

# ARTICLES

## INTERPRETING HONG KONG'S BASIC LAW: A CASE FOR CASES

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*On April 4, 2004, China issued a formal interpretation of the Hong Kong Basic Law. While the interpretation was controversial because it effectively asserted the central government's authority to control the pace of Hong Kong's democratic development, it was also significant for its implication that the Chinese national government had claimed for itself absolute authority to determine the meaning of contested provisions in the Basic Law. This article argues that the interpretation upset the balance established in the Basic Law between Chinese and Hong Kong authorities, improperly aggregating power to the national government and curtailing the autonomy that is guaranteed to Hong Kong under the Basic Law. The article argues that Chinese authorities should adopt a more restrained approach to interpretation — a so-called “cases and controversies” approach — that combines elements of both China's civil law heritage and Hong Kong's common law tradition.*

### I. INTRODUCTION

In 1997, Great Britain and the People's Republic of China (PRC) consummated their agreement to restore Chinese sovereignty over Hong Kong. In keeping with that agreement, the Chinese government has since governed the Hong Kong Special Administrative Region (HKSAR) with a unique piece of legislation called the Basic Law.<sup>1</sup> Originally promulgated in 1990 by China's national legislature, the Basic Law embodies the uneasy agreement reached between the British and the Chinese: it estab-

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1. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Apr. 4, 1990, 29 I.L.M. 1511 [hereinafter *BASIC LAW*], available at [http://www.info.gov.hk/basic\\_law/fulltext/index.htm](http://www.info.gov.hk/basic_law/fulltext/index.htm).

lishes Beijing's authority over Hong Kong, yet it also preserves some degree of autonomy for the territory to govern itself. The Basic Law is somewhat schizophrenic in this sense; it is a piece of legislation by which a national legislature has established a framework for governing a local territory, as well as a quasi-constitutional document that enumerates and guarantees the rights of the HKSAR citizens who are governed by it. It epitomizes both national sovereignty and local autonomy, depending upon the reader's perspective. It is no wonder, then, that Beijing and Hong Kong have sometimes found themselves at loggerheads over the meaning of the Basic Law, as they did in the spring of 2004.

On April 6, 2004, the Standing Committee of the National People's Congress (NPCSC) issued a formal Interpretation of the Basic Law.<sup>2</sup> Through this Interpretation, the NPCSC established that the National People's Congress (NPC) would have to approve any amendment to Annex I or Annex II of the Basic Law, which set forth the processes for selecting Hong Kong's Chief Executive and Legislative Council, respectively.<sup>3</sup> The Interpretation was a setback to Hong Kong's nascent democratic reform movement, which had been advocating reform for the executive and legislative selection processes. In addition, however, the NPCSC's Interpretation had significant implications for Hong Kong's legal landscape. It marked the first effort by China's central government to address the meaning of the Basic Law without any consultation from the HKSAR itself. The Interpretation thus suggested that the mainland had effectively claimed for itself authority, without any substantive or procedural limitations or any involvement by Hong Kong, to settle questions about the meaning of the Basic Law.

This article examines the NPCSC's controversial Interpretation and argues that the Standing Committee's unsolicited, unilateral interpretation is a threat to the balance struck in the Basic Law between national sovereignty and political autonomy. In

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2. Standing Committee of the National People's Congress, *Interpretations of Clause 7 of Annex I and Clause 3 of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Apr. 6, 2004, (8th mtg., 10th Cong.) [hereinafter Interpretation of the Annexes], available at <http://law.hku.hk/clsourcebook/20040406scnpceng.htm>.

3. *Id.* ("Only upon the completion of the . . . the final approval or registration for the record by the Standing Committee of the National People's Congress . . . shall the amendments take effect. The Chief Executive of the Hong Kong Special Administrative Region shall submit a report to the Standing Committee of the National People's Congress if there is a need to amend the methods or voting procedures, which shall be decided upon by the Standing Committee . . . on the basis of the actual situation in the Hong Kong Special Administrative Region and the principle of gradual and orderly progress.").

lieu of the PRC's seemingly *ad hoc* approach to interpretation of the Basic Law, this article proposes a more principled, coherent model for resolving disputes over the meaning of its provisions. In particular, it argues that a common-law-style, "cases and controversies" approach to interpreting the Basic Law would create a more productive framework for the PRC and the HKSAR to resolve their recurring disputes about contested provisions in the Basic Law. Under this approach, China's national legislative body would refrain from issuing interpretations until a specific legal question or dispute arises that requires clarification. The term "cases and controversies" is borrowed, of course, from the context of American constitutional law.<sup>4</sup> But this article's use of the term does not entail any of the intricacies of American jurisprudence. Instead, "cases and controversies" refers here more generally to the approach, typically followed in common law jurisdictions, of waiting to issue binding legal interpretations until a particular dispute is ripe for adjudication or decision, and then providing only such a narrow interpretation as is necessary to decide that particular case.

The article's "cases and controversies" approach is premised on the argument that one of the sources of tension in the recurring controversies over the Basic Law is the difference in legal culture between Hong Kong and the mainland. To be clear, the differences between the legal traditions of these two jurisdictions do not adequately explain the conflict over the Basic Law, and there are important political, economic, and historical aspects to the recent controversy over the Annexes. But the friction between the PRC's civil law tradition and Hong Kong's common law system is an important and often unappreciated aspect of the conflict, too.<sup>5</sup> For instance, whereas the civil law tradition typically vests authority to interpret the law with the legislature, the common law tradition places that power — sometimes "emphatically"<sup>6</sup> — in the judiciary. These competing conceptions about the proper role of legislative and judicial institutions are evident in the controversy over the Basic Law: while the mainland insists that Chinese security and unity depends on the NPCSC's ultimate authority to interpret the Basic Law, Hong Kong reacts to

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4. See U.S. CONST. art. III, § 2.

5. As further discussion will make clear, the labels "civil law" and "common law" apply only loosely in the Chinese context; especially on the mainland, China has a legal tradition that defies simple categorization in one of the historically Western legal traditions. See *infra* text accompanying notes 115–122. Such labels are nonetheless useful in the present discussion, if only to serve as shorthand for the different legal milieu in Hong Kong and on the mainland, and to highlight some of the more salient differences between those two jurisdictions.

6. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (establishing the American judiciary's "province and duty" to "say what the law is").

each interpretation by decrying the loss of its judiciary's independence and the erosion of the rule of law.

Building on the argument that a clash of legal cultures is adding to the tension between Hong Kong and the mainland, the article argues that an interpretive approach that effectively incorporates elements of these two legal cultures will help alleviate some of that tension. For example, it is clear that (consistent with a civil law model) Beijing's legislature must remain the final arbiter of the meaning of the Basic Law. Nonetheless, greater restraint on the part of the central government in issuing interpretations (consistent with a common law model) would help ensure fidelity to the Basic Law's purpose of providing Hong Kong with a "high degree of autonomy"<sup>7</sup> and might foster greater confidence among the people and government of Hong Kong in the mainland's competence as the final arbiter of the Basic Law's meaning. By incorporating elements of both the civil law and common law traditions, a "cases and controversies" approach to interpretation may improve the sometimes strained relationship between the people of Hong Kong and authorities in Beijing and facilitate their ongoing dialogue about the meaning of the Basic Law.

This article begins in Part II by discussing the Basic Law and the controversies it has spawned. Section II.A describes the nature and structure of the Basic Law, and it recounts the first major controversy over the Basic Law — the 1999 cases of *Ng Ka Ling v. Director of Immigration*<sup>8</sup> and *Chan Kam Nga v. Director of Immigration*,<sup>9</sup> which involved the validity of a local HKSAR immigration ordinance. Section II.B turns to the recent controversy over the Annexes, explaining how the NPCSC's Interpretation fits into the Chinese legal framework and how it undermines that framework. Part III examines the NPCSC's decision to issue its unprecedented proclamation. Section III.A explores the political, historical, and economic forces that may have prompted the Interpretation — aspects of the controversy that are frequently discussed. Section III.B considers how the different legal traditions of Hong Kong and the mainland also have contributed to and exacerbated the conflict. Part IV turns to the task of finding a suitable framework to guide future interpretive endeavors. This Part concludes that the cases and controversies principle provides a sound approach to interpreting the Basic Law; it argues that, by aspects of each of the two legal cultures in Hong Kong and on the mainland, this approach will also help alleviate

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7. BASIC LAW art. 2.

8. [1999] 1 H.K. REP. & DIG. 315 (Court of Final Appeal).

9. [1999] 1 H.K. REP. & DIG. 347 (Court of Final Appeal).

some of the other serious political tensions that are reflected in disputes over the Basic Law's interpretation.

## II. THE CONTROVERSY OVER THE BASIC LAW

To understand why the recent Interpretation of the Annexes sets such a novel legal precedent, some explanation as to the structure and history of the Basic Law is necessary. This Part begins with a description of the Basic Law and then proceeds to an examination of recent controversies surrounding its interpretation.

### A. THE BASIC LAW

When Great Britain and China agreed upon terms to restore Chinese sovereignty over Hong Kong, their Joint Declaration in 1984 stipulated that the NPC would provide a Basic Law to function as "the constitutional instrument" of the HKSAR.<sup>10</sup> After consultation with Hong Kong's business, labor, and professional communities, as well as public review of legislative drafts, the NPC enacted the Basic Law on April 4, 1990, and this "mini-constitution" took effect following the handover on July 1, 1997.<sup>11</sup>

The Basic Law establishes a scheme of governance popularly known as "one country, two systems."<sup>12</sup> This scheme guarantees to Hong Kong "a high degree of autonomy"<sup>13</sup> and provides that the region's "previous capitalist system and way of life shall remain unchanged for 50 years."<sup>14</sup> The Basic Law is frequently described in constitutional terms, as it was in the Joint Declaration itself — indeed, the document has attained virtually constitutional status and significance in Hong Kong.<sup>15</sup> Yet formally it re-

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10. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 1399 U.N.T.S. 33, 23 I.L.M. 1366, 1382 (1984) (entered into force May 27, 1985) [hereinafter Joint Declaration].

11. Charlotte Ku, *Introductory Note to People's Republic of China: The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 29 I.L.M. 1511, 1511-12 (1990).

12. BASIC LAW pmb1.

13. *Id.* art. 2; *id.* art. 12.

14. *Id.* art. 5.

15. See Owen Fiss, *Hong Kong Democracy*, 36 COLUM. J. TRANSNAT'L L. 493, 498 (1998) ("The Basic Law—much like certain foundational statutes in our own system such as the Civil Rights Act of 1964 or the Sherman Antitrust Act of 1890—seems to have a specially revered place in the culture and thus may have acquired a near-permanent status. While in the ordinary post-colonial scenario the constitution acquires its entrenched quality through the unique process that brought it into being, in the case of Hong Kong, the special status of the Basic Law derives from how people actually view or think of the law."); see also Michael C. Davis, *Constitutionalism Under Chinese Rule: Hong Kong After the Handover*, 27 DENV. J. INT'L L. &

mains an act of China's legislature. As Owen Fiss remarks, "in at least one crucial respect [the Basic Law] is unlike other constitutions: it is not self-authored by an independent, sovereign people. . . . It is formally a delegation of autonomy to a special administrative region, not a sovereign act of self-definition."<sup>16</sup> Indeed, the contemporary debate about the Basic Law reflects its quasi-constitutional and somewhat oxymoronic status. For example, in defense of the recent Interpretation, the government-run *People's Daily* recently argued that "[t]he high degree of autonomy for Hong Kong has been authorized by the central authorities, . . . and the local government has no authority to decide or change its constitutional system."<sup>17</sup> Thus, even though the Basic Law has become entrenched as a fundamental expression of the rights and duties of Hong Kong citizens, authority over the Law rests primarily, if not exclusively, with the central government, and not with the "constitutional" constituency in Hong Kong.

The quasi-constitutional of the Basic Law status finds expression in several of its provisions. Nowhere is this more apparent than in Article 158, which addresses the issue of interpretation. On the one hand, Article 158 grants to Hong Kong a limited degree of legal stewardship over its mini-constitution. It instructs the NPCSC to "authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region."<sup>18</sup> On the other hand, Article 158 provides that the Hong Kong judiciary "shall seek an interpretation of the relevant provisions from the Standing Committee" if the provisions "concern[ ] affairs which are the responsibility of the Central People's government or concern[ ] the relationship between the Central Authorities and the Region."<sup>19</sup> Moreover, the Basic Law places the power of interpretation squarely within the province of the NPCSC: "The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress."<sup>20</sup> In this way, the Basic Law divides the authority for interpreting its provisions in a

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POL'Y 275, 277 (1999) ("The 1984 Sino-British Joint Declaration, in addition to providing for the return of Hong Kong to China in 1997, essentially promised Hong Kong a future with a liberal constitutional order and a high degree of autonomy under the Basic Law.")

16. Fiss, *supra* note 15, at 497.

17. Editorial, *Interpretations of Basic Law "Timely, Necessary"*, PEOPLE'S DAILY, Apr. 7, 2004, [http://english.peopledaily.com.cn/200404/06/eng20040406\\_139635.shtml](http://english.peopledaily.com.cn/200404/06/eng20040406_139635.shtml).

18. BASIC LAW art. 158.

19. *Id.*

20. *Id.*

somewhat awkward fashion between the central and regional governments, giving each the power to contribute to the development of the Basic Law but reserving the final say on issues of national concern with the central government.

The Basic Law's delegation of concurrent authority to interpret its provisions strikes a delicate balance. As Professor Yash Ghai explains:

The precise demarcation of powers between the Central Authorities and the HKSAR is uncertain, and yet the operation of many provisions of the Basic Law depends on a clear understanding of the division of powers. A crucial task of interpretation must be to maintain the boundaries between the economic, social and political systems of the HKSAR and the rest of China.<sup>21</sup>

The syncretic scheme of "one country, two systems" means that both mainland and Hong Kong institutions have a role to play in interpreting the Basic Law and policing the boundaries that it establishes.

But the competing interests of Hong Kong and the mainland are not always amenable to syncretism. National authorities have an undeniable interest in preserving the "one country" aspect of the constitutional scheme. In Beijing's view, national direction of Hong Kong's constitutional development is "the best safeguard of the territory's long-term peace" and is necessary to deter divisive reformers who are "trying to create trouble under the excuse of a high degree of autonomy."<sup>22</sup> Regional authorities have an equally strong interest in preserving the "two systems" aspect of the constitutional scheme. Many in Hong Kong believe that independent interpretation by the HKSAR courts is essential to safeguard the political and civil liberties guaranteed by the Basic Law, including freedom of speech, freedom of assembly, freedom from unlawful searches, freedom of privacy and communication, freedom of religion, the right to vote, and certain economic rights.<sup>23</sup> Such competing interests are, to put it mildly, "unlikely to promote a harmony of interpretation."<sup>24</sup>

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21. YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW* 189 (2d ed. 1999).

22. Au Wen, *No One Is Allowed To Hurt HK Stability*, CHINA DAILY (Hong Kong ed.), Apr. 9, 2004, [http://www.chinadaily.com.cn/english/doc/2004-04/09/content\\_321928.htm](http://www.chinadaily.com.cn/english/doc/2004-04/09/content_321928.htm).

23. See BASIC LAW, ch. III, arts. 24-42; see also Vincent Wei-Cheng Wang, *Scheme for HK Lacks Safeguards*, FIN. TIMES (London), Apr. 28, 2004, at 14 (expressing concern that without an independent judiciary to interpret and enforce the civil liberties promised in the Basic Law the people of Hong Kong would be left "to rely only on Beijing's goodwill for protecting their rights and freedoms").

24. GHAI, *supra* note 21, at 191.

Not surprisingly, the Basic Law has produced controversy. The first major dispute over the proper interpretation of the Basic Law occurred in 1999 and concerned the so-called "right of abode" conferred by Article 24 of the statute.<sup>25</sup> In the cases of *Ng Ka Ling v. Director of Immigration*<sup>26</sup> and *Chan Kam Nga v. Director of Immigration*,<sup>27</sup> Hong Kong's Court of Final Appeals (CFA) addressed the validity of two immigration ordinances passed by the Legislative Council. The ordinances involved rules about the entry and exit of individuals between mainland China and Hong Kong, and limited the right of abode to certain classes of children of Hong Kong residents.<sup>28</sup> Significantly, in *Ng Ka Ling*, the CFA declared that it possessed authority to decide whether to seek an interpretation of the Basic Law from the NPC's Standing Committee. Although it recognized that right of abode controversy was "arguably relevant" to "affairs which are the responsibility of the Central People's Government [or] the relationship between the Central Authorities and the [Hong Kong] Region," the CFA found that the immigration ordinances "predominantly" concerned Article 24, which the court concluded was a matter of more local concern and therefore fell within its jurisdiction to interpret.<sup>29</sup> The CFA held that it was unnecessary to solicit an interpretation from mainland authorities in the right of abode cases.<sup>30</sup> On the merits, the CFA invalidated the immigration ordinances as repugnant to Article 24 of the Basic Law.<sup>31</sup> The CFA's ruling thereby extended the right of abode in Hong Kong to thousands of mainland residents who had previously been denied that right by the Hong Kong ordinances.<sup>32</sup>

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25. *see* BASIC LAW art. 24,

26. [1999] 1 H.K. REP. & DIG. 315 (Court of Final Appeal).

27. [1999] 1 H.K. REP. & DIG. 347 (Court of Final Appeal).

28. *See Ng Ka Ling*, 1 H.K. REP. & DIG. at 328-330; *Chan Kam Nga*, 1 H.K. REP. & DIG. at 308-09. The ordinances at issue granted or denied the right of abode to children based on the residence of their parents. The practical effect of the immigration laws was to deny the right of abode only to those children who were born out of wedlock to Hong Kong fathers and mainland mothers. *See Ng Ka Ling*, 1 H.K. REP. & DIG. at 328-29.

29. *See Ng Ka Ling*, 1 H.K. REP. & DIG. at 342, 344-45 (quoting BASIC LAW art. 158(1)).

30. *Id.* at 345.

31. *See id.* at 345-48; *Chan Kam Nga*, 1 H.K. REP. & DIG. at 313.

32. Report of the Joseph R. Crowley Program, *One Country, Two Legal Systems*, 23 FORDHAM INT'L L.J. 1, 24 (1999) (According to the government's figures, enforcement of the CFA decision would result in 1.67 million additional mainlanders acquiring the right of abode over the next seven years. . . . Some critics reacted to the government's analysis, claiming that these figures were grossly inflated and that the actual numbers were as low as half the administration estimate." (footnotes omitted)).

Horrified at the prospect of being “overwhelmed by new immigrants,”<sup>33</sup> the Hong Kong government requested that mainland authorities clarify the “true legislative intent” behind the Basic Law and to define the proper scope of the right of abode.<sup>34</sup> In response to the HKSAR’s plea, the NPCSC promulgated an interpretation of Articles 22 and 24, which effectively overruled *Ng Ka Ling* and *Chan Kam Nga*.<sup>35</sup> This interpretation declared that the CFA had failed to comply with the “requirement of Article 158(3)” to seek an interpretation from the NPC, and that its ruling was “inconsistent with the legislative intent” behind the Basic Law.<sup>36</sup> As the Standing Committee explained in an accompanying note authored by Qiao Xiaoyang, the CFA’s expansion of the right of abode directly affected the central government’s policies on the travel privileges of mainland citizens. “People from all provinces, autonomous regions or municipalities directly under the Central Government, . . . who wish to enter the HKSAR for whatever reason, must apply to the relevant authorities of their residential districts for approval,” wrote Qiao.<sup>37</sup> Accordingly, the case had “a bearing on the relationship between the Central Authorities and the HKSAR” that made it improper for the CFA to resolve the dispute and interpret the Basic Law independently.<sup>38</sup> The NPCSC’s interpretation construed the right of abode more narrowly than had the CFA and upheld the immigration ordinances — though it did not reverse the CFA’s judgment as to the classes of plaintiffs involved in *Ng Ka Ling* and *Chan Kam Nga*.<sup>39</sup>

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33. *Id.* at 25.

34. Tung Chee-Hwa, *Report on Seeking Assistance from the Central People’s Government in Solving Problems Encountered in the Implementation of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, in HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 474, 477 (2000). Although the administration obtained a resolution from the Legislative Council in support of referring the decision to the NPC, many members of that organization walked out prior to the vote in a dramatic black-robed protest. See *id.* at 25 (citing Chris Yeung, *LegCo Walkout on Abode Vote*, S. CHINA MORNING POST, May 20 1999, at 1).

35. Standing Committee of the National People’s Congress, *Interpretation of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, June 26, 1999 (10th mtg., 9th Cong.) [hereinafter NPC Right of Abode Interpretation], available at <http://law.hku.hk/cl-sourcebook/10095.htm>.

36. *Id.*

37. Qiao Xiaoyang, *Explanatory Note on ‘The Interpretation by the National People’s Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)’*, in HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION, *supra* note 34, at 481, 482.

38. *Id.* at 482.

39. NPC Right of Abode Interpretation, *supra* note 35.

The effective reversal of the CFA sparked a constitutional crisis in the HKSAR and provoked a great deal of academic consternation over the fate of the Hong Kong courts.<sup>40</sup> Critics attacked the HKSAR administration for seeking the interpretation, describing the tactic as “a constitutionally dubious method to achieve the result of amendment” and a “threat to the independence of the judiciary.”<sup>41</sup> They likewise critiqued the Standing Committee for overruling the CFA, criticizing the mainland’s interpretation as “a perilous threat to [Hong Kong’s] common law system [that] merits the attention and concern of lawyers around the world.”<sup>42</sup>

Mainland scholars defended the interpretation, calling the CFA’s decision “a deliberate challenge of the power of the NPC.”<sup>43</sup> In their view, the CFA had not only neglected its constitutional duty to refer the case to the Standing Committee under Article 158 but had “reversed the relationship between the Central Authorities and the [HK]SAR” by usurping the central government’s legislative authority.<sup>44</sup> Disapproval of the CFA’s decision was not limited to the mainland; some Hong Kong legal scholars also shared the view that the CFA had overstepped its authority in *Ng Ka Ling* and *Chan Kam Nga*.<sup>45</sup> Indeed, the CFA itself seemed to recognize the thin ice on which it had trod when it issued an unusual “clarification” of the decision in *Ng Ka Ling*, perhaps in an effort to insulate its opinion from review by the NPCSC, explaining that the ruling did not purport to assert any

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40. See generally HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION, *supra* note 34; see also Lin Feng, *The Constitutional Crisis in Hong Kong — Is It Over?*, 9 PAC. RIM L. & POL’Y J. 281 (2000); Shen Kui, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China’s “First Constitutional Case”*, 12 PAC. RIM L. & POL’Y J. 199 (2003); Yongping Xiao, *Comments on the Right of Abode by Hong Kong CFA*, 48 AM. J. COMP. L. 471 (2000).

41. Johannes M.M. Chan, *Judicial Independence: A Reply to the Comments of the Mainland Legal Experts on the Constitutional Jurisdiction of the Court of Final Appeal*, in HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION, *supra* note 34, at 61, 70.

42. Karen Kam, Note, *Right of Abode Cases: The Judicial Independence of the Hong Kong Special Administrative Region v. The Sovereignty Interests of China*, 27 BROOK. J. INT’L L. 611, 635 (2002).

43. Xiao Weiyun et al., *Why the Court of Final Appeal Was Wrong: Comments of the Mainland Scholars on the Judgment of the Court of Final Appeal*, in HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION, *supra* note 34, at 53, 59.

44. *Id.* at 57–59.

45. See, e.g., Albert H.Y. Chen, *Ng Ka-ling and Article 158(3) of the Basic Law*, 5 J. CHINESE & COMP. L. 221, 247 (2002) (“The correct application of Article 158(3) in the *Ng Ka-ling* case would have required the CFA to refer Article 22(4) to the NPCSC for interpretation. To the extent that it failed to make such a reference, the decision in the case is demonstrably wrong.”).

authority to interpret the Basic Law superior to the authority of the national government.<sup>46</sup>

## B. THE NPCSC'S INTERPRETATION OF THE ANNEXES

Whereas the *Ng Ka Ling* controversy involved debate about the power of judicial review, the most NPCSC's most recent Interpretation involved a dispute about the structure of the HKSAR government. Chapter Four of the Basic Law outlines the executive, legislative, judicial, local governmental, and civil service branches of the HKSAR administration.<sup>47</sup> But the Basic Law provides only vague instructions about the process of selecting the Chief Executive, who sits head of the regional administration and whose allegiance expressly runs both to the HKSAR and to Beijing:<sup>48</sup>

The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.<sup>49</sup>

In similarly vague language, the Basic Law describes the goal of a Legislative Council elected "by universal suffrage,"<sup>50</sup> but stops short of describing a process whereby Hong Kong might establish elections for all of its legislature's members. Thus, the body of the Basic Law establishes long-term democratic goals, but it does not set forth a timetable to reach them.

With the broad, democratic aspirations of the HKSAR enshrined in the body of the Basic Law, Annexes I and II lay out the details. These Annexes primarily accomplish two things: first, they set forth a short-term scheme for selecting Hong Kong's Chief Executive and Legislative Council, and second, they contemplate their own amendment and their gradual evolution into a democratic framework for the HKSAR.<sup>51</sup> Pursuant to

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46. See *Ng Ka Ling v. Director of Immigration (No 2)*, [1999] 1 H.K. REP. & DIG. 577, 578 (Court of Final Appeal).

47. See *id.* arts. 43–58 (Chief Executive); *id.* arts. 59–65 (Executive Authorities); *id.* arts. 66–79 (Legislature); *id.* arts. 80–96 (District Organizations); *id.* arts. 97–98 (Judiciary); *id.* arts. 99–104 (Public Servants).

48. See *id.* art. 43 ("The Chief Executive of the Hong Kong Special Administrative region shall be accountable to the Central People's Government and the Hong Kong Special Administrative Region in accordance with the provisions of this Law.").

49. *Id.* art. 45.

50. See *id.* art. 68.

51. The first government of Hong Kong was elected pursuant to procedures specifically set forth by the NPC in its *Decision on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Admin-*

Annex I, an Election Committee of 800 members — comprising 200 members from the commercial and financial sectors; 200 members from “the professions,” including law and medicine; 200 members from “labour, social services, religious and other sectors”; and 200 members from various political offices in Hong Kong and in the region’s representative offices on the mainland — has the responsibility for nominating and then electing the Chief Executive.<sup>52</sup> Though this Committee contains a “broadly representative” cross-section of the Hong Kong demography, observers generally acknowledge that it follows directions from Beijing.<sup>53</sup> Annex II establishes sixty seats in the Legislative Council, and it provides a scheme for selecting representatives in the second and third terms of the legislature. It provides an alternate scheme for the Legislative Councils third term, for which the elections took place in September 2004; for that election, Annex II provided for half of the legislature’s seats to represent geographical constituencies through direct elections and the other half to represent so-called “functional constituencies,” or special-interest communities.<sup>54</sup>

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*istrative Region.* See 29 I.L.M. 1519, 1550–51 (1990). Substantially similar to the procedures subsequently established by Annexes I and II, this decision created a Preparatory Committee composed of mainland and Hong Kong members with the responsibility for preparing the first government of the HKSAR. *Id.* at 1550. The Preparatory Committee, in turn, established the Selection Committee, which was composed of 400 members from various sectors of Hong Kong society, and which nominated the first Chief Executive, Tung Chee-hwa. *Id.* The first Legislative Council, whose members served only two years, as opposed to the current term of four, comprised a group of thirty members selected by functional constituencies such as the professions or the financial sector, twenty members selected through direct elections in geographical districts, and ten members selected by a central election committee. *Id.* at 1550–51.

52. See BASIC LAW Annex I.

53. As the Election Committee prepared to fill the Chief Executive’s post following the completion of the first term under Tung Chee-hwa, some members complained publicly of coercion from PRC officials:

Two years before Tung’s five-year term as Hong Kong’s first chief executive expires in 2002, China’s leadership is telling the territory’s business elite to get behind Tung. As it is, many of them will be on the 800-member Election Committee to choose the next CE. One businessman, who asked not to be named, said that China’s leaders minced no words as to whom they expected that person to be: “We were told [to vote for Tung]. We were not asked.”

Todd Crowell & Yulanda Chung, *Chief Executive Under Fire*, ASIaweek, July 7, 2000, <http://www.asiaweek.com/asiaweek/magazine/2000/0707/nat.hk.html>. See also Mark Landler, *Hong Kong Leader Expects a Sequel, Based on China’s Script*, N.Y. TIMES, Dec. 14, 2001, at A17 (“The chief executive is selected by an 800-member committee, composed of business people, lawyers, accountants and other establishment figures who can be counted on for their loyalty to Beijing. Given the carefully timed endorsements of [first-term Chief Executive] Tung, his victory seems assured.”).

54. See BASIC LAW Annex II (incorporating through reference to Annex I various constituencies including the commercial and financial sectors; various profes-

This framework for the HKSAR administration was never intended to be set in stone, however. In keeping with the democratic objectives set forth in the body of the Basic Law, Annexes I and II both contemplate their own revision. Both Annexes provide that, “if there is a need to amend” the methods of selecting the executive or legislative branches, “such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive.”<sup>55</sup> In addition, both Annexes establish a role in the process of amendment for the Standing Committee of the National People’s Congress: changes to the selection process for Legislative Council members must be reported to the NPC “for the record,”<sup>56</sup> and changes to the process for selection of the Chief Executive must be reported to the NPC “for approval.”<sup>57</sup> Moreover, both of these Annexes expressly provide that they remain unamendable for a certain period of years, at which point, presumably, amendments become permissible. Thus, under the terms of the Annexes, the Basic Law’s formal obstacles to democratic reform expire at the end of the Chief Executive’s second term in 2007 and the Legislative Council’s third term in 2008.

Against a background of growing support for democratic reform, which had been developing in anticipation of the Annexes’ becoming amendable, the NPCSC announced in March 2004 its intention to issue an interpretation of the Basic Law.<sup>58</sup> After brief consultations with the Committee for the Basic Law of the HKSAR, the Standing Committee promulgated its Interpretation of the Annexes. The Interpretation first specified that the freeze imposed by the Annexes on amendments to the election procedures extended through the year 2007.<sup>59</sup> Next, in the Interpretation’s most significant passage, the Standing Committee interpreted the Annexes to require a report from Hong Kong authorities not merely upon proposing specific changes to the text of the Annexes, but even before beginning the process of amendment. The Interpretation read:

The Chief Executive of the Hong Kong Special Administrative Region shall submit a report to the Standing Committee of the National People’s Congress if there is a need to amend the methods or voting procedures, which shall be de-

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sional communities, members of political office, and members of the labor, religious and social services sectors).

55. BASIC LAW Annex I; BASIC LAW Annex II.

56. BASIC LAW Annex II.

57. BASIC LAW Annex I.

58. See Tyler Marshall, *Beijing Flexes Hong Kong Muscle*, L.A. TIMES, Mar. 27, 2004, at A5 (describing the commentary published by Wang Zhenmin through Xinhua, China’s state-run news agency).

59. Interpretation of the Annexes, *supra* note 2.

cided upon by the Standing Committee of the National People's Congress in accordance with the provisions [of the Basic Law] . . . and on the basis of the actual situation in the Hong Kong Special Administrative Region and the principle of gradual and orderly progress. Bills and draft amendments regarding the revision of the methods for selecting the Chief Executive and forming the Legislative Council, as well as of the procedures for voting on bills and motions in the Legislative Council, shall be proposed to the Legislative Council by the Hong Kong Special Administrative Regional Government.<sup>60</sup>

Finally, the Interpretation explained that, until the Basic Law is amended, the Chief Executive and members of the Legislative Council will continue to be selected according to the procedures set forth in the Annexes.<sup>61</sup>

Although the Interpretation left open the possibility of amendment — it stated equivocally that the Annexes “may be amended or may not be amended”<sup>62</sup> — most commentators agreed that the Interpretation “amounted to a clear assertion by the Communist Party that, in Hong Kong as in the rest of China, Beijing intends to set the pace of political reform.”<sup>63</sup> Indeed, the Interpretation created at least additional procedural hurdles to reform: approval by the NPC is now a condition precedent to, as well as subsequent to, the process of amending the Annexes.<sup>64</sup>

Although some reformers expressed relief that the Interpretation had not prohibited democratic amendments altogether,<sup>65</sup> most expressed dismay that the PRC had established “a checkpoint on democracy and political reform” such that “the special administrative region cannot even make an amendment proposal

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60. *Id.*

61. *Id.*

62. *Id.*

63. Edward Cody & Philip P. Pan, *Beijing Tightens Control of Hong Kong: China to Set Pace Of Political Reform*, WASH. POST, Apr. 6, at A1.

64. This result is directly contrary to the reading that some scholars had of the Basic Law just months prior to the Interpretation. See Johannes Chan, *Some Thoughts on Constitutional Reform in Hong Kong*, 34 HONG KONG L.J. 1, 8 (2004) (“It could not have been the intention of the Basic Law that Annexes 1 and 2 should provide another hurdle for amending the provisions for the election of the Chief Executive and the Legislative Council, namely that any amendment process has to be initiated by the NPCSC.”).

65. Jonathan Watts, *Hong Kong Democrats Angered by Beijing's Interference in Reform*, THE GUARDIAN (London), Apr. 7, 2004, at 13 (“What has happened is more interesting than I thought. . . . The door hasn't been slammed shut. We are still talking about reform, but Hong Kong must now push very hard for change.” (quoting Christine Loh, chief executive of Civic Exchange, a Hong Kong think tank) (internal quotation marks omitted)).

itself but needs to first get Beijing's approval."<sup>66</sup> Opponents of the Interpretation reacted with indignation and accused Beijing of moving the constitutional goalposts. Activist Martin Lee, for example, described the Interpretation as a ploy by the PRC to divest Hong Kong of the rights and liberties guaranteed under the Basic Law. "This is the thin edge of the wedge," said Lee, "If Beijing says something is white by interpretation they can say it is blue and tomorrow they can say it is yellow. They can change anything. There is no certainty."<sup>67</sup> Outside China, foreign observers criticized the Interpretation as a heavy-handed decree by an authoritarian government bent on preserving its power even at the expense of its citizens' welfare. As the *Washington Post* editorial page remarked, "China apparently hopes that its fiat will strip Hong Kong's pro-democracy movement of its growing momentum. . . . The stubbornly unenlightened approach they have chosen merely ensures that Hong Kong — and with it, Taiwan — will continue to be a trouble spot."<sup>68</sup>

Beijing, meanwhile, hurried to assure the citizens of the HKSAR that it had their best interests at heart. A columnist for *China Daily*, the PRC's English-language newspaper, insisted that "[a]s a matter of fact, the interpretation exercise was undertaken solely for Hong Kong's benefit."<sup>69</sup> According to PRC officials, the Interpretation was a necessary and timely step, taken to ensure the "correct" understanding and implementation of the Basic Law in a manner "beneficial to Hong Kong's economic development."<sup>70</sup> Even as the Interpretation plainly signaled Beijing's discomfort with aggressive democratization and its intention to control the pace of reform in the HKSAR, the PRC affirmed the "ultimate aim" of providing for direct elections and universal suffrage.<sup>71</sup>

PRC officials offered numerous justifications for the decision to intervene: the authority and responsibility of the central

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66. Ambrose Leung & Klaudia Lee, "A Checkpoint on Democracy", S. CHINA MORNING POST, Apr. 7, 2004, at 2 (quoting Democratic Party Chairman Yeung Sum) (internal quotation marks omitted).

67. A. Lin Neumann & Cannix Yau, *Draft Makes Clear Beijing Holds Sway*, THE STANDARD (Hong Kong), Apr. 7, 2004, [http://www.thestandard.com.hk/news\\_detail\\_frame.cfm?articleid=46507&intcatid=1](http://www.thestandard.com.hk/news_detail_frame.cfm?articleid=46507&intcatid=1).

68. Editorial, *Self-Defeat by Fiat*, WASH. POST, Apr. 8, 2004, at A26.

69. Wen, *supra* note 22.

70. Cannix Yau et al., *Protest Ends, Talks Begin*, THE STANDARD (Hong Kong), Apr. 5, 2004 (quoting Li Fei, Deputy Director of the National People's Congress's Commission on Legislative Affairs), [http://www.thestandard.com.hk/news\\_detail\\_frame.cfm?articleid=46452&intcatid=1](http://www.thestandard.com.hk/news_detail_frame.cfm?articleid=46452&intcatid=1).

71. James Kynge et al., *China Tells Hong Kong It Will Control Reforms*, FIN. TIMES (London), Apr. 7, 2004, at 8 (quoting Qiao Xiaoyang, Deputy Secretary-General of the NPCSC).

government to ensure an orderly agenda for reform,<sup>72</sup> the goal of promoting economic prosperity in Hong Kong by avoiding political instability and uncertainty,<sup>73</sup> the benefit of preventing unnecessary wrangling over futile democratic initiatives,<sup>74</sup> and the need to disabuse overzealous democrats of the notion that Hong Kong could pave its own democratic path without the guiding hand of mainland authorities.<sup>75</sup> In the wake of the controversy over its Interpretation, the Standing Committee dispatched a representative, Qiao Xiaoyang, to ease tensions with Hong Kong and hold meetings with HKSAR officials.<sup>76</sup> Qiao acknowledged reformers' concerns, insisting that "the Chinese government remains flexible on how the chief executive should be elected in 2007."<sup>77</sup> But the mainland's emissary left no doubt that Beijing intended the Interpretation to reinforce the mainland's supervisory authority over the HKSAR: "A locality has no fixed power," he said. "All powers of the locality derive from the authorization of the central authorities."<sup>78</sup>

]Whatever its long-term effect may be, the immediate impact of the NPCSC's Interpretation was to throw a giant wrench

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72. See Editorial, *supra* note 17 ("As long as we consider the political reform from the 'one country' perspective, we can have a more smooth discussion on the issue" (quoting Peter Wong, local deputy to the National People's Congress) (internal quotation marks omitted)).

73. See Joseph Kahn and Keith Bradsher, *Hong Kong Reformers Protest Election Rule*, N.Y. TIMES, Apr. 7, 2004 ("If we allowed discussion and debate to go on and on without limit, that would affect the stability, living standards and overall development of Hong Kong." (quoting Qiao Xiaoyang, Deputy Secretary-General of the NPC's Standing Committee) (internal quotation marks omitted)); see also, Editorial, *supra* note 17 ("Hong Kong compatriots are urged to safeguard the authority of the Basic Law and the interpretations by the NPC Standing Committee, and properly handle the constitutional development in Hong Kong according to the Basic Law and the interpretations so as to promote the democratic system that suits the actual conditions of Hong Kong step by step, and lay a sound social and political foundation for long-term prosperity and stability in Hong Kong.")

74. Press Release, Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region, HKSARG's response to US's Hong Kong Policy Act Report (Apr. 3, 2004) ("There are divergent views in the Hong Kong community on the interpretation of the provisions in the two Annexes. The interpretations by the [Standing Committee] will help to clarify the views, put an end to disputes in the community, and provide a firm foundation for our next stage of work."), available at <http://www.info.gov.hk/cab/cab-review/eng/media/p040304.htm>.

75. See Watts, *supra* note 65 ("Hong Kong can build a bridge to greater democracy, but it must follow China's blueprint. . . . Otherwise, no one will be able to cross the river." (quoting Qiao Xiaoyang, Deputy Secretary-General of the NPC's Standing Committee) (internal quotation marks omitted)).

76. See Edward Cody, *China Acts To Ease Tensions With Hong Kong*, WASH. POST, Apr. 8, 2004, at A16 ("Seeking to ease tensions, the Chinese government dispatched a senior official to Hong Kong on Wednesday to reassure the enclave's worried political activists that Beijing means them no harm.")

77. Cody & Pan, *supra* note 63.

78. Kyngé et al., *supra* note 71 (internal quotation marks omitted).

into the grand plans of Hong Kong's democratic movement. The Interpretation's reporting requirement assures, somewhat ironically, that constructive deliberation about democratic reform will not begin until the PRC says so. In this sense, even though the Interpretation does not explicitly preclude democratic reform, it poses a significant threat to Hong Kong's autonomy by establishing boundaries on the democratic debate even before discussions about reform have begun in earnest. Moreover, by interpreting the two Annexes together, the Standing Committee seems effectively to have eliminated the difference in language between the two Annexes. Whereas Annex I requires a report to the NPC "for approval" of changes to the process of electing the Chief Executive, Annex II requires a report "for the record" for changes to the legislative scheme. Given that the text of the two Annexes is parallel in every other material respect, that difference in language arguably indicated a less rigorous standard of review for changes to the legislative branch. Whatever legal significance might have been read into this difference between the texts of the Annexes, that difference now seems moot. The Interpretation made no meaningful distinction between the Annexes and imposed the requirement of preapproval equally on changes to the election processes for both the Chief Executive and the Legislative Council.<sup>79</sup> Finally, by requiring the request for approval to come from Hong Kong's Chief Executive, the Interpretation has created an additional layer of insulation between the Legislative Council may consist of democratically elected members who might be inclined to introduce democratic reforms, the Chief Executive remains politically insulated — and more loyal to Beijing, which has the practical, if not formal, power of appointment. Vesting the power to initiate reforms with the Chief Executive further ensures that discussion will take place on a timetable suitable to mainland authorities.

In addition to its political ramifications, the Interpretation also has important legal consequences. Just as the Interpretation secured the mainland's control over the process of political reform, it also suggested that the central government has unrestrained power to issue interpretations of the Basic Law. Indeed, the NPCSC's decision to issue the Interpretation was entirely unsolicited — there was no concrete legal dispute, no lower court decision, no legislative resolution, and no request from the HK-SAR administration to provide guidance as to the proper mean-

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79. See Interpretation of the Annexes, *supra* note 2 ("The provisions, in the two annexes mentioned above, on requirements relating to . . . reporting to the NPC Standing Committee for approval or for the record, refer to prerequisite legal procedures for amending the methods of selecting the Chief Executive and forming the Legislative Council.").

ing of the Annexes. In this respect, the Standing Committee's Interpretation of the Annexes marks a uniquely unilateral approach to interpreting the Basic Law that is arguably much more expansive than the mainland's previous practice.

However one may have viewed the right of abode controversy, the latest conflict over the Interpretation of the Annexes raises even more serious questions about the proper interpretive approach to the Basic Law. Perhaps most significantly, the NPCSC undertook to interpret the Annexes *on its own initiative*. In the right of abode controversy, the Court of Final Appeals arguably forced the hand of the central government; after all, that interpretation came at the behest of the regional administration in Hong Kong, albeit through a controversial request by the Chief Executive.<sup>80</sup> By contrast, the NPC announced its decision to issue the Interpretation of Annexes I and II evidently without serious consultation of, much less solicitation by, HKSAR authorities. The NPCSC's decision to issue its unsolicited Interpretation of the Annexes therefore marks an important departure from past interpretive practice under the Basic Law and represents a more expansive exercise of the central government's authority over the law. It was precisely the fact that the Interpretation was issued *sua sponte* that jarred Hong Kong's Democrats. Democratic Party legislator James To feared that the most recent Interpretation set a "dangerous course" because "anything in the Basic Law could now be subjected to further interpretation."<sup>81</sup> The hurried, proactive manner of the Interpretation's promulgation has left many in Hong Kong justifiably concerned about the interpretive discretion that the NPC may wield.

It is worth noting that the recent Interpretation also provided the administration in Hong Kong with much less leeway to attempt its own resolution of disputes over the Basic Law. Whereas the NPC's interpretation in the right of abode case was an *ex post* rebuke of the Court of Final Appeals for reaching an unacceptable decision in a politically sensitive matter, the recent decision to circumscribe the democratic reform movement erects obstacles *ex ante* to Hong Kong's ability to engage fully in its own

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80. See Report of the Joseph R. Crowley Program, *supra* note 32, at 26–27 (“As a threshold matter, prominent members of the Hong Kong bar and academy argued that the Chief Executive’s action was flatly inconsistent with the Basic Law. . . . Asking a higher mainland authority to correct the judgment considered by Hong Kong’s highest court, has substantially the same effect as appellate review by the mainland over the CFA.”).

81. Michael Ng, “No One Can Stop Beijing”, THE STANDARD (Hong Kong), Apr. 6, 2004 (quoting Peter Wong, local deputy to the NPC), [http://www.thestandard.com.hk/news\\_detail\\_frame.cfm?articleid=46494&intcatid=1](http://www.thestandard.com.hk/news_detail_frame.cfm?articleid=46494&intcatid=1).

constitutional development. The latest interpretation has thus raised serious questions about *when* the Basic Law should be interpreted.

Another reason why the NPCSC's Interpretation of the Annexes is more troubling than its interpretation in the right of abode cases is that the controversy over the Annexes arguably involves a matter of more local than national concern. Whereas the right of abode controversy implicated the immigration policies of the central government and directly affected its ability to administer those policies, the row over Hong Kong's democratic timetable affects — by definition — the political autonomy of the regional government. Admittedly, the central government has a keen interest in Hong Kong's political development, and if democratization is to take place at all, it must happen with the mainland's blessing. After all, any change to the Annexes must clearly pass muster with the central government, which alone has the power to amend the Basic Law.<sup>82</sup> Yet it is difficult to imagine a more quintessential issue of local concern than the process by which Hong Kong administrators assume political office. If the election of local government officials is not local, what is? Thus, in an even more important — though perhaps less direct — fashion than in the right of abode controversy, the Interpretation of the Annexes has also raised serious questions about the proper allocation of interpretive power over substantive areas of the Basic Law.

In many ways, the recent controversy is just another by-product of a statute whose quasi-constitutional status portends conflict between those in Beijing who see it as serving distinctly national goals and those in Hong Kong who see it as protecting distinctly regional prerogatives. Yet the recent Interpretation is more than that: substantively as well as procedurally, the NPCSC's Interpretation of the Annexes pushed the envelope of the central government's power to interpret the Basic Law further than any other previous interpretation had done before.<sup>83</sup> If

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82. See BASIC LAW art. 159.

83. A caveat here: to say that Beijing has pushed the envelope is not to say that Beijing has exceeded its authority. There are possible arguments that the Interpretation is inconsistent with the Basic Law's pledge of autonomy to Hong Kong, that the Interpretation undermines Hong Kong's common law tradition, or that the Interpretation was a clumsy an unenlightened pronouncement that undermines Hong Kong's development rather than promotes it. It is not plausible to claim that the NPCSC was without legal authority to issue the interpretation, and it is important to note explicitly that this article does not make such a claim. See GHAI, *supra* note 21, at 202 (noting that "the NPCSC might become involved in the interpretation of the Basic Law . . . on its own initiative, perhaps to clear doubts that may have arisen about the reach of a provision in order to provide guidance to the relevant authorities or to correct what it deems a wrong interpretation by the HKSAR courts").

the Interpretation of Annexes I and II represents a departure from the blueprint of the Basic Law and a procedural aberration from the NPCSC's previous post-handover interpretive practice (limited as that practice may be), then some explanation is necessary as to why the NPCSC chose to issue such a hurried pronouncement on Hong Kong's aspirations for democracy.

### III. INTERPRETING THE CONTROVERSY OVER INTERPRETATION

This Part examines the various conditions that produced the NPCSC's unusual *sua sponte* Interpretation of the Annexes. First, it explores the historical, political, and forces that helped lead to the recent Interpretation. Second, it explores how the different legal cultures of the mainland and Hong Kong have also perpetuated conflict over the Basic Law.

#### A. DEMOCRATIC REFORM IN HONG KONG

The suddenness of the NPCSC's Interpretation is attributable in part to the complex historical, political, and social sensitivities attached to the issue of sovereignty over Hong Kong. One factor contributing to the Interpretation is the mainland's historical preoccupation with the resumption of Chinese sovereignty over Hong Kong and its determination to defend against perceived threats to that sovereignty. Another part of the explanation rests with the political culture of the modern-day PRC, where the government has shown a remarkable willingness to experiment with economic reforms but remains wary of political liberalization. In addition, the recent topsy-turvy re-election of Taiwan's President may have contributed to the PRC's feeling that it was time to apply brakes to Hong Kong's reform movement. Finally, the political situation in Hong Kong also may have encouraged Beijing to issue the Interpretation — economic troubles and dissatisfaction with the current HKSAR administration had led to widespread protests against the HKSAR administration only months before it issued the Interpretation. Moreover, even within Hong Kong — and especially in the business community, which tends generally to favor pro-Beijing policies — there is a sense within the territory that Hong Kong may not be ready for universal suffrage. To the extent that instability and the undertow of elite sentiment may actually cut against apparently widespread support for democracy in Hong Kong, Beijing may have felt that it was time to reinforce the less democratic governance structures currently in place in the HKSAR.

First, history and identity. To look at Hong Kong through Western eyes is to see "its freewheeling capitalism, its indepen-

dent judiciary, its professional civil service and many of the other characteristics that made it such a spectacular success.”<sup>84</sup> Yet a Chinese perspective on Hong Kong recalls the Opium War, in which the Chinese were resolutely defeated at the hands of superior British forces, and the Treaty of Nanking, under which Britain compelled China to cede control over the island. When, in 1997, Jiang Zemin presided over the handover ceremony, his remarks reflected the mainland’s deep-seated cultural resentment toward Hong Kong’s colonial history:

China’s resumption of the exercise of sovereignty over Hong Kong . . . is both a festival for the Chinese nation and a victory for the universal cause of peace and justice. Thus, July 1, 1997 will go down in the annals of history as a day that merits eternal memory. The return of Hong Kong to the motherland after going through more than one century of vicissitudes indicates that from now on, Hong Kong compatriots have become true masters of this Chinese land and that Hong Kong has now entered a new era of development. History will remember Mr. Deng Xiaoping for his creative concept of “one country, two systems.” It is precisely along the course envisaged by this great concept that we have successfully resolved the Hong Kong question through diplomatic negotiations and finally achieved Hong Kong’s return to the motherland.<sup>85</sup>

If the West understands “one country, two systems” as a bulwark devised to protect the freewheeling capitalist enclave, Jiang’s speech indicates that the Chinese Communist Party (CCP) understands it as the formula through which China finally acquired more, not less, influence over the territory.<sup>86</sup>

Democratic governance under the Basic Law has been a sensitive issue since before the handover occurred. According to Michael Davis, the student demonstrations in Tiananmen Square in 1989 left the central government deeply concerned about granting too much political leeway to the HKSAR. As Davis writes: “After the 1989 demonstrations, as Chinese leaders worried about Hong Kong becoming a base of subversion, they sought to tighten the noose on democracy, insisting on retaining this very conservative evolutionary model in the final Basic Law.”<sup>87</sup> As a result, the Basic Law reflects a conservatism that

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84. Editorial, *Hong Kong’s Protest*, GLOBE & MAIL (Toronto), Apr. 13, 2004 (on file with author).

85. Xinhua News Agency, *Full Text of Jiang’s Speech at Hong Kong Handover Ceremony*, July 1, 1997, LEXIS, Xinhua General News Service File, Item No. 0701234.

86. See Editorial, *Hong Kong’s Democrats Deserve Britain’s Support*, DAILY TELEGRAPH (London), Apr. 7, 2004, at 25 (“Faced with diverging ‘systems,’ Beijing has chosen to emphasise the ‘one country’ part of Deng’s formula with a vengeance.”).

87. Davis, *supra* note 15, at 279.

deviates from the tone of the Joint Declaration, and the version of the Basic Law enacted in 1990 by the NPC is notably less permissive of political reform than earlier drafts of the document. The imprecision of the Basic Law's democratic timetable thus reflects the PRC's ambivalence about its commitment to provide "a high degree of autonomy" to the HKSAR and its determination to wield controlling influence in the political progress and development of Hong Kong.<sup>88</sup>

In 1992, British Governor Chris Patten stirred more controversy when he introduced a set of reforms replacing appointed seats in the Legislative Council with directly elected seats and provided more direct popular control over the Selection Committee that chose representatives for several other seats.<sup>89</sup> Over the vociferous objections of the PRC, which accused Patten of violating the Joint Declaration<sup>90</sup> and conducted mock military exercises simulating the bloodless recapture of the colony as a not-so-subtle form of intimidation,<sup>91</sup> the Legislative Council passed the reforms, and the 1995 elections became a high-water mark for democracy in Hong Kong. With some justification, the Chinese viewed Patten's reforms as a hypocritical attempt by the British to insulate Hong Kong from PRC control, and the legacy of those reforms as a foreign imposition still influences Beijing's view of the democratic movement. Immediately following the handover in 1997, China replaced the sitting legislature with a Provisional Council, which remained in power until new representatives were selected in April of 1998.<sup>92</sup>

Even in the present controversy, latent hostility over Hong Kong's lingering British identity continues to surface in the democracy debate. Chairman Ma Lik of the Democratic Alliance for the Betterment of Hong Kong recently stated that one of the reasons Hong Kong is not ready for democracy is because its citizens do not possess enough of a sense of national identity. "I

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88. See *id.* at 278 (describing the cautiousness of Chinese officials with respect to democratic development, the effect of the Tiananmen Square demonstrations on China's attitude toward Hong Kong's autonomy and the Basic Law, and "China's basic political instincts to maximize control").

89. See *id.* at 280-81.

90. See James Pringle, *China Steps Up Its Attack on Governor*, THE TIMES (London), Oct. 9, 1992, LEXIS, The Times file ("The Chinese stepped up attacks on proposals by Chris Patten, the governor of Hong Kong, yesterday saying that they were inconsistent with accords reached with Britain eight years ago.").

91. See Jon Swain, *Chinese Play War Games with Patten*, THE TIMES (London), Dec. 6, 1992, LEXIS, The Times file ("In a sabre-rattling move that will raise tension with Hong Kong to new heights, the Chinese People's Liberation Army is preparing to conduct military manoeuvres close to the British colony. The two-day exercise, involving three divisions of troops and eight warships, has as its scenario the capture of Hong Kong in six hours without a shot being fired.").

92. See Davis, *supra* note 15, at 282.

read a survey last year that said 90 percent [of Hong Kongers] don't think they are Chinese," said Ma. "Many think they are British. How can the time be right for us [to adopt universal suffrage] if Hong Kong people are anti-communist and anti-central government?"<sup>93</sup> Some officials indirectly hinted at the problem of national identity: "As long as we consider the political reform from the 'one country' perspective, we can have a more smooth discussion on the issue."<sup>94</sup> Others did not mince words: the Vice-Chairman of the National People's Congress, Cheng Siwei, slandered Hong Kong democrats as "bananas," a racial slur describing someone of Asian appearance and Western behavior — yellow outside and white inside.<sup>95</sup> Although political gamesmanship is also at work when democracy activists are branded "unpatriotic" or "traitorous" for their liberal activism,<sup>96</sup> many mainlanders perceive Hong Kong's foreign legacy as a threat to Chinese sovereignty, and identity politics are at play in the reform movement in a way that critics of the Chinese government often fail to appreciate.

Second, the domestic political climate of the PRC played a role in the controversy over the Annexes. Simply put, change in Hong Kong is a bellwether for change on the mainland, despite the HKSAR's ostensible autonomy. And Beijing's ambivalence about political reforms within mainland China has played a major role in its lukewarm response to Hong Kong's democratic movement. While the CCP has permitted gradual experimentation in grass-roots democracy and direct elections at the local level,<sup>97</sup> it remains vigilantly opposed to encroachments on the Party's power. And despite the perception of Hong Kong as an enclave of capitalism and liberalism, activity in the HKSAR invariably has ramifications across the border: as commerce, travel, and communication increase between the autonomous region and the mainland, Chinese officials may find themselves unable to monitor and contain the effects of liberalization in Hong

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93. Mark Clifford & Cannix Yau, *Mind of the Party Man*, THE STANDARD (Hong Kong), Apr. 25, 2004 (second alteration in original), [http://www.thestandard.com.hk/news\\_detail\\_frame\\_wkend2.cfm?articleid=47037&intcatid=45](http://www.thestandard.com.hk/news_detail_frame_wkend2.cfm?articleid=47037&intcatid=45).

94. Editorial, *supra* note 17 (quoting Peter Wong, local deputy to the National People's Congress) (internal quotation marks omitted).

95. Cf. Gary Cheung, *Some HK People Are "Bananas": NPC Official*, S. CHINA MORNING POST, May 8, 2004, at 2.

96. Kynge et al., *supra* note 71 ("Beijing and its allies have dismissed Hong Kong democrats as 'clowns', 'traitors' and — in the case of veteran Hong Kong democracy leader Martin Lee — a 'running dog of colonialists'").

97. See M. Kent Jennings, *Political Participation in the Chinese Countryside*, 91 AM. POL. SCI. REV. 361 (1997); Minxin Pei, "Creeping Democratization" in China, J. DEMOCRACY, Oct. 1995, at 65; Susan Lawrence, *Democracy, Chinese Style*, AUSTL. J. CHINESE AFF., July 1994, at 61.

Kong.<sup>98</sup> Thus, the prospect of a runaway reform movement in Hong Kong also raises the specter of a spillover effect that would generate similar demands for democracy on the mainland.<sup>99</sup> Qiao Xiaoyong's metaphorical remark that "Hong Kong can build a bridge to greater democracy, but it must follow China's blueprint"<sup>100</sup> reflects China's attitude that the architecture of Hong Kong's democracy has consequences for the stability of the PRC.

Third, there is the issue of regional politics — specifically, Taiwan. For the PRC, the "one country, two systems" experiment is a blueprint for reunification with its estranged province, and Hong Kong's success under the hybrid system is crucial to the mainland's goal of achieving Taiwan's return to the mainland.<sup>101</sup> Yet even as it seeks reunification with Taiwan through the democratic model of Hong Kong's Basic Law, Beijing is simultaneously unnerved by Taiwan's own democratic development. The PRC has issued both veiled and flagrant threats to try to ensure the election of conciliatory candidates to Taiwan's public offices. In the run-up to the island's most recent presidential election, for example, mainland newspapers published ominous photographs of armed forces conducting amphibious landing exercises and reported public opinion polls showing that more than ninety-five percent of Chinese are ready to fight to stop Taiwanese independence.<sup>102</sup>

Taiwan's election in March may well have triggered Beijing's decision to issue its Interpretation of the Annexes. On March 20, just six days before the Standing Committee announced its decision to issue the Interpretation, Taiwanese voters re-elected pro-

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98. See Min Lee, *Mainlanders Get a Glimpse of Hong Kong Glimpse*, WASH. POST, May 9, 2004, at A21 (describing the reactions of mainland vacationers who visit the HKSAR).

99. See Joseph Kahn, *Hong Kong Stirs and Its Neighbors Take Notice*, N.Y. TIMES, July 19, 2003, at A9 ("The big fear among Chinese officials is that Hong Kong's peaceful and at least partly effective street demonstrations, which involved 500,000 people at their peak earlier this month, could prod bolder action by mainland China's many discontented groups. Farmers burdened by heavy taxation, urban residents evicted from their homes to make way for real estate developers, and laid-off workers in rust-belt industries regularly stage angry demonstrations around China, though rarely with much coordination.").

100. Watts, *supra* note 65.

101. See George E. Edwards, *Applicability of the "One Country, Two Systems" Hong Kong Model to Taiwan: Will Hong Kong's Post-Reversion Autonomy, Accountability, and Human Rights Record Discourage Taiwan's Reunification with the People's Republic of China?*, 32 NEW ENG. L. REV. 751 ("Though Taiwan has not embraced the 'One Country, Two Systems' model, it has not ruled out a reunification, under modified terms. Therefore, Taiwan is closely studying the Hong Kong reversion, assessing carefully the experiment's 'success' or lack thereof . . .").

102. See *Analysis: China's Nightmare*, BBC NEWS, Mar. 20, 2004, <http://news.bbc.co.uk/1/hi/world/asia-pacific/683860.stm>.

independence candidate Chen Shuibian. Perhaps even worse, from Beijing's perspective, were the antics that accompanied the controversial election: an assassination attempt, sometimes violent protests, a "razor-thin victory" that prompted an immediate recount of ballots, the disqualification of 330,000 votes due to irregularities in the election, and a referendum (which failed) criticizing China's threatening use of ballistic missiles.<sup>103</sup> The Taiwanese election may have generated an immediate fear in Beijing that the already restless Hong Kong, if given the power to choose its own Chief Executive, might choose someone hostile to Beijing.<sup>104</sup> As one columnist wrote: "It is no coincidence that Beijing decided to remind the Hong Kong people who is the boss precisely at a time it intensified its propaganda against Taiwan's democracy and what it described as a post-election 'turmoil.'"<sup>105</sup>

Fourth, there is the issue of Hong Kong's local politics. Since the handover, there has been growing popular discontent with the HKSAR administration, and in particular, with the current Chief Executive, Tung Chee-hwa. In recent years Hong Kong has faced declining property values and record unemployment; when Tung introduced a strict security law that critics viewed as threatening to individual liberties — a law whose eventual promulgation, in some form, is required under Article 23 of the Basic Law<sup>106</sup> — nearly 500,000 Hong Kongers responded with a protest that eventually forced the Chief Executive to soften, and then withdraw completely, the proposed law.<sup>107</sup>

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103. See Tyler Marshall & Tsai Ting-I, *Taiwan's Election Results Disputed*, L.A. TIMES, Mar. 21, 2004, at A4.

104. One mainland scholar candidly confessed: "The problem for China is not legal. . . . The problem is that if Hong Kong holds direct elections now, it will probably elect people who are not loyal to Beijing." Joseph Kahn, *A Democratic China? Not So Fast, Beijing Leaders Say*, N.Y. TIMES, Apr. 8, 2004, at A3 (quoting Shi Yinhong of People's University in Beijing) (internal quotation marks omitted).

105. Jean-Pierre Cabestan, *Chen Shui-Bian's Re-election and Hong Kong Democratization*, APPLE DAILY, Apr. 6, 2004 (on file with author).

106. See BASIC LAW, art. 23 ("The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets . . ."). Such laws provide the legal basis for most of the PRC's more controversial criminal prosecutions, including the recent arrest of dissidents who have published critical political essays on the Internet; recently, a high-profile group of activists and academics called on the government to reform the laws, contending that "the vagueness of the law is essentially a license for abuse that allows the police to arrest anyone who criticizes the government, regardless of their intent." See Jim Yardley & Chris Buckley, *Chinese Reformers Petition for Review of Subversion Law*, N.Y. TIMES, Feb. 1, 2004, § 1, at 6.

107. See Philip P. Pan, *Hong Kong's Summer of Discontent; Spread of Unrest Feared by Beijing*, WASH. POST, July 15, 2003, at A1 (describing the economic doldrums and the security law that helped "galvanize" the Hong Kong resistance movement). For discussion of the possible legal consequences of Article 23, see Albert H.Y. Chen, *How Hong Kong Law Will Change when Article 23 of the Basic Law Is*

Many political commentators therefore viewed the recent Interpretation of the Annexes as an indictment of Tung's rule. As a faculty member at the Hong Kong University School of Law remarked, "the person most affected by all of this is Tung as it shows the central government believes he can no longer be their spokesman. . . . Tung is neither trusted by the central government nor by the public."<sup>108</sup>

It is especially plausible to view the Interpretation as an effort by Beijing to prop up a struggling HKSAR administration considering that the Interpretation consolidates control over the reform process in the position of the Chief Executive. As originally enacted, the Basic Law had already required the Chief Executive's authorization in order for the legislature to introduce bills pertaining to political reforms.<sup>109</sup> The Interpretation reinforces this power, giving sole responsibility to the Chief Executive for initiating the reform process. Because it helps insulate Beijing from a semi-democratic legislature that might attempt to seize control over the reform movement from an unpopular Chief Executive, the Interpretation may signal Beijing's anxiety over the weakness and unpopularity of the current administration in the HKSAR.

It is also worth noting that there is a good deal of ambivalence about democracy within Hong Kong society as well. Particularly among the business elite, many citizens of the HKSAR have expressed skepticism about the ability of Hong Kong's democrats to govern effectively. The Chairman of the pro-business and pro-government Liberal Party put it bluntly: "The minority of lawmakers who are already elected by the general public are not friendly enough to the business community and lack expertise in business issues."<sup>110</sup> Conservatives in Hong Kong frequently express the need to postpone universal suffrage because Hong Kong's political culture is underdeveloped. One trade representative argued that "[u]ntil we have mature and trustworthy political groups and political figures, we think there is a need to

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*Implemented*, 33 HONG KONG L.J. 1 (2003); H. L. Fu, Richard Cullen, & Pinky Choy, *Curbing the Enemies of the State in Hong Kong — What does Article 23 Require?*, 5 J. CHINESE & COMP. L. 45 (2002); and Inbal Sansani, *The Threat of Article 23 to Civil Liberties in the Hong Kong Special Administrative Region*, HUM. RTS. Q., Spring 2003, at 28.

108. Michael Ng, *Beijing "Takes Over Role of Tung"*, THE STANDARD (Hong Kong), Apr. 7, 2004, [http://www.thestandard.com.hk/news\\_detail\\_frame.cfm?articleid=46520&intcatid=1](http://www.thestandard.com.hk/news_detail_frame.cfm?articleid=46520&intcatid=1).

109. See BASIC LAW art. 74 ("The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.")

110. Keith Bradsher, *Hong Kong Protesters Demand Free Elections*, N.Y. TIMES, July 21, 2004, at A8. (attributing remarks to Liberal Party Chairman James Tien).

retain functional constituencies,<sup>111</sup> such as the professional and business communities, which have disproportionately large influence under the current structure of the Basic Law. In the same way, representatives of the functional constituencies, who currently compose half the legislature, have expressed doubts about whether a popularly elected Legislative Council would command the technical expertise required of lawmakers.<sup>112</sup> Hong Kong's Task Force on Constitutional Development stated similar concerns in a recent report:

At present, political groups focus more on issues of the day and individual political episodes. They lack an overall governing manifesto and an overview in policy research in different areas. As a result, the public is not certain whether political groups are able to look after the interests of different sectors of society, as well as the long term interests of the HKSAR.<sup>113</sup>

It is uncertain whether these concerns have any merit, or whether they are simply cover for the desire of these functional constituencies — who comprise only about 160,000 of Hong Kong's approximately 6.8 million people, yet determine the membership of half the legislature and the committee that nominates the Chief Executive<sup>114</sup> — to preserve their disproportionate power in the HKSAR government. Regardless, they are the views of some of the most powerful segments of Hong Kong society. As such, these concerns are likely to carry a great deal of influence with a central government eager to hear the message that the HKSAR is not ready for full-scale democratization.

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111. Jimmy Cheung, *Go-Slow Plea on Full Democracy; Manufacturers Say HK Needs Mature and Trustworthy Political Parties*, S. CHINA MORNING POST, Feb. 21, 2004, at 2 (quoting Chinese Manufacturers' Association President Jose Yu Sun-say).

112. Keith Bradsher, *Hong Kong Protesters Demand Free Elections*, N.Y. TIMES, July 21, 2004, at A8 ("Eric Li, a political independent chosen by the territory's 22,000 accountants, said . . . business executives should continue to be allocated special seats in the 2004 and 2008 legislative elections, contending that the political parties were not well enough developed yet to attract technically qualified candidates.").

113. See CONSTITUTIONAL DEVELOPMENT TASK FORCE, THE SECOND REPORT OF THE CONSTITUTIONAL DEVELOPMENT TASK FORCE: ISSUES OF PRINCIPLE IN THE BASIC LAW RELATING TO CONSTITUTIONAL DEVELOPMENT ¶ 3.23, at 18–19 (May 2004) [hereinafter SECOND REPORT ON CONSTITUTIONAL DEVELOPMENT], available at <http://www.info.gov.hk/cab/cab-review/eng/report2/pdf/secondreport-e.pdf>.

114. See CONSTITUTIONAL DEVELOPMENT TASK FORCE, THE THIRD REPORT OF THE CONSTITUTIONAL DEVELOPMENT TASK FORCE: AREAS WHICH MAY BE CONSIDERED FOR AMENDMENT IN RESPECT OF THE METHODS FOR SELECTING THE CHIEF EXECUTIVE IN 2007 AND FOR FORMING THE LEGISLATIVE COUNCIL IN 2008 ¶ 2.03, at 9 (May 2004) [hereinafter THIRD REPORT ON CONSTITUTIONAL DEVELOPMENT], available at <http://www.info.gov.hk/cab/cab-review/eng/report3/pdf/thirdreport.pdf>. For detailed information on the composition of the Election Committee and the functional constituencies, see *id.* at apps. 1–4.

Any jurisprudence related to the Basic Law must take into account these multifarious issues, which certainly influenced, if they did not direct entirely, the Standing Committee's decision to interpret Annexes I and II.

## B. LEGAL HERITAGE AND CONTEMPORARY CONFLICT

In addition to the many historical, political, and social issues that affect the course of Hong Kong's democratic development under the Basic Law, there are also competing legal traditions at work in the conflict between the HKSAR and the mainland. Hong Kong has inherited, and the Basic Law protects, the common law tradition of its British colonizers. By contrast, China's legal system, though unique in many respects, is more closely related to the civil law tradition of the European continent. This section explores two salient differences between the common law and civil law traditions that contribute to the dispute over the proper interpretation of the Basic Law. First, it examines the different institutional arrangements of the common law and civil law schemes: specifically, that common law jurisdictions generally place the power to interpret the laws in the courts while civil law jurisdictions generally give that authority to the legislature. Second, this section explores the different procedures typical of the common and civil law traditions: specifically, the common law's preference for adjudicating concrete controversies by applying law to events that have already transpired and the civil law's relative tolerance for issuing prospective or advisory interpretations in anticipation of future legal disputes. Much of the controversy surrounding the NPC's interpretations of the Basic Law has to do with the jurisprudential syncretism of a document that simultaneously grants the "power of final adjudication" in a common law court<sup>115</sup> and reserves the "power of interpretation" for a civil law legislature.<sup>116</sup> Developing a stable interpretive framework under the Basic Law requires striking a balance between the competing and sometimes contradictory instincts of these two legal traditions.

At the outset, it is important to recognize the limits of the labels "common law" and "civil law." These terms usefully identify features shared by families of legal systems, but they also mask a great deal of variety within those families. As John Henry Merryman writes, "there is no such thing as *the* civil law

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115. BASIC LAW art. 82.

116. *Id.* art. 158. As discussed above, the Basic Law further complicates the matter by granting partial interpretive power over the Basic Law to the Hong Kong judiciary in the adjudication of cases not concerning affairs or responsibilities of the Central People's Government. See *id.* art. 158.

system, *the* common law system, or *the* socialist law system.”<sup>117</sup> The following discussion proceeds with the recognition that the labels of common law and civil law have certain limitations, as well as with the acknowledgment that these labels are especially dubious in the Chinese context. Although Hong Kong has a legal tradition rooted in the common law, its tradition differs from the system of its British colonizer — or, for that matter, from other common law systems.<sup>118</sup> Moreover, the quasi-federalism of the Basic Law makes it difficult to identify post-handover Hong Kong as a purely common law jurisdiction; it is unlikely that the common law system in Hong Kong will be able to resist syncretism with the legal culture of its “motherland” any more than, say, Louisiana has been able to insulate its civil law jurisprudence from the pervasive influence of American common law.<sup>119</sup> The mainland likewise resists classification as a civil law jurisdiction. China’s legal system is a conglomerate of the civil law tradition of the European continent,<sup>120</sup> the Soviet empire’s socialist ideology, which altered the civil law tradition in many communist countries,<sup>121</sup> and the unique tendencies of its own legal tradition.<sup>122</sup>

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117. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 2 (2d ed. 1985); *see also id.* (emphasizing that “differences in legal systems are reflections of the fact that for several centuries the world has been divided up into individual states, under intellectual conditions that have emphasized the importance of state sovereignty and encouraged a nationalistic emphasis on national characteristics and traditions”).

118. *See* BERRY FONG-CHUNG HSU, *THE COMMON LAW SYSTEM IN CHINESE CONTEXT: HONG KONG IN TRANSITION* (1992) (noting that “Common Law and Chinese law and custom have been administered by a fused Common Law system in Hong Kong, and identifying various aspects of indigenous Chinese law — including “family law, succession law, and even concubinage” — that were retained during the colonial period).

119. *See* MARK F. FERNANDEZ, *FROM CHAOS TO CONTINUITY: THE EVOLUTION OF LOUISIANA’S JUDICIAL SYSTEM 1712–1862*, at 17 (describing “the profound influence of Anglo-American principles on Louisiana’s legal development” that “allowed for the introduction of the common law into Louisiana’s legal system” and made Louisiana “a mixed jurisdiction”); *see also* LOUISIANA: MICROCOSM OF A MIXED JURISDICTION (Vernon Valentine Palmer ed., 1999); LOUISIANA’S LEGAL HERITAGE (Edward F. Haas ed., 1983).

120. *See* Perry Keller, *Sources of Order in Chinese Law*, 42 *AM. J. COMP. L.* 711, 717–19 (describing Chinese access to and incorporation of legal structures and codes from civil law jurisdictions during the later imperial and modern eras, and noting “China’s complete reception of the Romano-German civil law tradition” during the Republican era).

121. *See id.* at 719–24 (describing the influence of Soviet ideology on the Chinese legal system); *see also* MERRYMAN, *supra* note 117, at 4 (“One intention of the Soviet revolutionaries was to abolish the bourgeois civil law system and substitute a new socialist legal order. The actual effect of their reform was to impose certain principles of socialist ideology on existing civil law systems and on the civil law tradition.”).

122. Although law has not served to organize and structure Chinese society in the same way that it has throughout the modern history of the West, China possesses

Moreover, the lack of a strong sense of the rule of law in China — a topic of extensive scholarly commentary that this article does not intend to rehash<sup>123</sup> — also counsels against relying too heavily on legal culture as an explanation for the behavior of its modern legal institutions, much less classifying China as a civil law jurisdiction.

Still, Hong Kong and the mainland have vastly different legal systems, and a great many of the differences between them are attributable to their common law and civil law backgrounds. In particular, the role of the judiciary in the HKSAR administration is a unique and important common law feature of its governmental system. Most common law systems provide the judiciary with a great deal of interpretive autonomy; common law courts, in short, generally have the final say on statutory meaning.<sup>124</sup> In some jurisdictions, the judiciary also possesses the power to review and invalidate statutes that are inconsistent with a constitutional text.

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its own distinct legal history. As some scholars have noted, early Chinese history evidences a great deal of philosophical debate about the proper role of law in shaping society. See Karen Turner, *Rule of Law Ideals in Early China*, 6 J. CHINESE L. 1 (1992). Likewise, imperial China possessed a distinct Confucian legal ethic, a unique legal hierarchy, and a legal code as complex as any contemporaneous code that may have existed in Europe. See generally DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* (1967); *CIVIL LAW IN QING AND REPUBLICAN CHINA* (Kathryn Bernhardt & Philip C.C. Huang eds., 1994); Liang Zhiping, *Explicating 'Law': A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55 (1988).

123. Nearly every article on modern Chinese legal reform includes the clichéd observation that the Chinese term *fazhi* translates into English as either “rule of law” or “rule by law,” a semiotic indication of China’s tendency to view law more as an instrument with which to achieve a governmental objective than a constraint on governmental power. See generally Deborah Cao, “Fazhi” vs/and/or Rule of Law? *A Semiotic Venture into Chinese Law*, 14 INT’L J. SEMIOTICS L. 223 (2001). For several sophisticated articles whose debate transcends such clichés about the prospects for the rule of law in China, see William P. Alford, *A Second Great Wall?: China’s Post-Cultural Revolution Project of Legal Construction*, 11 CULTURAL DYNAMICS 193 (1999); Cai Dingjian, *Development of The Chinese Legal System Since 1979 and its Current Crisis and Transformation*, 11 CULTURAL DYNAMICS 135 (1999); Michael Dowdle, *Heretical Laments: China and the Fallacies of ‘Rule of Law’*, 11 CULTURAL DYNAMICS 287 (1999); G. H. Hintzen, *The Place of Law in the PRC’s Culture*, 11 CULTURAL DYNAMICS 167 (1999); Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 CULTURAL DYNAMICS 315 (1999). See also RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* (2002).

124. See Richard J. Wilson, *Reflections on Judicial Review in Latin America*, 7 SW. J. L. & TRADE AM. 435 (2000) (“In the common law, there is a strong history placing judges and their decisions at the center of the legal system; law is made in the courts through the system of stare decisis and strong judicial review. In the civil law, by contrast, the legislature is the locus of lawgiving and change in the law; judges are merely the caretakers of the law who must apply the law as given to them by congress.”)

Although there is some doubt about the scope of the Hong Kong judiciary's authority under the Basic Law, particularly with respect to the question of judicial review,<sup>125</sup> there is consensus that the Hong Kong courts have long reflected and should continue to reflect the common law's model of an independent judiciary. During the colonial era, the Hong Kong judiciary was one of the few institutions that exemplified the notion of separation of powers, and the concept of judicial independence remains "well established in Hong Kong."<sup>126</sup> Indeed, some scholars have argued that judicial independence has become an even more fundamental feature of the government in post-handover Hong Kong.<sup>127</sup> Contemporary conversation about the Basic Law reflects a great deal of concern, both popular and academic, that the handover may jeopardize the prominent and independent status of the Hong Kong courts.<sup>128</sup>

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125. Compare MICHAEL C. DAVIS, CONSTITUTIONAL CONFRONTATION IN HONG KONG: ISSUES AND IMPLICATIONS OF THE BASIC LAW 17–20 (1990) (noting that the Basic Law is "ambiguous as to whether the local [Hong Kong] courts can exercise constitutional judicial review of legislation," but arguing that the Joint Declaration justifies interpreting the Basic Law to provide that power), and GHAI, *supra* note 21, at 209–18 (arguing that the structure of the Basic Law recommends a system that incorporates at least some kind of judicial review because otherwise there would be "no effective way of holding the Legislative Council to its proper powers or maintaining the balance between the legislature and the executive," but admitting that Chinese authorities have not approved the notion of judicial review), with Liu Yiu Chu, *Interpretation and Review of the Basic Law of the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 49, 56 (1988) (acknowledging the indeterminacy of the Basic Law's provisions, but asserting that Basic Law does not confer the power of judicial review because it would improperly imply "the supremacy of the SAR judiciary not only over the SAR executive and legislature, but also over the Central Government in all matters covered by the Basic Law"). Some scholars have viewed the controversy over the right of abode cases as affirming the power of the Hong Kong judiciary to invalidate legislation passed by the HKSAR. See Paul Gewirtz, *Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics*, 31 HONG KONG L.J. 200, 202 (2001) ("[T]he power [of the HK-SAR courts] to declare an act of the Hong Kong Government invalid . . . is a hugely important power — and may prove increasingly important in the years ahead — but, happily, this power now seems uncontroversial.").

126. Byron S.J. Weng, *Judicial Independence Under the Basic Law*, in JUDICIAL INDEPENDENCE AND THE RULE OF LAW IN HONG KONG 48, 50 (Steve Tsang, ed., 2001) (citing PETER WESLEY SMITH, 2 CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 479 (1988)); see also Hsu, *supra* note 118, at 127 (examining "attitudes and values among the Chinese population of Hong Kong" and concluding that "the Common Law has established itself in Hong Kong to a considerable extent").

127. See Yash Ghai, *Litigating the Basic Law, Jurisdiction, Interpretation and Procedure*, in HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION, *supra* note 34, at 3, 7 (noting that the lack of independence within the legislative and executive branches, both of which are beholden in many ways to Beijing, has reinforced the "centrality of the role of courts for the defence of rights and autonomy").

128. See generally JUDICIAL INDEPENDENCE AND THE RULE OF LAW IN HONG KONG, *supra* note 126; see also Mark Landler, *China Tells Hong Kong It Wants Immigration Ruling 'Rectified'*, N.Y. TIMES, Feb. 14, 1999, §1, at 13 (noting that the

Likewise, the procedure of adjudication followed by Hong Kong courts reflects their common law ancestry. The common law connotes a case-by-case approach to adjudication. The underlying philosophy of this approach is that, by examining only individual cases and by deciding only questions necessary for a proper resolution of those cases, there will emerge in the comparison of subsequent cases a set of governing principles that constitute the law. As Oliver Wendell Holmes put it: "Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make [judicial pronouncements] more precise, and [then] to generalize them into a thoroughly connected system."<sup>129</sup> Hong Kong's legal system follows, and the Basic Law reinforces, this case-by-case approach to legal interpretation.<sup>130</sup>

Numerous provisions of the Basic Law defend against encroachment on Hong Kong's common law system. Article 81, for example, provides that "the judicial system previously practised in Hong Kong shall be maintained,"<sup>131</sup> and Article 85 states that "[t]he courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference."<sup>132</sup> Other provisions allow judges from other common law jurisdictions to sit on the Court of Final Appeal,<sup>133</sup> permit reference to foreign common law precedent in the adjudication of cases,<sup>134</sup> and provide for the recruitment of judicial officers from common law jurisdictions.<sup>135</sup> From the scheme of the Basic Law, then, it is evident that China has given, in effect, a legal promise to respect the independent judgment of the Hong Kong courts and preserve their practice of the common law.

By contrast, China's constitutional scheme draws heavily on the civil law tradition. As in many other civil law systems, the

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mainland's involvement in the right of abode cases "deeply alarmed lawyers and pro-democracy leaders, who say the dispute with Beijing is a litmus test of Hong Kong's judicial independence since its return to Chinese rule 19 months ago"; Carole J. Petersen, *Preserving Institutions of Autonomy in Hong Kong: The Impact of 1997 on Academia and the Legal Profession*, 22 S. ILL. U. L.J. 337 (1998).

129. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457-58 (1897). For classic texts on the common law approach to adjudication, see BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

130. See BASIC LAW art. 2 (granting to the HKSAR "independent judicial power, including that of final adjudication"); GHAI, *supra* note 21, at 199-200 (describing common law systems, including Hong Kong's, as "reluctant to provide an interpretation . . . outside the course of litigation").

131. BASIC LAW art. 81.

132. *Id.* art. 85.

133. *Id.* art. 82.

134. *Id.* art. 84.

135. *Id.* art. 92.

Chinese Constitution bestows plenary political authority on the legislative branch: in China's case, both to the NPC as "the highest organ of state power" and to its permanent body, the Standing Committee.<sup>136</sup> Under this constitutional system, the Chinese legislature has power both to enact laws and to interpret them — one of the features of China's constitutional scheme that is "most misunderstood by Western commentators."<sup>137</sup> As Michael Dowdle explains:

China possesses a civil law system, not a common law system, and in civil law systems, the power to issue binding interpretations of law is regarded as a legislative or administrative function rather than a judicial function. China's treatment of this matter is thus consistent with that advocated by many civilian legal theorists.

The power to interpret the laws and the constitution thus works to give the Standing Committee power to pass supplemental legislation to fill in interstices in the constitutional and legal framework. This particular form of interpretation, called "legislative interpretation" by many Chinese constitutional scholars, involves abstract interpretations addressed to a lacunae in the positive law rather than to particular legal disputes.<sup>138</sup>

Indeed, China's legislature wields more authority than even many other civil law legislatures. As one Chinese scholar notes, whereas many civilian jurisdictions have restricted or eliminated the power of the legislature to issue legal interpretations, "China is one of the few remaining countries still retaining legislative interpretation."<sup>139</sup> Chinese legal scholarship thus frequently employs the term "constitutional supervision" to denote the NPC's expansive authority to determine the meaning of the law, whether through the supervision of cases or through its own initiative.<sup>140</sup>

China's constitutional system also assigns a relatively small role to the judiciary. In contrast to common law jurisdictions, in China "the judiciary does not have inherent authority to issue binding interpretations of law . . . [and the] role of the courts,

136. XIANFA art. 57 (1982).

137. Michael W. Dowdle, *The Constitutional Development and Operations of the People's Republic of China*, 11 COLUM. J. ASIAN L. 1, 81–82 (1997).

138. *Id.* at 82 (footnotes omitted).

139. LIN FENG, CONSTITUTIONAL LAW IN CHINA 107 (2000); *see also id.* at 107 n.200 (noting that "the majority of countries with continental legal systems, however, including leading countries such as France and Germany, have give up legislative interpretation").

140. *See* Cai Dingjian, *Constitutional Supervision and Interpretation in the People's Republic of China*, 9 J. CHINESE L. 219, 219 n.3 (1995) ("Besides examining cases that have been brought before it for review, a supervisory body can also take the initiative to review and investigate cases on its own.").

therefore, is much more focused on applying the law, rather than developing it.”<sup>141</sup> To be sure, Chinese courts effectively engage in subtle forms of legal interpretation as they adjudicate the cases that come before them, just as the courts of all civil law jurisdictions do;<sup>142</sup> after all, any application of law inevitably involves some degree of extrapolation from the black letter of a statute to address the specific facts of a case.<sup>143</sup> Moreover, sweeping reforms of the Chinese legal system in recent years have gone a long way toward empowering the judiciary. Such reforms have frequently drawn on common law methods of adjudication and interpretation,<sup>144</sup> and a judge in Luoyang recent issued a ruling that raised the prospect of judicial review.<sup>145</sup> Still, despite the development of the Chinese judiciary over the course of the past two decades, it remains subordinate to the legislature and it interprets the law only by the grace of the NPC’s explicit or tacit consent,<sup>146</sup> knowing that the NPC may intervene and effectively reverse its interpretations.<sup>147</sup> Consistent with the civil law model, “the NPC still forms the cornerstone of the system.”<sup>148</sup>

The Basic Law incorporates many elements of the Chinese constitutional scheme, including the civil law paradigm of legisla-

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141. Dowdle, *supra* note 137, at 55.

142. See MERRYMAN, *supra* note 117, at 47 (“Otherwise thoughtful civil lawyers frequently ignore the widespread use of precedent by their own courts, just as equally thoughtful common lawyers frequently oversimplify and misrepresent the use of precedent by common law courts. The important distinction between the civil law and the common law judicial processes does not lie in what courts in fact do, but in what the dominant folklore tells them they do.”).

143. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 865 (1930) (“In every case, however, the process of adjusting the statute to the case will be called good or bad according to the skill shown in the adjustment.”); see also *id.* at 868 (“[A statute] is a statement of a situation, or rather a group of possible events within a situation, and as such is essentially ambiguous.”).

144. See, e.g., 4 ASIAN-PAC. L. & POL’Y J. 180, 224–33 (2003) (identifying the emergence of a system of “*stare decisis* with Chinese characteristics,” and reviewing contemporary Chinese perspectives on the development that the Chinese judiciary has “borrowed the reasonable parts of the Anglo-American doctrine” (quoting Presiding Judge Li Guanghu of the Zhongyuan District Court) (internal quotation marks omitted)).

145. See Jim Yardley, *A Judge Tests China’s Courts, Making History*, N.Y. TIMES, Nov. 28, 2005, at A1 (telling the story of Li Huijuan, a judge on the Luoyang Intermediate Court who made “revealed the rising influence of legal reformers” and “unwittingly made legal history” by declaring a Henan provincial law invalid because it conflicted with a national law).

146. See Dowdle, *supra* note 137, at 55 (noting that “[t]he Supreme People’s Court has been granted delegated authority [by the NPC] to issue binding legal interpretations”).

147. See *id.* at 108–09 (describing the NPC’s power of supervision, which allows the legislature to petition the Supreme Court or some other judicial body “to review the handling of a particular case for procedural errors or errors of interpretation”).

148. See Laifan Lin & Minkang Gu, *Interpretation of the Basic Law: Viewpoints from a Pure Jurisprudence*, 5 J. CHINESE & COMP. L. 73, 84 (2002).

tive supremacy. Most important is its delegation of the power to interpret the Basic Law: "The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress."<sup>149</sup> Other provisions in the Basic Law also provide for varying degrees of oversight and legal interpretation by the national legislature. Article 17 grants the NPCSC the power to return and thereby invalidate any law submitted to it by Hong Kong's Legislative Council if the NPCSC deems the law "not in conformity with the provisions of [the Basic Law] regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region."<sup>150</sup> Despite assurances that the laws previously in force in Hong Kong will remain the law of the territory under the Basic Law, Article 18 grants authority to the NPCSC to identify certain national laws that will apply in the HKSAR.<sup>151</sup> Finally, Article 20 provides that the central government — and in particular, the legislative branch — may delegate additional powers to the HKSAR, suggesting that any residual power not explicitly conferred on Hong Kong administration by the Basic Law rests with the Chinese legislature.<sup>152</sup>

The Basic Law is thus something of a legal centaur: a statute with a common law body and a civil law torso. This is not altogether surprising, considering that it is essentially the product of a political negotiation between Great Britain and the PRC about how to transfer sovereignty over a developed common law territory to a developing civil law country. But what makes for effective political compromise also makes for messy jurisprudence. Legal scholars have long anticipated a clash of cultures as ambiguities in and controversies over the Basic Law come to the surface. "[T]he influence on the Hong Kong Basic Law drafting process of both the liberal Anglo-American constitutional experience and Chinese constitutionalism," wrote Michael Davis in 1990, "may prove to be the overriding theme of Sino-Hong Kong constitutionalism, both in drafting and implementation."<sup>153</sup>

Since the handover, the controversies over the right of abode and the Annexes have highlighted the tensions between the common law and civil law inherent in the Basic Law. Hong

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149. BASIC LAW art. 158; *see also id.* art. 159 (granting the power of amendment to the NPC).

150. *Id.* art. 17.

151. *Id.* art. 18 ("The Standing Committee of the National People's Congress may add to or delete from the list of [national laws applicable to Hong Kong, subject to the limitation that such laws] shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by [the Basic Law].").

152. *Id.* art. 20.

153. DAVIS, *supra* note 125, at 32.

Kong has viewed both episodes as a potential threat to the integrity of its judicial system. In *Ng Ka Ling v. Director of Immigration*, the Court of Final Appeals vigorously defended its role as a common law tribunal. Chief Justice Andrew Li wrote:

In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that law. They undoubtedly have the jurisdiction to examine whether the legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion . . . . Although this has not been questioned, it is right that we should take this opportunity of stating it unequivocally.<sup>154</sup>

The CFA further declared that “in our view, it is for the Court of Final Appeal and for it alone to decide, in adjudicating a case, whether both conditions [that would require referral to the NPC] are satisfied.”<sup>155</sup> The CFA’s rigorous defense of the common law regime for legal interpretation is remarkable, especially because the right of abode controversy did not directly present any direct question regarding its power to interpret the laws of the HK-SAR. Likewise, in the more recent dispute over the Annexes, many observers perceived that the Interpretation’s gravest threat was not to Hong Kong’s democracy movement but to the judiciary. “The interpretation [of the Annexes],” stated one Hong Kong legislator, “makes nonsense of the common law system.”<sup>156</sup>

Mainland authorities have defended each of their interpretations as consistent with the Basic Law and have emphasized the

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154. [1999] 1 H.K. REP. & DIG. 315, 337 (Court of Final Appeal). In addition, the CFA also claimed for itself the power “to determine whether an act of the National People’s Congress or its Standing Committee is inconsistent with the Basic Law, subject of course to the provisions of the Basic Law itself.” *Id.* at 338. The Court retreated from this incendiary position a month later in a “clarification” of its decision in *Ng Ka Ling*. See *Ng Ka Ling (an Infant) & Anor v. Dir. of Immigration*, [1999] 1 H.K. REP. & DIG. 425, 427 (Court of Final Appeal) (“The Court’s judgment on 29 January 1999 did not question the authority of the Standing Committee to make an interpretation under art 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court’s judgment question, and the Court accepts that it cannot question, the authority of the National People’s Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.”). Most scholars have concluded that the CFA overstepped its authority on this point; even in a federal system with sovereign states, a model that China has emphatically rejected in the case of Hong Kong, the courts of a subordinate jurisdiction lack the power to invalidate actions of a national legislature. See Paul Gerwitz, *Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics*, 31 HONG KONG L.J. 200, 205 (2001).

155. *Ng Ka Ling*, 1 H.K. REP. & DIG. at 342.

156. Neumann & Yau, *supra* note 67 (quoting Democratic Party leader and Legislative Council Representative Martin Lee) (internal quotation marks omitted).

proper role of the national legislature as the ultimate expositor of the meaning of the Basic Law. In explaining the Standing Committee's decision to intervene in the right of abode conflict, one Chinese scholar on the NPCSC expressed the view that the "power of the [HK]SAR courts to interpret the provisions of the Basic Law in adjudicating cases was delegated by the NPC Standing Committee and was subject to limitations."<sup>157</sup> These remarks underscore the civil law understanding that legal interpretation is primarily a legislative function, even if the courts are doing the interpreting by proxy. Following the NPCSC's interpretation of the Annexes, the government again emphasized the leading role of the legislature in matters of interpretation: "By giving an official interpretation of the electoral provisions of the Basic Law, the NPCSC has demonstrated to Hong Kong and the world its determination to act in strict accordance with the Basic Law and to maintain its leading role in the [HK]SAR's constitutional development."<sup>158</sup>

Each side in the conflict views the other's approach to legal interpretation as a threat to its autonomy. On the one hand, common law scholars have inferred from the PRC's interpretive approach a breach of the mainland's promise to uphold the common law system.<sup>159</sup> The reaction of Hong Kong Bar Association Chairman Edward Chan King-sang reflects the common law perception that mainland legislators have usurped the judicial function: "From the common law perspective, they are not interpreting the laws but enacting new laws."<sup>160</sup> On the other hand, mainland scholars contend that giving the Hong Kong judiciary the right to determine when an interpretation of the Basic Law is necessary is tantamount to giving a regional government

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157. Xiao et al., *supra* note 43, at 57 (attributing the view to Professor Wu Jianfan, member of the Chinese Academy of Social Sciences and a member of the Basic Law Drafting Committee).

158. Editorial, *Beijing's Power on Change Actual, Real*, CHINA DAILY, Apr. 7, 2004.

159. See, e.g., Report of the Joseph R. Crowley Program, *supra* note 32, at 5 ("Under the 'One Country, Two Systems' pledge, Hong Kong was to retain its autonomous common law framework, including an independent judiciary to exercise the power of final adjudication. Beijing's reinterpretation of the Basic Law provisions, on which the Court of Final Appeals based its right of abode judgments, has dealt these guarantees a severe blow.").

160. Klaudia Lee, *Law Amended, Not Interpreted: Hong Kong Bar Chief*, S. CHINA MORNING POST, Apr. 7, 2004, at 2. As Part II notes, the recent interpretation *did* in fact impose new procedural requirements in order to change Annexes I and II, so in this sense there seems to have been an actual amendment to the Basic Law, irrespective of common- or civil-law orientation. After all, even in a common law system, the legislature retains the final say over a statute's meaning and can override a judicial interpretation by amendment. Still, Chairman Chan's emphasis on the common law system reflects the perception within Hong Kong's legal community that mainland practices are incompatible with its legal tradition.

veto power over the NPC's authority to interpret the Basic Law, a result that inverts the governmental hierarchy and places the HKSAR above the central government.<sup>161</sup>

Another thing that complicates the conflict over interpretation is that authorities on both sides of the dispute have little experience upon which to draw. The Basic Law itself is a brand new and uniquely challenging statute to interpret. Moreover, until 1997 the British colonial administration allowed the people of Hong Kong only limited participation in government.<sup>162</sup> Current authorities in the HKSAR have had comparatively little experience administering the legal system,<sup>163</sup> which will undoubtedly assume unique practices as Hong Kong writes its post-handover history. Likewise, the Chinese approach to legal interpretation remains underdeveloped on the mainland. In 1995, the Division Chief at the Research Department of the NPC Standing Committee reported that he knew of no instance in which the Standing Committee had "explicitly exercised the power of constitutional interpretation."<sup>164</sup> Another scholar similarly notes that the Standing Committee has exercised its power to issue legislative interpretations infrequently.<sup>165</sup> Although legal reforms on the mainland have started to provide some guidance to the legislature as to how it should wield the power of interpretation,<sup>166</sup>

161. See Xiao et al., *supra* note 43, at 53.

162. See David J. Clark, *The Basic Law: One Document, Two Systems*, in *THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY?* 36, 50 (Ming K. Chan & David J. Clark, eds. 1991) (distinguishing the various civil rights afforded under "the domestic British legal system and the variant imposed on a number of colonies"); see also *id.* at 48-49 (describing the Hong Kong colonial system's "government by consultation" and noting that the colonial government remained essentially unaccountable to the population); *id.* at 54 ("One of the unfortunate legacies of the colonial era has been the creation of an overwhelming concentration of legal authority in the hands of the governor, together with a frequently instrumentalist view of the law.").

163. See HSU, *supra* note 118, at 121 (noting concerns among several Hong Kong jurists about "whether suitable ethnic Chinese candidates can be found" to administer the judicial system (quoting Emily Lau, *The Judiciary Faces Major Task in 1997 Run-Up*, *FAR E. ECON. REV.*, Apr. 20, 1989, at 21 (quoting Sir Ti-liang Yang, Chief Justice of the Supreme Court of Hong Kong)) (internal quotation marks omitted)).

164. Cai, *supra* note 140, at 235.

165. LIN, *supra* note 139, at 110 & n.218 (estimating that "the NPCSC has exercised legislative interpretation authority seven times in its history").

166. In March of 2000, the NPC adopted the Legislation Law, which provides in Article 42:

The Standing Committee of National People's Congress shall give interpretation to a national law in any of the following circumstances:

- (i) the specific meaning of a provision of such legislation requires further clarification;
- (ii) a new situation arises after enactment of such legislation, thereby requiring clarification of the basis of its application.

Zhongguo Renmin Gongheguo Lifa Fa, art. 42 [Legislation Law of the People's Republic of China] (P.R.C.) (2000), available at <http://www.novexc.com/legis->

there remains a great deal of uncertainty about how the Standing Committee will exercise its interpretive power with respect to the Basic Law.

Public reaction to the latest Interpretation reflects an uneasiness with the Standing Committee's *ad hoc* approach to interpretation. Consider the comments of Peter Wong, a Hong Kong deputy to the NPC:

The NPC standing committee only gave the local public seven days notice of its intention, yet no one was told in advance the content, scope and law articles involved in the interpretation. . . . This means the NPC can decide to interpret the Basic Law any time it says there is a political dispute in Hong Kong. And if this is the case, what sections of the Basic Law cannot be interpreted?<sup>167</sup>

In a similar vein, *The Los Angeles Times* described a “sense of growing anxiety” in Hong Kong after China announced its plan to interpret the Annexes; part of the fear, according to the article, was a result of the NPC’s seemingly limitless discretion.<sup>168</sup> (Conversely, when the Standing Committee issued its formal Interpretation, a number of Hong Kong citizens expressed relief at its relatively “mild” contents and narrow scope.<sup>169</sup>) In a sense, then, the hostility in Hong Kong to the NPC’s interpretations of the Basic Law reflects the need for a more concrete set of procedures to navigate the conflicts over interpretation. The next Part offers some preliminary thoughts on what those appropriate guidelines or procedures might be.

#### IV. TOWARD PRINCIPLED INTERPRETATION OF THE BASIC LAW

A comprehensive model for interpretation of the Basic Law, much less for the NPC’s broader interpretive responsibility under

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latLaw\_00.html (last visited Feb. 7, 2005). The precise contours of the Legislation Law — and indeed, the very practice of legislative interpretation — remain a subject of scholarly debate in China. See LIN, *supra* note 139, at 110 & nn.216–17. Still, the law represents a recognition that guidance (even if vague and somewhat circular) is necessary. See *id.* at 109–10 (“Before the adoption of the Law on Legislation, the NPCSC had no established procedure to follow for exercising statutory interpretation authority.”); see also Lin & Gu, *supra* note 148, at 87 (noting the passage of the Legislation Law, prior to which “there had been no specific regulation regarding the procedure for legislative interpretation”).

167. Ng, *supra* note 81.

168. See Tyler Marshall, *China To Define Hong Kong Reform Limits*, L.A. TIMES, Apr. 3, 2004, at A3 (“[A]nalysts speculate that the committee can rule in any number of ways, possibly limiting its advice to a set of relatively loose guidelines to ensure an orderly reform with Beijing’s consultation, or perhaps imposing arduous conditions that would take years to fulfill.”).

169. See Cody & Pan, *supra* note 63 (quoting Tsang Hin-chi, a Hong Kong member of the Standing Committee).

the Chinese constitution, is far beyond the scope of this article. This Part suggests only one principle that might serve as the foundation for an approach to interpreting the Basic Law — namely, that the Standing Committee should issue a formal interpretation of the Basic Law only when the demand for one arises from an actual “case or controversy.” As the previous discussion has made clear, responsibility for interpreting the Basic Law is shared between the Hong Kong courts and the Chinese legislature. This Part focuses on the interpretive approach of the NPC for three reasons — first, because the most significant controversies over the Basic Law have involved interpretation by that institution; second, because the NPC is certain to involve itself in the most important and controversial aspects of the Basic Law and thus the most interesting aspects of legal interpretation; and third, because the institutional nature of the Hong Kong judiciary already makes it apt to follow a cases and controversy approach to interpretation.<sup>170</sup> Using the recent controversy over the Interpretation of the Annexes as an example, this Part contends that the cases and controversy principle would usefully constrain the NPC’s discretion to issue interpretations and would promote more systematic and effective development of Hong Kong’s mini-constitution. In addition, a cases and controversies approach would help generate a more productive political relationship between the mainland and Hong Kong.

It is important to emphasize the narrowness of the interpretive principle suggested here. This article addresses only the question of *when* the NPC or the courts should take up the task of interpreting the Basic Law, not *how* they should execute that task. (Interestingly, the Chinese legislature and the Hong Kong judiciary both seem to have espoused a purposive approach to interpreting the Basic Law.<sup>171</sup> This article leaves an analysis of

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170. As part of a common law judiciary, the Hong Kong courts may adjudicate only those cases brought before them by disputing parties and may exercise their interpretive authority over only such legal questions as are pertinent to the resolution of those cases. The “passive virtues” of the “cases and controversies” approach are therefore already inherent in the Hong Kong judiciary’s institutional design, although even in the judicial context there is certainly the possibility for courts to employ more or less discretion in exercising their authority to interpret the laws. See generally Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

171. As the preeminent proponents of the purposive approach to statutory interpretation put it, an interpreter should construe ambiguities in the law in light of the purpose of the lawmakers who passed it, assuming that such lawmakers were “reasonable persons pursuing reasonable purposes reasonably.” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1415 (tentative ed. 1958). Both the Court of Final Appeals and members of the Standing Committee have endorsed this approach. See *Ng Ka Ling v. Director of Immigration*, [1999] 1 H.K. REP. & DIG. 315 (Court of Final

that approach — and how the unique problems of legislative intent,<sup>172</sup> public choice theory,<sup>173</sup> and institutional competence<sup>174</sup> play out in the Chinese context — for another day.) The point here is to identify a procedural method with which the mainland

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Appeal) (“In the interpretation of a constitution, such as the Basic Law, a purposive approach was to be applied. The courts should consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context.”). Cf. Xiao et al., *supra* note 43, at 54 (“‘One country, two systems’ was the guiding principle and the legal foundation of the Basic Law. The starting premise was ‘one country.’ . . . It was on this basis that the NPC conferred on the SAR a high degree of autonomy. Such special status of the SAR meant that the CFA of the SAR could not have the power to review and declare invalid the legislative act of the NPC and its Standing Committee.”).

172. One of the problems in interpreting a statute according to the intent of the lawmaker is, of course, discerning the intent of the many lawmakers involved in the promulgation of a statute: “A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.” Radin, *supra* note 143, at 870. The problems of ascertaining legislative intent are particularly interesting in the context of the Basic Law. On the one hand, the Basic Law is the product of the Joint Declaration between Great Britain and the PRC, whose purpose in securing passage of the Basic Law were diametrically opposed. The purpose of the former was to insulate the territory from control; the purpose of the latter was to assert control over the territory. How could any statute capture the oxymoronic concept of legislative intent better than the Basic Law? On the other hand, it was the NPC that passed the Basic Law. As an organ of the legislative institution that passed the law, the NPCSC has a strong — if circular — claim that it not only knows the legislature’s purpose in passing the Basic Law, but that it acts as the very voice of the legislature. What better body to interpret the purpose of the legislature than the legislature itself?

173. Many scholars have used public choice theory to critique the purposivist approach to legal interpretation, suggesting that the disproportionate influence of interest groups on contemporary politics makes it impossible to impute a proper rational purpose to the legislature from the text of a statute. See, e.g., Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265–68 (1982). Again, this critique has interest implications for the debate over the Basic Law. On the one hand, various and competing interests that produced the Basic Law, from Great Britain’s interest in its colonial legacy, to the PRC’s interest in vindicating the historical injustice imposed by colonial rule, to Hong Kong’s conflicting interests in stability and political autonomy. These disparate interests might suggest abandoning a purposive approach to interpretation. On the other hand, the near unanimity of the Chinese legislature in passing the Basic Law and the comparative lack of pluralism in the political institutions on the mainland might mitigate the concerns of public choice theory.

174. The critique of the purposive approach launched by many conservative scholars is that interpreters (usually courts) are not in a position to know the intent of the legislature and lack the institutional competence to figure it out. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); Frank Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983). This critique takes on interesting dimensions in the Chinese context. While the conservatives’ criticism is still apt as to the ability of the Hong Kong judiciary to discern legislative intent, the calculus changes when it is the legislature itself that is doing the interpreting. The inquiry becomes still more complex when one considers that Hong Kong’s judicial branch and the PRC’s legislative branch interpret the Basic Law not in isolation but in tandem.

and Hong Kong can begin cooperatively to address the many problems that will continue to arise under the Basic Law. By seeking common ground as to when an interpretation is proper, authorities on the mainland and in the HKSAR could eliminate much of the uncertainty that surrounds the administration of the Basic Law and could focus on the merits of the disputes that they will inevitably continue to face over the proper meaning of its provisions. A cases and controversies approach to adjudication may offer such common ground.

Before examining how such an approach may be useful in interpreting the Basic Law, it is necessary to examine what it means to postpone interpretation until there is a case or controversy. The concepts of "case" and "controversy" are malleable. Strictly construed, the requirement of a "case" might suggest that interpretation by the NPC is improper until opposing parties have litigated a case to judgment by a judicial institution (and perhaps through an appeals process). Broadly construed, the term "controversy" could easily encompass the debate over democratic reform that was percolating in Hong Kong and precipitated the NPCSC's most recent Interpretation. As the United States Supreme Court has explained, "The difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test."<sup>175</sup> This malleability simultaneously recommends the theory as capable of adjusting to the various disputes that may arise under the Basic Law and undermines the theory as incapable of providing any useful guidance.

That the test is malleable, however, does not mean it is analytically meaningless. Many jurisdictions have imposed meaningful legal thresholds that disputing parties must meet in order to invoke the aid of the legal process to clarify the legal rights of the parties or the meaning of a legal text. In this respect, the jurisprudence of justiciability in American courts is instructive:

A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.<sup>176</sup>

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175. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979).

176. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937).

Other legal concepts from common law jurisprudence might help inform the cases and controversies principle with respect to the Basic Law, just as the doctrines of ripeness<sup>177</sup> and mootness<sup>178</sup> do in the American context. While the law of justiciability has often been criticized for its lack of substance<sup>179</sup> and for the variation that it exhibits even within a given jurisdiction,<sup>180</sup> there is also general consensus that there are important policy reasons for declining to issue a formal legal ruling whenever a question is raised as to its proper construction.<sup>181</sup> For present purposes, it suffices to say that a case or controversy exists when an interested party raises a specific question of law of immediate and ongoing significance that can be articulated and identified in advance of an interpretation by all other interested parties.

This formulation of the cases and controversies requirement would demand some degree of specificity with respect to the actual question asked, but it would allow a significant degree of latitude with respect to how the question is presented. For example, this formulation would require a legal contest to develop to a sufficient degree that all interested actors can assess and articulate their viewpoint on the legal question presented — in the context of the Basic Law, that would mean authorities in Beijing, the NPCSC, the HKSAR administration, the political constituen-

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177. See 13A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §3532, at 112 (2d ed. 1984) (“Ripeness doctrine is invoked to determine whether a dispute has yet matured to a point that warrants decision. The determination is rested both on Article III concepts and on discretionary reasons of policy. The central concern is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.” (citation omitted)).

178. See *id.* § 3533, at 211 (“Mootness doctrine encompasses the circumstances that destroy the justiciability of a suit previously suitable for determination. It is not enough that the initial requirements of standing and ripeness have been satisfied; the suit must remain alive throughout the course of litigation, to the moment of final appellate disposition.”).

179. See, e.g., William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221, 221 (1988) (collecting various unflattering descriptions that scholars and jurists have applied to the law of justiciability).

180. Compare *Frothingham v. Mellon*, 262 U.S. 447 (1923) (articulating a strict requirement of standing, and denying a taxpayer’s challenge to the constitutionality of a law under the Tenth Amendment), with *Flast v. Cohen*, 392 U.S. 83 (1968) (articulating a more relaxed requirement of standing, and proceeding to resolve a taxpayer’s challenge to the constitutionality of a law under the Establishment Clause). See also RICHARD H. FALLON ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 67–70 (5th ed. 2003) (identifying a “dispute resolution” model and a “public rights” model of adjudication in American jurisprudence, and explaining their competing conceptions of the judiciary’s adjudicatory function and the concomitant differences between the models as far as the types of cases that they view as appropriate for adjudication).

181. See *id.* at 221 (“The structure of standing law in federal courts has long been criticized as incoherent. . . . This unhappy state of affairs does not result from the unimportance of standing doctrine. If anything, the contrary is true.”).

cies of Hong Kong, and the public. This formulation would not, however, necessarily impose formal restrictions on the method for invoking the NPC's authority to interpret the Basic Law; the vehicle for such a request might take the form of a resolution by the Legislative Council, an order by the Chief Executive, a lawsuit by private parties, or perhaps even a sufficiently representative petition by the public. In this sense, the cases and controversies requirement would be consistent with the constitutional law of the PRC, which one Chinese scholar has described as a system of "constitutional review," as opposed to "constitutional litigation."<sup>182</sup> Indeed, in light of the more expansive interpretive tradition of Chinese law, the broad grant of interpretive authority under Article 158 of the Basic Law, and the NPC's practice thus far in the right of abode cases and Annexes to the Basic Law, it seems proper to understand "case or controversy" in broad terms.

Moreover, it may be appropriate to apply the notion of cases and controversies differently to different legal provisions in the Basic Law. For example, a broad definition of a cases and controversies seems suitable for those provisions of the Basic Law that directly implicate the sovereignty or unity of the nation, such as those provisions dealing with national security or foreign relations. By contrast, a more narrow definition of cases and controversies seems suitable for those provisions that address the individual rights of Hong Kong residents, or those provisions relating to the intricacies of administration in Hong Kong. The structure of the Basic Law supports an inference that its provisions fall into different categories, each of which may recommend a more expansive or narrow approach to their interpretation; for example, Chapter II pertains to the "relationship between the Central Authorities and the Hong Kong Special Administrative Region," while Chapter III pertains to the "fundamental rights and duties of Hong Kong residents." Admittedly, this division between nationally oriented provisions and locally oriented provisions in the Basic Law is not entirely tidy — under such a scheme, it would be unclear how to interpret, for example, a provision such as Article 158, which demonstrates concern for the national *and* the local by dividing power between them. Yet it is entirely consistent with the scheme of the Basic Law to apply a more strict, common law methodology for inter-

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182. See Cai, *supra* note 140, at 233 ("The difference between constitutional review and constitutional litigation is that the former is initiated by statutory or authoritative organs, while the latter is filed by victimized citizens or social organizations.").

pretation to provisions of uniquely local concern and a broader, civil law methodology to provisions of more national concern.

Whatever formulation of the cases and controversies principle may be most suitable for developing the unique jurisprudence of the Basic Law, it is clear that the NPC's present approach is unsatisfactory. Its recent Interpretation of the Annexes illustrates the problems of issuing an interpretation without either a case or a controversy (however defined) — that pronouncement did not address a specific proposal for reform, it did not suggest any timetable for amendment, no particular change to the text had been suggested with regard to either the executive or legislative branch of the HKSAR, there was no particular party or interest group advocating an amendment, and the NPCSC did not articulate any specific concern relating to Hong Kong's prior understanding of the Basic Law. In fact, the NPC's so-called Interpretation amounted to little more than an assertion by Beijing that it was in charge. The *ad hoc* approach currently employed by the NPC does little to promote its own position as expositor of the Basic Law or to develop the Basic Law as a fundamental legal text.

By reserving judgment on the meaning of the Basic Law until a concrete controversy arises, the NPC would advance important goals.<sup>183</sup> First, and most obviously, it avoids creating legal battles where none exist. By waiting to address particular and actual controversies, this approach allows the interpreter to avoid involvement in contentious issues that might otherwise resolve themselves, as well as to avoid wasting the time and energy of solving problems that may never materialize. Second, it enhances the integrity of the interpreting authority. Because a cases and controversies approach would allow the NPC to avoid issuing unnecessary interpretations, it would also help preserve the authority of the Standing Committee when such interpretations are truly necessary. Third, it enhances the quality of legal interpretation. A cases and controversy approach provides the interpreter with a concrete set of facts to help frame the precise legal issue to be settled, and it ensures that there is contextual evidence to promote greater understanding of that issue. Fourth,

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183. For a discussion of the similar policy goals advanced by the case and controversy requirement of Article III of the American Constitution, see FALLON ET AL., *supra* note 180, at 67–73. See also *United States v. Fruehauf*, 365 U.S. 146, 157 (1961) (noting that advisory opinions are to be avoided because “[s]uch opinions advance expressions of legal judgment on issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.”).

it promotes a more satisfactory resolution of the actual dispute. Because a case-by-case approach presents the specific interests of various parties to a dispute, it promotes a resolution that satisfies (or at least addresses) the interests all such interested parties. Finally, it lessens the burden on the interpreter. Whereas an advisory pronouncement on the meaning of a legal text must address difficult questions on uncertain facts, a cases and controversy approach allows a decisionmaker to tailor an interpretation to the narrow facts of a dispute, and to reserve legal judgment on issues that do not yet require resolution. This narrower interpretive focus thus helps avoid an underinclusive or overinclusive pronouncement on an abstract legal issue that might later require clarification or even reversal. Although the Chinese legislature has authority to issue interpretations at its whim, that institution would more successfully promote the development of the Basic Law and the interests of the NPCSC as an institution by adopting a common-law-style, case-by-case approach to interpretation.

Each of these benefits — economy, integrity, specificity, resolution, ease of interpretation — is illustrated well in the controversy over the Annexes. Had the NPC decided to let debate over the proper approach to democratization run its course, it is unlikely that it would have faced demands from the HKSAR administration for sweeping reforms. Given the pro-Beijing orientation of the Chief Executive and the functional constituencies that comprise half of the legislative council, Hong Kong's own ruling class would itself have been likely to water down any proposals to amend the Annexes. In that case, the Standing Committee's Interpretation would have been entirely unnecessary. Moreover, the NPC's actions damaged its credibility both in Hong Kong and abroad. With newspapers already reporting that "trust of the Communist Party leadership in Hong Kong [had] hit its lowest point since the one million-strong protest against the June 4 crackdown in 1989,"<sup>184</sup> it seems that Beijing did little to help its cause with a preemptive strike against democracy. And after all the hand-wringing that accompanied its promulgation, the Interpretation did little to alter the state of affairs in Hong Kong — few people doubted that reform would have been possible without Beijing's approval, and without a concrete proposal to assess, the Interpretation could do little but reiterate the need to go slow according to the abstract "principle of gradual and orderly progress."<sup>185</sup>

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184. Chris Yeung, *Unpopular, Dutiful and Beijing's Favourite*, S. CHINA MORNING POST, Feb. 29, 2004, at 10.

185. Interpretation of the Annexes, *supra* note 2.

In addition to these practical benefits, a cases and controversies approach is consistent with both the common law tradition of the HKSAR and the civil law tradition of the mainland. As such, it is also faithful to the Basic Law, which requires that these two traditions interact, even if they do not integrate, under the model of “one country, two systems.” From a common law perspective, this approach retains the case-by-case methodology that allows for minimal intervention and the concrete resolution of difficult cases. From the perspective of Chinese law, it is consistent with the civil model of legislative superiority on which the PRC’s system is based. Significantly, the cases and controversies approach supports both the litigant-up model of adjudication from the common law and the legislature-down model of the civil law — both Hong Kong parties and the NPC itself may identify a case or controversy for resolution, and the capacity of both to initiate an interpretation should enhance the vigilance of each to uphold the “one country, two systems” formula. Even if imperfectly, this approach thus helps resolve some of the tensions inherent in the Basic Law, honoring the commitment to preserve Hong Kong’s legal system while maintaining the overall interpretive scheme of Chinese constitutional law.

From a political perspective, as well, the cases and controversies approach might mitigate some of the thorniest issues in the struggle between the mainland and Hong Kong to define the future of the HKSAR. For Hong Kong, it would provide sufficient breathing room to conduct the political discourse that must accompany its democratic reforms. If the HKSAR is to achieve the Basic Law’s ultimate aim of universal suffrage, it must engage in the difficult debates between opposing political forces that will shape not only future amendments to the Annexes but also its public policy. By holding off on interpretation until Hong Kong as a society has produced a specific case or controversy for adjudication, the NPC would avoid short-circuiting a deliberative process that is essential to whatever form of democracy Hong Kong eventually acquires.<sup>186</sup> Moreover, a more hesitant approach to interpretation allows controversies over the Basic Law to work themselves out, creating a sort of safety valve for political controversies in the HKSAR by respecting freedom of speech and deliberation.<sup>187</sup> Most importantly, for the PRC, it preserves

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186. Cf. Press Release, U.S. Department of State, Release of 2004 Hong Kong Policy Act Report (Apr. 2, 2004), LEXIS, States News Service file (“We are seriously concerned that Beijing has decided to issue an interpretation of the Basic Law on this important issue before the Hong Kong people have fully aired the issues.” (statement of spokesman Adam Ereli)).

187. Cf. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“[The authors of the American Constitution] knew that order cannot be secured

the mainland's ultimate authority to speak on matters of constitutional (and mini-constitutional) concern, without which no model of adjudication could succeed. Furthermore, although it constrains the NPC's discretion to interpret at whim, a cases and controversies approach is an inherently conservative approach to interpretation that prevents the interpreter from saying more than is necessary about the meaning of the Basic Law. Procedurally speaking, cases and controversies is the ultimate go-slow methodology.

## V. CONCLUSION

In the aftermath of the NPC's Interpretation, Hong Kong pressed on with its democratic debate, albeit in a much more muted manner. At the behest of Hong Kong's Constitutional Development Task Force, Chief Executive Tung Chee-hwa submitted a report to the NPC on April 15, fewer than ten days after the Interpretation was handed down.<sup>188</sup> In the report, he writes: "I consider that the methods for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008 should be amended so as to enable Hong Kong's constitutional development to move forward."<sup>189</sup> Yet the report subsequently lists nine principles to guide the process of amendment, all of which emphasize deference to PRC authorities, adherence to centralized governance in Hong Kong, caution as to the pace of reform, and economic stability and prosperity.<sup>190</sup>

In response, the Standing Committee issued a decision that hammered home both its intransigence and the uselessness of its previous Interpretation — it explicitly ruled out universal suffrage in the 2007 and 2008 elections, prohibited changes to the division of democratically elected seats and functional constituency seats in the legislature, and provided only that specific methods for the election of the Chief Executive and the Legisla-

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merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.")

188. See CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, REPORT ON WHETHER THERE IS A NEED TO AMEND THE METHODS FOR SELECTING THE CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION IN 2007 AND FOR FORMING THE LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION IN 2008 (April 15, 2004), available at <http://www.info.gov.hk/cab/cab-review/eng/executive/pdf/cereport.pdf>.

189. *Id.* at 3.

190. *See id.* at 4–5.

tive Council might be “appropriately modified.”<sup>191</sup> Thereafter, Hong Kong’s Task Force on Constitutional Development issued a report suggesting possible avenues for amendment, including the composition of the Election Committee and its nominating procedures,<sup>192</sup> the number of seats in the Legislative Council,<sup>193</sup> and the composition of the functional constituencies.<sup>194</sup>

For democrats, discussion of these minor alterations is, as the Chinese proverb says, like painting feet on a snake — it serves little practical purpose and only confuses the issue. Rather than entertain the charade of debating such hollow reforms, liberals accused the administration of breaching its trust with the Hong Kong people and turning its back on democracy.<sup>195</sup> Democratic Party legislators introduced a motion condemning the NPC decision, which was vetoed by the president of the Council, as was a watered-down version expressing regret over the denial of universal suffrage.<sup>196</sup> As one columnist remarked, the mainland’s uncompromising position on reform has left Hong Kong “filled with disappointment and a sense of impotence.”<sup>197</sup>

The most striking thing about the NPC’s final verdict on reform in Hong Kong is that it rendered the previous Interpretation totally superfluous. As the HKSAR began to tackle the problem of democracy, it was inevitable that they would devise a proposal for reform and that this proposal would require a concrete response from the PRC. Given that Chief Executive eventually submitted this particular proposal for consideration by the NPC within a month of the Standing Committee’s Interpretation of the Basic Law Annexes, it is difficult to understand why the NPC perceived a need to intervene when it did. Perhaps the

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191. See Standing Committee of the National People’s Congress, *Decision of the Standing Committee of the National People’s Congress on issues relating to issues relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008*, Apr. 26, 2004, (8th mtg., 10th Cong), available at <http://law.hku.hk/clsourcebook/scnpc20040426eng.htm>; see also Gary Cheung & Jimmy Cheung, *Beijing’s Last Word on Elections in 2007 and 2008*, S. CHINA MORNING POST, Apr. 27, 2004, at 1.

192. See THIRD REPORT ON CONSTITUTIONAL DEVELOPMENT, *supra* note 114, at 14–16.

193. See *id.* at 21–22.

194. See *id.* at 23–24.

195. See CAINNIX YAU, *You’ve Lost People’s Trust, Tsang Told*, THE STANDARD (Hong Kong), May 5, 2004, available at [http://www.thestandard.com.hk/news\\_detail\\_frame.cfm?articleid=47313&intcatid=42](http://www.thestandard.com.hk/news_detail_frame.cfm?articleid=47313&intcatid=42).

196. Louisa Yan & Ambrose Leung, *Motion To Condemn NPC Toned Down; Democrats To Express Regret over Universal Suffrage Decision*, S. CHINA MORNING POST, May 5, 2004, at 3.

197. Albert Cheng King-hon, *Dwindling Freedom of Speech*, S. CHINA MORNING POST, May 17, 2004, at 13.

PRC believed its Interpretation was necessary to guide a more productive debate in Hong Kong, perhaps the Interpretation was an attempt to dilute the contents of the Chief Executive's forthcoming report, or perhaps the NPC felt it was politically wise to dampen the expectations of the Hong Kong citizenry before ultimately quashing the movement's hope for immediate universal suffrage. Under any of these explanations, the PRC's approach to interpreting the Basic Law belies an even more troubling tendency to disregard the constraints of the rule of law and to use Hong Kong's mini-constitution as a tool for manipulation and political expediency.

With respect to the specific issue of amending the Annexes and the more general issue of abiding by the constraints set forth in the Basic Law, "Beijing will be asked to take a political risk which it is not familiar with and which it has never taken before."<sup>198</sup> The willingness of the NPC to submit to a more restrained mode of legislative interpretation ultimately hinges on its perception that such an approach benefits both Hong Kong and China. As one scholar in Hong Kong writes: "In this sense, the constitutional reform is both a challenge to Hong Kong and to the new generation of leaders in Beijing."<sup>199</sup> Given the lack of a strong sense of the rule of law in China, a "cases and controversies" approach to the Basic Law seems viable only if CCP leaders understand that such a restrained approach can strengthen Hong Kong without weakening the mainland. Legislative Council member Margaret Ng puts it succinctly:

The significance of the Basic Law lies in its being the embodiment of an important party policy. The only way to persuade China to uphold the rule of law in Hong Kong . . . is to argue that it is vital to China's policy toward Hong Kong . . . .<sup>200</sup>

This article has tried to demonstrate that a more reserved approach to interpretation of the Basic Law would not only benefit Hong Kong's political culture, but would also promote China's political and legal development. Whether China eventually adopts this view is another matter — for the time being, the PRC's anxiety over Hong Kong's looming liberalization seems to prevent it from doing so.

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198. Johannes Chan, *Some Thoughts on Constitutional Reform in Hong Kong*, 34 HONG KONG L.J. 1, 11 (2004).

199. *Id.*

200. Hon. Margaret Ng, *Will the Rule of Law Survive After July 1, 1997?*, 91 AM. SOC'Y INT'L L. PROC. 176, 177 (1997).