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# Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region

Ann D. Jordan\*

## Introduction

Hong Kong's common law legal system will not survive the 1997 transfer of sovereignty to China intact. It will slowly be transformed into a capitalist common law/socialist civil law system, tempered by political realities rather than forged by a coherent set of legal principles. The formal source of the conflict is the Basic Law,<sup>1</sup> a Chinese state-level law written by mainland Chinese scholars and officials with input from Hong Kong officials. The Basic Law is the national expression of China's promises contained in the Joint Declaration,<sup>2</sup> the 1984 agreement whereby Britain transfers sovereignty over Hong Kong to China. The Basic Law implements the Joint Declaration, contains the essential terms and conditions for creation of Hong Kong as a separate political and legal entity within China, and constitutes the highest law of the post-handover Hong Kong Special Administrative Region (HKSAR). Unfortunately, it also imposes incompatible elements of the socialist civil law system upon Hong Kong's common law legal system and, consequently, poses a threat to the survival of Hong Kong's independent judiciary and legal system. Nonetheless, there has been remarkably little commentary in Hong Kong exposing this threat. The silence, I believe, is due to the tendency of public discourse in Hong Kong to assume a common law perspective in matters concerning interpretation of the Basic Law.

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1. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted by the National People's Congress on April 4, 1990, 29 I.L.M. 1511 (1990) [hereinafter Basic Law].

2. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Sept. 26, 1984, U.K.-P.R.C., 1984 Gr. Brit. T.S. No. 20 (Cmd. 9352), reprinted in 23 I.L.M. 1366, 1371-72 (1984) [hereinafter Joint Declaration].

The purpose of this Article is to expand the debate to include the Chinese perspective in order to understand the extent to which China's legal system is inscribed on the surface and imbedded in the language of the Basic Law text. The Article also considers the extent to which the socialist civil law perspective is present in Chinese interpretations of Basic Law provisions relating to the judiciary. The Article focuses on the most basic constitutional issue threatening the survivability of the future HKSAR judiciary, namely, limitations on the scope of judicial powers. The Article first introduces each contentious Basic Law provision from the Chinese and Hong Kong perspectives. Then it considers public statements and writings on the issue by influential scholars and officials from both mainland China and Hong Kong. Finally, it analyzes alternative interpretations and solutions that emerge from the borderline where the two legal cultures meet and resist each other.

The mixture of common law and socialist civil law concepts and language has already given rise to verbal disputes between common-law-trained and socialist civil-law-trained legal professionals and politicians over linguistic, cultural and political control of the Basic Law content. The vigorous public debates are essentially struggles over whose legal principles and whose cultural values will prevail. For example, in one dispute involving interpretation of the Basic Law, a member of the future HKSAR government rejected the application of common law principles when he "accused some members of the [Hong Kong] legal profession of wrongly applying British legal traditions."<sup>3</sup> Unfortunately, the Basic Law virtually guarantees that common law principles and values will be seriously compromised after 1997.

An essential element for retaining Hong Kong's present capitalist system and lifestyle is the preservation of the present independent judiciary. However, independence is not assured because both explicit and imprecise wording in the Basic Law provide considerable scope for culture conflict and incompatible interpretations that are capable of undermining Joint Declaration promises. Nonetheless, all solutions to Basic Law puzzles must be organized around, and not deviate from, China's commitments in the Joint Declaration. China promises to permit the HKSAR to "enjoy a high degree of autonomy," to "be vested with . . . independent judicial power," and to allow its "previous capitalist system and life-style [to] remain unchanged for 50 years."<sup>4</sup> These promises are intended to preserve Hong Kong's pre-handover system to the maximum extent possible. Therefore, at a minimum, they provide a strong source of support for the position taken in this Article, namely, that China must resolve all ambiguities in favor of the common law interpretation. Unfortunately, even if China agrees to adopt a common law perspective regarding ambiguous provisions, a number of unambiguous Basic Law provisions undermine the Joint Declaration's commitment to an independent judiciary and legal system.

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3. Linda Choi, *NPC Can Be Unreasonable, Says Convenor*, SO. CHINA MORNING POST, Mar. 27, 1997, at 8.

4. Joint Declaration, *supra* note 2, art. 3 & Annex I.

Most worrisome are provisions that import civil law principles and practices into Hong Kong. These provisions are capable of sounding the death knell of judicial review as presently practiced in Hong Kong and must be amended if the common law is to be preserved.

## I. Conflicting Legal Cultures and Legal Languages

Part I establishes a conceptual framework for the textual analysis of Basic Law provisions in Part II. It introduces the fundamentally distinctive and conflicting characteristics of Hong Kong's and China's legal systems and legal languages.

### A. Two Legal Cultures

#### 1. *Hong Kong's British Common Law Culture*

The modern British common law legal system derives from a Western epistemology based upon notions of rationality, scientific thinking and truth. Its methodology applies reason and rational thinking to facts and law. The scientific tools of investigation separate legally material facts of the case from irrelevant or background facts. The system is coherently structured and organized and has its own internal logic. The application of reason and scientific analysis is commonly believed to result in a clear understanding of the *truth* of the case, which, when applied to the law, means justice is served.<sup>5</sup> The scientific method, which is highly valued in Western societies, elevates law and the legal process above other forms of knowledge and other methods for meting out justice.

The common law legal system requires procedural justice as well as substantive justice—without the former, the latter cannot be guaranteed. The system sets out objective legal procedures that, under a rule of law system, are applied equally to everyone, including rulers. The rule of law system has been accepted by the majority of Hong Kong people, who respect the power of the law and common law legal institutions.

[T]he common law heritage has given Hong Kong not just a neat set of rules but an attitude of mind, not mere *rules of action* but also *ways of acting*, not just "Rule by Law" but "the Rule of Law." It is these attitudes and forms of conduct as well as the spirit of the Rule of Law that are particularly difficult to translate into legal norms, especially in a context where radically different principles and attitudes are espoused by the incoming sovereign authority.<sup>6</sup>

Above all, Hong Kong people expect the law to protect them from abuses of political power.<sup>7</sup> These attitudes and values are incompatible with the Chi-

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5. For a critical analysis of the scientific method, see generally SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN'S LIVES* (1991).

6. Dennis Chang, *Towards a Jurisprudence of a Third Kind—"One Country, Two Systems,"* 20 CASE W. RES. J. INT'L L. 99, 110 (1988).

7. The degree to which the British common law system has been integrated into the culture and consciousness of the people of Hong Kong is, of course, relevant to the question of whether the Hong Kong public will accept the new legal order. However, as Hong Kong people will have little influence over the resolution of the issues discussed in this Article, their views are not included. For more on Hong Kong's legal culture, see

nese legal system.

## 2. China's Socialist Civil Law Culture

China does not have a *legal culture* in the Western sense of a set of cultural beliefs in the primacy of law as an instrument of social control and legal institutions as the appropriate forum for enforcing correct social behavior. Rather, "[t]he foundation of Chinese culture is the concept of 'rule of etiquettes' and the concept of 'no litigation.'"<sup>8</sup> The traditional Chinese means of social control is based on Confucianism, which is given expression through a complicated sets of rituals, practices and class and gender codes of conduct (*li*). The nearest approximation in Confucian culture to law in the Western sense is a set of criminal punishments (*fa*) that are found in the pre-socialist Qing Code.<sup>9</sup>

After the Communist Revolution, China adopted a civil law system. So far, however, the new legal system has been unsuccessful in replacing traditional cultural beliefs that law is morally inferior to *li*. Since the start of the modernization drive in 1979, China has made numerous unsuccessful attempts to create a rule of law culture.<sup>10</sup> Despite the existence of hundreds of new laws, China remains a rule by law system rather than a rule of law system. As one scholar notes, "Marxist-Leninist ideology converges with Confucianism in a sense: they share a common distrust of, or lack of respect for, the rule of law."<sup>11</sup> According to orthodox Marxist-Leninist theory, bourgeoisie law is a tool of the ruling classes used against the people. Socialist law, however, is an instrument of the people because the party, which represents and protects the interests of the masses, controls the law. As a result of the socialist distrust of law, some notable aspects of the Chinese system are legal flexibility, lack of procedural regularity and the supremacy of Chinese Communist Party (CCP) policy. Some notable characteristics of the Chinese people are a high degree of distrust, if not disdain, for law and a preference, even by victims of criminal acts, for settling conflicts privately.

The Chinese distrust for the law and political preoccupation with controlling the legal system stand in stark contrast with Hong Kong's common law rule of law philosophy. This difference is discernible in the often confusing and imprecise language of the Basic Law.

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Anthony Neoh, *Hong Kong's Future: The View of a Hong Kong Lawyer*, 22 CAL. W. INT'L L.J. 309 (1992); Kuan Hsin-chi, *Legal Culture: The Challenge of Modernization*, in INDICATORS OF SOCIAL DEVELOPMENT: HONG KONG 1990, at 159 (Lau Siu-Kai et al. eds., 1992); LAU SIU-KAI & KUAN HSIN-CHI, THE ETHOS OF THE HONG KONG CHINESE 119-45 (1988).

8. Yang Kaixiang, *A Comparative Study of Judges' Status*, 137 SHANGHAI FAXUE [JURISPRUDENCE] 45 (Apr. 10, 1993), translated in JPRS-CAR-93-041, at 28 (F.B.I.S. June 21, 1993).

9. See generally SYBILLE VAN DER SPENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA: A SOCIOLOGICAL ANALYSIS (1977); T'UNG-TSU CH'U, LAW AND SOCIETY IN TRADITIONAL CHINA (1965).

10. See, e.g., Agatha Ngai, *Lawmakers Angry at Lack of Enforcement*, SO. CHINA MORNING POST, Mar. 15, 1997, at 9.

11. Albert H.Y. Chen, *Justice After 1997*, in CRIME AND JUSTICE IN HONG KONG 172, 182 (Harold Traver & Jon Vagg eds., 1991).

## B. Two Legal Languages

Law is a living language: it has a history, a vocabulary and a point of view. China's and Hong Kong's legal languages are no exceptions. China's and Hong Kong's legal histories and jurisprudences, although once the same, have developed along different paths since Britain's colonization of Hong Kong and China's transformation to socialism. The two jurisdictions have developed distinct legal cultures and mutually-unintelligible legal languages. After more than 100 years of colonial rule and the common law, the meanings Hong Kong people attach to legal terms in the Chinese language are imbued with common law assumptions and referents. Likewise, more than fifty years of socialism have altered the meaning of legal terms in China. As a result, although Chinese people on both sides of the border utter the same legal words, they do not speak the same legal language. Legal discussions between people in Hong Kong and the Chinese mainland are often no more than mutually uninformative cross-talk. In fact, Hong Kong people are really in no better position to understand China's legal system than are people who do not speak or read Chinese.

Certainly, Chinese terms for common law terms exist, but translation is more than merely finding equivalent terms. Properly executed, translation captures the essence of the language so that the message imbedded in those terms is transmitted by the messenger, i.e., by the words. Successful translation exposes, rather than submerges, cultural differences. It creates dialogue rather than lulls the recipient into complacency. It does not permit the recipient to *assume* she understands the speaker's meaning. Hit-or-miss translation may suffice, for example, in the mass media, but it is not adequate when the life or death of an entire legal system is at stake. Nowhere is the need for a precise translation more obvious than in the Basic Law. Unfortunately, however, the English-language version of the Basic Law simply does not carry the essence of the official Chinese-language version. For example, one cannot translate even the most basic, most important concept, that of *law* itself, from Chinese into English, although the Chinese term *falū* is commonly used to denote the "law."<sup>12</sup> These differences are never discussed, and so the Basic Law has, I fear, lulled many people into a false sense of security about the survivability of the present legal system.

Thus, the entire process of analyzing and interpreting the Basic Law is problematic and fraught with danger. The flaw contained in existing analyses is the assumption that Chinese and English terms are interchangeable. The deception of current discourse lies in the failure of official pronouncements from both sides of the border to address the fragility of this assumption. As long as Chinese and Hong Kong government officials assume that the words they use, such as *law* and *constitution*, have the same content or referents in both legal languages, they perpetuate the myth that Hong Kong's legal system will remain basically unchanged after 1997. For exam-

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12. Liang Zhiping, *Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55, 89 (1989).

ple, when the two sides declare in their own culture-specific languages that Hong Kong's judiciary will be "independent," they appear to be in agreement. However, as demonstrated in Part II, the meaning of *independent* in China differs radically from the meaning in Hong Kong and so use of this word hides the differences. Hong Kong's six million people need and deserve leaders who will engage in open and frank discussions about the two systems' cultural, philosophical, political and legal differences. Without such a dialogue, the resolution of the dilemmas posed by the unique challenges to Hong Kong's legal system will be a slow and painful process. I do not expect the two governments to abandon their fundamental philosophies, but *realpolitik* requires each side to acknowledge and resolve the issues raised in this Article.

## II. Demise of Judicial Powers

Part II addresses the central issue of judicial power in the Basic Law. It compares essential elements of judicial authority, such as judicial independence, in the common law and Chinese civil law systems and then attempts to resolve, to the extent possible, the inevitable conflicting meanings within the context of the Basic Law and the HKSAR. In most instances, the conflicts cannot be resolved and the only outcome is a call for clarification or amendment to the Basic Law. Part A describes judicial independence in Hong Kong and China and then sets out the possible implications for the HKSAR of the broad expanse separating the concept in Hong Kong and China. Part B asks the basic, and yet unanswered, question of the legal effect of the Basic Law. Is it a common law constitution, a Chinese civil law "constitution" or an unwieldy amalgam of the two? Parts C, D and E proceed with a review of several complicated, interlinking and, to this author's mind, poorly drafted Basic Law provisions in an attempt to assess the central question of this Article. The question is: which specific powers of judicial review will be retained by the HKSAR judiciary after the handover to Chinese sovereignty and which powers will be transferred out of the common law system and into the hands of the Standing Committee? The analysis reveals the impossibility of a definitive answer to the question, but makes it abundantly clear that a significant transfer of judicial power will occur unless the Basic Law is amended immediately.

### A. Judicial Independence

This section highlights significant differences between the Hong Kong and Chinese judiciaries and the implications of those differences for the HKSAR judiciary, the Hong Kong legal system and the people of Hong Kong. As demonstrated below, terms such as *constitution*, *independence*, *judiciary*, *judge*, and *judicial review* are not translatable into Chinese even though "equivalent" Chinese terms exist. The meanings of the commonly-used Chinese and English "equivalents" are so dissimilar that using them is, at best, uninformative and, at worst, misleading.

### 1. *Hong Kong's Independent Judiciary*

The term *independence of the judiciary* is fraught with potential for misunderstanding and conflict because the very notion of a *judiciary* in China diverges significantly from the meaning attached in Hong Kong. The common law definition of *independence* is straightforward and uncompromising. Judges are not beholden to the executive or the legislative branch, may not become enmeshed in partisan politics, and do not take directions from any person or institution when adjudicating cases. Judges of the highest courts cannot be removed except for cause, and all judicial salaries are fixed by law at a rate high enough to reduce the risk of corruption. Judges may not adjudicate cases in which there may be, or could be perceived to be, any conflict of interest. They must endeavor to remain engaged, yet uninvolved, with the cases they adjudicate and must appear to act, and indeed act, fairly and impartially in the exercise of their discretion. They may neither meet with parties or their attorneys unless both sides are present nor comment publicly on a case in progress.

Trials are open to the public and jury verdicts and judicial decisions are available for public scrutiny. Judges must render decisions in non-jury and appellate cases in writing and apply proper legal reasoning for the outcome. Judges have no power to decide matters that are not before them in their official capacity or to apply the law in an arbitrary or irrational manner. If a judge erroneously, arbitrarily or irrationally decides a case, the system provides an appeal mechanism for reviewing and correcting improper decisions. The institutional practices protecting the judiciary, combined with these restraints on judicial behavior, ensure, to the greatest extent possible, independence of the judiciary.

### 2. *China's Judicial Organs and Non-Interference*

The Chinese judiciary, although superficially similar to Hong Kong's, is entirely different in form and function. It is the antithesis of Hong Kong's independent judiciary, yet the Chinese also consider their "judges" to be "independent." The Chinese term for independence is *duli*. However, a yawning cultural gap separates China's "*duli*" judiciary from Hong Kong's "independent" one.

First, China does not have courts, in the Western sense. Instead, judicial organs within the civil service have responsibility for administering the law.<sup>13</sup> Until recently, "judges" had civil service titles and were indistinguishable from bureaucrats in other administrative organs of the state. In 1995, the National People's Congress (NPC) adopted the Legal Official (*Faguan*) Law, which separates the judiciary from the bureaucracy and establishes a system for hiring, firing, classifying, evaluating and training

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13. See generally Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145, 148 (1993). "The [Supreme People's] Court is the highest judicial organ of the state, not the highest court of the state." *Id.* The other judicial organs are the people's procuratorate, the public security organ, the state security organ and the judicial administration organ.



judges.<sup>14</sup> However, while judges are no longer classified as bureaucrats, they remain subordinate officials. Under the old system, judges were called *shenpanyuan* (adjudication personnel) or *fayuan ganbu* (court cadres/officials),<sup>15</sup> both of which accurately reflected the bureaucratic role of the judiciary. They are now simply called *faguan* (legal officials), which still reflects their subordinate civil servant status. Therefore, in order to express the bureaucratic nature of China's judiciary, I use the more accurate terms *adjudicatory organ* instead of court and *legal official* instead of judge.

Second, legal officials, even those on the Supreme People's Adjudicatory Organ, the highest adjudicatory organ, have no job security.<sup>16</sup> Even though the Legal Official Law establishes fixed salaries, lower-level legal officials are paid from local revenues, making them especially vulnerable to pressure from local bureaucracies. Except for the Supreme People's Adjudicatory Organ, most legal officials have no, or minimal, legal training and only a very few possess law degrees. Before 1995,

law school graduates, demobilized soldiers seeking a new profession, and cadres of other state organs [made] up the bulk of potential judges. There [was] no special training or test [to qualify for such position] . . . . Their salary is low; they have little social status, and in society as a whole, and even within the legal profession, they do not play a "remarkable" role.<sup>17</sup>

The quality of Legal Officials should improve over time as the Legal Official Law introduces an examination and evaluation system and intensive short-term legal training for existing non-law trained legal officials.<sup>18</sup> However, many years will pass before educated and legally-trained personnel can fulfill the country's need for qualified staff: very few law graduates are willing to join the judiciary unless forced to do so, and training of the existing legal officials will take time.

Third, the judicial organ is not the sole state organ charged with exercising adjudicatory power. The Public Security Bureau can arrest, convict, fine and/or sentence persons to a period of detention for various crimes that, in the common law system, would be handled by the courts.<sup>19</sup>

Fourth, although the *Xianfa* states that adjudicatory organs are independent and "not subject to any interference by administrative organs,

14. Zhonghua Renmin Gongheguo Faguanfa [Legal Official Law of the People's Republic of China] (adopted Feb. 2, 1995), reprinted in I ZHONGHUA RENMEN GONGHEGUO FALU FAGUI [STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA] 1-2-2-1.9 (1995) [hereinafter Legal Official Law].

15. Finder, *supra* note 13, at 175.

16. XIANFA [Constitution] art. 67, secs. 11, 124 (1982) (P.R.C.), translated in I STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 821204 (1987). The Legal Official Law strengthens the position of legal personnel somewhat by establishing criteria for removal. However, the criteria are sufficiently broad and vague to support dismissal for almost any reason. Legal Official Law, *supra* note 14, arts. 8(3), 13.

17. Yang, *supra* note 8, at 28.

18. Legal Official Law, *supra* note 14, arts. 4(6), 9.

19. E.g., Regulations of the PRC on Security Administration and Punishment (adopted Sept. 5, 1986), translated in III STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 860905 (1990).

public organizations or individuals,"<sup>20</sup> adjudicatory organs are not free from the influence of the CCP, the NPC or the Standing Committee.<sup>21</sup> Despite recent legal reforms intended to bring about a rule of law system, the CCP still maintains its control over the work of the adjudicatory organs. As described by Qiao Shi, Secretary of the Central Political and Legal Commission of the CCP, "[b]asic court functions are to independently hear various cases within the legal framework and *under the party's leadership*."<sup>22</sup> Any attempt by a legal official to claim independence from the CCP would be tantamount to a counterrevolutionary act.

The CCP exercises supervision through a hierarchical structure, with the CCP at the top dictating overall policy. The NPC and Standing Committee supervise the Supreme People's Adjudicatory Organ,<sup>23</sup> which, in turn, supervises lower adjudicatory organs, which, in turn, supervise adjudicatory organs below them.<sup>24</sup> The Supreme People's Adjudicatory Organ is directly responsible to the NPC and the Standing Committee, and the lower adjudicatory organs are responsible to the organs of state power that created them. The lack of judicial independence is further evident in the fact that adjudicatory organs must submit annual work reports to the supervisory organs. These reports describe the year's adjudicatory work and plans for the next year.<sup>25</sup> Therefore, from the Chinese point of view, the CCP, the NPC, the Standing Committee and the lower people's congresses do not *interfere* with the judicial process; they *direct* or *guide* the adjudicatory organs, just as the Supreme People's Adjudicatory Organ *directs* and *guides* the lower-level adjudicatory organs.

Nonetheless, even some Chinese scholars recognize that supervision constitutes interference with adjudicatory independence. As one Chinese commentator describes it: "[administrative] interference comes mainly from two sources: One, the judicial committee and the leaders within the court system . . . . Two, leaders of certain administrative departments put pressure on judges" in certain cases.<sup>26</sup> The author frankly concludes, "it is

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20. XIANFA art. 126 (1982) (P.R.C.); Organic Law of the People's Courts of the People's Republic of China, adopted July 1, 1979, art. 4, *translated in* 2 LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1983-86), at 39 (1987) [hereinafter Adjudicatory Organ Organization Law]. See *infra* text and accompanying notes 56-67 for a discussion of the *Xianfa*.

21. Legal Official Law, *supra* note 14, art. 8(2) (only bars interference from administrative organs, social groups and individuals). The Standing Committee is the highest organ under the NPC. It meets every two months while the NPC meets once a year. The Standing Committee has, *inter alia*, power to make law, interpret the *Xianfa* and national-level laws, and supervise state organs.

22. Liu Zhenying & Sun Benyao, XINHUA (Beijing), Jan. 10, 1992, *translated in* F.B.I.S.-CHI-92-008, Jan. 13, 1992, at 27-28 (emphasis added).

23. XIANFA art. 67, sec. 6 (1982) (P.R.C.).

24. *Id.* art. 127.

25. For example, the 1991 Supreme People's Court Work Report reported on its major accomplishments and set out goals for 1992, such as "attending to reform and opening on the one hand and to cracking down on crimes on the other." Report on the Work of the Supreme People's Court delivered by Ren Jianxin, President of the Supreme People's Court at the Fifth Session of the Seventh NPC on Mar. 28, 1992, XINHUA, Apr. 6, 1992, *translated in* F.B.I.S.-CHI-92-070-S, Apr. 10, 1992, at 8, 13-14.

26. Yang, *supra* note 8, at 28-29.

very difficult for [legal officials] to exercise independent judicial power and even more difficult for them to have judicial freedom."<sup>27</sup> Although the Legal Official Law now forbids administrative organs from exercising influence over legal officials,<sup>28</sup> enforcement will be difficult given the low status of the adjudicatory organs and the tremendous power wielded by bureaucracies in China.

Judicial committees will continue to interfere with the work of adjudicatory organs through their exercise of adjudicatory powers.<sup>29</sup> Judicial committees decide important or difficult cases collectively before trial and the subordinate adjudicatory organs are bound to enforce the committee's decisions.<sup>30</sup> Two legal officials of the Supreme People's Adjudicatory Organ describe the committee's job thusly:

These committees, instead of trying cases directly, first discuss and then make decisions on the most important or difficult cases handled by collegiate benches of judges. The collegiate benches are obliged to carry out the decisions by the judicial committee. . . . The judicial committee exercises collective leadership over the judicial activity within each people's court. Members of the judicial committee are appointed or dismissed by the standing committee of the people's congress at the request of the president of the court.<sup>31</sup>

In ordinary cases that do not require direct decisionmaking by a judicial committee, "the court president or the chief judge of the relevant division of the court" and, in certain situations the judicial committee, must, nonetheless, pre-approve the decision.<sup>32</sup> Adjudicatory organs at the lower levels, where almost all cases are heard, have very little judicial-type power. They are limited to administering law as received and are not empowered to interpret the law or question its appropriateness.<sup>33</sup> Thus, China's civil law courts, neither have the institutional independence of European civil law courts nor the individual independence of judges in common law courts.

Fifth, legal officials are not expected to, and do not, remain independent from the pre-trial process or from the parties or lawyers involved in cases before them. In criminal and civil cases, legal officials are authorized

27. *Id.* at 29.

28. Legal Official Law, *supra* note 14, art 8(2).

29. Adjudicatory Organ Organization Law, *supra* note 20, art. 11 (function is "to sum up judicial experience and to discuss important or difficult cases and other issues relating to the judicial work").

30. *Id.*; Zhonghua Renmin Gongheguo Xingshi Susongfa [Criminal Procedure Law of the People's Republic of China], adopted March 17, 1996, art. 149, *reprinted in* RENMEN FAYUAN BAO [PEOPLE'S LEGAL DAILY], Mar. 26, 1996, at 1, col. 1 [hereinafter Criminal Procedure Law].

31. Zhang Min & Shan Changzong, *Inside China's Court System*, BEIJING REV., Nov. 5-11, 1990, at 15, 17.

32. ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 120 (1992). The judicial committee decides even quite simple cases. I attended the trial of a simple assault case that the legal officials turned over to the judicial committee.

33. However, see *infra* note 97 and accompanying text.

to conduct their own investigations and to discuss cases with parties, witnesses and/or counsel for one side without the presence of representatives from the other side.<sup>34</sup> According to the more constrained Chinese definitions of *independent* and *impartial*, the legal officials are engaging in mutual assistance that does not interfere with their ability to render impartial decisions. Not surprisingly, legal officials' ability to meet with parties can easily lead to corrupt practices. To offset their low salaries and increase their prestige, many legal officials long ago abandoned any attempt to act impartially. Instead, they often require parties to hold lavish banquets for them before the trial begins.<sup>35</sup> The problem is so serious that the Legal Official Law specifically outlaws accepting gifts or attending banquets.<sup>36</sup>

*Duli*, therefore, does not mean independence from the executive or legislative branches or from the CCP; neither does it mean impartiality, in the common law sense. It simply means the ability to adjudicate within the parameters set by the supervisory organs. It amounts to little more than investigating, hearing testimony,<sup>37</sup> and mechanically applying (but rarely questioning) a pre-determined outcome.

### 3. *The HKSAR Judiciary*

The Basic Law appears to ensure the continued independence of the HKSAR judiciary. It contains an assurance that "[t]he courts of the [HKSAR] shall exercise judicial power independently, free from any interference."<sup>38</sup> Specific provisions support an independent judiciary through judicial immunity from lawsuits,<sup>39</sup> merit-based judicial appointments by the Chief Executive upon the recommendation of an independent commission,<sup>40</sup> judicial removal only for cause,<sup>41</sup> and no changes in seniority or

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34. Criminal Procedure Law, *supra* note 30, art. 43; Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law of the People's Republic of China], adopted Apr. 9, 1991, arts. 64-65, *translated in* 5 CHINA LAW AND PRACTICE 15 (June 17, 1991). I was once present when the attorney for the defendant met a legal official both before and after the trial to discuss the case and make small talk. We were the only persons present in the room.

35. For example, while teaching in northern China, I asked a student about her experience working for a law firm over the summer. She replied that she had never eaten so many bear paws (i.e., attended so many banquets) in her life. The banquets had been hosted by the firm's clients for adjudication personnel before trial. Litigants failing to hold banquets experienced delays and possible adverse outcomes.

36. Legal Official Law, *supra* note 14, art. 30(12).

37. The 1996 revised Criminal Procedure Law adopted, for the first time, the principle of presumption of innocence, or at least the lack of presumption of guilt, before trial. Criminal Procedure Law, *supra* note 30, art. 12 ("Until the court reaches a decision, no one may be determined to be guilty."). Presumably, if the defendant's guilt or innocence can only be determined during trial, then legal officials will play a greater role in hearing and determining evidence. The new law will have no impact upon the quasi-judicial roles of the CCP and the judicial committees.

38. Basic Law, *supra* note 1, art. 85.

39. *Id.*

40. *Id.* arts. 88, 92.

41. *Id.* art. 89.

pay.<sup>42</sup> Unfortunately, the promises cannot, by themselves, ensure preservation of a truly independent judiciary until Hong Kong and China reconcile the meanings of the words *independent* and *duli*.

The wide gulf separating the common law and Chinese interpretations of the phrase *judicial independence* can only have an adverse impact upon the HKSAR judiciary. The gulf will be revealed in the day-to-day work of the judiciary as cases are adjudicated and laws interpreted. First, as discussed in greater detail later,<sup>43</sup> the judiciary will be forced to share much of its present power with the Standing Committee. Second, ambiguous, poorly drafted language in the Basic Law will cause tremendous difficulties for the judiciary as it will force judges to ask a new non-common-law question—how exactly does this provision affect the court's competence and jurisdiction?

Chinese legal experts have difficulty, however, understanding how the division of power between the courts and the Standing Committee will affect judicial independence. For example, Wu Jianfan, an influential legal advisor to the Chinese government on Hong Kong,<sup>44</sup> believes Hong Kong people have no reason to fear Standing Committee interference with HKSAR judicial powers because the Standing Committee will only have power to *interpret* the Basic Law's meaning in certain areas and will not itself *apply* the law.<sup>45</sup> Another Chinese scholar, Zheng Yi, also confines the meaning of *judicial independence* to freedom from interference in deciding the outcome of cases.<sup>46</sup> Neither Wu nor Zheng recognizes that transfer to the Standing Committee of judicial power to interpret the law means the loss of common law judicial independence.

In the view of these mainland writers, the HKSAR courts will be independent because, even though they will have to share their powers with the Standing Committee, they will be free to decide how to *apply* laws in all cases and how to *interpret* the Basic Law in many or most cases. From the Chinese perspective, this position is unassailable, as the HKSAR courts will exercise more power than do China's adjudicatory organs and will theoretically be free from CCP and central government control. However, Wu's

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42. *Id.* art. 93.

43. See discussion *infra* Part II.C.

44. Wu is a member of the Basic Law Drafting Committee, the Preliminary Working Committee and the Preparatory Committee. The last two committees advise the Chinese government on transitional issues. The Preparatory Committee was established by the Standing Committee in accordance with the Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region, adopted Apr. 4, 1990. It is composed of Hong Kong and mainland Chinese representatives. The Preliminary Working Committee operated prior to the formation of the Preparatory Committee.

45. Wu Jianfan, "Yiguo Liangzhi" de Falü Baozheng—Tan Zhongyang yu Xianggang Tebie Xingzhengqu de Guanxi [A Law Safeguarding One Country, Two Systems: A Discussion Concerning the Relationship Between the Central Government and the Hong Kong Special Administrative Region], 13 ZHONGGUO FALÜ KEXUE [CHINA L. SCI.] 15, 19-20 (1990).

46. Zheng Yi, Xianggong Tebie Xingzhengqu de Sifa Tizhi [The Judicial System of the Hong Kong Special Administrative Region], in YIGUO LIANGZHI YU XIANGGONG JIBENFALÜ ZHIDU [ONE COUNTRY, TWO SYSTEMS AND HONG KONG'S BASIC LAW SYSTEM] 299, 310-311 (Xiao Weiyun ed., 1990) [hereinafter ONE COUNTRY, TWO SYSTEMS].

and Zheng's statements are particularly worrisome because they come from Chinese legal scholars who claim to understand Hong Kong's legal system and whose opinions (especially Wu's) about China's Hong Kong policy are influential. Yet, neither scholar is capable of analyzing the HKSAR judiciary on its own terms. Each of them perceives it through the lens of the Chinese legal system and fails to recognize that the Chinese definition of *independence* is entirely inconsistent with common law tradition. They are apparently ignorant of the fact that common law courts interpret for many reasons, not just for the purpose of determining whether a law is appropriate in a particular case and how it should be applied to the parties.

The struggle over the definition of *independence* came to the fore in the heated debate about the composition of the Court of Final Appeal (CFA), which will be the HKSAR's highest court. The Basic Law permits "judges from other common law jurisdictions" to sit on the CFA but is silent as to the number who can sit at any one time.<sup>47</sup> People in Hong Kong welcome this silence because it allows for the flexibility, which they consider essential, to protect the independence of the judiciary and to retain investors' confidence in the legal system. Unfortunately, the Chinese and British governments eliminated this flexibility in a secret deal to permit only one judge from abroad to sit on the CFA. When the Hong Kong Governor presented the Legislative Council (Legco) with a CFA bill containing a provision providing for only one non-local judge, the legal community, legislators and the public were outraged by the terms of the secret deal. Nonetheless, Legco was forced, as a practical matter, to capitulate to the terms of the secret deal because the Chinese are adamantly opposed to any other formula. No other version would have received the governor's approval and Legco has no power to override the governor's action.<sup>48</sup> Legco had no choice but to pass the bill.

The demand to restrict foreign judges came in response to China's recent realization that *independence of the judiciary* in the common law context does not mean *duli*. Not only do Chinese officials consider the presence of even one expatriate judge on the CFA to represent the continuation of colonial influence, but they also fear that a truly independent CFA would itself constitute a threat to China's sovereignty over the HKSAR. China believes it has already conceded an enormous amount of sovereignty over HKSAR affairs by permitting the HKSAR to have its own final court of appeals and by agreeing to the presence of even one expatriate judge. To the Chinese, these concessions alone mean the region's judiciary will be more "independent" than any other judicial organ in China. From the Hong Kong perspective, however, there is no consolation in the knowledge that the present independent judiciary will remain *more* independent than the Chinese adjudicatory organs when it will also become *less* independent

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47. Basic Law, *supra* note 1, art. 82.

48. Hong Kong Letters Patent, app. I (1991) (L.N. 201/91), arts. X, XI [hereinafter Letters Patent].

than it is now. China sees a glass half full; Hong Kong sees a glass half empty.

The struggle over the definition of the term *independent judiciary* is brought into even sharper focus in the following analyses of the Basic Law and its potential impact on judicial review, final adjudication and case law. These are all potential flashpoints that will, if not resolved soon, surely lead to misunderstandings and friction after 1997. The outcome could alter the nature of the judiciary in significant and, often, unexpected ways.

## B. The Status of the Basic Law

One area in which the differences between the Chinese and Hong Kong views are submerged in language is in discussions concerning the legal status of the Basic Law. The resolution of these differences will directly affect the post-1997 level of judicial independence. The most basic issue, the status of the Basic Law, is still unresolved. The Basic Law will be the highest law in the HKSAR. However, the Chinese and British Hong Kong governments have yet to clarify the ambiguous status of this socialist civil law document within the common law context. Each side defines the Basic Law in the terms with which it is most familiar, assuming that the other side is using the same point of reference and the same legal vocabulary. Hong Kong legal experts and politicians refer to the Basic Law as the HKSAR's "mini-constitution."<sup>49</sup> The Chinese categorize the Basic Law as a *fangzhen* or *fangzhen zhengce* (basic indicator policy).<sup>50</sup> The difference between the two interpretations is never brought to the foreground for clarification and the consequences are far from being merely academic. At stake is the very nature of the Basic Law—hence the nature of Hong Kong's post-1997 legal system.

### 1. Hong Kong's Common Law Constitution

From the Hong Kong perspective, the territory's highest law is properly a constitution. Hong Kong's colonial constitution sets out the form of government in the colony, the powers of the three branches of government and the relationship between the Hong Kong and British governments. It is found in the Letters Patent, the Royal Instructions, an abstract constitution consisting of laws and instruments having constitutional effect, and unwritten practices or conventions that limit or direct the manner in which the government exercises its power.<sup>51</sup> The conventions are especially

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49. See, e.g., Trevor M. Morris, *Some Problems Regarding the Power of Constitutional Interpretation under Article 158 of the Basic Law of the Hong Kong Special Administrative Region*, 21 H.K. L.J. 87, 87 (1991).

50. See, e.g., Xiao Weiyun, *The Relationship between the Constitution of the People's Republic of China and the Basic Law of the Hong Kong Special Administrative Region*, in ONE COUNTRY, TWO SYSTEMS, *supra* note 46, at 109.

51. Letters Patent, *supra* note 48; Hong Kong Royal Instructions, app. I (1991) (L.N. 202/91) [hereinafter Royal Instructions]. See PETER WESLEY-SMITH, I CONSTITUTIONAL & ADMINISTRATIVE LAW IN HONG KONG 4-7, 56-81 (1987); NORMAN MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG 54-63 (5th ed. 1991).

important as "they are the political ethics of the constitution."<sup>52</sup> Deviations from the written or abstract portions of the constitution are rare because common law constitutional principles are deeply ingrained in the Hong Kong legal and political establishment.

The non-administrative portions of the constitution are directly enforceable in court.<sup>53</sup> However, courts have rarely been called upon to exercise their judicial review powers because the constitution is primarily concerned with the operation of government and does not contain any rights provisions. Hong Kong does have a Bill of Rights Ordinance (BRO)<sup>54</sup> though, which, although technically an ordinary piece of legislation, is similar in effect to a constitutional bill of rights. Until midnight June 30, 1997, it is enforceable in court against all laws, even future laws, and against the government,<sup>55</sup> but it is inapplicable in the private sector.

## 2. *China's Xianfa*

The *Xianfa*<sup>56</sup> is China's highest law and, accordingly, is translated into English as "constitution." The *Xianfa* is structurally similar to a common law constitution in that it establishes branches of government, regulates the relationship between different branches of government and sets out the relationship between the public and the government.<sup>57</sup> However, it is fundamentally distinguishable from Hong Kong's constitution because it is merely a "semantic" constitution,<sup>58</sup> "seems to bear no relation to the actual government of China,"<sup>59</sup> and is overtly political. A semantic constitution has no independent legal authority; it is a programmatic set of policies that may be codified into domestic legislation over time as conditions permit.<sup>60</sup> Provisions, such as the rights (more accurately, privileges) of speech, press, assembly, association, etc.,<sup>61</sup> become law only when given effect through national legislation.<sup>62</sup> In the absence of national legislation, rights (privileges) do not exist. In one respect the *Xianfa* does have some legal effect: if a conflict exists between the *Xianfa* and certain other laws, the Standing Committee can declare the other law "unconstitutional," hence invalid.<sup>63</sup> This should not be confused with common law judicial

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52. WESLEY-SMITH, *supra* note 51, at 7. It is possible that the conventions will disappear in 1997 along with the Letters Patent and Royal Instructions.

53. *Id.* at 11, 68-69.

54. Hong Kong Bill of Rights Ordinance, No. 59 (1991) (H.K.) [hereinafter Bill of Rights Ordinance].

55. See *infra* text accompanying notes 87-90.

56. *Xian* is translated as "constitution" or "statute" and *fa* as "law." Pronounced "shee-ann fah."

57. XIANFA arts. 2, 3, 57-133 (1982) (P.R.C.).

58. CHEN, *supra* note 32, at 41.

59. William C. Jones, *The Constitution of the People's Republic of China*, 63 WASH. U. L.Q. 707, 710 (1985).

60. See CHEN, *supra* note 58, at 46.

61. XIANFA ch. II (1982) (P.R.C.).

62. See CHEN, *supra* note 58, at 46.

63. XIANFA art. 67, secs. 7, 8 (1982) (P.R.C.).



review in which a *litigant* can argue that application of a particular law to her or him is unconstitutional.

Next, real political power is held by the CCP, not the officials and institutions stipulated in the *Xianfa*. For example, until several years before his death, Deng Xiaoping controlled the CCP, and hence the government, even though he had not held any official government post for a number of years. Lastly, the *Xianfa* is similar to the Soviet-style constitution "in the presence of ideological statements and the prominence of economics."<sup>64</sup> The most important function of all *xianfa*, argues Professor Jones, is their political function: "the adoption of a constitution is a signal that a significant change has taken place in the government or in society, and that it is conceived to be long-lasting"<sup>65</sup> and "tend[s] to show the direction that their promulgators plan to take in governing China."<sup>66</sup> For example, the NPC promulgated the 1982 *Xianfa* to confirm that the political, social and economic transformations to a socialist-market economy, which commenced in 1979, would be long-lasting.<sup>67</sup>

In brief, the *Xianfa* is not law, in the common law sense. It stands in stark contrast to Hong Kong's common law (albeit colonial) constitution; therefore, it is fundamentally inappropriate and misleading to apply the English term *constitution* to China's *Xianfa*. The differences between Hong Kong's colonial constitution and China's *Xianfa* are so vast that even the term *Chinese-style constitution* is misleading. For this reason, I use the Chinese term *Xianfa* to avoid the natural tendency of English speakers familiar with common law constitutions to associate the Chinese *Xianfa* with a common law constitution.

### 3. *The HKSAR's Basic Law*

The Basic Law poses a special problem for the common law scholar as no neat common law constitutional category exists into which it fits. It is the domestic codification of an international agreement adopted by a socialist civil law legislature for application in a capitalist common law society. Hong Kong people assume it is a constitution. The Chinese government rejects that view and considers it to be a political document that expresses its Hong Kong policy.<sup>68</sup>

When Hong Kong people categorize the Basic Law as a "mini-constitution," they assume that the Basic Law will step into the legal vacuum created by the disappearance of the colonial constitution. They envision a constitution that litigants can, at least in part, invoke. In their view, the Basic Law is two-dimensional: its policy/administrative portions are not directly enforceable in court, while the rest of it is. For example, the public

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64. Jones, *supra* note 59, at 707.

65. *Id.* at 712.

66. *Id.* at 713.

67. XIANFA arts. 11 ("the individual economy of urban and rural working people . . . is a complement to the Socialist public economy."), 18 ("[f]oreign enterprises . . . and individual foreigners [can] invest in China.") (1982) (P.R.C.).

68. See *supra* note 50 and accompanying text.

expects courts to give the rights stipulated in the Basic Law the same force and effect as the rights contained in the BRO. The judiciary expects to remain competent to repeal legislation and to modify or overturn common law and rules of equity that do not conform with the Basic Law. It also expects to retain its ability to refer to international and common law precedents and principles.<sup>69</sup> The mini-constitution position finds further support in the fact that the Basic Law will be applied in a common law jurisdiction; therefore, common law rules of interpretation should prevail. According to this position, the Basic Law will have constitutional status within the HKSAR, notwithstanding its being a Chinese national law, because it will be the region's highest law.

This argument, however, leaves the Chinese at the border. China's views on the Basic Law cannot be dismissed as wrong simply because they are inconsistent with the common law position. After all, China alone is responsible for implementing the Joint Declaration in Hong Kong and the Basic Law is the instrument by which China will fulfill its international obligations. Obviously, China must meet its international law obligations. However, given the general language of the Joint Declaration, the nature of those obligations is open to debate. As stated at the outset, the Joint Declaration is intended to preserve Hong Kong's existing capitalist system and way of life. Therefore, ambiguities should be resolved in a manner consistent with the common law system wherever possible. Nonetheless, while it is proper to argue that the Basic Law is a mini-constitution, prudence dictates a more realistic approach that recognizes the fragile status of the post-1997 common law in the Basic Law. The Basic Law's mixture of socialist civil law language with common law language requires common law practitioners to become well-acquainted with the Chinese perspective and the Chinese legal system. They also must recognize that compromise will be a necessary component in the re-creation of the legal system.

In the Chinese legal hierarchy, the Basic Law is merely another, albeit special, national-level law. It is not a mini-constitution, as China is a unitary state having only one constitution. Unlike the United States, China is not a federation and does not permit local autonomous governments to enact local constitutions. Although the HKSAR will have more autonomy than any other region in China, it will not be a province or a state. Rather, it will be an administrative region.<sup>70</sup>

[A]n S.A.R. [Special Administrative Region] is not just an economic unit distinct from the rest of the country. It is a localized political-legal entity and a socio-economic reality differentiated from the general socialist system but forming part of a unitary state . . . . [This] implies that the two systems are not equal since the basic norm of the new order will be located within the

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69. On the other hand, Article 107, which requires the HKSAR to "follow the principle of keeping expenditure within the limits of revenues," Basic Law, *supra* note 1, art. 107, is an administrative directive, which private parties certainly will not have the ability to invoke against the HKSAR government. These provisions alone do not prevent the Basic Law from being a constitution as the Royal Instructions, which is part of Hong Kong's colonial constitution, contains similar unenforceable provisions.

70. *Xianfa* art. 31 (1982) (P.R.C.).

P.R.C.'s socialist system which article I of the P.R.C. Constitution uncompromisingly declares to be "the basic system of the People's Republic of China."<sup>71</sup>

From the Chinese perspective, the Basic Law is a non-enforceable statement of policy and an administrative directive from the central government to a regional subunit. It gives expression to China's Hong Kong *fangzhen zhengce*,<sup>72</sup> translated as "basic policies." As Chang points out, the English translation has "de-ideologized" the real meaning, which is politically charged.<sup>73</sup> A more accurate translation of *fangzhen zhengce* is "direction indicator policy." *Fangzhen* (which means "direction indicator") "prescribes the course of the task to be undertaken and regulates those aspects of the work which are perceived to be in dialectical relationship,"<sup>74</sup> and *zhengce* (which means "policy") "refers to the actual measures and procedures laid down by the C.C.P. to realize its political objectives."<sup>75</sup> According to its Preamble, the Basic Law "prescrib[es] the systems to be practised in the [HKSAR], in order to ensure the implementation of the basic policies [*fangzhen zhengce*] of the People's Republic of China regarding Hong Kong."<sup>76</sup>

In addition to implementing the Joint Declaration, the Basic Law is the concrete expression of China's "one country, two systems" policy. The policy was first enunciated in the Joint Declaration as a means to permit Hong Kong to rejoin the Mainland while retaining its existing economic, political, legal, and social institutions. The Basic Law is a tool for implementing the policy and for regulating the contradictions between Hong Kong's capitalist common law system and China's socialist civil law system as well as other contradictions inherent in the "one country, two systems" policy. Its basic practical function is to direct the HKSAR government in the administration of the HKSAR's social, political, economic and legal institutions in a manner that is distinct from the administration of similar institutions on the Mainland.

The Chinese drafters charged with the task of implementing the "one country, two systems" policy through the Basic Law may have intended the entire Basic Law to be programmatic and administrative. Given their unfamiliarity with Western constitutions, they may not even have thought about the question of whether or not the Basic Law is "law." They also may not have realized that contradictions exist between China's system of legislative review and the common law system of judicial review<sup>77</sup> because they misunderstood judicial review and so simply assumed the primacy of legislative review. Consequently, they gave the primary review powers to the Standing Committee.

71. Chang, *supra* note 6, at 107-08 (footnote omitted).

72. Pronounced "fong-jen jeng-tse."

73. Chang, *supra* note 6, at 101.

74. *Id.* at 102.

75. *Id.* at 103.

76. Basic Law, *supra* note 1, preamble (emphasis added).

77. See *infra* discussion accompanying notes 83-97.

Some Basic Law provisions could be interpreted to support the Chinese view that the Basic Law is a set of policies and not an enforceable common law constitution. For example, the Basic Law does not state explicitly that private citizens can ask courts to enforce any of its provisions. Indeed, several Basic Law rights provisions imply the opposite. The Basic Law, as well as the Joint Declaration and the *Xianfa*, contain wording such as rights are "protected by law," or "safeguarded by the laws."<sup>78</sup> In the Chinese context, these phrases mean that the legislature must implement the provisions in order for the enumerated rights to have legal effect. Without legislation, they are simply statements of policy. In fact, all *Xianfa* rights, with or without such language, need legislation to be effective. Consequently, it is probable that China considers the Basic Law provisions containing such language, if not all Basic Law rights' provisions, to be similar to *Xianfa* provisions, i.e., programmatic and unenforceable in the absence of legislation.

On the other hand, the Basic Law also supports the common law view that it is an enforceable constitution. At least some of the provisions must have legal effect because Article 158 empowers the Standing Committee to "interpret" the Basic Law and to delegate some of that power to the courts:

The power of interpretation of this Law shall be vested in the Standing Committee . . . . The Standing Committee . . . shall authorize the courts of the [HKSAR] to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the [HKSAR] may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee . . . through the Court of Final appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.<sup>79</sup>

The only reason courts will interpret the Basic Law under this Article will be to determine how to apply the Basic Law provisions in adjudicating concrete cases. Thus, logic dictates that Article 158 means that the Basic Law is, to some extent, legally enforceable. The principle of interpreting ambiguous provisions in favor of preserving the common law also dictates the same conclusion, as directly enforceable constitutions are part and parcel of Hong Kong's common law tradition.

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78. E.g., XIANFA arts. 40, 41 (1982) (P.R.C.); Basic Law, *supra* note 1, arts. 36, 39, 41; Joint Declaration, *supra* note 2, art. 3(5).

79. Basic Law, *supra* note 1, art. 158. The Standing Committee has yet to issue such authorization.

### C. Interpretation and Judicial Review in the Basic Law

Unfortunately, Article 158 does not provide any clue as to which Basic Law provisions will have legal effect or the *purpose* for which courts and the Standing Committee will be able to interpret those provisions. Instead, it leaves considerable room for disagreement. China's purpose in drafting the Basic Law was to solve the contradictions inherent in the "one country, two systems" policy, but the Basic Law falls short of the mark. For instance, the Basic Law does not resolve the contradiction between the common law rule that judges alone interpret the constitution and the socialist civil law rule that the legislature alone interprets the *Xianfa*. Nor does it resolve the contradiction between common law's directly enforceable constitutions and socialist civil law's programmatic *xianfa*.

One interpretation of Article 158 is that it confers all common law powers of interpretation on the courts. Common law courts generally interpret constitutions for the purpose of (a) determining which provisions have legal effect, (b) judicially reviewing ordinances and legislation, (c) judicially reviewing acts or omissions of government officials, and/or (d) determining how to apply a provision directly to litigants.<sup>80</sup> The discussion below addresses the question of whether or not all four forms of interpretation will remain unchanged and concludes that the Basic Law significantly diminishes the common law meaning of *judicial interpretation*.

#### 1. Legal Effect of the Basic Law

It is not possible to determine which provisions may or will be legally effective. The more important question at this point is which body—the HKSAR judiciary or the Standing Committee—is authorized by Article 158 to interpret the Basic Law to determine which, if any, provisions are directly enforceable. Four possible answers exist: the courts, the Standing Committee, the two bodies with divided responsibilities, or no response. The Article addresses each alternative in turn.

First, it is highly unlikely that China will allow the HKSAR courts to continue exercising monopoly powers of interpretation. Articles 17, 158 and 160, discussed below in detail, transfer considerable judicial powers of interpretation to the Standing Committee. Therefore, unless the NPC amends the Basic Law, Article 158 most likely will not confer monopoly power on the courts to determine which provisions, if any, are directly enforceable.

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80. Further complicating the issue is the question of how the HKSAR judiciary has competence to decide whether or not a particular Basic Law provision is within its own or Standing Committee jurisdiction when the question itself is a matter "concerning the relationship between the Central Authorities and the Region." Basic Law, *supra* note 1, art. 158. If, as indicated in Article 158, it is up to the courts to refer Basic Law provisions to the Standing Committee, then the courts are put in the anomalous position, out of necessity, of having to decide whether a particular Basic Law provision is a matter for HKSAR courts or the Standing Committee. This means they must interpret all Basic Law provisions in the first instance, not just the ones circumscribed by Article 158. For more on this conundrum, see generally Morris, *supra* note 49.

Second, the Chinese could argue that the Basic Law itself regulates the relationship between the central government and the HKSAR. Under this argument, if Article 158 dictates that the Standing Committee alone has the power to interpret the Basic Law on issues involving local-central relations, then the Standing Committee alone has the power to determine which Basic Law provisions are directly enforceable.

If China accepts (as it should) that some provisions of the Basic Law are directly enforceable, but insists that only the Standing Committee can decide which ones, then courts will neither know, nor have the power to determine, which provisions litigants can invoke in court. Every time a party presents a new Basic Law provision for enforcement, the presiding judge will have to refer the issue of direct enforceability to the Standing Committee, which will then consult with the Committee for the Basic Law (which has yet to be established), as required by Article 158. The Basic Law Committee will then meet, discuss and submit its views to the Standing Committee, which will consider the Committee's views and issue a response to the court. In the interim, the court (and litigants) will have no alternative but to wait for the Standing Committee's reply.

Once the Standing Committee rules that a provision has legal effect, courts will only have power to interpret and apply that provision in concrete cases. This is an unacceptable result and would constitute a serious breach of China's promise to permit Hong Kong to retain a high degree of autonomy. If China insists that Article 158 transfers all power to determine the direct enforceability of the Basic Law to the Standing Committee, it will strip Hong Kong of its present total autonomy in judicial matters.

Third, the Basic Law could be interpreted to divide power between the Standing Committee and the courts, according to the separate delegation of powers in Article 158. The courts could decide whether the Basic Law provisions within their scope of authority were directly enforceable, and the Standing Committee could do likewise for the provisions within its scope of authority. In order to make this arrangement explicit, the Standing Committee could approve it in writing. Article 158 requires the Standing Committee to authorize the HKSAR courts to interpret the Basic Law. The Standing Committee could include appropriate language in this authorization. While this is not an ideal solution, it would at least leave courts with many, although not all, of their present powers to interpret the enforceability of Hong Kong's constitution. Such an arrangement would also restore some confidence in the HKSAR and demonstrate China's intention to honor its commitment to allow Hong Kong to exercise a "high degree of autonomy."<sup>81</sup>

Fourth, the most likely scenario is one in which China takes no position at the outset. As a result, the first time a litigant attempts to invoke the Basic Law in an HKSAR court, the judge will have to decide the meaning of the word *interpret* in Article 158. The judge may apply common law principles and assume that Article 158 preserves the pre-1997 power of the

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81. Joint Declaration, *supra* note 2, art. 3, sec. 2.

courts to interpret the HKSAR's highest law. In so doing, the court will assume, in the first instance, that interpretation of Article 158 is within the court's powers, i.e., that Article 158 does not implicate the relationship between the central authorities and the HKSAR, and, thus, the Standing Committee need not interpret it. It will assume, in the second instance, that the word *interpret* gives HKSAR courts power to determine which Basic Law provisions have legal effect. The court's assumption of a power to interpret law would be justified because judicial exercise of such power is in complete accord with existing common law principles and practices.

This solution, although consistent with the common law system and with China's promises in the Joint Declaration, is unsatisfactory because, more than likely, the court's assumption of power would last only as long as the Chinese government does not feel threatened by the court's decisions. China could, and probably would, step in to object if courts began to declare provisions, especially the rights provisions, directly enforceable.

Some lawyers and legal scholars in Hong Kong have expressed to this author a preference for the fourth alternative because they do not believe the Chinese will step in once the court assumes power. However, this alternative requires that the first judge to hear such a case be totally committed to judicial review and able to withstand political pressure and Chinese approbation. Unfortunately, Hong Kong's judiciary is quite conservative and, until the recent passage of the BRO, has had little experience with judicial review. Most of its members are more familiar and comfortable with the British system in which Parliament is supreme than they are with playing the role of enforcer of rights. It is unrealistic to expect one judge, or even several judges sitting on the highest court, to solve what is essentially a political problem—that of the distribution of power between the regional judiciary and the central legislative authority.<sup>82</sup> Those who advocate that courts in a state-controlled special administrative region should determine the scope of judicial power must assume that, first, the Chinese will accept a truly independent judiciary and, second, HKSAR judges are prepared to render controversial decisions that may lead to confrontations with the sovereign power. I do not assume that either set of facts will exist. Rather, I suspect that, if China does not somehow clarify the meaning of Article 158 by July 1, 1997, judges will take very conservative positions to avoid confrontation with China. They will thus voluntarily curtail their own judicial powers.

## 2. Judicial Review of Law

Assuming that at least some Basic Law provisions are directly enforceable, the next question is whether Article 158 authorizes the HKSAR courts to interpret the Basic Law for the purpose of determining whether any laws are unconstitutional, and hence unenforceable.

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82. The HKSAR Court of Final Appeals will not be in a position comparable to the U.S. Supreme Court in *Marbury v. Madison*. 5 U.S. (1 Cranch) 137 (1803). That case involved a struggle for review power between two co-equal branches of government, which struggle the judiciary won.

### a. Judicial Review in Hong Kong

Hong Kong courts presently have judicial review power to "declare void and inoperative an ordinance or part of an ordinance on the ground that it is repugnant to an Act of Parliament"<sup>83</sup> or to the Letters Patent.<sup>84</sup> The more detailed Royal Instructions are "partly administrative in nature, though most clauses are clearly legislative and . . . in general, . . . have legal effect."<sup>85</sup> Thus, courts can also strike down laws they determine to be repugnant to the legislative portions of the Royal Instructions. The Crown has no power to determine any law's constitutionality. Legco adopts a bill, the governor signs it, the Crown gives its "assent," and the bill becomes law.<sup>86</sup> Rarely has the Crown refused to give its assent. Assent simply means that the bill becomes law; it does not include any determination by the Crown on the *constitutionality* of the bill, which is left for the courts to decide.

The scope of the courts' judicial review was expanded recently with the passage of the Bill of Rights Ordinance (BRO).<sup>87</sup> Although the BRO is a piece of ordinary legislation, it has been given constitutional effect. Two provisions in the BRO give courts power to declare void part or all of any pre-BRO ordinance or subsidiary legislation that the courts are unable to interpret in a manner consistent with the BRO.<sup>88</sup> A provision added to the Letters Patent gives courts power to void post-BRO laws for failure to comply with the BRO.<sup>89</sup> Together, these two sets of provisions give the BRO quasi-constitutional status at least until midnight June 30, 1997, when the Letters Patent lapses.<sup>90</sup>

### b. Legislative Review of Law in China

Officially, judicial review does not exist in China, as exclusive power to interpret the *Xianfa* is delegated to the Standing Committee.<sup>91</sup> The Standing Committee can only interpret the *Xianfa* for the limited purpose of determining whether it should declare a law invalid for repugnance.<sup>92</sup> It has never exercised this power because national laws adopted by the NPC or the Standing Committee are presumptively constitutional.<sup>93</sup> Appar-

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83. MINERS, *supra* note 51, at 58-59.

84. WESLEY-SMITH, *supra* note 51, at 11.

85. *Id.* at 68-69.

86. Letters Patent, *supra* note 48, art. XI.

87. Bill of Rights Ordinance, *supra* note 54.

88. *Id.* arts. 3, 4.

89. Letters Patent, *supra* note 48, art. VII, sec. 3.

90. The Hong Kong government and others have taken the somewhat disingenuous position that the BRO does not have a higher status than other ordinances. However, the sole reason the BRO is an ordinance rather than a part of Hong Kong's constitution is that the Letters Patent and Royal Instructions cease to exist at midnight June 30, 1997.

91. XIANFA art. 67, sec. 1 (1982) (P.R.C.).

92. *Id.* art. 5, art. 67, sec. 1.

93. The NPC enacted the *Xianfa* and the NPC and Standing Committee enact state-level laws. If the Standing Committee were to rule that a state-level law is unconstitutional, it would be ruling that a law passed by itself or the NPC is unconstitutional. It is illogical to assume that the body that either enacted the *Xianfa* or interprets the *Xianfa*



ently, ministry and bureau rules and regulations are also presumptively constitutional as the Standing Committee has never challenged any of them either. Furthermore, the Standing Committee has not delegated its power to interpret the *Xianfa* to any other body, not even the Supreme People's Adjudicatory Organ, to whom it has delegated power to interpret certain other laws.<sup>94</sup> Additionally, judicial review is a theoretical and factual impossibility because the adjudicatory branch is not a co-equal branch of government.<sup>95</sup> The Supreme People's Adjudicatory Organ is inferior to the executive and legislative branches, and thus it could never have the right to sit in judgment on the legality of laws passed by the NPC.

Virtually all legal scholars accept that Chinese adjudicatory organs never exercise any power of judicial review.<sup>96</sup> Nonetheless, one scholar suggests that lower-level adjudicatory organs can indirectly review local, but not national, laws. Liu Nanping cites the following example in a Supreme People's Adjudicatory Organ Notice to a lower-level adjudicatory organ: "If some local laws are found [by the lower-level adjudicatory organs] to contravene the Constitution, laws and administrative rules, they should be reported to the people's congress of the province and its standing committee."<sup>97</sup> Procedurally, this means that the provincial peoples congress or its standing committee then determines the constitutionality of the law and, in the interim period before the final decision, the adjudicatory organ cannot apply the law in the case before it. It also means that, if either body declares the law invalid, the law is unenforceable. The end result is the same as if the adjudicatory organ itself had declared the law invalid. The only difference is that the people's congress can disagree with the adjudicatory organ's interpretation, declare the law valid and require the court to enforce it. I am not aware of an instance in which a lower adjudicatory organ has exercised this power; however, the Notice is significant as it points the way toward a form of judicial review of laws in China and, perhaps, if necessary, in the HKSAR. Thus, despite its own lack of authority to engage in constitutional review and its consequent lack of power to delegate review powers to lower adjudicatory organs, the Supreme People's Adjudicatory Organ nonetheless has created a form of judicial review for lower adjudicatory organs.

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would ever pass a law capable of being interpreted by the Standing Committee as inconsistent with the *Xianfa*. Therefore, all laws passed by the NPC or Standing Committee are presumptively constitutional.

94. Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law (June 10, 1981), translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982, at 251 (1987) [hereinafter Interpretation Resolution]. The Interpretation Resolution also delegates interpretative authority to the State Council and the Supreme People's Procuratorate. *Id.*

95. XIANFA art. 63, sec. 4, art. 67, sec. 6, art. 128 (1982) (P.R.C.).

96. See, e.g., CHEN, *supra* note 32, at 46.

97. Liu Nanping, "Judicial Review" in *China: A Comparative Perspective*, 14 REV. SOCIALIST L. 245-46 (1988) (citing Notice on Strengthening Economic Adjudication, SEASONAL BULL. No. 1 (1986) ("The same Notice also contains a similar opinion concerning regulations in China's Autonomous Regions . . .")).

### c. Judicial/Legislative Review of Law in the HKSAR

The Basic Law could significantly diminish the power of Hong Kong's courts to review laws for constitutionality. At first glance, Articles 8 and 11 of the Basic Law appear to support continued judicial review. Article 8, which relates to colonial laws, provides that, "[t]he laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, *except for any that contravene this Law*, and subject to any amendment by the legislature of the [HKSAR]."<sup>98</sup> Article 11, which relates to post-handover laws, provides that, "no law enacted by the legislature of the [HKSAR] *shall contravene this law*."<sup>99</sup>

From the common law perspective, both Articles ensure the continuation of the common law system, including judicial review. However, from the Chinese perspective, Article 8 merely enumerates the types of laws that will be in effect, not which legal practices and judicial powers will exist. Chinese legal scholars might interpret the emphasized words in Article 8 to mean that colonial laws contravening the Basic Law shall not become HKSAR laws according to Article 160 procedures. They might further interpret Article 11 as a directive authorizing the legislative branch to enact only constitutional laws.

Article 160, which delegates review of colonial laws to the Standing Committee, provides a partial elucidation of the meaning of Article 8: "Upon the establishment of the [HKSAR], the laws previously in force in Hong Kong shall be adopted as the laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law."<sup>100</sup> In the process of its review, the Standing Committee will interpret the Basic Law and decide which colonial laws can become HKSAR laws. To this extent, at least, the Basic Law is legally enforceable.

Article 160's legislative review is consistent with Chinese practice; however, Article 160 is not clear as to whether Standing Committee review preempts judicial review. It is probably intended to delegate exclusive review powers to the Standing Committee because, unlike Article 158, it does not contain any language directing the Standing Committee to further delegate power to the HKSAR courts. Such legislative review is consistent with Chinese legal practice. While the language of Article 160 leans heavily toward such a restrictive interpretation of judicial review, if courts lose their power to review all of the colonial laws, then Article 160 violates the spirit, if not the meaning, of the Joint Declaration.

Fortunately, the inconclusive language of Article 160 and the inexplicable difference between Articles 158 and 160 also leave room for an interpretation that supports some form of concurrent review powers. Such power is what many in Hong Kong, either explicitly or implicitly, advocate.

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98. Basic Law, *supra* note 1, art. 8 (emphasis added).

99. *Id.* art. 11 (emphasis added).

100. *Id.* art. 160.

One view is that the quoted Article 160 language authorizes the Standing Committee to review colonial laws only in the abstract, leaving the courts to perform a second review in concrete cases. Another interpretation is that Article 160 does not eliminate judicial review of colonial laws altogether because it only gives the Standing Committee the power to *reject* laws that contravene the Basic Law but not to *decide* that HKSAR laws are constitutional. The judiciary alone would have that power. This interpretation is unsatisfactory as the quoted language specifically requires the Standing Committee to determine which colonial laws conflict with the Basic Law. Nonetheless, the two approaches are given some support by recent Chinese statements that the purpose of carrying out the Article 160 review is to amend or reject laws, such as "[t]he British 'letters patent,' the law instructions and certain laws like the British Nationality Act and certain laws [which refer to titles such as] Your Majesty [and] the Queen's Counsel."<sup>101</sup> Such a limited review makes it much easier to argue that Article 160 does not involve a comprehensive constitutional review of laws by the Standing Committee.

Furthermore, if the presumption in favor of preserving the common law system applies, then courts should be able to assume review powers. Unfortunately, it is unrealistic to expect the HKSAR courts to assume powers without some explicit indication from the Chinese either approving of Article 160 judicial review or endorsing the common law presumption principle. Otherwise, the potential for political conflict is too high to expect courts to act unilaterally. Without Chinese approval, judges will have to interpret the intention of the NPC when it adopted Article 160, and the intention of the Standing Committee when it reviewed colonial laws. They would have to assume the NPC, even though perhaps not intending to authorize judicial review, did intend to defer to the common law position on ambiguous Basic Law provisions. Additionally, courts will have no way of knowing whether or not the Standing Committee intended to leave any space within which a judge might be able to take a second look at the colonial law being challenged. They will have to assume the Standing Committee decision to allow the colonial law to become an HKSAR law either was not intended to bind courts in concrete cases or did not include a review for constitutionality.

For example, is a court prepared to use Article 27's<sup>102</sup> freedom of speech provision to strike down a draconian colonial law restricting freedom of speech even if the law has already been approved by the Standing Committee? Assuming Article 27 is directly enforceable, the court could apply it to protect speech rights in a case in which no law exists or a post-handover law is being challenged; however, it would face the Article 160 question if a colonial law is being attacked. I do not believe the court would strike down the law if there were even the slightest hint that the Chinese would object on Article 160 grounds. The only alternative would

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101. Jim Laurie, *The Future According to Lu Ping*, S. CHINA MORNING POST, May 30, 1996, at 15 (quoting Lu Ping).

102. Basic Law, *supra* note 1, art. 27.

be for the courts to avoid applying unconstitutional laws by ruling them inappropriate in each individual case. Avoidance is not the same as judicial review. Such a course is not an attractive solution because it is only a stopgap measure and the courts could not apply it in all cases. Nonetheless, if China forces a restrictive interpretation of Article 160 upon the judiciary, this may be the only available option.

Thus, even though courts could argue for judicial review powers consistent with the common law, they are unlikely to take such a bold step. More importantly, Hong Kong's regional courts are not well equipped to engage in such politically charged struggles for power, and, so, I do not see much hope for the judiciary to take a second look at colonial laws.

Article 160 poses an additional problem for common law and rules of equity. In order to fulfill its Article 160 responsibilities, the Chinese government has already commenced a review of all of Hong Kong's approximately 600 ordinances and almost 1,000 pieces of subsidiary legislation.<sup>103</sup> China will certainly not complete its review by the handover date. Additionally, the Chinese are not reviewing, nor have they ever indicated any intention to review, common law, rules of equity and customary law,<sup>104</sup> even though the Standing Committee has the power to review them since they constitute part of the laws of Hong Kong.<sup>105</sup> Mainland scholars and politicians appear not to grasp the fact that common law and rules of equity are as much *law* as is statutory law. Therefore, the question is not how the Chinese intended to deal with common law, rules of equity and customary law under Article 160, because it is apparent from the Basic Law that the Chinese did not *intend* anything. The question for the courts will be, instead, whether they should undertake judicial review of such (colonial) laws or refer the law in question to the Standing Committee.

Article 160 interjects further uncertainty into the common law. The second part of Article 160 states that "[i]f any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law."<sup>106</sup> The words *later discovered* can mean that colonial laws that become HKSAR laws either (i) are all assumed to be constitutional as of July 1, 1997, or (ii) are constitutional only if the Standing Committee specifically declares them to be constitutional as of July 1. In either case, the words *amended or cease to have force* would permit such laws to be enforced until some body declares them unconstitutional. However, Article 160 does not state whether the courts or the Standing Committee is authorized to "discover" the unconstitutional law. As discussed above, Article 160 only authorizes the Standing Committee to review and, unlike Article 158, does not provide for sub-delegation to the courts. Any attempt by the courts to assume such authority would be politically sensitive. Thus, unless and until the Chinese clarify the extent to which the Standing Committee will continue

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103. Rain Ren, *Beijing Will Undertake Law Review*, E. EXPRESS, Oct. 25, 1994, at 2.

104. Basic Law, *supra* note 1, art. 8.

105. *Id.*

106. *Id.* art. 160.

to exercise Article 160 review powers after June 30, 1997, the HKSAR court's competence to review colonial-era laws of questionable constitutional character remains unclear.

Xiao Weiyun, who headed the Basic Law Drafting Committee and continues to be a highly authoritative voice on the official Chinese view of the Basic Law, states that colonial laws discovered after 1997 to violate the Basic Law will be handled by the Standing Committee and Legco.<sup>107</sup> According to Xiao, the Standing Committee will not directly declare the laws invalid or amend them. It will send the offending law back to Legco which will decide whether to repeal or amend the law.<sup>108</sup> Xiao's solution splits the courts' power in half. The Standing Committee decides on the constitutionality, but Legco declares the law unenforceable. This procedure raises numerous jurisdictional and procedural issues. Does the Standing Committee alone have the power to decide whether a colonial law violates the Basic Law? What if the question arises during a trial? Must the court turn the question over to the Standing Committee? What happens if the Standing Committee decides that a law is contrary to the Basic Law and a court case at the time hinges on the existence of that law? Must the court wait until Legco formally repeals or amends the law before it can enter a judgment? Is the law effective in the time period between the Standing Committee decision and Legco action? What about common law, rules of equity and customary law? Is Xiao suggesting that only Legco will have the responsibility for repealing and amending non-statutory laws? At present, courts can modify or overrule common law and rules of equity, although Legco can overrule both common law and equity by passing a new law.

Courts, then, will have three choices when the constitutionality of an ambiguous colonial-era law is at issue: (a) they can refer the law to the Standing Committee for legislative review; (b) they can treat the law as valid and apply it even though the court, if operating within the common law tradition, would declare the law repugnant to the Basic Law; or (c) they can assume judicial review power over the law.

The first option is the least politically sensitive, but it poses a plethora of problems for the judiciary. It effectively requires a complete transformation of judicial practices and procedures during the course of adjudication. However, if Xiao is correct, this may be the only option for the courts. The second option is not much better, as it also destroys judicial independence and the principles underlying the common law system. If courts elect either of these two options, judges will be no different from Chinese legal officials. The third option, while consistent with the common law, is highly political. Hong Kong's conservative judges are unlikely to take any action that directly challenges Chinese authority.

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107. XIAO WEIYUN, XIANGGANG JIBENFA YU YIGUO LIANGZHIDE WEIDA SHIJIAN [IMPLEMENTING THE HONG KONG BASIC LAW AND ONE COUNTRY TWO SYSTEMS POLICY] 85 (1993).

108. *Id.*

The conclusion, then, is inescapable: the HKSAR courts will have to steer through uncharted waters and learn to navigate around dangerous legal and political whirlpools when called upon to interpret colonial-era laws (including, unfortunately, common law, rules of equity and customary law). Despite China's contentions of having solved the "one country, two systems" contradictions, the Basic Law provides very little guidance on how to handle a politically sensitive issue of local/central legal relations. In fact, it seriously complicates the operation of law in the HKSAR.

The court's ability to review new legislation is on somewhat more solid ground. An answer to the question of whether courts can interpret the Basic Law language "no law enacted by the legislature of the [HKSAR] shall contravene this law"<sup>109</sup> to include judicial review of new legislation is found in Article 17, which states in relevant part:

If the Standing Committee. . . , after consulting the Committee for the Basic Law of the [HKSAR] under it, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the Standing Committee may return the law in question but shall not amend it. Any law returned by the Standing Committee . . . shall immediately be invalidated. This invalidation shall not have retroactive effect, unless otherwise provided for in the laws of the Region.<sup>110</sup>

Both Articles 17 and 160 involve constitutional review of legislation. However, Article 17 limits the scope of the Standing Committee's competence to review while Article 160 does not. Wu Jianfan, a legal advisor to the Chinese government on Hong Kong legal affairs, agrees that Article 17 limits Standing Committee powers. "The central government will have nothing to say about inconsistent laws if they do not involve the central government."<sup>111</sup>

The negative inference one can draw from both Article 17 and Wu's statement is that the courts will have judicial review powers over all new laws that the Standing Committee cannot review under Article 17. The limitation on judicial review in Article 17 implies a division of review pow-

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109. Basic Law, *supra* note 1, art. 11.

110. *Id.* art. 17. Article 17 presents a further problem in that bills become effective when the legislature adopts them, but the Standing Committee, which is under no obligation to return bills within any particular time period, can repeal them. This raises the possibility that an unconstitutional law could be effective for a short period of time and then be repealed by the Standing Committee. The only solution is for Legco to include a provision that the bill will only become effective upon its entry into the Standing Committee record. Under the present system, bills signed by the Governor theoretically do not become effective until approved by the Crown. Letters Patent, *supra* note 48, art. XI. However, as the Crown never disallows any bills signed by the Hong Kong governor (who is, in any event, a servant of the Crown), bills always contain clauses permitting new laws to become effective immediately.

111. Wu Jianfan, *Fundamental Norms in the Relationship Between the Central Government of China and the Hong Kong Special Administrative Region*, 16 H.K. LIAOWANG [OUTLOOK], Apr. 16, 1990, at 26-27, translated in J.P.R.S.-CAR-90-057, at 69, 70 (F.B.I.S. July 31, 1990).

ers between the Standing Committee and the courts similar to the division of interpretation powers under Article 158. The only other interpretation, which is highly implausible, is that laws not involving the central government will not be scrutinized at all. The only logical and meaningful interpretation of Article 17 is that it permits courts to exercise judicial review powers of interpretation for the purpose of reviewing new laws not submitted to the Standing Committee for review.

Notwithstanding the reasonableness of this interpretation, the inconsistency between Articles 17 and 160 regarding review of laws is problematic. If the Chinese insist that Article 160 confers exclusive power to review all colonial laws on the Standing Committee, then the combination of Articles 17 and 160 will give rise to a system of judicial powers lacking in any logic or cohesiveness. Courts will be able to apply common law principles when interpreting *and* applying most *new* laws but unable to interpret and refer to common law principles when faced with *old* laws. The sole basis for the difference in judicial powers and judicial treatment of laws will be the new law/old law dichotomy demarcated solely by a date—July 1, 1997—rather than by a legal principle. The Basic Law gives no clue as to whether Articles 17 and 160 should be interpreted independently or consistently. One can only offer a conjecture at this point. The inconsistency could be due to a drafting oversight; however, oversight implies a desire for internal consistency, which is not evident anywhere in the Basic Law. It could also be that the Chinese, who are unfamiliar with the role of common law courts in interpreting legislation, simply copied the style of the *Xianfa* without any regard to problems that could arise later due to internal inconsistencies and imprecise language. The most likely explanation for the inconsistency is a political one. China drafted the provisions to give the new sovereign almost total control over the content of the HKSAR's laws. A restrictive interpretation of Articles 17 and 160 gives the Chinese control over all colonial laws and some post-handover laws.<sup>1</sup> Additionally, Article 45 gives the Chinese government indirect control over all new legislation through its power to appoint the Chief Executive, who will oversee introduction of new bills to Legco.<sup>112</sup>

China's desire to control the HKSAR's laws is already evident. Hong Kong recently witnessed a heated, and often hostile, debate between the Chinese and Hong Kong governments over the powers of the to-be-established Court of Final Appeals (CFA). As recently as 1995, during Sino-British discussions on establishment of the CFA, the Chinese reportedly told the British they do not want the CFA to have "power inquire into the

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112. Basic Law, *supra* note 1, arts. 62(5) (the government shall "draft and introduce bills, motions and subordinate legislation"), 48(3) (the Chief Executive shall "sign bills passed by the Legislative Council and . . . promulgate laws"), 74 (Legco members "may introduce bills . . . which do not relate to public expenditure or political structure or the operation of the government" and the Chief Executive must approve the introduction of "bills relating to government policies").

constitutionality of laws.”<sup>113</sup> Other reports refer ambiguously to the Chinese desire to settle the issue of the CFA’s “scope of judicial administration,” which presumably refers to jurisdiction.<sup>114</sup> Fortunately, the Hong Kong government did not include any restrictions on court jurisdiction or powers in its final bill to set up the CFA. Nonetheless, if the reports of China’s concerns about judicial powers are true, then it is not farfetched to imagine that China will take the narrowest possible view of Articles 17 and 160 in order to restrict, to the maximum extent possible, the courts’ ability to review laws.

### 3. *Judicial Review in the Bill of Rights Ordinance*

A second judicial review dispute exploded in late 1995 over the BRO. The dispute raises many issues requiring clarification prior to 1997, but the main disagreement revolves around the still-unarticulated issue of whether or not HKSAR courts will have power to review laws for constitutionality or for conflict with the BRO.

#### a. The BRO’s Pre-Handover Status

Prior to July 1, 1997, the BRO implements much of the International Covenant on Civil and Political Rights (ICCPR),<sup>115</sup> which Britain extended to Hong Kong on August 20, 1976. After July 1, Article 39 of the Basic Law authorizes the incorporation of ICCPR provisions into HKSAR law. Article 39 provides: “The provisions of the International Covenant on Civil and Political Rights, . . . as applied to Hong Kong shall remain in force and shall be implemented through the laws of the [HKSAR].”<sup>116</sup>

As previously explained,<sup>117</sup> the BRO also has a quasi-constitutional status until July 1, 1997, despite its being an ordinary piece of legislation. The Hong Kong government intended the BRO to comport with Article 39 of the Basic Law in order to minimize any possibility that the BRO might not withstand Standing Committee scrutiny under Article 160. As will be seen,<sup>118</sup> the attempt has failed primarily because the BRO has a broad scope and implements most of the ICCPR provisions Britain extended to Hong Kong in 1976. The broad scope of the BRO reflects the view of the Hong Kong government that the Article 39 phrase *as applied to Hong Kong* means the ICCPR as *extended to Hong Kong* in 1976 rather than to the extent it was actually *implemented in Hong Kong* prior to the BRO.

113. Sally Blyth, E. EXPRESS, May 3, 1995, at 1, reported in F.B.I.S.-CHI-95-085, May 3, 1995, at 71. They apparently still do not understand that lower courts *also* “inquire into the constitutionality of laws.”

114. Shi Qingbin, *Why Are the Sino-British Talks on the Court of Final Appeal Deadlocked?*, ZHONGGUO TONGXUN [CHINA NEWS], Apr. 23, 1995, translated in F.B.I.S.-CHI-95-078, Apr. 24, 1995, at 88; Chris Yeung & So Lai-fun, S. CHINA MORNING POST, Mar. 13, 1995, at 1, reported in F.B.I.S.-CHI-95-048, Mar. 13, 1995, at 104, 105.

115. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

116. Basic Law, *supra* note 1, art. 39.

117. See *supra* text accompanying notes 87-90.

118. See *infra* text accompanying notes 122-33.



### b. The Chinese Interpretation of Article 39

In contrast, Chinese officials interpret Article 39 quite narrowly. In China's view, the phrase *as applied to Hong Kong* means the extent to which the ICCPR was actually in effect in Hong Kong when the Joint Declaration was signed in 1984.<sup>119</sup> Unfortunately, prior to the BRO, Britain failed to implement all of the ICCPR provisions in Hong Kong, which is evident in the number of laws that courts have struck down since the enactment of the BRO. Support for China's static view of Hong Kong's law comes from the Joint Declaration phrase calling for "laws currently in force in Hong Kong [to] remain basically unchanged."<sup>120</sup> Lu Ping, Director of the Hong Kong and Macao Affairs Office, makes the Chinese position clear when he says, "The parts in the two human rights conventions [including the ICCPR] that have been applicable to Hong Kong . . . must be implemented through the local laws of Hong Kong."<sup>121</sup> Mr. Lu restricts Article 39 to those portions of the ICCPR that Hong Kong had actually enacted into law and not the entire ICCPR as extended by Britain to Hong Kong.

China's rulers expected the Joint Declaration to freeze the 1984 legal regime in time so they could take over a community restrained by the same repressive colonial laws that were available for use by Britain during its colonial tenure. The broad scope of the BRO directly confronts that view because it permits courts and the government to repeal numerous laws, such as reverse presumption laws that place the burden of proof on criminal defendants and draconian colonial laws that suppress civil rights. The loss of these powerful police enforcement tools provoked Chinese officials to voice concerns about a potential breakdown of law and order in Hong Kong and firmly entrenched Chinese opposition to the BRO.

Consequently, if any HKSAR court declares a law invalid under the BRO on the grounds that the ICCPR, as signed by the prior colonial ruler, is the baseline for interpreting Article 39, China will certainly interpret the declaration as an act of defiance challenging its sovereignty. The court's declaration would be tantamount to binding China to an international covenant it has never signed and, even worse, binding it according to the terms agreed to by the British colonial government. China will definitely not countenance a judge (possibly even an expatriate one) defining the extent to which it is "bound" to the terms of an international human rights instrument.

### c. The Chinese View of Judicial Review in the BRO

The Chinese also attack the BRO for its "overriding" effect, claiming it

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119. See, e.g., May Sin-mi Hon, *Tung's Office to Hold Constitution on Rights Laws*, S. CHINA MORNING POST, Mar. 21, 1997, at 6 (HKSAR Chief Executive designate Tung Chee-hua "considers 'previously in place' as meaning 1984 when the Joint Declaration was signed.").

120. Joint Declaration, *supra* note 2, art. 3, sec. 3.

121. XIA YUHUA, ZHONGGUO XINWENSHE [NEW CHINA NEWS AGENCY], May 6, 1994, translated in F.B.I.S.-CHI-94-088, May 6, 1994, at 74 (emphasis added). Note the phrase *applicable to* could also have been translated as "applied in."

would be above the Basic Law.<sup>122</sup> They brand the BRO “queer” and “absurd” because it is so different from other laws, i.e., it provides for judicial review.<sup>123</sup> Their complaint stems primarily from an unwarranted, but understandable, fear of a “no holds barred” judiciary.<sup>124</sup> Their fear of judicial review powers is understandable when one realizes that there is no judicial review in China.<sup>125</sup>

Accordingly, the Standing Committee has approved the “repeal” of BRO Articles 3 and 4, which authorize review of pre- and post-BRO laws.<sup>126</sup> Constitutional support for judicial review of post-BRO laws will also end on July 1, 1997, with the demise of the Letters Patent. Thus, the BRO will simply be another HKSAR law on July 1.

Nonetheless, the Hong Kong Bar Association argues that, “with or without the [BRO], . . . a law [contrary to the BRO] would also be inconsistent with Article 39 of the Basic Law . . . and would be unconstitutional and liable to be declared so by judges exercising powers of final adjudication under Article 19 of the Basic Law.”<sup>127</sup> This position rests on two unexamined assumptions: first, the Basic Law (or at least Article 39) is directly enforceable; and second, the phrases *independent judicial power* and *final adjudication* in Article 19 give courts power to judicially review laws for constitutionality.

The first assumption, that Article 39 is directly enforceable, is questionable because, as previously discussed,<sup>128</sup> the direct enforceability of Basic Law provisions has yet to be clarified. However, with regard to Article 39, the Chinese position is clear. During the public debate over the BRO, Chinese officials maintained two inconsistent (from the common law perspective) positions. They declared that, on the one hand, the BRO is unnecessary because the Basic Law provides sufficient rights protections,<sup>129</sup> which implies that Article 39 and other rights provisions in the Basic Law are directly enforceable. However, on the other hand, they also refuse to allow the ICCPR to be directly enforceable through Article 39. Lu

122. Jimmy Cheung, *Heavyweights Sent to Fix Bill*, E. EXPRESS, Oct. 29, 1995, at 1.

123. See, e.g., Jimmy Cheung, *Ordinance is Illegal, Says PWC*, E. EXPRESS, Oct. 28-29, 1995, at 2.

124. Wing Kay Po, *Editor Reviews Debate History*, E. EXPRESS, May 3, 1995, at 15, reported in F.B.I.S.-CHI-95-085, May 3, 1995, at 72, 73.

125. See *infra* discussion accompanying notes 91-97.

126. DA GONG BAO (Hong Kong), Mar. 24, 1997, at B3. Basic Law Article 160 does not authorize the Standing Committee to modify colonial laws; it merely empowers the Standing Committee to declare laws “to be in contravention of” the Basic Law. *Id.* Repeal of some provisions of a law is no different from amending the law—both actions alter the law’s substance.

127. *A Bill to Protect the People’s Rights*, E. EXPRESS, Dec. 5, 1995, at 10. See Mary Luk & Leo Law, *Law Society Calls PWC to Order on Ordinance*, E. EXPRESS, Oct. 27, 1995, at 2.

128. See *supra* Part I.C.1.

129. See, e.g., Jimmy Cheung & Sally Blyth, *Bill of Rights Controversy Spreads*, E. EXPRESS, Oct. 19, 1995, at 1 (quoting China’s Vice-Foreign Minister, Jiang Enzhu: “Basic Law has provided enough protection for the people of Hong Kong of their rights”); Cheung, *supra* note 123, at 2 (quoting Shao Tianren, Preliminary Working Committee, Legal Subgroup convener: “Bill of Rights was unnecessary because the Basic Law safeguards human rights after 1997”).

Ping stated quite emphatically that the Basic Law "provides full legal safeguards" but that "the two human rights conventions cannot be directly applied to Hong Kong [and] [t]here was a consensus on this point when the Basic Law was drafted."<sup>130</sup> However, if the BRO is unnecessary and the Basic Law is the source of human rights protections, the only way the ICCPR could be applied would be through the direct enforcement of Article 39. Mr. Lu clearly rejects this interpretation. One is left wondering, then, just what the Chinese intended when they agreed to include Article 39. Lastly, it is worth noting in passing that Mr. Lu's statement also means that the Basic Law drafters, who merely wrote but did not enact the Basic Law, have power to pre-empt the right of the Standing Committee and the courts to "interpret" the Basic Law. If the drafters do have this power, then Article 158 of the Basic Law should be rewritten to delegate interpretation powers to the drafting committee.

Before July 1, 1997, no conflict exists between the BRO and Hong Kong's colonial constitution, because the constitution does not contain any rights provisions that could conflict with the BRO. Nor do conflicts exist in countries having written common law constitutions containing rights provisions because constitutional rights are directly enforceable and superior to all other laws. The problem will arise in the HKSAR because the Basic Law is modeled after the *Xianfa* and, consequently, incorporates inconsistent *Xianfa* concepts, such as programmatic, judicially unenforceable constitutional provisions.

The second assumption, that Article 19 gives courts judicial review power, is also problematic as it is constructed around common law principles of judicial independence and constitutionalism that the Basic Law threatens. Article 19 states that "[t]he [HKSAR] shall be vested with independent judicial power, including that of final adjudication."<sup>131</sup> Neither *independent judicial power* nor *final adjudication* is explicitly defined but partial definitions are found in Articles 17, 158 and 160. These three Articles strip the HKSAR courts of their power and independence.<sup>132</sup> They fundamentally alter the relationship between the regional courts and the central government, rendering it impossible for HKSAR courts to determine the precise meaning of Article 19.

Therefore, as the Standing Committee has repealed the judicial review provisions of the BRO, HKSAR judges will be under severe constraints mitigating against declaring any law unconstitutional on the basis of either Article 39 or Article 19. I do not believe that Hong Kong's judges will be willing to walk through the political minefield such a declaration would require. The problem is not a legal one so much as a political one which Hong Kong's common law courts are ill-equipped to handle. The Hong Kong and Chinese governments must resolve this issue.

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130. *XIA*, *supra* note 121 (emphasis added).

131. Basic Law, *supra* note 1, art. 19.

132. See *supra* Part I.C.1 and II.C.2.c.

Even if the Standing Committee had permitted the BRO to become HKSAR law without any alterations, the BRO could not have preserved the court's present monopoly on judicial review. Courts would still be forced to share BRO review power with the Standing Committee.<sup>133</sup> BRO review of legislation from two crucial time periods is involved: legislation enacted before the BRO and legislation enacted after the BRO. Each category will suffer a similar, though not identical, fate after the handover.

#### d. Review of Pre-BRO Laws

Courts will find it difficult, if not impossible, to review legislation enacted prior to the BRO, as the Standing Committee has stripped the BRO of provisions authorizing such review. In any event, this power would probably also disappear through the operation of Article 160 of the Basic Law because courts will probably be forced to declare that Article 160 only authorizes Standing Committee review of colonial laws. If courts fail to assume concurrent Article 160 review powers, then a Standing Committee declaration that certain colonial laws will become laws of the HKSAR is also a declaration that these laws do not violate Article 39. If the colonial law is not repugnant to the Basic Law, it is not repugnant to Article 39 of the Basic Law. It follows that, if the law is not repugnant to Article 39, it is not repugnant to the BRO either as the BRO draws the scope of its authority from Article 39. The BRO cannot have a broader scope than Article 39. Thus, even if the BRO were to remain intact at the handover, Article 160 would prevent courts from engaging in BRO review of any colonial laws approved by the Standing Committee.

Furthermore, colonial laws that are not reviewed under Article 160 by the Standing Committee by July 1, 1997 (the "left-over laws") would only be reviewable by the courts at great risk. If courts review left-over laws for compliance with the BRO, they will effectively be circumventing Standing Committee review under Article 160 because a BRO review is but a species of Article 39 review. Under the narrow interpretation of Article 160, only the Standing Committee is authorized to engage in Article 39 review of colonial laws. Even after a court's decision on a left-over law's BRO status, the Standing Committee could still assert Article 160 jurisdiction to re-review the colonial law and declare it repugnant to the Basic Law, hence to Article 39, hence to the BRO. It could also reinstate laws for non-repugnance.

If courts are unwilling to assume judicial review powers under Article 160, they will be bound to enforce colonial laws approved (or yet to be reviewed) by the Standing Committee whether or not common law principles or interpretations of the ICCPR from other jurisdictions would require the courts to declare the laws unenforceable for repugnance to the BRO. The problem lies in the nature of the BRO. It duplicates Article 39, is not a part of the constitution, is inferior to the Basic Law, and may not be used to override the Standing Committee's power under Article 160.

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133. Basic Law, *supra* note 1, art. 19.

#### e. Review of Post-BRO Legislation

The courts' power to review post-BRO legislation for repugnance to the BRO ends at midnight, June 30, 1997, with the demise of the Letters Patent.<sup>134</sup> However, courts might decide that Article 39 provides the necessary constitutional authority for review of all pre- and post-BRO laws. This interpretation would necessarily rest on erroneous assumptions about HKSAR judicial review. As previously discussed, it is unlikely that the courts will have any power to review any colonial legislation (either pre- or post-BRO) because that power is probably reserved exclusively to the Standing Committee under Article 160.<sup>135</sup> Furthermore, even if the Standing Committee were to decide not to interfere with the use of Article 39 to support judicial review of laws enacted post-handover, Article 17 limits the review to laws not reviewable by the Standing Committee.<sup>136</sup> At the most, then, courts might be able to review certain, if not most, new laws for compliance with the BRO.

In summary, even if the Standing Committee had not removed the BRO's judicial review provisions, the BRO would almost certainly not be available for review of pre-BRO colonial laws, probably not be available for review of post-BRO colonial laws and, if applicable at all to post-BRO laws, would at most be applicable to HKSAR laws not reviewable by the Standing Committee pursuant to Article 17. The result is that most of the courts' present BRO power to review laws will almost certainly die a natural death on July 1, 1997.

#### 4. Judicial Review of Executive and Administrative Acts

The next question is whether Article 158 of the Basic Law authorizes the HKSAR courts to interpret the Basic Law for the purpose of ruling on the constitutionality of executive and administrative acts. This form of judicial review is absolutely essential to the preservation of a rule of law system because it codifies the principle that no person, not even the highest member of the executive branch, is above the law. It is the difference between a rule of law system and a rule by law system.

##### a. Judicial Review of Executive and Administrative Branches in Hong Kong

The rule of law principle is firmly entrenched in Hong Kong's common law according to which the courts have power to:

restrain the Executive by the use of powers and procedures established under the Common Law, such as the issuing of a writ of *habeas corpus*. . . . They can also interpret the words of the *Letters Patent* to decide whether the Governor is entitled to act as he has done, and they could if necessary issue an injunction to forbid the Governor to act in this way.<sup>137</sup>

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134. See *supra* note 89 and accompanying text.

135. See *supra* Part II.C.2.c.

136. Basic Law, *supra* note 1, art. 17.

137. MINERS, *supra* note 51, at 58.

The power extends to the entire executive branch. The primary tool the judiciary uses to control administrative abuse of power is the *ultra vires* doctrine:

Ultra vires . . . is the principal legal means by which the Rule of Law is enforced against the executive branch of government. Officials must operate within their powers. Should they fail to do so they are subject to judicial review; their decisions may be quashed. . . or pronounced null and void . . . , they can be prevented from carrying out an unlawful decision . . . and they can be ordered to do their duty . . . .<sup>138</sup>

Additional statutory authority to review administrative and executive acts is found in the BRO, which binds "(a) the Government and all public authorities; and (b) any person acting on behalf of the Government or a public authority."<sup>139</sup> Courts may award monetary remedies or issue orders as they "[consider] appropriate and just in the circumstances."<sup>140</sup>

#### b. Judicial Review of Administrative Acts in China

Adjudicative organs can also review administrative actions of administrative agencies (*xingzheng jiguan*) and those of their personnel (*xingzheng jiguan gongzuoren*), but not executive actions.<sup>141</sup> China's Civil Law permits citizens or legal persons to sue state organs or their personnel for infringing upon their legitimate rights.<sup>142</sup> The Administrative Litigation Law, which China enacted in 1989, broadens the scope of the adjudicatory organs' power to review actions taken by administrative organs.<sup>143</sup> It enables citizens, legal persons and other organizations to file suits against administrative agencies and their personnel for violations of eight types of concrete administrative actions.<sup>144</sup> Chinese law does not permit adjudicatory organs to review official acts of the country's top leaders.<sup>145</sup>

#### c. Judicial Review of Executive Branch in HKSAR

As mentioned previously, the BRO provides one basis for judicial review of administrative acts.<sup>146</sup> If the Chinese remove such review powers from the

138. PETER WESLEY-SMITH, 2 CONSTITUTIONAL & ADMINISTRATIVE LAW IN HONG KONG 313 (1988).

139. Bill of Rights Ordinance, *supra* note 54, art. 7.

140. *Id.* art. 6.

141. Zhonghua Renmin Gongheguo Minfa Tongze [General Code of the Civil Law of the PRC] (adopted Apr. 12, 1986) art. 121, translated in III STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 860412.1 (1988).

142. *Id.* ("State organs or officials shall, in the discharge of official duties, bear civil liability for any acts which infringe on the lawful interests of citizens or legal persons who have suffered losses as a result.")

143. Zhonghua Renmin Gongheguo Xingzheng Susongfa [Administrative Litigation Law of China] (adopted April 4, 1989), translated in VI STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 890404.2 (1990).

144. *Id.* arts. 2, 5, 11.

145. For a more thorough discussion of judicial review of administrative actions, see CHEN, *supra* note 32, at 176-84; Susan Finder, *Like Throwing an Egg Against a Stone? Administrative Litigation in the People's Republic of China*, 3 J. CHINESE L. 1 (1989).

146. See *supra* text accompanying notes 139-40.

BRO, courts will be left with their common law powers of review. However, the Basic Law might modify those powers also. Common law distinguishes between the executive and the administrative; the former includes the president, prime minister, governor, the cabinet, etc., while the latter includes government agencies that implement the directions of the executive and the laws passed by the legislature. Basic Law Article 35 states that "Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities (*xingzheng bumen*) and their personnel (*xingzheng renyuan*)." <sup>147</sup> The Basic Law thus sanctions judicial review of the executive while Chinese law does not. China's Administrative Litigation Law only permits actions against *xingzheng jiguan*, which is commonly translated as "administrative agencies or organs." If the difference in wording between the two laws is intentional, then Article 35 simply continues the present common law power of the courts to engage in judicial review of the executive branch and administrative agencies. If the difference is due to sloppy drafting, then China may have intended to limit judicial review to administrative agencies, consistent with the practice in China.

Although Article 35 is not ambiguous and judicial review of executive acts is consistent with the common law, the Chinese could, and I believe certainly will, insist that courts have no power to review acts of the Chief Executive of the HKSAR. The Chinese have no experience with the rule of law and would be horrified at the suggestion that mere judges, some of whom are expatriates, might have the right to criticize a leader and even to issue an *injunction* directing the Chief Executive to cease from engaging in certain actions. If HKSAR courts are unable to engage in review of executive actions, Hong Kong's rule of law system will be set on its head. Hong Kong will become a rule *by* law society. Such a gross violation of the Joint Declaration would be justifiably condemned by all.

##### 5. Application of Basic Law Provisions to Facts of Cases

Assuming some of the Basic Law is directly enforceable, the most narrow view of Article 158 is that HKSAR courts can interpret enforceable Basic Law provisions solely to answer the question of whether or not a party before the court properly invoked the provision. If so, the court could then apply the provision to the facts of the case. This situation would only arise in the absence of applicable law. Such a narrow interpretation of Article

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147. Basic Law, *supra* note 1, art. 35 (emphasis added). Prior to the final drafting of the Basic Law, Michael Davis inquired whether Article 35 also "include[s] a challenge of the underlying supporting statute." MICHAEL C. DAVIS, CONSTITUTIONAL CONFRONTATION IN HONG KONG 20 (1989). Unfortunately, the final draft failed to address his query; however, under the Chinese Administrative Litigation Law, one may challenge only the action, and not the law. Administrative Litigation Law of China, *supra* note 143, art. 11. Similarly, in the HKSAR, if the Standing Committee approves the underlying ordinance or subordinate legislation pursuant to Article 17 or 160, the answer will have to be no. Only if the underlying ordinance or subordinate legislation fits within the scope of the judiciary's review powers under Article 17 might a party be able to challenge the law.

158 is a gross distortion of the meaning of the term *within the common law system* and must be rejected.

#### 6. *Resolving the Conflicts*

The Basic Law's division of interpretation powers between the courts and the Standing Committee poses a tremendous threat to the stability and coherence of the legal system. The Basic Law contemplates two bodies working in tandem, applying different legal principles and employing different methodologies, yet arriving at different interpretations having effect within one legal system.

The Chinese probably believe they have reduced the possibility of any conflict by inserting a provision in Articles 158 and 17 (but not Article 160) requiring the Standing Committee to "consult" with the "Committee for the Basic Law" of the HKSAR prior to rendering an interpretation. The composition of the Committee is not yet known, but it will certainly include Chinese and Hong Kong members who may, or may not, have expertise in Hong Kong law. Even if some members are familiar with Hong Kong's legal system, the fact remains that the Standing Committee, which is itself a non-judicial body, will rely upon the advice of another non-judicial body for advice on how to render a legal interpretation. Wu Jianfan believes Hong Kong Committee members will provide valuable assistance to the Standing Committee because they will contribute information and opinion about the HKSAR situation.<sup>148</sup> However, familiarity with the views of Hong Kong people is not a sufficient basis for lawmaking in a common law system. If it were, judges would not need to be trained in the law. Wu sees no problem in having a select group of individuals, many of whom may have no legal training and who may be more concerned with protecting their own political or economic interests than in upholding legal principles, play a major role in determining constitutional issues. Unfortunately, comments such as Wu's only further expose China's distrust of the independent role of Hong Kong's judiciary, misunderstanding of the common law system, and failure to appreciate the negative effect the Basic Law will have upon both the judiciary and the law.

If the judiciary does lose judicial review powers, the significance of the loss will go beyond merely a weakening of the court's authority. The loss will place courts in an untenable and anomalous situation. Judges hear cases on an individual basis and do not decide in a collegiate bench in the first instance. A single trial court judge or even several judges on an appellate bench will have to decide, on his or her own, to assume judicial review power. Will judges have the strength to carry out their convictions or will they compromise principles once they understand the Chinese view? Will common law-trained judges be able to make the transition to a common law/socialist-civil law reality? Will the present members of the judiciary even remain after 1997 once they realize what the Basic Law will require of them? The Hong Kong and Chinese governments must, at some point,

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148. Wu, *supra* note 45, at 20. See also Zheng, *supra* note 46, at 321-22.



address this looming constitutional crisis, because, I believe, any strategy based upon the belief in the ability of the judiciary to act assertively is doomed to fail.

If the answers to the above questions are no, then judges who choose to remain will have no choice but to enforce some laws that they would otherwise declare unenforceable under common law principles, precedents or international standards. This situation will reduce judges to operating in a bureaucratic manner similar to China's legal officials and will, by the courts' acquiescence to the diminished role of the judiciary, bring socialist civil law principles on judicial powers into Hong Kong's common law system. Alternatively, if courts are reluctant to take a political stance to preserve the common law and balk at enforcing unconstitutional laws, they could decide to follow the advice in the Notice by the Supreme People's Adjudicatory Organ discussed previously.<sup>149</sup> They could circumvent the political dilemma by returning unconstitutional legislation to Legco, accompanied by a request for the law's repeal or amendment. However, by doing so, the courts would openly acknowledge their inferior position, which would also allow the Chinese legal system to seep into the HKSAR.

None of this confusion, uncertainty or inconsistency is necessitated by any language in the Joint Declaration. On the contrary, the Joint Declaration promises that the HKSAR "will enjoy a high degree of autonomy, except in foreign and defence affairs" and that its courts will have independent judicial power.<sup>150</sup> Articles 17, 158, and 160 of the Basic Law amount to gross deviations from these promises. They render the terms *high degree of autonomy* and *independence of the judiciary* almost meaningless because they divide the existing judicial powers into overlapping judicial powers and legislative powers. Even worse, they do so in an incoherent and unprincipled manner. If China insists on a restrictive interpretation of Articles 17, 158, and 160, it will totally transform Hong Kong's present legal system from one having an internal logic and consistency into one with several logics and no overall consistency. Rather than solving the contradictions inherent in the "one country, two legal systems" policy, the Basic Law could actually create problems having no obvious, coherent or logical solutions.

The only condition under which the common law will survive is if the HKSAR courts have freedom to declare laws unenforceable according to the existing common law principles, precedents and standards. Only when exercising their full powers of interpretation can HKSAR judges claim the title of common law judges. If the common law judiciary is to be preserved at all, the NPC must pass three amendments, at a minimum, to the Basic

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149. See *supra* note 97 and accompanying text.

150. Joint Declaration, *supra* note 2, art. 3(2), Annex I. Actually, the Chinese expanded the range of exceptions in article 3(2) with the following language in the Basic Law: "The courts of the [HKSAR] shall have no jurisdiction over acts of state such as defence and foreign affairs." Basic Law, *supra* note 1, art. 19 (emphasis added).

Law: one returning full powers of judicial review to the courts,<sup>151</sup> one authorizing courts to strike down any law that cannot be interpreted in a manner consistent with the BRO or any other law specifically intended to implement Article 39, and one formalizing the principle that all ambiguities should be resolved in favor of an interpretation preserving the common law. If the NPC refuses to pass these amendments, the common law system is doomed to disappear.

#### D. Interpretation of Other Laws and Creation of New Laws

##### 1. *Hong Kong Courts*

In the process of adjudicating cases, Hong Kong judges have the power to interpret the meaning of legislation, subordinate legislation, common law, rules of equity and customary law. They also create, modify and overrule common law and rules of equity. Courts develop new legal rules in the course of deciding cases that raise legal issues for which no law exists. In the process of developing new legal norms, judges resort to general legal principles and, through a process of reasoning by analogy to legal principles found in legal precedents, create a legal rule that resolves the novel issue. Hong Kong's executive and legislative branches on the other hand, have no power to interpret laws in specific cases. Hong Kong's executive-led government can only enact, amend and repeal laws with prospective application. However, the power to enact new laws at any time gives the executive and legislative branches the ability to control common law and equity because ordinances are superior to, and effectively repeal, all inconsistent pre-existing laws, including those found in common law and equity.

##### 2. *Chinese Adjudicatory Organs*

The legislative branch creates Chinese law, and several branches interpret, but do not amend, repeal, or augment the law. The power to interpret Chinese laws is diffused among the legislative, executive and judicial branches. The *Xianfa* delegates power to interpret statutes to the Standing Committee.<sup>152</sup> The Standing Committee only recently began to issue any type of legislative interpretations and, even now, does so rarely. Instead, it has delegated most of its interpretation functions to the State Council, the Supreme People's Procuratorate and the Supreme People's Adjudicatory Organ.<sup>153</sup> These three bodies may exercise their power at any time and may issue interpretations, notices or other instruments either separately,

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151. The International Commission of Jurists arrived at a similar conclusion in their 1991 study. They attacked Article 158 for its lack of clarity, for usurping the courts' power of interpretation, for being unworkable and, most importantly, for contravening the Joint Declaration. They similarly dismissed Article 160 as an unacceptable usurpation of judicial powers and recommended that all power to interpret laws be returned to the courts. INTERNATIONAL COMMISSION OF JURISTS, COUNTDOWN TO 1997: REPORT OF A MISSION TO HONG KONG 83-84 (1991).

152. XIANFA art. 67, sec. 4 (1982) (P.R.C.).

153. Interpretation Resolution, *supra* note 76. Article 33 of the Adjudicatory Organ Organization Law, which became effective Sept. 2, 1983, gives the same power to the

together or jointly with other administrative organs. The Standing Committee settles conflicts between Procuratorate and Adjudicatory Organ interpretations.<sup>154</sup> None of the lower adjudicatory organs or procuratorates have similar interpretative power;<sup>155</sup> however, the standing committees of people's congresses and certain departments at the provincial level do have interpretative power over the laws, rules and regulations they issue.<sup>156</sup>

The Supreme People's Adjudicatory Organ has the additional ability to interpret national laws and regulations in the context of actual cases.<sup>157</sup> Although the Supreme People's Adjudicatory Organ is authorized to try cases,<sup>158</sup> it is primarily a supervisory and administrative body and only hears cases on very rare occasions. It interprets laws in cases being tried by lower adjudicatory organs but it need not wait until a lower adjudicatory organ solicits advice. It may intercede in ongoing cases in order to render guidance in the correct interpretation of the law.

Nonetheless, non-legislative law is created in two ways. First, the CCP creates law by when it issues documents "which the judiciary considers to be normative."<sup>159</sup> Second, although the Supreme People's Adjudicatory Organ is not specifically authorized to create law, it actually does create law in two ways. It creates legal rules in situations where the NPC has failed to enact relevant legislation.<sup>160</sup> However, instead of referring to precedents or legal principles for guidance as is the practice in the common law system, the Supreme People's Adjudicatory Organ refers to current CCP policy for guidance.<sup>161</sup> It also creates new legal rules through its power to issue interpretative documents that go beyond merely interpreting national legislation to fill in legislative gaps. The documents have a quasi-legislative effect. Some Chinese scholars go so far as to call some of them "caselaw."<sup>162</sup> However, the work of the Supreme People's Adjudicatory Organ cannot be compared with the work of common law courts. The Supreme People's Judiciary Organ organizes a work group to draft an opinion while common law judges work independently. The draft is circulated among the judges for comments yet remains unavailable to the public. Only after months of review and discussion does the Supreme People's

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Supreme People's Adjudicatory Organ. Adjudicatory Organ Organization Law, *supra* note 20, art. 33.

154. Interpretation Resolution, *supra* note 94, art. 2.

155. *Guanyu Difang Geji Renmin Fayuan Buying Zhiding Sifa Jieshixing Wenjiande Pifu* [Official Reply that Regional Adjudicatory Organs at All Levels Should Not Draft Documents Having the Character of Judicial Interpretations], *ZHONGGUO FALU NIANJIAN* [CHINESE LAW YEARBOOK] 548 (1988).

156. Interpretation Resolution, *supra* note 94, art. 2.

157. *Id.*; Adjudicatory Organ Organization Law, *supra* note 20, art. 33 (The Supreme People's Court renders interpretations on questions concerning specific application of laws and decrees in judicial proceedings.).

158. Adjudicatory Organ Organization Law, *supra* note 20, art. 32.

159. Finder, *supra* note 13, at 151.

160. *Id.* at 165-66.

161. General Code of the Civil Law of the PRC (Apr. 12, 1986), art. 6.

162. CHEN, *supra* note 32, at 102.

Adjudicatory Organ approve it.<sup>163</sup> In fact, the resulting document is more akin to legislation than to judge-made law.

The Chinese do not recognize any of these activities to involve the creation of new law. From their perspective, the Supreme People's Adjudicatory Organ and CCP merely give opinions or explanations of the law or policy. However, from the common law perspective, when the penalty for disobeying a norm is a state-enforced sanction or imprisonment, the document or declaration containing the norm is law.

### 3. *HKSAR Courts*

The HKSAR courts should be able to interpret, create, modify and overrule common law and rules of equity, subject only to the limitations imposed by the common law. However, Articles 8 and 18 of the Basic Law, if taken literally, would interfere with the courts' traditional powers as they do not reflect the actual manner in which laws are created in Hong Kong. Article 8 provides that "[t]he laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the [HKSAR]."<sup>164</sup> Article 18 proves that "[t]he laws in force in the [HKSAR] shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region."<sup>165</sup> These Articles are either examples of sloppy drafting, intentional limitations on traditional court powers or further evidence of the Chinese failure fully to grasp the manner in which common law judges create, alter and overturn existing common law and rules of equity.

If China intended Article 8 to be a conclusive statement on the manner in which laws may be created, amended, or repealed, then Article 8 literally means that Legco can amend colonial-era common law and rules of equity, but the judiciary cannot. It further means that Legco cannot repeal colonial-era ordinances, subordinate legislation or customary law. Similarly, the literal meaning of Article 18 is that new laws can only be created by the legislature. Certainly, the Chinese do not intend a result that would make a mockery of their promise to preserve the common law system for fifty years. At most, Articles 8 and 18, like others in the Basic Law, expose the difficulties the Chinese encounter in their attempts to accommodate a common law system within their socialist civil law mindset in which only the legislature creates, amends or repeals laws.

## E. Final Adjudication

### 1. *Final Adjudication in Hong Kong*

Disappointed parties in Hong Kong have two opportunities to appeal their cases after trial. Once a final non-appealable decision is rendered, the case

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163. Finder, *supra* note 13, at 169.

164. Basic Law, *supra* note 1, art. 8.

165. *Id.* art. 18.

is closed and neither courts nor any non-judicial body may reopen or review it. Defendants convicted of crimes, however, may be able to obtain a pardon from the Governor if, for example, compelling evidence of a miscarriage of justice surfaces after conviction.<sup>166</sup> The rule of no second trial forces the government to build its cases against defendants very carefully and to prosecute only when sufficient evidence exists for conviction. Similarly, it forces civil plaintiffs to prepare carefully prior to instituting a lawsuit. As a result, successful defendants in both criminal and civil cases can resume their lives secure in the knowledge that the courts can never try them again on the same set of facts.

## 2. "Final" Adjudication in China

Technically, Chinese adjudicatory organs also have the power of final adjudication (*zhongshenquan*). Parties disappointed with the outcome of their cases in China have only one opportunity for appeal and the decision on appeal is final.<sup>167</sup> In practice, however, a decision may not be final after the appeal because, if the Supreme People's Adjudicatory Organ (or the higher-level people's adjudicatory organs in cases tried at the lower level) discovers a mistake, it has power to review cases or to order retrials.<sup>168</sup> Although this procedure may be justified within the Chinese context where only one appeal is allowed, the legal system is often abused for political purposes, and the members of the adjudicatory organ and bar have a relatively low level of competence.<sup>169</sup> However, the review and retrial procedure is a powerful tool that can be abused and used for political purposes. Final adjudication power and *zhongshenquan*, then, are not linguistically equivalent.

## 3. Final Adjudication in HKSAR

The Chinese version of the Basic Law also contains the term *zhongshenquan*.<sup>170</sup> The common law meaning of *final adjudication* should prevail despite reports indicating that the Chinese would prefer to interpret the term according to Chinese practice. Several Hong Kong newspapers, including at least one pro-China one, report that, during Chinese-British discussions on establishing the CFA, the Chinese side proposed a "mechanism for follow-up measures after the reaching of a verdict."<sup>171</sup> Fortunately, the announcement was met with so much resistance from the Hong Kong side that the Chinese immediately denied the reports.<sup>172</sup> The reports

166. Letters Patent, *supra* note 48, art. XV; Royal Instructions, *supra* note 51, art. XXIV.

167. Adjudicatory Organ Organization Law, *supra* note 20, art. 12.

168. *Id.* art. 14.

169. Finder, *supra* note 13, at 203-04.

170. Basic Law, *supra* note 1, arts. 2, 82.

171. Shi, *supra* note 114. See Blyth, *supra* note 113.

172. ZHONGGUO XINWEN SHE [NEW CHINA NEWS AGENCY], May 5, 1995, translated in F.B.I.S.-CHI-95-088, May 8, 1995, at 102; S. CHINA MORNING POST, May 6, 1995, at 1, in F.B.I.S.-CHI-95-088, May 8, 1995, at 102 ("Mr. Lu dismissed as 'ridiculous' reports that Beijing wanted to put in place a higher authority than the Court of Final Appeal.").

are probably true as the Chinese have a practice of leaking a proposed policy to the media, waiting for the public and official reaction, and then denying the statement if public outcry is too great.

The proposal itself is also completely consistent with China's own legal practice and with China's wariness of common law judicial powers. From the Chinese perspective, the idea of setting up a body superior to the CFA is not radical. China's public refutation of the proposal does not necessarily reflect a decision to trust and respect Hong Kong's legal system. On the contrary, it is additional evidence of the Chinese government's lack of understanding of the common law system. It reveals that officials do not yet understand how the rule of law and common law principles and practices impose significant internal constraints on the court's powers. For example, they apparently have yet to realize that, although judges have great freedoms, those freedoms are exercised within parameters constructed over several hundred years through compromises reached between the executive, legislative, judiciary and the public. The reports just add to other evidence pointing to close Chinese scrutiny of the courts. If the Chinese perceive the judiciary to constitute a threat to their control over the HKSAR, they will probably seek to impose a method for "supervising" the courts.

## Conclusion

The transition period during which Hong Kong's common law legal system will undergo a metamorphosis from a common law system into a common/socialist/civil law system will involve numerous uncertainties and continual struggles between two political and social ideologies and two jurisprudences. The period of change will force members of the common law judiciary to undergo an uncomfortable adjustment as they try to accommodate themselves to new constraints on judicial powers and to a new jurisprudence. At the same time, members of the Standing Committee will have no choice but to learn and respect a new legal language and to understand an alien legal philosophy.

The process will not be pleasant nor the tasks easy for officials in Hong Kong or in China. Retention of the viable and internationally-respected pre-handover legal system depends upon the mutual respect and cooperation of all parties. Both sides must endeavor to understand each other's legal systems and legal philosophies and be willing to work together to arrive at mutually-acceptable definitions of legal terms and issues in the Basic Law. They must find unique solutions to meet the unique challenges posed by the "one country-two legal systems" model. Solutions proposed by this Article include the following changes to the Basic Law:

1. amendment of Articles 17, 158 and 160 restoring full powers of judicial review to the courts;
2. a provision stipulating that all non-administrative provisions are directly enforceable;

3. a provision authorizing the HKSAR courts to resolve all ambiguities in the Basic Law in a manner consistent with the preservation of the common law system;
4. amendment of Article 35 leaving no doubt that the Basic Law is intended to preserve the common law right of the judiciary to review acts of the executive branch, including those of the Chief Executive;
5. amendment of Article 39 authorizing courts to strike down any law that cannot be interpreted in a manner consistent with Article 39 or any law specifically intended to implement Article 39; and
6. amendment of Article 8 preserving the common law power of the courts to create, modify, and overrule the common law and rules of equity.

If China refuses to take the positive steps necessary to ensure the survival of the common law system, and if the Chinese, British and Hong Kong governments continue to ignore the constitutional issues raised by this Article, then the international community may justifiably hold Hong Kong's sovereigns accountable for any resulting chaos or harm to Hong Kong's social, economic and political stability and prosperity.