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Anticipating Hong Kong's Constitution from a U.S. Legal Perspective

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Anticipating Hong Kong's Constitution from a U.S. Legal Perspective

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ABSTRACT

This Article explores the possible nature of Hong Kong's Constitution after July, 1997, and discusses alternative ways of interpreting and enforcing the constitution. The author first proposes three definitions for the word "constitution:" (1) how political power is actually "constituted;" (2) a written document; and (3) a referent for disputes. The author then explains Hong Kong's unusual constitutional status where Hong Kong will be governed under a written constitution, the Basic Law, and at the same time, many aspects of the Basic Law will be "guaranteed" by an international agreement, the Joint Declaration. The author proceeds to evaluate the means by which domestic bodies, such as the judiciary, may play a role in ensuring adherence to the written terms of the Basic Law. However, because the Standing Committee of China's National People's Congress retains ultimate interpretative power, the author proposes that the Joint Declaration may have more influence on China's actions than Hong Kong's Basic Law. The author then examines the executive and legislative structure of Hong Kong and its influence on political responsiveness in Hong Kong after July, 1997. Reflecting upon recent Chinese resistance to institutionalized political responsibility in China, the author suggests that international legal arguments may be the more effective legal means of ensuring political responsiveness.

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I. INTRODUCTION

What will be the constitution of Hong Kong after July, 1997?

As with so many simple questions about China, the terms here need to be defined and refined to such an extent that the bottom line answer is not very satisfying. Depending on what is meant by the word "constitution," the answer to this question is either largely unpredictable or relatively insignificant. Coming to this conclusion, however, can be rewarding, as the path that takes us inexorably to such an unsatisfying answer can offer an insightful perspective on the nature of constitutions.

II. DEFINING WHAT IS A CONSTITUTION

A. *Three Different Meanings*

The word "constitution" can be defined in three ways: (1) how the political body is put together; (2) an allocation of powers and rights in a written document; and (3) a referent for disputes.

In one sense the "constitution" of a political body is simply a way of stating how the body is put together. It is how the body is actually "constituted." In this sense every political body, and accordingly every state, has a constitution. A person or institution within the state who effectively exercises a certain kind of power *has* such power because of the constitution of that state. If some document states that the power lies elsewhere, then the document is to that extent *not* the constitution as so defined, since the document does not accurately reflect how the state is actually constituted.

In another commonly used sense, a "constitution" is simply a document that allocates powers and rights in a political body. Thus, there are works that compile constitutions of the world; works that are collections of such documents.[1] We can state meaningfully that the People's Republic of China has, in its history, adopted four constitutions. Amendments to a constitution are amendments to the document. A constitution consists of words in articles and amendments.

Finally, we can think of a constitution as a kind of fundamental political agreement. The elements of a political society that hold power agree that decisions will be made in a certain way, by certain officials, institutions, or bodies. The terms of the agreement may be written or not. The agreement may be changed by express or implicit agreement. The agreement may be abolished or superseded by express or implicit agreement. Moreover, the agreement may be violated, even repeatedly. But as long as such an agreement serves as a fundamental referent for disputes among the elements that have power in the political society, one can speak of it as a constitution.

In the United States, it is frequently unnecessary to distinguish among these different meanings of the word "constitution." This is because the *document* that is known as the

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1. *See, e.g.*, CONSTITUTIONS OF NATIONS (Amos J. Peaslee, ed., 4th ed. 1985); CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz, eds., 1996).

U.S. Constitution is remarkably consistent with the allocation of powers and rights that *actually exists* in the nation, and because there is widespread *acceptance* of the idea that the terms of the document are the ultimate determinant for resolving disputes.

For example, under the U.S. Constitution, may a thirty-year-old individual serve as President of the United States? The answer is simply "no." There is no need to define precisely the meaning of the term "U.S. Constitution," since the answer is the same regardless. Historically, there has never been political support for such a young presidential candidate, the terms of the document prohibit it,[2] and if a thirty-year-old individual was to run for President, there would be widespread reference to Article II, section 1 in opposition to the candidacy.

But, assume the following events were to occur. A thirty-year-old candidate runs for President and is elected. She serves for four years, fulfilling all the constitutional and legal duties of President. Legal challenges to her service are unsuccessful perhaps because the challenges are considered to be "political questions."[3] She is defeated for re-election by another thirty-year-old candidate four years later. The new President also carries out the duties of the office. Now the question is asked, under the U.S. Constitution, may a thirty-year-old individual serve as President?

The answer depends upon what is meant by the U.S. Constitution. In the first sense of the term (how power is actually exercised), the answer, of course, is yes. In the second sense (the contents of a document), the answer for the objective reader is doubtless no.[4] In the third sense, the answer *depends* upon whether the person or institution answering the question accepts or rejects the change in a fundamental rule for the society. One who rejects the change will simply state that the current practice is a *violation* of the fundamental societal agreement, which continues to require that Presidents be at least thirty-five years old. Such a person, with a full grasp on reality, can argue that the answer is still no; that under the U.S. Constitution a thirty-year-old individual may still not be President. There have simply been a couple of violations of the constitution in that regard. On

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2. U.S. CONST. art. II, § 1, cl. 5.

3. *Cf.* Powell v. McCormack, 395 U.S. 486, 521 n.42 (1969) (reserving issue of whether a determination by the House of Representatives that a person elected to the House was underage was a nonjusticiable political question). The argument might receive some support from Luther v. Borden, 48 U.S. (7 How.) 1 (1849) or Coleman v. Miller, 307 U.S. 433 (1939).

4. I recognize that some scholars argue against the very idea of objective meaning being contained in text. *See, e.g.*, Paul Campos, *The Chaotic Pseudotext*, 94 MICH. L. REV. 2178 (1996).

the other hand, those who accept the change, no matter what the reason, effectively have agreed to a modification of the fundamental agreement about how power should be exercised in the nation.[5]

Thus, the answer to a question about the content of the U.S. Constitution, under the hypothetical, is either yes, no, or "it depends on political facts," depending in turn upon what the answering person *means* by "constitution."

B. *U.S. and U.K. Constitutions*

In order to construct the foregoing example, it was necessary to hypothesize a plausible situation where no objective body within the system would have the power to force the practice to conform to the terms of the document. Thus, there was the need to assume that the political question doctrine would keep the courts from finding the practice unconstitutional.[6] An alternative assumption—less plausible to U.S. citizens—would be that courts find the practice unconstitutional, but the political branches simply disregard what the courts hold. In either of these situations, the necessity becomes more obvious for the analyst to attribute precise meaning to the word "constitution" in order to avoid speaking nonsense.

In contrast, where a *written* constitution is the ultimate basis or *referent* for decisions of an objective body, and powerful elements of society *comply* with the decisions of that body, then we may expect the different meanings of "constitution" to be conflated. In the United States, we are accustomed to assuming all three of these conditions. First, we have a written constitution that is widely assumed to have meaningful content. Second, the courts interpret the writing and apply it as the highest law. Finally, those with political power in the United States have generally acquiesced in decisions of the highest court applying such interpretations.

Thus, if a foreigner asks a U.S. scholar whether, under the U.S. Constitution, a person may be criminally prosecuted for burning the U.S. flag, the scholar could legitimately answer a simple "no." The text has been interpreted to state "no" by the U.S. Supreme Court.[7] Despite disagreement by some Supreme

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5. A similar point has often been made by Professor Maier. *See, e.g.*, Harold G. Maier, *Customary Practice and the People's Voice: Separation of Powers and Foreign Affairs*, 25 VAND. J. TRANSNAT'L L. 991, 1000 & n.41 (1993).

6. *See supra* text accompanying note 3.

7. Texas v. Johnson, 491 U.S. 397 (1989).

Court justices,[8] and by the majority of the U.S. Congress,[9] criminal prosecutions for such acts have ceased. "No" is a defensible answer whether we mean the U.S. Constitution as text, referent, or practice.

Not all political entities in the world have systems with the three characteristics that we often assume about the United States. Some systems lack a written constitution, notably the British.[10] Others have written constitutions that are *not law*, in the sense that courts (or other decision-makers) are not permitted to apply them directly.[11] Finally, some systems have written constitutions, whether or not directly applicable, where flouting of the provisions is simply not corrected by any person or institution in the system.[12] Such differences demand of any constitutional discussion a clarification of the meaning of "constitution."

For instance, take the question of whether a man married to a divorced woman may serve as King of England under the British Constitution. If "constitution" means a written document superior to statutes, then there is no relevant provision one way or another. If "constitution" means fundamental referent for disputes, then an observer could argue yes or no, based on the customs and practices that give content to the "conventions" of the British constitution. The events of 1937 might serve as a precedent.[13] A different answer might result if we mean by "constitution" what power actually gets exercised. If parliament were to acquiesce in such a marriage, and the King were to exercise the powers allocated to him under the British system, then the answer would be yes. Otherwise, presumably not. The answer under this meaning of "constitution" depends on a political prediction, which may or may not be governed by *stare decisis*. Apart from what the answer is to these questions, the point is that as different questions, it is certainly possible that they might have different answers.

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8. *Id.* at 421 (Rehnquist, C.J., dissenting, joined by White, J. and O'Connor, J.); *Id.* at 436 (Stevens, J., dissenting).

9. Flag Protection Act of 1989, 18 U.S.C. § 700 (1988 ed., Supp. I) (held unconstitutional in United States v. Eichman, 496 U.S. 310 (1990)).

10. *See* A.V. DICEY, THE LAW OF THE CONSTITUTION 28, 32 (10th ed. 1965); COLIN TURPIN, BRITISH GOVERNMENT AND THE CONSTITUTION 1 (3rd ed. 1995).

11. For instance the Japanese Constitution prior to 1946. HIROSHI ODA, JAPANESE LAW 35 (1992).

12. *See, e.g.*, Terry Atlas, *Clinton Risks a Russian Visit; January Trip Seen as Boost to Yeltsin*, CHI. TRIB., Oct. 23, 1993 (reporting President Clinton's support for an apparently unconstitutional action by Russian President Boris Yeltsin).

13. *See* A.J.P. TAYLOR, ENGLISH HISTORY 1914-1945, 398-403 (1965); E.C.S. Wade, *Introduction to the Study of the Law of the Constitution*, *in* DICEY, *supra* note 9, at clxvi.

Without a written constitution, Britain is unusual among nation-states today. Not so unusual, however, are written constitutions that are not directly applicable by courts or other decision-making bodies. Indeed, until fifty years ago the United States was almost unique in giving its courts the power to apply the constitution as law higher than statute or other sources of law. The theory of a constitution that is applied directly by courts as the highest law is set forth most famously in Chief Justice Marshall's opinion in *Marbury v. Madison*.[14] Marshall's opinion relied to a notable extent on the written nature of the U.S. Constitution:

> Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.
>
> This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.
>
> That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.[15]

To the modern observer of constitutional systems, however, the conclusion that a written constitution is inherently a directly applicable one is a *non sequitur*. As a matter of logic, a written constitution could, after all, contain a provision making it not directly applicable. As a matter of practice, some written constitutions are simply not law at all in the sense of being applicable in court.[16]

C. *Chinese "Constitutions"*

In the People's Republic of China (PRC), for instance, the written constitution is by its terms supreme, but it is not law in

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14. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

15. *Id.* at 178.

16. *See supra* text accompanying note 10. Even truly democratic republics that not only have written constitutions but also have reputations for respecting human rights have such limits on the direct applicability of their constitutions.

the sense that it is directly applicable in court.[17] Instead, the courts follow the laws of the National People's Congress and the policies of the government and party. Those institutions presumably follow the written constitution, but they also have the power to amend or supersede it.[18] In effect, the constitution is a political, rather than a legal document. There is nothing intrinsically wrong about having fundamental political documents that are not treated as law. The United States, for instance, has its Declaration of Independence, as well as the party platform for the party in power. Such documents may serve important political purposes without being binding law in form or effect. In China, for instance, the constitution may tell us more about recent political trends than about how power will be exercised in the future.[19] Because of its lack of direct applicability, the written constitution of China should be read with less expectation that it either reflects accurately how power is currently allocated, or serves as the ultimate referent for disputes within the Chinese system. This alone should not be read as a criticism of the Chinese constitutional system, any more than it would be a criticism of the U.S. system to assert that the right to the "pursuit of happiness" found in the U.S. Declaration of Independence finds only political implementation and is not a legally enforceable right.

It does mean, however, that one should exercise care in assuming the actual significance of compliance or non-compliance with such a constitution. For instance, when the Sino-British Joint Declaration on Hong Kong was relatively new,[20] it was debated whether important aspects of it were consistent with the constitution of the PRC.[21] The argument was

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17. ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 46 (1992); William C. Jones, *The Constitution of the People's Republic of China*, 63 WASH. UNIV. L.Q. 707, 710 (1985).

18. XIAN FA [Constitution] ch.3, § 1, art. 62, para. 1, *et seq.* (The People's Republic of China).

19. Ralph H. Folsom et al., LAW AND POLITICS IN THE PEOPLE'S REPUBLIC OF CHINA 56 (1992); Jones, *supra* note 17, at 726-28.

20. 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, Sept. 26, 1984, P.R.C.-U.K., 23 I.L.M. 1366 [hereinafter Joint Declaration].

21. See Joseph Y.S. Cheng, *The Constitutional Relationship Between the Central Government and the Future Hong Kong Special Administrative Region Government*, 20 CASE W. RES. J. INT'L L. 65, 68 & 68 n.21 (1988) (describing the raising of these concerns in Hong Kong in 1983 and 1984). Mr. Cheng advocated a revision of the PRC Constitution to exempt special administrative regions from certain constitutional provisions, in order to "demonstrate the sincerity of the PRC leadership and to strengthen the attraction of the 'one country, two systems' policy to Taiwan." *Id.* at 70.

that, despite the allowance of Special Administrative Regions in Article 31,[22] the continuance of a capitalist system in Hong Kong after 1997 would be inconsistent with more general and comprehensive provisions of the constitution to the effect that the PRC is a socialist state that "upholds the uniformity and dignity of the socialist legal system" and that is founded on "socialist public ownership of the means of production."[23]

Now, if the Chinese Government intends to maintain the capitalist system that has existed in Hong Kong for fifty years, as the Joint Declaration plainly contemplates,[24] it is impossible that a legal argument based upon its constitution will stop it. If the Chinese Government intends to renege on its clear assurances to that effect, it will not be because its constitution requires it to do so. To maintain a capitalist system or not, then, is a decision that, once decided, will either be read to conform to the constitution or have the constitution conformed to it. Indeed, the argument under Chinese law may have puzzled Chinese policy-makers, in light of their government's clear commitment to the "one country, two systems" concept when the Joint Declaration was signed. A response to the argument was contained in an article in People's Daily: "[S]ince Article 31 of the Constitution is an inalienable part of the Constitution, conformity with Article 31 means conformity with the Constitution, and not violating Article 31 means not violating the Constitution."[25] While such a

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22. XIAN FA [Constitution] ch.1, art. 31 (The People's Republic of China) provides:

> The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions.

23. XIAN FA [Constitution] ch.1, arts. 1, 5, & 6 (The People's Republic of China) provide:

> Article 1: The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants.
> Article 5: The state upholds the uniformity and dignity of the socialist legal system. No law or administrative or local rules and regulations shall contravene the Constitution.
> Article 6: The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.

24. Joint Declaration, para. 3(12), *supra* note 20, at 1372.

25. Wang Shuwen (director of the Institute of Law of the Chinese Academy of Social Sciences), Sheli Tebie Xingzhengqu shi Woguo de Zhongyao Juece (The Establishment of Special Administrative Regions is an Important Policy Decision

response is not logically satisfying to western-trained legalists,[26] it makes some sense in the Chinese system. It is just a way of stating that the *question* does not make sense within the system.[27]

A more recent example is humorous because of the source. When the Chinese government announced that it would install an unelected provisional legislature promptly upon the handover[28]—a course that at least arguably violates the Joint Declaration[29]—Hong Kong Governor Chris Patten was arguably in a position of needing to assure Hong Kong interests that his administration could live with the inevitable, while *not* conveying to the Chinese any official British acceptance of their course of action. He explicitly acknowledged that the provisional legislature may be consistent with the *Chinese* constitution.[30] Remarkably, this was taken in Hong Kong as some measure of acceptance of the provisional legislature, while doubtless connoting little of the sort to the Chinese.

D. *Hybrid Systems*

Between the two poles of direct applicability contemplated in *Marbury* and exclusively indirect or political applicability exemplified in China is the hybrid example of those states where only one specialized court has the power to apply the constitution as highest law. Examples are Germany and Italy, whose specialized constitutional courts alone have the power to find statutes unconstitutional.[31] Much can be said in favor of such systems. For instance, one could argue that if the national legislature reads the constitution one way, and a local judge reads it another way, the national legislature's reading should

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of our Country), Renmin Ribao [People's Daily], Sept. 28, 1984, as summarized by Joseph Y.S. Cheng of the Chinese University of Hong Kong, Cheng, *supra* note 21, at 70.

26. In Joseph Y.S. Cheng's marvelous understatement the "argument appears simple and reassuring, though not necessarily logical." *Id.* at 70.

27. According to Douglas Hofstadter, when Zen monk Joshu was asked by another monk whether a dog has a Buddha-nature or not, Joshu answered "mu," thereby effectively "unasking" the question. DOUGLAS R. HOFSTADTER ET AL., BACH: AN ETERNAL GOLDEN BRAID 233 (1979). In doing so, Joshu "let the other monk know that only by not asking such questions can one know the answer to them." *Id.*

28. Catherine Ng et al., *Black Day for Democracy*, S. CHINA MORNING POST, Mar. 25, 1996, 1996 WL 3755071.

29. *See* Joint Declaration, Annex I, art. I, para. 3. *See* Philip Wong & Carmen Cheung, *Democrats to go Ahead with Legislature Litigation*, HONG KONG STD., Sept. 11, 1996, 1996 WL 11716371.

30. Governor's Question-and-Answer Session in the Legislative Council, Apr. 18, 1996, http://www.info.gov.k/isd/news/apr96/18qa.htm, p. 6.

31. Grundgesetz [Constitution] art. 93 (Germany); LA COSTITUZIONE [Constitution] art. 134 (Italy).

prevail, at least until a broadly representative legal body, with a national mandate, concludes to the contrary. While the constitutional court in such a system is presumably composed of legally trained persons largely independent from the rest of the government, it is only the judicial nature of the body that distinguishes such a system from the Chinese model. The theory of *Marbury*, that the constitution is simply the highest law, to be applied by those who apply law, is necessarily absent.

Each country must determine the extent to which any written constitution that it may have will serve as its law. The more that a country does so, the more one can treat interchangeably the notions of a constitution as written document, reflection of actual allocation of powers, and fundamental political agreement. It is necessary to focus on the different meanings of constitution, however, in order to anticipate the future constitutional status of Hong Kong.

III. THE FUTURE CONSTITUTIONAL STATUS OF HONG KONG

Great Britain and China agreed to the 1997 handover of Hong Kong in the Joint Declaration of 1984.[32] The Joint Declaration provided that Hong Kong would retain important aspects of its legal and economic systems for fifty years following the handover.[33] A Basic Law, promulgated by the Chinese Government, consistent with the Joint Declaration, would serve as the legal charter for the territory, which would be called a "Special Administrative Region" (SAR) of the PRC.[34] The Basic Law for the Hong Kong SAR was adopted by the National People's Congress in 1990.[35]

In the return of Hong Kong to China one sees a remarkable amalgam of systems. U.S. citizens, whose legal perspective is presumably imbued with the conceptual framework of *Marbury v. Madison*, must be doubly cautious. Hong Kong has been a colony under the sovereignty of the British crown,[36] and Britain, in turn, has an unwritten constitution in which Parliament is

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32. *See generally* John H. Henderson, *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, 511-27 (1995).

33. Joint Declaration, Annex I, Part I, *supra* note 20, at 1373.

34. Joint Declaration, para. 3(12), *supra* note 20, at 1372.

35. Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Apr. 4, 1988, 29 I.L.M. 1520 [hereinafter Basic Law]. For a helpful description, *see* Henderson, *supra* note 32, at 528-30.

36. PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 23-38 (2d ed. 1994).

"supreme."[37] Hong Kong has a charter in the form of Letters Patent and Royal Instructions,[38] and a body of laws imposed by the British Parliament directly and indirectly through the legislative bodies of the colony.[39] However, typically in the case of decolonization from Britain, the former colony develops a written constitution (as in the United States) or has a written constitution passed for it (as in the British North America Act, Canada's constitution that was "patriated" in 1982)[40] that is directly applicable, at least at the outset of independence, in courts that are set up to be somewhat independent. Such a constitution may evolve, or get superseded, in response to power interests within the territory, with the result that former British colonies now range in form from multi-party democratic republics like Canada, India, and Australia, to one-party states like Zimbabwe, to military dictatorships like Myanmar. It may not be clear at the time of decolonization how the constitution of a former British colony will develop, but the result can generally be said to be a product of the interplay of power interests within the territory.

Hong Kong will be different in two important respects, which generally cut in opposite directions. First, Hong Kong is being given a constitution (the Basic Law) that is similar to the charter of a former British colony, but which is *from the outset* being placed subordinate to a sovereignty that simply does not treat written constitutions in the way that common law scholars are used to thinking about them.[41] This factor suggests lessened expectation that the written constitution (the Basic Law) will reflect political reality or serve as a referent for resolving disputes. Second, and conversely, many aspects of the Basic Law are guaranteed in effect by an international agreement, the Joint Declaration, to which the succeeding sovereign is bound. This distinguishes Hong Kong's post-decolonization constitution from those of other former British colonies, and provides a test for the relative efficacy of international, as opposed to domestic, law in maintaining the effectiveness of written constitutional provisions. To the extent that this factor operates, it suggests greater expectation that the Basic Law will reflect political reality or serve as a referent for resolving disputes.

Of course, the final answer to what the political reality will be in Hong Kong depends upon how the Chinese government exercises its power. At the pessimistic end of the range of

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37. *Id.* at 171-86.
38. *Id.* at 42.
39. *Id.*
40. *See* TURPIN, *supra* note 10, at 93-101.
41. *See supra* note 17 and accompanying text.

possibilities is a form-over-substance reality of total political control and repression, coupled with economic milking and rampant corruption and only the merest token of compliance with the forms of the Basic Law. At the optimistic opposite end of the range is a simple change in flags, coins, and stamps, with Beijing merely acting in effect as a new, benevolent, distant colonial power. Neither extreme is likely, but where along the spectrum the Chinese government will settle depends largely on political factors beyond the scope of this Article. Among these factors are the ability of the central Chinese government to control enormous Chinese interest in tapping into Hong Kong's prosperity, the degree of sensitivity to expressions of political discontent that simply would not be tolerated in the rest of China, the need to encourage world business confidence in Hong Kong, and the need to provide a model for the possible return of Taiwan to central government control.

In contrast to the weight of inherently political factors, legal protections for preserving a constitutional system reflected by the Basic Law—the subject of this Article—pale in comparison. But there are different shades of pale. The type of protection to which common law lawyers are accustomed—an independent judiciary with an overarching mandate—is fundamentally and uniquely handicapped from the outset. The type of law in which common law lawyers are less accustomed to putting their faith—public international law—may in contrast carry at least some weight.

IV. THE INDEPENDENT JUDICIARY AND THE BASIC LAW

A. *General View of the Judiciary*

The official position of the British Government is that the judicial system of Hong Kong will change very little after 1997.[42] Article 19 of the Basic Law provides that the Hong Kong SAR

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42. According to the Hong Kong Government Information Centre:

> As in other areas of Hong Kong's life, there will be very few changes to the Judiciary with the change of sovereignty in 1997. The one significant change actually enhances it, namely, final appeal will no longer lie to the Judicial Committee of the Privy Council in London, but to a new Court of Final Appeal located in Hong Kong. In all other major respects the judicial system will remain as it is, as guaranteed by the Joint Declaration and Basic Law, which has specific articles ensuring the independence of the Judiciary, the continuation of the common law and trial by jury, etc.

<Http://www.info.gov.hk/info/fjudic.htm#changes>.

"shall be vested with independent judicial power, including that of final adjudication."[43] Section 4, moreover, contains a number of provisions that seem to describe an independent judiciary with the power to apply the Basic Law directly. The power of "final adjudication" for the SAR will be vested in the Court of Final Appeal (CFA) of the SAR, "which may as required invite judges from other common law jurisdictions to sit."[44] The structure, powers, and functions of the Hong Kong courts are to be prescribed by law,[45] and the courts are to adjudicate cases in accordance with the Basic Law itself, local laws previously in force and those subsequently enacted by the SAR legislature, and the common law,[46] for which the courts may look to "precedents of other common law jurisdictions."[47] The courts shall exercise power "independently, free from any interference," and judges shall be "immune from legal action in the performance of their judicial functions."[48] Trial by jury, speedy trial, and the presumption of innocence are preserved.[49] Judges of the CFA are to be appointed by the SAR Chief Executive on the recommendation of an independent commission, and subject to the endorsement of the Legislative Council.[50] They may be removed only for inability to discharge duties or misbehavior, and then only on the recommendation of a tribunal of judges.[51]

The CFA was intended to be a substitute for the Judicial Committee of the Privy Council, which has served as the final appeal court for Hong Kong, other colonies, and some dominions of the British Commonwealth.[52] The Judicial Committee of the Privy Council is composed of law lords of the British House of Lords.[53] To conform the Hong Kong CFA in one significant respect to the model of the Privy Council, the Basic Law provides for the possibility of inviting "judges from other common law jurisdictions to sit on the Court of Final Appeal."[54] Perhaps the most controversial question regarding the implementation of the CFA provisions of the Basic Law has been the question of how

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43. Basic Law, *supra* note 35, art. 19.
44. *Id.* art. 82.
45. *Id.* art. 83.
46. *Id.* arts. 8, 18, 84.
47. *Id.* art. 84.
48. *Id.* art. 85.
49. *Id.* arts. 86, 87.
50. *Id.* arts. 88, 90.
51. *Id.* art. 89.
52. WESLEY-SMITH, *supra* note 36.
53. *Id.* at 140.
54. Basic Law, *supra* note 35, art. 82.

many non-Hong Kong judges may sit on the CFA.[55] The issue was essentially a question of how much the CFA might resemble a commonwealth court like the Privy Council as opposed to a local court. The controversy was stirred by an unpublished 1991 agreement between Britain and China that there would be five members of the CFA, at most one of whom would be a judge from another common law jurisdiction in any particular case.[56] The Hong Kong Legislative Council (LegCo) voted against a bill to implement the 1991 agreement in December, 1991, largely on the basis of the limit on the number of foreign judges.[57] Ultimately, following three years of controversy, Britain in June, 1995, announced its continued acceptance of the principle that no more than one foreign judge would sit in any particular case.[58] The bill to establish the CFA was pushed through the Hong Kong Legislative Council by the British Administration in Hong Kong in 1996 on the theory that the only alternative was a judicial vacuum.[59] The bill further disappointed democracy advocates in Hong Kong by reaffirming an "act of state" exception to the jurisdiction of the CFA, and delaying the start of the CFA's function until after the handover of Hong Kong in July, 1997.[60]

B. *Interpretation and Applicability of Basic Law*

While persons in Hong Kong concerned about the independence of Hong Kong's legal system have focused their attention on the outside jurist controversy, and to a lesser extent on the exception for acts of state and the CFA startup date, there is an element of Hong Kong's Basic Law that is probably far more significant. That is Article 158, which expressly gives the "power of interpretation" of the Basic Law to the Standing Committee of the National People's Congress.[61] The same article makes the

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55. *See Hong Kong's Court of Final Appeal Still in Dispute*, Reuters News Agency, Mar. 23, 1995, *available in* LEXIS, News Library, Non-US File.

56. WESLEY-SMITH, *supra* note 36, at 74. The agreement was leaked but not officially publicized in 1991. According to China's official news agency, the 1991 agreement was "revealed for the first time" by China's top official on Hong Kong and Macao Affairs in May 1995. *Lu Ping on HK's Court of Final Appeal*, Xinhua News Agency, May 18, 1995, *available in* LEXIS, News Library, Non-US File.

57. Emily Lau, *Testing Time for Political Players*, SOUTH CHINA MORNING POST, July 24, 1995, at 18, *available in* LEXIS, News Library, S.China File.

58. Simon Holberton, *China and UK Agree over Supreme Court*, THE TIMES, June 9, 1995, at 6.

59. Peter Stein & Marcus W. Brauchli, *London and Beijing Agree on High Court for Hong Kong*, WALL ST. J. EURO., June 12, 1995.

60. *Id.*

61. Basic Law, *supra* note 35, art. 158.

Basic Law directly applicable by the courts of Hong Kong, including the CFA and lower courts, but,

> if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.[62]

Compare the likelihood that the Basic Law will be descriptive of the future constitutional order with the likelihood that a hypothetical Basic Law without such an interpretation provision would be so descriptive. In either case, an exercise of power in conflict with the Basic Law, if accepted by the elements with power in society, will change the "actual" or effective "constitution." But judges, because of their perceived legitimacy, can also provide evaluations which serve as a very persuasive part of that power process. Their statement that a power exercise is contrary to law may induce some elements in society to accept that position and reject the exercise of power. The more this occurs, the greater the congruity of written constitution and effective constitution. It is unlikely to occur at all, however, and arguably impossible, when the written constitution contains a potentially self-destructing mechanism like Article 158 of Hong Kong's Basic Law.

Support for this argument is found by comparing Professor Tayyub Mahmud's fascinating study of pre-existing national courts in other formerly British territories faced with new constitutions declared following *coups d'etat.*[63] Mahmud surveyed judicial responses to *coups d'etat* in eleven post-colonial common law settings: Pakistan, Ghana, Southern Rhodesia (now Zimbabwe), Uganda, Nigeria, Cyprus, Seychelles, Grenada, Lesotho, Transkei, and Bophuthatswana. Each of these places had at one time been under the British crown, and each had a written constitution under which judges were appointed who later had to rule on the validity of actions that unquestionably violated those written constitutions: wholesale usurpations of power

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62. *Id.* In addition, under Article 159, the National People's Congress has the power to amend the Basic Law. *Id.* art. 159.

63. Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat & Common Law*, 27 CORNELL INT'L L.J. 49 (1994).

outside the requirements of the written constitutions. In virtually every instance, the court validated the actions of the usurpers,[64] at least where the usurpers continued in power at the time of the court decisions.

Mahmud identifies four options available to a judge when confronted with a successful *coup*: "(i) validate the usurpation of power; (ii) declare the usurpation unconstitutional and hence invalid; (iii) resign . . .; or (iv) declare the issue a nonjusticiable political question."[65] Mahmud criticizes the theoretical underpinnings for the first option of validating the usurpation, even though it is the option which has historically been the most frequently exercised. His critique is strong, and only partially captured by the following summation: there is more than one sense to the word constitution, and the fact that political power has put a new constitution into effect does not mean that the new constitution is valid within the system of the old constitution.[66] Mahmud also criticizes the second, and opposite option, strict constitutionalism, as one that would render the court practically irrelevant, and perhaps endanger the judges. Mahmud criticizes the third option, resignation, on similar grounds,[67] and moreover, resignation is essentially only available to a judge and not to a court. Mahmud advocates the fourth option, declaring the issue of the validity of the usurpation of power to be a nonjusticiable political question.[68] This course would "deny judicially pronounced legitimacy to the usurpers without jeopardizing the very existence of the courts."[69]

Mahmud's argument is that the political question doctrine should be applied extra-constitutionally. That is, the doctrine should apply even if the previous constitution had clearly precluded application of the doctrine. It may be confusing to use the "political question" term of art at this level. The political question doctrine in the United States, sparingly used and heavily criticized though never overruled, is a doctrine that by hypothesis is consistent with the constitution and accordingly implies acceptance of the political *status quo*. This is

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64. In the middle of three succeeding instances in which this type of scenario played out in Pakistan, the Pakistani Supreme Court invalidated the assumption of power by the military in 1969. Mahmud, *supra* note 61, at 73-76. By the time that the case was decided, it should be noted, the military regime had fallen and been replaced by an elected regime. *Id.* at 75. In the other coups examined by Mahmud, the courts validated the incumbent usurper regimes.

65. *Id.* at 100.

66. *Id.* at 133.

67. *Id.* at 128-29.

68. *Id.* at 131-38.

69. *Id.* at 139-40.

demonstrated by the fact that while application of the doctrine usually means dismissing the case against the government, in some other court contexts, application of the doctrine might mean *providing relief* based on the action of a political branch of the government.[70] This is warranted as a matter of constitutional law because the basis for the political question doctrine can be found in, or inferred from, the Constitution.[71] By way of contrast, if the U.S. Constitution expressly rejected the political question doctrine, then the Supreme Court could not constitutionally apply it. Thus, exercise of the political question option amounts to an acceptance of the new political order unless that option is permitted by the old order. But if the latter option is permitted, the court simply does not have to decide and can rule comfortably in conformity with strict constitutionalism, Mahmud's second option.

To apply the "political question" doctrine at the extra-constitutional level—in contravention of the earlier constitution—thus essentially amounts to acceptance of the new constitutional order. This is because the court will be giving effect to actions that would not be given effect under the old constitutional order.[72] Applying the political question doctrine extra-constitutionally is thus simply a way to accept the new order. But for the conscientious judge, who is concerned about the moral obligation to comply with his or her oath, and who finds the new order *not* to be legitimate (as a political or moral matter), strict constitutionalism is the proper answer.

Deciding whether to accept a new constitutional order, therefore, ultimately depends upon political and moral value judgments. It is, accordingly, impossible to tell judges in advance whether it is better to uphold a usurpation or apply the political question doctrine, or to resign or apply the old constitution strictly. The choice is a political and moral one to be made by the members of the polity, including the judges. Therefore, it cannot be made in advance by legal analysis. An inherently political and moral decision requires an examination of factors including: whether the old or new regime is corrupt; whether the old or new

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70. For instance, in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), five Supreme Court justices characterized the Act of State Doctrine (which can serve to permit plaintiffs to recover, as in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)) as an application of the political question doctrine. 406 U.S. at 772 (Douglas, J., concurring); 406 U.S. at 787-88 (Brennan, J., dissenting).

71. Marbury, 5 U.S. at 166.

72. Thus, the court in R. v. Ndhlovu, 1968 (4) SALR 515, 520-21(A), which accepted the new order in power at that time in Rhodesia, relied heavily on Luther v. Borden, 48 U.S. (7 How.) 1 (1849), which Mahmud relies upon to support his use of the political question doctrine.

regime has popular support; whether the old or new regime better serves the interest of the state; whether an oath to support a subsequently corrupted regime is binding; and whether resistance against the new regime is futile. These *are* political and moral questions, of course, but every public servant is faced with them when a revolution occurs. Compare Robert E. Lee's dilemma as to whether to lead the Union or Confederate Army in 1861. It is the polity of a state that ultimately determines what constitution a state has.[73] A judge may be an important part of the polity that must decide whether or not to accept the new order. The judge must decide to accept the new order or not, just as the ministry officials and military leaders must make the same decision.

The cases examined by Mahmud show that common law judges almost always have ruled to uphold extra-constitutional assertions of power in the context of wholesale *coups d'etat*. On the other hand, in the context of smaller scale exercises of power in contravention of a written constitution, common law courts may more often rule against such exercise. Indeed, in a sense this occurs every time the U.S. Supreme Court or a European constitutional court invalidates a statute or executive action. But whether wholesale or smaller scale unconstitutionality, the choices outlined by Mahmud are the same.

How much can law insure that the content of the Basic Law of Hong Kong will also reflect the political reality in Hong Kong? Or similarly, how much can law insure that a particular written constitution will stay in effect in any common law jurisdiction? Of course, as long as political interests act in conformity with the constitution, the written constitution will correspondingly coincide with the actual exercise of power. In this situation, a legal check is unnecessary. When political interests violate the written constitution, the legal check consists of a declaration of illegality by an objective, respected body, and the possibility that the political interests will defer to the decision. The legal check does not always work, as the *coup* cases show. However, it only can work if judges assert the unconstitutionality of political action, and there is enough political will in the polity to demand compliance with the decision. In terms of political reality in the nations of the world, this legal check may seem small, but it may serve to increase, at least marginally, the expectation that a

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73. *See* John M. Rogers & Robert Molzon, *Some Lessons About the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992, 1003-06 (1992).

particular written constitution will reflect the real exercise of power.

Even that marginal increase in assurance is destroyed, however, if the objective body (court) is disempowered under the written constitution from making such a declaration of invalidity. The grant of final interpretative power to the Standing Committee of the National People's Congress effectively does this.

This is not an argument that words can have any meaning, and serve as no constraint on persons interpreting them.[74] But any body with final interpretative power has discretion to make more than one interpretation, and one text can support a range of meanings. The narrowness of the range may depend significantly on the shared assumptions of professional and national culture, as well as the extent to which the decision-maker is motivated by logic as opposed to political pressure or interest. The Standing Committee of the National People's Congress is a political body[75] in a government composed of persons with concepts of ideology, government, and law different from those who live and operate in nonsocialist republics.[76] It is, moreover, an arm of the very political power that has the strongest interest in, and capability of, of exceeding the limits of the Basic Law.

While the latter part of this Article deals with structural constitutional issues, and leaves civil rights issues to others, an example involving civil rights of individuals shows the extent to which the interpretive power undermines the effective legal force of the written Basic Law. Suppose a resident of Hong Kong, after the handover, expresses a political point of view contrary to that of the Chinese government. For instance, suppose a protester holds a sign up in a Hong Kong park saying that Taiwan should be admitted to the United Nations.[77] Or a businessman writes a letter to a Hong Kong paper saying that Tibet should be independent from China. Or a lawyer in a television interview

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74. Indeed, this very paper has assumed that a written constitution has meaningful content.

75. *See* Jones, *supra* note 17, at 710; KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 162 (1995); *see also* Owen M. Fiss, *Two Constitutions*, 11 YALE J. INT'L L. 492, 496 (1986).

76. *See* Janet E. Ainsworth, *On Seeing Chinese Law from the Chinese Point of View: An Appreciative Look at the Scholarly Career of Professor William Jones*, 74 WASH. U. L.Q. 547, 556-57 (1996).

77. Chinese Foreign Minister Qian Qichen has been quoted as warning that "Hong Kong should not hold political activities which directly interfere in the affairs of the mainland." *See* China News Digest, Global Ed., Oct. 21, 1996 (reporting the public outcry resulting from the remarks). Hong Kong Secretary of Justice-Designate Elsie Leung is reported to have said that slogans such as "Down with Deng Xiaoping!" will be illegal in Hong Kong after July 1, 1997. *Anti-Chinese Leader Slogans Illegal in Hong Kong after July 1*, China News Digest, Global Ed., Feb. 28, 1997.

sharply criticizes China's insistence on replacing the LegCo elected democratically under the British with an unelected Provisional Legislature. Suppose that the SAR government, under pressure or direction from Beijing, punishes such activity, either through arrest and criminal prosecution, or through administrative retaliation.[78]

The question is not whether such punishment might come about, but rather what effect the legal system will have on whether it does. The Basic Law will be the law of Hong Kong, and the Basic Law states, "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration."[79] In addition, Article 39 requires that the provisions of the International Covenant on Civil and Political Rights [ICCPR] shall remain in force and "be implemented through the laws of the Hong Kong Special Administrative Region."[80] Moreover, "[t]he rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law," and such restrictions may not contravene the ICCPR.[81] These provisions suggest that the SAR would not have the power under the Basic Law to punish the political expressions hypothesized above. Of course, one could argue that the right to free speech in Hong Kong is qualified by the need for national unity and political stability. The preamble to the Basic Law states that the establishment of the SAR is based upon "[u]pholding national unity and territorial integrity," and "maintaining the prosperity and stability" of Hong Kong.[82] Objectively speaking, one may conclude that the Basic Law protects the activities described. An exception for speech that is inconsistent with government political positions would appear to eviscerate the protection. There would not even be core content to the freedom set forth in the Basic Law. A legal conclusion therefore certainly could be that these activities are protected.

How could such a conclusion affect the real allocation of powers under the actual SAR? If an objective and independent legal body makes the determination that the Basic Law is violated, it may be somewhat harder for the SAR to carry out the

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78. Jimmy Lai, a majority shareholder of the highly popular Giordano clothing chain, spoke out against Li Peng in a magazine editorial, referring to Peng as a tortoise egg with a zero IQ. Almost immediately, Giordano stores in China began to be shut down by the government, forcing Lai to bow out of his top position at Giordano and surrender his voting rights in order to save the company. THE ASIAN WALL ST. J., Aug. 10, 1994, at 6.

79. Basic Law, *supra* note 35, art. 27.

80. *Id.* art. 39.

81. *Id.*

82. *Id.* Preamble.

act of punishment. Some respectability for the SAR would be lost if an official arm of the government, one that has some credibility with the polity as a whole, declares a violation of the Basic Law. Now, whether the CFA will be a body with such credibility has been the focus of disputes regarding how the judges will be appointed, and whether more than one judge can be from another common law jurisdiction. The history in the cases of *coups d'etat* shows that judges may accept wholesale exercises of brute political power. It may be a lot to expect judges of the CFA to defy the exercise of political power by the new sovereign. But only if they are willing to do so, at least in particular—as opposed to wholesale—violations, can it be said that an objectively determined content of the law will be the real content of the exercise of political power.

Assume for the moment that the CFA is composed of the wisest, the most analytical, the most courageous, and the most independent of judges imaginable. They still can apply the Basic Law to invalidate a political exercise of power only if the Basic Law is directly applicable. This does not appear to be a problem. It may be that the ICCPR is not directly applicable, since Article 39 states that it "shall be implemented through the laws" of the SAR,[83] but the freedom of speech guaranteed by Article 27 is accompanied by no such limitation. More explicitly, Article 84 provides that the courts of the SAR "shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18," and Article 18 in turn lists the Basic Law itself as law "in force in the Hong Kong Special Administrative Region." [84]

Leave also aside the exception to the jurisdiction of the SAR courts for "acts of state such as defence and foreign affairs,"[85] which exception could conceivably be used in the way that the political question doctrine is used in the United States, to avoid adjudication of certain sensitive issues of foreign or military policy. The doctrine could also be limited to the way it is used in Britain. Thus Professor Wesley-Smith finds the following common law limitations to be "apparent on the face of" Article 19 of the Basic Law:

> [D]eclarations of war and peace, recognition of foreign governments and envoys, or determinations of the extent of Chinese territory are matters outside the courts' purview. This is the intergovernmental act of state doctrine, and it is properly supplemented by executive certificates in discovering the true view of the executive government. Acts of state against individuals will continue to be possible (or act of state as a defence will continue to be available)

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83. *Id.* art. 39.
84. *Id.* arts. 84, 18.
85. *Id.* at art. 19.

> *only when the action complained of occurs outside the territory in relation to 'foreigners'*: decisions of the Central People's Government in the realm of defence and foreign affairs which directly impinge upon the rights of persons within the SAR must comply with SAR law, and the courts may adjudicate any disputes arising from them.[86]

Assume then, that the SAR gets a wise, objective, and independent Court of Final Appeal with the power to apply the Basic Law directly in a case before it, and the CFA finds the act of state limitation not to apply. Even with all of this, the court is bound expressly by the interpretation of the Basic Law of the Standing Committee of the National People's Congress. No matter how powerful the reasoning of the court to the effect that Article 27 prohibits the government action at issue, the Standing Committee can simply interpret the Basic Law not to extend so far.[87] Even if very stretched or constrained, tortured or unprecedented, this interpretation of the Basic Law is controlling under the words of Article 158, which "vests" interpretative power in the Standing Committee. Now an objective reading, the very linchpin of the power—such as it may be—to conform practice to words, requires acceptance of the politicized meaning. In short, the legal check is no check at all since the very source for legal pressure to conform to the written constitution contains the basis for effective violation.

In the example, assume the CFA is asked to find that the punishment violates Article 27. The conclusion requires an interpretation of Article 27 to that effect. Assume (as a hypothesis, not a prediction) that the Standing Committee simply interprets "freedom of speech" not to include speech that contravenes national policy or potentially destabilizes the political equilibrium of the People's Republic, and that more specifically, the speech is not protected by Article 27 as interpreted by the Committee. What then is the wise, analytical, independent, and courageous court to do? The words of the Basic Law, the very foundation for any argument that the speech is protected, would require the judges to accept the interpretation of the Standing Committee.

These hypotheticals are not used to suggest that the People's Republic will necessarily distort the Basic Law in this way, but rather to show that because of the locus of final interpretive

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86. WESLEY-SMITH, *supra* note 36, at 106 (emphasis added).

87. Compare the description by Owen Fiss of how the Standing Committee might treat an issue of freedom of speech under the Chinese Constitution, Article 35 of which provides for freedom of speech for PRC citizens. Fiss, *supra* note 75, at 497-98.

authority, it avails an observer little to apply legal analysis to determine the content of the Basic Law. One could look at the words, evaluate the intent of the drafters, invoke natural law, look at precedent, analyze logically, and so forth, all to determine an interpretation of the Basic Law. One could do so with the implicit assumption that the courts of the SAR will (or should) replicate that reasoning to come to the same conclusion. One could expect a wise and independent CFA to replicate such reasoning, and thus one could use legal analysis to anticipate the real and effective allocation of power within the SAR. But there is little if any basis for expecting the Standing Committee of the National People's Congress to replicate such reasoning. There is no history of the Standing Committee applying anything contrary to the then-current policy line of the Chinese Communist Party.

Within the constitutional system, then, there is little legal basis for anticipating what the effective allocation of power will be. This is not to argue that the SAR will not operate within the letter of the Basic Law, but only to state that the domestic system itself can have little if any force in impelling the SAR government in that direction. The government of the People's Republic may see the benefit of administering the SAR in a fashion that comports very closely to a fair reading of the Basic Law. Doing so would encourage productive Hong Kong residents to stay in Hong Kong and would encourage business interests to continue to use Hong Kong as a financial center.[88] Doing so would also strengthen the negotiating position of the People's Republic government with the Taiwan authorities in any reunification talks.[89] Such political interests, as noted, would have to be weighed against the need for control and stability within the Chinese political system. How these factors and other political factors are balanced cannot be predicted by constitutional legal analysis.

V. PUBLIC INTERNATIONAL LAW

On the other hand, while the domestic legal system is unlikely to have any weight in conforming the effective allocation of power to the written allocation of power, the international legal system may have some weight to that effect. This is because the written constitution of Hong Kong, the Basic Law, was passed to implement (in part) obligations under a bilateral international agreement, the Joint Declaration. Many key provisions of the

88. *See* Henderson, *supra* note 32, at 535.
89. *Id.* at 537-38.

Basic Law are taken directly from the Joint Declaration. To a large extent then, the Basic Law is guaranteed by treaty in a way that is distinct from most constitutions. The treaty, unlike the Basic Law, has no provision giving one party the power to interpret its meaning. Presumably, therefore, it has an objective, or at least mutually accessible, meaning. Lawyers, then, can evaluate whether one action or another on the part of the PRC following handover complies with the treaty. As a treaty, the Joint Declaration will bind legally if (1) treaties really bind legally, (2) the PRC in particular "feels" bound, and (3) the British Government demands compliance. Each of these is discussed below.

A. *Legally Binding Power of Treaties*

Are treaties "legally binding"? At one level, the question is a philosophical one about the nature of law. If a rule requires a third-party enforcement agency in order to "bind," then international law is arguably not "law" at all.[90] On the other hand, if each nation finds it in its interest to comply with certain basic rules in order to be able to insist that other nations comply with the same rules, we can call the system a "binding" one, even without a third-party enforcement agency.[91] The system "binds" in the precise sense that nations will (at least much of the time) comport with the rule when doing so would otherwise be against their particular interest. They do so in order to preserve the ability to demand that other nations comply with respect to them. Whether or not such a system is "law" in its purest form, it is a system of binding obligations that is referred to by diplomats as law, since it binds in the sense described, and since diplomats treat it as something objectively ascertainable.

Even most positivist legal theorists can accept written international agreements as creating rules of international law, since it is hard to argue that nations do not at least hesitate to violate treaties, even when compliance is otherwise entirely against their interests. Protests against alleged violations are generally met with explanations of how the act is not a violation, or that the treaty is not in effect, rather than assertions of the right to violate treaties at will. Nonetheless, those with strongly

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90. *See* Anthony D'Amato, *Is International Law Really "Law?,"* 79 NW. U. L. REV. 1293 (1985) (discussing whether "enforcement power" is necessarily the hallmark of the concept of "law").

91. *Id.* at 1303, 1312-14; *see also* John M. Rogers, *A Way to Think About International Law, in* ESSAYS IN HONOUR OF WANG TIE YA 611-16 (Ronald St.J. MacDonald ed., 1994).

positivist backgrounds may challenge the statement that states are ever really affected in their actions by treaty obligations alone. For instance, some Chinese students once asked me for an example of when a nation had acted differently solely because of a treaty obligation. The clearest example to come to mind was Britain's decision to hand Hong Kong back to China based on the expiration of the lease term for the New Territories of Hong Kong.[92] British policy has been to decolonize around the world in the last few decades, but Britain has pretty consistently refused to decolonize against the wishes of the inhabitants. Thus, both in Gibraltar and the Falkland Islands, where Spain and Argentina respectively claim the territory in question, the primary sticking point has been the refusal of the inhabitants to be turned over to the mainland state.[93] Today, neither territory is of particular strategic or economic benefit to Britain, but Britain has permitted its relations with European Union partner Spain to suffer,[94] and even fought a war with Argentina, to preserve control over these territories pending local acquiescence in a handover.

What is different about Hong Kong? Indeed, Hong Kong would seem of enormously greater value to Britain than Gibraltar or the Falkland Islands. Moreover, the potential for disrupting Britain's national interests seems far greater when the PRC takes over Hong Kong than if democratic Spain were to take over Gibraltar or Argentina were to take over the remote Falkland Islands. The only real difference is the treaty of 1898 that effectively terminates Britain's right to most of the territory of what is now the colony of Hong Kong. In other words, treaty law operates to control what likely would be a different policy.

This is not to say that all states comply with all treaties to which they are parties. The much more modest claim is that states, to obtain the value of other states complying with clearly binding obligations, find an independent interest with substantial and sometimes dispositive weight, in complying with such obligations. It is in this sense that treaties "bind." At the international level, it really makes little difference what the internal constitution of a state is. Externally, the state still has an interest in being perceived as trustworthy. Otherwise the

92. The second Convention of Peking, which came into operation on July 1, 1898, leased the New Territories (the greater territorial part of the present Colony of Hong Kong) to Britain for only 99 years. WESLEY-SMITH, *supra* note 36, at 26.

93. With respect to Gibraltar, see Simon J. Lincoln, Note, *The Legal Status of Gibraltar: Whose Rock Is It Anyway?*, 18 FORDHAM INT'L L.J. 285, 297-300 (1994).

94. *Id.* at 288-89.

benefit from other, especially future, agreements may be threatened.[95]

Accordingly, there is a basis for expecting a similar effect to operate for the government of China, regardless of its internal legal structure. China enters into bilateral and multilateral treaties, and treats them with seriousness. It responds to allegations of treaty violation with denial rather than assertion of the right to violate. It demands compliance with bilateral obligations in its favor. In short, it acts as part of the international legal system, and has shown serious interest in continuing to do so.

B. *The PRC's Treatment of the Joint Declaration*

The next question asks whether the government of the PRC treats the Joint Declaration as a binding legal obligation?[96] One argument against treating it as a valid international obligation would be that Hong Kong was never validly British in the first place due to inequality in the nineteenth century treaties of cession and lease,[97] and thus, that the British cannot impose binding conditions on its return. The idea that Hong Kong was never validly British is deeply ingrained in China.[98] If from the Chinese perspective all British control of Hong Kong pursuant to nineteenth century treaties was illegal, it could be argued that relinquishment of control was required without condition, and any condition is arguably not Britain's to demand. Like a promise made to a kidnapper, it is not enforceable at law. While the Vienna Convention on the Law of Treaties—widely accepted in large part as reflective of customary international law—does not demand consideration in order for treaty obligations to be binding, it at least admits of the possibility that coerced

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95. See James Boyd White's description of how this interest was reflected in the actions of ancient Greek city-states. JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 66, 80-81 (1984).

96. *See generally* Paul Vitrano, *Hong Kong 1997: Can the People's Republic of China Be Compelled to Abide by the Joint Declaration?*, 28 Geo. Wash. J. Int'l L. & Econ. 445 (1995); Henderson, *supra* note 30, at 510.

97. *See* Vitrano, *supra* note 96, at 450.

98. Once while lecturing to graduate students at a highly regarded law school in central China, I was asked whether I thought that countries really complied with treaties when it was against their interest. When I gave the British handover of Hong Kong as an example of treaty compliance against interest, the response of the Chinese law students was not what I might have logically anticipated: that Britain found it in its interest to turn Hong Kong over, in order to keep good relations with China. Instead, the immediate response (with others nodding heads and murmuring agreement) was that the treaties giving Hong Kong to Britain were invalid treaties, without legally binding content in the first place.

agreements are not binding.[99] A similar argument could have been made that the United States was not bound to comply with undertakings made with Iran to obtain release of illegally held diplomatic hostages. The Chinese have been the leading advocate of the doctrine that imposed "unequal" treaties are not binding.[100] It would be a relatively short step to say that undertakings made to lift such treaties are similarly not binding, and that compliance is simply a matter of comity or discretion.

No such argument has been asserted by the Chinese Government, although if the argument were to be made, it would not make sense to make it until after the handover.[101] There have been some suggestions, however, to the effect that what China does in Hong Kong after the handover is a domestic matter, not subject to interference by Britain.[102] On the other hand, violation of the Joint Declaration would undermine China's reputation as a reliable treaty partner. Of course, the degree of violation would affect the degree to which the reputation is undermined. Small or technical violations, or violations of ambiguous terms, would damage China's reputation for honoring treaties far less than wholesale or egregious violations. That this dynamic exists suggests that there is a legal push that will to a certain extent steer China toward compliance with the Joint Declaration.

So viewed, the lack-of-consideration and unequal treaty argument is of little weight, just as in domestic contract law the relinquishment of a disputed claim amounts to consideration.[103] If a treaty settling a pre-existing dispute can be violated because the other party is said to be wrong on the merits of the pre-existing dispute, it would be next to impossible to achieve settlement of such disputes. All peace treaties would be in danger. The United States complied with the requirements of the agreements resolving the hostage crisis for the obvious, if unstated, reason that noncompliance would make it difficult to resolve future crises by agreement. What "binds" then, is the shared international need for a system of binding agreements. The need is equally present when the parties are settling a dispute.

The PRC, thus, has a legal interest in complying with the Joint Declaration, above and apart from political interests that

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99. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 52, 1115 U.N.T.S. 331, 344 [hereinafter Vienna Convention].

100. Vitrano, *supra* note 96, at 452.

101. *See* Henderson, *supra* note 32, at 519.

102. *See* Vitrano, *supra* note 96, at 452, n.52.

103. Restatement (Second) of Contracts §§ 71 & 74 (1981).

might lead it to do so.[104] Of course, as with any treaty there is the possibility of noncompliance.

But lawyers who accept that international law "binds" in the sense described should expect that China is more likely to comply with the terms of the Joint Declaration as an international agreement than if it were, for example, a mere statement of policy of the Chinese Government. If this is true, international law, in addition to purely political factors, may have some predictive value in determining what the constitutional system of Hong Kong will be.

International law recognizes that treaties, particularly territorial settlement treaties, may give one state the power to protect the interests of nationals of another state. For example, it is not unusual to find bilateral cession treaties that protect inhabitants of ceded territory, notwithstanding that the inhabitants have become nationals of the nation to which the territory was ceded. Thus, the Treaty of Paris ceding Puerto Rico from Spain to the United States provided that the cession:

> cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or *of private individuals, of whatsoever nationality such individuals may be.*[105]

Similarly, in a 1923 Advisory Opinion, the Permanent Court of International Justice held that a treaty between Germany and Poland regarding territory turned over to Poland after World War I protected the interests of formerly German domiciliaries who had acquired Polish nationality.[106]

C. *Great Britain's Insistence on Compliance*

As in any bilateral treaty, if one party waives its rights, or chooses not to enforce them, then the legal incentive to comply is gone. The question here is whether Britain will insist on the PRC's compliance with the Joint Declaration in the years following July, 1997. The official British position is that the Joint

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104. *See supra* text accompanying notes 88-89.

105. Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. VIII, 30 Stat. 1754, 1758 (emphasis added). The Supreme Court in Ponce v. Roman Catholic Church, 210 U.S. 296, 310-11 (1908), relied in part on this treaty to hold that ownership of certain property in Puerto Rico remained in the Roman Catholic Church.

106. Advisory Opinion No. 6, German Settlers in Poland, 1923 P.C.I.J. (ser. B) No. 6, at 6-7, 36-37.

Declaration is a treaty, binding as such under public international law.[107] The British government has also stated that it will insist on Chinese compliance.[108] Of course it is a political question whether Britain will in fact do so,[109] and therefore beyond the scope of this Article. Britain's stated intent to insist on compliance, however, coupled with China's interest in being seen as a state that honors treaty obligations, warrant assessing the future of Hong Kong's legal system as an international legal matter.

D. *Possible Third State Role in Compliance*

There is also the possibility that third states will insist upon Chinese compliance with the Joint Declaration. The United States has adopted legislation designed to encourage the Chinese government to comply with the Joint Declaration.[110] In particular, the United States-Hong Kong Policy Act of 1992 proclaims the United States recognition of the role Hong Kong plays culturally and economically in the world economy. The Act recognizes Hong Kong as "fully autonomous" in terms of its abilities to engage in commerce, enter into treaties, and maintain diplomatic relations. The Act also declares Congress' and the President's respective wishes to see full implementation of the provisions of the Joint Declaration, and provides for a reporting system to keep the U.S. government informed of the transition from British to Chinese control. The Act states that democratization is a fundamental principle of U.S. foreign policy, and that the principle will continue to apply to Hong Kong after June, 1997. Finally, the Act expresses that:

> [t]he human rights of the people of Hong Kong are of great importance to the United States and are directly relevant to United States interests in Hong Kong. A fully successful transition in the

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107. Giles Hewitt & Peter Lim, *Patten's Farewell Speech Condemned in China and Hong Kong*, Agence France-Presse, Oct. 3, 1996; *Hong Kong--Major Vows to Protect Post-1997 Rights*, Facts on File World Digest, Mar. 28, 1996, at 210, F3; Ian Black & Andrew Higgins, *Rifkind Accuses China of Treaty Breach--Plan to Scrap Hong Kong Elected Legislature Provokes Thinly Veiled Threats from Britain*, Guardian, Dec. 21, 1996, at 3.

108. Giles Hewitt & Peter Lim, Agence France-Presse, Oct. 3, 1996; *Hong Kong--Major Vows to Protect Post-1997 Rights*, Facts on the File World Digest, Mar. 28, 1996; Ian Black & Andrew Higgins, *Rifkind Accuses China of Treaty Breach--Plan to Scap Hong Kong Elected Legislature Provokes Thinly Veiled Threats from Britain*, Guardian, Dec. 21, 1996.

109. Governor Patten has shown reluctance to take up a democratic party proposal that he urge Britain to raise such issues in the United Nations. *Patten Cold on Complaining to UN Security Council*, HONG KONG STANDARD, Feb. 28, 1997.

110. United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701-32 (1992).

> exercise of sovereignty over Hong Kong must safeguard human rights in and of themselves. Human rights also serve as a basis for Hong Kong's continued economic prosperity.[111]

However, as a nonparty to the Joint Declaration, the United States suffers from a lack of legal interest in making any protests (or reprisals) on the basis of international obligations to the United States. It is possible for bilateral treaties to provide international law rights to third parties.[112] However, it would be difficult to argue that the United States is a third-party beneficiary of the Joint Declaration,[113] since its terms do not appear directly to protect the interests of foreign states.[114] Nonetheless, there is a way in which third-party concern about compliance with the Joint Declaration is legally relevant. The mechanism for "enforcing" international law, and treaty law in particular, is largely the need to be perceived internationally as a reliable treaty partner. Violations of a treaty with one bilateral treaty partner could undermine the ability to enter into treaties with other potential treaty partners. In particular, the continued ability to enter into treaty obligations with the United States is of value to the PRC.[115] Noncompliance with obligations toward Britain can only hurt this ability.

The bottom line is that, with respect to any issue of Hong Kong constitutional law, it can be looked at it in different ways. A legal analysis of the Basic Law will provide insight into what the written constitution says. It can help us contemplate its beauty

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111. 22 U.S.C. § 5701(b).

112. Vienna Convention, *supra* note 99, art. 36, 1155 U.N.T.S. at 341. CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 34, 62-64 (1993). For extensive treatment, see Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57 (1989).

113. Professor Charney argues, however, that a stronger argument for third-party remedies in international law may be present when there are "directly injured states with the interest and ability to seek a remedy, but blatant and widespread violations of the law committed by a powerful state or group of states may have created a situation such that the injured states alone are not able to effectuate a remedy." Charney, *supra* note 112, at 96.

114. There is the possible exception of the terms of the Joint Declaration dealing with pre-handover treaties with third states. Joint Declaration, para. 3(10), *supra* note 20. Even if these terms provide legal rights to third parties, this does not mean that other provisions of the Joint Declaration, for instance providing for 50 years of a capitalist system, legislative elections, etc., somehow provide such third party rights.

115. New international obligations on the part of China to take certain domestic actions, for instance, were the means by which Sino-U.S. trade wars over copyright infringements were avoided. *See* Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, U.S.-P.R.C., 34 I.L.M. 881. If the United States assumed that such undertakings were meaningless, it would be impossible to resolve the disputes in such a manner.

and understand its intent, but it may not tell us much about what the effective allocation of power will be. An international law analysis of the Joint Declaration, in contrast, may give us some information, albeit far from dispositive, about the effective allocation of power. Finally, if we think of a constitution as a referent to which elements in the system have agreed, the Basic Law is still handicapped by its grant of interpretive power to a political body. Conversely, the Joint Declaration is likely to continue to be the point of reference for public international legal arguments.

VI. POLITICAL RESPONSIVENESS AND THE STRUCTURAL ASPECTS OF HONG KONG'S CONSTITUTION

With this framework in mind, this section examines two structural aspects of the impending Hong Kong constitution. The Basic Law assigns executive, legislative, and judicial power—categories of government power that are familiar to lawyers in constitutional systems around the world. The assignment of judicial power is discussed to some extent above. Therefore, this section briefly discusses the assignment of executive and legislative power under the new Hong Kong constitution. The particular question addressed will appear to many foreigners as the central one: to what extent will these branches be responsive to the wishes of the people of Hong Kong? The discussion here attempts to be careful in distinguishing (1) how the written constitution answers this question, (2) what the real answer is likely to be (effective constitution), and (3) the extent to which there is an agreement that answers the question.

A. The Role of Political Responsiveness

"Democracy" is a word that has so many different meanings that it is difficult to discuss carefully whether a constitutional scheme is "democratic." The German Democratic Republic for instance was "democratic" in a sense foreign to most Americans. The "democracy" protesters in Tian An Men Square in 1989 were subjected to the criticism that they did not "really understand" democracy. Rather than try to distill meanings of the term, it may be helpful to identify a characteristic of political institutions that is often, but not always associated with the concept of "democracy." That characteristic may be called political responsiveness. When political institutions react quickly to the desires of the people and institutions of a society, those institutions have a high level of political responsiveness. In contrast, if institutions are immune from the desires of the people

and institutions of the society, this is the opposite extreme of no political responsiveness. There is also a distinction between institutions that by their structure are politically responsive, and those whose incumbents happen to be more or less politically responsive. An elected legislature is structured to have a high degree of political responsiveness, though in fact its members may not be so, as in the instance of a corrupted legislature. On the other hand, a hereditary absolute monarch may in fact be politically responsive, for instance, if the monarch conforms his or her royal actions to the will of the people, but the structure of such an institution does nothing to insure that this be the case.

What is the advantage of institutions that are structured to be politically responsive? It is hard to defend the position that an increase in political responsiveness corresponds directly with an increase in wise decisionmaking. Even assuming that we can agree on what type of decisionmaking is "wise," or good for the public, it is always possible that a small minority will be able to make the determination better than the people and institutions of the territory at large. Perhaps the small minority is better educated, more experienced, or has greater access to the source of wisdom. Arguments can be made for having a highly educated absolute monarch, or for rule by a single party whose members are bound by a coherent economic or religious theory. Very unresponsive governments can perhaps do some good things that could not be done by more responsive governments. The drastic methods used to curb population growth in China are perhaps an example. But very unresponsive governments can do things that are extraordinarily bad and correspondingly impossible under a politically responsive regime. Examples might be government policies directly resulting in mass starvation, or government actions encouraging widespread teenage abuse of teachers and destruction of books. Avoiding such bizarre results is an important policy underlying political responsiveness.

A deeper, related argument for political responsiveness is the stability to be derived from avoiding civil unrest, and ultimately, avoiding civil war. Institutions that are structured to be politically responsive should have an increased likelihood of actually being so. And institutions not so structured run the risk of being very unresponsive. Institutions that are in fact unresponsive obviously can instill social unrest. This can be in the form of flouting of laws, subversion or sabotage of the government, dislocation of populations, and at the extreme, civil war. Avoiding these is the underlying benefit from a constitutional system that responds to, and is reflective of, the

interests and desires of the people and institutions in the country.[116]

How politically responsive to the people and institutions of Hong Kong will the new executive and legislature of Hong Kong be? Using the various senses of "constitution" to essay an answer to this question requires a preliminary look at developments in the corresponding branches of the colonial government. These developments are briefly summarized here.

B. *Executive Power in Hong Kong's Colonial Government*

The executive power is exercised by the British Government, largely through the power delegated to the colonial Governor, appointed technically by the Queen, but in actuality by her government, *i.e.*, the British Prime Minister.[117] The Governor's office is created by the Letters Patent, and his powers are statutory in the sense that he is limited to powers granted him by the Letters Patent, British Parliamentary Acts, and laws of Hong Kong.[118] He is the head of the "administration" in Hong Kong. Following Prime Minister Major's victory in the 1992 British elections, he appointed Mr. Chris Patten as Governor of Hong Kong. Mr. Patten had been a close associate of Mr. Major in Parliament, but Patten had lost his particular seat in the elections.[119] The Governor is advised and assisted by a cabinet-like body, the Executive Council (ExCo), which consists of three *ex officio* members and other appointed members (currently twelve).[120]

C. *Developments in Legislative Power*

The British Parliament retains the power to legislate for Hong Kong, but it has also statutorily delegated such power to Hong Kong's Legislative Council.[121] The composition of LegCo is set out in the Letters Patent, and elections are governed by local ordinance.[122] Over the last fifty years, the LegCo has been constituted in ways that have been structurally more politically responsive.

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116. *See* Rogers & Molzon, *supra* note 73, at 1004 & 1004 n.29.

117. WESLEY-SMITH, *supra* note 36, at 37.

118. *Id.* at 37-38.

119. *Hong Kong Gets Last Governor*, CINCINNATI ENQUIRER, Apr. 25, 1992, at A4.

120. WESLEY-SMITH, *supra* note 36, at 123-24.

121. Formally, it is the Governor who legislates, with the advice and consent of the LegCo, but this is a technicality. *Id.* at 154.

122. *Id.* at 154-55.

In 1947, for instance, the Legislative Council consisted of six *ex officio* members (the Governor, the Chief Secretary, the Attorney-General, the Secretary for Home Affairs, the Financial Secretary, and the Commander of British Forces), three nominated officials (representing the departments of Urban Services, Public Works, and Medical and Health Services), and seven nominated persons who were not otherwise officials ("unofficials").[123] Thus, the entire body was nominated (formally by the Secretary of State in London, but in practice and effect by the Governor).[124] Furthermore, the official members were bound to vote as the Governor directed them unless they obtained a specific release.[125] Because of this composition, the administration was always granted a majority.

By 1976, this had changed. The Council had grown in size, and the number of nominated unofficials had grown relative to the number of nominated officials. The body consisted of five *ex officio* members (the Commander of British Forces no longer included), fifteen officials, and twenty-two unofficials.[126] Although all members were still appointed, appointments were beginning to be made from sectors of society which had not been represented before.[127] Over the next few years, the diversity of the body became even more evident.

Then, in 1985, the Legislative Council included its first elected members.[128] Although the twenty-four elected members had won their seats by indirect elections, this was still a marked increase in the representative nature of the Legislative Council. The fifty-seven member Council at that point also included twenty-two appointed members and eleven officials (including the President).[129]

It was just a year earlier that agreement on the handover of Hong Kong was reached between Britain and China. The Joint Declaration provides that:

> The legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature of the Hong Kong Special Administrative Region. The legislature may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing

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123. NORMAN MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG 126, 127 (3d ed. 1981).

124. *Id.* at 127.

125. *Id.* at 129.

126. *Id.* at 126-29.

127. *Id.* at 129.

128. NORMAN MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG 114 (5th ed. 1995).

129. *Id.*

> Committee of the National People's Congress for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid.[130]

The Joint Declaration also provides that "[t]he legislature of the Hong Kong Special Administrative Region shall be constituted by elections."[131] These provisions and others in the Joint Declaration are to be stipulated in a Basic Law to be promulgated by the National People's Congress of the PRC.[132]

The Basic Law was drafted by a working group of the Chinese National People's Congress appointed in 1985.[133] A first draft was published in 1988. Following a consultation period and the adoption of some amendments, it was adopted by the National People's Congress in 1990.[134] It provides that the SAR Legislative Council will be "the legislature of the Region," and provides that it "shall be constituted by election."[135] The method for forming the Council "shall be specified in the light of the actual situation" in the SAR and "in accordance with the principle of gradual and orderly progress."[136] The "ultimate aim is the election of all the members of the Legislative Council by universal suffrage."[137]

The specific method for forming the Legislative Council is contained in an annex to the Basic Law. It provides that the Council will be composed of sixty members.[138] During the first two-year term, the council will have twenty members elected by geographical constituencies, ten by an election committee, and thirty by functional constituencies.[139] The second term council will have the following ratio: thirty functional/six election committee/twenty-four geographical, and the third term council will have thirty functional/thirty geographical.[140]

LegCo, as actually constituted in 1988, consisted of the Governor, the three principal officials of the administration (Chief Secretary, Attorney-General, and Finance Secretary), twenty appointed members, twelve members elected by local councils and boards (the Urban Council, the Regional Council, and

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130. Joint Declaration, *supra* note 20, Annex I, Part II.
131. *Id.* Annex I, Part I.
132. *Id.* art. 3(12).
133. WESLEY-SMITH, *supra* note 36, at 66.
134. *Id.*
135. Basic Law, *supra* note 35, arts. 66, 68.
136. *Id.* art. 68.
137. *Id.*
138. *Id.* pt. I, Annex II, para. 1.
139. Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region, para. 6, 3d Sess., 7th National People's Congress, Apr. 4, 1990.
140. Basic Law, *supra* note 35, Annex II, Part I, para. 1.

District Boards), and fourteen members elected by functional constituencies.[141] This was modified to include directly elected members in 1991. Under the law applicable to the 1991 constitution of LegCo, it consisted of the Governor and three principal officers, eighteen appointees of the Governor, twenty-one members elected from functional constituencies, and eighteen directly elected members.[142]

In order to understand further developments regarding the legislative power, it is necessary at this point to examine how the executive branch is to be constituted under the Basic Law. Under the Basic Law, the Chief Executive will wield the executive power in the SAR, make the important administrative and judicial appointments, and be the head of the administration.[143] He is to be appointed by the Central People's Government "by election or through consultations held locally."[144] As in the case of the Legislature, the method for selection the Chief Executive "shall be specified in the light of the actual situation [in the SAR] and in accordance with the principle of gradual and orderly progress."[145] Additionally, the Basic Law states that the "ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures."[146] Annex I of the Basic Law provides that the Chief Executive will be elected by a "broadly representative Election Committee."[147] Each member of the committee may nominate only one candidate, and the members will elect a Chief Executive designate by secret ballot on a one-person-one-vote basis from among those candidates who gained nominations from more than 100 members of the committee. The annex further prescribes the size and composition of the Election Committee.

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141. The 21 functional constituency seats in 1991 were allocated for instance to companies that are members of the Chinese Chamber of Commerce, companies that are members of the Federation of Hong Kong industries, banks, trade unions, doctors and dentists, engineers, companies that are engaged in real estate development and constitution, etc. MINERS, *supra* note 128, at 116-17. The number of electors in each functional constituency ranged from a few hundred to 50,000 (teachers). *Id.* at 117.

142. Two members were elected from each of nine geographical constituencies with an average of 200,0000 registered voters. MINERS, *supra* note 128, at 117.

143. Basic Law, *supra* note 35, art. 43, para. 1.

144. *Id.* at art. 45, para. 1.

145. *Id.* art. 45, para. 2.

146. *Id.*

147. *Id.* Annex I, para. 1.

The term of office of the Election Committee shall be five years.[148] The Election Committee shall be composed of 800 members from the following sectors:

Industrial, commercial and financial sectors:	200
The professions:	200
Labour, social services, religious and other sectors:	200
Members of the Legislative Council, representatives of district based organizations, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference:	200

The annex also states that "[c]orporate bodies in various sectors shall, on their own, elect members to the Election Committee, in accordance with the number of seats allocated and the election method as prescribed by" an election law to be enacted in the SAR and "in accordance with the principles of democracy and openness."[149]

The Basic Law is supplemented by four National People's Congress Decisions. These Decisions concern, among other things, the procedures for the formation of the first government and Legislative Council. These procedures differ somewhat from the standard procedures described above.

The "Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region" states that "the first Government and the first Legislative Council of the Hong Kong Special Administrative Region shall be formed in accordance with the principles of state sovereignty and smooth transition."[150] The Decision describes the creation of the Preparatory Committee and the Selection Committee. The Preparatory Committee is responsible for "preparing the establishment" of a 400-member Selection Committee.[151] The Preparatory Committee is appointed by the Standing Committee

148. *Id.* Annex I, para. 2.

149. *Id.* Annex I, para. 3.

150. Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region, para. 1, 3d. Sess., 7th National People's Congress, Apr. 4, 1990.

151. *Id.* para. 3.

of the National People's Congress. The Selection Committee is composed as follows:

Industrial, commercial, and financial sectors:	25 percent
The professions:	25 percent
Labour, grass-roots, religious, and other sectors:	25 percent
Former political figures, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference:	25 percent[152]

The Selection Committee will recommend the candidate for the first Chief Executive "through local consultations or through nomination and election after consultations," and report the recommended candidate to the Central People's Government for appointment.[153]

In October 1992, Governor Patten made proposals to increase the political responsiveness of the LegCo.[154] These included lowering of the voting age from twenty-one to eighteen, adoption of a single-vote, single-seat system for the geographical constituencies,[155] and greatly increasing the electorate in the functional constituencies such that all eligible workers could vote for functional representatives.[156] These and related proposals were designed to "extend democracy while working within the Basic Law,"[157] but have been vehemently challenged by the Chinese government as inconsistent with the Basic Law and contrary to certain Sino-British "understandings." The Administration nonetheless obtained their passage and implemented them in 1995. The 1995 election came very close to giving the Democratic Party led by Martin Lee a majority in the Legislative Council.[158]

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152. *Id.*

153. *Id.* para. 4.

154. WESLEY-SMITH, *supra* note 36, at 157.

155. In the previous election, larger districts had each elected two members. *See supra* note 142.

156. *Id.* at 158-59.

157. *Id.* at 159.

158. In what was described as a decisive victory, the Democratic Party won 19 of the 25 seats they contested. They were joined by several other victors who supported the party on many key issues. Thus, the total number of pro-democratic seats was between 27 and 29, out of a total of 60 Council seats. Peter

The Chinese Government's position has been that LegCo, so constituted, is a violation of the Basic Law, and will be dissolved immediately upon the handover of power.[159] In its place a Provisional Legislature will exercise legislative power pending installation of a legislature in conformity with the Basic Law. The sixty members of the Provisional Legislature would be named by the same Selection Committee that would name the Chief Executive.

The Preparatory Committee was appointed by the Central People's Government in January, 1996.[160] No member of the Democratic Party was included in the Preparatory Committee.[161] Likewise, after the announcement of China's intentions to create a provisional legislature, the Democrats boycotted the nomination process for the Selection Committee, and accordingly obtained no appointments.[162]

On December 11, 1996, the Selection Committee selected Tung Chee Hwa as Chief Executive.[163] At the time his name first surfaced, he was the choice of a very small part of the electorate.[164] Tung is a businessman whose business interests have been aided by the Chinese Government.[165] Tung has

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Stein, *Colony Voters' Message Is Clear. Reception Isn't*, ASIAN WALL ST. J., Sept. 19, 1995, at A3.

159. In February, 1997, the New China [Xinhua] News Agency released a list of laws that will cease to be effective from the handover in accordance with the decision of the Standing Committee of the National People's Congress. *List of Existing Laws that China Will Scrap on 1 July*, HONG KONG STANDARD, Feb. 24, 1997. These laws included the Legislative Council (Electoral Provisions) Ordinance, and the provisions on elections contained in the Urban Council Ordinance, the Regional Council Ordinance, and the District Board Ordinance. *Id.*

160. Mary Kwang, *China to Hand Out 150 Appointments*, STRAITS TIMES (Singapore), Jan. 26, 1996, at 22.

161. Mary Kwang, *HK Representatives for Post-'97 Panel Mostly Businessmen*, Straits Times (Singapore), Dec. 28, 1995, at 1.

162. Wang Hui Ling, *Chinese Officials Defend HK Selection Committee*, Straits Times (Singapore), Nov. 5, 1996, at 17.

163. Eric Guyot & Craig S. Smith, *Body Elects Tung Next Chief of Territory*, ASIAN WALL ST. J., Dec. 12, 1996, at 1.

164. In a poll taken by the South China Morning Post less than one year before the selection, Tung ranked last among the eight people listed. He received less than half of one percent of support from the 606 respondents. Chris Yeung, *Anson Tops Poularity Poll*, SOUTH CHINA MORNING POST, Dec. 26, 1995, at 2.

165. *See* Wang Hui Ling, *Chinese Group Helped Me in 1986, says HK Chief Exec Candidate*, STRAITS TIMES (Singapore), Oct. 24, 1996 at 17 (reporting Tung's revelation that his family shipping business was rescued from financial difficulties in 1986 by a Chinese interest). Also reflective of Tung's pro-business stance were his inner-cabinet appointments, which were given almost entirely to business professionals. This move was welcomed by businesses but also criticized for its overly homogenous nature. *See* Erik Guyot, *Tung's Executive Council Seen Playing Active Role*, ASIAN WALL ST. J., Jan. 27, 1997, at 5.

avoided positions objectionable to the Chinese Government, such as criticism of the Provisional Legislature.[166]

The Selection Committee chose the members of the Provisional Legislature on December 21, 1996.[167] Although thirty-three members of the current LegCo are members of the Provisional Legislature, and the Democratic Party has the largest faction in the current LegCo, no Democratic Party members were named.[168] Furthermore, fifty-four of the Provisional Legislature's sixty newly-elected members have worked in various capacities as advisers for Beijing.[169]

The U.K. Government has consistently opposed the Provisional Legislature, and that body has until now, met only in Shenzhen, a PRC city bordering on Hong Kong territory.[170] The meetings in Shenzhen were closed to the public and the media.[171]

D. *Form Versus Substance with Respect to Political Responsibility*

In form, the government will be responsive to the interests and inclinations of the people and institutions of Hong Kong. The Basic Law explicitly requires the election of the Legislative Council, and supports steps toward its being constituted solely of democratically elected members. The Basic Law also provides that the Chief Executive, if not elected, will be appointed following "consultations." A legal argument could be made that such consultations must be more than a sham; that the views of those consulted should not be totally disregarded. The British practice of consulting dominion governments prior to the appointment of governors-general might be cited in support. Even though the Chief Executive has been appointed without the formal assent of

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166. *See* Linda Choy, *Quiet Talks with China Favored Over Wrangling*, SOUTH CHINA MORNING POST, Dec. 12, 1996, at 7 (describing Tung as "plain about his pro-China stance," and discussing his non-confrontational nature with regard to China).

167. *Long Running Political Struggle Ends in Stalemate*, HONG KONG STANDARD, Dec. 22, 1996.

168. Eric Guyot, *New Legislature Plans Shake-Up in Hong Kong*, ASIAN WALL ST. J., Dec. 23, 1996; *see also* Peter Stein, *Conlony Voters' Message is Clear, Reception Isn't*, ASIAN WALL ST. J., Sept. 19, 1995, at A3.

169. *Members with Beijing Connections in Majority*, HONG KONG STANDARD, Dec. 22, 1996.

170. Clarence Tsui, *Shower of Basic Law Booklets*, SOUTH CHINA MORNING POST, Jan. 26, 1997, at 4 (reporting that minutes before Provisional Legislature members left for their first meeting in Shenzhen, activists showered the alley with red booklets of the Basic Law, the implication being that as the members rode in their carriages toward Shenzhen they "trampl[ed] the Basic Law").

171. Linda Choy & Angela Li. *Media Denied Direct Access*, SOUTH CHINA MORNING POST, Jan. 25, 1997, at 4.

several elements in Hong Kong society, the government of the SAR retains on paper substantial and significant elements of political responsibility. The body with the legislative power could be politically responsive, and could curtail through legislation the most egregious actions of an extremely arbitrary or unreasonable Chief Executive.

E. Portents of the Real Situation

The Chinese Government has taken a number of steps that reflect resistance to institutionalized political responsibility in Hong Kong. It has excluded Democratic Party members from all aspects of the process of selecting leaders. It has refused to accept the currently composed LegCo as an initial legislative body. It has indirectly chosen a leader who has carefully towed the PRC line on political responsiveness issues. It has aimed its sharpest criticism at proposals for greater political responsiveness. Of course, particular actions might reflect the particular level of political tension between Britain and China. While these actions may also reflect temporary political circumstances, there appears to be a consistent thread in Chinese actions toward Hong Kong, at least since 1989. That thread is adversity to democratic limits on the exercise of political power by the Central government.

The Chinese Government has objected vigorously to steps that increased the political responsibility of the LegCo. Objection to the LegCo reforms has been continuous and strong. Senior Chinese officials, including those responsible for Hong Kong matters, will not meet with Governor Patten or even be seen with him. The Chinese Government has adhered to its announced intention to disband the elected LegCo immediately and put in its place an unelected Provisional Legislature. The Provisional Legislature is particularly controversial since it appears to contravene both the Joint Declaration requirement that "the legislature of the Hong Kong Special Administrative region shall be constituted by elections."[172]

One might charitably attribute these objections to the manner in which LegCo reforms were introduced, *i.e.*, without private consultations to obtain the prior acceptance of the Chinese government, and arguably in conflict with earlier private understandings. But it is difficult not to get the impression that it is the substance of the steps that the Chinese Government finds objectionable. If the Chinese, who have had limited experience with legislative elections, can successfully participate

172. Joint Declaration, *supra* note 20, Annex I, § I, para. 3.

in LegCo elections, it is harder for the Chinese government to justify a Chinese People's Congress that is effectively appointed. Arguably the same concern motivated the intense opposition in Beijing to the presidential election in Taiwan. In short, Chinese elections in China threaten a fundamental tenet of the Central Government in Beijing—continued power by the leadership of the Chinese Communist Party.

VII. THE HONG KONG CONSTITUTION AS A RECONCILIATION OF INTERNATIONAL POLITICAL POWER

The words of the constitutional documents of the Hong Kong SAR thus describe a level of political responsibility that may well not reflect the way in which the government of Hong Kong will be "constituted." But what of the political power that caused the words to be inserted in the first place? In other words, why should we not expect the very interests that caused protections to be put in a charter or constitution to insist on a level of compliance? When those interests subsequently come into conflict, they may refer to the constitution as a rhetorical basis for insisting on certain rights. Thus, if the factions and interests that constitute a political entity agree on a certain allocation of powers, a usurpation by one faction should anticipate at least some political opposition from the faction that is not receiving the benefit of the bargain that the written constitution reflects. One should naturally look first, therefore, to the political forces that negotiated for (or insisted upon) the particular power allocation that the written constitution reflects. One could then determine whether that force is sufficiently strong to insist upon power allocations that work in its favor. For instance, if the U.S. Constitution was in one respect an allocation of power between large and small states of the Union, an assertion of power that works to the detriment of small states might be opposed by those small states as a constitutional violation. This is the previously discussed sense in which a constitution can be observed a referent for fundamental disputes. What is peculiar about the Hong Kong constitution in this regard is that the power-allocating documents were negotiated and entered into not by the various factions and interests in the territory of Hong Kong, but rather by two distant governments. It follows that in this sense of the word "constitution," one should look at it as an agreement between Britain and China, rather than as an agreement among the powers, factions, and interests of Hong Kong. Thus, looking at the constitution as a fundamental referent for disputes requires a return to consideration of legal aspects of the Hong Kong

constitution as an international law question—a question that concerns the interpretation of a bilateral treaty.

It is difficult at this time to anticipate all of the treaty-interpretation arguments that might be made concerning whether the actual procedures that will take place in Hong Kong will conform to the Joint Declaration. This is because we do not know exactly what will happen. This Article has already adverted to the potential argument that the Joint Declaration creates no continuing obligation by China toward the United Kingdom. Additionally, this Article has suggested the difficulties that such a hard line position might entail. Assuming, in contrast, a binding obligation, there is room for dispute as to the extent of the obligation. How much political responsibility is actually required? Britain can argue that China is subject to an international treaty obligation that the legisature of Hong Kong SAR be "constituted by elections"[173] and that the requirement is one of substance and not merely of form. A legislature that is constituted by "election" of the Beijing Government would accordingly violate China's international obligation. China could argue that the particular elements of the current election law are not required by the Joint Declaration, that it is impossible for China to have an elected legislature in place on July 1, 1997, and that, therefore, it is impossible immediately to constitute a legislature by popular election. Treaty law does not require impossibilities.[174] At the very least, Britain may demand that the Legislature Council be constituted by popular election within a reasonable time, certainly by 1999. How far the government of the People's Republic will be willing to go in permitting "true" elections at that time in order to appear in compliance with its treaty obligations is not really possible to anticipate at this time.

VIII. CONCLUSION

What can be said then about the new Hong Kong Constitution? The Basic Law as an implementation of the Joint Declaration describes a structure that is reasonably politically responsive. The superficiality of such a conclusion should be obvious at this point. One simply cannot conclude that the Hong Kong SAR will have a politically responsive government based upon the written charters for that government. If "constitution" means how the political power is actually "constituted," then the conclusion has to be largely a political prediction. Such a

173. *Id.* Annex I, § I.
174. Vienna Convention, *supra* note 99, art. 61.

prediction may better be left to political scientists or historians than to legal scholars. Finally, as a referent for international legal arguments, however, the Joint Declaration—as an international treaty—could serve Britain, and perhaps other countries, as a basis for insisting upon a level of political responsibility that otherwise might not occur. In short, the international lawyer may have more to say about how politically responsive the new Hong Kong government will be than the constitutional lawyer. This makes the prospect of examining how the Hong Kong government will develop a particularly interesting one for those who argue about whether international law really works. No matter how positively or negatively the situation develops in Hong Kong, constitutional scholars and international law scholars will have an objective lesson in how law works—or does not.