

1-1-1997

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### Recommended Citation

Robert C. Berring, *Farewell to All That*, 19 Loy. L.A. Int'l & Comp. L. Rev. 431 (1997).  
Available at: <http://digitalcommons.lmu.edu/ilr/vol19/iss2/9>

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# Farewell to All That

ROBERT C. BERRING\*

## I. INTRODUCTION

The agreement to return Hong Kong to the People's Republic of China (PRC)<sup>1</sup> represents both the best and the worst of the modern international legal system. It represents the best of international law and policy because it did not involve either the firing of shots or any bloodshed. This non-violent resolution of Hong Kong's forcible annexation is the paradigm for international order: a situation imposed via force that was peacefully resolved around a bargaining table.<sup>2</sup>

On the other hand, the agreement to return Hong Kong to the PRC also represents the worst of international law and policy because the negotiating parties disregarded the opinions of citizens whom the agreement will directly affect. During the settlement process, Great Britain aimed to preserve its prestige, and the PRC sought to extend its sovereignty over Hong Kong. These two sovereigns never gave a voice to the six million Hong Kong residents whose futures also hang in the balance. Such neglect of public opinion is similar to the treatment of people in the Treaty of Ver-

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\* Walter Perry Johnson Professor of Law and Law Librarian, Boalt Hall Law School. Thanks to Elvin Geng for some great ideas and citations.

1. See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 23 I.L.M. 1371 [hereinafter Joint Declaration].

2. The three treaties by which Hong Kong and its environs came under British control are perfect examples of unequal treaties. See Treaty Between China and Great Britain, Aug. 29, 1842, China-Gr. Brit., 93 Consol. T.S. 465 [hereinafter Treaty of Nanking]; Convention of Friendship, Oct. 24, 1860, China-Gr. Brit., 123 Consol. T.S. 71; Convention Respecting an Extension of Hong Kong Territory, June 9, 1898, China-Gr. Brit., 186 Consol. T.S. 310. British protests to the contrary represent revisionist history. For further discussion, see PETER WESLEY-SMITH, *UNEQUAL TREATY 1898-1997: CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES* (1980).

sailles after World War I and the Yalta Conference after World War II. These events demonstrate that powerful nations trade territories without considering the effects of the trade on the people within those territories. In this "board game" concept of the world, where pieces are moved with impunity, the only issue is: who controls the dice?

The final outcome of the Great Britain-PRC negotiations on the return of Hong Kong to the PRC still remains to be seen. What will happen on July 1, 1997? Will Hong Kong's transition from Crown Colony to Special Administrative Region proceed smoothly? Because many dependent variables compose these complex questions, they defy analysis. Nevertheless, some parts of the larger picture are predictable. Some developments are so certain—at least in the broad context—that they may be used as points of analysis.

The development of Hong Kong's legal system is relatively certain and may be safely predicted. This Article focuses on the future of Hong Kong's legal system. Part II sets the stage to analyze Hong Kong's reversion to the PRC.<sup>3</sup> Part III analyzes the existing legal infrastructure, mainly the common law system, and explains why neither this system nor any Western legal culture will survive past 1997.

The previous sentence should sufficiently warn the reader of my cynicism. Be forewarned, hard truths lie ahead.

## II. SETTING THE STAGE

The return of Hong Kong to Chinese control represents the final remnants of the colonial era. Colonialism was once a major

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3. The rich literature on Hong Kong's transition to Chinese control recapitulates two major subjects. The first major issue is the history of the transition, including the bargaining that transpired between the PRC and Great Britain. See generally WESLEY-SMITH, *supra* note 2. The second topic is traditional law, particularly the Chinese doctrines of *li* and *fa*. See DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 29 (1967); see also SYBILLE VAN DER SPENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA* (London Sch. of Econ. Monographs on Soc. Anthropology No. 24, 1962). *Li* is a Confucian doctrine that requires individuals to be treated according to their rank, relationship, and particular circumstances. See BODDE & MORRIS, *supra*, at 29. *Fa*, on the other hand, is a legal theory that does not make exceptions for particular groups or individuals. See *id.* The doctrines of *li* and *fa* are closely related, and their interaction and importance in the PRC will undoubtedly impact the legal system in Hong Kong after 1997.

force in international affairs, and nations viewed it favorably.<sup>4</sup> Although Hong Kong is a relic, the last major possession held by one of the old powers, it was never a typical colony. Great Britain's acquisition of Hong Kong in 1842 cannot be viewed as the conquering and swallowing of a population because it was the product of an unequal treaty that permitted the British to take control of a largely unpopulated area.<sup>5</sup> The lease itself, while clothed in legalese,<sup>6</sup> was not a negotiated agreement; rather, Great Britain imposed it upon China.

One might ask how Hong Kong lasted so long as a Crown Colony. Bringing Hong Kong back under Chinese control has been part of every twentieth-century Chinese leader's agenda. Chairman Mao Tse-Dong was no exception. In 1949, the British rushed troops to Hong Kong to prevent a Red Army invasion.<sup>7</sup> Once the dust of the revolution settled, however, the PRC seemed to accept Hong Kong. Rather than harassing Hong Kong, the PRC chose to make good use of it—even though as a tiny freckle on the face of the PRC, the PRC could easily have overrun it. Even the chaos of the Cultural Revolution did not lead to the end of Hong Kong as a Crown Colony.

Ultimately, Hong Kong served everyone in some way. The British retained a touch of colonial glory and acted as a major player in the Cold War by maintaining a Western foothold against the Communist Bloc. The PRC used Hong Kong as a place to move money and information—an entrepôt to the world. The people of Hong Kong became rich, or at least hoped to become rich, while avoiding the deadly comic opera of the PRC's political gyrations. The United States gained an allied presence in the Pacific Rim and demonstrated the superiority of the Western way of life. The world acquired an international free port, where laissez-faire economics held sway and money was to be made. The arrangement exemplified John Rawls' famous maxim: everyone

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4. For an illustration of the colonial era, see E.J. HOBSBAWM, *THE AGE OF EMPIRE 1875-1914* (1987).

5. See Treaty of Nanking, *supra* note 2. The second Opium War and the Convention of Friendship followed the Treaty of Nanking. See Convention of Friendship, *supra* note 1.

6. See Convention Respecting an Extension of Hong Kong Territory, *supra* note 2.

7. See generally FRANK WALSH, *THE HISTORY OF HONG KONG* 441-47 (1993).

came out at least a little ahead of the game.<sup>8</sup>

There is also a certain inertia to intransigent international problems. Some situations are so intractable that no solution is immediately available without huge costs. Taiwan, Northern Ireland, and Palestine are vastly different examples of this phenomenon. Each nation presents a seemingly unsolvable problem that the rest of the world—and sometimes the nations involved—are willing to ignore. If seeking a cure is too risky, stabilizing the matter is enough. The current problem in Bosnia exemplifies what occurs when stability cannot be attained. There is safety in the status quo.

Hong Kong fits into this category of misfits perfectly. From the Western perspective, disentangling the Crown Colony from Great Britain was too problematic. Although Great Britain was clearly in the wrong historically, returning a part of the free world to a communist regime was too difficult to consider.

From the Chinese perspective, Hong Kong brought money, expertise, and a window into the rest of the world. Would it be worth risking serious military engagement with Great Britain and the United States to reclaim it? The edgy Cold War context—now quite difficult to recreate<sup>9</sup>—with nuclear warheads poised to destroy great areas of the world and Chairman Mao happily proclaiming that he had no fear of nuclear war, made anything seem possible; however, the PRC held back. As long as Hong Kong existed, it could be left alone.

Some speculate that Chinese leader Deng Xiaoping would even have allowed Hong Kong to drift past 1997 if the British had acted properly, but we will never know. British Prime Minister Margaret Thatcher's trip to the PRC to meet with Chinese Premier Zhao Zhiyang began the chess game.<sup>10</sup> Once the process started, it could not be stopped. It became driven by July 1, 1997, the day the "lease" ends. Great Britain was not paying rent for the lease because it imposed the lease as an unequal treaty on an un-

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8. See JOHN RAWLS, A THEORY OF JUSTICE 61-62 (1971).

9. As a teacher of undergraduate students, I see how difficult it is to convey the tension and sense of impending doom that once prevailed.

10. See John H. Henderson, Note, *The Reintegration of Hong Kong into the People's Republic of China: What It Means to Hong Kong's Future Prosperity*, 28 VAND. J. TRANSNAT'L L. 503, 513 n.43 (1995).

willing China. The original outright grant of Hong Kong was intended to resolve the Opium War,<sup>11</sup> but that justification would not go very far in the late twentieth century. The survival of nineteenth century imperialism was certainly not the real justification for the continued existence of Hong Kong. Yet once its spirit was invoked, there was a bright line in the future. Unlike Taiwan, Northern Ireland, and Palestine, the certain date of July 1, 1997 called for action.

This context is crucial to understanding what has transpired. The British had to save face, and the Chinese wanted back what was unarguably their territory. The 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 (Joint Declaration)<sup>12</sup> served as the conduit. Despite all of its problems, the bargaining process accomplished the goals of both Great Britain and the PRC. The British will retire with grace, and the Chinese will fulfill their long cherished goal of eliminating the last remnant of the embarrassing days of Western imposition. Given that, what happens after the new flag is raised?

### III. WILL THE COMMON LAW SYSTEM ENDURE?

Will the common law system and the existing legal infrastructure of Hong Kong survive the transition? The answer to this question is clear if it is based on documented evidence—the Joint Declaration<sup>13</sup> and the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law).<sup>14</sup> The Joint Declaration reads: "The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged."<sup>15</sup>

Could it be more clear? The PRC has promised that there

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11. *See id.* at 508.

12. Joint Declaration, *supra* note 1.

13. *Id.*

14. Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990), *reprinted in* 29 I.L.M. 1519 (1990) [hereinafter Basic Law].

15. Joint Declaration, *supra* note 1, para. 3(3), at 1371.

will be no change for at least for fifty years: the legal system will remain intact, the laws will stay the same, and the judiciary will be independent. Indeed, PRC officials continue to offer reassurance.<sup>16</sup> Given the explicit wording of the Joint Declaration and the Basic Law, how can one doubt such an outcome? Nevertheless, I not only doubt the eventual outcome, but also contend that neither the common law system nor the current legal infrastructure can possibly survive in Hong Kong after the lease expires. Four reasons support my belief: (1) the nature of the common law itself, (2) the concept of judicial independence, (3) the Chinese legal tradition, and (4) the lack of means to enforce the language of the Joint Declaration and the Basic Law.

### A. *The Nature of the Common Law*

Author Benjamin Schwartz once wrote that the only time that we in the West can ever agree on who and what we are is when we contrast ourselves with someone else.<sup>17</sup> The common law exemplifies this observation. Understanding the nature and the rationale of the common law is no easy task. As a professor who teaches Contracts to first-year law students, I am keenly aware of the difficulty of making people understand that there is law that is not authored by legislative or executive bodies or that may not be written down.<sup>18</sup> What is the source of these rules? Are they really the product of the experience of the people? The answer, which is quite complex, is based on a blend of British history, the Christian origins of Western natural law, and a heady brew of elements that common law scholars still dispute.<sup>19</sup>

The very existence of the common law system is its most powerful attribute. Because this system is alive and functions, it carries with it the power of practice. Scholars debate about its origins or

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16. See *Li Peng Gives a Banquet in Honor of All Members of HKSAR Committee and Reiterates the Guarantee to Implement the Guidelines and Policy Toward Hong Kong*, 3 Hsin Hua Yueh Pao Tsung Mu [NEW CHINA MONTHLY] 28, 28-29 (1996).

17. See BENJAMIN SCHWARTZ, IN SEARCH OF WEALTH AND POWER: YEN FU AND THE WEST 1-2 (1964).

18. The British demonstrate this phenomenon to an extreme by having an unwritten constitution, but it is familiar enough to U.S. legal scholars.

19. See Roscoe Pound, *Common Law*, in 3 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 50-55 (Edwin R.A. Seligman ed., 1930). Pound's essay remains the most concise statement of the nature of the common law and the issues surrounding it.

its functions. These debates may represent brilliant intellectual exegeses, but they simply attempt to describe that which exists. It is undeniable that the common law system—no matter how or why it came to be—represents the current stage of evolution of the British legal culture. Common law only makes sense in such an environment. Whatever may have been the crucial steps in its evolution, we may only speculate on how it reached this point. The common law cannot be effectively transferred outside this context.

Despite all of the power of the common law's existence, it is very difficult to explain, even to members of the originating culture. How could such a system, rooted so deeply in British legal history and traditions, make sense to Chinese people who come from a very different, much older and richer, set of traditions? Our sense of cultural superiority may be so profound that we believe, the common law—a product of our own history and culture—would be useful to everyone, but evidence and common sense tell us otherwise.

In many post-colonial settings, the nation builders left behind consisted almost entirely of individuals trained in the colonizing power's system. The colonizer's language became the language of the educated classes in the new state.<sup>20</sup> The colonizing power's culture became identified as the superior culture. Although the new nation's builders purposefully sought to reject the colonizing state as a model, the dominance of the colonizing power's cultural models would cast an inescapable shadow. The former colony would eventually follow the colonizer's model because it could only work with concepts that it knew and ideals to which it had been subjugated.

Under this theory, some mutation of the common law might be expected to play a powerful role in Hong Kong after 1997, but this will not be the case. Once the PRC reclaims Hong Kong, the PRC will bring its own legal personnel, legal culture, language, and

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20. For example, in India, a country that Great Britain once colonized, "English 'is the most important language for national, political, and commercial communication.'" Scott E. Kauff, Comment, *Compulsory Disclosure of Hazards, Emergency Planning, and Training in the Workplace: India's Factories Act and the United States' Hazard Communication Standard*, 17 COMP. LAB. L.J. 565, 573 n.59 (1996) (quoting India, in CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 1994, at 184, 184 (1994)).



rich legal tradition to Hong Kong.<sup>21</sup> Chinese will soon become the language of the elite. At the risk of offending the British, the Chinese will neither need nor be compelled to use Great Britain as a model for anything. The Chinese will not need British infrastructure to define the operation of bureaucracies. Chinese governments have been organizing bureaucracies for several millennia.<sup>22</sup> Furthermore, the Chinese have a legal tradition that dates back thousands of years.<sup>23</sup> Hong Kong is more realistically viewed as an annexed territory that is being handed from one world power to another. Such a new power has no need for old systems. On the contrary, there are incentives to create new systems, and the PRC has the models and personnel to do so.

The common law has no cultural claims to offer. No social heritage constituencies support it. The quaint trapping of the common law system may be maintained for a short time, but will wither and die at each challenge. Every tradition has nonsensical rituals that are accepted as part of the culture. The Chinese will have no reason to accept British rituals, they come fully equipped with their own.

The problem of language poses another challenge. Common law literature is not written in a language that most Chinese people can read.<sup>24</sup> Even if they could, it would not make sense to them. The fact that the judiciary in Hong Kong is composed mostly of expatriates, English-speaking judges from around the world,<sup>25</sup> demonstrates how divorced the common law is from the Chinese experience. The PRC will no longer tolerate a legal culture that progresses in the language of another culture.

My friend from Hong Kong, a legally trained British citizen

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21. The Republic of China still claims sovereignty over mainland China, just as the PRC claims sovereignty over the island of Taiwan. I would contend that the common law and the existing Hong Kong legal infrastructure would have just as small a chance of surviving if the Taiwanese government took control of Hong Kong.

22. See generally HOBBSAWM, *supra* note 4.

23. See BODDE & MORRIS, *supra* note 3, at 7-8 (referring to a 1955 study that recovered codes and judicial procedure rules from the first Chinese imperial dynasty, the Han Dynasty (206 B.C. to A.D. 220)).

24. See Richard Klein, *Law and Racism in an Asian Setting: An Analysis of the British Rule of Hong Kong*, 18 HASTINGS INT'L & COMP. L. REV. 223, 223-24 (1995).

25. For example, in *R. v. Kwong Kim Wah*, [1996] 1 H.K.C. 161 (Dist. Ct.), the judge was an expatriate with minimal knowledge of the Chinese language.

who deeply believes that the common law will survive past 1997, told me that he is amazed that Hong Kong trials are now being conducted in Cantonese. He pondered the problem of how appellate judges, who must work in English, will review such trials. He noted that Chinese would never work as a legal language. In response, I informed him that it has been the legal language of China for thousands of years. Furthermore, English will not survive as the language of Hong Kong's government because government officials will be Chinese speakers unwilling to import expatriates. Accordingly, the common law cannot survive as an institution.

### B. Judicial Independence

Judicial independence is such an integral part of the common law tradition that it requires a separate discussion. The explicit guarantee of judicial independence indicates that the negotiating parties saw its centrality to Hong Kong's current legal system.<sup>26</sup> There is no guarantee, however, that judicial independence will be a reality.

The common law system rests upon the judiciary's independence. By judicial independence, I refer to a judge's ability to make a decision without reference to the executive authority's desires. What gives judges such power and status? As U.S. residents, we can barely understand it ourselves; however, due to a mix of historical, philosophical, and cultural reasons, it does work. In the United States, a judge may defy a President,<sup>27</sup> invalidate a law of Congress,<sup>28</sup> or order a state or a city to abide by his order.<sup>29</sup> Given the reluctance of any sovereign to be bound by another authority, this phenomenon is remarkable. Judicial independence is not without its tensions and failures, but it is remarkably resilient. The common law operates under the same principle. While analysts may empty many ink cartridges in their printers trying to parse the wherefores of judicial independence, it still exists as a result of English legal history and its expansion in the English-speaking colonies. It is the hallmark of the U.S. judicial system.

This tradition finds no counterpart in two millennia of Chi-

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26. See Joint Declaration, *supra* note 1, para. 3(3), at 1371.

27. See *U.S. v. Nixon*, 418 U.S. 683, 713 (1974).

28. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 7, 70-72 (1803).

29. See *Missouri v. Jenkins*, 495 U.S. 33, 57-58 (1990).

nese legal history. The traditional Chinese magistrate was a servant of the Emperor and could not operate outside of the authority structure.<sup>30</sup> Whatever forces blended to create the judge's role in the common law, they do not exist in the Chinese tradition. Furthermore, the judge's role in the common law did not take root in Communist China. Because the Communist Party controls the decisions of the state and judges in the PRC must serve the state, Chinese judges are never free from the Communist Party's hold.<sup>31</sup>

Some of my colleagues in the PRC have written about judicial independence and PRC's progress toward it;<sup>32</sup> however, these writings are only the aspirations of academics and theorists. A court's ability to defy the Communist Party and to be independent goes against deep cultural attitudes. Only when a judge can defy the dictates of the Communist Party—with the knowledge that his opinion might stand—will real progress be made. The judicial function in PRC remains subservient to the sovereign, which completely alters the equation of the legal system and means that Hong Kong judges will serve the Communist Party. Similar to current judges in Special Economic Zones, the future Hong Kong judges may be given more freedom in economic cases. When a matter of paramount importance to the Communist Party arises, however, such as a case that tests the system's mettle, the judge's role must fit into the framework of Communist Party rule—to think otherwise is naive.

### C. Chinese Legal Tradition

The Chinese legal tradition is at great odds with the common law tradition. Thus, hopes for tolerating common law norms are slim. While a topic as broad as the Chinese legal tradition hardly avails itself to short treatment, I will elucidate some of its salient features.

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30. See William P. Alford, *On the Limits of 'Grand Theory' in Comparative Law*, 61 WASH. L. REV. 945, 952 (1986).

31. See KEN JOWITT, *NEW WORLD DISORDER: THE LENINIST EXTINCTION* 306-31 (1992). It is a mistake to think of the Chinese system without referring to Leninism. While many academics think that the Marxist theory is the most salient feature of the PRC's future, it is more likely that the Leninist party, with its absolute authority structure, will affect the PRC the most. See *id.* at 15-16, 21, 23, 315.

32. See, e.g., Shizhou Wang, *The Judicial Explanation in Chinese Criminal Law*, 43 AM. J. COMP. L. 569 (1995).

### 1. Law Is a Tool of the Sovereign

In his book *Chinese Democracy*,<sup>33</sup> Andrew Nathan examines the commonalties of each of the eleven constitutions authored by the regimes controlling, at least in theory, the Chinese mainland throughout the twentieth century.<sup>34</sup> This group of constitutional documents includes drafts of the Q'ing Dynasty, the Kuomintang (KMT),<sup>35</sup> and the early Chinese Communist Party, as well as each of the four official constitutions ratified by the PRC.<sup>36</sup> One important similarity in each of these constitutions—whether drafted by the Imperial Commission of the Q'ing, Republican idealist reformers like Sun Yat Sen, the civil law inspired draftsmen of Chiang Kai Shek, Stalinist communists, or Maoist idealists—is that the state holds and grants power to the citizens.<sup>37</sup> There is no contractual basis for government in society, no agreement among citizens to create a government, and no underlying rights rooted in the citizenry. No ultimate power resides in the people to check the state's actions.<sup>38</sup> The state is superior.

This line of analysis leads to the difficult area of human rights. Without going into an extended discussion of human rights in Chinese politics,<sup>39</sup> it is sufficient to state that Chinese legal tradition consisted of civil rights, but not natural or human rights.<sup>40</sup> “It must be realized at the outset that constitutional rights should not be based on the theory of natural rights. It is beyond controversy that any enforceable right is the creation of the law. Only when the law recognizes a certain right is such a right legally protected.”<sup>41</sup>

It is hardly surprising that such a theory is rooted in the imperial Chinese tradition. In traditional China, power in legal rela-

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33. ANDREW J. NATHAN, *CHINESE DEMOCRACY* (1985).

34. *See id.* at 107-32.

35. The Kuomintang was China's Nationalist Party. *See id.* at 110.

36. *See id.*

37. *See id.* at 111.

38. *See id.* at 112.

39. For a discussion of human rights in Chinese politics, see R. RANDLE EDWARDS ET AL., *HUMAN RIGHTS IN CONTEMPORARY CHINA* (1986).

40. *See* NATHAN, *supra* note 33, at 115-16.

41. *Id.* at 115 (quoting a 1982 editorial from *Red Flag*, the leading theoretical journal of the Chinese Communist Party).

tionships flowed vertically from a superior to an inferior.<sup>42</sup> Traditional Chinese courts were designed to demonstrate the Empire's power and wisdom. The magistrate was a fearsome personage, empowered by the Dynastic Code to torture witnesses in the courtroom.<sup>43</sup> The court was a place for redressing wrongs; fairness to the parties was *not* at issue. One indication of this fact was that the Codes forbade lawyers. The Empire believed that lawyers would only interfere with the magistrate's actions.<sup>44</sup> Thus China encouraged people to handle the business of their lives, including their disputes, among themselves. Appearing in a court was seen as a quick road to disaster.

This attitude remains in the PRC. If the Communist Party, or for a time, Chairman Mao, was supreme, how could either be wrong? The courts might be needed for some cases, but they were not designed to be fair forums. Good people worked out their own differences, making the legal system a last resort. Furthermore, the legal system could be used for educational purposes. If the state wished to make a point—to send a message to society, it would try to execute criminals. Law was an instrument of the state, whose power could not be challenged.

Some of my colleagues argue that China is very different today. A plethora of law schools produce new lawyers and legal workers. Courts and court cases proliferate. Nevertheless, I would argue that the paradigm has not changed. For courts to play a meaningful role in Chinese society, there will have to be a long and deliberate evolution. Studies show that even current court judgments cannot be enforced.<sup>45</sup> The culture must change for the institution to change.<sup>46</sup>

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42. See BODDE & MORRIS, *supra* note 3, at 15 (describing the political structure of the Chou Dynasty (1027 to 221 B.C.)).

43. See Alford, *supra* note 30, at 952.

44. See *id.* at 952-53.

45. See ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 112 (1992).

46. At the risk of descending into total cynicism, I must point out that in the heady days of liberalism, just before the 1989 Tiananmen massacre, I was in the PRC as a research fellow at the Institute of Law of the Chinese Academy of Social Sciences. My colleagues at the institute told me that the PRC was in the grip of a new legality and that the regime was too weak and too insecure to ever again violate citizens' rights. Thus, the excitement of a few colleagues over recent developments does not inspire great confidence. The road to real change, if ever truly traveled, will be long and arduous.

Perhaps courts could operate more freely in areas that least impact state interests. This practice is beginning throughout the PRC. When an issue touches state or Communist Party interests, however, there is no doubt about how the system will work.

There is little hope that Hong Kong's legal infrastructure can survive as anything more than a part of the PRC's governing apparatus. It cannot resist the pull of Chinese tradition and the Leninist Party ethos. The law will continue to serve the Communist Party and the State—it is inevitable.

## 2. The Use of Status-Based Solutions to Legal Problems.

Legal transactions and activities in the PRC often revolve around "guan-shi," or the use of contacts.<sup>47</sup> The Confucian tradition—newly revived in official doctrine but never far away in daily life—is based on relationships between people.<sup>48</sup> The status of the people with whom one dealt was always apparent. One stayed within one's group and understood one's obligations. The Confucian ethos stressed working through human relationships, not abstract principles.<sup>49</sup> In this system, it is always easier to trust someone whom one understands.

People in Western legal systems have come to place faith in institutions. Ideally, these institutions offer fair treatment and protection from predators. Most of these institutions are legal. Even as we claim to be losing faith in them, they are at the center of our enterprise. In court, individuals redress their wrongs, sue for justice, and defend their constitutional rights. But how does a culture come to trust such institutions?

The reasons that the Chinese continue to have faith in people rather than institutions are complex. The significant fact is that the Chinese are likely to carry out legal relationships through personal contacts because what matters most to the Chinese is working with people. Winning a point through the wording of a contract or prevailing on a technicality is not part of the Chinese system. The enlivening (or excruciating) manipulation of source materials and language underlying much of the common law is not

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47. See Keith Damsell, *Assessing Team Canada: B.C. Firms Find 'Things Are Never as They Seem,'* FIN. POST (Vancouver), Nov. 24, 1994, at 4, available in 1994 WL 6190642.

48. See BODDE & MORRIS, *supra* note 3, at 18.

49. See *id.*

part of this tradition. Some of my Chinese colleagues brag that the PRC will find a new path for law that recognizes Confucian relational behavior at its base, with formal, written law, as a mere component. They see the synthesis of entirely new structural legal principles. If the PRC develops such law, it will be considerably different than any law practiced in the West.

Regardless of whether the PRC synthesizes new law, it is safe to say that the Chinese preference to work with people and the lack of a tradition of abstract neutral principles will make it very hard for the common law to continue. Even while the British ruled Hong Kong, most Chinese conducted their lives according to Chinese traditions. The colonial presence was not persuasive. Any colonial principles that people acquired by people in Hong Kong will now merge into the rest of Chinese culture.

#### *D. Lack of Means to Enforce the Agreement*

Once Hong Kong reverts to Chinese control, its fate will be in the hands of the Chinese. There will be no way to ensure that the PRC abides by the agreement set forth in the Joint Declaration and the Basic Law. It is not likely that the British will use military force to enforce the terms of the agreement. The United Nations will also be of no assistance, as Hong Kong will be under the PRC's direct control after July 1, 1997.<sup>50</sup> The Chinese will be able to classify whatever happens in Hong Kong as an internal matter in the PRC. After all, there can be no dispute that Hong Kong is a part of the PRC and that the vast majority of Hong Kong's residents are Chinese. Any violations of the agreement will be a matter of domestic politics, and no one will be in a position to intervene.

Furthermore, who in Hong Kong will be in a position to call for help? Most residents, particularly members of the business community who have been closely working as the PRC's representatives, understand that the PRC will be their government. Hong Kong residents know that it will be in their best interests to work with this government rather than to struggle against it. Committed democrats, however, will have the courage to try to enforce the terms of the Basic Law and certain individuals may see Hong

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50. See Joint Declaration, *supra* note 1, para. 3(1), at 1371.

Kong as a potential center for revolutionary activity—but can they prevail? The possible success of a revolution must never be precluded, but it will not be easy. Indeed, the more vociferous protests become, the more quickly and surely the PRC will move to consolidate its position.

Any agreement that lacks an enforcement provision is destined for failure. Hong Kong lacks such potential for enforcement through either internal channels or the court of world politics. Hong Kong may appeal to Beijing; however, the soldiers will belong to the PRC. Mao may be long dead, but his fundamental observation that political power comes out of the barrel of a gun has continually proven to be correct.<sup>51</sup> For Hong Kong, the power equation is easy to calculate.

The PRC will have absolute discretion to follow any agreements made with the British as the price for Hong Kong's return. Perhaps in the post-Deng era, a government will unite the PRC under a more progressive, liberal banner, and by choice, Hong Kong will be left alone—but I seriously question the likelihood of such an event.

#### IV. CONCLUSION AND FINAL THOUGHTS

The future of Hong Kong directly depends on the future of the PRC. If the post-Deng era brings continued degeneration of the Communist party and its ability to rule a united PRC, the scenario will quickly grow very serious. Such a systemic degeneration of central power in the PRC will have massive implications. There are many possible outcomes, yet none will quietly pass across the world stage.

Perhaps the PRC will gradually evolve into a regional confederation. The southeastern portion of mainland China clearly shares interests with Hong Kong and Taiwan. While no Chinese politician would endorse such a development, it could become a reality. Indeed, such a situation could become one of those *de facto* unsolvable international situations previously discussed.<sup>52</sup> If some type of solution were to emerge, Hong Kong could find itself with more autonomy than would be possible under any centrally

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51. See Lina Hsu, *Teng Will Be Pursued by 'Tiger' He Released*, *FREE CHINA J.*, Sept. 11, 1989, at 5, available in 1989 WL 2669090.

52. See *supra* Part II.



coordinated regime.

In contrast, continued degeneration of the PRC's central control could create a power struggle. If such a struggle arises, the matter could indeed become grim. While no one who works with the PRC wants to consider the repercussions of armed conflict or civil strife, the possibility must be acknowledged. Armed struggle for control of the PRC has previously occurred numerous times. On more than one occasion, commentators have compared the PRC—with its wide economic disparity, its drift from central control, and its rampant corruption—to the KMT government of the 1930s. As the ability to control the PRC weakens, violence always hovers. If violence occurs, Hong Kong will be only one stone in a much larger game of Go.

Perhaps the Communist Party will revive itself and reassert control of the PRC. Even in its weakened condition, the Communist Party possesses enormous resources. If it finds a coherent ideological base and some means to reinspire the people's faith, it could reassert itself. The Chinese remain afraid of chaos, and thus, highly responsive to the argument that there is a need for central control. This response gives immediate legitimacy to a strong party. Whether a revitalized Communist Party or another group asserts control of the PRC, the new leadership will determine the course of the PRC and the fate of Hong Kong.

I have studied the PRC long enough to know that it is difficult to predict, and thus, that it would be unwise to preclude the possibility of a completely different alternative. Perhaps a new movement, based in social, political, or religious foundations, may arise. Some combination of elements that seem totally unthinkable to us today may occur, similar to the Cultural Revolution in 1966 or Deng's reforms in 1978. Such a surprising paradigm shift would have to be powerful, however, in order to sweep away the current thinking of Hong Kong. One safe prediction is that any new movement in the PRC will *not* be built on Western legality or culture. Under any scenario, Hong Kong's fate is in the PRC's hands.

Future possibilities aside, the PRC wants to maintain Hong Kong's viability as a trading center. I have doubts, however, that the PRC government can indeed maintain Hong Kong. There is too much to tempt the current leadership, too many profits to be

skimmed, too much to do. This regime will not be a “hands-off” economics regime like Great Britain’s. Hong Kong will quickly become like any other Special Economic Zone. There will be money to be made, but it will have to be made the Chinese way. One thing is certain: the checkered history of Hong Kong as a free-wheeling, open city is drawing to a close. Whatever follows will be different. The Western powers had a long and fascinating adventure in Hong Kong, but that adventure is about to end.

