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The Effect of the Tiananmen Square Massacre Upon Negotiations for the Draft Basic Law of the Hong Kong Special Administrative Region

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I. Introduction

It began in mid-May 1989 as a student hunger strike[1] staged to protest governmental corruption and nepotism, and to demand democratization;[2] it ended June 4 as soldiers of the People's Liberation Army leveled AK-47's at a crowd of thousands and opened fire.[3] The place was Tiananmen Square, in the heart of Beijing.[4] The massacre at Tiananmen Square, and the Chinese government's actions in the weeks following the massacre, were watched closely in Hong Kong which is scheduled to be reunified with China in 1997.[5]

This Comment will examine the effect of the massacre and the Chinese government's subsequent actions upon the negotiation of certain provisions of Hong Kong's future laws. Section II will examine the massacre, China's subsequent denial of any massacre, and Hong Kong's reaction to those events. Section III will discuss Great Britain's acquisition of Hong Kong, and the China-Britain agreement regarding Hong Kong. Section IV will compare provisions for the protection of human and individual rights contained within the Constitution of the People's Republic of China (PRC Constitution),[6] the China-Britain Joint Declaration,[7] (Joint Declaration) and the Draft Basic Law (DBL)[8] which has been proposed for Hong Kong.

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1. Benjamin, *State of Siege: With Tiananmen Square the Epicenter, a Political Quake Convulses China*, TIME, May 29, 1989, at 36.

2. Elson, *China: Backed by the Army and Deng Xiaoping, Beijing's Hard-Liners Win the Edge Over Moderates in a Closed-Door Struggle for Power*, TIME, June 5, 1989, at 20.

3. Birnbaum & Chua-Eoan, *Despair and Death in a Beijing Square*, TIME, June 12, 1989, at 24 [hereinafter Birnbaum].

4. *Id.* This Comment's identification of Tiananmen Square as the place of the massacre is meant to include all the deaths which occurred in Beijing as part of the uprising, whether these occurred in the Square itself or in the city.

5. *See* Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, China-Great Britain, 1984 Gr. Brit. T.S. No. 2352 (Cmd. 20) *reprinted in* 23 I.L.M. 1336; 7 LOY. L.A. INT'L & COMP. L.J. 142 (1984) [hereinafter Joint Declaration].

6. ZHONG HUA REN MIN GONG HE GUO XIAN FA (People's Republic of China Constitution) [hereinafter PRC CONST.].

7. Joint Declaration, *supra* note 5.

8. THE DRAFT BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF

Proposed articles of the Draft Basic Law which are possible avenues for the limitation of human and individual rights will also be identified.

II. The Massacre at Tiananmen Square

The demonstrations began in Tiananmen Square, in the heart of Beijing.[9] The student protesters were joined by hundreds of thousands of workers and sympathizers, paralyzing China's capital.[10] Ferment spread to at least a dozen other cities[11] including Shanghai, Guangzhou, Xian, and Chengdu.[12] On May 20, 1989, Premier Li Peng and President Yang Shangkun imposed martial law, and troops entered Beijing.[13] The protests diminished in size but did not cease, and each time troops attempted to move into the city they were met by groups of citizens who blocked the soldiers' path.[14] The stalemate lasted until June 4 when China's leadership ordered soldiers to remove the protesters from Tiananmen Square.[15] The military moved into the Square, and thousands of students and workers were massacred.[16]

In the days following the massacre, it became apparent that China's leadership was attempting to deny that any killings had taken place.[17] While observers reported that as many as 20,000[18] citizens were killed at Tiananmen Square, China's leadership claimed that no more than 100 died.[19] Chinese leaders also claimed that army troops "were viciously attacked by rioters"[20] and denied that soldiers fired directly at anyone.[21] China's official account varied sharply from reports given by survivors of the carnage.[22]

Foreign journalists also reported that China engaged in an effort to arrest and execute those who participated in the demonstrations.[23] Organizers of the demonstrations have been the targets of

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THE PEOPLE'S REPUBLIC OF CHINA for Solicitation of Opinions, *reprinted in* 20 CASE W. RES. J. INT'L L. 301 (1988) [hereinafter DRAFT BASIC LAW].

9. Elson, *supra* note 2, at 20.
10. *Id.*
11. Benjamin, *supra* note 1, at 40.
12. Talbott, *Defiance*, TIME, June 19, 1989, at 10.
13. Elson, *supra* note 2, at 20.
14. *Id.* at 23.
15. Birnbaum, *supra* note 3, at 24.
16. *Id.* For the purposes of this Comment, the term "Tiananmen Square" has ceased to describe just a location; it has come to symbolize an event and will be used in that context.
17. Smolowe, *Deng's Big Lie: The Hard-Liners Rewrite History to Justify Arrests and Bury Democracy*, TIME, June 26, 1989, at 32.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 34.

these manhunts.[24] Pictures of student leaders of the demonstrations have been broadcast on Chinese television,[25] and the citizens of China have been exhorted to turn in these "counter-revolutionaries."[26]

In Hong Kong,[27] the events in China did not go unnoticed. Hong Kong, once a part of China, is currently a British Crown Colony and is scheduled to be reunified with China in 1997.[28] The population of Hong Kong voiced strong support for the protesting citizens in China.[29] One million inhabitants of Hong Kong thronged the streets of the Colony[30] to demonstrate in support of those protesting in Tiananmen Square. The unity of a shared ethnic and cultural background diminished any differences brought about by 147 years of British rule. Hong Kong residents said: "[t]he people in Tiananmen Square are my brothers and sisters. They have the same blood as I do. I am Chinese."[31] "Blood has flowed like a river. A catastrophe has befallen my country."[32] After the May 20 declaration of martial law in China, two Hong Kong negotiators walked out of talks with China,[33] which were intended to develop Hong Kong's future laws. Negotiations were suspended after the walk-out.[34] The Hong Kong negotiators said that events in China had undermined the confidence of the people of Hong Kong.[35] Hong Kong's concern can only be deepened by China's subsequent attempts to rewrite the history of June 4. Television news reports, broadcast worldwide, clearly showed soldiers firing upon the crowd,[36] yet China denied that the soldiers fired at anyone.[37] Hong Kong surely wondered at its own future after reunification, and at the amount of faith it could place in China's promises.

Ninety-eight percent of the population of Hong Kong is Chinese.[38] While Hong Kong has been perceived as apolitical and devoted to the business of business,[39] "since the student movement blossomed in Beijing last April, Hong Kong has been galvanized. It

24. Amnesty International, *Amnesty Action*, 4, col. 1 (Sept./Oct. 1989).
25. Smolowe, *supra* note 17, at 32.
26. *Id.* at 33.
27. *See infra* Appendix I.
28. Joint Declaration, *supra* note 5.
29. Greenwald, *Next Door and Eight Years Away: Hong Kong Demands Greater Freedom for China — and Itself*, TIME, June 5, 1989, at 29.
30. *Id.*
31. *Id.*
32. Stewart, *Fear and Anger in Hong Kong*, TIME, June 19, 1989, at 22.
33. Greenwald, *supra* note 29, at 29.
34. *Id.*
35. *Id.*
36. Talbott, *supra* note 12, at 10.
37. Smolowe, *supra* note 17, at 32.
38. Stewart, *supra* note 32, at 22.
39. Greenwald, *supra* note 29, at 29.

has found an identity at last, and it is Chinese."[40] Now, Hong Kong's confidence in China has been undermined by the massacre at Tiananmen Square, and there is concern over a future under China's control.[41]

One of the greatest concerns of Hong Kong citizens is whether the guarantees contained within the Joint Declaration,[42] which establishes the reunification of China and Hong Kong, will be honored. The Joint Declaration provides for promulgation of a Basic Law[43] for Hong Kong. The Basic Law is still being negotiated by the Basic Law Drafting Committee (BLDC),[44] and will not be promulgated until 1990.[45] The DBL has been published[46] for comment and the solicitation of opinions. It may be helpful to examine the Constitution of the People's Republic of China (PRC), in particular its provisions protecting human and individual rights, interpreted in light of the events in Tiananmen Square. The provisions of China's Constitution can be compared with similar provisions in the Joint Declaration and DBL. It will then be possible to identify areas of the DBL which Hong Kong's negotiators need to focus upon to ensure protection for human and individual rights.[47]

III. The History of Britain's Acquisition of Hong Kong

Great Britain acquired Hong Kong Island in 1842 through the Treaty of Nanking.[48] After China's defeat in the Opium Wars, it ceded the Island of Hong Kong to Britain in perpetuity,[49] as part of the price paid for cessation of hostilities.[50] After eighteen additional years of conflict with Britain,[51] China ceded additional territory to Britain as the price of peace. The Kowloon peninsula[52] and nearby Stonecutters Island[53] were ceded to Britain in perpetuity through the

40. *Id.*
41. Chua-Eoan, *China: The Wrath of Deng*, TIME, June 19, 1989, at 18.
42. *See generally* Joint Declaration, *supra* note 5.
43. *See generally* DRAFT BASIC LAW, *supra* note 8.
44. Lau, *Structure of the Hong Kong Special Administrative Region Government*, 20 CASE W. RES. J. INT'L L. 51, 52 (1988).
45. *Id.*
46. Los Angeles Daily Journal, June 23, 1988, at 4, col. 1.
47. For the purpose of this Comment, it is necessary to assume that China will honor the provisions of the Joint Declaration and Draft Basic Law. While it is acknowledged that there is a possibility that the assumption is in error, that is a subject for another discussion and is beyond the scope of this Comment.
48. Treaty of Nanking, August 29, 1842, China-Great Britain, 50 British and Foreign State Papers 389, *reprinted in* 93 PARRY'S T.S. 465 (1979) [hereinafter Treaty of Nanking].
49. *Id.* at art. III.
50. *Id.* at para. 1.
51. Jackson, *The Legal Regime of Hong Kong After 1997: An Examination of the Joint Declaration of the United Kingdom and the People's Republic of China*, 5 INT'L TAX & BUS. LAW. 379, 380 (1987).
52. *See infra* Appendix I.
53. *Id.*

Convention of Peking.[54] The Convention of 1898 leased the New Territories[55] to Britain for ninety-nine years.[56] These areas together are a whole, and constitute present-day Hong Kong.

China has, at least since the early 1960s, maintained that these agreements are unequal treaties and are subject to renegotiation.[57] China considers all treaties imposed upon it during the period of European expansion and colonization "in the nineteenth and early twentieth centuries . . . to be unequal treaties."[58] Although China has never offered a definition of the term unequal treaties,[59] it does suggest that there must be genuine equality between the parties; equality depends upon "state character, economic strength, and the substance of correlation of the contracting states."[60]

The reunification agreement was the result of British negotiations with China beginning in 1982. The need for negotiation at that time was due in part to threatened economic disruption in Hong Kong.[61] Britain's ninety-nine year lease, acquired through the Convention of 1898, technically applied to only the New Territories.[62] While the expiration of the lease in 1997 relates only to this portion of present-day Hong Kong, the interdependence of the areas comprising the colony makes partition unlikely.[63]

In light of the approaching 1997 deadline, the Hong Kong business community was concerned over the extension of current private real estate leases, which typically run at least fifteen years.[64] Reluctance to extend current leases thus led to the Britain-China negotiations which culminated in the signing of the Joint Declaration in 1984.[65]

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54. Convention of Peking, Oct. 24, 1860, China-Great Britain, art. VI, 50 British and Foreign State Papers 10, *reprinted in* 123 PARRY'S T.S. 71 (1979).

55. *See infra* Appendix I.

56. Convention of 1898, June 9, 1898, China-Great Britain, para. 1, 50 British and Foreign State Papers 17, *reprinted in* 186 PARRY'S T.S. 310 (1979) [hereinafter 1898 Convention].

57. H. CHIU, THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES 97 (1972).

58. *Id.* at 63.

59. *Id.*

60. *Id.*

61. Corwin, *China's Choices: The 1984 Sino-British Joint Declaration and its Aftermath*, 19 L. & POL'Y INT'L BUS. 505, 506-07 (1987).

62. 1898 Convention, *supra* note 50, at para. 1.

63. Jackson, *supra* note 51, at 380.

64. Corwin, *supra* note 61, at 507.

65. *Id.*

IV. Comparison of the Constitution of the PRC, the Joint Declaration, and the Draft Basic Law: Protection and Violation of Human and Individual Rights

A. Human Rights as a Global Concept

Certain events or situations may be viewed differently by individuals of different cultural, ethnic, or religious backgrounds. Some moral or cultural values vary widely. Religious intolerance, for example, lies at the heart of the disturbances in Northern Ireland. In South Africa, racial intolerance is codified in the system of apartheid. The debate over abortion is a source of discord in the United States. The appropriateness of capital punishment is a subject over which people differ, with some countries such as the United States permitting execution and others, such as France, prohibiting it.

There are other events such as genocide and homicide, which are viewed almost universally as wrongs. A country's deliberate massacre of its own citizens is an act which would and, in the case of Tiananmen Square, has received worldwide condemnation.

B. Examination of China's Constitution: Can Tiananmen Square be Justified Under its Provisions?

Although China is attempting to rewrite the history of the Tiananmen Square massacre,[66] a reading of China's Constitution reveals that its articles can be interpreted to permit the very events which occurred. The State is given the power to maintain public order and suppress "treasonable and other counterrevolutionary activities."[67] Using this power, the state can infringe upon the rights of China's citizens. While the Constitution gives certain rights to citizens, it also imposes certain duties upon them.[68] The duties required of each citizen are the gateway to the state's limitation of individual rights.

Citizens are given freedom of speech and demonstration,[69] provided that their use of these freedoms does not "infringe upon the interests of the State, of society, . . . or upon the lawful freedoms and rights of other citizens."[70] The students in Tiananmen Square,

66. Smolowe, *supra* note 17, at 32.

67. "The state maintains public order and suppresses treasonable and other counterrevolutionary activities; it penalizes actions that endanger public security and disrupt the socialist economy and other criminal activities, and punishes and reforms criminals." *Id.* at ch. 1, art. 28.

68. "Every citizen enjoys the rights and at the same time must perform the duties prescribed by the constitution and the law." *Id.* at ch. 2, art. 33, para. 3.

69. "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration." *Id.* at art. 35.

70. "The exercise by citizens of the People's Republic of China of their freedoms and

therefore, were permitted to demonstrate so long as they did not infringe upon the rights of other citizens, such as those who work in public sanitation and maintenance or require access to or through the square,[71] or those who simply wish to use the square.[72] While the students were free to "criticize or make suggestions"[73] regarding the government, these criticisms must be "relevant,"[74] and must not be a fabrication or distortion. The citizens of China have a duty to "safeguard the unity of the country,"[75] to "abide by the Constitution and the law, keep state secrets, and protect public property,"[76] and a duty to not "commit acts detrimental to the security [of China]."[77]

While this theoretical exercise finds potential justification for the Tiananmen massacre in the Constitution of the PRC, China has not attempted to justify its actions in this manner. China has neither explained nor attempted to justify the Tiananmen Square massacre; instead it has attempted to rewrite the history of that event.[78]

1. Application of the PRC Constitution to the Arrests and Executions Following Tiananmen Square.—In justifying the pursuit, arrest and, in some cases, execution of participants in the student uprising, official explanations have labeled the participants as counterrevolutionaries.[79] The government of China has televised pictures of the participants, calling them the country's most wanted criminals.[80] China has exhorted patriotic citizens to turn in these

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rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens." *Id.* at art. 51.

71. "Citizens of the People's Republic of China have the right as well as the duty to work." *Id.* at ch. 2, art. 42, para. 1; "Disturbance of the orderly functioning of the social economy or disruption of the state economic plan by any organization or individual is prohibited." *Id.* at ch. 1, art. 15, para. 2.

72. "Socialist public property is sacred and inviolable. The state protects socialist public property . . . . Appropriation or damage of state or collective property by any organization or individual by whatever means is prohibited." *Id.* at art. 12; "The state protects places of ethnic and historical interest, valuable cultural monuments and relics and other important items of China's historical and cultural heritage." *Id.* at art. 22, para. 2.

73. "Citizens of the People's Republic of China have the right to criticize and make suggestions to any state organ or functionary. Citizens have the right to make relevant complaints and charges against, or exposure of, violation of the law or dereliction of duty by any state organ or functionary; but fabrication or distortion of facts with the intention of libel or frame-up is prohibited." *Id.* at ch. 2, art. 41, para. 1.

74. *Id.*

75. "It is the duty of citizens of the People's Republic of China to safeguard the unity of the country and the unity of all its nationalities." *Id.* at art. 52.

76. "Citizens of the People's Republic of China must abide by the constitution and the law, keep state secrets, protect public property and observe labour discipline and public order and respect social ethics." *Id.* at art. 53.

77. "It is the duty of citizens of the People's Republic of China to safeguard the security, honour and interests of the motherland, they must not commit acts detrimental to the security, honour, and interests of the motherland." *Id.* at art. 54.

78. Smolowe, *supra* note 17, at 32.

79. *Id.*

80. *Id.*

"criminals,"[81] terming them counterrevolutionaries and hooligans.[82] Those who have been arrested have been paraded on television where they publicly "confessed" that they were counterrevolutionaries.[83] Some have been arrested and charged with rumormongering or treason.[84]

Many of these offenses carry the death penalty,[85] and can be effectively used by China's government to remove those remaining participants who are seen as leaders of the opposition. China has also attempted to silence the press.[86] Chinese television, which had been accurately broadcasting the events at Tiananmen Square, began instead to broadcast only praise of the military, arrest of the participants, and exhortation to the citizenry to turn in the wanted criminals.[87] Foreign journalists are not exempt from China's attempts to halt any discussion of the true story of Tiananmen Square. A Western journalist was charged with "distorting facts"[88] and "stirring turmoil,"[89] and was given seventy-two hours to leave the country.

Can events such as these be prevented from occurring in Hong Kong? With time still available before promulgation of the DBL, Hong Kong may be able to negotiate for provisions in the law which will minimize this possibility.

C. *Joint Declaration*

1. Provisions of the Joint Declaration Which are of Special Concern with Respect to Protection of Human and Individual Rights.—The Joint Declaration and its Annexes, hereinafter jointly referred to as the Joint Declaration, which provide for transfer of sovereignty over Hong Kong, state that China will establish Hong Kong as a Special Administrative Region[90] under article 31 of the Constitution of the PRC, which authorizes the creation of special administrative regions when necessary.[91] The Joint Declaration promises that Hong Kong will enjoy a high degree of autonomy ex-

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. Scobell, *Strung Up or Shot Down? The Death Penalty in Hong Kong and China and Implications for Post-1997*, 20 CASE W. RES. J. INT'L L. 147, 148-49 (1988).
86. Smolowe, *supra* note 17, at 32.
87. *Id.*
88. *Id.*
89. *Id.*
90. Joint Declaration, *supra* note 5, at sec. 3(1).
91. "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." PRC CONST., at ch. 1, art. 31. The Constitution does not identify the meaning of "specific conditions."

cept in foreign and defense affairs, and that the current social and economic systems, as well as the life style will remain unchanged.[92] The Hong Kong Special Administrative Region (HKSAR) will be vested with executive, legislative, and independent judicial power.[93] The Government of the HKSAR will be composed of local inhabitants,[94] and the Chief Executive will be appointed by the Central People's Government of China.[95] The Joint Declaration does not specify the exact process by which the chief executive will be chosen, but mentions consultations or elections.[96]

The declaration provides that maintenance of public order will be the responsibility of the HKSAR.[97] However, the PRC will maintain military forces in the HKSAR "for the purpose of defence;"[98] these forces will not interfere in the internal affairs of the HKSAR.[99] Annex I of the Joint Declaration also provides that the "provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,"[100] to which China is not a signatory,[101] "as applied to Hong Kong shall remain in force."[102]

The policies named in the Joint Declaration will be stipulated in a Basic Law of the HKSAR, and will remain unchanged for fifty years.[103] The National People's Congress, a governing body of the PRC, will enact and promulgate the Basic Law in accordance with the Constitution of the PRC.[104] Annex I of the Joint Declaration provides that the socialist system and policies will not be practiced in the HKSAR,[105] and that the laws previously in force in Hong Kong will be maintained except where they contradict the Basic Law.[106]

2. Ambiguities and Omissions in the Joint Declaration Which Should Be Specifically Addressed in the Basic Law to Ensure Protection of Human and Individual Rights.—One issue which remains unresolved is whether the entire Constitution of the PRC becomes

92. Joint Declaration, *supra* note 5, at sec. 3(2).
93. *Id.* at sec. 3(3).
94. *Id.* at sec. 3(4).
95. *Id.*
96. *Id.*
97. *Id.* at sec. 3(11).
98. *Id.* at Annex I, sec. XII, para. 1.
99. *Id.*
100. *Id.* at sec. XIII, para. 4; *see also International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 14, U.N. Doc. A/6316 (1966) [hereinafter *International Covenants*].
101. Jackson, *supra* note 51, at 415.
102. Joint Declaration, *supra* note 5, at Annex I, sec. XIII, para. 4.
103. *Id.* at sec. 3(12).
104. *Id.* at Annex I, sec. I, para. 1.
105. *Id.*
106. *Id.* at Annex I, sec. II, para. 1.

applicable to any special administrative region created under article 31. While it could be so interpreted, it can also be argued that any special administrative region created in compliance with article 31 would also be in compliance with the Constitution.[107] One commentator suggests that the Constitution of the PRC be amended or revised to stipulate that special administrative regions would not be bound by certain provisions of the Constitution of the PRC.[108] China's leadership may be resistant to an attempt to amend the PRC Constitution. An attempt to incorporate the same concept into the DBL may be more acceptable and more likely to succeed.

Article 31 provides authority for the National People's Congress to enact laws for the special administrative regions "in light of the specified conditions."[109] A statement should be negotiated and incorporated into the Basic Law to the effect that the Basic Law is promulgated under the authority of article 31, and that article 31 is the only article of the PRC Constitution applicable to the HKSAR. Since the events in Tiananmen Square, it is all too clear that some articles of the PRC Constitution can be used, in effect, to eliminate human and individual rights contained within other articles of that Constitution. While a provision in the Basic Law limiting application of the PRC Constitution to article 31 will not necessarily protect Hong Kong from an administration intent upon circumventing the spirit and letter of the Joint Agreement, the absence of any such provision makes it much easier for China to do so.

The Joint Declaration provides that the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights "as applied to Hong Kong shall remain in force."[110] China is not a signatory to either document,[111] and is not, therefore, bound by their terms under international law. To increase the specificity of the Basic Law and decrease the opportunity for selective interpretation, specific provisions of the Covenants, which protect human and individual rights, should be incorporated into the Basic Law. It would also be wise to attempt to negotiate for a provision similar to Part Two, article 5 of the International Covenant on Civil and Political Rights,[112] which prohibits

107. For an excellent discussion of the question *see* Cheng, *The Constitutional Relationship Between the Central Government and the Future Hong Kong Special Administrative Region Government*, 20 CASE W. RES. J. INT'L L. 65, 70 (1988).

108. *Id.*

109. PRC CONST., at ch. 1, art. 31.

110. Joint Declaration, *supra* note 5, at Annex I, sec. XIII, para. 4.

111. Jackson, *supra* note 51, at 415.

112. "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant." *International Covenants, supra* note 101, at Part II, art. 5.

interpretation of provisions in a manner which would destroy or limit the rights and freedoms contained in the document.

On the surface it would appear that China would be reluctant to include specific, carefully worded provisions which would restrict its opportunities to increase its control over, or presence in, the HKSAR. It must be remembered, however, that in light of world condemnation of the Tiananmen Square incident, it would be to China's advantage to accommodate the fears and uncertainties of the citizens of Hong Kong as well as the concerns of those who have business interests there. Failure to do so could result in further delays in promulgation of the Basic Law and in delayed investment in Hong Kong, or in a wholesale retreat of those who have current business interests there.

D. Draft Basic Laws

1. Negotiation and Publication of the Draft Basic Law.—The effort to draft the Basic Law began in 1985.[113] The BLDC was established[114] to draft a Basic Law which would incorporate the principles contained in the Joint Declaration.[115] The Basic Law will establish and define the governmental structure of the HKSAR,[116] and the relationship between the HKSAR and the PRC.[117]

The BLDC "consist[s] of 40 Chinese members appointed by the PRC government and 23 Hong Kong members selected by the initial 40 Chinese members."[118] The ratio of Chinese and Hong Kong members makes it likely that PRC views will prevail. In response, the Hong Kong public insisted that they be allowed to participate in the drafting of the Basic Law;[119] as a result, 180 residents were selected in 1985 from a cross-section of the community to form a Consultative Committee.[120] The Committee is to act as liaison between the Hong Kong community and the BLDC[121] "so that public concern and aspiration will be reflected in the Basic Law."[122]

While it appears that the PRC acted to include Hong Kong in the process of determining its future government, it must be noted that the Consultative Committee is advisory and that ultimately the content of the Basic Law must satisfy the PRC. The Basic Law is to

113. Lau, *supra* note 44, at 51.
114. Jackson, *supra* note 51, at 379.
115. Joint Declaration, *supra* note 5, at art. 3(12).
116. *See generally* Joint Declaration, *supra* note 5.
117. *Id.*
118. Jackson, *supra* note 51, at 382-83.
119. *Id.* at 383.
120. *Id.*
121. *Id.*
122. *Id.*

be enacted and promulgated by the PRC[123] "in accordance with the Constitution of the People's Republic of China."[124]

Between 1985 and the publication of the DBL, viewpoints were "bitterly divided within the . . . BLDC as well as within the Hong Kong community. The biggest contention concerned selections of the chief executive . . . and members of the legislature . . . ."[125] Many within the Hong Kong community did not believe that China would honor the promises it had made,[126] or believed that China would honor "most of the promises made in the Joint Declaration, . . . but [would] retain full control over the political sphere."[127] Those concerns were, no doubt, heightened by remarks made by Deng Xiaoping[128] during an April 1987 meeting with BLDC members at the fourth BLDC plenary session in Beijing.[129] There, Deng indicated that the Basic Law should not borrow wholesale from the West and should not be too detailed.[130] Deng also declared that the separation of powers concept was not suitable for the future government of Hong Kong because Hong Kong was not to be a country.[131]

Although the Joint Declaration promised an independent judiciary,[132] Deng's statement that there should be no separation-of-powers undermines that promise. The Joint Declaration stipulates that China will appoint the chief executive of the HKSAR,[133] and that the chief executive will appoint judges[134] in accordance with recommendations made by an independent commission.[135] With the selection of judges ultimately under the control of the PRC, and without separation-of-powers within the government of the HKSAR, the functioning of the judiciary will be under China's control as well. The promise of an independent judiciary is form without substance.

Two years after the work of the BLDC began, the DBL was published in April 1988[136] for comment by the residents of Hong Kong.[137] A thorough reading of the DBL reveals that the fears of the Hong Kong community may be valid, and that "vague principles contained in the Joint Declaration could be subject to wide-ranging

123. Joint Declaration, *supra* note 5, at Annex I, art. I, para. 1.
124. *Id.*
125. Lau, *supra* note 44, at 51.
126. *Id.*
127. *Id.*
128. *Id.* at 59.
129. *Id.*
130. *Id.*
131. *Id.*
132. Joint Declaration, *supra* note 5, at Annex I, sec. III, para. 2.
133. *Id.* at art. 3(4).
134. *Id.* at Annex I, sec. III, para. 3.
135. *Id.*
136. Los Angeles Daily Journal, *supra* note 46, at 4, col. 1.
137. *Id.*

interpretations.[138] Many of the provisions of the DBL were inconsistent with the spirit and wording of the Joint Declaration. On the surface, these suspect provisions echo the wording of the Joint Declaration, but are either modified by other provisions or are candidates for recharacterization should the Government of China so choose.

2. Appointment and Duties of the Chief Executive: Potential Trouble Spots for Protection of Human and Individual Rights.—The Chief Executive of the HKSAR will be appointed by China,[139] and will be selected either through election or consultation.[140] He or she must be a Chinese national,[141] at least forty years old,[142] and must have resided in Hong Kong for twenty years.[143] The BLDC has currently proposed five alternative methods[144] for selection of the Chief Executive. No matter which method is finally adopted, the candidate will have to be acceptable to China since the PRC retains the power of appointment.

The Chief Executive is to be assisted in policy-making by the Executive Council,[145] a group which he or she selects, then appoints,[146] and over which he or she presides.[147] The Chief Executive retains the power to remove any members of the Executive Council,[148] and is expected to consult with the Executive Council before making important decisions,[149] but is not bound to follow its opinion so long as the reason for not doing so is stated on the record.[150]

The Chief Executive may nominate for appointment the Secretaries and Deputy Secretaries of Departments.[151] China also retains the power to appoint[152] these officials. The Chief Executive and the heads of Departments constitute the Executive Authorities,[153] and the Executive Authorities, in turn, constitute the Government of the HKSAR.[154] This arrangement of power is of concern because of the potential use of China's military presence in Hong Kong. The military forces sent by China are for the defense of the HKSAR[155] and

138. Lau, *supra* note 44, at 52.
139. DRAFT BASIC LAW, *supra* note 8, at ch. II, art. 14.
140. *Id.* at ch. IV, sec. 1, art. 45.
141. *Id.* at art. 44.
142. *Id.*
143. *Id.*
144. *Id.* at Annex I.
145. *Id.* at art. 54.
146. *Id.* at art. 55, para. 1.
147. *Id.* at art. 56, para. 1.
148. *Id.* at art. 55, para. 1.
149. *Id.* at art. 56, para. 2.
150. *Id.* at para. 3.
151. *Id.* at sec. 1, art. 48(5).
152. *Id.*
153. *Id.* at sec. 2, art. 60.
154. *Id.* at art. 59.
155. *Id.* at ch. I, art. 13, para. 2.

may not interfere in local affairs.[156] Article 13,[157] however, gives the government of the HKSAR the power to ask the PRC for the assistance of the military stationed in the HKSAR to maintain public order.

The power of the Chief Executive and Department heads to summon China's military does not require approval or input from the Legislative Council (legislature). The Chief Executive is excused from consultation with his Executive Council in event of emergency,[158] which further reduces the number of individuals involved in the decision to use China's military. While such authority may be useful and necessary in the event of natural disasters, such as earthquakes or typhoons, it is not limited to such events by the terms of article 13.[159] China has thus retained the power to appoint a government that can summon China's military to intervene upon any occasion which it determines a threat to public order. With a Government appointed by China, the risk exists that the military will also be called out if *China* deems it necessary. Tiananmen Square was such an occasion, and China called out its military in response. The DBL opens the door for the government of the HKSAR to act in the same manner. The Hong Kong members of the BLDC should attempt to negotiate for incorporation of language which will limit or specify the instances in which military assistance may be requested.

3. Election and Duties of the Legislature: Further Areas for Potential Compromise of Human and Individual Rights.—The first legislature of the HKSAR will be elected for a two-year term.[160] The mechanism for election of members of the first legislature is somewhat convoluted. The Standing Committee of the National People's Congress of the PRC will select a Preparatory Committee,[161] whose membership will consist of no less than fifty percent Hong Kong members, with the remaining members from mainland China.[162] The Preparatory Committee will establish an Election Committee composed entirely of permanent residents of Hong Kong.[163] The Election Committee will, in turn, select and elect the first legislature of the HKSAR.[164]

With China selecting all the members of the Preparatory Committee, it will no doubt select members sympathetic to its ideology

156. *Id.*
157. *Id.*
158. *Id.* at ch. IV, sec. 1, art. 56, para. 2.
159. *Id.*
160. *Id.* at Annex III, art. 5.
161. *Id.* at art. 1.
162. *Id.*
163. *Id.* at art. 2.
164. *Id.*

and responsive to its wishes. The Preparatory Committee will likely do as China wishes in its selection of the Election Committee, and the Election Committee will be electing the entire first legislature. While this election process honors the letter of the Joint Declaration's[165] promise of an elected legislature, only a minute proportion of Hong Kong citizens will have any direct participation in this putative election.

The DBL gives China a number of other controls over the enactment and amendment of laws;[166] the additional control of selection of the legislating body can, in effect, give China the power to rewrite the existing law during the first legislature's two-year term. While the Joint Declaration[167] promises that the law will remain unchanged, it also provides that the laws are subject to amendment by the HKSAR legislature.[168] Article 8[169] of the DBL echoes the promise, and its caveat. The power to amend the Basic Law, however, remains with China.[170] The Standing Committee of the National People's Congress[171] and the State Council[172] have the right to propose amendments to the Basic Law.[173] The HKSAR may propose amendments by submitting them to the National People's Congress[174] after obtaining the consent of two-thirds of the HKSAR's representatives to the National People's Congress,[175] two-thirds of the members of the legislature,[176] and the Chief Executive.[177]

While the power to change the law is necessary to permit law to evolve, it carries a risk of abuse. There is no provision for any ratification of amendments by the general population of Hong Kong. The power of amendment coupled with China's potential ability to ensure that the first legislature will be sympathetic and responsive to China's views, could result in eradication of the human and individual rights protections incorporated into the Joint Declaration and the DBL.

Alternative methods of election of the first legislature have already been proposed.[178] The Hong Kong representatives on the BLDC may be able to use the incident at Tiananmen Square to ob-

165. Joint Declaration, *supra* note 5, at Annex I, sec. I, para. 3.
166. *See generally* DRAFT BASIC LAW, *supra* note 8, at ch. IV.
167. Joint Declaration, *supra* note 5, at Annex I, sec. II, para. 1.
168. *Id.*
169. DRAFT BASIC LAW, *supra* note 8, at ch. I, art. 8.
170. *Id.* at ch. IX, art. 170, para. 1.
171. *Id.* at para. 2.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at Appendix II.

tain an election process which includes direct voting by the population of Hong Kong, and removes China's pervasive influence in the selection and election of the first legislature.

The DBL specifies that subsequent legislatures will be constituted by a combination of direct and indirect election.[179] Four alternative methods are included in the DBL.[180] The portion of the legislature to be elected through direct elections ranges from twenty-five percent[181] to fifty percent.[182] In order to obtain a legislature responsive to the needs and rights of the population of Hong Kong, it is imperative that the general population be ensured greater participation in election of their representatives. Tiananmen Square may provide the leverage necessary to acquire a more favorable election process.

4. Provisions of the Draft Basic Law Which Threaten the Integrity of the Legislature, and of the Office of Chief Executive.—Articles 67[183] and 45[184] provide that the methods for selecting the legislature and chief executive, respectively, are subject to modification in light of the situation in the HKSAR. Modification requires the approval of two-thirds of the legislature,[185] consent of the Chief Executive,[186] and approval of the National People's Congress of China.[187] Given China's influence in the election of the first legislature,[188] and power of appointment of the Chief Executive[189] of the HKSAR, China may be able to mastermind alteration of the election process. This could occur even where Hong Kong members of the BLDC are able to negotiate and ultimately promulgate an election process which includes direct election. Any laws protecting individual and human rights would be held hostage to the political machinations occurring in China, given China's control or influence over the executive and legislative branches of the HKSAR.

The offending provisions of articles 67[190] and 45[191] should either be eliminated or criteria which specify when modification of the election processes can occur should be incorporated. The Hong Kong members may now have the ability to effect these changes. The fears

179. *Id.* at ch. IV, sec. 3, art. 67.
180. *Id.* at Annex II.
181. *Id.* at Alternative 1(1); Alternative 4(1).
182. *Id.* at Alternative 2(1).
183. *Id.* at ch. IV, sec. 3, art. 67, para. 3.
184. *Id.* at sec. 1, art. 45, para. 3.
185. *Id.* at sec. 3, art. 67, para. 3; ch. IV, sec. 1, art. 45, para. 3.
186. *Id.*; *see also id.* at sec. 1, art. 45, para. 3.
187. *Id.*
188. *See generally id* at Annex III.
189. *Id.* at ch. II, art. 14.
190. *Id.* at ch. IV, sec. 3, art. 67, para. 3.
191. *Id.* at sec. 1, art. 45, para. 3.

in Hong Kong, raised by Tiananmen Square and by China's response to the incident, may make China more amenable to changing the DBL rather than risk economic disruption and an exodus of business investments.

The Chief Executive, after consultation with the Executive Council[192] may, under certain circumstances, dissolve the legislature.[193] The Chief Executive is not required to heed the opinion of the Executive Council,[194] but must state, on the record, the reason for not doing so.[195] The legislature does not have the power to introduce bills.[196] The DBL draws a distinction between bills, which must be introduced by the Executive Authorities,[197] and laws which may be enacted and amended by the legislature.[198] The legislature's failure to pass bills which the Chief Executive deems *important* is one circumstance which can trigger its dissolution.[199] While the Chief Executive may only dissolve the legislature once during each term in office,[200] once would be sufficient where the legislature refused to pass a bill limiting the rights of the citizens of Hong Kong.

5. The Independent Judiciary: Fact or Fiction?—The DBL promises an independent judiciary with the power of final adjudication.[201] The exercise of judicial power is to be free from any interference.[202] What the DBL grants it also may eliminate, for the power to interpret the law of the HKSAR is vested in the Standing Committee of the National People's Congress of the PRC.[203] When the Standing Committee makes an interpretation of the Basic Law, the courts of the HKSAR must follow the interpretation of the Standing Committee.[204] The courts of the HKSAR have no jurisdiction over matters related to defense or foreign affairs,[205] or over other affairs[206] which are the responsibility of the PRC. If a case involves

192. *Id.* at art. 56, para. 2.
193. *Id.* at art. 50.
194. *Id.* at art. 56, para. 3.
195. *Id.*
196. *Id.* at sec. 3, art. 62. The power to introduce bills belongs to the Executive Authorities. *Id.* at ch. IV, sec. 2, art. 62(5). This group consists of the Chief Executive and Department heads, who are nominated by the Chief Executive, and appointed by China. *See id.* at sec. 1, art. 48(5), sec. 2 arts. 59-62.
197. *Id.* at sec. 2, art. 62(5).
198. *Id.* at sec. 3, art. 72(1). The distinction is not expressly defined but is inherent in the terminology of the power granted to the legislature in Article 72, and to the Executive Authorities in Article 62.
199. *Id.* at art. 50, para. 1.
200. *Id.* at para. 2.
201. *Id.* at ch. I, art. 2; ch. IV, sec. 4, art. 81.
202. *Id.* at ch. IV, sec. 4, art. 84.
203. *Id.* at ch. IX, art. 169, para. 1.
204. *Id.* at para. 2.
205. *Id.* at ch. I, art. 18, para. 3.
206. *Id.* Article 169 does not specify what affairs are the other affairs which are the responsibility of the PRC.

interpretation of provisions of the DBL relating to these matters, the court is to seek an interpretation of the provision from the Standing Committee of the PRC.[207]

The promise of an independent judiciary is an empty one. The right of interpretation of the DBL is reserved to the PRC, and the court becomes little more than a rubber stamp for the direct decisions of China. China is free to interpret all provisions of the DBL in any manner it chooses, and may eliminate rights by recharacterizing and selectively interpreting the articles of the DBL. A court can do little but apply what China says is the law to the facts of the case before it. The promise of final adjudication gives Hong Kong little when China retains the power to interpret the law. China may also remove jurisdiction by characterizing a matter as one related to defense, foreign affairs, or to other affairs which are the responsibility of China.

Hong Kong's control over its own judiciary is only an appearance of control. While it is possible that China may be willing to negotiate changes in an effort to ease Hong Kong's fears in the wake of Tiananmen Square, it is more likely that China will wish to retain control over the judiciary. The power to interpret the Basic Law is one of the strongest and most direct mechanisms for control of Hong Kong's population. While China has the power to appoint or influence the appointment of executive and legislative officials, its control over these officials is less direct.

6. Protection of Specific Individual Rights Under the Draft Basic Law: Enough is Never Enough.—Hong Kong's current law retains the death penalty for three offenses,[208] although no executions have been carried out since 1966.[209] The Governor of Hong Kong generally commutes all death sentences.[210] This practice of commutation began shortly after the death penalty for murder was abolished in the United Kingdom.[211]

In China, however, forty-four distinct crimes are capital offenses,[212] including "counter-revolutionary crimes"[213] such as plotting to subvert the government,[214] and "crimes endangering public security"[215] such as hooliganism.[216] China carries out the death pen-

207. *Id.*
208. Scobell, *supra* note 86, at 148. Murder, treason, and piracy with violence carry a possible sentence of death by hanging. *Id.* at 147.
209. *Id.* at 155.
210. *Id.*
211. *Id.*
212. *Id.* at 150.
213. *Id.* at 151.
214. *Id.* (*quoting* the CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA, art. 92).
215. *Id.* at 152.
216. *Id.*

alty, and Western diplomats estimate that as many as 10,000 executions are carried out each year.[217] Amnesty International reports that China is using both public and secret executions as a political tool[218] in the wake of Tiananmen Square. A directive, Document No. 3,[219] approved by the Communist Party's Central Committee, called for the execution of counterrevolutionaries,[220] the concealment of the precise number of individuals executed or imprisoned,[221] and the publication of certain death sentences in order to "make examples."[222]

Reports such as these raise fear for the future of Hong Kong. China's power of interpretation of the Basic Law, and potential control over the executive and legislative processes could mean that the number of capital offenses will increase, and that executions will again be carried out in the HKSAR. The wording of the DBL does not preclude the possibility that China may be able to use execution as a political tool in Hong Kong. For example, article 22[223] requires the HKSAR to "prohibit by law any act designed to undermine national unity or subvert the Central People's Government [of China]."[224] China's power to interpret the DBL gives it the ability to define article 22[225] to include any type of conduct which China wishes to forbid, and to punish that conduct by execution.

The DBL guarantees that Hong Kong residents will have freedom of speech, press, publication, association, assembly, and demonstration.[226] China is free to limit these rights through the use of article 22's[227] prohibition of acts designed to undermine national unity or subvert the government, in conjunction with China's power to interpret the Basic Law under article 169,[228] and its power to amend the Basic Law under article 170.[229] Using these powers in conjunction with article 39[230] which provides that rights and freedom shall not be restricted "*unless prescribed by law*,"[231] China has wide latitude to restrict rights without violating the letter of the Joint Declaration or the Basic Law. While article 39[232] specifies that restrictions

217. *Id.* at 161.
218. Amnesty International, *supra* note 24, at 4, col. 1.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. DRAFT BASIC LAW, *supra* note 8, at ch. II, art. 22.
224. *Id.*
225. *Id.*
226. *Id.* at ch. III, art. 26.
227. *Id.* at ch. II, art. 22.
228. *Id.* at ch. IX, art. 169, para. 1.
229. *Id.* at art. 170, para. 1.
230. *Id.* at ch. III, art. 39.
231. *Id.* (emphasis added).
232. *Id.*

on rights and freedoms may not go beyond that necessary to maintain "national security, public order, public safety, public health, public morals and for the safeguarding of the rights and freedoms of others,"[233] there is little that could not be fit into at least one of those categories.

The DBL,[234] on its face, purports to guarantee a number of other rights and freedoms, including: freedom of person,[235] inviolability of an individual's home,[236] freedom and privacy of communication,[237] and freedom of academic research, literary and artistic creation, and other cultural pursuits.[238] Each of these rights and freedoms could be subject to the same type of manipulation and limitation.

China's power to interpret[239] and amend the Basic Law,[240] coupled with a prohibition of "any act"[241] designed to undermine or subvert the government, gives China a potent arsenal with which it may sabotage the individual rights and freedoms of the citizens of the HKSAR. These powers, in conjunction with China's role in the selection of the Chief Executive and Executive Authorities give China awesome power to eradicate the intent of the Joint Declaration. China has the means to effect any changes it desires; it remains to be seen whether China will do so.

IV. Conclusion

China's political structure is undergoing some reorganization, with a consolidation of power by its hard-line political leaders.[242] Deng Xiaoping's support of the hard-line faction headed by Premier Li Peng,[243] and joined by President Yang Shangkun[244] set the stage for the massacre at Tiananmen Square. On November 10, 1989, Deng Xiaoping resigned his last government position[245] as Chairman of the Central Military Commission. The Central Committee accepted Deng's resignation, and at the same meeting, made changes in the military commission which will increase the power of President Yang Shangkun.[246] While Deng is expected to remain a power-

233. *Id.*
234. *See generally id.* at ch. III.
235. *Id.* at art. 27.
236. *Id.* at art. 28.
237. *Id.* at art. 29.
238. *Id.* at art. 33.
239. *Id.* at ch. IX, art. 169, para. 1.
240. *Id.* at art. 170, para. 1.
241. *Id.* at ch. II, art. 22.
242. Elson, *supra* note 2, at 20.
243. *Id.*
244. *Id.*
245. N.Y. Times, Nov. 10, 1989, at A1, col. 1.
246. *Id.*

ful force in Chinese politics,[247] his resignation and the ensuing reshuffling has served to consolidate power in the hard-line faction.

Hong Kong could have much to fear from this consolidation of power. The hard-line faction was the mastermind of Tiananmen Square,[248] and of the current policy of public and secret executions of counterrevolutionaries.[249]

There are factors which weigh against any attempt to curtail the rights and freedoms promised by the Joint Declaration and DBL. Among these factors are the amount of attention focused upon China since Tiananmen Square, the threat of economic disruption in the Hong Kong economy, and China's desire for reunification[250] with Taiwan.

World opinion may not be a particularly important factor, for world attention was focused upon China during the demonstrations which preceded Tiananmen Square, yet that scrutiny did not prevent a massacre. Perhaps in the balance, threat of worldwide disapproval was outweighed by the fear of widespread political upheaval which could have resulted if a population the size of China's discovered that demonstration could effect change.

China is in the process of effecting an economic austerity program.[251] A stable and prosperous Hong Kong will not only encourage business interests within Hong Kong, but can lead to increased investment in a China which keeps its promises. Businesses will be less reluctant to make long-term investments if they see that promises are honored. The reverse would harm both Hong Kong and China, for businesses would retreat from the present investments in Hong Kong, and would be reluctant to invest in China despite its large labor pool and favorable wages. China's current economic problems may actually serve to ensure the protection of individual rights and freedoms in Hong Kong.

Taiwan has been the site of the Nationalist Government[252] since the 1949 Communist uprising and Mao Zedong's accession to power. Taiwan has long been a target of Deng Xiaoping's[253] efforts to reunify China. While Hong Kong is a British Crown Colony, subject to the control of Great Britain, Taiwan is essentially independent. If China wishes reunification with Taiwan it must use care in its treatment of Hong Kong. Taiwan may share China's racial and ethnic heritage, but Taiwan does not share China's political philosophy and

247. *Id.*
248. Elson, *supra* note 2, at 20.
249. Amnesty International, *supra* note 24, at 4.
250. Jackson, *supra* note 51, at 422.
251. N.Y. Times, *supra* note 239, at A12, col. 3.
252. Scobell, *supra* note 86, at 164.
253. *Id.*

is unlikely to willingly reassociate with China if Hong Kong is treated poorly. If China's interest in reunification is greater than its need for political domination of Hong Kong, then China will be less likely to interfere in Hong Kong.

China's actions toward Hong Kong are not reliably predictable at the present time. Deng Xiaoping's advanced age, and the recent political reshuffling in China make it difficult to predict the path that China will take. The important factors weighing against interference with Hong Kong include China's desire for reunification with Taiwan, and the economic disruption which could result from such interference. World opinion plays some part, but in view of the Tiananmen Square massacre, world opinion is probably only significant as it impacts upon economic activity and reunification efforts with Taiwan. Meanwhile, the citizens of Hong Kong are held hostage to time, for only time will give the answer.

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Huaxian
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Conghua
(Jiekou)
Zengcheng
GUANGZHOU
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HUIZHOU
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Panyu (Shiqiao)
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