

# Establishing a Workable Autonomy in Tibet

*Michael C. Davis\**

## ABSTRACT

This article recommends a change in China's policy toward Tibet to better conform to national commitments and international obligations. Since the People's Liberation Army marched into Tibet in the 1950s China has generally imposed its will on the Tibetan people. The 1951 "17-Point Agreement on Measures for the Peaceful Liberation of Tibet" reflected the view that China was liberating Tibetan territory from imperialist forces. From the Tibetan perspective such "liberation" was imposed and promises of local self-rule were not kept. The emerging communist and totalitarian state that followed the 1949 Chinese revolution proved incapable of allowing genuine Tibetan self-rule. A harsh attitude of domination ensued. The present instrument of Chinese rule is China's national minority policy provided in Article 4 of the Chinese Constitution and China's Law on Regional National Autonomy (LRNA). Though this policy promises local self-rule, the habits of intervention both formally in the political system and in the mechanisms of Communist Party oversight leave Tibetans with very little of the promised legislative and administrative autonomy. Assessing this policy against the backdrop of China's long historical relationship with Tibet and the requirements of international law, this article concludes that China's national minority policy fails to meet its obligations to the Tibetan people. Taking account of standards articulated in the new UN Declaration on the Rights of Indigenous Peoples, this article recommends a change of course to establish a more genuine autonomy under Article 31 of the Chinese Constitution relating to the establishment of special administrative regions.

---

\* *Michael C. Davis* is a professor of law at the Chinese University of Hong Kong.

The author would like to thank the Northwestern University Law School where he began this research while serving as the J. Landis Martin Visiting Professor of Law in 2005–2006.

## I. INTRODUCTION

Nearly sixty years after the founding of the People's Republic of China (PRC) and almost as many years since the PRC claims to have "liberated" Tibet, the "Tibet issue" persists as one of the most enduring human rights problems in the world today. The protagonists, the PRC Central Government in Beijing and the Tibetan government-in-exile in Dharamsala, India have calibrated and recalibrated their positions on sovereignty and autonomy, as they aim at a solution to this seemingly intractable problem. The tragic March 2008 crisis in Tibet has made the urgency of this matter more apparent.<sup>1</sup> Presumably with the intention of heading off such crises and perhaps with the 2008 Beijing Olympics in mind, the Chinese government has engaged in six rounds of talks with Tibetan exile officials, since 2002.<sup>2</sup> However, China has shown little flexibility in the talks and has so far stuck to its position in the face of the 2008 crisis.<sup>3</sup>

Recent discussions and many other prior encounters have revealed the bottom line objectives of both sides: for the Tibetans "genuine autonomy" and for the Chinese "sovereignty."<sup>4</sup> In asking for "genuine autonomy" the Tibetan leaders clearly appreciate the role of autonomy as an essential step for participation in cultural, social, economic, and political life, promoting both democracy and human rights in Tibet. The Tibetans have advanced their proposal for genuine autonomy under a formula they have labeled the "middle way" approach and the Chinese have advanced their autonomy policy under their national minority laws.<sup>5</sup> The present analysis will not

- 
1. See Wu'er Kaixi, *China Mocks the Olympic Spirit*, FAR EASTERN ECON. REV., Sept. 2007, at 23; *Tibet Could Become Stain on Olympics, French Group Says*, SOUTH CHINA MORNING POST, 31 Aug. 2006, at A8. When international reporters have sought to take advantage of the more liberal reportage rules promised in the lead-up to the Olympics by covering controversial issues in Tibet the regime has slapped them down. Press Release, Reporters Without Borders, China-Tibet, Two Reporters Summoned and Warned about Tibet Story, Beijing Games Organiser asked to Clarify Tibet's Status in New Rules for Foreign Journalists (25 May 2007), available at [http://www.rsf.org/article.php3?id\\_article=22307](http://www.rsf.org/article.php3?id_article=22307).
  2. Interview with Samdhong Rinpoche, Kalon Tripa (Chair of the Kashag or elected Prime Minister) of the Tibetan Government-in-Exile, Dharamsala, India (3 Aug. 2006). Chinese officials appear to view these discussions as limited to the status of the Dalai Lama and not including substantive issues. Chinese Premier Wen Jiabao has stated that if the Dalai Lama "recognizes that Tibet is an inalienable part of Chinese territory" then "we are willing to carry out consultations and dialogue on his personal future." "Dalai Lama must give up secession, says premier." Kristine Kwok, SOUTH CHINA MORNING POST, 17 Mar. 2007, at A6.
  3. Interview with His Holiness, the Dalai Lama, Dharamsala, India (9 Aug. 2006).
  4. *Id.*; Interview with Samdhong Rinpoche, *supra* note 2; Interview with Liu Hongji and Wang Xiaobin, Tibetology Research Center, Beijing (25 Aug. 2006).
  5. CTA Dharamsala, Department of Information and Public Relations, *The Middle-Way Approach: A Framework for Resolving the Issue of Tibet* (2006), available at <http://www.tibet.net/en/diir/sino/std/imwa.html> [hereinafter *The Middle-Way Approach*]. The Chinese position is described in their White Paper on Tibet. PRC, *White Paper on Regional Ethnic Autonomy in Tibet*, Information Office of the State Council of the PRC, Beijing (May 2004) [hereinafter *Tibet White Paper*].

question the parties' expressed positions, on the Tibetan side that they would accept autonomy under Chinese sovereignty and, on the Chinese side that they are open to discussions of any course that does not lead to independence. This article assumes that autonomy is the goal and seeks to reconcile the parties' positions through analysis of present policy, historical experience, international practice, and constitutional outcomes.<sup>6</sup> With respect to the latter, this article will in particular suggest the use of PRC Constitution Article 31 relating to the creation of special administrative regions as an avenue to address this difficult problem. The question for the PRC is whether it can re-examine its policies, change direction, and take a new approach to meeting its obligations to the Tibetan people. Such a demonstration of political maturity and leadership would surely set a new benchmark in a world troubled by ethnic conflict.

One cannot fully appreciate the concerns of both sides without considering basic demographics. At a national level the total Tibetan population of approximately 5.5 million compares to a Han Chinese figure of 1.3 billion.<sup>7</sup> More than 130,000 Tibetans live in exile, mostly in India. Han in fact make up 92 percent of China's national population and the remaining fifty-five recognized national minorities make up only 8 percent. It is noteworthy that the thirteen designated Tibetan autonomous areas, approximating what Tibetans consider greater Tibet, encompass about one quarter of Chinese territory.<sup>8</sup> Demographic data within the Tibetan areas is disputed, as Tibetans in exile worry that China intends to eventually swamp the region with Han migrants. The Chinese census data projects the Han Chinese population figure in these areas at about 1.5 million compared to 5.5 million Tibetans. The Chinese figures for only the Tibetan Autonomous Region (TAR), occupying about half of the total Tibetan autonomous areas, is approximately 2.5 million Tibetans and 160,000 Han Chinese. The remaining twelve autonomous areas are adjoining autonomous prefectures and counties in Yunnan, Qinghai and Szechuan provinces.

- 
6. In recent years the Dalai Lama has set forth his position a number of times beginning in the 1980s with speeches before the US Congress and at Strasbourg before the European Parliament. Dalai Lama, Address to Members of the United States Congress: Five Point Peace Plan for Tibet (21 Sept. 1987); Dalai Lama, Address to Members of the European Parliament by His Holiness the Dalai Lama (15 June 1988). These original positions have been amended in response to Chinese requirements to make clear he is not seeking independence nor imposing any conditions for discussions. See Tibetan Parliamentary & Policy Research Centre, *Autonomy and the Tibetan Perspective* (2005), available at [http://tpprc.org/publications/pubs/autonomy\\_and\\_tibetan\\_perspective-2005.pdf](http://tpprc.org/publications/pubs/autonomy_and_tibetan_perspective-2005.pdf); The Middle-Way Approach, *supra* note 5.
  7. TABULATIONS ON NATIONALITIES OF 2000 POPULATION CENSUS OF CHINA (2003) [hereinafter 2000 POPULATION CENSUS].
  8. According to Chinese estimates the 155 ethnic autonomous areas at regional (5), prefecture (30), and county (120) levels for all ethnic minorities constitute 64 percent of Chinese territory. PRC White Paper: Regional Autonomy for Ethnic Minorities in China (2003) [hereinafter Minorities White Paper].

Scholars sometimes fault the Chinese census data for leaving out significant numbers of temporary residents, including a substantial presence of the Peoples' Liberation Army (PLA) and unregistered temporary Han traders and workers in Tibet. Chinese policies to encourage Han Chinese to "go west" to migrate to minority regions are seen as reflecting a Chinese aim to dominate the urban commercial sector and assimilate minorities.<sup>9</sup> Some conclude that the Chinese have already swamped the Tibetans in the TAR's larger urban areas of Lhasa and Xigaze, where Han are now thought to be in the majority.<sup>10</sup> Tibetan concerns of being outnumbered can be appreciated when one considers what has happened to two comparable ethnic autonomous regions on China's western borders. In Xinjiang, the Uyghur population of 8.3 million represents only 45 percent as compared to 40 percent Han; while in Inner Mongolia the Mongols are at 17 percent compared to 80 percent Han.<sup>11</sup>

The analysis below will first consider the application of China's current minority policies in Tibet in Part II. These policies clearly fail to secure genuine Tibetan autonomy and the basic rights of the Tibetan people. Part III will critique the reasoning China has advanced in favor of its current policies. China has especially relied on claims of historical title and the prerogatives of sovereignty under international law. Two subsections consider these arguments, addressing both the history of Tibet's long relationship with China and international practice respecting sovereignty and autonomy. The PRC's 17-Point Agreement with Tibet, the only such agreement the PRC government has ever made with any of its designated fifty-five national minorities, is a testimonial to Tibet's distinctive status.<sup>12</sup>

Parts IV and V respectively consider the constitutional path and the appropriate spirit for discussions going forward. The current PRC government has historically lumped the Tibetan case with that of fifty-five other national minorities under national minority laws provided for in Article 4 of the PRC Constitution. A careful evaluation of the historical Sino-Tibetan relationship may signal that China's past rejection of the "one country, two systems" formula under Article 31 of the PRC Constitution was unjustified

---

9. Cary Huang, "Go west" policy still key to region's development, *SOUTH CHINA MORNING POST*, 28 May 2007, at A5.

10. See June Teufel Dreyer, *Economic Development in Tibet Under the People's Republic of China*, in *CONTEMPORARY TIBET: POLITICS, DEVELOPMENT AND SOCIETY IN A DISPUTED REGION* 129, 139 (Barry Sautman & June Teufel Dreyer eds., 2006).

11. 2000 POPULATION CENSUS, *supra* note 7.

12. Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet (23 May 1951), available at <http://www.tibet.net/en/diir/pubs/phri/17point/data/app1.html> [hereinafter 17-Point Agreement] (reproduced in English in WARREN W. SMITH, *TIBETAN NATION, A HISTORY OF TIBETAN NATIONALISM AND SINO-TIBETAN RELATIONS* 297 (1996); MELVYN C. GOLDSTEIN, *A HISTORY OF MODERN TIBET, 1913-1951*, at 763 (1989)).

and unwise.<sup>13</sup> While Article 31 was clearly formulated with the Taiwan question in mind, its simple language has not precluded its use elsewhere in Hong Kong and Macau and should not bar its application to Tibet. Of course, there is no need to copy the Hong Kong model. With a very different history and circumstances, the parties would be expected to agree on a local constitutional formula in Tibet that is suited to Tibet's unique circumstances. The similarity between Article 31 policies and the 17-Point Agreement suggest that this question ought to be revisited. With its open-ended more flexible approach, Article 31 may offer the best foundation for a negotiated settlement concerning appropriate Sino-Tibetan autonomy arrangements. A more mature Chinese government may now be capable of living up to the type of commitments it earlier failed to fulfill in the 17-Point Agreement, which was drafted soon after the Chinese revolution.

## II. TIBETAN NATIONAL MINORITY AUTONOMY UNDER CHINESE RULE

China's national minority autonomy policies are promulgated in their current form in various articles on national regional autonomy in the 1982 PRC Constitution<sup>14</sup> and in the Law on Regional National Autonomy (LRNA) passed in 1984, as revised in 2001.<sup>15</sup> According to PRC Constitution Article 4, "Regional autonomy is practiced in areas where people of minority nationalities live in concentrated communities." Under Article 15 of the LRNA autonomous areas carry out their role "under the unified leadership of the State Council and shall be subordinate to it." The LRNA provides for protection of minority concerns in the areas of language, education, political representation, administrative appointments, local economic and financial policies, and the use of local natural resources,<sup>16</sup> but there are real

- 
13. "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." PEOPLE'S REPUBLIC OF CHINA CONSTITUTION, ch. 1, art. 31 (1982) [hereinafter PRC CONSTITUTION]; Articles 2 and 12 of the Basic Law of Hong Kong, enacted by the NPC under Article 31, expressly provide for the exercise of a "high degree of autonomy." The Basic Law of the Hong Kong Special Administrative Region arts. 2, 12; Article 4 of the PRC Constitution potentially carries such flexibility, providing, "The state assists areas inhabited by minority nationalities accelerating their economic and cultural development according to the characteristics and needs of the various minority nationalities." PRC CONSTITUTION, ch. 1, art. 4; This language is, however, further constrained by the numerous provisions on the system to be implemented in national autonomous areas in the PRC Constitution. PRC CONSTITUTION, ch. 3, §6, arts. 112–22.
  14. *Id.*, arts. 4, 59, 65, 89, 112–22.
  15. Law of the People's Republic of China on Regional National Autonomy, 1984, revised 2001 [hereinafter LRNA].
  16. See Minorities White Paper, *supra* note 8.

questions as to how effectively minorities can exercise the powers the law seemingly gives them. In contrast to Article 31's broad flexible provision for the establishment of special administrative regions "in light of the specific conditions," Article 4 and its associated laws have served as the basis for substantial intrusions of central control and the national political system into local affairs. This has meant that national minority autonomy has been more of a vehicle for asserting central control than a vehicle for genuine autonomy. A close look at the instruments of control under the national minority policy serves to illustrate such limitations and highlight objectives to which any efforts at mutual accommodation may aspire. These current policies will then be compared with both historical and international practice in Part III of this article.

The 1982 PRC Constitution appears to allow a degree of local control under China's national minority policies, including the power 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" of such nationalities.<sup>17</sup> The LRNA repeats this same language allowing for the enactment of "regulations on the exercise of autonomy and other separate regulations." Both the Constitution and the LRNA specify the need, with respect to such legislation, for approval from the next higher level of government, namely the Standing Committee of the NPC for autonomous regions and the provincial level standing committee for autonomous prefectures and counties.<sup>18</sup> Normal regulations unrelated to autonomy do not require such higher approval, though they are bound to conform to national constitutional and legislative requirements.<sup>19</sup> Typically an autonomous area is expected to enact only one regulation on the exercise of autonomy, which would have the status of a sub-constitution or basic law for the area.<sup>20</sup> For autonomous regions, the highest level of autonomous area, approval of such sub-constitutional regulations must come from the Central Government. None of the PRC's five autonomous regions (which include not only Tibet but also Xinjiang, Inner Mongolia, Guangxi, and Ningxia) have received such approval. The one attempt at enacting a basic regulation on the exercise of autonomy in the TAR went through fifteen drafts and was eventually aban-

---

17. PRC CONSTITUTION, *supra* note 13, ch. 3, §6, art. 116.

18. LRNA, *supra* note 15, art. 19. This provision is repeated in Article 66 of the Legislative Law of the PRC, available at <http://www.cclaw.net/library/legislationlaw.php>.

19. These laws cover topics unrelated to autonomy and will generally track national laws rather closely. Chunli Xia, *Autonomous Legislative Power in Regional Ethnic Autonomy of the People's Republic of China: The Law and the Reality*, presented at Conference on One Country, Two Systems, Three Legal Orders—Perspectives on Evolution, Macau, PRC (5–7 Feb. 2007) (citing Organic Law of the People's Republic of China, art. 7, Legislative Law, art. 63, at 10–11) (on file with author).

20. PRC Legislative Law, art. 63, at 10.

done.<sup>21</sup> For lesser autonomous areas at the prefecture and county level, approval has come from provincial governments for basic autonomy laws that largely track the LRNA. Autonomous areas have enacted many more “separate regulations,” the second category specified in the authorizing provisions.<sup>22</sup> Chinese scholar Chunli Xia notes that the basis for approval of both categories of autonomous regulations is not clear, with some getting colder treatment than others.<sup>23</sup>

Chinese Communist Party (CCP) supervision over legislative drafting processes may impose even greater central control in autonomous areas than the formal approval process. Such party control assures that very little legislative discretion is available at the local level. Xia describes the rather complex process of CCP oversight of the legislative drafting process as including several stages, roughly as follows: first, the Party Committee of the Local People’s Congress (LPC) sets up a legislative group made up of people from the LPC Party Committee, the LPC Standing Committee, and the local government; second, a draft is circulated and submitted by the LPC Standing Committee to the Party Committee of the autonomous area; third, after approval by the Party Committee of the autonomous area it is then submitted to a higher party committee for further review; fourth, when the Party Committee of the autonomous area receives approval it will submit the draft to the LPC Standing Committee Party Committee to be submitted to the LPC for passage.<sup>24</sup> Xia notes that this process has been followed especially since the 2001 revisions of the LRNA.<sup>25</sup> After the party approval process the newly passed legislation is still subject to the above-noted higher-level official approval. Given the top down nature of CCP control and the fact that Han Chinese party officials from the center have always occupied top local party positions, there is little room for local legislative initiative by autonomous communities.<sup>26</sup> Final decision-making power ultimately rests with the CCP,

- 
21. Yash Ghai, China’s Constitutional and Legal Framework for Autonomy, Limitations and Possibilities for Negotiations, draft paper, at 19 (18 June 2005) (on file with author).
  22. Separate regulations (translated by Xia as “singular regulations”) are regulations made by autonomous legislative bodies on specific issues (e.g., language, marriage, family planning, etc.). Xia, *supra* note 19, at 11.
  23. *Id.* at 12.
  24. *Id.* at 19–20.
  25. *Id.* at 21.
  26. The top Party Secretary for autonomous regions is nearly always a Han Chinese. A recent Human Rights Watch news release notes that even for the Lhasa City Party Committee, the number of Tibetans in the most recent appointment process is at the lowest level in forty years. Press Release, Human Rights Watch, China: Fewer Tibetans on Lhasa’s Key Ruling Body Lowest Representation Since 1966 (7 Nov. 2006), available at <http://hrw.org/english/docs/2006/11/07/china14522.htm>. In 1986—the beginning of the reform period—the number of Tibetans in the City Party Committee stood at 80 percent, while now it appears to be at 26 percent. For the first time since 1980, the head of the Lhasa Party Committee, Qin Yizhi, is also ethnic Chinese. While the Constitution imposes requirements for locals to hold leading government positions, this does not apply to the CCP, which holds all final decision making power. This development follows in 2003 the infusion for the first time of 280 ethnic Han Chinese officials into the local rural governments at the county and village level. *Id.*

which is dominated by Han Chinese. The upshot of these tight approval processes, both in the formal government structure and the CCP drafting process, is that minority areas enjoy very little legislative autonomy.

Technical legal analyses do not tell the whole story.<sup>27</sup> To these legal impediments the national minority policy adds structural and conceptual impediments. Two aspects pose a particular challenge to the realization of national minority autonomy. First, the fact that national minority laws require replication of the national political structures in minority areas renders minority areas especially susceptible to central control. This includes replication of the highly centralized system of the top-down CCP and people's congresses in minority areas, as is evident in the above-described legislative processes. Minority areas are not allowed a distinct structure of government suitable to local self-rule. The 17-Point Agreement regarding Tibet is the only case where distinct minority autonomy was promised, though it was ultimately not delivered. Today, the closest possibility for that design arises under Article 31 of the PRC Constitution.

Second, the system of national minority autonomy in China rests on certain Marxist doctrines, which deny the essential character of China's policies in Tibet. These doctrines see the 1950s occupation of Tibet as "liberation" and the institution of CCP rule in Tibet as "democratic reform." According to Beijing's Marxist logic, colonialism is a product of capitalist exploitation. In this view, since China had not reached the stage of full capitalist development it could not have colonized Tibet. This theory provides that the exploited classes of Tibet be joined under a multinational system in China in a "common program" of local autonomous rule.<sup>28</sup> This policy tends to see any autonomy regime as merely a temporary solution on the path to ultimate assimilation of minority nationalities into the dominant multinational Han Chinese state.<sup>29</sup> Statements to the contrary from an earlier period—such as the 17-Point Agreement—were essentially temporary in their vision. Though

- 
27. See Xia, *supra* note 19; Dreyer, *supra* note 10; Colin P. Mackerras, *People's Republic of China: Background Paper on the Situation of the Tibetan Population*, report commissioned by the United Nations High Commissioner for Refugees (Feb. 2005) available at <http://unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=423ea9094>; THEODORE C. SORENSEN & DAVID L. PHILLIPS, LEGAL STANDARDS AND AUTONOMY OPTIONS FOR MINORITIES IN CHINA: THE TIBETAN CASE (2004), available at <http://belfercenter.ksg.harvard.edu/files/141208%20bcsia%20monograph.pdf>.
28. Common Program of the Chinese People's Political Consultative Committee (1949). This document, which contains special provisions on ethnic minorities, is thought by the PRC to have functioned as a constitution of the PRC until the first Constitution was passed in 1954. See Minorities White Paper, *supra* note 8, § 1.
29. WARREN W. SMITH, CHINA'S TIBET: AUTONOMY OR ASSIMILATION 233 (forthcoming). When Chinese officials from the Tibetology Research Center are confronted with the discrepancy between the current version of autonomy and the looser indirect imperial version they cite advanced technology and modern communications as justification. Interview with Liu Hongji, *supra* note 4.

the 17-Point Agreement promised that the “Central Authorities would not alter the existing political system in Tibet” it clearly envisioned—as evident in practice at the time—that the “liberated” Tibetans would soon favor reform embracing the CCP’s vision of minority autonomy.<sup>30</sup>

Through the long years of China’s national minority autonomy policy, all forms of traditional political structure were progressively eliminated. The Cultural Revolution (1966–1976) was a period of hard-line class struggle and massive cultural destruction even by China’s own admission. A brief period of liberalization in the early 1980s, as China pursued post-Cultural Revolution policy reform nationally, was followed by greater repression and even martial law later that decade. Policies restricting the use of Han cadres in Tibet in the early 1980s were followed by greater central control of Tibet by the end of the decade. In the most recent decade, a policy of cracking down on political support for the exiled Dalai Lama has been combined with a policy emphasis on economic development under which free Chinese immigration has been favored under China’s “go west” policy.<sup>31</sup> Under such conditions massive Chinese economic investments in Tibet have done little to assuage Tibetan concerns and resentment. Even in periods of greater moderation only those Tibetans willing to collaborate with Chinese rule have been given some role in the Chinese structure of control. The CCP still dominates Tibet, and Han Chinese cadres still dominate party leadership in Tibet.

Chinese dominance and repression has produced a pattern of resistance followed by more repression. Repression over the years has meant not only armed invasion and crackdowns but also the sacking and razing of Buddhist monasteries during the Cultural Revolution, the suppression of religion, the imprisonment and coerced “re-education” of dissidents, curtailment of free speech, and the forced relocation of herders to more urbanized areas.<sup>32</sup> Political repression has especially targeted those monks and nuns, who are thought to support the “splittist” camp led by the Dalai Lama. They have

---

30. Huang, *supra* note 9; SMITH, CHINA’S TIBET, *supra* note 29, at 233.

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

32. Press Release, Human Rights Watch, China: Tibetan Intellectual Blogs Shuttered (9 Oct. 2006), available at <http://hrw.org/english/docs/2006/10/09/china14364.htm>; Press Release, Human Rights Watch, China: Tibetan Herders’ Livelihood in Jeopardy, Government Must Halt Forced Resettlement of Herders, Provide Redress for Abuse (10 June 2007); HUMAN RIGHTS WATCH, NO ONE HAS THE LIBERTY TO REFUSE: TIBETAN HERDERS FORCIBLY RELOCATED IN GANSU, QINGHAI, SICHUAN AND THE TIBETAN AUTONOMOUS REGION (2007), available at <http://hrw.org/reports/2007/tibet0607>; Press Release, Human Rights Watch, Tibet: China Must End Rural Reconstruction Campaign (20 Dec. 2006), available at <http://hrw.org/english/docs/2006/12/20/china14903.htm>. Even children advocating the return of the Dalai Lama have reportedly been subject to arrest. Press Release, Human Rights Watch, China: Tibetan Schoolboys Detained as Crackdown Worsens (20 Sept. 2007).

been the targets of re-education and have been asked to renounce the Dalai Lama.<sup>33</sup> Tibetan resistance has occasionally involved open popular dissent and rebellion, but more often has been a matter of smaller-scale resistance by monks, nuns, and others opposed to Chinese rule and its methods. Tibetan resistance has in turn spawned Chinese distrust. Instead of being a valued national participant in the Chinese multinational political experiment, Tibetans have found themselves a distrusted national minority targeted for control. Cycles of liberalization and crackdown have sparked a number of rebellions in recent decades, always followed by greater repression. While the Chinese leaders generally blame such disturbances on liberalizing policies, a more accurate account would credit Chinese repression. Periods of liberalization simply allow such resistance to be expressed.

A May 2004 Chinese White Paper on “Regional Ethnic Autonomy in Tibet” (Tibet White Paper) highlighted a number of favorable statistics on Tibetan participation in autonomous governance, including very favorable data on Tibetan participation in the local people’s congresses and local government.<sup>34</sup> This paper points out a 93 percent voter turnout rate for county level elections. The number of Tibetan and other ethnic minority deputies is in excess of 80 percent at both the regional and city levels, and twelve of the nineteen deputies from the TAR to the National People’s Congress are Tibetan.<sup>35</sup> The paper also notes that in accordance with the constitution Tibetans occupy all the top positions of various autonomous governments and standing committees. Tibetan membership in such committees is generally above 80 percent. The paper notes the enactment of over 200 local regional laws, and claims full Tibetan participation in local regional and cultural development.

According to the Tibet White Paper, Tibetans make up 92 percent of the TAR’s population of 2.5 million. The Tibetan language is taught in the schools and is widely used along with Chinese language. The paper references the wide promotion of Tibetan religion and restoration of religious sites—there being roughly 46,000 resident monks and nuns. The Chinese government’s official involvement in the processes of high lama reincarnation is also noted—including that of the eleventh Panchen Lama and the seventeenth Karmapa. Not mentioned is the fact that the eleventh Panchen Lama earlier

---

33. Interview with Ven. Ngawang Woebar, President, Gu Chu Sun Movement of Tibet (Association of former Political Prisoners) (3 Aug. 2006); Interview with “Singing Nun” Renchen Choeky, Dharamsala, India (4 Aug. 2006) (After refusing to denounce the Dalai Lama in re-education meetings in their nunnery, they were sentenced to prison for demonstrating in protest in Lhasa and sentenced again while in prison when eighteen nuns produced a singing recording that was smuggled out). See also *Abbot forced to step down for not condemning Dalai Lama*, SOUTH CHINA MORNING POST, 1 June 2007, at A4.

34. Tibet White Paper, *supra* note 5.

35. *Id.*

designated by the Dalai Lama has disappeared and the Karmapa nurtured by the Chinese government has fled into exile.<sup>36</sup> In late 2007 the Chinese government went so far as to enact a regulation requiring government approval of Tibetan reincarnations of “living Buddhas.”<sup>37</sup>

Outside reports, while acknowledging these favorable statistics, have highlighted more critical statistics that tend to show a lack of local autonomy in areas where it most counts. The International Commission of Jurists in a 1997 report noted that while “Tibetans are in positions of nominal authority, they are often shadowed by more powerful Chinese officials” and “every local organ is shadowed by a CCP committee or ‘leading group.’”<sup>38</sup> The ICJ report describes other forms of repression in housing, imprisonment, freedom of expression, women’s rights, and religious practice. The relatively poor economic development of Tibet compared to other regions of China may also have significance for local autonomy, as relatively poor and undereducated communities have few resources for informed political engagement.<sup>39</sup>

Deficiencies regarding the national minority policy in general have been most comprehensively described in a 2007 report prepared jointly by Minority Rights Group International and Human Rights in China.<sup>40</sup> The report notes as a preliminary matter that the centralization of power in the top leadership of the CCP impedes popular empowerment across the country, even for the Han majority. Accordingly, “ethnic identity is an additional, but not the only, obstacle to participation in a non-democratic regime.”<sup>41</sup> The report then highlights other political obstacles inherent in the ethnic autonomy regime. For example, the report expresses concern that the governments of the five autonomous regions in China have yet to pass a basic self-governing regulation, due to the lack of the required Central Government approval. As noted above, national minority autonomous regions require approval of self-governing regulations, while other provinces in China only report local laws to the Central Government for the record. Fundamentally, this means that the autonomous regions have less autonomy than Han majority

- 
36. Interview with Karmapa Lama, Dharamsala, India (5 Aug. 2007); *Beijing’s Panchen Lama returns to home village*, SOUTH CHINA MORNING POST, 31 Aug. 2007, at A8.
  37. Regulation About Reincarnation of Living Buddhas in Tibetan Buddhism, National Religious Affairs Bureau (13 July 2007), available at <http://www.savetibet.org/news/newsitem.php?id=1159>. This regulation seems aimed at heading off the Dalai Lama’s planned reincarnation outside of China. *US panel attacks rules on “living Buddhas,”* SOUTH CHINA MORNING POST, 2 Sept. 2007, at 5.
  38. INTERNATIONAL COMMISSION OF JURISTS, TIBET: HUMAN RIGHTS AND THE RULE OF LAW 14–21 (1997).
  39. The Tibetan areas are the least developed in China. Dreyer, *supra* note 10, at 129–51.
  40. MINORITY RIGHTS GROUP, HUMAN RIGHTS IN CHINA, CHINA: EXCLUSION, MARGINALIZATION AND RISING TENSION (2007), available at <http://hrichina.org/public/PDFs/MRG-HRIC.China.Report.pdf>. It should be recalled that China has produced another White Paper that covers national minorities generally. Minorities White Paper, *supra* note 8.
  41. MINORITY RIGHTS GROUP, *supra* note 40.

provinces. The report notes that practically, while ethnic autonomous areas throughout the country had passed 679 self-governing regulations and separate regulations by 2004, most of these were passed at the prefecture and county levels—where only the approval of the local regional or provincial government is required—and not at the level of autonomous regions.<sup>42</sup> Such laws generally track national legislation with superficial alternations and are typically on less controversial topics.

The Minority Rights Group report concurs in the Tibet White Paper's findings of high levels of minority participation in people's congresses at all levels, but expresses concern that this may not translate into real power.<sup>43</sup> One noted inhibiting factor is that all five CCP party secretaries of minority regions are Han Chinese men. "Minority leaders are therefore typically viewed as 'puppets' who, despite holding fairly high positions such as chief of a government department, are usually 'assisted' by a Han deputy who, along with the local Party leadership, controls actual policy formulation."<sup>44</sup> In this system the structure of autonomy becomes a vehicle for top-down implementation of CCP leadership policies, rather than bottom-up popular control. Loyalty requirements for minority cadres further diminish genuine minority representation. Of particular concern is a CCP rule that bars party members from practicing Tibetan Buddhism, a rule certain to undermine Tibetan participation.<sup>45</sup> Added to these limitations are the usual problems in China of severe restrictions on freedom of speech, press, and association for minority groups. Minority activists are closely monitored by the public security bureau. Of 2,279 cases in the Political Prisoner Database of the US Congressional Executive Commission on China, 2,085 are ethnic minority prisoners.<sup>46</sup> The report notes that 449 of these are ethnic women, mostly Tibetan nuns. These difficult political conditions may in turn spawn further minority disaffection. Part III of this article explores both Sino-Tibetan history and international practice in order to better appreciate the need for an alternative approach.

### III. FINDING A BETTER CONSTITUTIONAL FIT: HISTORY AND INTERNATIONAL PRACTICE

The above analysis shows the contours of a Chinese autonomy policy that fails to meet the legitimate self-rule needs of the Tibetan people. Clearly, it is time for China to craft an approach that recognizes Tibet as a distinctive

---

42. *Id.*

43. *Id.*

44. *Id.*

45. Ghai, *supra* note 21, at 21.

46. MINORITY RIGHTS GROUP, *supra* note 40.

national community. Such an approach will require a flexible constitutional path that can accommodate China's special obligations toward Tibet. In this regard the most convenient path may be for China to reconsider its earlier rejection of the more flexible open-ended approach under Article 31 of the PRC Constitution governing special administrative regions.<sup>47</sup> This approach, now employed in Hong Kong and Macau, contrasts sharply with the above pattern of central intrusion upon and domination of Tibetan affairs under Article 4 and related articles of the PRC Constitution. Though Hong Kong experiences Central Government interference in the selection of local officials, factors such as an open society, the rule of law, and a vibrant press keep this intrusion somewhat in check.<sup>48</sup> There is nothing on the face of the PRC Constitution that would bar Tibet from being governed as a special administrative region under Article 31. This approach would clearly offer a better constitutional fit than current efforts to address the issue under national minority principles.

In its 2004 Tibet White Paper, China credited its refusal to apply Article 31 to Tibet to a lack of "imperialist aggression" and contestation over "effective sovereign jurisdiction" and the consolidation of the socialist system:

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>49</sup>

Because of this statement, Tibetan negotiators have in recent years been putting their case under Article 4 of the PRC Constitution and laws governing national minorities, arguing that the Chinese government has not fulfilled its constitutional requirements toward national minorities.<sup>50</sup> But Chinese officials interviewed in connection with this research appear to reject this move as well, arguing that the contents of the "middle way" approach

47. PRC CONSTITUTION, *supra* note 13, ch. 1, art. 31.

48. Michael C. Davis, *Constitutionalism and the Rule of Law in Hong Kong*, 3 *LOY. U. CHI. INT'L L. REV.* 165 (2006); Michael C. Davis, *Constitutionalism and the Politics of Democracy in Hong Kong*, 30 *FLETCHER FORUM WORLD AFF.* 165 (2006).

49. Tibet White Paper, *supra* note 5.

50. Interview with Samdhong Rinpoche, *supra* note 2.

offered by Tibetan representatives are “tantamount to not recognizing the Central Government, not recognizing ethnic autonomy, and not recognizing the socialist system.”<sup>51</sup> The Chinese stress that the Dalai Lama must: 1) recognize Tibet as part of China; 2) recognize that Taiwan is a Chinese province; 3) give up all activities toward independence; and 4) recognize the leadership of the CCP.<sup>52</sup> Because of the above categorical rejection of Article 31’s special administrative region approach and rejection of Tibetan efforts to put their case under Article 4’s national minority law, the parties seemingly confront intractable circumstances with no way forward. A more flexible open-ended approach on the Chinese side is required if the parties are to get beyond this impasse.

The Tibet White Paper statement essentially cites a history of Chinese control over Tibet and international law principles of sovereignty as justification for its rejection of the more flexible Article 31 approach and its insistence on proceeding under its Article 4 national minority policies in the manner discussed above. The following subsections address both the history of the Sino-Tibetan relationship and international practice. Such historical and legal analyses reveal with compelling force the likely benefits of the new, more flexible policies to be discussed in Parts IV and V of this article.

## A. A History of Independence and Interdependence

Sovereignty claims often rely on allegations of historical title and the Chinese claims to Tibet are no exception. As is evident in the above excerpt from the Tibet White Paper, Chinese officials are fond of arguing that, “Since Ancient times Tibet has been an inseparable part of Chinese territory.”<sup>53</sup> This claim has been so central to Chinese efforts to rule Tibet in the manner they have, that a closer look at history is essential to the present analysis. History reveals a more nuanced story, one that would hardly justify such unfettered Chinese domination as is evident in the current policies.<sup>54</sup> Discussions with Chinese officials and Tibetan exiles, as well as the numerous policy statements and historical accounts, reveal that there is often substantial agreement over the historical ledger of events in Sino-Tibetan history, but little agreement over their interpretation and contemporary relevance. The Chinese interpretation

---

51. Interview with Liu Hongji, *supra* note 4.

52. *Id.*

53. Tibet White Paper, *supra* note 5.

54. The Chinese analysis of this often engages a retrospective perspective of history that assumes that current “national minorities” such as the Mongols are just another constituent member of the Chinese Empire, which they clearly were not at the time of their conquest. See Minorities White Paper, *supra* note 8. For analysis of “retrospective perspectives” of history see VICTORIA T. HUI, WAR AND STATE FORMATION IN ANCIENT CHINA AND EARLY MODERN EUROPE 9 (2005).

that Tibet has always been an inseparable part of Chinese territory is dubious. It is clear that Chinese efforts at imperial conquest have met with Tibetan resistance for nearly a thousand years. Given present-day skepticism about imperial conquest as a justification for sovereign claims, this historical record offers nothing compelling to support current claims for Chinese sovereignty. The record does demonstrate the special character of the Sino-Tibetan relationship and may be of use in shaping a future autonomous relationship.<sup>55</sup>

In the imperial age China generally aimed to contain external threats by subordinating and eventually incorporating its neighbors. Tibet was a target of such efforts but was sufficiently remote and non-threatening that it was never fully assimilated into the Chinese empire. What levels of subordination there were from time to time usually involved loose imperial association and indirect rule through the Tibetan ruling religious elite.<sup>56</sup> The religious standing of Tibet's leaders facilitated the protocol of this imperial relationship, which involved a high degree of autonomy long before this modern term was employed.

Chinese accounts usually date China's claimed incorporation of Tibet to the Yuan Dynasty, around 1240 AD. An earlier claim based on a Tibetan royal marriage in 640AD to the Chinese Princess Wencheng is generally not emphasized by the Chinese themselves. Tibet was reportedly a very powerful independent kingdom with imperial aspirations of its own as late as 822 AD, when Tibet and China signed a treaty of mutual recognition. This agreement, inscribed on a stone pillar placed in front of the Jokhang Temple in the Tibetan capital Lhasa, characterized the Tibetan relationship with Tang China as an uncle-nephew relationship.<sup>57</sup>

The first substantial Chinese claim is based on the alleged submission of the Tibetan Abbot Sakya Pandita from the then dominant Sakya Buddhist sect to the emerging Mongol Empire in 1247 AD. After some local Tibetan resistance, the Mongols later invaded and established indirect administrative control in 1267. It was only in 1270 that Mongol King Kubilai Khan proclaimed the Yuan Dynasty (1270–1368) in China and even then China was only part of the larger Mongol empire administered separately from Tibet among the Mongol's conquests.<sup>58</sup> Given Tibet's incorporation into the

- 
55. Chinese officials have acknowledged as much about Tibet, speaking of the "four uniques," which include region, culture, significance, and treatment. Barry Sautman, *Resolving the Tibet Problem: Problems and Prospects*, 11 J. CONTEMP. CHINA, 77, 103 (2002). In a statement issued in Delhi in 1956, Chou Enlai acknowledged that China considered Tibet a special case. Interview with the Dalai Lama, *supra* note 3.
  56. PAMELA CROSSLEY, *A TRANSLUCENT MIRROR: HISTORY AND IDENTITY IN QING IMPERIAL IDEOLOGY* 327–336 (1999). Crossley notes that these areas fell not under the Qing civil government but under the court of colonial affairs (lifa yuan).
  57. CHRISTOPHER I. BECKWITH, *THE TIBETAN EMPIRE IN CENTRAL ASIA* 24, 167 (1987); SMITH, *TIBETAN NATION*, *supra* note 12, at 73–74.
  58. SMITH, *TIBETAN NATION*, *supra* note 12, at 83–100.

Mongol empire before China it is difficult to judge whether Tibet should be viewed as part of the conquering force or as the conquered.

Leading Tibet scholar Warren Smith describes a rather carefully calibrated diplomatic relationship from the Yuan Dynasty forward between China's emperors and Tibetan high lamas, often involving Chinese attempts at subordination and Tibetan resistance. The Yuan Mongol emperor's relationship with leading Tibetan Buddhist lamas appeared to recognize that the leading lamas ruled Tibet and granted them special Chinese titles. At the same time the Tibetan lamas served in a religious advisory role for the Mongol emperor—a role characterized by the Tibetans as a *Cho-yon* or patron-priest relationship. The succeeding Chinese Ming Dynasty (1368–1644) appeared to have much less interest in Tibet. Ming emperors were less ardent Buddhist and the Tibetan lamas were frequently reluctant to engage Chinese ceremonial roles. When the fifth Karmapa Lama, leader of the then dominant Sakya Buddhist sect, visited Beijing in 1407 he refused Chinese titles, seemingly out of concern for his own independence. The Ming were more interested in controlling the Mongols, with whom the Tibetans had many connections, than with ruling Tibet. In 1642 the independent Mongol king, Gushri Khan, conferred temporal, as well as spiritual, authority on the fifth Dalai Lama, establishing a dominance for the Gelugpa Buddhist sect and the Dalai Lama that persists to this day. The Mongols also conferred parts of Eastern Tibet (Kham) on the Tibetans, while the Mongols continued to rule the Tibetan Amdo province—raising present day questions as to which areas in Eastern Tibet the Tibetan government consistently ruled.<sup>59</sup>

The succeeding Manchu-dominated Qing Dynasty (1636–1910) offered the height of Chinese intervention in Tibet. The Tibetan fourth and fifth Dalai Lama again pursued a chess game of conferring and receiving titles and trying to placate the Qing in a patron-priest relationship. The Qing considered Tibet a special case and pursued the same chess game sometimes with ceremonies and titles and sometimes in the eighteenth century with actual conquest. This game often involved very carefully choreographed ceremony in the handling of Tibetan visits to Beijing, the fifth Dalai Lama even insisting on one occasion that the Qing Emperor meet him outside the city at Taika Lake. During this visit, commencing on 15 January 1653, the Emperor initially agreed, but ultimately did not travel outside the city. Instead, he walked thirty feet from the throne to meet the Dalai Lama and the Dalai Lama declined to kowtow. At the same time the Dalai Lama was given an exalted Chinese title and relegated in protocol to a status slightly below the emperor—a form of nominal submission. This complex interplay then secured the emperor's continued support of Gelugpa rule in Tibet.<sup>60</sup>

---

59. *Id.* at 103–07.

60. *Id.* at 111–12.

As the Qing Empire expanded in the eighteenth century it would intrude more and more on Tibetan autonomy, frequently invading Eastern Tibet and occasionally Central Tibet. It also took an interest in the rituals of reincarnation of high lamas, attempting to relegate to itself a role in approving the new Dalai Lama incarnate, as it did for the sixth Dalai Lama. By 1720, under the Emperor Kang Xi, the Qing occupied and ruled Tibet, though the Qing garrison was withdrawn when he died in 1722—only to be restored later and off and on in the decades to follow. During this occupation, the Qing first set up a mixed provisional government and then a permanent government under a Tibetan Kashag or council. The Qing was represented in Lhasa by its Amban under a system of indirect rule. Qing control would vary over time, reaching its height in the late eighteenth century. By 1750 the seventh Dalai Lama was largely in charge of Tibet and tended toward a patron-priest, or *Cho-yon*, relationship with the Qing Emperor, Qian Long. But the seventh Dalai Lama died in 1757 and the Panchan Lama became ascendant and more submissive to Beijing. In 1788 the Qing also sent in troops to help Tibet ward off an attack from Nepal.

In the late eighteenth century the Qing instituted a system of choosing from a final Tibetan list of three candidates for Dalai Lama or Panchan Lama by drawing names from a golden urn. This system is much touted today by China's current leaders to justify their selection of successor Tibetan high lamas—including their selection most recently of an alternative Panchen Lama to the one identified by the Dalai Lama. The current PRC government has gone so far as to enact a law prohibiting the selection of a high incarnate lama without official approval.<sup>61</sup> In its origin, however, this ceremony was not consistently used as the Qing itself began to decline in the nineteenth century. By the late nineteenth century, the declining Qing was less able to exercise control in Tibet, which it considered part of its "exterior empire." The Eastern Tibetan provinces of Kham and Amdo were more frequently invaded and put under direct Qing control than Central Tibet.<sup>62</sup>

The above historical narrative offers little support for China's claim of title based on its relationship with Tibet during the imperial era. It appears that imperial China long defended against and had designs on neighboring countries and kingdoms in Central and North Asia. These neighboring polities likewise formed their own alliances of resistance and conquest. The Tibetan narrative of security was especially entangled in that of the Mongols. The only substantial claim China laid to central Tibet before the eighteenth

---

61. This is believed to be aimed at insuring that the Tibetans in exile do not select a replacement Dalai Lama in exile after the current one passes away, given that the Dalai Lama has indicated that if he dies in exile he will be reborn outside China. *US panel attacks rules on "living Buddhas," supra* note 37.

62. SMITH, *supra* note 57, at 121, 134–38, 145, 151.

century was that engendered in this Mongol relationship, a claim that became partially Chinese in the Mongol ruled Yuan Dynasty. The patron-priest relationship described by Tibetan history then largely prevailed until the end of the Chinese dynastic period. The closest China came to directly intervening in Tibet was in the eighteenth century when its military representatives took a more active role in Tibetan affairs and occasionally invaded. Such invasions were more frequent and sustained in Eastern Tibet, encompassing some Tibetan regions now outside the TAR in adjoining provinces.

In the first half of the twentieth century Tibet was *de facto* independent. Chinese officials often portray Tibetan society during this time as hopelessly feudal. This may not have been the case. In his mammoth study on early twentieth century Tibet Melvyn Goldstein notes that Tibetan serfs "were not necessarily downtrodden."<sup>63</sup> Tibetan politics had also begun to evolve beyond the purely feudal. As in Europe, where modern constitutionalism evolved with expanding inclusive bargains between the monarch, landed aristocracy, estates, and clerical elite,<sup>64</sup> similar developments of shared power and nascent checks and balances occurred in Tibet. Under the monastic system of consultation and decision leading lamas had long had some say in checking each other's power. The system of monastic training and accession to power had likewise engaged monastic regents and educators. A degree of egalitarianism also existed in the movement of both aristocrats and commoners into monastic life. Under Chinese tutelage, during the initial Qing protectorate at the height of Qing power in the eighteenth century, a council or cabinet called the *Kashag* was introduced. In addition, the Tibetans themselves introduced a national assembly or *Tshongdu* around the 1860s, which included representatives of all the Lhasa monasteries and secular officials.<sup>65</sup>

These institutions continued during the period of independence in the early twentieth century and during the initial Chinese occupation in the 1950s. The *Kashag* and the *Tshongdu* were very instrumental in advising a young Dalai Lama throughout this difficult latter period. Calls for further reform were occasionally heard. As recently described by Lobsang Sangay, the promise of these nascent constitutional developments has been born out in recent Tibetan exile, where a form of liberal constitutional democracy has been instituted that includes universal suffrage in the exile community, a directly elected prime minister served by a cabinet or *Kashag*, a Supreme Justice Commission, and an elected Assembly of Tibetan People's Deputies.<sup>66</sup> Liberal democratic commitments, including the Dalai Lama's commitment

---

63. GOLDSTEIN, *supra* note 12, at 5.

64. See HUI, *supra* note 54, at 117–216.

65. GOLDSTEIN, *supra* note 12, at 10–31.

66. Lobsang Sangay, *Tibet: Exiles' Journey*, 14 J. DEMOC. 119–130 (2003).

to withdraw from temporal rule, have been embodied in proposals by the exile government for future autonomy in Tibet.<sup>67</sup>

It was in the early to mid twentieth century that Republican Chinese officials began to articulate in modern state terms—generally in various negotiations with Tibet and Britain—the character of their claims to Tibet. The British characterized the Chinese feudal imperial territorial claims as suzerainty. The British conceived of suzerainty as a feudal relationship that embodied something less than full Chinese sovereignty and was accompanied by a high level of Tibetan autonomy under traditional governance.<sup>68</sup> While claiming Tibetan subordination, Chinese leaders have generally acknowledged a special status and indirect rule. During the period from the end of the Qing in 1911 until the communist invasion in 1950 Tibet remained effectively independent. The reluctance of the British—as part of the “great game” with the Republic of China and Russia over control of territories in Inner Asia—to recognize more independence than a state of Chinese suzerainty, appeared to be the only thing that held the Tibetans back in fully securing their independence. In negotiations at Simla, India in 1913 the British advanced a notion, similar to what China had agreed for Mongolia, of inner and outer Tibet, distinguishing a largely independent central Tibet under Chinese suzerainty from a subordinate Eastern Tibet under Chinese sovereignty. Various negotiations, first with Britain and Republican China at Simla and then directly with the Republic of China in the 1930s, would see China acknowledging Tibet’s high degree of autonomy under nominal Chinese rule. All parties actually initialed the Simla Convention reflecting this perspective, though ultimately the Chinese did not ratify it due to dissatisfaction with the specified boundary between inner and outer Tibet.<sup>69</sup>

The 17-Point Agreement imposed by the PRC in 1950 switched firmly to the notion of Chinese sovereignty but promised Tibetans continued autonomous local rule under their existing form of government.<sup>70</sup> Though the PRC claimed to be “liberating” Tibet, presumably from foreign influences such as those of British India, they were essentially occupying a then independent country.<sup>71</sup> The Dalai Lama takes the view that the agreement was

---

67. Dalai Lama, *Guidelines for Future Tibet’s Polity and Basic Features of its Constitution* (26 Feb. 1992), available at <http://www.tibet.com/future.html>; The Middle-Way Approach, *supra* note 5.

68. “[A] distinctive element of the feudal suzerainty relationship is that the suzerain holds the source of the governmental authority of the vassal state whose ruler he grants the right to exercise the authority autonomously.” MICHAEL C. VAN WALT VAN PRAAG, *THE STATUS OF TIBET* 105–06 (1987).

69. GOLDSTEIN, *supra* note 12, at 68–80, 832–41. On the side of the Simla Conference the British negotiated a secret boundary between Tibet and India, called the McMahon line, a source of continuing disagreement between China and India. *Id.* at 75–76.

70. 17-Point Agreement, *supra* note 12.

71. *Id.*; See GOLDSTEIN, *supra* note 12, at 759–72.

forced upon him.<sup>72</sup> Even the 17-Point Agreement, presented by a much more confident China, still acknowledges the special status of Tibet. In fact, this is the only treaty-like agreement that the PRC has entered into with any of its purported national minorities. As in the past, the Agreement promised Tibet autonomy and local self-rule under its existing system of governance. A state of popular rebellion against Chinese “reforms” and the Dalai Lama’s perception that Chinese commitments were not being kept, as newly arrived communist officials sought to impose their will on Tibet, inspired his flight on 28 March 1959.<sup>73</sup>

After the collapse of the 17-Point Agreement China seized full local direct rule under its national minority autonomy policies.<sup>74</sup> China dismissed the local government of Tibet and designated the Preparatory Committee for the Tibet Autonomous Region (PCTAR) as the official governing body of Tibet.<sup>75</sup> The PCTAR had been established by China under the Dalai Lama’s earlier nominal chairmanship. In September 1965 the TAR was proclaimed under the first People’s Congress of the TAR. Since the Dalai Lama’s departure in 1959 China has exercised direct rule, including Tibet in the same category as fifty-five other “national minorities” in application of its constitution and national minority law. In addition to the TAR, there are twelve adjacent Tibetan autonomous areas in neighboring provinces. In exile, the Tibetan leaders first demanded independence and then softened this demand to genuine autonomy under their “middle way” approach.<sup>76</sup> The latter demand has included a further call for unification of all Tibetan areas under the proposed autonomous government.

## B. International Practice Respecting Autonomy

Beyond history, the other source of claimed legitimacy for China’s policies in Tibet is international law. Both China’s claim to sovereignty over Tibet—based on historical title—and its arguments for the legitimacy of its autonomy policy are couched in the language of international law. Tibetans in exile have raised doubts about both the historical title and the sufficiency of China’s current autonomy policy. The above historical narrative of Chinese attempts at domination and Tibetan resistance, with only limited periods of direct rule, tends to bear out the Tibetan challenges to historical title. The

---

72. DALAI LAMA, *FREEDOM IN EXILE, THE AUTOBIOGRAPHY OF THE DALAI LAMA* 64 (1991); GOLDSTEIN, *supra* note 12, at 798–803.

73. DALAI LAMA, *FREEDOM IN EXILE*, *supra* note 72, at 136.

74. *Id.*

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

76. The Middle-Way Approach, *supra* note 5.

current policies under the LRNA likewise call into question the *bona fides* of China's autonomy policy in terms of human rights and self-rule.

Regardless of the legitimacy of China's original 1950s occupation of Tibet, China has forcefully maintained effective control over several decades to the point that it has gained substantial international recognition. This recognition has flowed from assertive actual rule by one of the world's most powerful states and is bolstered by the uncertain status of both autonomy and indigenous rights to self-determination in international law. Nevertheless, much of the international community has not been happy with China's Tibet policy. This has been evident in frequent international criticisms and in China's constantly perceived need to isolate the highly respected Dalai Lama.<sup>77</sup> China has been pressured to adopt a more accommodating policy that guarantees genuine autonomy if it wants to gain not only grudging international recognition of its claim but also international approval. At the same time, the exile Tibetan government, while seemingly having a just basis in international law to challenge Chinese rule, has had to take a more accommodating approach if it wants to reach an agreeable settlement to restore a semblance of self-rule to Tibet.

Not only are Chinese historical-title claims empirically weak but they also have a weak legal foundation. Imperial claims are generally viewed with suspicion in an anti-colonial age. Moreover, historical title, as judged by the ICJ in the *Western Sahara* case, is itself a rather weak basis for claiming territory held by neighboring national groups.<sup>78</sup> The historical identity and distinctive indigenous status of Tibetans compete with Chinese policies of occupation in shaping international expectations regarding the content of Tibetan self-determination. If the goal is to come up with an autonomy policy in lieu of independence then there is a need to offer some legal content to Tibetan autonomy and self-determination.

The Supreme Court of Canada in *Reference re Secession of Quebec* 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>79</sup> The Tibetan leadership in exile has in the past argued that Tibet satisfies both of these criteria. Their claims that they were "denied meaningful access to government to pursue their political, economic, social or cultural develop-

---

77. Klaudia Lee, *Don't meet the Dalai Lama, China urges foreign leaders*, SOUTH CHINA MORNING POST, 21 Sept. 2007, at A12; Agencies, *Beijing slams meeting as 'gross interference'*, SOUTH CHINA MORNING POST, 31 Oct. 2007, at A6.

78. *Western Sahara*, 1975 I.C.J. 4 (13 Jan.).

79. *Reference re Secession of Quebec*, [1998] S.C.R. 217 (Can.).

ment" were largely supported by three UN General Assembly resolutions passed in 1959, 1961, and 1965 after the Dalai Lama's 1959 departure.<sup>80</sup> The above assessment of current autonomy policy tends to further bear this out. Tibetan arguments for self-determination were grounded in the above-noted historical character of the Sino-Tibetan relationship and four decades of *de facto* Tibetan independence after the end of the Qing Dynasty.

While the three UN resolutions did not contest Chinese sovereignty or demand withdrawal, they did condemn China severely for human rights violations and point the way to the current discussions over autonomy. Tibetans now have to contend with five decades of Chinese occupation and direct rule in Tibet as a *fait accompli*. Further, as a matter of *realpolitik* the powerful Chinese regime clearly sees the retention of control over Tibet as a matter of vital national interest. Under such circumstances *fait accompli* may effectively combine with *realpolitik* to deny Tibetans any hope of independence. In such circumstances is there a strong argument for securing internal autonomy under international law?

In international practice the notion of self-determination, as conceived in the UN Charter and developed in various UN declarations, distinguishes between an external and internal right of self-determination.<sup>81</sup> The external right includes the right of secession, while the internal right is concerned with the minority's right of self-governance within a sovereign state. While common Article (1) of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provide "all peoples" with a right of self-determination to "freely determine their political status and freely pursue their economic, social and cultural rights," these treaties offer little guidance on who such peoples are and how the right is to be exercised.<sup>82</sup> This ambiguity has presented great difficulties for the Tibetan cause and has often left international law on the sidelines in seeking a solution to this and similar national ethnic conflicts.<sup>83</sup> Given the other guarantees in the human rights

80. For a discussion of the three United Nations General Assembly Resolutions condemning China's human rights record in Tibet (1959, 1961, 1965) see SMITH, TIBETAN NATION, *supra* note 12, at 492-532.

81. See Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted 14 Dec. 1960, G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. No. 16, 66, U.N. Doc. A/4684 (1960); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, 1970, G.A. Res. 2625 (XXV), Annex, 25 U.N. GAOR, Supp. No. 28, 121, U.N. Doc. A/5217 (1970).

82. International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976); International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force 3 Jan. 1976).

83. See HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION, THE ACCOMMODATION OF CONFLICTING RIGHTS (2d ed. 1996).

covenants it would seem that both internal and external self-determination harbor an expectation of democracy and human rights protection so that self-governance is possible. For countries committed to living up to international human rights expectations, this may point the way forward.

While guarantees of internal autonomy have generally not been well-secured by international law,<sup>84</sup> it can be argued that under at least two circumstances internal autonomy in effect becomes 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 people. The Tibet case implicates both circumstances, having been the subject of the 17-Point Agreement and involving a local indigenous population denied free choice as to their status. To the extent that the matter found itself before the Human Rights Committee or the Human Rights Council or any other body charged with human rights assessment, one might expect a degree of scrutiny regarding the full enjoyment of autonomous rights of self-rule and cultural preservation. Even when an autonomous community has little hope of strictly enforcing such right, as is generally the case, other countries and international organizations will be legitimately solicitous of the rights of the community in question and a responsible central government should be as well.

These evolving standards have now gained greater international traction in the new UN Declaration on the Rights of Indigenous Peoples, which provides a more comprehensive account of established international standards.<sup>85</sup> This declaration, passed by the UN General Assembly on 13 September 2007, gives new salience to the notion of internal autonomy and suggests its substantive content. While UN declarations are usually not considered legally binding international law, certain characteristics of this declaration recommend it more than most such declarations. These include its nearly unanimous passage 143 to four with eleven abstentions,<sup>86</sup> and its status as a UN declaration that interprets existing international legal requirements

---

84. Douglas Sanders, *Is Autonomy a Principle of International Law*, 55 *NORDIC J. INT'L L.* 17 (1986); Frank L. Kirgis, *The Degrees of Self-determination in the UN Era*, 88 *AM. J. INT'L L.* 310 (1994); Hans-Joachim Heintze, *Autonomy and Federalism: Which Evolution?*, presented at Conference on "One Country, Two Systems, Three Legal Orders—Perspectives on Evolution," Macau, PRC (5–7 Feb. 2007) (on file with Author).

85. Declaration on the Rights of Indigenous Peoples, *adopted* 12 Sept. 2007, G.A. Res. XXX, U.N. GAOR, 61st Sess., U.N. Doc. A/61/L.67 (2007) [hereinafter Declaration on Indigenous Peoples]. As noted above, the International Human Rights Covenants (ICCPR and ICESCR) had earlier addressed the basic question of self-determination, as did the International Labor Conventions. International Labor Convention 169, Concerning Indigenous Peoples in Independent Countries (1989) (not signed by China).

86. Declaration on Indigenous Peoples, *supra* note 85. The four opposing the Declaration on Indigenous Peoples 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.

embodied in the UN Charter and other international human rights treaties.<sup>87</sup> The Chinese government voted for the resolution adopting this declaration both in the Human Rights Council and the General Assembly but maintained their consistent position that there are no indigenous peoples in China and that the declaration has no application to China.<sup>88</sup> In the drafting meetings of the Human Rights Council China invoked the above historical arguments as to all fifty-six presently designated nationalities, claiming that for 5,000 years China was always united with minorities living on their own lands.<sup>89</sup> In the case of Tibet, as developed above, there is cause for considerable doubts about such claims. Even China's own earlier 17-Point Agreement verifies Tibet's unique status.

While the UN Declaration does not define what is meant by indigenous peoples, it does specify that such indigenous communities exist throughout the world and are seemingly not confined to former victims of European colonialism in the Americas.<sup>90</sup> A UN study has 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,

- 
87. Declarations that purport to lay down existing law are sometimes viewed as reflecting customary international law. The opening preliminary phrase added to the draft at its final stage before passage indicates that the General Assembly was "[g]uided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfillment of the obligations assumed by States in accordance with the Charter." The Declaration, in other preliminary clauses, invokes treaty obligations regarding the right to self-determination and respecting human rights, ultimately invoking the Declaration's role "as a standard of achievement to be pursued in a spirit of partnership and mutual respect." Article 1 then makes clear this existing international status, providing, "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. *Id.*
88. Embassy of the People's Republic of China in Switzerland, China Concerned with Protection of Indigenous Peoples' Rights (1 Apr. 1997), available at <http://ch.China-embassy.org/eng/ztnr/rqwt/t138829.htm>.
89. See generally *id.*
90. A 1986 UN study of indigenous populations included several Asian countries in the study: Bangladesh, Burma, India, Indonesia, Japan, Laos, Philippines, and Sri Lanka. *Study of the Problem of Discrimination Against Indigenous Populations: Final Report Submitted by the Special Rapporteur, Mr. José R. Martínez Cobo*, U.N. ESCOR, Comm'n Hum. Rts., 36th Sess. Agenda Item 11, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8 (1983). There are thought to be over 370 million indigenous people worldwide. *UN adopts declaration on rights for indigenous peoples worldwide*, INT'L HERALD TRIBUNE, 13 Sept. 2007, available at <http://www.iht.com/articles/ap/2007/09/13/news/UN-GEN-UN-Indigenous-Peoples.php>.

as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>91</sup>

There can be little doubt that the Tibetan people satisfy these criteria. They have a long cultural and ethnic history on their own territory, were forcefully invaded in 1950, consider themselves distinct from the surrounding Chinese population that now controls their territory, and are a present non-dominant society that is determined to preserve their ethnic identity in accordance with their own cultural patterns. Given the indigenous character of nearly all indicators of the Tibetan community, the Chinese claim that the Tibetan people are not indigenous is not likely to satisfy skeptics and should not satisfy any international or foreign bodies evaluating China's human rights record. With the above limitations concerning its legal status, the Declaration clearly offers a guide for the treatment of indigenous or similarly situated peoples with respect to internal self-determination.

That the current Chinese policies do not meet the standards of the Declaration on the Rights of Indigenous Peoples is self-evident. The preliminary articles of the Declaration emphasize such notions as: demilitarization of indigenous lands; the right of indigenous peoples 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;"<sup>92</sup> that the right to exercise self-determination in conformity with international law shall not be denied; and that adherence to the rights of indigenous peoples in this declaration will enhance harmonious and cooperative relations based on principles of justice, democracy, respect for human rights, non-discrimination, and good faith. The current policies discussed in Part II above show little sign that Tibetans have freely exercised their right of self-determination or that their circumstances have otherwise conformed to these requirements.

The various operative articles of the Declaration seek to implement the above presumptive requirements, guaranteeing indigenous peoples the following rights: the right of self-determination;<sup>93</sup> the right to autonomy or self-government in matters relating to their internal and local affairs;<sup>94</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>95</sup> the

---

91. *Study of the Problem of Discrimination against Indigenous Populations*, *supra* note 90.

92. Declaration on Indigenous Peoples, *supra* note 85, at 3.

93. *Id.* art. 3.

94. *Id.* art. 4.

95. *Id.* art. 12.

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>96</sup> the right to be consulted and prior consent through their own representative institutions before implementing state legislative and administrative measures;<sup>97</sup> and the right to recognition, observance and enforcement of treaties, agreements and other constructive arrangements. Added to the basic ingredients of autonomy and self-determination are a whole cast of contemporary and traditional rights already guaranteed in the various human rights treaties and covenants.

Whether China concurs in the indigenous status of the Tibetan people or takes up the spirit of this declaration as a standard for treating a people similarly situated, it is clear that it can learn a great deal from these requirements. A more consensual relationship that respects China's traditional relationship with Tibet and secures the basic rights of this declaration would allow China to establish an agreeable and internationally acceptable relationship with an autonomous Tibet. It must be borne in mind that the international legal recognition of autonomous rights of democratic self-governance in these circumstances is the first step toward giving greater security to such rights under autonomy arrangements. For distinct groups who might be entitled to such protection this offers an avenue to group security short of seeking full independence. For a country that incorporates such a national group within its sovereign boundary, international legal security for internal autonomy and its democratic guarantees—through a treaty or otherwise—could allow the country to regularize an arrangement short of full secession. For a national group exercising internal self-determination external effectiveness translates into the degree of internal effectiveness that makes the internal autonomy arrangement reliable. In the face of the failures of the current policies, the more flexible approach under PRC Constitution Article 31 holds out the possibility of achieving this purpose under the framework of the PRC Constitution and international practice.

An internationally acceptable autonomy arrangement would reduce the tendency to convert autonomy into the first step toward independence,<sup>98</sup> a fear Beijing clearly entertains with respect to Tibet. There can be little doubt that the international treaty and the international solicitude that has long attached to the Hong Kong arrangements has rendered that arrangement more reliable for all concerned. Similar international solicitude, if acknowledged in the Tibet case, could be an advantage that will allow China to regularize and achieve full international support for a distinctive autonomy policy in Tibet.

---

96. *Id.* art 18.

97. *Id.* art. 19.

98. Hurst Hannum, *Territorial Autonomy: Permanent Solution or Step Toward Secession?*, in *FACING ETHNIC CONFLICTS: TOWARD A NEW REALISM* (Andreas Wimmer et al. eds., 2004).

Current expressions of recognition for China's claims to Tibet are generally thought to be dependent on China's substantial power and influence. An autonomy arrangement acceptable to the Dalai Lama and the government in exile could encourage more genuine satisfaction with Chinese sovereignty in Tibet. A number of autonomy arrangements recognized by members of the European Union, for example, are now much less contentious than the Tibetan case, especially because of the international recognition of such democratic rights under the European Union.<sup>99</sup>

#### IV. A PATH TO GENUINE AUTONOMY FOR TIBET

The assertion in the above quoted Tibet White Paper that Article 31 only applies under circumstances that are a "product of imperialist aggression against China" or involve "an issue of China's resumption of the exercise of its sovereignty" is not supported by the text of Article 31. Further, it is not evident that Taiwan, to which Article 31 clearly applies by design, would meet such requirement.<sup>100</sup> China generally takes the view that the present ruling elite in Taiwan are Chinese nationals. Even if dispute as to sovereignty were required as a precondition for application of Article 31 the same Tibet White Paper in the next sentence appears to raise precisely that issue in speaking of Tibet being extricated from the "fetters of imperialism."<sup>101</sup> It seems obvious that the Article 31 route to resolving this long festering problem is a realistic option for a government truly sincere about resolving this issue. Any alleged obstacles appear to be questions of policy, not law. It is significant that under Article 62(13) of the PRC Constitution the National People's Congress has the power "To decide on the establishment of special administrative regions and the systems to be instituted there."<sup>102</sup> Rejecting the application of Article 31 out of hand raises doubts about the Central Government's determination to resolve this issue.

If this categorical question could be solved then the discussions might move forward to the more serious question concerning the design of the democratic, human rights, and rule of law institutions to be employed in an autonomous democratic Tibet. If the aim is to achieve a prosperous society

---

99. Markku Suksi, Legal Foundations, Structures and Institutions of Autonomy in Comparative Law, presented at the Conference on "One Country, Two Systems, Three Legal Orders—Perspectives of Evolution," Macao, PRC (5–7 Feb. 2007) (on file with Author). Suksi identifies ten such cases with full democratic guarantees within Europe, including Aland Islands, Catalonia, Corsica, Crimea, Basque Country, Azores, Scotland, Faroe Islands, Greenland, and Wales.

100. See *THE INTERNATIONAL LEGAL STATUS OF TAIWAN IN THE NEW WORLD ORDER* (Jean-Marie Henckaerts, ed., 1996).

101. Tibet White Paper, *supra* note 5.

102. PRC CONSTITUTION, art. 62(13).

secured by stable constitutional and rule of law institutions then there is a great deal that can be learned from constitutional experience in Hong Kong and elsewhere in Asia.<sup>103</sup> Such discussions can also be informed by the standards set forth in the UN Declaration on the Rights of Indigenous Peoples, as these standards would surely lend legitimacy to any outcome.

It is understood that Beijing's chief concern about genuine autonomy is that true democracy creates a platform for hostile forces to organize to promote independence in Tibet. There may be anxiety that autonomy is the first step on the road to secession. Beijing's anxieties over democratic development in Hong Kong have also included concern that Hong Kong not be a base of subversion or foreign interference. Nevertheless, in spite of considerable freedom and the presence of organized political parties in Hong Kong, no such hostile forces have emerged. If there are concerns about national security or subversive activities, there are no shortage of international regulatory standards, such as those expressed in the Johannesburg Principles.<sup>104</sup> That Tibetan exiles have long pursued a policy of non-violence should be reassuring to their Chinese partners.

It is important to consider what kind of democratic institutional model would best diminish this risk. Chinese scholar, Wang Li-xiong, has suggested that Beijing will be very anxious about this issue and that such anxiety might be better allayed by some form of indirect democracy that, while providing genuine choice at the local level, employs a structure going upward somewhat like the people's congress system, a pyramid structure where locally elected assemblies elect representatives to the next higher county, prefecture, and regional assemblies.<sup>105</sup> Such a model would distinguish itself from the current Chinese system of top-down control by having multi-party competitive elections with associational freedoms, human rights, and the rule of law. Wang argues the Chinese government will be reassured only if the Dalai Lama's plan can be modified to make the separation of Tibet impossible.<sup>106</sup> He feels that by shifting politics toward the village level there will be less grandstanding and more moderation. This is just one example of more serious issues for the discussion that has so far been deferred. To this discussion can be added other critical constitutional issues to secure

---

103. See Michael C. Davis, *Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998); Michael C. Davis, *The Price of Rights: Constitutionalism and East Asian Economic Development*, 20 HUM. RTS. Q. 303 (1998).

104. ARTICLE 19, THE JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION (Nov. 1996), available at <http://www.article19.org/pdfs/standards/joburg-principles.pdf>.

105. Wang Lixiong, *Indirect Representation Versus a Democratic System: Relative Advantages for Resolving the Tibet Question*, in CONTEMPORARY TIBET, *supra* note 10, at 107–128.

106. *Id.*

the rule of law, human rights, and education. China could be engaged in helping to establish such institutions. Experience in Hong Kong and Macau would be instructive, as Tibet will have had much less experience with rule of law and human rights institutions.

## V. MOVING THE DISCUSSIONS FORWARD

Throughout several hundred years of imperial history China pursued a distinctive and flexible policy in its dealings with Tibet. Boundary issues were generally left somewhat uncertain and the actual status of Tibet *vis à vis* the Chinese empire was generally a matter of complex protocol and dialogue. Until the occupation of Tibet in 1950 the occasional Imperial Chinese efforts at subordination of Tibet at most involved indirect rule through Tibetan elites. In the early twentieth century Tibet enjoyed *de facto* independence. In the late twentieth century, in the first decades after the Chinese revolution, efforts to fit this traditional relationship into the framework of a communist-totalitarian state proved unsatisfactory. More extreme policies during the totalitarian period explain the failure of the 17-Point Agreement.

In the reform era, China has pursued more flexible and inventive policies in its relationships with other peripheral communities. Attempting to fit its ancient empire into the clothes of a modern state, it has offered up the rather inventive model of “one country, two systems” under Article 31 of the PRC Constitution, as now applied in Hong Kong and Macau. The same model is on offer to Taiwan, where there is no occupation by a foreign power and the people in effective control are viewed by the PRC as Chinese. One may conclude from the above historical record that the Tibetan case for distinct national treatment is even more robust than the Taiwan case. The full achievement of China’s international human rights obligations may require internationally recognized autonomy.<sup>107</sup> The time is ripe for a serious approach to Tibet that appreciates China’s historical and international obligations.

In its middle way approach, the Tibetan side has called for “genuine autonomy” and unification of Tibetan regions. In the spirit of promoting a “cordial atmosphere” they have bent over backwards to reduce the stridency of their claims and moderate resistance against the Chinese government. Both the Dalai Lama and the exile Prime Minister Samdhong Rinpoche have shown great determination to use the recent rounds of discussion to reassure the Chinese of Tibetan sincerity in their middle way policy.<sup>108</sup> At the same

---

107. Michael C. Davis, *The Case for Chinese Federalism*, 10 J. DEMOC. 124 (1999).

108. Interview with the Dalai Lama, *supra* note 3; Interview with Samdhong Rinpoche, *supra* note 2.

time, the Tibetans have flexibly advanced proposals that depart dramatically from the traditional form of governance in Tibet before 1950, favoring replacement of the traditional theocracy with a modern liberal democracy.<sup>109</sup> They have proposed a new type of Tibetan autonomy that embraces liberal secular democracy. Such a democracy would aim at preservation of Tibetan culture and language, special protection of the environment, restraints on Han immigration into Tibet, unifying of Tibetan areas, and generally greater local control over the implementation of national and local policies. This is very much in line with the standards articulated in the new UN Declaration on the Rights of Indigenous Peoples. The Dalai Lama has also asked to be excused from temporal politics. This reformist attitude should reassure the Chinese that Tibetan leaders do not seek to move Tibet backwards toward theocracy but forward toward a modern inclusive form of democratic politics—a direction China may eventually favor for itself.

Unfortunately, there has been little cause for optimism about the present discussions. Since May 2006 Chinese officials have offered increased criticism of the Dalai Lama and his exile government.<sup>110</sup> Some attribute this sudden chill to Chinese anxiety over continued support in Tibet for the Dalai Lama, whom they have incessantly labeled a “splittist.”<sup>111</sup> This support, shown most recently in the 2008 crisis, has been demonstrated on a number of occasions over the past few years. For example, beginning in early 2006 there was widespread adherence—including destruction of expensive ceremonial items—among Tibetans in Tibet to a call for protection of endangered species made by the Dalai Lama during a Kalachakra ceremony in India. On several occasions Chinese attempts to pressure Tibetans to ignore the Dalai Lama’s edict and wear ceremonial objects made from endangered species have met with Tibetan resistance. In late 2006, monks at the Gandan Monastery destroyed a statue of the protective spirit Shugden, whose worship the Dalai Lama has discouraged. This was followed by popular interest in a rumored Dalai Lama visit to the Kumbum Monastery in Amdo.<sup>112</sup> These events tended

---

109. Interview with the Dalai Lama, *supra* note 3.

110. Paul Mooney, *Dalai Lama attacked with new ferocity*, SOUTH CHINA MORNING POST, 21 Aug. 2006, at A6.

111. For an aggressive 2006 Chinese critique of the Dalai Lama’s allegedly “splittist” clique see Yedor, China Tibet Information Center, On the “Middle Way” of the Dalai Lama (18 Jul. 2006) available at [http://en.tibet.cn/news/tin/t20060718\\_134212.htm](http://en.tibet.cn/news/tin/t20060718_134212.htm) (the name “Yedor” is given for this lengthy critique of the Dalai Lama, though it is unclear if this is a real person).

112. Edward Cody, *In Tibet, Dalai Lama Continues to Hold Sway*, WASH. POST, 10 July 2006, at A10; Jane Macartney, *Festival-goers ordered to wear fur or face fines as China flouts Dalai Lama’s ruling*, TIMES OF LONDON, 27 July 2007, available at <http://timesonline.co.uk/tol/news/world/asia/article2148342.ece>; Mooney, *supra*, note 110; SMITH, CHINA’S TIBET, *supra* note 29, at 219–20. China accuses the Dalai Lama of politicizing the endangered species issue through public displays of the burning of hides. Interview with Liu Hongji, *supra* note 4.

to prove the continued influence of the Dalai Lama within Tibetan society, contrary to frequent Chinese assertions that Chinese rule is widely supported. Of course, thousands of Tibetans continue to take the hazardous route over the Himalayas to visit the Dalai Lama in exile. Robert Barnett suggests that the paths of resistance to Chinese rule and the level of mutual distrust may be greater, involving even doubts among Han Chinese officials about the true loyalty of many local Tibetan officials.<sup>113</sup> Recent increased reliance on Han Chinese cadres in Tibet may tend to bear out this suspicion.<sup>114</sup>

It is time for China's leaders to reconsider their antipathy toward the Dalai Lama. It should be born in mind that the same Tibetan loyalty they perceive as a threat demonstrates the Dalai Lama's ability to win popular support for any agreement that is ultimately reached with China to achieve genuine autonomy. Even more radical pro-independence Tibetans in exile are generally supportive of the Dalai Lama's non-violent struggle and would probably support a settlement—though they are highly skeptical of efforts to create a cordial atmosphere and the prospects of China agreeing to genuine autonomy.<sup>115</sup> Lobsang Yeshe of the pro-independence Tibetan Youth Congress complains that Tibetans are allowed “talks about talks,” but when they finally explain their position they are condemned.<sup>116</sup> Chair of the Assembly of Tibetan People's Deputies, Karma Chopel, notes that skepticism has grown within the exile Tibetan Assembly as well due to the lack of progress.<sup>117</sup> Accordingly, the Dalai Lama may be uniquely instrumental in bringing a satisfactory closure to this vexing issue.

Many Chinese officials involved in the Tibet issue have, nevertheless, refused to move the discussions substantially forward, accusing the Dalai Lama and his supporters of “splittist” activities.<sup>118</sup> A leading Tibetan communist retired official, Phuntso Wangye, who reportedly helped lead Chinese advanced troops into his homeland in the 1950s and served as a translator in negotiations with the Dalai Lama in 1954, has expressed rare dissent from within. In three letters to Chinese President Hu Jintao he argues that hawks have thrived on their opposition to the return of the Dalai Lama:

---

113. Robert Barnett, *Beyond the Collaborator—Martyr Model: Strategies of Compliance, Opportunism, and Opposition Within Tibet*, in *CONTEMPORARY TIBET*, *supra* note 10, at 25–66.

114. See China: Fewer Tibetans on Lhasa's Key Ruling Body Lowest Representation Since 1966, *supra* note 26.

115. Interview with Tenzin Tsundue, prominent social activist, Dharamsala, India (9 Aug. 2006).

116. Interview with Lobsang Yeshe, Vice-President of the Tibetan Youth Congress, Dharamsala, India (3 Aug. 2006).

117. Interview with Karma Chopel, Chair of the Assembly of Tibetan People's Deputies, Dharamsala, India (2 Aug. 2006). This general level of frustration may account for the Dalai Lama's increased travel schedule in late 2007 to several countries in Europe, Australia, and finally to the US, where he received the US Congressional Gold Medal.

118. See Yedor, *supra* note 111.

They make a living, are promoted and become rich by opposing splittism. . . . If the Dalai Lama and the central government reconcile, these people will be in a state of trepidation, feel nervous and could lose their jobs. . . . Any notion of delaying the problem until after the 14<sup>th</sup> Dalai Lama dies a natural death is not only naïve, it is also unwise and especially tactically wrong (fearing the radicalization of young Tibetans).<sup>119</sup>

He then argues that China's objectives of a harmonious society would be advanced by welcoming the Dalai Lama and thousands of Tibetans home. Nevertheless, there is a perception that some Chinese officials favor waiting until after the Dalai Lama passes away to solve the Tibet problem. In a similar vein, some Tibetans suspect that they can only solve the problem after communism collapses in China.<sup>120</sup> There is probably folly in both positions, especially if they lead to complacency and protracted delays.

Chinese reservations about Tibetan intentions have essentially deferred any discussion of substance, as Chinese officials have so far even refused to acknowledge the existence of a problem or give any consideration to the Tibetan perspective.<sup>121</sup> This level of indifference about the wishes of the Tibetan people comes far short of the spirit of the UN Declaration on the Rights of Indigenous Peoples that the Chinese government supported. Even if the PRC refuses to respect Tibetan status as indigenous people, their past policies embodied in the 17-Point Agreement acknowledge at least an analogous status. If the UN Declaration requirements for indigenous peoples are supported, as is evident in China's UN vote, then the total neglect of analogous obligations is surely anomalous. For most observers, who may reasonably believe Tibetans are indigenous people, the Chinese policy is simply a breach of the UN Declaration.

If a consensus emerges that the time is ripe for addressing the Tibet issue the challenge will be to come up with a solution that responds to both sides' stated objectives. The LRNA national regional ethnic autonomy policy fails to do so. It is the right time for reconsideration of the Article 31 framework. If the Article 31 solution is deemed satisfactory for the Han nationality in Hong Kong, Macau, and Taiwan, then it should be deemed equally satisfactory for the Tibetan nationality. Article 31 of the Chinese Constitution would allow much greater flexibility in achieving China's autonomy obligations for the historically distinctive Tibetan nationality.

---

119. Benjamin Kang Lim, *Tibetan says hawks blocking Dalai Lama's return*, REUTERS, 7 Mar. 2007; Benjamin Kang Lim, *Top official dismisses call for Dalai Lama's return*, REUTERS, 20 June 2007. It is interesting that Chinese officials accuse the Tibetan government in exile of the same thing, saying they "live on independence; they eat political rice." Interview with Liu Hongji, *supra* note 4.

120. Even Mr. Rato Ngawang, a well-known former CIA trained Mustang resistance fighter who now supports the Dalai Lama's middle way approach, suspects that settlement would be more likely with a democratic China. Interview with Mr. Rato Ngawang, Dharamsala, India (7 Aug. 2006). He expressed doubts about the efficacy of violent resistance at the present stage and supports the Dalai Lama's middle way approach.

121. Interview with the Dalai Lama, *supra* note 3.