the Game, Not the End of the Games*

Finally, pre-reversion Hong Kong's endgame can be analyzed as the end of "a game," but not the end of a series of "games" for key participants in the political struggle to shape the territory's laws and institutions. That is, when the "game" — the particular set of related, reiterative interactions among a stable set of players — comes to an end, the players do not disappear from one another's worlds. They may continue to interact but in a new "game" where they may play different roles, under different rules, and with different assets. In such a context, the players approaching the end of the initial game may face extremely complex choices, with, for example, the low costs of "defecting" being much less certain than in a true endgame in the technical sense, and the demarcation between "pre-deadline" and "post-deadline" deals being much less sharp than in a true endgame in the colloquial sense.

Although not as analytically crisp, this conception has empirical appeal. In Hong Kong, most of the major participants are likely to remain in the picture beyond 1997, but on very different terms. The P.R.C. will become a more dominant force in Hong Kong once Britain has withdrawn, the colonial government has been abolished, and the current Legco has been dissolved. Although, at last, the territory's effective sovereign, the P.R.C. is not likely to be the only player in what promises to be an ongoing process of shaping S.A.R. laws and institutions. A local government and pro-P.R.C. organizations are not likely suddenly to become completely indistinguishable from the central Chinese authorities in a Chinese state that seems ever more fragmented. Also, it is by no means certain that the leading Democrats and like-minded independents will be permanently

silenced or marginalized. In addition, some people with broadly liberal and legalist sympathies hold some of the most important posts in the through-train-riding executive branch. Even the U.K. leadership has insisted that its obligations to Hong Kong extend beyond 1997 and that it will continue to exert whatever international pressure it can to enforce the agreements and principles that it believes apply.

From this perspective, the political battles over "business" and "the people" are in part about pressuring participants in the political process to make favorable deals before the July 1, 1997 deadline, and in part about building constituencies to press for desired solutions in the absence of any effective pre-reversion deal. But they are also about cultivating and accumulating assets for the next "game." Much of what both sides have done in the political struggle over social groups seems to make sense on these terms. Such an account, for example, suggests that it was coherent and rational for some of Hong Kong's most prominent democrats to continue to campaign for popular and business support for their positions on rule-of-law issues despite a belief that no meaningful deal with the P.R.C. was possible in advance of the 1997 deadline, and despite pessimism about the likelihood of business leaders or the people pressing the liberal agenda immediately after reversion. Conversely, the pursuit of the same sort of asset-cultivation strategy could provide one explanation of the P.R.C.'s sometimes provocative and sometimes embarrassingly unsuccessful attempts to foster pro-P.R.C. views and build a cadre of pro-P.R.C. organs and loyalists, both among the masses and among the territory's business elites, even though such groups seemed relatively ineffectual before the handback, and arguably superfluous afterwards.

A notion of an ending game, but with continuing games, also provides another way of making sense of the major political participants' interactions on the eve of reversion. For example, if reputational concerns matter more than in a pure endgame in the technical sense and making a deal matters less than in a pure endgame in the colloquial sense, then the P.R.C. and its allies were understandably willing to press for resolutions of major legal and institutional issues before July 1, but remained reluctant to strike deals or make promises that were relatively unpalatable. Not wanting to bear the costs to credibility and confidence that a failure to perform would bring and reasonably confident that

adequate and affordable resolutions might still be crafted after reversion, the P.R.C. was understandably willing to be fairly, but not completely, intransigent. Similarly, Hong Kong's pro-democracy leaders and activists, on this view, had perhaps equally comprehensible reasons to seek genuine solutions on key issues, but not to compromise very much: analogous reputational concerns (absent from the simplest version of the true technical endgame) dissuaded them from imperiling, through compromise or defection, the claim to the moral high ground that was perhaps their principal reversion-surviving asset; so too did a plausible belief (less tenable in the true colloquial endgame) that they might be able, despite their initially weakened condition, ultimately to negotiate post-reversion resolutions of key legal and institutional issues that were preferable to what the P.R.C. was offering at the endgame. Perhaps tellingly, this notion of an endgame within an on-going and changing series of games works least well in explaining the behavior of the British authorities, the one heretofore principal participant who would not play a major role in post-1997 "games."

All three of these notions of an endgame fit the evidence from contemporary Hong Kong reasonably well; none fits perfectly. Each may well capture some facets of a reality too complex to be reduced to a single model. On the eve of July 1, 1997 choosing among them, or rejecting all three, is at best a speculative enterprise. For now, at least, their utility likely lies in the light they collectively shed on contemporary Hong Kong's patterns of purity and pragmatism: they provide frameworks for understanding how the clash between principled but partially indeterminate visions of domestic law and sovereignty plays out in the practical politics of shaping specific laws and concrete institutions in a context where the key participants accept that the views and values of ordinary citizens, business elites, and others matter.