"ONE COUNTRY, TWO SYSTEMS," THREE LAW FAMILIES, AND FOUR LEGAL REGIONS: THE EMERGING INTER-REGIONAL CONFLICTS OF LAW IN CHINA

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I. INTRODUCTION

Inter-regional conflict of laws is a rather new concept to Chinese legal scholars.[1] For over four decades, ever since the

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1. Conflict of laws, to the Anglo-American jurist, is defined as:

> that part of the private law of a country which deals with cases having a foreign element. By a "foreign element" is meant simply a contact with some system of law other than English law. Such a contact may exist, for example, because a contract was made or to be performed in a foreign country, or because a tort was committed there, or because property was situated there, or because the parties are not English. In the conflict of laws, a foreign element and a foreign country mean a non-English element and country other than England. From the point of view of conflict of laws, Scotland and Northern Ireland are for most but not all purposes as much foreign countries as France or Germany.

J. H. C. MORRIS, THE CONFLICT OF LAWS 1 (4th ed. 1993).

> Conflicts of laws as a legal subject is a catch-all. Its expositions have taken for their subject matter just about all transactions and events that touch more than one state or nation. The core of the subject has been choice among territorially located substantive laws that might govern transactions or events. A number of other legal areas are regularly listed as part of conflicts law, in addition to being parts of their own jural subjects, when they touch two or more states.

ROBERT A. LEFLAR, ET AL., AMERICAN CONFLICTS LAW: CASES AND MATERIALS 1 (2d ed. 1989).

Some study of conflict of laws may have existed in the private international law of China. However, study of the inter-regional conflict of laws in China has been rare. See Tung-pi Chen, *Private International Law of the People's Republic of China: An Overview*, 35 AM. J. COMP. L.

People's Republic of China (PRC) was established in 1949,[2] China has had a unitary socialist legal system with a single legal district.[3] Moreover, the Chinese political and legal culture prefers harmony to conflict and unity to multiplicity.[4] Nevertheless, inter-regional conflicts of law were the inevitable result of Deng Xiaoping's quest to reunite Hong Kong and Macao with China. Deng Xiaoping's policy, known as "one country, two systems,"[5] has been incorporated by the PRC in two joint declarations—one concluded between the PRC and

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445 (1987) and Henry R. Zheng, *Private International Law in the People's Republic of China: Principles and Procedures*, 22 TEX. INT'L L.J. 231 (1987), for an overview of the study of private international law in China.

2. *See generally* 14 CAMBRIDGE HISTORY ON CHINA (Denis Twichett & John K. Fairbank eds., 1987); CONTEMPORARY CHINESE POLITICS (C. R. MacFarquhar & John K. Fairbank eds., 1991).

3. Article 5 of the PRC Constitution provides: "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." XIANFA (1983) [Constitution] art. 5 (China), *translated in* LEXIS, INTLAW Library, CHINALAW File. Article 6 provides: "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." *Id.* art. 6. See William C. Jones, *The Constitution of the People's Republic of China*, 63 WASH. U. L.Q. 707 (1985) and Michael C. Davis, *Anglo-American Constitutionalism with Chinese Characteristics*, 36 AM. J. COMP. L. 761 (1988), for a discussion of the PRC Constitution.

In conflict of laws, various terms have been used to describe the basic unit of a legal system, e.g., a "country", a "law district," or a "state." These terms may not necessarily coincide with those in public international law. *See* MORRIS, *supra* note 1, at 2 (explaining the different meanings of "country" in the public as well as the private law context). In the conflict of laws context, Hong Kong, Macao, and Taiwan will be independent "law districts" on an equal basis with the Mainland. This paper frequently uses the term "region" or "legal region" synonymously with "law district."

4. The dominant confucianism in China's legal history has several central precepts: *ren* (moral feeling towards other people or feeling of humanity), *i* (moral integrity, or consciousness of moral obligations), and *li* (rites, customs or rules as to proper individual and social conduct). *See* ALBERT H. Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 9-10 (1993). The realization of these ideals on the part of individuals will achieve peace, harmony, and stability in society. *Id.*

5. The strategy of "one country, two systems" emerged in late 1978 when Deng Xiaoping formulated his policy for the peaceful settlement of the Taiwan question. *See Deng Xiaoping's Talk with Yang Liyu, in* DENG XIAOPING WENXUAN [SELECTED WORKS OF DENG XIAOPING] 230 (1993). For a general discussion of the policy of "one country, two systems" see *A Reliable Guarantee for Hong Kong's Long-Term Stability and Prosperity*, HONGQI [RED FLAG] (Beijing), Oct. 21, 1984 at 21-22, *reprinted* in F.B.I.S. (JPRS-CRF-84-023), Dec. 10, 1984, at 34. *See also* Denis Chang, *Towards a Jurisprudence of a Third Kind: "One Country, Two Systems,"* 20 CASE W. RES. J. INT'L L. 99 (1988); Kevin M. Harris, *The Hong Kong Accords as a Model for Dealing With Other Disputed Territories*, 80 AM. SOC'Y INT'L L. PROC. 348 (1986); Leonard J. Turkel, *One Country, Two Systems: Hong Kong's Paradox of Politics and Business*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 471 (1987).

the United Kingdom for the return of Hong Kong in 1997,[6] and one between the PRC and Portugal for the return of Macao in 1999.[7] China's policy was reaffirmed in the two basic laws which will serve as mini-constitutions for two Special Administrative Regions (SARs): the Hong Kong Basic Law (HKBL) (promulgated in April 1990, to take effect in Hong Kong on July 1, 1997)[8]; and the Macao Basic Law (MBL) (promulgated in April 1993, to take effect in Macao on December 31, 1999). Preparations for the return of Hong Kong and Macao to the PRC have already begun.[9] At the same time, the civil contacts and commercial transactions between mainland China and Taiwan have increased rapidly, especially since the Wang-Koo meetings in Singapore in mid-1993.[10] Thus, inter-regional conflict of

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6. Joint Declaration on the Question of Hong Kong, Sept. 26, 1984, U.K.-P.R.C., 23 I.L.M. 1371 [hereinafter the Sino-British Joint Declaration]. For comments, see Michael Davis, *Where Two Legal Systems Collide: An American Constitutional Scholar in Hong Kong*, 20 CASE W. RES. J. INT'L L. 127, 145 (1988) ("The Joint Declaration reveals a prominent commitment to autonomy, self-determination, stability, capitalist economy, and human rights in a common law framework. These concepts collectively provide the outline of a pluralist, liberal capitalist system."). *See also* THE FUTURE OF HONG KONG TOWARD 1997 AND BEYOND (H. Chiu et al. eds. 1987); HONG KONG AND 1997: STRATEGIES FOR THE FUTURE (Y. C. Jao et al. eds. 1985) (discussing the political, legal, economic and social aspects of the Sino-British Joint Declaration on Hong Kong); Comments, *Analysis of the Sino-British Joint Declarations and the Basic Law of Hong Kong: What Do They Guarantee The People of Hong Kong After 1997?* 6 CONN. J. INT'L L. 667 (1991); David M. Corwin, *China's Choices: The 1984 Sino-British Joint Declaration and Its Aftermath*, 19 L. & POL'Y INT'L BUS. 505 (1987).

7. Joint Declaration on the Question of Macao, Mar. 26, 1987, P.R.C.-Port., [hereinafter the Sino-Portuguese Joint Declaration] *translated in Sino-Portuguese Joint Declaration*, BEIJING REV., Apr. 6, 1987, at III.

8. *See* Albert H. Y. Chen, *From Colony to the Special Administrative Region: Hong Kong's Constitutional Journey, in* THE FUTURE OF THE LAW IN HONG KONG 76, 76-126 (Raymond Wacks ed., 1989); NORMAN MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG 267-92 (5th ed. 1991) (discussing the Hong Kong Basic Law).

9. A preparatory committee which consists of five working groups has been set up to prepare for the transition of Hong Kong in 1997. *See* Qian Qichen, Closing Address to Members of SAR Preparatory Committee at the Second General Meeting, *translated in* S. CHINA MORNING POST, Dec. 12, 1993, *available in* LEXIS, NEWS Library, MAJPAP File.

10. Taiwan's investment in mainland China soared in 1993 and is expected to reach a record of $10 billion involving 10,000 projects. By the end of 1993, around $15.7 billion had been invested in 15,136 projects on the Mainland. After Hong Kong, Taiwan is the second largest investor in China. Bilateral trade between Taiwan and the Mainland reached $9.4 billion during the first nine months of 1993. *Taiwan Investment in China Expected to Reach 10 Billion Dollars*, AGENCE FRANCE PRESSE, Dec. 13, 1993, *available in* LEXIS, NEWS Library, CURNWS File. All this has been achieved without direct flight and direct shipping between the Mainland and Taiwan. *See, e.g.*, Nicholas Kristof, *Starting to Build Their First Bridge, China and Taiwan Sign Four Pacts*, N.Y. TIMES, Apr. 30, 1993, at A11 (discussing the Wang-Koo meeting in Singapore); *see also 1993 Was A Milestone in Cross-Straits Relations*, Central News Agency, Jan. 3, 1994, *available in* LEXIS, NEWS Library, CURNWS File.

laws issues are emerging.[11] Consequently, Chinese jurists from the Mainland, Hong Kong, Macao, and Taiwan will soon be confronted with these previously unexplored conflicts problems.

This Article explores this critical moment of nascent inter-regional conflicts of law in China by focusing on the conflict of laws issues which result from the policy of "one country, two systems." In particular, this Article examines the emergence of multiple legal regions within China and identifies the unique characteristics of the resulting inter-regional conflicts of law. By drawing primarily upon the Anglo-American experience with conflicts of law, this Article addresses a number of specific issues that are crucial to the drafting of proposed unified conflicts rules. In addition, this Article presents a framework to aid in the development of appropriate solutions to the emerging inter-regional conflicts of law in contract, tort, real property, personal laws, and family relations such as marriage and succession.

II. THE EMERGENCE OF INTER-REGIONAL CONFLICTS OF LAW IN CHINA

"Inter-regional conflicts of law" refers to conflicts of law among regions with different legal systems within one country. These conflicts arise from civil contacts and commercial transactions among people from different regions within a sovereign country, or involving "foreign" interests within a sovereign country.[12] Interactions among China, Hong Kong, Macao, and Taiwan have increased substantially over the last few years. The reversion of Hong Kong and Macao to China[13] and the prospective unification of Taiwan with China[14] will increase these interactions even more. The different legal systems adopted in the Mainland,[15] Hong Kong,[16] Macao, and Taiwan,[17]

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11. For a discussion of Taiwan's regulation of Taiwan-Mainland relations, see Ada Koon Hang Tse, *The Emerging Legal Framework for Regulating Economic Relations Between Taiwan and the Mainland*, 6 J. CHINESE L. 137 (1992) (including a translation of the Taiwan Statute Governing Relations Between People of the Areas of Taiwan and Mainland China).

12. For a discussion of the concept and characteristics of "inter-regional" conflict of laws, see JIN HUANG, QUJI CONGTUFA YANJIU [Study of the Inter-Regional Conflict of Laws] 91-104 (1991). There are three basic characteristics of "inter-regional" conflict of laws: (1) the conflict is basically involved with domestic laws; (2) the conflict is applicable as a choice of law in civil and commercial matters; and (3) the conflict differs from private international law. *Id.* at 95-97.

13. *See* Lawrence A. Castle, Note, *The Reversion of Hong Kong to China: Legal and Practical Questions*, 21 WILLAMETTE L. REV. 327 (1985).

14. *See* Agnes J. Bundy, *The Reunification of China with Hong Kong and Its Implications for Taiwan*, 19 CAL. W. INT'L L.J. 271 (1989); *see also supra* notes 10-11 and accompanying text.

15. *See generally* CHEN, *supra* note 4; *see also* Zhou Hairong, *The Re-establishment of the Chinese Legal System: Achievements and Disappointments*, 10 CIV. JUST. Q. 44 (1991); Chin Kim,

will inevitably create questions as to which regional law should be applied and whether courts in different regions will recognize and enforce the judgments of the courts of other regions.[18] At their core, these inter-regional conflicts of laws may be similar to the interstate conflicts that so frequently arise in the United States.

In general, the following four conditions within a country can create conflicts between inter-regional laws: (1) multiple legal regions with different legal systems; (2) civil contacts and commercial transactions among these various legal regions leading to legal relations involving "foreign" interests;[19] (3) every legal region's recognition of the civil legal status of natural persons and legal persons from the other legal regions; and (4) every legal region's recognition of the extraterritorial effects of the laws of the other legal regions. These four components and their interrelations contribute to the extent and the complexity of inter-regional conflict of laws problems.

The first of the above conditions is especially significant because it results in multiple legal regions. There are a variety of reasons why a country might develop multiple legal regions, including the unification of states,[20] the annexation of states,[21] the restoration of territo-

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The Modern Chinese Legal System, 61 TUL. L. REV. 1413 (1987); Craig B. Simonsen, *Development and Organization of the Governmental and Legal System of the People's Republic of China*, 6 CHINA L. REP. 239 (1991).

16. *See generally* MINERS, *supra* note 8; *see also* PETER WESLEY-SMITH, 1 CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW IN HONG KONG: TEXT AND MATERIALS (1987).

17. *See* Hungda Chiu, *The Legal System of the Republic of China*, 13 LOY. L.A. INT'L & COMP. L.J. 44 (1990); *cf.* Ruth Bader Ginsburg, *A Study Tour of Taiwan's Legal System*, 66 A.B.A. J. 165 (1980).

18. Although the emerging inter-regional conflict of laws in China bears some similarity to that of the United States, it nevertheless has some substantial differences. For example, in the United States, all states within the federal system enjoy "full faith and credit" under the U.S. Constitution, whereas China does not have a formal federal system. *See* U.S. CONST. art. IV, § 1. The return of Hong Kong and Macao will introduce certain elements of federalism to the political structure in China, but how it will develop is yet to be seen.

19. *See supra* notes 10, 12 and accompanying text.

20. The unification of a state may refer to two different situations. First, it may refer to a confederation in which different member states are united as one state, such as the United States after 1776 and Switzerland after 1848. *See* HUANG, *supra* note 12, at 15-16. Second, it may refer to the reunification of a state that has been split apart previously, such as the German reunification in 1990 and the prospective Korean reunification. *Id.* at 22.

21. For example, the German occupation of Alsace and Lorraine in the 1930s made Germany a state with compound legal regions. *See* Edoardo Vitta, *Interlocal Conflict of Laws*, *in* 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, 9-3, 9-14 to 9-15 (Kurt Lipstein, et al. eds, 1985).

ries,[22] and the colonization of states.[23] After the return of Hong Kong and Macao to, and the eventual unification of Taiwan with, the Mainland, China could conceivably become a country with multiple legal regions. As a result, legal problems regarding inter-regional conflicts of law will inevitably arise on the political-legal horizon.

A. Territorial Return: Hong Kong and Macao

When Hong Kong[24] and Macao[25] revert to Chinese control as provided by the joint declarations and the basic laws, the laws currently in effect in the two regions will remain basically unchanged.[26] The Hong Kong SAR, for example, will continue to exercise independent legislative, judicial, and final adjudicative powers to maintain the prosperity and stability of the region.[27] Thus, under the Hong Kong Basic Law and Macao Basic Law, Hong Kong and

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22. In 1871, after the Franco-Prussian War, France had to cede Alsace and Lorraine to Germany. When France restored its sovereignty over these two regions after World War I, it temporarily kept the German laws in these two regions, thus making France a state with compound legal regions until 1924 when France promulgated two French laws to replace the German laws in the two territories. *See* HUANG, *supra* note 12, at 21-22; OTTO KAHN-FREUND, GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW 61 (1976); Vitta, *supra* note 21, at 9-10.

23. Colonization includes lease and long-term use of lands from a state, such as when the Qing Dynasty leased the Shandong Bay to Germany in the late 1800s (for 99 years), the cities of Lusun and Dalian to Russia (for 25 years), the Canton Bay to France (for 99 years), and the New Territories to Britain (for 99 years). *See* HUANG, *supra* note 12, at 20-21.

24. For a brief discussion of the history of British rule over Hong Kong see Hungdah Chiu, *Introduction: Hong Kong, Transfer of Sovereignty*, 20 CASE W. RES. J. INT'L L. 1 (1988). *See also* MINERS, *supra* note 8, at 3-31 (discussing the historical, economic and social ties between Hong Kong, China and Britain). For a discussion of several possible scenarios for Hong Kong, see Kenneth Lieberthal, *Hong Kong Scenarios: Hong Kong-China Reunification Question*, CHINA BUS. REV., Sept. 1992, at 45. *Cf.* FRANK CHING, HONG KONG AND CHINA: FOR BETTER OR FOR WORSE (1985) (representing the views on the future of Hong Kong before the 1989 Tiananmen Square incident).

25. *See* Jaw-ling Joanne Chang, *Settlement of the Macao Issue: Distinctive Features of Beijing's Negotiating Behavior*, 20 CASE W. RES. J. INT'L L. 253 (1988).

26. *See* Sino-British Joint Declaration, *supra* note 6, para. 3, cl. 3.

27. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (HKBL) was adopted at the Third Session of the Seventh National People's Congress of the PRC on April 4, 1990, and will be effective as of July 1997. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990) (effective July 1997) (P.R.C.), *reprinted in* MINERS, *supra* note 8, at 267. The HKBL is a legislative document of the PRC that is intended to give effect to the provisions of the Sino-British Joint Declaration. The HKBL consists of the decree of the President of China, the preamble, articles 1-160, three annexes, additional decisions by the National People's Congress, and an appendix. *Id.* For a discussion of the HKBL see THE BASIC LAW AND HONG KONG'S FUTURE (Peter Wesley-Smith & Albert H. Y. Chen eds., 1988) and Daniel R. Fung, *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China: Problems of Interpretation*, 37 INT'L & COMP. L.Q. 701 (1988).

Macao will become independent legal regions, with Hong Kong retaining a legal system deeply influenced by British common law and with Macao retaining a legal system similarly influenced by Portuguese civil law.[28] This merger will transform China from a unitary and hierarchical socialist legal system into a plural legal system, which includes elements of socialist law, common law, and civil law. In addition, the PRC, previously a country with a single law district, will become a country with multiple legal regions.[29]

1. *The Legal System in Hong Kong.*

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28. Article 31 of the constitution of the PRC provides that "[t]he State may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of the specific conditions." XIANFA (1983) [Constitution] art. 31. In accord with article 31, article 62(13) grants the National People's Congress the power "to decide on the establishment of special administrative regions and the systems to be instituted there." *Id.* art. 62.

The Hong Kong SAR will enjoy "high autonomy" even in its foreign relations. For example, Hong Kong will join the General Agreement on Tariffs and Trade (GATT) as an independent customary union, and its existing international agreements regarding transportation, tourism, shipping etc. will be honored. *See* Brian Z. Tamanaha, *Post-1997 Hong Kong: A Comparative Study of the Meaning of "High Degree of Autonomy,"* 20 CAL. W. INT'L L.J. 41 (1989-90).

The SAR is different from both the national autonomous region established under the constitution and the Special Economic Zones (SEZ) established under the Chinese government's open policy. The PRC is a country with unitary administration and multiple nationalities (with 55 minority nationality groups). There are 116 national autonomous areas, including 5 autonomous regions, 31 autonomous prefectures and 80 autonomous counties. *See* LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON REGIONAL NATIONAL AUTONOMY, (May 1984) (effective Oct. 1, 1984) (P.R.C.), *translated in* LEXIS, INTLAW Library, CHINALAW File. The autonomous areas and the SEZs all belong to one single constituent unit of the Mainland. *See generally* Ann Fenwick, *Evaluating China's Special Economic Zones*, 2 INT'L TAX & BUS. L. 376 (1984); Note, *Special Economic Zones in the People's Republic of China*, 13 SYRACUSE J. INT'L & COMP. L. 345 (1986); Charles C. Valauskas, *China's Special Economic Zones*, 9 HASTINGS INT'L & COMP. L. REV. 152 (1986).

29. There is a hierarchy of laws in the PRC. The constitution is "the fundamental law of the State and has supreme legal authority." XIANFA (1983) [Constitution] pmbl. The basic laws, ordinary statutes, administrative rules, and regulations enacted by the State Council stand next in line, followed by the local regulations adopted by the people's congresses of provinces and municipalities directly under the central government and their standing committee. *Id.* arts. 89-1, 100. Laws at a lower level cannot contravene those at a higher level in the hierarchy. *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, 66 (1988).

a. Legislative Power. The future Hong Kong SAR[30] will retain legislative powers, be governed by locally elected officials,[31] and have the power to enact laws and procedures, provided that these laws and procedures do not disagree with the provisions of the Hong Kong Basic Law (HKBL).[32] The legislature will report to the PRC's Standing Committee of the National People's Congress (NPC), which is the PRC's supreme legislature.[33] All laws previously enacted by Hong Kong's legislative organ will remain in force to the extent they are in accord with the HKBL and its legal procedures.[34] The legislative organ will be allowed to draft laws in either English or Chinese.[35]

The present body of law in Hong Kong consists of statutory provisions and common law doctrines from various sources. For example, letters patent,[36] royal instructions,[37] and colonial regulations[38] are statements of the British sovereign that established the executive and legislative organs of Hong Kong and defined its status as a royal colony. Because they constitute the supreme law of Hong Kong, they are known as Hong Kong's "constitutional documents."[39] No Hong Kong laws can contravene the letters patent, the royal instructions, or colonial regulations. In addition, English common law and rules of equity have legal force in Hong Kong,[40] although the

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30. *See* Cheng, *supra* note 29, at 65; Emily Lau, *Structure of the Hong Kong Special Administrative Region Government*, 20 CASE W. RES. J. INT'L L. 51 (1988).

31. *See* HKBL, arts. 67-68, annex II. For a discussion of the current Hong Kong Legislative Council (LEGCO), see MINERS, *supra* note 8, at 114-29.

32. HKBL art. 17.

33. *Id.*

34. *Id.* arts. 8, 18.

35. *Id.* art. 9. For a discussion of the use of English in Hong Kong Law, see Tomasz Ujejski, *The Future of the English Language in Hong Kong Law*, *in* THE FUTURE OF THE LAW IN HONG KONG, *supra* note 8, at 164-85.

36. *See* MINERS, *supra* note 8, at 56; *see also* WESLEY-SMITH, *supra* note 16, at 56-62.

37. *See* MINERS, *supra* note 8, at 56; *see also* WESLEY-SMITH, *supra* note 16, at 62-76.

38. *See* MINERS, *supra* note 8, at 60.

39. *See id.* at 54-56. Of the constitutional documents, the most important are: the Charter of April 5, 1843 (which established the island of Hong Kong as a colony); the Order in Council of October 24, 1860 (which annexed the peninsula of Kowloon to the original colony); and the Order in Council of October 20, 1898 (which added the New Territories to Hong Kong).

40. *See* The Application of English Law Ordinance, para. 3 (1966) (amended 1971), *reprinted in* WESLEY-SMITH, *supra* note 16, at 77. For a brief introduction of the common law system, see CLEMENT SHUM, GENERAL PRINCIPLES OF HONG KONG LAW 3-6 (1992) and Peter Wesley-Smith, *Understanding the Common Law*, *in* THE FUTURE OF THE LAW IN HONG KONG, *supra* note 8, at 15. For a discussion of the common law in Hong Kong, see SHUM, *supra*, at 7, and BERRY HSU, THE COMMON LAW SYSTEM IN CHINESE CONTEXT: HONG KONG IN

legislative organ in Hong Kong can modify this body of law to suit local conditions.[41]

At present, Hong Kong's supreme legislature is the British Parliament. According to the Application of the English Law Ordinance of 1966, of all the English statutes enacted before April 5, 1843 (leaving aside those found unsuitable to Hong Kong or modified by the Hong Kong Legislative Council),[42] about thirty-four measures are still in effect in Hong Kong. English statutes passed after April 5, 1843, have force in Hong Kong only by virtue of an ordinance, an order of the Privy Council, or an express provision (or necessary implications of such a provision) in the enactment.[43]

At present, the majority of Hong Kong's laws consists of ordinances enacted by the Hong Kong Legislative Council.[44] These ordinances are enacted in accordance with applicable English law and tailored to meet Hong Kong's unique requirements.[45] However, the United Kingdom has imposed many restrictions on Hong Kong's so-called "subsidiary legislature."[46] For instance, Hong Kong regulations cannot alter the general principles of common law or contravene laws enacted for Hong Kong by the British Parliament.[47] Further, the Legislative Council may only enact regulations applicable to the internal affairs of Hong Kong. The Council has no authority to introduce regulations on major issues such as the status of Hong Kong or Hong Kong's relations with other regions or countries. Certain important regulations also require the approval of the English sovereign or the Privy Council.[48]

Hong Kong's legislative organ can pass enabling legislation to permit various administrative entities (such as the Governor in Council, the Urban Council, and the chief justice) to enact regulations

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TRANSITION 7-19 (1992).

41. *See* The Application of English Law Ordinance, para. 5 (1966) (amended 1971), *reprinted in* WESLEY-SMITH, *supra* note 16, at 77.

42. VALERIE A. PENLINGTON, THE LAW IN HONG KONG: AN INTRODUCTION 31 (1985).

43. *See* The Application of English Law Ordinance, para. 4, 5 (1966), *reprinted in* WESLEY-SMITH, *supra* note 16, at 77.

44. *See* MINERS, *supra* note 8, at 114-26.

45. *See* WESLEY-SMITH, *supra* note 16, at 228-33 (discussing the delegated or subsidiary legislatures in Hong Kong).

46. MINERS, *supra* note 8, at 121-23, 126, 129 n.11.

47. *See* WESLEY-SMITH, *supra* note 16, at 76-77.

48. *See* WESLEY-SMITH, *supra* note 16, at 223-25 (discussing the famous colonial constitutional law case, Kielly v. Carson, 4 Moo PC 63, 13 ER 225 (1842)); A. Berriedale Keith, RESPONSIBLE GOVERNMENT IN THE DOMINIONS 446 ("There is no doubt that apart from enacting statutes a colonial legislature had no more real power than a debating society . . . .").

to implement certain laws. This enabling legislation is known as delegated, subsidiary, or subordinated legislation.[49] The Governor in Council issues most regulations, but an ordinance may authorize a body other than the Governor in Council to issue regulations. When this occurs, the ordinance typically requires that the regulations be approved by the Legislative Council in order to have legal effect.[50] In addition, courts have the power to nullify regulations if they contravene either Hong Kong's written law or laws enacted by the British Parliament applicable to Hong Kong.[51]

Chinese customary laws are also recognized in Hong Kong. These customary laws can be traced back to the Qing Dynasty (1640-1911), the last dynasty of imperial China. However, the application of these customary laws is strictly limited.[52] They can be invoked only when there is no controlling English law or Hong Kong law. Furthermore, the Hong Kong government has continually whittled down the scope of these customary laws.[53]

To summarize, the current body of Hong Kong laws will remain unchanged after July 1, 1997, except for those laws which contravene the HKBL or those amended by the legislative organ of the Hong Kong SAR.[54] As of 1997, the laws in force in the Hong Kong SAR will be as follows: the HKBL,[55] the essentially unchanged original laws, and new laws enacted by the legislative organ of the Hong Kong SAR. Thus, the laws of the Hong Kong SAR will be different, in form and in substance, from the laws of the Mainland.

b. Judicial Power. After the establishment of the Hong Kong SAR, the judicial system currently in place will remain essentially intact. There will, however, be certain changes that will strengthen the independence of the judiciary.[56]

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49. *See* MINERS, *supra* note 8, at 127.

50. *Id.* at 127.

51. *Id.* at 128.

52. The Chinese laws and customs are mostly used in relation to land in the New Territories, family law, and succession. *See* SHUM, *supra* note 40, at 12-13; *see also* HSU, *supra* note 40, at 14-19.

53. *See* Hsu, *supra* note 40, at 14-19.

54. *See* HKBL art. 8 and Annex III (National Laws to be Applied in the Hong Kong SAR).

55. The Basic Law provides that certain PRC national laws would be applied to the Hong Kong SAR. *See* HKBL Annex III (National Laws to be Applied in the Hong Kong SAR.)

56. *See, e.g.*, HKBL. art. 82. For a discussion of the current process by which judges are appointed and removed in Hong Kong, see SHUM, *supra* note 40, at 13-14; *see also* Raymond Wacks, *The Judicial Function*, *in* THE FUTURE OF THE LAW IN HONG KONG, *supra* note 8, at 127, 136-37.

The present judicial system in Hong Kong consists of the magistrate courts (including tribunals for capital punishment and juvenile cases), district courts, and the Supreme Court of Judicature.[57] Even decisions by the Supreme Court of Judicature are not final—the judicial committee of the Privy Council in London is the supreme court of appeal.[58] At present, Hong Kong judges are directly appointed by the Governor of Hong Kong, often upon the recommendation of the Privy Council's judicial committee.[59]

After the establishment of the Hong Kong SAR, the judicial power will vest in the courts of the special administrative region.[60] These courts, consisting of the Court of Final Appeal, the High Court, the district courts, the magistrate courts, and other special courts,[61] shall exercise judicial power independently—that is, without any interference from the Mainland.[62] The SAR courts will decide all criminal and civil cases in accordance with the laws of the Hong Kong SAR.[63] The Hong Kong SAR's courts may refer to the case law of other common law jurisdictions. Judges will be appointed by the chief executive upon the recommendation of an independent committee composed of local judges, persons from the legal profession, and other prominent persons.[64] Judges will be chosen based on their judicial and professional qualifications,[65] and persons from other common law jurisdictions will be eligible for appointment.[66] Members of the judiciary acting in their official capacities will be immune from legal action.[67] Judges can be removed from office, however, for malfeasance or incapacity.[68] To remove a judge, the chief executive must act upon the recommendation of a tribunal composed of not less than three local judges who are appointed by the chief justice of the Court of Final Appeal. To appoint or to remove senior judges (judges of the highest level), the chief executive must obtain the consent of the

57. *See* WESLEY-SMITH, *supra* note 16, at 199-213 (discussing the judicial institutions in Hong Kong).

58. *Id.* at 199 (discussing the Privy Council); *see also* SHUM, *supra* note 40, at 13.

59. *See* WESLEY-SMITH *supra* note 16, at 199-213 (discussing judicial appointment in Hong Kong).

60. HKBL art. 19.

61. *Id.* art. 81.

62. *Id.* art. 85.

63. *Id.* arts. 19, 80.

64. *Id.* art. 88.

65. *Id.* art. 92.

66. *Id.*

67. *Id.* art. 85.

68. *Id.* art. 89.

legislative organ of the Hong Kong SAR and report, for the record, to the NPC Standing Committee.[69] There will be no change in the method of appointing and removing members of the judiciary other than judges.[70] Unlike the present system, the final power of adjudication will reside in Hong Kong's highest court—the Court of Final Appeal.[71] The Court of Final Appeal will be allowed to invite judges from other common law jurisdictions to participate in its proceedings.[72]

2. *Legal System in Macao.* The legal system in Macao has been heavily influenced by the Portuguese civil law system. In accordance with the MBL, after the establishment of the Macao SAR, the legislative power will vest in the legislative organ of the Macao SAR.[73] Members of this legislative organ, most of whom will be elected,[74] will come from the local population. The legislature will enact laws and report to the Standing Committee of the National People's Congress.[75] The laws enacted by this legislative organ must follow the MBL and must comply with the MBL's legal procedures. Except for those which contravene the MBL or which are amended by the legislative organ of the Macao SAR, the original laws, decrees, administrative regulations, and other regulations in Macao will remain unchanged.[76] Thus, the legal system in the Macao SAR, like that of the Hong Kong SAR, will consist of the MBL, the essentially unchanged original laws, and new laws enacted by the legislative organ of the Macao SAR. It is anticipated that the laws adopted in the Macao SAR will be quite different in form and content from those in the Mainland. Likewise, the legal system in the Macao and Hong Kong SARs will also differ from each other to varying degrees due to the territories' different colonial heritages and legal influences.[77] The judiciary in the Macao SAR, however, will exercise the

69. *Id.* art. 90.
70. *Id.* art. 91.
71. *Id.* art. 82.
72. *Id.*
73. *See* the Macao Basic Law [hereinafter MBL], art. 17., *translated in* BEIJING REV., May 2-9, 1993 at I. The MBL was adopted at the First Session of the Eighth National People's Congress on March 31, 1993. *Id.*
74. MBL art. 68.
75. MBL art. 65.
76. MBL arts. 8, 19.
77. For example, the court structure in Macao SAR will be slightly different from that of the Hong Kong SAR. It will be made up of primary courts, intermediate courts, and a Court of Final Appeal with the power of final adjudication. MBL art. 84. The primary courts may

same independence and final adjudication power as the judiciary in the Hong Kong SAR. Similarly, the system of appointing and removing judges will be the same in the Macao SAR as it will be in the Hong Kong SAR.[78] The traditional method of appointing or removing judicial personnel at lower levels will be maintained.[79]

After China resumes its sovereignty over Hong Kong and Macao, the original laws and legal systems in Hong Kong and Macao will be substantially unchanged. The two regions will enjoy a high degree of autonomy in the exercise of legislative, judicial, and final adjudicative power. From the conflict of laws perspective, this means that Hong Kong and Macao, despite their minuscule land sizes and populations in comparison to the Mainland,[80] will become independent and equal legal regions within a united China. Thus, their status as jurisdictions in the private law context will be on a par with that of the Mainland.

B. Prospective Reunification: the Mainland and Taiwan

The possible reunification of the Mainland and Taiwan adds another dimension to the evolution of China's compound legal system. Although Beijing has no "official" contact with Taipei at present, the tremendous expansion of contacts between the Mainland and Taiwan has greatly enhanced the prospect of a peaceful reunification of the two.[81] Beijing has repeatedly proposed to Taipei the model of "one country, two systems" to solve the problem of reunification.[82] Under this model, Taiwan would become a special administrative region enjoying even more autonomy than the Hong Kong and Macao SARs. Under the Beijing proposal, for example, Taiwan could retain its own armed forces.[83] This means that the Taiwan SAR would not only keep its present laws (with only minor changes), but would also enjoy

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establish special courts. MBL art. 85. An administrative court shall be established in the Macao SAR to handle administrative and tax issues. MBL art. 86.

78. MBL arts. 82, 83, 89.

79. MBL art. 87.

80. Hong Kong covers approximately 412 square miles (1067 square kilometers, an area approximately half the size of Rhode Island) with a population in 1985 of 5.4 million. 6 ENCYCLOPEDIA BRITANNICA MACROPEDIA 37-38 (15th ed. 1989). Macao covers approximately 6 square miles (15.5 square kilometers) with a population of around five hundred thousand. 7 ENCYCLOPEDIA BRITANNICA MICROPEDIA 605 (15th ed. 1989). Mainland China, however, covers about 3.7 million square miles (9.6 million square kilometers, a bit larger than the United States) with a population estimated in 1992 to be 1.2 billion people. THE WORLD ALMANAC AND BOOK OF FACTS 751 (Robert Famighetti ed., 1993).

81. *See supra* note 10 and accompanying text.

82. *See supra* note 5 and accompanying text.

83. *See Deng Xiaoping's Talk with Yang Liyu*, *supra* note 5, at 230.

legislative autonomy, judicial independence, and the power of final adjudication.

Historically, the legal system in Taiwan has been influenced by Japanese and European civil law traditions.[84] Because the laws of the nationalist Kuomintang government were abolished in the Mainland in 1949, there are some substantial differences between the laws of the Mainland and the laws of Taiwan. Thus, the reunification between the two will consolidate the model of China as one country with multiple socio-economic systems and multiple legal regions.

Notwithstanding the possibility of unification,[85] the increasing number of interactions between the Mainland and Taiwan have already led to complex legal problems. Transactions between the Mainland and Taiwan have taken place in a number of fields, such as investment protection,[86] fishing disputes,[87] intellectual property,[88] illegal immigration, and judicial cooperation.[89] Both sides need to resort to an inter-regional conflict of laws approach to resolve some of these legal problems, since neither a public international law approach nor a unitary jurisdictional approach would be appropriate to resolve them.[90]

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84. Tay-sheng WANG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE (1895-1945): THE RECEPTION OF WESTERN LAW 26-83 (1992).

85. The possible reunification of Taiwan is especially contentious in Taiwan. In response to the Mainland's proposal of "one country, two systems", there have been contentious—and sometimes fierce—arguments in Taiwan and elsewhere for either *yizhong yitai* (one China, one Taiwan), *liang'ge zhongguo* (two Chinas) or alternatively, *taidu* (Taiwan independence) and *dutai* (an independent Taiwan). The Democratic Progressive Party (D.P.P.) in Taiwan has placed Taiwanese independence at the top of its agenda. The current Nationalist Kuomintang Party is tilting toward the "one China, one Taiwan" and "two Chinas" policies, especially after the APEC summit meeting in Seattle in November 1993, where the Economic Minister from Taiwan stated that Taiwan is practicing a policy of "transitional two Chinas." Taiwan's response has invited strong criticism from the Mainland. *See The White Paper of the Government of the People's Republic of China on the Issue of Taiwan, reprinted in* BEIJING REV. Jan. 7-13, 1994, at 23.

86. *See New China News Agency, Discussion of Protection of Interests of Taiwan Business Investing in Mainland China*, BBC, Nov. 9, 1993, *available in* LEXIS, NEWS Library, CURNWS File.

87. *See Cross-Straits Fishing Dispute Resolution In Sight*, Central News Agency, Nov. 3, 1993, *available in* LEXIS, NEWS Library, CURNWS File.

88. *See* Kristof, *supra* note 10, at A11 (Wang-Koo meeting in Singapore set forth topics for future discussion).

89. *Id.* For example, Taiwan and the Mainland have cooperated in the investigation and prosecution of hijackers. *See* Chris Yeung, *Taiwan May Cooperate on Hijackers*, S. CHINA MORNING P., Aug. 30, 1993, at 5, *available in* LEXIS, NEWS Library, CURNWS File.

90. This appears to be in conformity with the principle governing the consultations between the Mainland's Association for Relations across the Taiwan Straits (ARATS) and Taiwan's Straits Exchange Foundation (SEF). *See Tang Subei Jiao Rehe Gongtong Xinwen Gongbao*

With the addition of Hong Kong and Macao, China will be transformed from a unitary socialist legal system into a pluralistic legal system composed of socialist, common law, and civil law elements, all of which are quite different in nature, form, and content. Since each region will retain its own distinctive system, there will be three law families (socialist, common law, and civil law elements) and four independent legal regions (the Mainland, Hong Kong, Macao, and Taiwan) in China. That is, within a united China, under one central government, the Mainland will continue to follow socialism while Hong Kong and Macao—plus Taiwan—will remain capitalist societies. From the conflict of laws perspective, the Mainland's socialist legal system will not be superior to any of the other legal systems. The PRC Constitution, the HKBL and MBL, and statutes governing national issues such as defense and diplomacy shall constitute the "supreme law of the land" over the Hong Kong and Macao SARs. Nevertheless, in the private law context, China's socialist laws will be on par with the laws of the SARs, because the Mainland, Hong Kong, Macao, and Taiwan will all be equal, independent legal regions.

III. THE UNIQUE CHARACTERISTICS OF THE INTER-REGIONAL CONFLICT OF LAWS IN CHINA

To a large extent, a future united China will be a product of historical conditions unique to China. Similarly, because the emerging inter-regional conflicts issues are a by-product of unification, they will have certain distinctive characteristics that will distinguish them from those that arise in other compound legal systems. Thus, although Chinese jurists will need to draw upon the experience of other countries in the study of this important issue, at the same time they will need to seek solutions suited to China's unique inter-regional conflict of laws problems.

A. Domestic Conflicts with International Scope

The emerging inter-regional conflicts problems in China are distinctly different from the conflicts issues that arise within a federal state. The degree of autonomy enjoyed by the Hong Kong and

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[Joint Statement by Tang Shubei and Jiao Renhe], PEOPLE'S DAILY (overseas ed. Feb. 7, 1994), at 5 (stating that the two institutions should avoid political issues). For an overview of 1993 developments in the Mainland-Taiwan relationship, see Fan Liqing, *A New Stage of Non-Official Talks*, BEIJING REV., Feb. 28-Mar. 6, 1994, at 21.

Macao SARs will be greater than the rights of individual states within a federal system such as the United States.[91] Indeed, during the initial stage, when these regions are first reunited with the Mainland, the SARs will have so little in common with the legal system on the Mainland—and with each other's legal systems—that the scope of inter-regional conflicts of law may approach the level of international conflicts of law.[92] Because each legal region in China will enjoy legislative autonomy, judicial independence, and final adjudicative power,[93] the process of achieving a uniform national legal system will be slow and difficult, and perhaps ultimately impossible.

Yet, the autonomy of these regions exists only by special grant of China's constitution, and the SARs are therefore only local administrative regions under the leadership of the central government. This is quite different from the relationship between a federal government and the member states within a federal system. The limited scope and the special design of the SARs will prevent China's inter-regional conflicts of law from developing into international conflicts of law.[94] A united China will be a single sovereign country and the SARs will have no right to claim independence from the sovereign.[95]

B. Different Legal and Socio-Economic Systems

China's emerging inter-regional conflicts of law is unusually complicated because it involves not only conflicts between different legal regions of the same socio-economic system, but also conflicts

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91. For example, in the exercise of the judicial power, the SAR enjoys more autonomy than a state within a federal system. The Hong Kong SAR's Court of Appeals, for instance, has the right of final adjudication. In handling economic affairs, the SARs maintain their own currencies and can join certain international economic and trade organizations—privileges that are unavailable to states in federal systems.

92. Conflicts of law can be divided into two levels: domestic and international. Domestic conflicts of law exists among different legal regions of one sovereign state (i.e., the interstate conflicts of law in the United States). International conflicts of law crosses national boundaries and exists among different legal regions of different sovereign states. The scope of conflicts of law at the international level is generally larger than the domestic level. *See* MORRIS, *supra* note 1, at 2 (arguing that different legal regions or "countries" within a sovereign state may constitute a common legal region such as the United Kingdom (for law of negotiable instruments and law of companies), Australia (for law of marriages), and Canada (for law of divorce)). *See also* LEFLAR *supra* note 1, at 24.

93. *See* discussion *supra* Part II.

94. *See supra* note 28 and accompanying text.

95. Article 1 of the Hong Kong Basic Law stipulates that the Hong Kong SAR is an "inalienable part" of the People's Republic of China.

between legal regions of different socio-economic systems.[96] The inter-regional conflicts of law in most other countries have arisen in the context of a unified socio-economic system. Furthermore, even within the similar socio-economic systems of capitalism in Hong Kong, Macao and Taiwan, the legal system in each region has been shaped by different legal doctrines and heritages, commonly called the "law families." For example, the legal systems in Macao and Taiwan have been profoundly influenced by the continental European civil law system,[97] whereas the legal system in Hong Kong was derived from the English common law system.[98]

C. Unique International Dimension

China's inter-regional conflicts of law will have an international dimension that is not found in other compound legal systems. All international agreements and treaties in effect in Hong Kong and Macao when the PRC takes control will continue to be effective. There will be conflicts not only between the laws of various regions, but also between the regional laws and the international treaties applicable to other regions. Moreover, the two joint declarations, the Hong Kong Basic Law, and the Macao Basic Law empower the SARs to continue to conclude and execute international agreements on numerous matters[99] with other sovereign countries, regions, and international organizations, provided that the SARs identify themselves as "Hong Kong, China" or "Macao, China" rather than as independent sovereigns.[100] When the PRC concludes an international agreement or treaty, the central government (Beijing) may, in light of the specific needs of the SARs, solicit the opinion of the local SAR

96. *See also* Inga Markovits, *Socialism and the Rule of Law*, *in* COMPARATIVE AND PRIVATE INTERNATIONAL LAW 205 (David Clark, ed. 1990); ALBERT A. EHRENZWEIG & ERIK JAYME, PRIVATE INTERNATIONAL LAW 11-17 (1973).

97. *See* T. S. WANG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE (1895-1945): THE RECEPTION OF WESTERN LAW (1992).

98. *See supra* note 16 and accompanying text; *see also* EHRENZWEIG, *supra* note 96, at 20-49.

99. The SARs will be able to enter into agreements in fields such as trade, finance, shipping, telecommunications, tourism, cultural exchanges, science and technology, and sports. *See* the Sino-British Joint Declaration, *supra* note 6 para. 11, Annex I; the Sino-Portuguese Joint Declaration, *supra* note 7, para. 8; HKBL art. 151.

100. *See* the Sino-British Joint Declaration, *supra* note 6, para. 11, Annex I; the Sino-Portuguese Joint Declaration, *supra* note 7, para. 8; HKBL art. 151.

governments before deciding whether the agreement or treaty will apply to these localities.[101]

In addition, any international agreement or treaty to which the PRC has not acceded—but which is already in place in Hong Kong or Macao—will continue to be applicable to the SARs. This will result in certain international treaties and agreements being applied to some regions but not to the others. This may lead to conflicts either between the local law of one region and the international agreements applicable to another region, or between the international agreements that are applicable to different regions in the same field.

D. Unique Legislative and Judicial Structure of the SARs

In contrast to other compound legal systems, the PRC has no supreme judicial organ to coordinate and to resolve conflicts among the independent courts of the SARs. Each SAR will have a court of final adjudication which will be independent of all other regional and PRC courts.

Similarly, the PRC legislature will be unable to preempt the SARs from legislating on many subjects. There is no clear division between the jurisdiction of the central legislature and that of the regional (SAR) legislatures. In fact, with respect to civil and commercial law, the various legal regions may enjoy complete legislative independence.[102] In addition, the legislative power of the SARs is not directly conferred by the constitution of the PRC, but by the relevant international treaties and the basic laws of the SARs.[103] Such power could possibly be stripped or reduced by the PRC's Standing Committee of the NPC through future amendments to the constitution.

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101. HKBL art. 153. For a discussion of the international status of Hong Kong after 1997 under current international law, see Wan Exiang, *Xianggang zai Guoji Tiaoyue Zhong de Diwei Zhuanbian* [Changes of Hong Kong's Status in the International Treaties] and Lin Yi, *Xianggang Tebie Xinzhenqu Diyue ji Chengdan Guoji Zeren de Wenti* [Problems of Treaty-making and International Responsibility of Hong Kong SAR], *in* YIGUO LIANGZHI FALU WENTI MIANMIANGUAN [LEGAL ISSUES IN "ONE COUNTRY, TWO SYSTEMS"] 119-65 (Huang Bingkun ed., 1989) [hereinafter BINGKUN].

102. *See* HKBL art. 17 (the Hong Kong SAR is "vested with legislative power") and art. 73(1) (the SAR legislative council is to "enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures").

103. HKBL arts. 17, 73(1).

IV. DIFFERENT PROPOSED SOLUTIONS TO CHINA'S INTER-REGIONAL CONFLICT OF LAWS

The complexity and novelty of China's emerging inter-regional conflicts of law will make it especially difficult to find viable solutions. In searching for these solutions, Chinese jurists should be guided by two objectives of the "one country, two systems" policy: maintaining the unity of the country and promoting normal civil and commercial intercourse between the PRC and the SARs under general principles of equality and mutual benefit.

There are two approaches to solving China's emerging inter-regional conflicts of law which would achieve the policy's primary objectives: first, unifying the substantive law in the various regions;[104] and second, adopting rules governing inter-regional conflicts of law.[105]

A. Unifying the Substantive Laws

Countries with compound legal regions may adopt uniform substantive laws in any one of five ways: (1) a national legislature can enact uniform national substantive laws applicable in every region;[106] (2) a national legislature can enact uniform substantive laws applicable only in certain legal regions;[107] (3) a supreme court can intervene to promote both uniform application and interpretation of the uniform substantive laws of the various legal regions;[108] or (4) each

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104. *See* HUANG, *supra* note 12, at 80-90.

105. *See* HUANG, *supra* note 12, at 75-80 (citing GUOJI SIFA [PRIVATE INTERNATIONAL LAW] 4 (Han Depei, ed., 1989) [hereinafter GUOJI SIFA] (noting that rules of conflict of laws serves a function of "indirect adjustment" as it relates to choice of law rather than determining the rights and obligations of the conflicting parties)); Ren Jishen, *Lun Guoji Sifa de Fazhan Qushi [On the Development of Private International Law]*, 4 FAXUE YANJIU [JOURNAL OF LEGAL STUDIES] 54-59 (1981)).

106. The legislative practice in the United States since the late 19th century is a good illustration. Starting with the Interstate Commerce Law (1877) and the Sherman Act (1890), federal laws occupied or preempted certain areas of law formerly regulated by the states. *See* HUANG, *supra* note 12, at 82-83.

107. For example, the Company Law (1948) and the Adoption Law (1958 and 1968) of the United Kingdom applied to England and Scotland, but not Northern Ireland or the Channel Islands. *See* DICEY & MORRIS, THE CONFLICT OF LAWS 13-14 (9th ed. 1973) *cited in* HUANG, *supra* note 12, at 83-84.

108. HUANG, *supra* note 12, at 88-89 discussing the examples of the supreme courts in (a) Canada, (citing SHANGHAI SHEHUI KEXUEYUAN FAXUE YANJIUSUO BIANYISHI [TRANSLATION OFFICE OF LAW INSTITUTE, SHANGHAI SOCIAL SCIENCE ACADEMY] GEGUO XIANZHEN ZHIDU HE MINFA YAOLAN, MEIZHOU YU DAYANGZHOU [OVERVIEW OF THE CONSTITUTIONAL AND CIVIL LAW SYSTEMS IN VARIOUS COUNTRIES: VOLUMES FOR AMERICAS AND OCEANIA] 167-68

legal region can adopt the same or similar substantive laws to achieve unification.[109] The first three of these methods apply on a national scale and are relevant to the PRC's attempt to establish uniform substantive laws.

Enacting uniform national legislation applicable to all the regions is not likely to succeed given the vast dissimilarities between and among mainland China, Hong Kong, Macao, and Taiwan. These regions have very different legal, social, and economic systems which will not easily accommodate solutions that are based on achieving uniformity in substantive laws.[110]

Having the national legislature enact uniform substantive laws applicable only to certain legal regions might create more problems than it would solve. By definition, it is only a partial solution because the national legislation would not be universally applicable and would address only specific areas of law. This approach may even further complicate the conflicts problem because unifying the laws on some substantive issues among some legal regions might, in effect, lead to the formation of new legal regions. Thus, such a method should be used sparingly if at all.

China also cannot rely on its courts to solve the conflicts problem because there will be no supreme court with jurisdiction over the various administrative regions. As discussed previously, each region will have its own court of final adjudication.[111]

The central premise of the policy of "one country, two systems" is that current differences among the laws of the various regions can continue to exist. Unification will only be accomplished over a long period of time based on full respect for the independence of the various legal systems. As Yaozhu Liao, a well-known member of the Hong Kong legal profession, pointed out, "the unification [of substantive laws and rules of conflict of laws] would certainly be gradual. As a matter of fact, it can only take the form of a kind of coordina-

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(1986)); (b) Australia (citing Kahn-Freund, *supra* note 22, at 68, 148 (1976)) and (c) Britain (citing A. E. ANTON, PRIVATE INTERNATIONAL LAW: A TREATISE FROM THE POINT OF VIEW OF SCOTS LAW 9 (1967).

109. *See* HUANG, *supra* note 12, at 85-86 (noting that the American Uniform Commercial Code (UCC), which has been adopted by all the states in the United States (except Louisiana, has had a strong influence in achieving unification of substantive laws in different regions without national legislation).

110. *See supra* part II.

111. *See* HKBL art. 82.

tion."[112] According to Ms. Liao, the possibilities of unifying or coordinating laws will also depend upon the subject matter of the law.[113] Unification is most likely to be achieved in such substantive areas as international trade, bills of exchange, international transportation, trademarks, and patent registration. The pressure for uniform laws in these areas is reflected by the numerous existing and proposed international agreements on these subjects. Uniformity in laws governing purely internal affairs (e.g., family relations and duties and responsibilities of citizens) may take much longer,[114] because these laws are based on the more intimate local socio-economic composition of the region. Nevertheless, some Hong Kong lawyers believe family law may be among the first to be united or coordinated because the cultural traditions and racial origins in Hong Kong are identical to those in the other parts of China.[115]

Creating a uniform national substantive law to resolve the inter-regional conflicts of law can occur only by closing the socio-economic gaps among the various regions and promoting better understanding between them. This would then allow the legislative organs in the Mainland, Hong Kong, Macao, and Taiwan to gradually adopt identical or similar substantive laws, or to accede to multilateral conventions, while avoiding the apparent pitfalls of unifying the substantive laws of the regions all at once.

B. Adopting Rules to Govern Inter-Regional Conflicts of Law

A country with compound legal regions has five options when adopting rules for resolving inter-regional conflicts of law: (1) rules of private international law may be applied by each region by analogy;[116] (2) rules of inter-regional conflict of laws may be formulated

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112. *See* Yaozhu Liao, *A Plan for the Gradual Unification of Laws*, DA GONG BAO [DA GONG DAILY] (Hong Kong), Apr. 11, 1986.

113. *Id.*

114. For a discussion of the intellectual property laws across the Taiwan Straits, see Zheng Chengsi, *Taiwan Dui Dalu Zuanlifa de Baohu* [On Taiwan's Copyright Protection for Mainland], 4 FAXUE YANJIU [STUDIES IN LAW] 1993; *see also* Zheng Chengsi, *The First Copyright Law of the People's Republic of China*, 12 EUR. INTELL. PROP. REV. 376 (1990).

115. *See* Liao, *supra* note 112.

116. *See* HUANG, *supra* note 12, at 77-78 (noting that article 14 of the Spanish Civil Law of 1888 provided that private international law applied to regional conflicts of law; *citing* I. SZASZY, CONFLICT OF LAWS IN THE WESTERN, SOCIALIST AND DEVELOPING COUNTRIES 247 (1974)).

by each region;[117] (3) a uniform set of national rules governing inter-regional conflicts of law may be established;[118] (4) the same rules governing international conflicts of law may be applied to domestic inter-regional conflicts;[119] and (5) international conventions or treaties governing rules of conflicts of law may be adopted in order to unify conflict of laws rules among different regions.[120]

Adopting conflicts rules is likely to be more effective than unifying substantive laws in resolving China's inter-regional conflicts of law. However, not all rule formulations are appropriate for resolving China's conflicts of law. Allowing each legal region to work out its own conflicts rules would be injudicious. This approach would likely result in the development of widely divergent provisions among the regions, which would lead to further conflicts. Furthermore, such conflicts would only increase the complexity of inter-regional conflicts of law, leading to problems of renvoi[121] and transmission, inducing "forum shopping,"[122] and making characterization[123] more complicated than ever.

With the exception of Hong Kong, it is not feasible for China to apply international conflicts rules to resolve its inter-regional conflicts. International conflict of laws rules are appropriate in common law countries because they are influenced by a continental law system. Moreover, applying private international law by analogy to solve

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117. *See* HUANG, *supra* note 12, at 77 (noting that prior to the promulgation of the Law on Private International Law and Regional Conflict of Laws in Czechoslovakia in 1948, each region in Czechoslovakia applied its own conflicts rules; citing KAHN-FREUND, *supra* note 22, at 75 n.9.

118. *See* HUANG, *supra* note 12, at 76.

119. The Anglo-American common law system, for example, modelled its domestic conflict of laws principles on the international rules, yet subtle differences do exist. *See* RESTATEMENT (SECOND) ON THE CONFLICT OF LAWS § 10 (1971), *cited in* HUANG, *supra* note 12, at 78.

120. The international treaties and conventions in private international law can be generally divided into two categories: (1) those providing conflict rules and international civil procedures; and (2) those enacting substantive laws. The first category comprises over 31 international treaties or conventions, of which 18 are in effect. Most of the treaties and conventions still in effect were formulated by the Hague Conference on Private International Law from 1893 to 1987). *See* GUOJI SIFA, *supra* note 105, at 20-27.

121. C. F. FORSYTH, PRIVATE INTERNATIONAL LAW 69 (2d ed. 1990); *see also infra* note 150 and accompanying text; *see generally* MORRIS, *supra* note 1, at 404-15.

122. Forum shopping occurs when parties select where to bring their case to their own advantage and to the disadvantage of the other party. George D. Brown, *The Ideologies of Forum Shopping-Why Doesn't A Conservative Court Protect Defendant?* 71 N.C. L. REV. 649 (1993); *see* HUANG, *supra* note 12, at 80, 238-39; *see generally* Weyman I. Lundquist, *The New Art of Forum Shopping*, 11 LITIGATION, Spring 1985 (No. 3), at 21.

123. MORRIS *supra* note 1, at 416; FORSYTH, *supra* note 121, at 69; *see also infra* note 143 and accompanying text.

regional conflicts of law is, at best, only a temporary solution, and cannot be maintained as a long-term method. Because inter-regional conflicts rules are used to solve conflicts of law between different legal regions within one country, they are quite different from the rules of private international law that exist to solve international conflicts of law between private parties.

The best approach to resolve China's inter-regional conflicts of law is the enactment of nationally uniform rules. Such an approach could have the following benefits. First, uniform rules would eliminate forum shopping since courts in every region would be applying the same conflicts principles. Second, because drafting the national conflicts rules will not involve unifying the substantive civil and commercial laws which differ among the various regions, enacting uniform rules could be achieved more easily than the unification of the substantive laws. Enactment of a nationally unified set of rules will also insure that the same case will be handled in the same way in courts of all the legal regions, thereby limiting, if not eliminating, forum shopping.[124] Third, this approach will also prevent clashes between inter-regional conflict of laws rules from giving rise to renvoi. Furthermore, national rules will simplify and, indeed, lay the foundation for a possible unification of the substantive laws of the various regions in the future.

Private international law will not be an adequate source of conflicts rules for China. Although there are some private international law treaties governing international conflicts of law, obtaining global agreements on all conflicts problems will prove difficult if not impossible.[125] Since all the new SARs will be under one common sovereign with one central government, it is in the interest of the various regions to resolve conflicts of law in a more direct manner.

A set of nationally unified conflicts rules can be established provided they do not run counter to the public policy of a region. Should the application of such conflicts rules violate the public policy of an SAR, the region may invalidate these rules in order to uphold its own lawful interests (as guaranteed by the region's high degree of autonomy). This approach generally conforms with the grand scheme of "one country, two systems"—a plausible and realistic method for

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124. *See generally* J. James Fawcett, *Products Liability in Private International Law: A European Perspective*, R.C.A.D.I. 96-111 (1993); *Note, Forum Shopping—Some Questions Answered*, 35 N. IR. L.Q. 141 (1984).

125. *See* Heikki Jokela, *Internationalism in Private International Law, in* COMPARATIVE AND PRIVATE INTERNATIONAL LAW (David S. Clark ed., 1990) at 395, 395-408.

the reunification of Hong Kong and Macao, as well as Taiwan (if implemented truthfully and effectively).[126]

International conventions on conflict of laws might provide a starting point for the formation of a set of national rules. A united China might accede to international conflict conventions or treaties which address conflicts issues in order to unify the inter-regional conflicts rules in some fields prior to the enactment of a nationally unified set of rules applicable to all fields. However, there is a question as to how rules of international conventions would be transformed into national rules. Thus, applying rules of private international law to domestic inter-regional conflicts of law can only be used to help expedite the formulation of national rules.

C. A Proposed Framework

In the short run, the Mainland, Hong Kong, Macao, and Taiwan should use their own existing private international conflicts rules to address inter-regional conflicts of law, or formulate new rules for resolving inter-regional conflicts of law. At present, each region has its own private international law statutes or unwritten laws based on custom and common practice. For example, in the Mainland, there are provisions for the application of law in civil relations with foreign parties[127] and some separate statutory provisions for the application of law to specific problems.[128] In Taiwan, there is the Regulation on the Application of Foreign Civil Law.[129] In Hong Kong, international conflicts rules are taken from English common law and statutes.[130] Each of these regions could apply its private international law by analogy to solve inter-regional conflicts of law, while provisions in their private international law statutes and rules that are

126. *See* The Taiwan Statute Governing Relations Between People of the Areas of Taiwan and Mainland China, ch. 3 (Civil Matters), *translated in* Tse, *supra* note 11, at 195-204.

127. For a discussion of China's General Principles of Civil Law, *see* Henry R. Zheng, *China's New Civil Law*, 34 AM. J. COMP. L. 669 (1986); *see also* Edward Epstein, *The Evolution of China's General Principles of Civil Law*, 34 AM. J. COMP. L. 705 (1986).

128. *See, e.g.*, the Foreign Economic Contract Law of the PRC, art. 5 (1985); the Inheritance Law of the PRC, art. 36 (1985); the Procedures of the Bank of China for Extending Loans to Enterprises with Foreign Investment, art. 25 (1987).

129. The Regulation on the Application of Foreign Civil Law was promulgated in June of 1953. *See* LU DONGYA, GUOJI SIFA [PRIVATE INTERNATIONAL LAW] 225-28 (6th ed. 1979); *see also* MEI ZHONGXIE, GUOJI SIFA XINLUN [NEW PERSPECTIVES ON PRIVATE INTERNATIONAL LAW] 274-78 (5th ed. 1984).

130. *See* Yang Tieliang, *Xianggang de Falui Zhidu yu Fazhan [Hong Kong's Legal System and Its Development]*, *in* BINGKUN, *supra* note 101, at 57-68.

unsuitable for solving the inter-regional conflicts of law could be amended. It must be stressed, however, that this approach is recommended only as a temporary, transitional measure.

Next, as an intermediate step, on the basis of full negotiations and coordination among the various regions, a set of nationally unified conflicts rules should be enacted to solve the inter-regional conflicts of law. These conflicts rules should remain effective for a fairly long time in keeping with the principle of "one country, two systems," which China has pledged to maintain at least until 2047.

In the long run, however, if the laws of the PRC and its SARs are to ever become fully integrated, a set of nationally unified substantive laws on a limited number of issues must be enacted. The earliest this could happen would be fifty years after the establishment of the Hong Kong SAR. By then, however, the unification of China's legal system, perhaps unlike China's territorial unification, may not even be considered a desirable objective.

Alternatively, the Mainland and the various regions may choose to adopt identical or similar substantive laws to either avoid or eliminate inter-regional conflicts of law in those subject areas. Progress toward unifying substantive law could occur simultaneously with the interim measure of adopting uniform conflicts rules, but this long-term approach should not, and cannot, replace the above interim measure. If these steps can be achieved, the national legal system will move closer to true unification.

There is a jurisdictional obstacle to enacting nationally unified conflicts rules and nationally unified substantive laws. According to the two joint declarations and the SARs' basic laws, the NPC and its Standing Committee may enact basic laws applicable to Hong Kong and Macao on national defense and foreign affairs.[131] The basic laws further provide that only certain national laws are applicable to the SARs.[132] However, this provision does not compromise the eventual national unification and territorial integrity, nor is it necessarily inconsistent with the high degree of autonomy promised in the SARs' basic laws. Because the autonomy (including the legislative jurisdiction) of the SARs has been affirmed by the basic laws, the "residual powers" of the Central Government would not be

131. *See* HKBL art. 18 and Annex III.
132. *Id.*

sufficient to authorize it to enact inter-regional conflict of laws rules or nationally unified substantive laws.[133]

If, however, the basic laws authorized the supreme legislature to enact inter-regional conflicts rules or nationally unified substantive laws on certain substantive matters,[134] the NPC or its Standing Committee could enact national conflicts rules and substantive laws after soliciting the opinion of the SARs' respective governments. Nevertheless, as mentioned above, the enactment of nationally unified inter-regional conflicts rules is not necessarily under the legislative jurisdiction of the supreme legislature. Moreover, most issues relating to civil and commercial laws fall within the autonomous legislative and judicial powers enjoyed by the SARs.

These jurisdictional obstacles might be overcome through coordination and negotiation. Representatives of the NPC and its Standing Committee could meet with their counterparts in the regional legislatures in order to formulate mutually agreeable proposed model laws on various subjects.[135] At that point, the NPC and its Standing Committee, together with the regional legislature, could enact laws on the basis of full negotiation and coordination. The NPC or its Standing Committee could then be authorized to promulgate these laws in the Mainland, and the legislative organs of the SARs could promulgate them in their respective regions. This could pave the way for the enactment of a national "model code" of inter-regional conflict of laws, which would be fully applicable to the SARs, despite the basic laws' silence in this respect.

Finally, there is the question of the basic principles and measures involved in incorporating inter-regional conflicts rules into the basic laws of the SARs. Of course, it would be acceptable if the basic laws explicitly provided that nationally unified inter-regional conflicts rules would be enacted in due course and in an appropriate manner. The specific contents of these rules could be outlined in another piece of legislation. In order to resolve inter-regional conflicts of law correctly, relevant problems, such as the jurisdiction of the legislative

133. Some scholars, however, doubt that Beijing's residual power over Hong Kong SAR would be "residual" and/or insignificant. *See* David Clark, *The Basic Law: One Document, Two Systems*, *in* THE HONG KONG BASIC LAW 36, 41 (Ming K. Chan et al. eds., 1991)(arguing that the Hong Kong SAR's high degree of autonomy is very limited by Beijing).

134. The 1974 Yugoslav constitution had a similar provision. Act of 27 February 1979, No. 151, (entered into force on June 2, 1979), Službeni List, 2 March 1979, No.9, *reprinted in* 27 NETH. INT'L L. REV. 121, 124 (1980).

135. *See supra* note 99 and accompanying text.

and judicial organs and judicial assistance, should also be considered. Therefore, the basic laws for the SARs should contain provisions to solve inter-regional conflicts of law and to provide for legislative and judicial jurisdiction and judicial assistance.[136] However, the Hong Kong Basic Law is ambiguous about the SAR's authority to create and enforce conflicts rules. Only two provisions of the Basic Law address this power. Article 95 allows the SAR to maintain juridical relations, including rendering judicial assistance to the judicial organs of other parts of China,[137] and article 96 permits the SAR to make appropriate arrangements with foreign states for reciprocal juridical assistance.[138]

V. IMPORTANT ISSUES IN THE PROPOSED UNIFORM RULES OF CHINA'S INTER-REGIONAL CONFLICT OF LAWS

Enacting nationally unified rules governing conflicts of law is a desirable and feasible solution to China's emerging inter-regional conflicts problems, but it will not be an easy task. The following section of this Article discusses a number of issues that must be addressed in the process of formulating such rules.

A. An Overall Plan

China's future rules on the subject of inter-regional conflicts of law should be embodied in one discrete statute. Because neither the civil law of the PRC,[139] nor the PRC rules applicable to international conflicts of law, are binding on the SARs, the inter-regional conflict of laws statute should be separate from both.[140] The proposed uniform conflicts rules should be divided into two parts: general principles and specific provisions. The general provisions should cover the scope of application, basic principles, basic systems (including characterization, public policy, ascertainment of foreign regions law, evasion of the law, etc.), reference to Chinese law by

136. HKBL art. 96. *See generally* Tung-Pi Chen, *International Judicial Assistance in China: Plodding Into the Twenty-First Century*, 26 INT'L LAW. 387 (1992).

137. HKBL art. 95.

138. HKBL art. 96.

139. *See generally* supra note 128.

140. According to the HKBL, only certain national legislation regarding foreign affairs and national defense would be applicable to the SAR. Thus, international agreements containing rules of international conflict of laws that the Mainland has acceded to will not be applicable to the SAR.

foreign conflicts rules, and the time factor of inter-regional conflicts of law.[141] The specific provisions should govern which law should apply to various civil legal relations involving foreign interests.[142]

B. Characterization

Characterization problems will inevitably emerge in enacting and adopting a set of nationally unified conflicts rules in China.[143] It is generally held that characterization should be governed by *lex fori,*[144] because conflicts rules should be interpreted according to each region's legal system.[145] However, characterization governed by *lex fori* is incompatible with the idea of nationally unified conflict of laws rules. Cases of domestic conflicts of law will arise in the respective courts of the Mainland, Hong Kong, Macao, and Taiwan; therefore, applying *lex fori* would result in courts in different regions making different decisions according to their respective laws. It would obviously be preferable for the nationally unified rules of inter-regional conflict of laws to be characterized in accordance with a nationally unified legal system. However, because the vast majority of matters in the sphere of civil and commercial law fall within the legislative jurisdiction of the SARs, a nationally unified body of civil and commercial substantive law is unlikely to exist in the near future.

To solve this problem, the nationally unified rules of inter-regional conflict of laws in China might be identified through a three-step process. First, if nationally unified substantive laws are passed on certain subjects, those statutes could provide for unified rules to resolve inter-regional conflicts of law. Second, on the basis of a comparative analysis of the regional legal systems,[146] the process of characterization should be performed in accordance with the principles of analytical jurisprudence and comparative law of universal

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141. For a discussion of the time factor of inter-regional conflicts of law, see MORRIS, *supra* note 1, at 428-37.

142. Civil legal relations involving foreign interests should be given a broad explanation, including, at least, the traditional civil and commercial relations (e.g., contracts, torts, immovables and movables, intellectual property, corporations, bankruptcy, negotiable instruments, insurance, marriage, guardianship, and succession).

143. *See* MORRIS, *supra* note 1, at 416-18; Veronique Allarousse, *A Comparative Approach to the Conflict of Characterization in Private International Law*, 23 CASE W. RES. J. INT'L L. 479 (1991).

144. *See* MORRIS, *supra* note 1, at 483-84.

145. *Id.*

146. *Id.* at 484 (referring to the "analytical jurisprudence and comparative law theory" put forward by the German scholar Rabel and the English scholar Beckett).

application. The method involves exercising characterization according to the common understanding or general concept of the regional legal systems on the relevant problems of the unified rules of inter-regional conflict of laws.[147] Although it is very difficult for such characterization to be effective between different countries, it is feasible within one country because the various regions have far more in common than do different countries; this commonality helps judges in the various legal regions better understand the laws of the other regions.[148]

Third, autonomous characterization can be exercised by including an explanation or definition of the relevant concepts in the nationally unified rules of inter-regional conflict of laws in order to eliminate and avert contrasting definitions.[149] This method, however, should be employed only to help understand and enforce the inter-regional conflicts rules. Accordingly, these rules may include an explanation or definition of relevant concepts of the regional law, the interpretation of which should be governed by the regional laws themselves.[150]

C. Renvoi[151]

A renvoi situation may emerge when two states (or regions) have two different choice-of-law rules, or when two states apply the same choice-of-law rules but characterize a case differently.[152] In the course of solving the inter-regional conflicts of law in China, there may be a short-lived stage during which each region will apply its own private international law by analogy. During this stage, all the elements of renvoi will be present.[153] Whether all the regions will

147. *Id.*

148. *See* HUANG, *supra* note 12, at 174-75.

149. *See* Tibor Varady, *Internal Conflict of Laws in Yugoslavia*, 23 NETH. INT'L L. REV. 137, 146-47 (1976).

150. *See* Vitta, *supra* note 21, at 9-4.

151. *See generally* Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979 (1991); Rhoda S. Barish, Comment, *Renvoi and the Modern Approaches to Choice-of-Law*, 30 AM. U. L. REV. 1049 (1981); John D. Egnal, *The "Essential" Role of Modern Renvoi in the Governmental Interest Analysis Approach to Choice of Law*, 54 TEMP. L.Q. 237 (1981).

152. *See* MORRIS, *supra* note 1, at 9-10.

153. For example, article 43 of the Statute Governing Relations Between People of the Areas of Taiwan and Mainland China provides that "[w]here, according to this Statute, the regulations of the Area of Mainland China shall apply, but nothing is stated expressly in the Area of Mainland China regulations with respect to the legal relationship involved, or the Area of Mainland China regulations specify that laws of the Area of Taiwan shall apply, laws of the Area of Taiwan shall apply." Tse, *supra* note 11, at 195. This provision is made in essence under the rule of renvoi.

accept renvoi during this stage will have to be determined by the respective provisions of their private international law.

At present, there is no provision in the private international law of mainland China addressing the renvoi situations. Apparently, legislators have chosen to leave the solution of this problem to the interplay of theory and praxis. It is explicitly stipulated in article 29 of the Taiwan Regulations on the Application of Law to Civil Relations Involving Foreign Interest that renvoi, including both transmission and renvoi in the narrow sense, is accepted.[154] Hong Kong courts similarly follow the English practice of recognizing single renvoi and double renvoi.[155] Thus, during the initial stage of solving China's inter-regional conflicts of law, renvoi will be accepted and adopted by at least some regions.

D. Ascertaining the Law of A Foreign Region

When a regional court applies the law of another region in accordance with either unified or regional rules of inter-regional conflict of laws, there will inevitably be some difficulty in ascertaining the contents of the law of another region. In private international law, there is no uniform practice for proving foreign law.[156] With regards to inter-regional conflicts of law, however, some countries with multiple legal regions have adopted a practices similar to those followed under private international law.[157] These countries hold that it is a function of the court to discover the contents of the law of another region.[158] Some also require the parties to provide necessary assistance in this inquiry.[159] As China's projected legal regions will be influenced to varying degrees by European continental laws, Anglo-American common law, and the socialist laws, a compromise for ascertaining the contents of the law of another region may be desirable. Such an accommodation is possible because courts of various regions will be charged with discovering the contents of the laws of other regions and the parties involved will be obliged to prove the contents of the law of another region on which they rely.[160]

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154. This regulation can be found in MEI, *supra* note 129, at 274-78.

155. *See* MORRIS, *supra* note 1, at 407-09.

156. *Id.* at 37-41.

157. *See Id.* at 36-40; *see also* KAHN-FREUND, *supra* note 22, at 163.

158. *See* HUANG, *supra* note 12, at 184-86.

159. *Id.*

160. Under the Anglo-American conflicts rules, foreign law in courts is a matter of fact which has to be pleaded and proved to the satisfaction of the judge. The general rule is that the

E. Public Policy

In many countries with compound legal regions, regions will apply one another's law when appropriate, even if such application offends the public policy of the forum region.[161] In countries which permit one region to refuse on public policy grounds to apply the law of another region,[162] such refusals occur far less frequently than refusals on public policy grounds to apply the law of a foreign country. Thus, in practice, it is rare for public policy considerations to influence the outcome of domestic inter-regional conflicts of law. In general, natural bonds are stronger between regions than between sovereign countries, and differences between regions are not as substantial as those separating sovereign countries.

However, China's inter-regional conflicts of law have special characteristics not found in other countries with multiple legal regions; the clash between fundamentally antagonistic socialist law and capitalist law precepts is particularly problematic. Furthermore, with regards to civil and commercial law, the scope of legislative jurisdiction permitted for each region is quite broad. The resulting differences between the civil and commercial laws of these regions are so great that they resemble the differences which exist between the laws of many sovereign countries. To resolve China's inter-regional conflicts of law with conventional conflicts rules would inevitably lead to courts of one region using fundamentally different laws of another region to regulate its own civil legal relations. This course would naturally affect, to some degree, the inner legal order of that region. Therefore, China and its regions must be left free to refuse on public policy grounds to apply certain provisions of another region's body of law.

Allowing public policy refusals is consistent with the policy of "one country, two systems" in promoting the co-existence of separate legal regions for a considerable period of time.[163] It will allow each

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burden of proving foreign law lies on the party whose claim or defense is based on the foreign law. *See* MORRIS, *supra* note 1, at 36-37; *see also* LEFLAR ET AL., *supra* note 1, at 215-20.

161. For a general discussion of public policy conflicts in international law, see Kent Murphy, *The Traditional View of Public Policy and* Ordre Public *in Private International Law*, 11 GA. J. INT'L & COMP. L. 591 (1981); John B. Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647 (1985).

162. For examples of countries that permit a region to refuse to apply the law of another region on public policy grounds, see KAHN-FREUND, *supra* note 160, at 150; *see also* HUANG, *supra* note 12, at 204-08.

163. According to the concept of "one country, two systems", each region should have its own legal system which is different from that of other regions. Applying public policy to inter-

region to defend its basic interests and help to allay any anxieties that the people of the SARs may have regarding the socialist legal system. Thus, although inter-regional conflicts rules will be nationally unified, their application will vary from region to region. Thus, when applying the rules, courts of each region will be able to refuse to apply the law of another region on the grounds that it contravenes the public policy of the applying region.[164]

The public policy principle may reduce the chances for the application of a particular conflict rule, but it does not negate the overall efficacy of unified rules to resolve inter-regional conflicts of law.[165] Public policy governs and guides the application of all rules, including conflicts rules.[166] Indeed, public policy considerations are also influential in private international law conventions.[167] An increasing number of private international conventions are allowing parties to avoid the application of the laws referred to by the convention if those laws would violate public policy. For example, article 10 of the Hague Convention on the Law Applicable to Traffic Accidents states that "[o]nly when its application would obviously contravene public policy can the application of the law referred to by the convention be refused."[168] Thus, the PRC would not be breaking new ground by incorporating a public policy exception into unified inter-regional conflicts rules.

The public policy exception should, however, be limited.[169] If public policy considerations were to be invoked merely as a pretext for avoiding the application of conflicts rules, this would adversely affect normal civil contacts and commercial transactions among the

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regional conflicts of law may maintain this difference in areas of fundamental legal policy. *See* HUANG, *supra* note 12, at 248-50.

164. For a discussion of the exclusion of foreign law on grounds of public policy, see MORRIS, *supra* note 1, at 41-46.

165. *See* SZASZY, *supra* note 117, at 256-57.

166. In P.S. Mancini's view, public order doctrine is one of the basic principles in private international law. *See* GOUJI SIFA , *supra* note 105, at 75.

167. *See, e.g.,* Inter-American Convention on General Rules of Private International Law, Mar. 8, 1979, art. 7, OEA/Ser. A/31, No. 54 (1979); European Communities: Convention on the Law Applicable to Contractual Obligations, June 19, 1980, art. 16, 19 I.L.M. 1492, 1496 (1980); Hague Conference on Private International Law: Draft Convention on the Law Applicable to Agency, June 16, 1977, art. 17, 16 I.L.M 775, 780 (1977); Hague Conference on Public International Law: Convention on the Law Applicable to Products Liability, Oct. 21, 1972, art. 10, 11 I.L.M. 1283, 1284 (1972).

168. The Hague Convention on the Law Applicable to Traffic Accidents was concluded on May 4, 1971. *See* GUOJI SIFA GONGYUE JI [COLLECTIONS OF PRIVATE INTERNATIONAL LAW CONVENTIONS] 350 (Lu Jin, ed., 1986).

169. For a general discussion, see GOUJI SIFA, *supra* note 105, at 81-84.

people of all the regions. In the long run, such invocation could jeopardize the prospect of future unification and threaten the policy of "one country, two systems." Therefore, the situation to which the public policy exception is applicable must be carefully defined and narrowly circumscribed by China's uniform rules on inter-regional conflict of laws.

F. Evasion of Law

When China becomes one country with multiple socio-economic systems, the opportunities for fraudulent manipulation of the legal system will multiply. As the exchange of people, goods, services, and capital increase between the Mainland, Hong Kong, Macao, and Taiwan, it will presumably be easier to alter domicile or to transfer property from one region to another to avoid the force of law.[170] Because the respective laws of the four regions are so different, the temptation to engage in forum shopping will also intensify.[171] If such strategies were permitted, they would compromise the consistency and certainty of the conflicts rules, and injure legal relations among the regions. The unified rules for resolving China's inter-regional conflicts of law should incorporate the principle of "*[f]raus omnia corrumpt*,"[172] and explicitly prohibit any and all attempts to evade the application of conflicts rules.

G. Personal Law

Legal relations concerning a person's status and capacity, matrimonial and family relations, and succession are generally considered personal legal relations.[173] Under private international law there are two interpretations of personal law: *lex petriæ*, the national law of the parties, and *lex domicilii*, the law of the domicile of the parties.[174] However, very few countries with federal systems

170. *See id.* at 84-85.

171. *See supra* note 122 and accompanying text.

172. Literally translated, *fraus omnia corrumpt* means "fraud destroys all." *See* GUOJI SIFA, *supra* note 105, at 4.

173. *Id.* at 53-54. *See generally*, Tung-pi Chen, *The Nationality Law of the People's Republic of China and the Overseas Chinese in Hong Kong, Macao and Southeast Asia*, 5 N.Y.L. SCH. J. INT'L & COMP. L. 281 (1984); *Helen Galas, Family Law in China*, 6 POL'Y L. REV. 54 (1980); Shaheen Malik, *Inheritance Law in the Soviet Union and the People's Republic of China: An Unfriendly Comment*, 34 AM. J. COMP. L. 137 (1986).

174. GUOJI SIFA, *supra* note 105, at 53-54.

and multiple legal regions recognize federal citizenship on the same level as regional citizenship.

Therefore, in theory, to apply the law of the citizenship of the member state to which the parties belong as the personal law has limited meaning. But without this, *lex patriæ* is an empty concept, because within one country, the nationality of all the natural persons in the various legal regions is the same. Even those countries which insist on taking the *lex patriæ* as the personal law are obliged in private international law to abandon the nationality criterion for the determination of personal law in inter-regional conflicts rules.[175]

In practice, most countries with multiple legal regions take the law of the domicile of the parties as the personal law.[176] Alternatively, some take the law of the place of birth or origin,[177] or the homeland or habitual residence.[178] Because China will remain a unified country with multiple legal regions, Chinese citizens in the Mainland, Hong Kong, Macao, and Taiwan will have only one common Chinese nationality. Obviously, it would be impossible to take the *lex patriæ* as the personal law. It is more appropriate to define personal law in terms of the domicile of the person, namely, to take the *lex domicilii* as the personal law. This is the general practice in most countries with compound legal regions. Because domicile is a generally accepted legal concept in China, it would not be difficult to persuade all the regions to accept the *lex domicilii* as the personal law. Of course, there may be different interpretations of "domicile" in the laws of the Mainland, Hong Kong, Macao, and Taiwan, leading to active and passive conflicts of law.[179] Thus, it is necessary to provide a definition of domicile in the nationally uniform rules of inter-regional conflict of laws.[180]

H. Laws Applicable to Contracts

As the pace of economic exchanges between the Mainland and other regions rapidly increases, so will the importance of the law of contracts. Thus, contract law will occupy a significant place in China's

175. *See* SZASZY, *supra* note 116, at 243.

176. For example, Australia, Canada, Britain and the United States follow this practice. *See* HUANG, *supra* note 12, at 156, 158-62; *see* also SZASZY, *supra* note 116, at 256-57.

177. *See* SZASZY, *supra* note 117, at 256-57; *see also* VITTA, *supra* note 21, at 16.

178. *See* HUANG, *supra* note 12, at 158.

179. *See* GUOJI SIFA, *supra* note 105, at 98-100.

180. *See* VARADY, *supra* note 149, at 146-47.

unified rules of inter-regional conflict of laws.[181] Currently, laws governing contractual relations in the Mainland, Hong Kong, Macao, and Taiwan share many common characteristics and principles.[182] Laws in the various regions all affirm the principle of the "autonomy of parties."[183] For example, the General Principles of the Civil Law of the PRC stipulates that "[t]he parties to a contract involving foreign interests may choose the law applicable to the settlement of their contractual disputes, except as otherwise stipulated by law."[184] Article 6 of Taiwan's Regulation on the Application of Law to Civil Relations Involving Foreign Interests[185] provides that "[f]or relations of obligations arising out of a legal act, its requirements and effect are governed by the law the parties intended to apply."[186]

Nevertheless, legal provisions in the various regions differ as to how to determine which law governs contracts when the parties have not chosen the law of an appropriate forum. For example, Hong Kong follows the English practice. English courts, upon finding no express or implicit choice of the proper law for the contract, choose the system of law with which the transaction has the closest connection.[187] Article 145 of the General Principles of Civil Law of the PRC is quite similar to the English practice. It provides that "[i]f the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied."[188]

However, Taiwan's Regulations on the Application of Law to Civil Relations Involving Foreign Interests adopts a different approach. Articles 6(2) and 6(3) provide:

> When the intention of the parties is not clear, their national law shall apply if both parties are of the same nationality. Otherwise, the law of the place of contracting shall apply. If the contract is

181. *See generally* Xu Guojian, *Contract in Chinese Private International Law*, 38 INT'L & COMP. L.Q. 648 (1989).

182. For example, the doctrine of autonomy of parties is the first principle of choice of law in the area of contract. *See* EHRENZWEIG & JAYME, *supra* note 96, at 43-44.

183. *See Id.*

184. *See* General Principles of the Civil Law of the People's Republic of China (1986) (effective Jan. 1, 1987) (P.R.C) art. 145 [hereinafter General Principles] *translated in* CHINA LAW YEARBOOK 1987 at 113-26 (Wang Zhongfang et al. eds., 1989).

185. Regulation on the Application of Law to Civil Relations Involving Foreign Interests, June 6, 1953, *reprinted* in MEI, *supra* note 129, at 276-78.

186. *See* MEI, *supra* note 129, at 274.

187. J. H. C. MORRIS, THE CONFLICT OF LAWS 214 (2d ed. 1980).

188. General Principles, art. 145, *translated in* CHINA LAW YEARBOOK 1987 at 113, 125.

> concluded in different places, the place where the offer is communicated shall be taken as the place of contracting. If the other party does not know where this is when accepting the offer, the domicile of the party making the offer shall be taken as the place of contracting.[189]

In addition, "[i]f the place of contracting referred to above lies in more than two countries or does not belong to any country, the law of the place of performance shall apply."[190] This rigid provision only partially embodies the "most closely connected" approach of the PRC. This approach lays the foundation for determining the applicable law of contract in China's future unified inter-regional conflicts rules.

In recent years, the "most closely connected" approach for choosing which body of law will govern a transaction has been widely followed in international treaties and in the private international law of some countries. For example, article 13 of the Benelux Treaty provides that parties to a contract can choose the applicable law of the contract, but if no choice has been made, "the law of the country most closely connected with the contract" applies.[191] Similarly, article 4(1) of the European Economic Community Convention on the Law Applicable to Contractual Obligations (1980) states:

> to the extent that the law applicable to the contract has not been chosen in accordance with article 3, the contract shall be governed by the law of that country with which it is the most closely connected. Nevertheless, a severable part of the contract which has a close connection with another country may by way of exception be governed by the law of that other country.[192]

There are similar provisions in sections 186-188 of the Restatement (Second) of the Law of Conflict of Laws,[193] article 24(2) of Turkey's Law on Private International Law and International Law of Procedure

189. *See* MEI, *supra* note 129, at 275.
190. *Id.*
191. KAHN-FREUND, *supra* note 22, at 264.
192. The European Communities: Convention on the Law Applicable to Contractual Obligations, June 19, 1980, art. 4(1), 19 I.L.M. 1492, 1493 (1980).
193. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186-88 (1971).

(1982),[194] and article 117 of the Private International Law of the Federation of Switzerland.[195]

China's unified inter-regional conflicts rules should conform to the new trend in international choice-of-law rules. Therefore, the following provisions should be adopted to determine what body of law will govern contracts: unless otherwise provided by laws, the law chosen by the parties to a contract shall apply to contractual relations. If the parties to a contract have made no choice, the law of the place most closely connected with the contract shall apply.

I. Laws Applicable to Property

There are some differences and some similarities in the laws regarding property in the various regions of China. Hong Kong law, like English law, divides property into movables and immovables.[196] Under English conflicts rules, all questions relating to immovables are governed by the principle of *lex situs*.[197] Hong Kong follows the same principle. In English law, movables are divided into choses in possession and choses in action.[198] For a chose in possession the governing conflict principle is also *lex situs*.[199] Drawing on English case law, Hong Kong courts have adopted the rule that chattels are governed by *lex situs*.[200] As for a chose in action, courts in Hong Kong, like those in England, hold that the law of the place where the right is created controls the transaction.[201]

In the Mainland, however, there is only one provision on the application of law to real property. Article 144 of the General Principles of Civil Law of the PRC stipulates that "[o]wnership of immovable property shall be governed by the law of the place where

194. *Turkey's Law on Private International Law and International Law of Procedure* (1982), *reprinted in* KENNETH ROBERT REDDEN, MODERN LEGAL SYSTEMS CYCLOPEDIA, vol. 5A, 5A.20.31 (1990).

195. Private International Law of the Federation of Switzerland, Jan. 1, 1989, art. 117, *translated in* 29 I.L.M. 1244, 1275 (1990).

196. *See* SHUM, *supra* note 40, at 245.

197. *Lex situs* means "the law of the place where property is located." BLACK'S LAW DICTIONARY 913 (6th ed. 1990). The general rule is that lands and other immovables are governed by the country in which they are situated. *See* MORRIS, *supra* note 1, at 315-16.

198. *See* J. A. C. THOMAS, PRIVATE INTERNATIONAL LAW 104 (1955).

199. *See* GUOJI SIFA, *supra* note 105, at 127-28.

200. *See* MORRIS, *supra* note 1, at 315-16.

201. *Id.*

it is situated."[202] PRC laws do not clarify which conflicts principle will apply to the ownership of movables.

In Taiwan, the germane provisions resemble those of Hong Kong. Article 10 of the Regulations on the Application of Law to Civil Relations Involving Foreign Interests provides:

> [T]he principle of *lex situs* shall apply to real property issues (Clause 1); the real property rights connected with the right is governed by the law governing the creation of the right (Clause 2); if there should be any change in the place where the property is situated, the gain or loss of the real property right is governed by *lex situs* at the time when the cause is situated, the gain or loss of the real right is governed by *lex situs* at the time when the cause to the fact is accomplished (Clause 3); and the ownership of a ship is governed by the law of the flag, the ownership of an aircraft is governed by the law of the country where the aircraft is registered (Clause 4).[203]

Clearly, the first two clauses of Taiwan's provisions are quite similar to the law in Hong Kong.

In view of existing judicial practice, the future uniform inter-regional conflicts rules should provide that questions relating to immovables shall be governed by the *lex situs*. As to movables, since the end of the nineteenth century, most countries have advocated the application of *lex situs*.[204] China might also do well to adopt this principle to resolve questions involving immovables. Exceptional cases may require some modifications of this approach. For example, while succession to immovables could be governed by *lex situs*, succession to movables could be determined by the law of the place of the decedent's domicile at death. Similarly, to determine ownership of cargoes in transit, it might be sensible to apply the law of the place where the cargoes are loaded, or the law of the place of destination. As for disputes involving transport vehicles such as ships, aircraft, or motor vehicles, the law of the place of registration is a better candidate for incorporation into the uniform rules of inter-regional conflict of laws than the law of the flag.[205]

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202. General Principles, art. 144, *translated in* CHINA LAW YEARBOOK 1987 at 113, 125.
203. MEI, *supra* note 129, at 275.
204. GUOJI SIFA, *supra* note 105, at 128-29.
205. *Id.*

V. CONCLUSION

China is gradually entering a unique stage of legal development. It will become "one country" with "two systems," comprising three law families and four compound legal regions. Like other countries with federal systems, China—currently a non-federal system country—will need to develop inter-regional conflicts rules. But the complex nature and the unique characteristics of China's emerging inter-regional conflicts of law are wholly unprecedented and therefore require fresh examination and creative thinking.

In the short term, the Mainland and the various regions should apply private international law by analogy or their own international conflicts rules to cases of inter-regional conflicts of law. As an intermediate solution, China needs unified conflicts rules for resolving the inter-regional conflicts of law. In the long run, it is possible to that unified substantive laws will evolve across the country, thus resolving the inter-regional conflicts of law. However, this prospect is rather remote and may become less desirable as it becomes more possible.

As the world awaits 1997, the manner in which China resolves inter-regional conflicts issues may play a significant role in determining how far the process of political unification will continue to progress. Conflicts rules may well prove to be the testing ground for how effectively China can implement the policy of "one country, two systems." It is not enough for Beijing simply to announce this policy. In order to mollify those who doubt or resist the concept of "one country, two systems," the Mainland must formulate specific proposals that will accommodate the needs and concerns of all of China's regions. Only by doing so will the Mainland carry its burden of persuasion on the prospect of future progress toward unification and entitle itself to the benefit of the doubts that its policy has provoked.

The strategies and recommendations in this Article may be of some use in increasing the likelihood of the successful implementation of the "one country, two systems" principle. Furthermore, China's prospective, yet by no means insignificant, legal development, which was discussed in this Article, may be an enlightening experience that will contribute to China's post-Deng Xiaoping political system. Having "three law families" and "four compound regions" will undoubtedly encourage China to progress in the direction of pluralism and, perhaps, even toward some kind of federalism in the foreseeable future.

The general suggestions outlined above are tentative and preliminary and are offered in the spirit of encouraging legal scholars to join in this inquiry. These suggestions serve, as the Chinese proverb puts it, to "throw out the stone in order to get the jade." This is undoubtedly a tract of the legal landscape that will require more plowing and sowing before any harvest can be reaped.