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The Changing Role of Law in Asia

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Chinese Policies in Tibet: Should India Remain Concerned?

Michael C. Davis[†]

India has long been engaged with the Tibet issue, though in recent years this engagement tends to focus more on strategic considerations, as some critics question the costs, in terms of Sino-Indian relations, of hosting Tibetan exiles. These costs are said to arise out of tense relations over border disputes, security concerns and trade. These strategic considerations may tend to drown out evaluation of the substantive situation that has produced the Sino-Tibetan impasse—which is the focus of this article. With its long relationship with Tibet, India can ill afford to ignore deep-seated social justice problems in the community that stretches along most of its northern border, especially if Chinese policies in Tibet are likely to increase or decrease refugee flows. This article offers an overview of the Sino-Tibetan dispute and efforts at resolution. After the March 2008 uprising, in a Chinese effort at damage control in the lead up to the Olympics, three quick Sino-Tibetan meetings took place, in May, July and October. In the October meeting the Tibetans produced a “Memorandum on Genuine Autonomy for the Tibetan People,” which the Chinese side quickly rejected. In a November plenary meeting of representatives of the worldwide Tibetan exile community, which took place in Dharamsala, India, Tibetans resolved to push on with their efforts to achieve autonomy. With China knocking at the door, these developments will continue to demonstrate the importance of India’s fundamental commitments to the Tibetan people.

INTRODUCTION

Public debate in India has frequently been engaged with the question of Tibet. This is not surprising, as Tibet has for centuries been India’s northern neighbour. More importantly, Tibetan culture has been deeply influenced by India, resulting in a deep and abiding relationship between the Tibetan and Indian peoples, which includes shared religious values. Tibet occupies much of India’s northern border and for centuries served as a buffer between India and China. With China’s occupation of Tibet since the early 1950s, China became India’s immediate neighbour, initiating a sometimes-troubled political relationship between the two nations. China’s intrusive territorial claims beyond the border into largely Tibetan areas in the North of India have been a frequent source of conflict. Other disputes have also plagued the Sino-Indian relationship, ranging from China’s alignment with Pakistan and global strategic alignments, to the vital issue of water. The presence of over 120,000 Tibetan refugees in India has surely intensified Indian interest in the Tibetan issue. This includes important moral concerns due to India’s long-term commitments to Tibetan refugees and due to concerns democratic India may have about the policies authoritarian China pursues across the border, aggravating the refugee problem.

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At the same time, China growing strength and assertiveness have produced strategic challenges for India that may often drown out the deeper moral commitments, as India seeks to maintain friendly relations with China, its largest trading partner. Critics of India's Tibet policies have pointed to the resultant costs in Sino-Indian relations, which they associate with India's hosting of the Dalai Lama and his fellow exiles.¹ Such critics identify a number of critical issues on the Sino-Indian agenda which are impacted by the Indian stance on Tibet, including concerns that China may align itself more closely with Pakistan, encouraging a belligerent attitude over common border disputes; Chinese intrusion into the Indian Ocean; concerns about placing at risk trade with one of India's largest trading partners; and concerns about critical Chinese support on issues such as climate change or a greater role for India in the UN Security Council.²

The present article focuses on Chinese policies in Tibet. It is the substance of such policies in Tibet that must ultimately drive long-term Indian commitments to Tibetan refugees, though the author feels compelled, as preliminary matter, to express skepticism about the claim that abandoning Tibetan refugees will offer strategic benefits to India vis-à-vis its relationship with China. Instead, the author argues, a more forceful and principled Indian policy that encourages solutions aimed at the source of this problem in Tibet may be more fruitful. In fact, a case may be made that a surrender of its principled stance on Tibet would cast India in a much weaker role and embolden China. As the two largest countries on earth in the same region, there is an inherent competitiveness in the Sino-Indian relationship. Over the past decades, even during relatively peaceful periods, China has showed little inclination to abandon its claims on Indian territory. The drying up of the North China plain and the consequent need to find new sources of water offer little hope that it will spare the Himalayan region from dam projects. China's insatiable thirst for energy resources offers little hope it will tone down its support of Pakistan. Further, the trade relationship between India and China appears to be one that has been unbalanced and unfavourable to India. Thus, since China has long pursued a hard realist perspective in international relations, the

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1. M. D. Nalapat, *Tibet's Shadow Over India, China, Russia*, PAKISTAN OBSERVER, Oct. 10, 2009, available at <http://www.uyghurnews.com/tibetan/Read.asp?TibetNews=tibets-shadow-over-india-china-russia-meet&ItemID=OX-1172009255055200283210>; Phunchok Stobdan, *An Indian View of the Tibetan Situation*, ASIA-PACIFIC BULLETIN, Mar. 20, 2009, available at <http://www.eastwestcenter.org/fileadmin/stored/pdfs/apb031.pdf>; Srinath Raghavan, *Hindi-Chini Ties Rest on Our Tibet Stand*, ASIAN AGE, Apr. 3, 2009, available at <http://www.asianage.com/presentation/leftnavigation/opinion/opinion/hindi-chini-ties-rest-on-our-tibet-stand.aspx>.
 2. *See China's 'intentions' Closely Monitored: India*, HINDUSTAN TIMES, Aug. 31, 2010, available at <http://www.hindustantimes.com/China-s-intentions-being-closely-monitored-India/H1-Article1-594233.aspx>; *Beijing is using Pakistan to slow India's rise as a great power*, INDIAN EXPRESS, Nov. 4, 2010, available at <http://www.indianexpress.com/news/beijing-is-using-pakistan-to-slow-indias-rise-as-great-power/706987/0>.

likelihood, from a strategic perspective, is that India surrendering its principles on Tibet will simply be viewed as a sign of weakness and embolden China in regard to these other vital concerns. In this sense, India's commitment to Tibetan exiles is both morally correct and strategically practical.

For the reasons indicated above, the present article will set aside these strategic considerations—which in any event, seem unlikely to be adequately addressed by some simple formula concerning Tibet—and consider the merits of Tibetan concerns in respect of China's policies. The author feels that this is the more practical route, as it directs India's considerations to the merits of its on-going offer of sanctuary to Tibetan refugees and encourages a foreign policy consistent with the long-held democratic and human rights principles of India. The above strategic considerations have all too often drowned out Indian considerations of the underlying merits of the Sino-Tibetan impasse. Are there ways for China to improve its Tibet policies to remove this obstacle from the strategic landscape? For India, there may also be lessons to be learned for a more constructive role in moving forward and concerning India's own border communities.

The present analysis will consider, in the following order: the events of 2008 which led to the present crisis, the substance of China's policies in recent years concerning Tibetan autonomy, international principles that may assist resolution, and domestic constitutional possibilities which may suggest a way forward to achieve a more genuine autonomy for the Tibetan region. The author will argue that China's current policies fail to live up to international standards and that the Chinese Constitution offers tools for a more constructive policy. Foreign governments, including India, may find it more constructive to encourage Chinese policy reform in this regard.

I. THE 2008 TIBETAN RIOTS AND DEMONSTRATIONS AND THE SINO-TIBETAN IMPASSE.

The March 2008 Tibetan riots and the subsequent Chinese crackdown raised considerable international concern about Chinese policies and human rights practices in Tibet. While Chinese officials were angered by the riots in Tibet and by the international protests that followed the Olympic torch—including protest in India—they faced considerable international pressure to meet with the Dalai Lama and resolve this long-standing dispute.³ With the 2008 Beijing Olympics approaching, China immediately moved into damage control mode, including pressuring countries such as India in regard to the safe passage of the Olympic torch. To placate international concern, they quickly held an informal meeting with Dalai Lama's representatives in Shenzhen near

3. Willy Lam, *Beijing's Post-Olympics Shakedown in Xinjiang and Tibet*, CHINA BRIEF, Sept. 3, 2008, available at [http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews\[tt_news\]=5132&tx_ttnews\[backPid\]=168&no_cache=1](http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews[tt_news]=5132&tx_ttnews[backPid]=168&no_cache=1).

Hong Kong in May 2008 and scheduled the seventh and eighth rounds in their ongoing formal dialogue for July and October 2008.⁴ The Chinese indifference to Tibetan concerns that was on display in these meetings certainly calls into question the Chinese capacity to bring closure to this issue.

In these meetings, the Chinese side showed no interest in discussing substantive concerns. They merely reiterated their long-standing position that the “contacts and dialogues were about the Dalai Lama’s personal future, and not so-called “China-Tibet negotiation” or “dialogue between Han and Tibetan people”.⁵ They insisted on three “stops” and four “non-supports”. The Dalai Lama’s representatives were told to “stop activities aimed at splitting China, stop plotting and inciting violence and stop disrupting and sabotaging the Beijing Olympic Games.” Later this was refined to include “four non-supports”: “not to support activities to disturb the upcoming Beijing Olympic Games, not to support plots to fan violent criminal activities, not to support and concretely curb the violent terrorist activities of the “Tibetan Youth Congress” and not to support any argument and activity to seek “Tibet independence” and split the region from the country.”⁶ The Tibetan side had long met all these conditions, though they would surely contest Chinese accusations of terrorist activities by the Tibetan Youth Congress based in Dharamsala, India.

In a display of disdain for the Tibetan cause, Chinese officials and supporting experts went so far as to challenge the Dalai Lama’s credentials to represent the Tibetan people, insisting that he must speak to the central government as a “common person.”⁷ Throughout the weeks and months following the March 2008 riots and demonstrations, Chinese leaders launched vociferous personal attacks on the Dalai Lama, labeling him a “wolf in monk’s robes” and lumping together all branches of the exile Tibetan community as the “Dalai clique”.⁸ However, these Chinese arguments generally met with skepticism across the globe.⁹

In response to a Chinese request, at the July 2008 Sino-Tibetan meeting, the Tibetan exiles prepared a “Memorandum on Genuine Autonomy for the Tibetan People” outlining their position for a way forward under the Chinese Constitution.¹⁰ The Tibetan Memorandum elaborates Tibetan “aspirations”

4. Michael C. Davis, *For Talks to Succeed, China Must Admit to a Tibet Problem*, YALE GLOBAL, May 16, 2008, <http://yaleglobal.yale.edu/content/talks-succeed-china-must-admit-tibet-problem>, (last visited Feb. 21, 2011).

5. *Chinese Official Urges Dalai Lama to Respond with Sincerity After Recent Contact*, CHINA VIEW, July 6, 2008, available at http://news.xinhuanet.com/english/2008-07/07/content_8500898.htm.

6. *Id.*

7. *China Unwilling to Broach Tibet with Dalai Lama*, INDO-ASIAN NEWS SERVICE, July 15, 2008.

8. Michael C. Davis, *supra* note 4.

9. Michael C. Davis, *Divergence Grows Between China and the West—Part II*, YALE GLOBAL, Dec. 23, 2010, <http://yaleglobal.yale.edu/content/divergence-grows-between-china-and-west---part-ii>, (last visited Feb. 21, 2011).

10. *Memorandum on Genuine Autonomy for the Tibetan People*, Nov. 4, 2008, <http://www>.

for autonomy in eleven policy areas, including language, culture, religion, education, environmental protection, utilization of natural resources, economic development and trade, public health, public security, population migration and cultural, educational, and religious exchanges with other countries.¹¹ As discussed below, all of these are covered by existing unfulfilled national ethnic autonomy policies enacted under Article 4 of the PRC Constitution, except those relating to public security, immigration and external exchanges in the commercial and cultural areas, which appear instead to track the Article 31 “one country, two systems” Hong Kong formula of local control. Similar to Hong Kong, their proposal includes a specification that local laws within the scope of autonomy not be subject to central approval as is now required in minority areas and that the terms of their agreement with the Central Government not be subject to the Central Government’s unilateral amendment. They further proposed to unify into one the thirteen contiguous Tibetan areas that China has designated under its national autonomy laws. These proposals were presented as a starting position for further negotiation.¹²

In response to the Tibetan Memorandum, the Chinese position hardened further. In early November 2008, in an extraordinary press conference hosted by the Chinese State Council, Mr. Zhu Weiqun of the United Front Works Department issued a stinging attack on the Tibetan position.¹³ In the printed State Council Address that accompanied the press conference, the Tibetan request for “genuine autonomy” is treated as a request for “a high degree of autonomy,” as is promised to Hong Kong. In seeking such “high degree of autonomy” the Tibetans are accused of seeking “half-independence,” and “covert independence.”¹⁴ No explanation is given why the exact same language applied to Hong Kong means only autonomy. The State Council Address further accuses the exile Tibetans of continuing to “collude with such dregs as ‘democracy activists’, ‘falunkun (falungong) elements’ and ‘Eastern Turkistan terrorists’, though no evidence of this is given.¹⁵ In seeking control over Chinese

tibet.net/en/index.php?id=78&articletype=press&rmenuid=morepress&tab=2#TabbedPanels1 (“Tibetan Memorandum”), (last visited Jan. 17, 2011); *Summary of the Memorandum on Genuine Autonomy for the Tibetan People*, Nov. 16, 2008, <http://www.tibet.net/en/index.php?id=77&articletype=press&rmenuid=morepress&tab=2#TabbedPanels1%3E> (last visited Jan 17, 2011).

11. Tibetan Memorandum, *supra* note 10.

12. *Id.*

13. China says serious differences in talks with private envoys of the Dalai Lama, Permanent Mission of the People’s Republic of China to the UN (Press Release), Nov. 9, 2010, <http://www.china-un.org/eng/gyzg/xizang/t521742.htm> (last visited Jan. 17, 2011) (“State Council Address”).

The press release quotes Mr. Zhu Weiqun, Executive Vice-Minister of the United Front Work Department of the CPC Central Committee, at the Press Conference by the State Council Office. The United Front Work Department has historically been responsible for national minority affairs.

14. *Id.*

15. *Id.*

migration into Tibet, the Dalai Lama is accused of “ethnic cleansing.” The exile government is characterized as a “small group of splittists.”¹⁶

The State Council Address makes clear that the Chinese government had no intention of discussing substantive issues. The meetings are said to be aimed at persuading the Dalai Lama to “give up his splitting activities.”¹⁷ The State Council Address declared, “[w]e never discussed the so-called ‘Tibet issue’ and will “never make a concession.”¹⁸ In January 2009, China demonstrated even greater indifference and insensitivity to the Tibetan cause by creating a new holiday they have labeled “Serfs Emancipation Day,” to celebrate their “liberation” of Tibet.¹⁹ Despite China’s dismissive attitude, a large mid-November Tibetan exile meeting in Dharamsala, India decided to continue efforts at achieving genuine autonomy. They determined to suspend this fruitless series of talks and find more effective nonviolent strategies to promote their cause.²⁰

Chinese anxieties over Tibetan intentions seem to block all efforts at finding a solution. At least rhetorically, the parties stated positions appear to reveal an overlapping consensus supporting autonomy under Chinese sovereignty.²¹ The Chinese government has, however, offered no concessions regarding the character of autonomy, claiming only that autonomy is provided under existing national minority laws²²—which some would say is no autonomy at all. The Tibetan representatives in these discussions have conceded to Chinese demands regarding sovereignty, while insisting on what they call “genuine autonomy” under a formula they have labeled the “middle way” approach.²³

16. *Id.*

17. *Id.*

18. *Id.*

19. Tibet Sets ‘Serfs Emancipation Day,’ CHINA DAILY, Jan. 19, 2009, available at http://www.chinadaily.com.cn/china/2009-01/19/content_7410293.htm.

20. *China’s Communist Regime Losing Ground: Dalai Lama*, TIBET SUN, Jan. 17, 2008, available at <http://www.tibetsun.com/archive/2009/01/17/chinas-communist-regime-losing-ground-dalai-lama/>.

21. Warren Smith sees the two sides position as irreconcilable, as the central issue for Tibetans is the maintenance of Tibetan national identity and for the Chinese is to extinguish it. See generally WARREN W. SMITH, CHINA’S TIBET: AUTONOMY OR ASSIMILATION 279 (2008).

22. *Regional Ethnic Autonomy in Tibet* (Information Office of the State Council of the PRC, May, 2004), available at <http://www.china.org.cn/e-white/20040524/index.htm> (“White Paper”).

23. The Dalai Lama began to articulate his “middle way” position in speeches in the 1980s before the US Congress and before the European Parliament. See *Address to Members of the United States Congress: Five Point Peace Plan for Tibet* (Sept. 21, 1987), <http://www.furhhd.org/peace+plan> (last visited Jan. 18, 2011); The Dalai Lama, *Address to Members of the European Parliament* (Jun. 15, 1988), <http://www.dalailama.com/messages/tibet/strasbourg-proposal-1988> (last visited Jan. 18, 2011).

These original positions have been amended in response to Chinese requirements to make it clear that he is not seeking independence or imposing any conditions for discussions. See *Autonomy and the Tibetan Perspective* (Tibetan Parliamentary & Policy Research Centre, 2005), http://www.tpprc.org/publication/autonomy_and_tibetan_perspective-2005.pdf (last visited Jan 18, 2011); *The Middle-Way Approach, A Framework for Resolving the Issue of Tibet* (Central Tibetan Administration, Dept. of Info. & Pub. Ref’ns, 2006),

In asking for “genuine autonomy” the Tibetan exile leaders clearly appreciate the role of political autonomy as an essential step for participation in cultural, social, economic and political life, promoting both democracy and human rights in Tibet.²⁴ The sense of urgency among Tibetans has increased in recent years along with fears that the 1.3 billion Chinese may eventually swamp the 5.5 million Tibetans in the vast mountainous Tibetan region, leaving them a minority in their own land.²⁵ There is fear it has already happened in the Tibetan cities.²⁶

II. CHINESE LAWS ON NATIONAL MINORITY AUTONOMY, AS APPLIED TO TIBET

China’s national minority autonomy policies are promulgated in articles on national regional autonomy in the 1982 PRC Constitution²⁷ and in the Law on Regional National Autonomy (“LRNA”) passed in 1984, as revised in 2001.²⁸ Article 4 of the PRC Constitution provides that, “Regional autonomy is practiced in areas where people of minority nationalities live in concentrated communities.” Article 15 of the LRNA provides that autonomous areas carry out their role “under the unified leadership of the State Council and shall be subordinate to it.” The LRNA expressly promises protection for national minority autonomy in the areas of language, education, political representation, administrative appointments, local economic and financial policies, and the use of local natural resources. How effectively minorities can exercise such promised autonomy is, however, debatable. As discussed below, these laws have been rigidly applied and serve as the basis for substantial intrusions of central control and the national political system into local affairs. They contrast dramatically with the broad and flexible autonomy provision applied in Hong Kong under Article 31 of the PRC Constitution.²⁹

The 1982 PRC Constitution passed during China’s liberalizing phase appears to be aimed at allowing an enhanced degree of local control. It includes the power, subject to higher approval, to enact “regulations on the exercise of autonomy (zizhi tiaoli) and other separate regulations (danxing tiaoli) in

tibet.net/en/index.php?id=115&rmenuid=11 (last visited Jan. 18, 2011).

24. Michael C. Davis, *Tibet*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L LAW, http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e1364&recno=25 & (last visited Jan. 18, 2011).

25. TABULATION ON NATIONALITIES OF 2000 POPULATION CENSUS OF CHINA (2003).

26. See June T. Dreyer, *Economic Development in Tibet Under the People’s Republic of China*, in CONTEMPORARY TIBET: POLITICS, DEVELOPMENT AND SOCIETY IN A DISPUTED REGION 129, 131 (Barry Sautman & June T. Dreyer, eds., 2006); ANNE-MARIE BLONDEAU & KATIA BUFFETRILLE, AUTHENTICATING TIBET, ANSWERS TO CHINA’S 100 QUESTIONS 144-151 (2008).

27. P.R.C. CONST. 1982, arts. 4, 59, 65, 89 & 112-122, available at http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372963.htm.

28. P.R.C. Law on Regional National Autonomy, 1984 (“LRNA”).

29. Article 31, which aimed at China’s recovery of Hong Kong, Macau and possibly Taiwan, provides for the creation of Special Administrative Regions, which are to be given a high degree of autonomy.

light of the political, economic and cultural characteristics.”³⁰ The LRNA, with the same language, specifies the need for approval of all autonomy and special regulations from the next higher level of government.³¹ “Regulations on the exercise of autonomy” have the status of a sub-constitution or basic law. It is typically expected that only one such regulation will be enacted in each autonomous area.³² For autonomous regions such approval must come directly from the Central Government, while for lesser autonomous areas at the prefecture and county levels such approval must come from the higher provincial government. The PRC’s five autonomous regions include Tibet, Xinjiang, Inner Mongolia, Guangxi, and Ningxia. None of these regions have received approval for such basic regulation on the exercise of autonomy. The one attempt at enacting a basic regulation on the exercise of autonomy in the Tibetan Autonomous Region (TAR) went through 15 drafts and was eventually abandoned.³³ Lesser autonomous areas at the prefecture and county level have received approval from provincial governments for the above noted regulations on the exercise of autonomy that largely track the LRNA content. Autonomous regions and areas have enacted many “separate regulations,” the second category specified in the authorizing provisions.³⁴ A third category would be ordinary laws unrelated to autonomy, which do not require such higher approval.³⁵

Chinese Communist Party (CCP) control over the legislative drafting processes in autonomous areas is an even more daunting challenge to autonomy than the legislative approval process, involving oversight and approval at every step in the legislative drafting process. This leaves very little legislative discretion for local “autonomous” communities. Chunli Xia describes a complex system of CCP oversight of the legislative drafting process: first, the Party Committee of the Local People’s Congress (LPC) sets up a legislative group made up of people from the LPC Party Committee, the LPC Standing Committee and the local government; second, a draft is circulated and submitted by the LPC Standing Committee to the Party Committee of the autonomous area; third, after approval by the Party Committee of the autonomous area it is then submitted to a higher party committee for further review; fourth, when the Party Committee of the autonomous area receives approval it submits the draft to the LPC Standing Committee Party Committee to be submitted to the

30. P.R.C. CONST., *supra* note 27, art.116.

31. LRNA art. 19.

32. *Id.*

33. Yash Ghai, *et al.*, *Is there Space for ‘Genuine Autonomy’ for the Tibetan Areas in the PRC’s System of Nationalities Regional Autonomy?* 17 INT’L J. MIN. & GP. RTS. 137, 175-78 (2010).

34. Separate regulations are regulations made by autonomous legislative bodies on specific topics such as Language, marriage, family planning, etc.

35. Chun Li Xia, *Autonomous Legislative Power in Regional Ethnic Autonomy of the People’s Republic of China: The Law and the Reality*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS—PERSPECTIVES ON EVOLUTION: ESSAYS ON MACAU’S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 541, 551 (Jorge C. Oliveira & Paulo Cardinal eds., 2009) (quoting the Organic Law of the People’s Republic of China, art. 7 and the Legislative Law, art. 63).

LPC for passage.³⁶ Given the center's control over the CCP and the fact that party officials from the center have always occupied top local party positions, there is little room for local legislative initiative.³⁷

To such legal impediments the national minority policy adds structural and conceptual impediments. First, the replication of the national political structures in minority areas, disallowing distinct indigenous forms of government, renders such areas especially susceptible to top-down central administrative control.³⁸ The distinctive indigenous form of government promised in the 1951 Seventeen-point Agreement surrendering to Chinese control of Tibet was ultimately not delivered. Today only Hong Kong and Macau possess such distinctive local self-rule, as provided by Article 31 of the PRC Constitution relating to special administrative regions.

Second, Marxist ideology seems to contradict the purported character of China's policies in Tibet. The Marxist doctrine would identify the 1950s occupation of Tibet as "liberation" and the institution of CCP rule in Tibet as "democratic reform." This is because, according to Marxist logic, colonialism is a product of capitalist exploitation and does not arise in a non-capitalist environment.³⁹ Since China never reached the stage of full capitalist development it could not be said to have colonized Tibet. The exploited classes of Tibet were to be joined, under a Chinese "internal multinational system," in a "common program" of local autonomous rule.⁴⁰ Any autonomy regime was merely a temporary solution on the path to ultimate assimilation of minority nationalities.⁴¹ Statements to the contrary, such as the 17-point agreement (which purports to be aimed at acceding way to greater local control/autonomy), from the Marxist point of view would be only temporary. The 17-point agreement promised that "Central Authorities would not alter the existing political system in Tibet."⁴² But, as the subsequent record of pervasive CCP intrusion suggests, it clearly envisioned that the "liberated" Tibetans would seek "reform" and ask for the CCP's vision of minority autonomy. Such a system was in fact imposed after the 1959 uprising when the Dalai Lama fled.

Especially after the 1959 Tibetan uprising, all forms of traditional political structure were progressively eliminated. This purging of traditional political

36. *Id.* at 545-47. Xia notes that this process has been followed rather closely since the 2001 revisions of the LRNA.

37. See BLONDEAU & BUFFETRILLE, *supra* note 26, at 191-196.

38. Such replication, as specified in the PRC Constitution and evident in CCP practice, essentially involves a system of Peoples' Congresses to rule at the local levels and national level. Likewise, CCP control prevails at all levels of government. While the details of how this system operates, is beyond the scope of this article, it suffices to say that replicating this system precludes the maintenance of indigenous forms of government in autonomous areas.

39. SMITH, *supra* note 21, at 233; White Paper, *supra* note 22.

40. Common Program of the Chinese Peoples Political Consultative Committee (1949).

41. SMITH, *supra* note 21, at 233. Chinese officials cite advanced technology and modern communications to justify a more direct form of rule.

42. *Id.*

forms was especially radical during the Cultural Revolution (1966-1976), which was a period of hard-line class struggle and massive cultural destruction across China. In the early 1980s after the Cultural Revolution, when Chinese Premier Hu Yaobang observed especially dire conditions in Tibet, a somewhat remorseful China pursued a brief period of liberalization. This was however, followed by greater repression and even martial law later that decade, as Tibetans became more outspoken in the slightly more liberal environment. Policies restricting the use of Han cadres in Tibet in the early 1980s were soon abandoned by the end of the decade. In the last recent decade, a policy of cracking down on political support for the exiled Dalai Lama and so-called patriotic education has been combined with greater emphasis on economic development under which Chinese immigration has been favored.⁴³ Massive Chinese economic investment in Tibet has been perceived by Tibetans as a form of colonization, which benefits the Chinese much more than the Tibetans.

Over the years Chinese repression has included military occupation and crackdowns, the sacking and razing of Buddhist monasteries during the Cultural Revolution, suppression of religion, coerced “reeducation” of monks and nuns in monasteries, imprisonment of dissidents, and the forced relocation of rural dwellers and herders to more populated areas.⁴⁴ Monks and nuns have been coerced into renouncing the Dalai Lama.⁴⁵ Popular dissent and rebellion famously arose in 1959, 1989 and 2008. Resistance by monks and nuns and others frequently occurs, as monks and nuns in the monasteries resist attempts at “patriotic education” and Chinese attempts to control religious doctrines and decisions.⁴⁶

The question then is, which side is correct? Studies and reports have appeared on both sides of this debate. On the Chinese side, the May 2004 official White Paper on Regional Ethnic Autonomy in Tibet highlights favorable statistics on Tibetan participation in autonomous governance, including very favourable data on Tibetan participation in the local people’s congresses and local government; a 93 percent voter turnout rate for county level elections; Tibetan and other ethnic minority deputies in excess of 80 percent at both the regional and city levels; and a claim of generally over 80 percent Tibetan occupation

43. Warren W. Smith, *China’s Policy on Tibetan Autonomy* 33-34 (East-West Center Washington Working Papers, Paper No. 2, October 2004), available at <http://www.eastwestcenter.org/fileadmin/stored/pdfs/EWCWwp002.pdf>.

44. See generally BLONDEAU & BUFFETRILLE, *supra* note 26, at 144-151.

45. Interview with President, Gu Chu Sun Movement of Tibet (Association of former Political Prisoners), in Dharamsala, India (Aug. 3, 2006); Interview of “Singing Nun” Renchen Choeky, Dharamsala, India (Aug. 4, 2006) (After refusing to denounce the Dalai Lama in reeducation meetings in their nunnery, the Singing Nun was sentenced to prison for demonstrating in protest in Lhasa; and sentenced again while in prison when 18 nuns produced a singing recording that was smuggled out)

46. *Id.*; See also *China: Exclusion, Marginalization and Rising Tension* (Minority Rights Grp. Int’l & Hum. Rts. in China, 2007), available at <http://hrichina.org/public/PDFs/MRG-HRIC.China.Report.pdf> (“HRIC Report”).

of the top positions of various autonomous governments and standing committees.⁴⁷ It states that at the time of the report 12 of the 19 deputies from the TAR to the National People's Congress were Tibetan;⁴⁸ that the Tibetan language is taught in the schools and widely used along with Chinese language—(though critics worry this is mostly at the primary level⁴⁹). Even that has come under threat, with recent reports of Tibetan demonstrations against reported Chinese efforts in Qinghai autonomous areas to replace Tibetan with Chinese as the primary language of instruction in primary schools.⁵⁰ The report also emphasizes China's contribution to Tibet's economic development⁵¹ (though critics worry that these policies benefit Chinese more than Tibetans⁵²).

On the other hand, outside reports (which may be less partisan than national Chinese reports) highlight statistics that tend to demonstrate a lack of local autonomy in areas where it is most required. A 1997 report of the International Commission of Jurist ("ICJ") notes that while "Tibetans are in positions of nominal authority, they are often shadowed by more powerful Chinese officials" and that "every local organ is shadowed by a CCP committee or 'leading group.'"⁵³ A 2007 report by the Minority Rights Group International and Human Rights in China further highlights several deficiencies, including the centralization of power in the top leadership of the CCP; the aforementioned concerns regarding the law-making process, Chinese dominance of CCP leadership in minority areas, and the lack of real power at the local level.⁵⁴ Of particular concern for the deeply religious Tibetan nationality, is a CCP rule that bars party members from practicing Tibetan Buddhism and a recently added rule that cadres withdraw their kids from Tibetan schools in India.⁵⁵

III. SEEKING A SOLUTION IN INTERNATIONAL PRACTICE

China has made great efforts to justify its Tibet policies on the basis of international law and practice, arguing that its 1951 "liberation" was justified by an international law claim of historical title; that its current policies and claims to defeat Tibetan rights of self-determination are protected by sovereignty;

47. White Paper, *supra* note 22.

48. *Id.*

49. See BLONDEAU & BUFFETRILLE, *supra* note 26, at 235.

50. Edward Wong, *Tibetans in China Protest Proposed Curbs on Their Language*, N.Y. TIMES, Oct. 22, 2010, available at http://www.nytimes.com/2010/10/23/world/asia/23china.html?_r=1.

51. White Paper, *supra* note 22.

52. See BLONDEAU & BUFFETRILLE, *supra* note 26, at 250-277. (Comments by Andrew M. Fischer. Fischer worries that the current policy of large public subsidies tends to benefit Chinese officials and large Chinese construction companies, while creating dependency and the need for more subsidies for Tibet—what he calls the 'boomerang effect'. He sees greater agriculture productivity if Tibetans are left alone in the traditional mixed system of herding and farming.)

53. TIBET: HUMAN RIGHTS AND THE RULE OF LAW 14-21 (1997).

54. See HRIC Report, *supra* note 46.

55. Ghai *et al.*, *supra* note 33, at 21.

that its autonomy policy is an internal affair both as a general proposition and as a matter of indigenous rights. However the legality and justification of all three claims is debatable. Perhaps more convincing to most foreign ministries has been China's forceful maintenance of effective control over Tibet for more than five decades, garnering formal international recognition of its claims. The uncertain status of both autonomy and indigenous rights in international law may also be a factor encouraging reluctance to directly challenge China's policies. Questionable Chinese human rights practices and autonomy policies have, nevertheless, attracted considerable disapproval and criticism. Let us examine the veracity and legality of the Chinese claims.

The historical narrative offers little support for China's claim to historical title. Similar to Korea, Tibet appears to have been at most a vassal state in an imperial system during limited periods of the Yuan and Qing dynasties.⁵⁶ The foreign Mongols who later established the Chinese Yuan Dynasty (1270-1368) actually accepted the submission of and eventually conquered Tibet from 1247AD before they conquered China and always operated Tibet as a separate part of their empire.⁵⁷ Warren Smith describes a rather carefully calibrated diplomatic relationship from the Yuan Dynasty forward between China's emperors and Tibetan lamas. Imperial attempts at subordination would meet Tibetan resistance.⁵⁸ During the Yuan Dynasty leading Tibetan lamas served in a religious advisory role for the Mongol emperors—a role characterized by the Tibetans as a *Cho-yon* or patron-priest relationship.⁵⁹ This state of affairs receded somewhat in the succeeding Chinese Ming Dynasty (1368-1644), when Tibetan lamas were of Chinese imperial interest mostly as intermediaries with the still-threatening Mongols.⁶⁰ The succeeding Manchu-dominated Qing Dynasty (1636-1910) featured the highest level of Chinese intervention, which in the 18th century sometimes involved occupation of Tibet by imperial forces.⁶¹ Though Qing control reached its zenith in the late 18th century, it always involved some form of indirect imperial rule, which classified Tibet under the Qing's "exterior empire," though the Eastern Tibetan provinces of Kham and Amdo were sometimes subject to direct Qing control.⁶² By the late 19th century, the declining Qing began to lose its grip on Tibet.

56. Eliot Sperling, *The Tibet-China Conflict: History and Polemics* 28-30 (East-West Center Washington, Policies Studies No. 7, 2004), available at <http://www.eastwestcenter.org/fileadmin/stored/pdfs/PS007.pdf>. (A vassal state in this context would be a loosely affiliated state that was not fully incorporated into the Chinese empire. Sperling points out that the Chinese need to recast Tibet as an historically internal part of China in order to justify occupation came up only under CCP rule.)

57. See generally WARREN W. SMITH, *TIBETAN NATION: A HISTORY OF TIBETAN NATIONALISM AND SINO-TIBETAN RELATIONS* 83-100 (1996).

58. *Id.*

59. Sperling, *supra* note 56, at 30-31.

60. SMITH, *supra* note 57, at 103-7.

61. *Id.* at 111-112.

62. *Id.* at 121, 134-138, 145, 151.

From 1911 until the PRC invasion in 1950, Tibet enjoyed *de facto* independence.⁶³ To further justify their “liberation” of Tibet, Chinese officials depict Tibet during this period as feudal and savage. One may wonder whether Tibet was any worse off than the other feudal regimes that surrounded it in this period.⁶⁴ Nascent forms of constitutional government, involving a cabinet and limited forms of legislative representation had been established during the late Qing.⁶⁵ During the *defacto* independence in the early twentieth century these institutions were further developed. Telling facts often ignored in this dispute are that the Tibetans largely maintained a separate language, culture and governance until their occupation in the 1950s and were never subject to outside direct rule.⁶⁶ The exile government has persisted to develop nascent constitutionalism, establishing a democratic constitutional system in exile, as they have also proposed to the Chinese government for any resumed autonomy regime.⁶⁷

It was also during the period of *de facto* independence in the early twentieth century that the language of statehood and sovereignty was first adopted in negotiations between Tibet, China and British India.⁶⁸ While Republican Chinese officials claimed Tibet as their own, they generally acknowledged that Tibet had a special status with only Chinese indirect rule.⁶⁹ In negotiations at Simla, India in 1913, the British proposed a notion, similar to that China had agreed for Mongolia, of inner and outer Tibet.⁷⁰ This included a largely independent central Tibet under Chinese suzerainty with a subordinate Eastern Tibet under Chinese sovereignty.⁷¹ In negotiations, both at Simla and later in the 1930s, Republican China acknowledged Tibet’s high degree of autonomy under nominal Chinese rule.⁷² All parties actually initialed the Simla Convention accepting this view, though the Chinese ultimately did not ratify it.⁷³ They were dissatisfied with the stipulated boundary between inner and outer Tibet.⁷⁴

When the Chinese People’s Liberation Army (PLA) invaded Tibet in 1951, the Dalai Lama faced an offer he could not refuse,⁷⁵ embodied in a 17-point Agreement on “measures for the peaceful liberation of Tibet.”⁷⁶ The PRC

63. MELVYN C. GOLDSTEIN, *A HISTORY OF MODERN TIBET: 1913-1951* 763 (1989).

64. White Paper, *supra* note 22; See also BLONDEAU & BUFFETRILLE, *supra* note 26, at 81-84.

65. GOLDSTEIN, *supra* note 63, at 10-31.

66. See generally SMITH, *supra* note 57.

67. See generally Lobsang Sangay, *Tibet: Exiles’ Journey*, 14 *JOURNAL OF DEMOCRACY* 119 (2003).

68. GOLDSTEIN, *supra* note 63, at 68-80, 832-841.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. DALAI LAMA, *FREEDOM IN EXILE: THE AUTOBIOGRAPHY OF THE DALAI LAMA* 64 (1991); GOLDSTEIN, *supra* note 63, at 798-803.

76. Agreement of the Central People’s Government and the Local Government of Tibet on

claimed to “liberate” Tibet, presumably from foreign influences such as British India.⁷⁷ The 17-point agreement, the only treaty the PRC entered with one of its national minorities, still acknowledged the special status of Tibet and promised indirect rule.⁷⁸ When China failed to honour these commitments, a state of popular rebellion ensued and the Dalai Lama fled to India on March 28, 1959, bringing to an end centuries of Tibetan self-rule.⁷⁹ In September 1965 the TAR was proclaimed under the first People’s Congress of the TAR.⁸⁰

Vassal state status, thus offers little justification for China’s current claim of historical title over this very distinctive and well-established national community. This explains why Chinese representatives have pushed the Dalai Lama to accept Chinese historical interpretations and why he has refused.⁸¹ In this particular case such historical title claims are particularly weak, given their lack of empirical foundation and the fact that they appeared to end completely with the collapse of the Qing imperial dynasty. Added to these difficulties associated with China’s imperial past, is the general weakness of historical title as an international legal basis for sovereign claims. In the *Western Sahara* case, the ICJ judged such claims as an insufficient basis for claiming territory held by neighboring national groups.⁸²

The second tactic employed by China is to emphasize its right to sovereignty to defeat any Tibetan claims of self-determination or outside interference. Refuting China’s current sovereignty claims, which are supported by actual control and the recognition of most other states, may pose a more difficult challenge to China’s critics. Tibetans have lived with six decades of Chinese occupation and direct rule. The Chinese see the retention of Tibet as a matter of vital national interest and have worked aggressively to gain international acceptance of this *fiat accompli*. *Fiat accompli* and *real politic* have combined to leave Tibetans with little hope of independence.⁸³ Under such circumstances

Measures for the Peaceful Liberation of Tibet, May 23, 1951 (“17-point Agreement”). See also GOLDSTEIN, *supra* note 63, at 759-772.

77. GOLDSTEIN, *supra* note 63, at 759-772.

78. 17-point Agreement, *supra* note 76.

79. Dalai Lama, *supra* note 46, at 136.

80. Preparatory Committee for the Tibetan Autonomous Region (PCTAR), Established in April 1956.

81. See Sperling, *supra* note 56.

82. Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct.16).

83. While mere occupation does not by itself, justify sovereign claims, when that occupation is by a major power with local acceptance (albeit under duress) and is accompanied by expressed recognition of Chinese sovereignty over Tibet by the many states that recognize China, the obstacles to any attempt to seek independence are formidable. Further, the recent ICJ advisory opinion regarding Kosovo, which confirmed the legality of a mere declaration of independence would appear to offer little practical solace to Tibet’s claims (unless circumstances change radically), given China’s strong position and the court’s deferral to political recognition as an indication of actual independence. See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Jul. 22, 2010), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=kos&case=141&k=21> (“Kosovo opinion”).

is there a strong argument for a heightened security in international law for internal self-determination and autonomy?

Self-determination is grounded in the UN Charter. International law generally distinguishes between external and internal rights of self-determination.⁸⁴ The external right of self-determination is considered to include a right of secession.⁸⁵ The internal right is concerned with minority rights of self-governance within a sovereign state. Common article (1) of both the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) provides “all peoples” with the right to “freely determine their political status and freely pursue their economic, social and cultural rights.” But these clauses offer little guidance on who such peoples are and how the right is to be exercised.⁸⁶

There has been only a few instances where this issue has been discussed at the international level, so as to shed light on this issue. In *Reference re Secession of Quebec*, the Supreme Court of Canada concluded, “The international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social or cultural development.”⁸⁷ One could argue that Tibet satisfies both of these criteria. Given the previous analysis of China’s historical title claim, there is a reasonable argument that China in effect colonized Tibet in the guise of liberation and further that Tibetans, under the system of governance described in the previous section lack meaningful access to government. Three UN General Assembly resolutions passed in 1959, 1961 and 1965 appeared to say as much on the latter point.⁸⁸ While the three UN resolutions did not contest Chinese sovereignty and demand withdrawal, they did condemn China severely for human rights violations and effective denial of internal self-determination. Unfortunately, the practical recognition of China’s claims by Tibetans in the 17-Point Agreement and by countries that have recognized China leaves little practical possibility for achieving external autonomy, as the Dalai Lama has generally acknowledged. Further, It is doubtful whether the

84. See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/4684 (Dec. 14, 1960) (“Independence Declaration”); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625 (XXV), U.N. Doc. A/5217 (Oct. 24, 1970) (“Friendly Relations Declaration”).

85. See Independence Declaration, *supra* note 86.

86. International Covenant on Civil and Political Rights, 1966, 999 U.N.T.S. 171 (“ICCPR”); International Covenant on Economic, Social and Cultural Rights, 1966, 993 U.N.T.S. 3 (“ICESCR”).

87. Reference re Secession of Quebec, [1998] 161 DLR 385, ¶135 (Can.).

88. For a discussion of the three UNGA Resolutions condemning China’s human rights record in Tibet (1959, 1961, 1965), see SMITH, *supra* note 57, at 492-532.

recent Kosovo advisory opinion recognizing a right to declare independence, subject ultimately to political decisions regarding recognition, would be of much assistance toward gaining recognition of independence for Tibet under present circumstances.⁸⁹

In respect of the third alternative argument, for autonomy, guarantees of internal autonomy have generally not been well secured by international law.⁹⁰ It may be argued, however, that in two circumstances internal autonomy rights gain a degree of international recognition: 1) when such rights are the consequence of treaty arrangements transferring or surrendering sovereignty, the treaty itself embodies such international recognition (such as the situation of Hong Kong) or 2) when it arises out of the denial of rights of self-determination to indigenous peoples.⁹¹ The Tibet case arguably implicates both situations. The 17-point agreement arguably reflects a treaty arrangement if one accepts, as Tibetans have claimed, that the *de facto* independence of Tibet before 1950 effectively established it as a state at the time of the agreement. An alternative route is offered by recognition of the indigenous status of Tibetans, which, as best articulated by the Indigenous People's Declaration, would require adherence to all agreements previously entered with the indigenous population.⁹²

Evolving standards of human rights, self-determination and autonomy have now gained greater international traction in the 2007 UN Declaration on the Rights of Indigenous Peoples. The Declaration provides a comprehensive account of established international standards for the protection of indigenous populations, including the substantive content of internal autonomy.⁹³ While UN declarations are considered soft law and not legally binding, declarations passed with unanimity or ones that purport to declare existing customary law may be taken as binding customary law.⁹⁴ The Indigenous Peoples' Declaration enjoyed nearly unanimous passage, 143 to 4 with 11 abstentions,⁹⁵ and can thus be seen to embody in its text some appearance of existing customary law

89. See, Kosovo opinion, *supra* note 83.

90. See generally D. Sanders, *Is Autonomy a Principle of International Law?* 55 *NORDIC J. INT'L L.* 17 (1986); F. L. Kirgis, *The Degrees of Self-determination in the UN Era*, 88 *AM. J. INT'L L.* 310 (1994); Hans-Joachim Heintze, *Evolution of Autonomy and Federalism*, in Jorge C. Oliveira & Paulo Cardinal, *supra* note 35, at 389-408.

91. See UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) ("Indigenous Peoples' Declaration").

92. *Id.*

93. *Id.*

94. The International Court of Justice has consistently used the voting patterns of states in respect of a particular resolution to assess the customary nature of the declaration. For instance, in the Nicaragua case, the Declaration on Friendly Relations between States, was considered by the court to be reflective of custom. See *Military and Paramilitary Activities in and against Nicaragua* (Nic. V. U.S.), 1986 ICJ 14, ¶188 (Jun. 27).

95. The only four states opposing the Declaration were the United States, Canada, New Zealand and Australia. The eleven abstaining were Azerbaijan, Bangladesh, Bhutan, Burundi, Columbia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine.

surrounding the UN Charter and international human rights treaties.⁹⁶ The Chinese government voted for the declaration both in the UN Human Rights Council and the UN General Assembly. Unfortunately, China maintains the position that there are no indigenous peoples in China,⁹⁷ claiming 5000 years of national unity and harmony with minorities living on their own lands.⁹⁸ Given Tibet's unique status, as recognized in the 17-point agreement, there is room for considerable doubt concerning this claim as to Tibet.

While the UN Declaration does not define "indigenous peoples," it does specify that such indigenous communities exist throughout the world and are not confined to former victims of European colonialism in the Americas.⁹⁹ A separate 1986 UN study defined indigenous peoples as "communities, ...which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing..."¹⁰⁰ It also emphasized that such communities consider themselves distinct from the dominant sector.¹⁰¹ The Tibetan people clearly satisfy these criteria. They were forcefully invaded in 1950, consider themselves distinct from other sectors of society, form a present non-dominant sector of society and seem determined to preserve their ethnic identity.¹⁰² Thus, whatever its legal status, this declaration can clearly serve as a useful guide for the treatment of indigenous or similarly situated peoples.

The Declaration offers an overview of what such internal autonomy should include. It's preamble emphasizes demilitarization of indigenous lands; the right of indigenous people to freely determine their relationship with states; that treaties, agreements and constructive arrangements with states are matters of international concern; "the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development"; and that the right to exercise self-determination in conformity

96. The opening preliminary phrase added to the draft in its final stage before passage indicates that the General Assembly was, "Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfillment of the obligations assumed by States in accordance with the Charter." See *Indigenous Peoples' Declaration*, *supra* note 91, Preamble.

97. *China Concerned with Protection of Indigenous Peoples' Rights*, Apr. 1, 1997, <http://ch.China-embassy.org/eng/ztnr/rqwt/t138829.htm> (last visited Jan. 18, 2011).

98. *Id.*

99. A 1986 UN study of indigenous populations included several Asian countries in the study: Bangladesh, Burma, India, Indonesia, Japan, Laos, Philippines and Sri Lanka. See Jose Martinez Coho, *Study of the Problem of Discrimination Against Indigenous Populations* (Final Report to UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Sept.13, 2007), UN Doc. E/CN.4/Sub.2/1983/21/Add.8. ("UN Working Group Report")

There are thought to be over 370 million indigenous people worldwide. See *UN adopts declaration on rights for indigenous peoples worldwide*, INT'L HERALD TRIB., Sept. 13, 2007.

100. UN Working Group Report, *supra* note 99, at 4.

101. *Id.*

102. Tibetan Memorandum, *supra* note 10.

with international law shall not be denied.¹⁰³ China's weak commitment to these ideals is evident in its practices under its national minority laws discussed earlier,¹⁰⁴ and its tendency towards militarization of the Tibetan plateau.¹⁰⁵

The operative articles of the Declaration guarantee to indigenous peoples the right of self-determination;¹⁰⁶ the right to autonomy or self-government in matters relating to their internal and local affairs;¹⁰⁷ the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies, including access in privacy to their religious and cultural sites and control of their ceremonial objects;¹⁰⁸ the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures;¹⁰⁹ the right to be consulted and prior consent through their own representative institutions before implementing state legislative and administrative measures;¹¹⁰ and the right to recognition, observance and enforcement of treaties, agreements and other constructive arrangements¹¹¹. At the same time they are guaranteed the rights protected by the various human rights treaties and covenants. China's treatment of Tibetan people under its national minority laws clearly falls considerably short of these requirements.¹¹²

The situation in Tibet appears to rather easily satisfy the requirements for international recognition of the Tibetan right to autonomy. First, China committed itself to provide autonomy in its 17-point agreement. Further, it appears to many researchers that Tibet was already effectively an independent state in the early twentieth century when this agreement was struck under the duress of the Chinese occupation. Even if this so-called "de facto independence" is not recognized, then the second route to the right to autonomy is clearly established. That Tibetans are an indigenous population seems empirically true by virtue of the available criteria discussed above. Their distinctiveness, separate language, distinct culture and subordination to a dominant population all point to this reality. Under the declaration that China voted for, they would clearly be entitled to autonomy and self-governance guarantees. That both cases are relatively strong at a minimum points to the justification for other countries, including India, to take an interest in this issue. Practically, however

103. See Indigenous Peoples' Declaration, *supra* note 91, Preamble.

104. See *supra* notes 27-55, and accompanying text.

105. Minnie Chan & Shaikh A. Rahman, *PLA live-fire drills warning to India on borders: experts*, SOUTH CHINA MORNING POST, Nov. 2, 2010 at A6.

106. Indigenous People's Declaration, *supra* note 91, art. 3.

107. *Id.* art. 4.

108. *Id.* art. 12.

109. *Id.* art. 18.

110. *Id.* art. 19.

111. *Id.* art. 37.

112. See *supra* note 27-55, and accompanying text, for a reflection on China's willingness to really consult with indigenous representatives and the many specific shortcomings in how Tibetans are permitted to participate in their own governance.

China wants to characterize the Tibetan people, it is clear that a responsible approach would be to adhere to the Indigenous Declaration that it had earlier supported. This would not only slow the flow of refugees into India but would also open the door to a more fruitful Sino-Tibetan relationship.

CONCLUSION: THE SOLUTION--ACHIEVING AUTONOMY
UNDER THE CHINESE CONSTITUTION

China faces a choice between continuing to pursue its existing Tibet policy with its tendency to maintain a now 60-year festering sore on the Sino-Indian border or considering a more open-ended flexible approach. I would suggest a hybrid approach combining its national minority laws and the approach under Article 31 of the PRC Constitution, as proposed in the Tibetan Memorandum. The current hard-line approach aiming at assimilation has not shown such flexibility and has created a very contentious situation. Article 31 provides, "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of the specific conditions." This flexible approach, now employed in Hong Kong and Macau, in some hybrid form would certainly be welcomed by the Tibetan side and fit under the frame of China's constitution. The Tibetan memorandum says as much by offering, in the spirit of compromise, a hybrid that would fully implement the current national minority laws with some Article 31 ingredients as security for the arrangement.

Unfortunately, the 2004 Chinese white paper on Tibet expressly rejected the Article 31 approach. China sought to distinguish Tibet from Hong Kong, citing a lack of "imperialist aggression" and contestation over "effective sovereignty":

"The situation in Tibet is entirely different from that in Hong Kong and Macao. The Hong Kong and Macao issue was a product of imperialist aggression against China; it was an issue of China's resumption of exercise of its sovereignty. Since Ancient times Tibet has been an inseparable part of Chinese territory, where the Central Government has always exercised effective sovereign jurisdiction over the region. So the issue of resuming exercise of sovereignty does not exist. With the peaceful liberation of Tibet in 1951, Tibet had fundamentally extricated itself from the fetters of imperialism. Later, through the Democratic Reform, the abolition of the feudal serfdom under theocracy and the establishment of the Tibet Autonomous Region, the socialist system has been steadily consolidated...So the possibility of implementing another social system does not exist either...Any act aimed at undermining and changing the regional ethnic autonomy in Tibet is in violation of the Constitution and law..."¹¹³

113. White Paper, *supra* note 22.

The questionable claims about ancient inseparability, liberation and socialist consolidation clearly cast doubt on Chinese policies.

Because of this statement, Tibetan negotiators have put their case under PRC Constitution Article 4 and national minority laws, arguing that the Chinese have not fulfilled their own expressed commitments. While China has promised local autonomy and a flexible approach tailored to specific minority interests,¹¹⁴ it has imposed a rigid top-down approach.¹¹⁵ Chinese officials have rejected the Tibetan middle way approach most recently reflected in the Tibetan Memorandum, arguing that the “middle way” approach is “tantamount to not recognizing the Central Government, not recognizing ethnic autonomy, and not recognizing the socialist system.”¹¹⁶ It seems that China will enter serious discussions with the Tibetan side only if the Tibetans admit there is nothing to discuss.¹¹⁷

A policy that genuinely respects Tibetan autonomy and treasures Tibet as a valued national constituent of the Chinese multinational state may offer a more appropriate path to resolution of this issue. The current Dalai Lama could be a reliable and efficacious partner in resolving these issues. While India has no direct control over Chinese policy, by hosting the Dalai Lama and his fellow exiles India plays a role in preserving Tibetan claims until a more agreeable solution can be found. Beyond this important historical role, India can be a voice to encourage a reasonable approach, perhaps using the Tibetan Memorandum as a discussion text going forward.

114. This promise was originally made in the 17-point Agreement and is currently made under the NLRA laws. *See supra* notes 27-55, and accompanying text.

115. Interview with Kalon Tripa, Chair of the Kashag or elected Prime Minister Samdhong Rinpoche, Dharamsala, India (Aug. 3, 2006).

116. Author's interview with Liu Hongji, Tibetology Research Centre, Beijing, China (Aug. 25, 2006).

117. *See SMITH, supra* note 57, at 256.