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## Chapter 8

### International Recognition of Autonomy for Indigenous Populations: The Case of Tibet

*Michael C. Davis*

#### **Introduction**

This chapter addresses China's Tibet policy and the claims made about it in relation to international legal standards and practices. At this critical time in a Sino-Tibetan dialogue that has gone on since 2002, a book on activating human rights and peace offers an excellent venue for China and the international community to evaluate various claims and policies and consider a path forward. China's claims about Tibet have provided a weak foundation for its policies. Emerging international standards concerning the human rights and political autonomy of indigenous ethnic populations may offer a more constructive path forward. Such standards may afford an agreeable alternative to the path of seeking independence that China fears. After the recent decision by the International Court of Justice in the Kosovo case upholding a right to declare independence Chinese anxieties about Tibetan intentions will only increase.<sup>1</sup> Now may be the time for a policy change to pursue an autonomy model more likely to satisfy the Tibetan urge for self-rule in the Chinese context.

In the following section I will briefly introduce the current dialogue process between the Chinese government and the Tibetan government-in-exile. This will be followed by discussion of three international legal aspects: first, claims regarding historical title, second, questions of sovereignty and non-intervention, and, third, models for autonomy with particular reference to the UN Declaration on the Rights of Indigenous Peoples. I will then conclude by noting that the latter standards are achievable under the Chinese Constitution if a flexible and constructive approach is taken. It is hoped that such efforts by this internal ethnic national group to achieve autonomy through non-violent strategies may inform similar efforts in other national contexts.

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<sup>1</sup> Advisory Opinion, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, International Court of Justice, July 22, 2010. Chinese concern about this issue is clearly signaled by its first ever written and oral submission of argument before the ICJ.

### The Sino-Tibetan Impasse

An efficient starting point to assess China's stance on Tibet is to consider its explicit positions taken in its dialogue with the Tibetan leaders in exile. The March 2008 Tibetan uprising and the subsequent Chinese crackdown gave rise to a flurry of Sino-Tibetan discussions in the lead-up to the Beijing Olympics. Chinese officials faced international pressure to meet with the Dalai Lama's representatives (Lam 2008: 2-4). They quickly held an informal meeting with Tibetan representatives in Shenzhen in May of 2008 and scheduled the seventh and eighth rounds in their formal dialogue for July and October.

For the Chinese, holding the meeting and not substantive dialogue was the objective. The Chinese side 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'.<sup>2</sup> 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'.<sup>3</sup> They challenged the Dalai Lama's credentials to represent the Tibetan people, insisting that he must speak to the central government as a 'common person'.<sup>4</sup> They launched personal attacks on the Dalai Lama, labelling him a 'wolf in monk's robes' and lumping together all branches of the exile Tibetan community as the 'Dalai clique' (Davis 2008). Though sceptical, foreign governments have shown little inclination to publicly confront the Chinese stand.

In the July 2008 meeting, as per China's request, the Tibetan exiles presented a 'Memorandum on Genuine Autonomy for the Tibetan People' outlining their initial proposals to implement genuine autonomy under the Chinese Constitution.<sup>5</sup> The Memorandum calls for autonomy in eleven policy areas, including language, culture, religion, education, environmental

<sup>2</sup> 'Chinese official urges Dalai Lama to respond with sincerity after recent contact' *Xinhua*, Beijing, July 6, 2008.

<sup>3</sup> Id.

<sup>4</sup> 'China unwilling to broach Tibet with Dalai,' *Indo-Asian News Service*, Beijing, Tuesday, July 15, 2008.

<sup>5</sup> 'Memorandum on Genuine Autonomy for the Tibetan People,' Issued During the Seventh Sino-Tibetan Meeting, November 4, 2008 (hereinafter 'Tibetan Memorandum'). See also 'Summary of the Memorandum on Genuine Autonomy for the Tibetan People' Dharamsala, India, November 16, 2008.

protection, utilization of natural resources, economic development and trade, public health, public security, population migration and cultural, educational, and religious exchanges with other countries. All of these are covered by existing unfulfilled national ethnic autonomy laws enacted under Article 4 of the PRC Constitution, except those relating to local provision of public security, control over immigration and autonomous rights to conduct external exchanges in non-sensitive commercial and cultural areas. The latter more closely track the Article 31 ‘one country, two systems’ Hong Kong formula. Though they do not mention their indigenous status, the proposals also largely track the requirements of the UN Declaration on the Rights of Indigenous Peoples discussed below. The Memorandum further proposed to unify into one the thirteen contiguous designated Tibetan areas.

In response, the Chinese positioned hardened further. In a November 2008 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. The Tibetan request for ‘genuine autonomy’ was labelled a request for ‘a high degree of autonomy,’ as is promised to Hong Kong, and the Tibetans were accused of seeking ‘half-independence,’ and ‘covert independence’.<sup>6</sup> Tibetans were further accused of ‘collud(ing) with such dregs as “democracy activists”, “falunkun (falungong) elements” and “Eastern Turkistan terrorists,”’ while efforts to control immigration were characterized as ‘ethnic cleansing’. The meetings were expressly aimed at persuading the Dalai Lama to ‘give up his splitting activities’. The State Council declared, ‘We never discussed the so-called ‘Tibet issue’ and will ‘never make a concession’. In January 2009 China showed even greater indifference by creating a new holiday named ‘Serfs Emancipation Day,’ to celebrate their ‘liberation’ of Tibet.<sup>7</sup>

Despite such indifference, a large mid-November Tibetan exile meeting in Dharamsala decided to persist in efforts at achieving ‘genuine autonomy’ under the Dalai Lama’s long-standing

<sup>6</sup> Address at the Press Conference by the State Council Office, Beijing, November 10, 2008 (hereinafter ‘State Council Address’) (address given by Mr. Zhu Weiqun, Executive Vice-Minister of the United Front Work Department of the CPC Central Committee). The United Front Work Department has historically been responsible for national minority affairs.

<sup>7</sup> ‘Tibet Sets “Serfs Emancipation Day”’ *Xinhua*, January 19, 2009, [http://www.chinadaily.com.cn/china/2009-01/19/content\\_7410293.htm](http://www.chinadaily.com.cn/china/2009-01/19/content_7410293.htm)

'middle way' approach.<sup>8</sup> Tibetan exiles determined to suspend this fruitless series of talks and find more effective nonviolent strategies to promote their cause.<sup>9</sup> Rhetorically, the parties' positions appear to overlap in supporting autonomy under Chinese sovereignty.<sup>10</sup> The Chinese government claims that autonomy is provided under existing national minority laws-which some would say is no autonomy at all.<sup>11</sup> 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.<sup>12</sup> There is fear this has already happened in the cities (Dreyer 2006: 129-151; Blondeau and Buffetrille 2008: 144-151).

### **International Legal Standards and Practice**

China has sought to justify its Tibet claims and policies on the basis of international law, arguing, first, its 1951 'liberation' was justified by its historical title; second, that its current policies denying a degree of self-determination are justified by sovereignty and non-intervention; and, third, that Tibetans do not enjoy any international legal rights to autonomy as indigenous peoples or otherwise. As discussed below, these arguments have weak factual and legal grounding. China's forceful maintenance of effective control over Tibet for more than five decades has been its strongest supporting factor, garnering international recognition of its sovereign claims. The uncertain status of autonomy and indigenous rights in international law has encouraged reluctance among foreign governments to directly challenge China's control of Tibet. These policies have, nevertheless, attracted considerable disapproval and criticism.

### *Historical Title*

<sup>8</sup> The Dalai Lama began to articulate his 'middle way' position in speeches in the 1980s before the US Congress and before the European Parliament. Address to Members of the United States Congress: Five Point Peace Plan for Tibet, 21 September 1987; Address to Members of the European Parliament by His Holiness the Dalai Lama, 15 June 1988. See *Autonomy and the Tibetan Perspective*, Tibetan Parliamentary & Policy Research Centre, 2005 (available at [www.tpprc.org](http://www.tpprc.org)); *The Middle-Way Approach, A Framework for Resolving the Issue of Tibet*, Department of Information and Public Relations, CTA Dharamsala, 2006.

<sup>9</sup> 'China's Communist Regime Loosing Ground' *Agencies*, January 16, 2008.

<sup>10</sup> Warren Smith (2008: 279) argues the central issue for Tibetans is the maintenance of Tibetan national identity and for the Chinese is to extinguish it.

<sup>11</sup> White Paper on 'Regional Ethnic Autonomy in Tibet' (hereinafter 'White Paper'), Information Office of the State Council of the PRC, May 2004, Beijing; Interview with Chinese Officials Liu Hongji (and Wang Xiaobin), Tibetology Research Centre, Beijing, August 25, 2006.

<sup>12</sup> *Tabulations on Nationalities of 2000 Population Census of China* (Beijing: Nationalities Publishing House, 2003).

The shared Sino-Tibetan historical narrative offers little support for China's claim to historical title. Like Korea, Tibet appears to have been at most a vassal state during periods of the Yuan and Qing dynasties (Crossley 1999: 327-336).<sup>13</sup> The foreign Mongols who established the Chinese Yuan Dynasty (1270-1368) actually gained the submission of Tibet in 1247AD before they conquered China in 1270 and always operated Tibet as a separate part of their empire (Smith 1996: 83-100). Smith describes a rather carefully calibrated diplomatic relationship from the Yuan Dynasty forward between China's emperors and Tibetan lamas, as imperial attempts at subordination met Tibetan resistance. During the Yuan Dynasty leading Tibetan lamas served as religious advisors to Mongol emperors—a role characterized by the Tibetans as a *Cho-yon* or patron-priest relationship (Sperling 2004: 30-31). This state of affairs receded somewhat in the succeeding Chinese Ming Dynasty (1368-1644), when Tibetan lamas were of interest mostly as intermediaries with the still-threatening Mongols. The succeeding Manchu-dominated Qing Dynasty (1636-1910) featured indirect imperial rule, which in the 18th century sometimes involved occupation of Tibet by imperial forces. Tibet was classified under the Qing's 'exterior empire,' though the Eastern Tibetan provinces of Kham and Amdo were sometimes subject to direct Qing control (Sperling 1994: 121, 134-138, 145, 151). By the late 19th century, the declining Qing began to lose its grip on Tibet.

From 1911 until the PRC invasion in 1950 Tibet enjoyed *de facto* independence. To further justify their 'liberation' of Tibet Chinese officials later depicted Tibet as feudal and savage. Query whether Tibet was any worse off than the other feudal regimes that surrounded it at the time.<sup>14</sup> Nascent forms of constitutional government, involving a cabinet and limited forms of legislative representation had been established during the late Qing. These were further developed during the early twentieth century *de facto* independence and later in exile. It is often ignored in this dispute 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.

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<sup>13</sup> Sperling (2004: 28-30) points out that the Chinese need to recast Tibet as an historically internal part of China to justify occupation came up only under CCP rule.

<sup>14</sup> White Paper. See also Blondeau and Buffetrille (2008: 81-84).

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. While claiming it as their own, Republican Chinese officials generally acknowledged Tibet's special status with only Chinese indirect rule. 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. This included a largely independent central Tibet under Chinese suzerainty with a subordinate Eastern Tibet under Chinese sovereignty. At Simla and later in the 1930s, Republican China acknowledged Tibet's high degree of autonomy under nominal Chinese rule. All parties actually initialled the Simla Convention accepting this view, though the Chinese ultimately did not ratify it, being dissatisfied with the stipulated boundary between inner and outer Tibet (Goldstein 1989: 68-80, 832-841).

When the Chinese People's Liberation Army (PLA) invaded Tibet in 1951, the Dalai Lama faced an offer he could not refuse (Dalai Lama 1991: 64; Goldstein 1989: 798-803), embodied in a 17-point Agreement on 'measures for the peaceful liberation of Tibet'.<sup>15</sup> The 17-point agreement, the only one China ever entered with one of its designated 'national minorities,' still acknowledged the special status of Tibet and promised local autonomous self-rule and indigenous governance. After China failed to keep these commitments, a state of popular rebellion ensued and the Dalai Lama fled to India on March 28, 1959 (Dalai Lama 1991: 136). In September 1965 the TAR was proclaimed under the first People's Congress of the TAR. Tibet is now lumped together with 55 designated 'national minorities' under China's constitution and national minority law.

Historical vassal state status would offer little justification for China's current claim of historical title. This explains why China has pushed the Dalai Lama to accept Chinese historical interpretations and why he has refused (Sperling 1994). In an anti-colonial age such imperial claims are viewed with suspicion. In this case they are particularly weak, given their weak empirical foundation and the fact that even indirect rule appeared to end as the Qing dynasty collapsed.

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<sup>15</sup> Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet, May 23, 1951 (hereinafter '17-point Agreement'). See also Goldstein (1989: 759 – 772).

Added to these difficulties associated with China's imperial past is the general weakness of historical title as an international legal basis for sovereign territorial claims.<sup>16</sup>

*Sovereignty vs. Self-Determination*

Tibetans have lived with six decades of Chinese occupation and direct rule. The reality of Chinese power and control has left Tibetans with little hope of independence. Under such circumstances there is a case for heightened security in international law for internal self-determination and autonomy. International law generally distinguishes between external and internal rights of self-determination.<sup>17</sup> The external right of self-determination is thought to include a right of secession, while the internal right is concerned with minority rights of self-governance within a state. The human rights covenants in Article 1 both provide 'all peoples' with the right to 'freely determine their political status and freely pursue their economic, social and cultural rights'. The Covenants offers no guidance who such 'peoples' are and how the right is to be exercised.<sup>18</sup> This ambiguity has put international law beyond reach for internal groups who might accept autonomy and has promoted independence as the default position (Hannum 1996).

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'.<sup>19</sup> One could argue that Tibet satisfies both of these criteria. Tibet was formerly either independent or a vassal state and Tibetans are now 'denied meaningful access to government to pursue their political, economic, social or cultural development?' Three UN Generally Assembly resolutions passed after the Dalai Lama's

<sup>16</sup> *Western Sahara Case* [1975] I.C.J. 4.

<sup>17</sup> See Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960 UNGA Resolution 1514 (XV), 15 UN Gaor, Supp. (No. 16), UN Doc. A/4684 (1960), at 66; Declarations on Principles of International Law Concerning Friendly Relations and Cooperation Among States, 1970 UNGA Resolution 2625 (XXV), Annex, 25 UN Gaor, Supp. (No. 28), UN Doc. A/5217 (1970), at 121.

<sup>18</sup> International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3.

<sup>19</sup> *Reference re Secession of Quebec*, (1998) 161 DLR (4<sup>th</sup>) 385, para. 135, Supreme Court of Canada.



1959 departure in 1959, 1961 and 1965 appeared to say as much.<sup>20</sup> While the three UN resolutions did not contest Chinese sovereignty and demand withdrawal they did condemn China severely for human rights violations and denial of self-determination.

#### *Indigenous Rights and Autonomy*

Guarantees of autonomy as internal self-determination have generally not been well-secured by international law (Sanders 1986; Kirgis 1994; Heintze 2007). It may be argued, however, that in two circumstances autonomy becomes effectively internationalized: 1) when it is the consequence of treaty arrangements transferring or surrendering sovereignty or 2) when it arises out of the denial of rights of self-determination, especially those of indigenous peoples. The Tibet case implicates both possibilities. The 17-point agreement reflects a treaty arrangement and Tibetans, contrary to China's claims, appear to be indigenous people.

Autonomy for an indigenous population gained greater international support in the 2007 UN Declaration on the Rights of Indigenous Peoples. The Declaration purports to provide a comprehensive account of established international standards for the protection of indigenous peoples.<sup>21</sup> While UN declarations are considered soft law and not legally binding, declarations passed with unanimity that purport to declare existing customary law sometimes qualify as binding customary law. The UN Declaration on the Rights of Indigenous Peoples did enjoy nearly unanimous passage, 143 to 4 with 11 abstentions,<sup>22</sup> and embodies some appearance of interpreting existing customary law surrounding the UN Charter and human rights treaties. The Chinese government voted for the declaration both in the UN Human Rights Council and the General Assembly. Unfortunately, China maintains the position that there are no indigenous peoples in China,<sup>23</sup> claiming 5,000 years of national unity and harmony with minorities living on their own

<sup>20</sup> For a discussion of the three UNGA Resolutions condemning China's human rights record in Tibet (1959, 1961, 1965) and Smith (1996: 492-532).

<sup>21</sup> UN Declaration on the Rights of Indigenous Peoples, (hereinafter 'UN Declaration') [http://www.tebtebba.org/tebtebba\\_files/ipr/undrip/OfficialResolution/A61L.67%20eng.pdf](http://www.tebtebba.org/tebtebba_files/ipr/undrip/OfficialResolution/A61L.67%20eng.pdf).

<sup>22</sup> Id. The four 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.

<sup>23</sup> 'China Concerned with Protection of Indigenous Peoples' Rights' Embassy of the People's Republic of China in Switzerland, 1997/04/01, <http://ch.China-embassy.org/eng/ztnr/rqwt/t138829.htm>.

lands.<sup>24</sup> Given Tibet's unique status, as recognized in the 17-point agreement, there is room for doubt concerning this claim.

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 victims of European colonialism.<sup>25</sup> A 1986 UN study defined indigenous peoples as follows:

Indigenous communities, peoples and nations are those 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 in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, further develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems....<sup>26</sup>

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. Whatever its legal status, this declaration can clearly serve as a useful guide.

China's current policies fall short of the standards articulated in the UN Declaration. The Declaration's preliminary articles emphasize 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 with international law shall not be denied.

<sup>24</sup> Speech of Chinese Representative Group Deputy Tong Zhihwa, Human Rights Council, 1<sup>st</sup> Meeting, 11<sup>th</sup> Drafting Session. [http://www.docip.org/HumanRightsCouncil/sessions1/cddh1\\_5.pdf](http://www.docip.org/HumanRightsCouncil/sessions1/cddh1_5.pdf).

<sup>25</sup> The UN Working Group A 1986 UN study of indigenous populations included several Asian countries in the study: Bangladesh, Burma, India, Indonesia, Japan, Laos, Philippines and Sri Lanka. United Nations Economic and Social Council, UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Jose Martinez Coho, Study of the Problem of Discrimination Against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1983/21/Add.8. (hereinafter 'UN Working Group Report') There are thought to be over 370 million indigenous people worldwide. 'UN adopts declaration on rights for indigenous peoples worldwide' *International Herald Tribune*, September 13, 2007.

<sup>26</sup> UN Working Group Report, 38.

The operative articles of the Declaration guarantee indigenous peoples: the right of self-determination;<sup>27</sup> the right to autonomy or self-government in matters relating to their internal and local affairs;<sup>28</sup> 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;<sup>29</sup> 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;<sup>30</sup> the right to be consulted and prior consent through their own representative institutions before implementing state legislative and administrative measures;<sup>31</sup> the right to recognition, observance and enforcement of treaties, agreements and other constructive arrangements; and the rights protected by the various human rights treaties and covenants. China's weak commitment to these ideals is evident in its practices under its national minority laws.

China's national minority autonomy policies are promulgated in articles on national regional autonomy in the 1982 PRC Constitution<sup>32</sup> and in the Law on Regional National Autonomy (LRNA) passed in 1984, as revised in 2001.<sup>33</sup> PRC Constitution Article 4 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'. In seeming appreciation of the above customary international standards, the LRNA expressly provides for 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 the difficulty. These laws have been weakly applied, in contrast to the broad and flexible autonomy provision suggested by the UN Declaration and those applied under Article 31 of the PRC Constitution to Hong Kong.

<sup>27</sup> Article 3, Indigenous People's Declaration.

<sup>28</sup> Id., Article 4.

<sup>29</sup> Id., Article 12.

<sup>30</sup> Id., Article 18.

<sup>31</sup> Id., Article 19.

<sup>32</sup> PRC Constitution (1982), Articles 4, 59, 65, 89 and 112-122.

<sup>33</sup> Law of the People's Republic of China on Regional National Autonomy (hereinafter LRNA), 1984, revised 2001.

Author

**Comment [1]:** Should this read something like 'consulted and sought for prior consent'...?

The autonomy provisions in the 1982 PRC Constitution include the power, subject to higher approval, to enact ‘regulations on the exercise of autonomy (*zizhi tiaoli*) and other separate regulations (*daxing tiaoli*) in light of the political, economic and cultural characteristics’.<sup>34</sup> The LRNA, contrary to the UN Declaration, also specifies the need for approval from the next higher level of government.<sup>35</sup> ‘Regulations on the exercise of autonomy’ have the status of a sub-constitution or basic law. It is expected that only one such regulation will be enacted in each autonomous area.<sup>36</sup> Autonomous regions must obtain approval directly from the Central 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 and none are allowed an indigenous form of government.<sup>37</sup> Lesser autonomous areas at the prefecture and county level have received approval from provincial governments for basic autonomy laws but these largely track the Central specified model of governance in the LRNA. Autonomous regions and areas have enacted many ‘separate regulations,’ the second category specified in the authorizing provisions.<sup>38</sup> Ordinary laws unrelated to autonomy do not require such higher approval.<sup>39</sup>

Chinese Communist Party (CCP) control over the legislative drafting processes in autonomous areas depreciates local autonomy even further, requiring party oversight and approval at every step in the legislative drafting process. This leaves very little legislative discretion for local ‘autonomous’ communities.<sup>40</sup> Given the centre’s control over the CCP and the fact that party officials from the centre have always occupied top local party positions, there is little room for local legislative initiative (Blondeau and Buffetrille 2008: 191-196).

<sup>34</sup> PRC Constitution (1982), Article 116.

<sup>35</sup> LRNA Article 19. Such provision is repeated in Article 66 of the Legislative Law.

<sup>36</sup> LRNA, 10.

<sup>37</sup> Yash Ghai, China’s Constitutional and Legal Framework for Autonomy, Limitations and Possibilities for Negotiations, draft paper, June 18, 2005, 19. (Available from author)

<sup>38</sup> Separate regulations are regulations made by autonomous legislative bodies on specific topics such as Language, marriage, family planning, etc.

<sup>39</sup> See Chunli Xia, *Autonomous Legislative Power in Regional Ethnic Autonomy of the People’s Republic of China: The Law and the Reality*, presented in Conference on ‘One Country, Two Systems, Three Legal Orders-Perspectives on Evolution’, Macau, February 2007 (citing Organic Law of the People’s Republic of China, Article 7 and the Legislative Law, Article 63).

<sup>40</sup> Chunli Xia describes a complex system of CCP oversight at every stage of the legislative drafting process. Id., 19-20.

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 indigenous forms of government, renders such areas especially susceptible to top-down central administrative control. Second, Marxist ideology denies the essential character of China's policies in Tibet. While there is no room for a full elaboration here, suffice it to say that over the years Tibetans have experienced a full range of repressive CCP policies, including: military occupation and crackdowns, the sacking and razing of Buddhist monasteries during the Cultural Revolution, suppression of religion, coerced 're-education' of monks and nuns in monasteries (including demands that they renounce the Dalai Lama), imprisonment of dissidents, and the forced relocation of rural dwellers and herders to more populated areas.<sup>41</sup> Marxist doctrines offer a very different account, identifying the 1950s occupation of Tibet as 'liberation' and the above CCP policies as 'democratic reform'. According to Marxist logic colonialism is a product of capitalist exploitation and does not arise in a non-capitalist environment. The exploited classes of Tibet were joined, under a Chinese 'internal multinational system,' in a 'common program' of local autonomous rule.<sup>42</sup> It is apparent to any critical observer that the autonomy regime was merely a temporary solution on the path to ultimate assimilation of minority nationalities (Smith 2008: 233).<sup>43</sup> The 17-point agreement promised, 'Central Authorities would not alter the existing political system in Tibet,' 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 system was in fact imposed after the 1959 uprising.<sup>44</sup>

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<sup>41</sup> Interview with President, Gu Chu Sun Movement of Tibet (Association of former Political Prisoners), Dharamsala, August 3, 2006; Interview of 'Singing Nun' Renchen Choeky, Dharamsala, August 4, 2006 (After refusing to denounce the Dalai Lama in reeducation meetings in their nunnery, 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).

<sup>42</sup> Common Program of the Chinese Peoples Political Consultative Committee (1949).

<sup>43</sup> Chinese officials cite advanced technology and modern communications to justify a more direct form of rule. Interview with Liu Hongji, *supra* note 11.

<sup>44</sup> Assessments and reports on policies and conditions in Tibet have been offered by both sides. See White Paper, *supra* note 11 (highlighting the level of Tibetan participation in local ruling government bodies); Blondeau and Buffetrille (2008: 235, 250-277) (comments by Andrew M. Fischer) (emphasizing economic policies that benefit Chinese more than Tibetans and create dependency); *Tibet: Human Rights and the Rule of Law* (Geneva: International Commission of Jurists, 1997) (noting that critical leadership is still monopolized by the CCP under Chinese control and the Tibetan lack of autonomy), 14-21; Human Rights in China and Minority Rights Group International, *China: Exclusion, Marginalization*

### **Achieving Autonomy for Tibet**

China clearly faces a choice between its failed policies and a more open-ended flexible approach in accordance with international standards. The latter could be achieved, as Tibetans have proposed in their Memorandum, by combining in hybrid form its existing minority laws with the ‘one country, two systems’ approach in Article 31. 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’.

Unfortunately, the 2004 Chinese White Paper on Tibet expressly rejected the Article 31 approach:

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...<sup>45</sup>

The questionable claims about ancient inseparability, liberation, reform and socialist consolidation clearly attract doubts about Chinese policies.

Tibetan negotiators have tried to navigate around this statement, putting their case under PRC Constitution Article 4 and the national minority laws, arguing that the Chinese have not fulfilled

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*and Rising Tension* (Minority Rights Group International, 2007). Available at <http://hrichina.org/public/PDFs/MRG-HRIC.China.Report.pdf>.

<sup>45</sup> White Paper, *supra* note 11.

these commitments.<sup>46</sup> Chinese officials have rejected this move, arguing that the ‘middle way’ approach is ‘tantamount to not recognizing the Central Government, not recognizing ethnic autonomy, and not recognizing the socialist system’.<sup>47</sup> It often seems that China will enter serious discussions with the Tibetan side only if the Tibetans admit there is nothing to discuss (Smith 1996: 256).

The Chinese often express worry about a slippery slope, where Tibetans may see autonomy as the first step to independence or the neighbouring Uyghurs in Xinjiang may be encouraged to ask for the same. It appears more likely that a reasonable and secure settlement that respects Tibetan identity and autonomy may satisfy the Tibetans and may offer a good example for settlement of Uyghur concerns. Other identified national minorities, who have long been part of China, are unlikely to pose similar demands. The current Dalai Lama could be a reliable and efficacious partner in resolving these issues.

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<sup>46</sup> Interview with Kalon Tripa (Chair of the Kashag or elected Prime Minister) Samdhong Rinpoche, Dharamsala, India, August 3, 2006.

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