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Where Two Legal Systems Collide: An American Constitutional Scholar in Hong Kong

*Michael C. Davis**

I. INTRODUCTION

Under the terms of the Sino-British Joint Declaration (“Joint Declaration”), Hong Kong, a significantly Westernized community with a highly developed economy, will become a Special Administrative Region (“SAR”) of the People’s Republic of China (“PRC”) on July 1, 1997. As a SAR it will be fundamentally constituted under a Basic Law that is now being drafted. Inevitably, elements of the Chinese legal system and the British common law legal system will act in concert to determine the characteristics of the end product, the Basic Law. Where two legal systems collide, major research implications for comparative legal scholarship are present. This Article aims to furnish a basis for considering those implications.

In drafting the Basic Law, the Chinese government is employing a very elaborate system embodying both a Basic Law Drafting Committee and a Basic Law Consultative Committee. This process is designed to ensure consultation with a large cross section of the Hong Kong community and the drafting of a constitution suitable to their needs and the aspirations of the Joint Declaration. The Drafting Committee includes significant representation from both mainland Chinese and Hong Kong compatriots, while the Consultative Committee is made up of only Hong Kong compatriots. Both the drafting and consultative committees have also established select working groups to tackle various topic areas of the Basic Law.¹

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¹ The Basic Law Drafting Committee has six subgroups: 1) economic system, 2) rights and duties of Hong Kong inhabitants, 3) culture, technology, education and religion, 4) political structure of the Special Administrative Region (SAR), 5) relationship between the Central Government and the SAR, and 6) law. The Consultative Committee for the Basic Law has eight subgroups: 1) political structure of the SAR, 2) the structure of the Basic Law, 3) law, 4) inhabitants’ and other persons’ rights, freedom, welfare, and duties, 5) finance, business, and economy, 6) culture, technol-

One can imagine that in countries with established constitutional systems, there is an interest in American constitutional law merely for the sake of developing general knowledge of a comparative nature. In the Basic Law drafting frenzy that permeates modern Hong Kong, an American comparative constitutional scholar encounters a thirst for foreign constitutional ideas with the potential for immediate application. This thirst, however, does not seek to be quenched by adoption of an unmolested foreign concept. The mainland Chinese and Hong Kong participants have shown a willingness to develop unique approaches, as reflected in the notion of "one country, two systems." An American comparative constitutional scholar in Hong Kong would be remiss if he or she did not contribute to this important public discussion.

In considering the "idea of the constitution" an American constitutional scholar in Hong Kong encounters a seemingly endless array of claims seeking resolution. While many of these claims draw primarily upon Hong Kong's unique political history and circumstances, several fundamental issues invite comparison with the American constitutional experience. Within the context of this panel on international legal exchange and the American Constitution, this Article will introduce several of these issues, with an eye to noting the potential value of comparative constitutional analysis to the Hong Kong Basic Law drafting enterprise.

In noting this potential value of comparative constitutional scholarship, it is imperative to advocate a readjustment of the mission of comparative legal scholarship. Such scholarship has too often been involved merely in descriptive studies of foreign legal systems. In a world where the mission of constitutionalism is ever-expanding, a more truly comparative form of constitutional scholarship is needed. This pressing need is particularly obvious in the rapidly changing world of Asian constitutionalism: scholars inevitably discover that a more application oriented form of comparative constitutional scholarship—one that aims better at a moving target—is needed. By way of illustration, advocating such a mission is an underlying primary point of this Article.

As Hong Kong sets about implementing a written constitution, the value of comparison with the oldest written constitutional tradition is apparent. This Article cannot fully carry out the invited comparison in the several areas noted; however, it extends that invitation to American constitutional scholars anticipating international legal exchange or some other form of participation in Basic Law drafting in Hong Kong or else-

ogy, education, and religion, 7) external affairs, and 8) the relationship between the Central Government and the SAR. See *Annual Report of the Consultative Committee for the Basic Law, 1986*, S. China Morning Post, Feb. 23, 1987. Note that only twenty-three members of the fifty-eight member Drafting Committee are from Hong Kong. See *Final pieces of the Jigsaw*, S. China Morning Post, Aug. 22, 1987.

where. Opportunities for application oriented comparative scholarship are abundant. In addition to noting the key issues, I will briefly chart the course which I took in a previous Article with respect to one of these issues.² This is done merely to illustrate some relevant factors in application oriented comparative legal scholarship. A theoretical framework for such scholarship is certainly in need of further development.³

II. THE BASIC LAW DEBATE

Several key issues have emerged as the most contentious and critical to the success of the "one country, two systems" endeavor. While the Chinese drafters have a seemingly monolithic view on these issues, widely varied views have emerged among the Hong Kong participants. While this debate may give greater weight to politics than it does to theory, one does sense a sincere concern about Hong Kong's continued stability among drafters on both sides of these issues. Many of these issues are perceived as very relevant to the existence of true autonomy for the future SAR. These issues are ripe for application oriented comparative analysis. A brief discussion of these issues is provided to aid in identification of their salient features.

A. Selection of the Future SAR Governor

Among the most contentious issues to emerge in the current Basic Law drafting debate has been the method for selection of the future governor. Of the several models proposed, the competing models of two well organized groups associated with the drafting process have emerged as the main contenders. The "Group of 76," which is generally characterized as conservative and pro-business, would have the future governor elected by an electoral college of 600 members.⁴ A twenty-member nominating committee would select three candidates. Members of the electo-

² Davis, *A Common Law Court in a Marxist Country, The Case For Constitutional Judicial Review in The Hong Kong SAR*, 16 DEN. J. INT'L L. AND POL'Y — (Spring 1988) (forthcoming).

³ *Id.* It has been suggested that some of these contentious issues, especially the first two, may not be resolved in the first draft of the Basic Law in early 1988 which may only list options. *Drafters Split on Crucial Issues*, S. China Morning Post, Aug. 28, 1987.

⁴ See Collection of Draft Provisions of the Various Chapters Prepared By the Subgroups of the Drafting Committee [hereinafter "Basic Law Draft"], art. 45 (Collection of Documents of the Sixth Plenary Session of the Drafting Committee, Compiled by the Secretariat of the Drafting Committee of the Basic Law (Dec. 1987)). This article is still worded in the alternative and could well remain so in the final draft to be produced by the seventh plenary session in May 1988. This draft will be referred to herein. No major changes are expected in the final draft to be submitted for community consultation in May of 1988. See also *Splits Appear in Law Group*, S. China Morning Post, Sept. 8, 1986; *Electoral College Plan Is Favored by Committee*, S. China Morning Post, Sept. 14, 1986 [hereinafter *Electoral College Plan*]; *New Formula to Elect Chief Executive*, S. China Morning Post, Nov. 5, 1986; *Chief Executive Options*, S. China Morning Post, July 3, 1987. The "Group of 71" was originally the "Group of 57" and recently the "Group of 76". See *Group of 76 To Give Poll a Miss*,

ral college would be elected from eleven functional constituencies representing various industry, labor, and government sectors of the community. The liberal model proposed by the "Group of 190," which is made up of more liberal, democracy oriented drafters and community leaders, would have the governor candidate nominated by no less than 10% of the legislature and then directly elected on a one man, one vote basis.⁵ The electoral college proposal of the "Group of 76" is generally perceived as more conservative and more subject to control from Beijing. This proposal is thought to be in line with Beijing's own view.⁶ The more liberal model incorporating universal suffrage is thought by its supporters to be better equipped to insure greater autonomy and confidence in Hong Kong.

Since the Joint Declaration merely provides for the chief executive to be selected by election or through local consultations and then appointed by the Central People's Government,⁷ it does not resolve this conflict. The conflict must therefore be resolved by the Basic Law drafters.

The terse statement in the Joint Declaration raises another issue in the selection process concerning whether or not Beijing can refuse a candidate selected locally. It appears to be Beijing's view that it need not endorse the locally selected candidate. The political sub-group of the Drafting Committee has apparently endorsed the view that Beijing's appointment should not be nominal. China, however, would "fully consider the aspirations" of Hong Kong people and not interfere with the nomination process held locally.⁸ The amount of power given in the Basic Law to the chief executive will no doubt have some bearing on Beijing's behavior in this respect. Beijing appears to favor a powerful chief executive similar to the current colonial governor. There is agreement in other respects, namely that the chief executive must be over forty years old, must be a Chinese national and must have lived in Hong Kong con-

S. China Morning Post, Aug. 12, 1987. They have also been called the business and professional group but for convenience will be referred to as the "Group of 76" in this Article.

⁵ *The Group of 190: Fighting for Change*, S. China Morning Post, Apr. 21, 1987.

⁶ While Beijing is careful not to directly favor one side or the other, the general conservatism of pronouncements from mainland officials and conclusions reached by drafting subgroups heavily weighted with mainland members is such as to suggest that Beijing would generally favor the more conservative model. See *Electoral College Plan*, *supra* note 4; *Beijing Keen to Exercise Control*, S. China Morning Post, Oct. 27, 1986.

⁷ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, United Kingdom-People's Republic of China, 1984 Gr. Brit. T.S. No. 20 (Cmd. 9352) para. 3(4), [hereinafter Joint Declaration], *reprinted in* 23 I.L.M. 1371 (within the British White Paper referred to as the Draft Agreement).

⁸ *Beijing To Have Final Say in Choice of Chief*, S. China Morning Post, Aug. 27, 1986.

tinuously for more than twenty years.⁹

Resolution of the contentious issues still awaits further discussion. It would appear that some comparative and theoretical assessment could be made of the potential for these models and various compromise models to achieve the desired stability and autonomy envisioned in the Joint Declaration. In doing so, a comparative scholar might consider the objectives of the participants, their political culture, and their conceptual difficulties.

B. *Composition of the Future Legislature*

When it comes to the composition of the post-1997 legislature, the differences in the final analysis appear smaller, while the amount of contention is larger. For a comparativist this area again is ripe for comparative legal and political analysis. Which model would ultimately render the desired degree of political stability and autonomy? The Joint Declaration again provides very terse guidance, indicating that the SAR Legislature "shall be constituted by elections" and that the executive shall be "accountable to the legislature."¹⁰

On first glance the differences in the two main opposing models seem to be largely an affair of numbers. For the "Group of 190" or the "democratic group," the post-1997 legislature should be composed of legislative councilors who are 50% directly elected from geographical constituencies, 25% from functional constituencies and 25% elected by local government district boards, the Urban Council, and the Regional Council.¹¹ The "Group of 76," now often referred to as the "Business and Professional Group", advocates that eighty legislative councilors be selected, 50% by functional constituencies, 25% by the electoral college (the electoral college would have 600 members elected from functional constituencies), and 25% by direct election.¹² The conservative group seems to place a lot of confidence in functional constituencies which were employed for the first time in the last election to the Legislative Council in Hong Kong and which seem to openly acknowledge the role of traditional power elites in government. This conservative group and Beijing have frequently expressed fear of instability should Hong Kong adopt the Western democratic model. Beijing's views in this respect may well hinge in part on the question of accountability: that is, Beijing may be

⁹ *The Profile of the Chief Executive*, S. China Morning Post, June 11, 1987.

¹⁰ Joint Declaration, *supra* note 7, Annex I, § I.

¹¹ Basic Law Draft, *supra* note 4, art. 64; *Working Towards a Democratic Government*, S. China Morning Post, Apr. 27, 1987.

¹² Basic Law Draft, *supra* note 4, art. 64; *New Formula to Elect Chief Executive*, *supra* note 4.

more amenable to a more democratic legislature if that body has little power to check the chief executive.¹³

While the aforementioned legislative composition alignment seems to be an affair of numbers with potential ease for compromise, the road to democracy proves, in fact, to be strewn with many more obstacles. The current debate over political reform in Hong Kong includes proposals towards achieving a more representative government. The recently published Green Paper on representative government includes options for incorporating direct elections to the Legislative Council.¹⁴ This has raised strong opposition from conservative members of the "Group of 76" and from representatives of the Beijing government.¹⁵ It is generally suggested that any such political reform should await promulgation of the Basic Law so as to assure convergence. One mainland representative went so far as to suggest that such development would violate the Joint Declaration, but his statement was retracted the next day.¹⁶ More liberal public speakers have suggested that the natural development of more representative government in response to popular demand would inform the Basic Law drafting process and thus assure convergence.

In debates reminiscent of those of the drafters of the American Constitution, fears have been expressed from local conservatives and Beijing that having too many directly elected legislators will render a legislative body that will be politically strong enough to challenge the governor and thus interfere with the smooth transfer of government.¹⁷ China is said to want "talent in administrative management rather than politicians, so as

¹³ *Gradual Reform Urged for 1997*, S. China Morning Post, Nov. 10, 1986; *Deng Criticized for "Being Misinformed,"* S. China Morning Post, Apr. 18, 1987; *Final Pieces of the Jigsaw*, *supra* note 2; *Students Question Power Proposal*, S. China Morning Post, Aug. 24, 1987; *Strong Opposition To a More Powerful Legislature*, S. China Morning Post, Aug. 26, 1987. This debate over a legislative-led government versus an executive-led government has been characterized as being one between a British style versus American style, but this seems incorrect since legislative checks exist under the American system. *Delicate Balance In Allocation of Power*, S. China Morning Post, Aug. 28, 1987. This structural question could be added as an additional issue herein, but it is intimately connected with issues A & B and, therefore, subsumed thereunder.

¹⁴ *Green Paper: The 1987 Review of Developments in Representative Government*, May 1987 (Hong Kong Government Publication). The subsequent White Paper delays any introduction of direct election to the Legislative Council until 1991 when a small number (10) of directly elected councilors will be permitted. WHITE PAPER: THE DEVELOPMENT OF REPRESENTATIVE GOVERNMENT: THE WAY FORWARD (February 1988). The White Paper is currently under debate but it appears the conservative view will win out.

¹⁵ *Beijing Opposed to Early Elections*, S. China Morning Post, Feb. 2, 1987. *Best Election Date 1991—Lu*, S. China Morning Post, Feb. 14, 1987; *Direct Election Support Requires Legal Backup: Xu*, S. China Morning Post, May 2, 1987; *We Don't Need Any Political Reform, Says Sir S.Y.*, S. China Morning Post, May 4, 1987.

¹⁶ *China and HK Heading for Row*, S. China Morning Post, June 19, 1987; *New Uproar as Li Hou Denies Remark*, S. China Morning Post, June 24, 1987.

¹⁷ *Beijing Opposed to Early Elections*, *supra* note 15.

to implement the policy of 'Hong Kong people ruling Hong Kong' [*gang-ren zhi gang*] after 1997."¹⁸

Another concern often attributed to Beijing and openly expressed by conservatives is that there be no development of political parties in Hong Kong.¹⁹ It is felt that the introduction of political parties would overheat politics and too easily result in challenges to Beijing rule. It is a twist of irony in that by organizing themselves into a political "Group of 76" the conservatives who generally oppose political parties may have created the beginning of a political party. The rival "Group of 190" has indicated that it will field candidates for district board elections.²⁰ The "Group of 76" has indicated that it will not but that members of the group "can run for any election as individuals."²¹ It appears that the conservative "Group of 76" may be caught in its own political web.

C. *Interpreting and Implementing the Basic Law*

The third main issue remaining highly contentious relates to the power of the judiciary to interpret the Basic Law. Justice Jackson once stated: "If put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices."²² If the reference is changed from Soviet Russia to the PRC this statement may have a rather serious bearing on the future prospects of constitutionalism in the common law jurisdiction of Hong Kong. It is too early to determine whether the future Basic Law, to be enacted by China's National People's Congress ("NPC"), will be "applied in good faith by our common-law procedures."²³

In all the hullabaloo over the electoral process, political structure, and other features of the Basic Law, there has been little attention given to the process for implementing the Basic Law. Beginning in early 1987, some Hong Kong members of the Basic Law Drafting Committee began to come out rather strongly in favor of the Hong Kong courts retaining the power to interpret the Basic Law. Nevertheless, a majority of the members of the Basic Law Drafting Committee appear set to recommend placing the primary power of review over Hong Kong SAR legislation in the Standing Committee of the NPC.²⁴ This power is said to be consis-

¹⁸ *Id.*

¹⁹ *We Don't Need Any Political Reform, Says Sir S. Y., supra* note 15; *Group of 76 To Give Poll a Miss, supra* note 4; *Group Turns on the Election Pressure*, S. China Morning Post, Aug. 21, 1987.

²⁰ *Id.*

²¹ *Id.*

²² *Shaughnessy v. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

²³ *Id.*

²⁴ The relevant draft article which appears slated for final approval in the Seventh Plenary Session of the Basic Law Drafting Committee reads as follows:

tent with the PRC Constitution which provides for the NPC Standing Committee to interpret national legislation.²⁵ After further discussion and opportunity for community input during the consultation period, Hong Kong participants may be able to get at least some part of what they are asking for. This may, on refinement, embody some aspects of what is in most common law jurisdictions referred to as constitutional judicial review of legislation. With several months remaining in the drafting process current attention to this issue is timely.

Constitutional judicial review, in its refined stage of development, may be the most fundamental contribution of the United States to constitutionalism and human rights development. Nevertheless, Hong Kong brings together two converging legal forces that have had little use of this instrument for constitutional implementation. The Chinese employ what is described as legislative implementation of their national constitution, i.e., the constitution is interpreted by the NPC or its Standing Committee and takes on life only when its principles are enacted into legislation.²⁶ There is no judicial review of legislative acts in China. Likewise, Hong Kong being a beneficiary in part of the British tradition of parliamentary supremacy, does not employ constitutional judicial review of legislation. Hong Kong does have a British system of judicial review of administrative acts as well as some very confined and virtually unemployed means for the judiciary to review legislation.²⁷ Like their British counterparts,

Article 168: The power of interpretation of the Basic Law shall be vested in the NPC Standing Committee.

If the NPC Standing Committee has given an interpretation of a provision of the Basic Law, the courts of the HKSAR shall in applying such provision follow the interpretation of the NPC Standing Committee. However, judgments previously given shall not be affected.

The courts in the HKSAR may, in adjudicating cases before them, interpret provisions of the Basic Law. If a case involves the interpretation of a provision of the Basic Law concerning defence, foreign affairs and other affairs which are the responsibilities of the Central Government, the courts of the HKSAR shall ask the NPC Standing Committee to give an interpretation of the relevant provision before giving their final judgment on the case.

The NPC Standing Committee shall consult the HKSAR Basic Law Committee before giving an interpretation of this Law.

Basic Law Draft, *supra* note 4, art. 168.

²⁵ XIANFA (Constitution) art. 67(4) (People's Republic of China) [hereinafter P.R.C. CONST.].

²⁶ P.R.C. CONST. See generally R. EDWARDS, L. HENKIN, & A. NATHAN, *HUMAN RIGHTS IN CONTEMPORARY CHINA* (1986) [hereinafter EDWARDS]; A. Chen, *Xianggang Jibenfa de Jieshi* (The question on the Interpretation of the Hong Kong Basic Law), *WIDE ANGLE MAGAZINE*, Mar. 16, 1985, at 24-27.

²⁷ In addition to review of administrative acts, Hong Kong law affords limited conceptual possibilities for judicial review of legislative acts. See P. Wesley-Smith, *Legal Limitations Upon the Legislative Competence of the Hong Kong Legislature*, 11 *HONG KONG L.J.* 3 (1981). Most noteworthy is a limited power of review for conformity to acts of the British Parliament. *Rediffusion (H.K.) Ltd. v. Attorney Gen.*, 1968 *HKLR* 277 (Sup. Ct.); *Rediffusion (H.K.) Ltd. v. Attorney Gen.*, 1970

the Hong Kong judiciary has had no written bill of rights to implement. Hong Kong's written constitution is confined to Letters Patent and Royal Instructions that merely delineate the structure of government and governmental powers.

The advent of a written Basic Law with a substantial rights component will work a fundamental change in the style of constitutionalism in Hong Kong. The Joint Declaration affords little guidance on this issue. As briefly discussed for illustrative purposes in the next section of this Article, however, this issue is one ripe for application of comparative law.

D. *The Concept of Human Rights*

An additional issue, lurking beneath the surface of the aforementioned issue, concerns the concept of human rights to be employed. Attention to the Western notion of fundamental rights is considered by many to be an important ingredient of Hong Kong's current success.²⁸ The concept of rights employed in the PRC, and by the Nationalist government before 1949, has been described as a policy based notion of rights.²⁹ In contrast to the natural rights notion of Western liberalism, the rights of the individual are more readily surrendered to the prevailing policy or collective interest. The PRC Constitution speaks of the "rights and duties" of citizens, creating a somewhat contingent notion of rights.³⁰

Whether the existing notion of rights will prevail in post-1997 Hong Kong is difficult to determine. It is noteworthy that the title of chapter 3 of the current Basic Law draft is "Fundamental Rights and Duties of HKSAR Inhabitants,"³¹ which is in effect borrowing from the contingent

HKLR 231 (Privy Council); *In re Application by the Attorney Gen.*, 1985 HKLR 381 (High Court). As a practical matter, such potential for review of legislation rarely occurs, and Hong Kong adheres to a tradition of legislative or parliamentary supremacy.

²⁸ Reference here is to liberal notions of natural rights that could be considered part of the English legal system employed in Hong Kong. *See generally* D. GERMINO, MACHIAVELLI TO MARX, MODERN WESTERN POLITICAL THOUGHT 116-48 (1972). Political discourse in Hong Kong would suggest that such notion of rights is well established among Hong Kong's elite. A recent survey among common people in an industrial community in Hong Kong would also tend to indicate very strong support for the Western concept of "freedom" generally, although no clear understanding of the idea of "inalienable rights." H. KUAN & S. KAU, COMMON LAW IN A CHINESE SOCIETY: THE CASE OF HONG KONG (1987). I am not sure that common citizens in working class communities in Western society have a clearer conception of the rights notion which they support. Certainly, when considering Hong Kong's economic success, we should be more interested in how important this rights notion is to the more elite or educated classes. The same survey indicated even stronger support for the legal system and its rights base among the educated and economic elite.

²⁹ *See generally* EDWARDS, *supra* note 25; O. M. FISS, *Two Constitutions*, 11 YALE J. INT'L L. 492 (1986).

³⁰ *See* P.R.C. CONST. arts. 33-56 (ch. 2, The Fundamental Rights and Duties of Citizens).

³¹ Basic Law Draft, *supra* note 4, ch. 3.

notion of rights in the PRC. Earlier drafts have also been criticized for failing to secure adequately against future amendment the guarantees of rights and freedoms "of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief."³² Such guarantees were listed as one of the twelve basic policies of the PRC in the Joint Declaration³³ but were omitted from a recent draft of the general provisions of the Basic Law, along with several of the other enumerated basic policies from the Joint Declaration. Drafters have proposed as a solution a stipulation in the Basic Law that the basic policies in the Joint Declaration cannot be amended while general provisions in the Basic Law can.³⁴ This of course still leaves us with interpretation problems.

Draft proposals have also been criticized for failing to take rights sufficiently seriously in other respects. A recent sub-group draft was criticized for suggesting that the onus for protecting inhabitants' rights and freedoms lay with the legislature, as is true in the PRC. While such a provision was rejected, draft language in the most recent draft does not impose sufficient restraint on the legislature, employing language permitting restriction of rights "according to law."³⁵

The passage in Hong Kong of recent laws such as the Public Order Ordinance, which makes it a crime to publish false news likely to cause alarm to the public or disturb public order, has also raised post-1997 concern.³⁶ Will there be equally restrained administration of such press laws, or secrecy laws, or film censorship laws in the post-1997 period? What will be the impact of the Basic Law in this respect? How might application of the comparative method help us to understand the likely impact of these various rights features on the future success of Hong Kong?

E. Other Issues

While the four previously discussed issues are the most contentious and may well remain so after publication of the first draft of the Basic Law in early 1988, other more solvable issues have occupied the drafters in recent months. Some of these also offer fuel for comparative analysis.

³² *Crucial Clauses Omitted from Basic Law Draft*, S. China Morning Post, Apr. 14, 1987.

³³ Joint Declaration, *supra* note 7, para. 3.

³⁴ Basic Law Draft, *supra* note 4, art. 169; *Drafters Find Solution to Amendment Problem*, S. China Morning Post, June 6, 1987.

³⁵ Basic Law Draft, *supra* note 4, art. 39; see also *Group of 71 Plans Strategy for Transfer*, S. China Morning Post, May 19, 1987; *Basic Law Draft on Human Rights Has Many Failing*, S. China Morning Post, June 1, 1987 (quoting Mr. M.M. Chan, Lecturer in Law, Hong Kong University).

³⁶ *Onus on AG for Public Order Bill Prosecutions*, S. China Morning Post, May 2, 1987; *Review of Press Bill By 1997*, *Says Tam*, S. China Morning Post, May 4, 1987.

These issues include: 1) the setting up and composition of a special Basic Law Committee under the NPC to advise on interpretation and amendment of the Basic Law; 2) whether residuary or reserve power should be vested in the national or the SAR government; 3) vesting of the power of amendment of the Basic Law; and 4) application of PRC law in the SAR.

There appears to be general agreement on the need for an advisory Basic Law Committee but very little agreement on its composition and function or whether it should be created by the Basic Law itself or directly by the NPC.³⁷ Hong Kong drafters appear to favor that a majority of the members be from Hong Kong. The committee will likely have several duties including some, as yet unspecified, role in the interpretation of the Basic Law. Since the committee will serve the NPC there is also disagreement on whether the Basic Law should address the issue or whether the drafters should merely recommend action to the NPC.

The question of residual powers gets hooked on Chinese claims that China is not a federation and Hong Kong claims that vesting such power in the SAR government is the only way to insure autonomy.³⁸ The potential for comparison with the reserved power (to the states) question in the United States is obvious.

The Chinese drafters seem unanimously of the view that amendment of the Basic Law should be left to the NPC, which ultimately must approve and enact the Basic Law.³⁹ The feeling is that the Basic Law is PRC legislation and should be amended in accordance with the NPC procedures. The Basic Law itself will only allow for initiation of proposals for amendment. The sub-group on local/central relations originally took the view that the NPC Standing Committee and State Council could propose changes but not the local legislature. Article 169 of the Basic Law Draft provides that, in addition, a combination of two-thirds of the local legislature, two-thirds of Hong Kong delegates to the NPC and the chief executive could propose a change with each, in effect, having the ability to veto submission of such a proposal.

The question of application of China's socialist laws in the Hong Kong SAR has likewise sparked contention but has now been allegedly resolved.⁴⁰ Article 17 of the Basic Law Draft now specifies that applicable Chinese laws should be limited to those concerning defense, foreign

³⁷ *Rulemakers in Triple Move to Allay H.K. Fears on China Law*, S. China Morning Post, June 7, 1987. Basic Law Draft, art. 168, for example, specifies that the NPC Standing Committee shall consult the HKSAR Basic Law Committee when interpreting the Basic Law but specifies no further the structure or procedures of such committee.

³⁸ *Power and Privileges, How the SAR Can Retain a Crucial Role*, S. China Morning Post, Mar. 9, 1987.

³⁹ *Basic Law Won't Contain Provision for Amendment*, S. China Morning Post, Mar. 15, 1987.

⁴⁰ Basic Law Draft, *supra* note 4, art. 17; *Agreement over China Law in HK*, S. China Morning Post, Aug. 5, 1987.

affairs, and the realization of China's national unity which are outside the scope of the high degree of autonomy given Hong Kong. In such cases the State Council would direct the Hong Kong government to publish and implement the mainland laws that it determines should apply in Hong Kong. Except in emergencies, the State Council should consult the Hong Kong government and the Basic Law Committee before issuing its directives. If the HKSAR does not comply with the directive, the State Council may apply its directive by issuing an order. Some Hong Kong drafters have objected to the possible direct application of PRC law, viewing it as an affront to autonomy. In its statement on this point, the Joint Declaration does not include PRC law among the laws that will apply to the Hong Kong SAR. This may raise treaty obligation problems.

III. IMPLEMENTATION OF THE BASIC LAW—AN ILLUSTRATION OF THE COMPARATIVE APPROACH

So far this discussion has introduced a series of key issues that are readily subject to comparative method used in comparative law or politics. A brief discussion of my experience in employing such methods with respect to the implementation of the Basic Law serves an illustrative purpose both for the comparative method and international legal exchange. It also reveals a possible structure for such application oriented comparative analysis. Such comparative analysis may, in addition, improve our understanding of the substantive concept under examination—in this case constitutional judicial review—by subjecting it to more rigorous contextual and policy examination.

Taking account of the American tradition of constitutional judicial review and considering various models employed elsewhere, I have preliminarily suggested a model for constitutional judicial review in Hong Kong. This model embodies features from other common law jurisdictions, as well as features with roots in continental Europe, with all such features being tailored to Hong Kong's unique circumstances and the policy objectives of the Joint Declaration.⁴¹

A. *The Joint Declaration*

An American constitutional scholar arriving on the scene of the intense Hong Kong Basic Law debate is struck by the uniqueness of the Hong Kong context and the "one country, two systems" endeavor. With reference to constitutional judicial review, the Joint Declaration proves as ambiguous as international treaties can be. The current Basic Law draft proposes that the interpretation power of the Basic Law belong pri-

⁴¹ Davis, *supra* note 2 and accompanying text.

marily to the Standing Committee of the NPC.⁴² This was described in some press accounts as a power to review under the Basic Law and "veto" all non-conforming SAR legislation.⁴³ Under the draft provision the SAR courts would retain some power of Basic Law interpretation, but would be bound by previous interpretations of the NPC Standing Committee. Suffice it to say that this proposal has met with considerable opposition.

The sub-group that originally advanced the aforementioned proposal reportedly traces such allocation of power to a portion of Annex I, section II of the Joint Declaration, which provides that the SAR legislature must report all legislation to the Standing Committee of the NPC "for the record."⁴⁴ One should query whether such reporting for the record implies a power of review or veto. The draft provision gains further support from article 67 of the PRC Constitution which affords to the Standing Committee the power to interpret legislation.⁴⁵ Article 31 of the PRC Constitution, however, permits the creation of special systems in SARs and would therefore appear to permit delegation of the power of interpretation, either in the Joint Declaration or Basic Law.⁴⁶

While the Joint Declaration is slightly ambiguous on this point, a case can be made that its language provides at least a strong suggestion of constitutional judicial review and that such may be more consistent with its spirit and the aspirations of the participants than constitutional review power vested in the NPC Standing Committee. The basic policies of the Joint Declaration and Annex I thereto are to be stipulated into the Basic Law.⁴⁷ The Joint Declaration indicates that these basic policies include an "independent judicial power, including that of final adjudication"⁴⁸ and requires that the rights enumerated therein "be ensured . . . [or] be protected by law."⁴⁹ Annex I, section II provides that laws previously in force in Hong Kong, including the common law system, shall be maintained "save for any that contravene the Basic Law,"⁵⁰ and that "[I]aws

⁴² See *supra* note 24 and accompanying text.

⁴³ *Agreement on Power of Veto*, S. China Morning Post, Nov. 11, 1986. The mainland co-convenor of the subgroup on local/central relations, Mr. Shao Tienren, was quoted as saying, "the NPC's Standing Committee will be vested with the final power to review future laws of Hong Kong, but in practice, the NPC will be unlikely to exercise the power frequently." *Id.*

⁴⁴ Joint Declaration, *supra* note 7, Annex I, § II.

⁴⁵ P.R.C. CONST. art. 67.

⁴⁶ 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 the light of the specific conditions.

Id. art. 31.

⁴⁷ Joint Declaration, *supra* note 7, para. 3(12).

⁴⁸ *Id.* para. 3(3).

⁴⁹ *Id.* para. 3(5).

⁵⁰ *Id.* Annex I, § II.

enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid."⁵¹ Should the courts treat laws not so in accord as invalid? Annex I, section III requires courts to act "independently and free from interference."⁵² This would tend to rule out judicial consultation with another entity such as the NPC Standing Committee. Finally, Annex I, section XIII provides "[e]very person shall have the right to challenge the actions of the executive in the courts."⁵³ Does this include the challenge of statutes or ordinances under which the executive purports to act? While it is not conclusive, perhaps a much stronger case can be made for constitutional judicial review than for NPC Standing Committee review where the Joint Declaration rather clearly indicates that reporting of legislation to the Standing Committee is "for the record."⁵⁴

B. Participant Perspectives

With a clear resolution of this issue not available in the Joint Declaration, a more useful enterprise might be to examine what the Basic Law can and should do on this issue. We might begin by examining the goals of the participants in this unique political endeavor. Both the Hong Kong and mainland participants share certain fundamental aspirations. The rhetoric on both sides continuously emphasizes the importance of maintaining political and economic stability in Hong Kong. This aspiration expressly includes maintaining a capitalist system,⁵⁵ as well as establishing a certain degree of political democracy and maintaining certain rights and liberties upon which this system is felt to depend. Political autonomy and continuance of the common law system are also a part of this package. There is general recognition that a certain dynamism of Hong Kong derives from these various institutions and values.

While there is much common ground, these participants appear to diverge in certain areas. Political discourse in Hong Kong has historically tended to view government as either a passive actor or as a facilitator of private endeavors. This perception tends to carry with it a Western Lockian conception of natural rights. It is the mission of government to uphold these rights upon which the system depends, and government will be called to task, often in the courts, if it fails to do so.⁵⁶

⁵¹ *Id.*

⁵² *Id.* Annex I, § III.

⁵³ *Id.* Annex I, § XIII.

⁵⁴ *Id.* Annex I, § II.

⁵⁵ *Id.* Annex I, § VI.

⁵⁶ As a result, a rather extensive body of administrative law has developed. *See generally* D. Clarke, B. Lai & A. Luk, *Hong Kong Administrative Law: Cases and Materials* (unpublished manuscript, University of Hong Kong, Dep't of Political Science, 1986).

This conception may have some bearing on the historic confidence in Hong Kong's economic and political institutions.

While Chinese mainland participants are equally committed to Hong Kong's success, they may come to the drafting table with a fundamentally different conception of rights and the relationship of legal process to their implementation. A very different policy-based conception of rights in China has recently been described by Professor Randle Edwards and his colleagues.⁵⁷ While in recent treaty accessions and in constitution drafting, China has begun to articulate a strong human rights commitment; this commitment may yet lack strong attention to the process for implementation. This is not to criticize China's remarkable accomplishments but instead to point out a fundamental divergence in basic values concerning rights and the rule of law between mainland China and Hong Kong. Given an equal commitment to stability in Hong Kong, constitutional judicial review may offer an avenue for meaningful and stable value development without encouraging destabilizing political disagreement as a result of such basic value differences.

C. *A Theoretical and Structural Perspective*

An American constitutional scholar in this context might ask, as I have elsewhere, how does constitutional judicial review offer a potential avenue to stable and meaningful rights or value development in Hong Kong? What does judicial review do? I examine these questions from both a theoretical and structural perspective.

The debate over the legitimacy of constitutional judicial review has raged for centuries, both in America, before and after the seminal decision of *Marbury v. Madison*,⁵⁸ and in England extending way back to the Glorious Revolution of 1688. It has raged in France in the ancient debate over separation of powers. With the spread of the institution of constitutional judicial review throughout much of Europe, America and Asia, this debate has spread as well.⁵⁹ How can judges be permitted to thwart the will of the democratically elected branches of government? In spite of this so-called countermajoritarian difficulty, this institution is increasingly employed by those countries serious about constitutional democracy and human rights, just as it is often rejected by those governments not so inclined.⁶⁰

Some examination of this debate reveals how this institution func-

⁵⁷ EDWARDS, *supra* note 26, at 44, 125-64.

⁵⁸ 5 U.S. (1 Cranch) 137 (1803).

⁵⁹ See generally H. Zamudio, *A Global Survey of Governmental Institutions to Protect Civil and Political Rights*, 13 DEN J. INT'L L. AND POL'Y 17 (1983).

⁶⁰ See M. Capelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 439 (1980).

tions successfully. Among the conclusions reached as a result of such examination, I find views that constitutional judicial review merely involves a search for the original "intent" of the founding fathers to not really reflect actual practice.⁶¹ As has been developed by Alexander Bickel,⁶² constitutional review functions in America as a dialogue among the judiciary, the elected branches of government and the people. This dialogue, in the constitutional area is a process, largely written, aimed at basic value development in the American system of government. Whether it is through "passive virtues" or hitting issues head on by stops and starts or even occasionally going forward and backing up a little, the Court engages in a conversation with the other branches of government.⁶³ This conversation is aimed at basic value development in a constitutional democracy. Through this dialogue on the higher plane of fundamental values, the Court contributes to a more stable basic value development. It may depoliticize to a limited extent the task of basic value development.

One need only watch the Basic Law drafting process in Hong Kong and mainland China to realize that highly charged political discussions about basic values can produce considerable anxiety and tend to generate instability. Perhaps constitutional judicial review permits many basic value issues to be addressed in a more ordered manner. In Hong Kong, where the chance for basic value disagreement between a Marxist-Leninist state and a capitalist SAR is great, this ordering and stabilizing feature may be attractive.

On the structural side, Mauro Cappelletti has pointed out the seminal role of the American and Austrian models of judicial review.⁶⁴ I have adopted his distinction between a decentralized incidenter and a centralized principaliter system.⁶⁵ The former permits all courts (decentralized) to exercise review incidental to actual court cases while the latter concept suggest a centralized constitutional court which can decide abstract constitutional questions as the principal issue and not merely incidental to a case. This latter system, developed in Austria under the influence of Hans Kelsen, originally permitted referral to the constitutional court only from the political branches, but all such systems now permit a form of incidenter review on referral from other courts as well. Use of such a centralized principaliter system in continental Europe was

⁶¹ For discussion of original intent doctrine, see generally R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

⁶² A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

⁶³ See *id.* at 70, 111 *passim*. See also H. Wellington, *The Nature of Judicial Review*, 91 *YALE L.J.* 486 (1982).

⁶⁴ M. CAPALLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 45 *passim* (1971).

⁶⁵ *Id.* at 45-84.

especially influenced by functional notions of separation of powers and the belief that ordinary courts should not exercise such political power. Such constitutional courts were originally attentive to issues concerning delineation of functional separation of powers. Continental judges are likewise more given to a tradition of abstract principle development.

In examining these two traditions one might notice that the continental model is more useful for abstract policing of the lines of power, as indeed was its original design. The common law or American model seems more conducive to an incremental, dialogue-based value development. Avoidance technics are more readily available in the common law or American model than in the continental model where the role of the constitutional court may be more confined.

D. A Model for Hong Kong

Confronted with the stark contrast between constitutional values in Hong Kong and mainland China and being particularly interested in legal process, I have considered the very real difficulty inherent in any attempt to implement the notion of "one country, two systems," to be embodied in the Basic Law. This leads me to suggest a model that takes account of the various aspirations and factors noted above, as follows:

My initial feeling is that Hong Kong might best benefit from use of a bifurcated system. At the local level this would include a decentralized incidenter system of constitutional judicial review similar to the one employed in most common law jurisdictions (all common law jurisdictions with written constitutions or basic laws). This would permit local judiciary at all levels, bound by highest court precedent, to review the acts of the legislative branch, as well as the executive, for conformity to both the powers and rights components of the Basic Law. This should generally include the full extent of the Basic Law. Yet, being part of a national system based initially on civil law traditions, certain components of a centralized principaliter system could be used to resolve constitutional issues involving constitutional power or jurisdiction questions between the central and local government or questions involving the Constitution of the PRC. This latter feature would preserve national authority in areas of national concern; yet, it is anticipated that it would rarely be employed because of its limited field of coverage and the ability to resolve most such issues in the Basic Law itself. A special committee composed of an equal number of Hong Kong and Mainland compatriots could be set up under the NPC or independent of it. To satisfy any question under article 67 of the PRC Constitution, the Basic Law could expressly delegate such power to the local courts and the special committee as indicated. To preserve autonomy and the independence and finality of local courts, I would permit referral of constitutional issues to the special committee only by the SAR executive or two-thirds of the legislature and by an appropri-

ate organ of the central government. Local courts would not make such referral exercising their constitutional judicial review independently. Local courts would ultimately be held in check by the amendment power, though it is anticipated that such courts would likely proceed rather conservatively in their constitutional mission as is often true of common law courts.⁶⁶

I have also offered a ten point argument in favor of this model, as follows:

1. The current British approach to rights development under a system of parliamentary supremacy may not be realistic outside of the British cultural and political context.

2. Constitutional judicial review seems more appropriate to a written constitution and is generally so employed in most common law jurisdictions.

3. Pure reliance on mainland-style legislative implementation seems unlikely to achieve a rights commitment that would be trusted and would thus cause considerable local tension and instability, not to mention offense to the notion of autonomy and "one country, two systems."

4. Current discussions in the Basic Law Consultative Committee suggest general agreement on employing separation of powers with checks and balances, as opposed to the civil law separation of functions approach, suggesting the appropriateness of a more common law approach.

5. Yet, as is true of the function of the French constitutional court, a special committee employing a centralized principaliter system may function well for the limited purpose of functional separation of powers between the two governments as well as providing an expression of national authority.

6. The existing use of common law and *stare decisis* in Hong Kong likewise favors the decentralized incidenter system as does the training of local lawyers and the judiciary.

7. Decentralized judicial review with access to avoidance techniques or passive virtues may better take advantage of the dialogue based evolution of principles in general in common law systems and of rights in particular.

8. Decentralized incidenter judicial review offers more avenues for evolutionary change in fundamental values with less risk of serious confrontation, thus advancing political stability and human rights.

9. The existing legal system contains the ingredients for such a

⁶⁶ Davis, *supra* note 2. In my view, the constitutional committee should rarely, if ever, be used. It would stand more as a symbol of national authority or be available in the event of a constitutional crisis. Otherwise, the Basic Law and any revisions of article 31 of the PRC Constitution could resolve most potential issues within the limited scope of the committee's power. It is very unlikely that the extremely conservative Hong Kong courts would get too far ahead of the local polity.

system and would thus permit continuity and permit Hong Kong to employ other common law precedent.

10. Hong Kong and China would thus be able to participate in a growing international commitment to employing proper process in the implementation of human rights.⁶⁷

For an American constitutional scholar, there is a certain familiarity in the Joint Declaration. The Joint Declaration reveals a prominent commitment to autonomy, self determination, stability, capitalist economy, and human rights in a common law framework. These concepts collectively provide the outline of a pluralist, liberal capitalist system. Constitutional judicial review appears to embody recognition of and a commitment to the basic values of a society. Its almost geometrical growth in use around the world reveals a growing belief that constitutional judicial review offers an opportunity to give life to the constitutional framework in a stable way essential to a functioning democracy. Yet any use of this instrument should be sensitive to the peculiar strains of the Hong Kong experiment.

This concept of the judiciary and constitutional review, as one side of a dialogue designed to articulate basic values, is a concept that depends on the other participants in this conversation. With the strong influence of China to the north, it seems that a political system in Hong Kong that fails to engage the local people will fail to insure liberty or autonomy. The people, not the courts alone, are the guardians of liberty. Until now, a British political process has offered a degree of protection to Hong Kong, but that will not be the case in the future.

IV. CONCLUSION

While it is difficult to measure scholarly contribution, it seems apparent that an American constitutional scholar in Hong Kong at the present time has plentiful opportunities. Hong Kong affords both an educational opportunity and a chance to participate in a unique developmental process of constitutionalism. For example, I have found that the characteristics of the converging legal systems involved tend to result in the Hong Kong and Chinese legal community overlooking some aspects of the very complex process issues involved in implementing a Basic Law in a capitalist SAR in Marxist-Leninist China. Very little Hong Kong or Chinese scholarship addresses the notion of constitutional judicial review in the Hong Kong SAR context.

Comparative law scholarship has often been preoccupied with mere

⁶⁷ *Id.* The comparative reference to the French constitutional court here is to its mission. Whether it is or is not a court in the true sense is not the object of comparison. See generally Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court*, 34 AM. J. COMP. L. 45 (1986).

description. This means that those parts of the world infected with upheaval and constant change are neglected. No one wants to describe a moving target; yet, these areas are precisely where close contextual examination of comparative constitutional law fundamentals can do the most good—with an eye more to application than description. The constitutional road map of Asia is, for example, now being redrafted at a rapid pace. This redrafting often involves a struggle with Western constitutional values. Western comparative constitutional scholarship can contribute to this process. Local drafters, in the struggle of political debate, sometimes overlook fundamentals that a comparative reflection may catch.

In the context of adopting foreign constitutional concepts, an analytical framework for application oriented comparative legal scholarship might at least include the following components:

1. The stated objectives;
2. The perspectives of the participants/language—
 - (a) local values/culture and
 - (b) theoretical and structural Western concepts sought to be accommodated;
3. Development of a proposed model; and
4. Critical examination of the model.

This framework offers simplicity, openness, and comprehensiveness. Of course, thoroughness also demands a critical examination of the analytical framework employed. This latter task aims at reflective development of the tools of comparative legal scholarship. This Article only begins to offer the beginning self-conscious reflections of a comparative constitutional legal scholar placed in a rather rigorous foreign constitution drafting context. An in-depth analysis of the factors that impact the application of imported constitutional concepts is a task awaiting comparative legal scholars.