Denver Journal of International Law & Policy

Volume 16
Number 1 *Fall*

Article 3

January 1987

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Recommended Citation
Michael C. Davis, A Common Law Court in a Marxist Country: The Case for Judicial Review in the Hong Kong SAR, 16 Denv. J. Int'l L. & Pol'y 1 (1987).

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Keywords
Common Law, Judicial Review, Constitutional Law, Mixed Legal Systems

This article is available in Denver Journal of International Law & Policy: https://digitalcommons.du.edu/djilp/vol16/iss1/3

A Common Law Court in a Marxist Country: The Case For Judicial Review in the Hong Kong SAR

MICHAEL C. DAVIS*

I. INTRODUCTION

Participants from Hong Kong and the People's Republic of China (PRC) have embarked on a Basic Law drafting process aimed at producing a constitution or Basic Law for the future capitalist Hong Kong Special Administrative Region (SAR) in Marxist China. This Basic Law is required by the Joint Declaration on the future of Hong Kong agreed to between the PRC and the United Kingdom in late 1984.[1] The Joint Declaration stipulates many of the basic policies of the future Basic Law and articulates an initial framework for China's policy of "one country, two systems", under which Hong Kong is to enjoy "a high degree of autonomy."[2] With the first draft of the Basic Law now completed, some attention to the appropriate process for its implementation is timely. This issue has emerged as one of the central issues in the ongoing Basic Law discussion. For a comparative constitutional lawyer, examination of this issue in the unique Hong Kong SAR context affords a rich opportunity for applied comparative constitutional law.

The economic and political stakes in the Hong Kong endeavor are enormous. Hong Kong's nearly six million people certainly have the most immediate interest in the success of the endeavor. The intensity of the debate over the Basic Law in Hong Kong reflects this concern. The stakes for China in the success of its Hong Kong policy are also considerable. Hong Kong is ranked third or fourth among the world's leading financial centers and could well become China's leading financial center in the next century. Hong Kong's container port is also among the world's largest and a considerable portion of China's trade passes through Hong Kong and China has a considerable investment there. Hong Kong's collapse would at a minimum be a major financial blow to China. Yet one suspects the stakes are much larger than the mere loss of the Hong Kong investment.

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1. 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, (hereinafter "Joint Declaration"). *Reprinted in* 23 I.L.M. 1366 (1984).

2. *Id.* para. 3(2).

Continued confidence in China's economic policies may also hinge on China's demonstrated commitment to the "one country, two systems" policy. China faces a fragile question of confidence both in Hong Kong and at home. Taiwan's future leaders are no doubt watching this process as well, as they contemplate China's overtures towards unification.

With so much at stake, concern over continued economic and political stability in Hong Kong has become a central issue in the Basic Law drafting discussions. Hong Kong's calls for democracy, direct elections and universal franchise have been met with Chinese resistance to party politics and claims to go slow in democratic reform.[3] While generally acknowledging the Joint Declaration's commitment to democracy, human rights, and liberal capitalism, the Chinese have appeared cautious on political reforms in Hong Kong, fearing resultant instability. With so much at stake, China's reluctance to relinquish too much control appears understandable, and yet this reluctance threatens to produce the very instability and lack of confidence they seek to avoid. With a stable and healthy Hong Kong as the objective, the problem for China may be one of nurturing the baby without holding it to close.

With reference to implementing the Basic Law, discussions on the appropriate process for its interpretation and application have begun to take shape. Proposals have ranged from vesting the primary power to interpret the Basic Law in the Standing Committee of the National People's Congress (NPC), to vesting such power exclusively in the Hong Kong courts.[4] For a constitutional lawyer, a comparative look at the concept of constitutional judicial review appears relevant to this discussion. Constitutional judicial review refers to vesting in appropriate courts the power to determine whether legislation conforms to the imperatives of the constitution or basic law. This includes the power to interpret the Basic Law in order to determine its requirements.[5]

3. *See infra* notes 7-27 and accompanying text.

4. *See infra* notes 18-27.

5. While Hong Kong's current colonial government is constituted under certain Letters Patent and Royal Instructions, these documents contain no bill of rights component, and Hong Kong has had no experience with constitutional judicial review of legislation. Historically, a more important conceptual limitation on the legislature may have been the enormous powers of the colonial governor. It should be stressed that, while Hong Kong courts have not historically asserted any power to throw out legislation for offending the Letters Patent and Royal Instructions, such courts have, in contexts other than review of legislation, asserted a power to construe the meaning of the constitutional documents and have a limited experience with other forms of review of legislation. *See infra* note 96. Constitutional judicial review, while being a new addition within the more elaborate future constitutional framework, would thus be consistent with the existing Hong Kong experience. With these important distinctions it is generally true that by legal training and practice, Hong Kong has largely (with limited exception) shared the British unwritten constitutional tradition of legislative supremacy. While Annex 1, Article II of the Joint Declaration calls for continuance of Hong Kong's current laws, it appears that the implementation of a written basic law with a bill of rights component will inherently cause fundamental change for which there will be no adequate recourse to the present system. *See generally*, Chen, *The Basic Idea of*

This essay will examine the contextual imperatives of the Hong Kong Basic Law debate and the various proposals put forth with respect to interpreting and applying the future Hong Kong SAR Basic Law. A starting point for this examination is the imperatives evident in the Joint Declaration, as well as those reflected in the aspirations and perspectives of the participants in the Basic Law drafting process. This will be followed by a comparative examination of the concept of constitutional judicial review, both from a theoretical and a structural perspective. With the aim of highlighting relevant features of this comparative constitutional experience, a proposed model for Hong Kong will then be offered.

It is hoped that this analysis will make a contribution, not only to the ongoing Hong Kong Basic Law debate, but more generally, to comparative analysis of constitutional implementation. Improved analysis may assist us in judging the reliability of such efforts at constitutionalism. Judgments of such nature will certainly be made by the world community at large with respect to the reliability of the final product in Hong Kong.

A. *The Basic Law in Context*

An examination of the process for implementing the Basic Law should begin with the Joint Declaration, by considering its imperatives with respect to constitutional judicial review, or more generally, with respect to interpreting and applying the Basic Law. While such examination does not provide a clear answer, it does perhaps suggest an appropriate direction. One might well conclude that some form of constitutional judicial review in the Hong Kong SAR courts may better conform to the spirit of the Joint Declaration than would the vesting of such review power largely in the Standing Committee of the NPC. The requirements of "a high degree of autonomy" and the policy of "one country, two systems" alone suggest this much. Yet the language of the Joint Declaration offers more. This language begins by informing us in Paragraph 3 (12) that the basic policies articulated in the Joint Declaration, and the elaboration of them in Annex I, will be stipulated into the Basic Law. These policies include the requirement that a large number of enumerated rights be "protected by law" and afford Hong Kong an "independent judicial power including that of final adjudication."[6]

Annex I to the Joint Declaration affords further elaboration of these policies. Annex I, Article II provides that laws previously in force shall be maintained "save for those that contravene the Basic Law," that the legislature may enact laws "in accordance with the provisions of the Basic Law," and that "laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid." Does this latter expression suggest that common law courts, charged with upholding the law, should treat enacted laws that are not in accordance with

the Basic Law, Wide Angle Magazine, May 16, 1986, at 44-48.

6. Joint Declaration, paras. 3(3) and 3(5).

the Basic Law as invalid? Article II expressly provides for the maintenance of the common law. Does this include the traditional role of common law courts in affording interpretation and otherwise giving life to statutory and Constitutional language?

. Several provisions further specify judicial independence, and Annex I, Article III requires that the judicial power be exercised "independently and free from interference." This clearly suggests the inappropriateness of the courts having to consult another entity on Basic Law issues. Finally, Annex I, Article XIII provides: "Every person shall have the right to challenge the actions of the executive in the courts." Does this include the challenge of executive actions under statutes that violate the Basic Law?

Those who favor vesting in the Standing Committee of the NPC the power to review all Hong Kong legislation for conformity to the Basic Law find support in the reporting requirement of the Joint Declaration and in Article 67 of the PRC Constitution. Annex I, Article II of the Joint Declaration provides: "The legislature may on its own authority enact laws in accordance with provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People's Congress for the record." Query whether such reporting "for the record" implies a power of review or "veto". Article 67 of the PRC Constitution affords the Standing Committee the power to interpret PRC legislation which is argued to include the Basic Law. Article 31 of the PRC constitution, however, permits the creation of special systems in SARs and would therefore appear to permit delegation of this interpretation power either in the Joint Declaration or the Basic Law. If such delegation has not clearly been accomplished in the Joint Declaration, then perhaps it should be in the Basic Law. While the Joint Declaration is ambiguous on this point, both its spirit and language appear to favor some form of constitutional judicial review. Any product of the Basic Law drafting process should be judged for conformity to such policies as indicated by the Joint Declaration.

B. *Hong Kong Perspectives*

In drafting the Basic Law, the PRC government is employing a very elaborate system, embodying both a Basic Law Drafting Committee and a Basic Law Consultative Committee, in a process designed to consult with a large cross-section of the Hong Kong community. Both Hong Kong and mainland participants are included on these committees. Their numbers include both lawyers and laymen. Recommendations for inclusions in the Basic Law have come from many sectors of the Hong Kong community. In selecting committee members, efforts were made to include representatives from these various sectors in conformity with the emerging Hong Kong tradition of functional constituencies. The electoral process for the future SAR has proven a particularly contentious issue. Competing electoral models pit direct elections and universal franchise for selecting the future governor against forms of indirect election employing an electoral

college.[7] Some four proposals have been short-listed for selecting the future legislature.[8] Some have even expressed fears that unless a consensus is reached on the proper political model, China may simply have to dictate the model.[9]

Any proposals specifically addressing the question of interpretation or implementation of the future Basic Law might better be considered in light of more general aspirations of the participants. It may be safe to conclude, from our contemporary look at this new generation of founding fathers, that there are certain shared aspirations for Hong Kong's future. These especially include a strong frequently emphasized commitment to economic and political stability. This motivation tends to animate much of the discussion from all perspectives. Shared aspirations also include agreement to maintain a capitalist economy[10] and to carry on a system of law and government that best facilities Hong Kong's capitalist dynamic. Sustaining a significant degree of political autonomy for Hong Kong is commonly recognized as an important ingredient of this process.[11] The importance of this latter ingredient is emphasized when one considers the reality of having a Marxist developing country take sovereignty over what is in effect a country with a developed capitalist economy.

Yet there are certain fundamental differences in the perspectives that come to the Basic Law drafting table. The elites of Hong Kong have been schooled for well over a century in a conception of governance which sees the government as a somewhat passive umpire, or even a facilitator of private endeavor.[12] This system appears to carry with it a Western,

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7. The two leading proposals for selection of the future SAR chief executive, pit rival groups within the Basic Law Consultative Committee against each other. Draft Basic Law, Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions) (April, 1988) [hereinafter Draft Basic Law]. The so called group of 80, largely representing conservative business interest, favors selection by an electoral college of 600 representatives elected from eleven functional sectors of the community. Twenty members of this group would constitute a nominating committee to propose three candidates. This model is felt to reduce the need for party politics. While this group is smaller than the rival group of 190, it appears to have better relations with Beijing. The rival group of 190 favors universal franchise with direct election of the chief executive. *See* Lueng, *New Formula to Elect Chief Executive*, South China Morning Post, Nov. 5, 1986 at 2, col. 2; Leung, *130 Groups Join Political Reform Lobby*, South China Morning Post, Feb. 5, 1987, at 1, col. 1.

8. These models differ with reference to the proportion of legislators to be elected by functional constituencies and by territorial constituencies with various indirect and direct election components. *See* Yeung, *Political System Gains Form*, South China Morning Post, Nov. 17, 1986, at 2, col. 2.

9. *See* Leung, *Political Conflict 'Must End'*, South China Morning Post, Nov. 16, 1986, at 2; Leung, *Basic Law team 'Kept in the Dark'*, South China Morning Post, Feb. 5, 1987, at 1. At this writing, with the Basic Law nearly final, the relevant electoral provisions are still worded in the alternative and may remain so when a final draft is presented to the community for pubic comment.

10. Joint Declaration, Annex I, Article VI.

11. Joint Declaration, para. 3(2).

12. Here, reference is had to fundamental notions of civil liberty and natural rights as

almost Lockean, conception of natural rights. It is the mission of government to uphold these rights upon which the system depends. When government fails to fulfill this mission, there is a tendency to seek resort to legal process, or, in particular, the courts.[13] While it is difficult to gauge the importance of passive-government and a rights process to Hong Kong's success, it appears that Hong Kong does take rights seriously and that this may have something to do with historic confidence in its economic and political institutions.

While PRC participants express an equal commitment to Hong Kong's stability and continued success, they may come to the table with a different conception of rights and the rule of law. These differences are in some respects fundamental and diverge radically from rights and law conceptions under the style of liberal capitalism the Joint Declaration appears to envision. This is not intended to criticize China's remarkable achievements in developing laws, but instead to point out a fundamental divergence in values concerning rights and the rule of law between mainland China and Hong Kong. While China has in recent years had remarkable achievement in the drafting of new laws, this achievement has yet to be matched with an equal commitment to legal process. In the constitutional area, this has meant that many constitutional values have yet to enjoy consistent application.

This approach to constitutionalism in general, and rights in particular, has been traced to a policy conception of rights as gifts from the state rather than as a limitation on the state.[14] This is further evident in the

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well as private ownership under a capitalist economy. Under English administration Hong Kong has been a beneficiary of English common law and political concepts. The value system this entails has numerous Western intellectual sources but perhaps is best traceable to Western enlightened thinkers such as John Locke who might view government as keeping a trust and interpreting the values naturally held by the people. For discussion of Locke's theories (as well as enlightened thought generally) and reference to other sources, *see* D. GERMINO, MACHIAVELLI TO MARX, MODERN WESTERN POLITICAL THOUGHT, 116 *et. seq.* (1972). While it is difficult to measure precisely the influence of Western political, legal and economic thought on Hong Kong's current political and economic institutions, the current public discourse seems to suggest a strong influence. Furthermore, the existence of such common basic values in Hong Kong, as might be expected, has not produced a monolithic Hong Kong position on the numerous issues in the Basic Law process. As might be expected in a liberal pluralist society, sharp divisions have emerged among the Hong Kong participants. *See generally*, Yeung, *Debate on Conflicting Political Systems*, South China Morning Post, Nov. 5, 1986, at 1; Leung, *New Formula to Elect Chief Executive*, South China Morning Post, Nov. 5, 1986, at 2, col. 2. One should further note that the government in Hong Kong does not always achieve adherence to such values although it may have such aspirations. For example, numerous complaints concerning police practices would tend to bear this out.

13. For indications of the vigor of resorting to courts for review of administrative process in Hong Kong, *see generally* D. J. Clarke, B. Lai and A. Luk, Hong Kong Administrative Law: Cases and Materials (1986) (unpublished manuscript) (available at University of Hong Kong, Department of Political Science).

14. R. R. EDWARDS, L. HENKIN, A. J. NATHAN, HUMAN RIGHTS IN CONTEMPORARY CHINA, 44, 125 *et. seq.* (1986).

association of constitutional duties with rights.[15] In the area of free speech, for example, as evident in the recent campaign against "bourgeois liberalism," this could mean a predominant emphasis on the duty not to "infringe upon the interest of the state."[16] This contrasts with the liberal conception of free speech as a limit on government aimed at enriching the public debate. Owen Fiss has traced this different conception of free speech to even deeper value differences:

> The truth is, however, a little deeper and a little darker. It is not that China sees one elite (eg. bourgeois capitalist) as more of a threat to free speech than another, but rather that it is informed by a different set of commitments altogether. Private elites are curbed as a by-product of socialism, rather than from a commitment to free and open debate. True, China sees itself as a democracy, but it appears to have a top-down, as opposed to a bottom-up conception. The emphasis is upon leading the masses, not enriching debate. The true path has been found.[17]

Whether one accepts this account or not, it is evident that basic value differences between China and Hong Kong are dramatic. Even if one assumes a serious effort at liberal thinking in Beijing, one could reasonably be concerned about the fragile fabric of confidence in Hong Kong with a Basic Law rights foundation dependent primarily on mainland interpretation. Acknowledging this difference is merely to take seriously the notion of "one country, two systems."

C. *The Current Debate on Basic Law Implementation*

The various specific proposals for interpreting and applying the Basic Law seem to be products of both the shared objectives and the divergent values. In a report presented to the full Basic Law Drafting Committee in December of 1986, the Drafting Committee subgroup on local/central Government relations proposed that the power to interpret the Basic Law be assigned to the Standing Committee of the NPC.[18] News accounts of

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15. CHINA CONST. ch. 2, concerning the fundamental rights and duties of citizens. It is noteworthy that the Basic Law drafters have already entitled one of the proposed chapters of the future Basic Law "The Fundamental Rights and Duties of the Hong Kong Inhabitants".

16. *Id.*, Art. 51

17. 0. M. Fiss, *Two Constitutions*, 11 YALE J. INT'L L. 492, 501 (1986).

18. *"Preliminary Provisions on the Relationship Between the Central Government and the Hong Kong SAR and the Fundamental Rights and Duties of Hong Kong Citizens"*; Ming Bao Daily, Nov. 30, 1986. This proposal has essentially been adopted as proposed in the nearly completed first draft of the Basic Law submitted in December of 1987 to the Sixth Plenary Session of the Basic Law Drafting Committee by the subgroup on local/central Government relations, as follows:

Chapter 9. Interpretation and Amendment of the Basic Law of the HKSAR.

Article 169: The power of interpretation of the Basic Law shall be vested in the NCP Standing Committee.

If the NPC Standing Committee has given an interpretaion of a provision of this Law, the courts of the HKSAR shall in applying such provision follow the interpretation of the

this proposal suggest that this review, or "veto" power, would be exercised at the time Hong Kong legislation is reported to the Standing Committee of the NPC "for the record."[19] This proposal appears to have a strong Beijing imprint on it.[20] The mainland co-convenor of the subgroup, Mr. Shao Tienren, reportedly stated: "The NPC's Standing Committee will be vested with the final power to review future laws of Hong Kong, but in practice, the NPC will be unlikely to exercise the power frequently."[21] One suspects that actual exercise of such power would be unnecessary when indications of disapproval might dissuade the future legislature from passing "unconstitutional laws." It is noteworthy that another subgroup of the drafting committee concerned with political structure has recommended a political system based on separation of powers with "checks and balances."[22] It is difficult to square such propo-

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NPC Standing Committee. However, judgments previously given shall not be affected.

The courts in the HKSAR may, in adjudicating cases before them, interpret provisions of the Basic Law. If a case involves the interpretation of the Basic Law concerning defense, foreign affairs, and other affairs which are the responsibilities of the Central Government, the courts of the HKSAR shall ask the NPC Standing Committee to give an interpretation of the relevant provision before giving their final judgment on the case.

The NPC Standing Committee shall consult the HKSAR Basic Law Committee before giving an interpretation of this law. *See, Collection of Documents of the Sixth Plenary Session of the Drafting Committee*, Dec. 87.

19. *See Id.* Article 16: The HKSAR shall be vested with legislative power.

Laws enacted by the HKSAR legislative shall be reported to the NPC Standing Committee for the record, and such reporting shall not affect the coming into operation of the laws.

If the NPC Standing Committee, after consulting the HKSAR Basic Committee, considers that any law of the HKSAR is not in accordance with the law or legal procedures, it may return the relevant law for reconsideration or revoke it, but it shall not amend it. Any law which is returned for reconsideration or revoked by the NPC Standing Committee shall immediately cease to have force, but this cessation shall not have retrospective effect.

20. It should he noted that the PRC does not employ constitutional judicial review, instead it employs legislative implementation of its national constitution, i.e. constitutional rights and principles take on life when enacted into legislation by the NPC or its Standing Committee. CHINA CONST.; *See generally supra* note 14. Chen, *The question on the interpretation of the Hong Kong Basic Law*, Wide Angle Magazine, Mar. 16, 1985, at 24-27.

21. Yeung, *supra* note 19. In more recent statements, Mr. Shao Tien-ren has reiterated this position. *Before Review of the Hong Kong Laws, the Standing Committee of the NPC will Consult with Hong Kong People*, Ming Bao, Feb. 17, 1987, at 2. In the same comments Mr. Shao notes that Hong Kong courts currently have the power to interpret Hong Kong's constitutional documents subject to power in London to overrule them. Whether this is a veiled suggestion that Beijing may be willing to accept nominal assignment of the power of constitutional review in the Standing Committee with practical exercise of such power in the Hong Kong courts is not clear. The issue could well be ambiguously resolved in the current debate leaving it to the future judiciary and Standing Committee to work the issue out through some process of mutual tolerance.

22. Separation of powers with checks and balances usually suggest some form of constitutional judicial review as a means for the courts to perform their role of checking the other two branches of government. This can be distinguished from a French style functional separation of powers. *See* M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 35 (1971); J. Cummins, *Constitutional Protection of Civil Liberties in France*, 33 AM. J. COMP. L. 721, 722-24 (1985); Davis, *The Law/Politics Distinction, the French Conseil Constitu-*

sal with a constitutionally impotent court.

The proposal of the subgroup on local/central Government relations appears not to have been thoroughly considered, and has met with strong disapproval from leading Hong Kong drafters.[23] The subgroup had also included a recommendation that Hong Kong courts could "interpret" the provisions of the Basic Law "within the scope of the autonomy power."[24] The leading Hong Kong drafters objected to such limitation because it does not appear clearly whether the word "interpretation", as employed by both sides, is intended to include the power to hold legislation unconstitutional, i.e., constitutional judicial review. The subgroup's discussions suggests restriction of the latter power to the Standing Committee. As developed in the following sections of this essay, the subgroup's recommendations appear theoretically and structurally problematic.

In noting their objection, the leading Hong Kong drafters have suggested that the Hong Kong courts should have full power to "interpret" the entire Basic Law. They suggested that this was consistent with common law practices and would insure greater public confidence in the Basic Law. The subgroup was advised to consider the matter further and make further recommendations in 1987.[25] More recently, Martin Lee, perhaps the most outspoken advocate for the people of Hong Kong, and a leading figure among the Hong Kong drafters who have objected to the above sub-group proposal, has advanced a proposal of his own. Mr. Lee would have Hong Kong's highest court of appeal, upon any request from the Standing Committee, determine in an advisory capacity whether SAR legislation was unconstitutional.[26] Mr. Lee feels that if the Standing Com-

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tionnel and the U.S. Supreme Court, 34 AM. J. COMP. L. 45, 46-50 (1986); Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N. Y. U. L. REV. 363 (1982). The political structure subgroup appears to have recognized this tension between its proposals and those of the other subgroup in its meetings in February of 1987, when it endeavored to address the duties of the future judiciary. Leung, *Basic Law Compromise Sought*, South China Morning Post, Feb. 17, 1987. These meetings have pushed to the forefront certain tensions between those advocating the power of constitutional review in the Hong Kong courts and those advocating Standing Committee review. Compromise positions that are more politically than theoretically or practically informed have been advanced. It appears possible that this issue could remain with us under an ambiguous provision even in the implementation stage. The question of direct elections has tended to overshadow this and other important issues resulting in very little study of the interpretation issue. The final solution to this question should be worked out in the final draft of the Basic Law but could well be fashioned by the future judiciary with Standing Committee acquiescence. The current essay points out some theoretical and structural aspects of the issue for consideration over the long term dialogue in this area.

23. *See generally supra* note 18.

24. *Id.*

25. M. Lee, The Significance of a Written Constitution for Hong Kong, paper presented at A Conference on the American Constitution and the Hong Kong Basic Law: Some Comparative Observations, Sponsored by United States Information Service and the Department of Law, Hong Kong University on Jan. 16, 1987 (Anticipated publication of proceedings after revisions and editing by Hong Kong University Press, R. Stevens, ed.).

26. Perhaps an important weakness of this proposal is its complexity and its tendency

mittee was not satisfied with such a determination, it could then refer the matter for resolution to a special committee under the Standing Committee consisting of legal experts largely from Hong Kong. As with other drafters, Mr. Lee appears to separate constitutional judicial review from interpretation of the Basic Law - the latter for which local courts would have full capacity. The basis for this latter distinction is difficult to appreciate. Query whether the proposed advisory opinion with committee referral offends the Joint Declaration requirement of finality in local courts. These various proposals for implementing the Basic Law raise more questions then they answer but make a valuable contribution to this debate. While it appears that these proposals fail to fully appreciate the theory of judicial review in a constitutional democracy and create unnecessary structural tangles, they do represent a beginning dialogue with reference to the important question of implementation of the Basic Law.[27]

Although attempts are being made at preliminary resolution of this issue, it appears that until this important issue is more thoroughly considered, any such resolution will be subject to question until the final drafting stage. If the American experience is any guide, the judiciary will add its own imprint after 1997. In the final analysis, any proposals, and the final product, should be judged both theoretically and structurally in terms of the imperatives of the Joint Declaration and the objectives of the participants. After examining theoretical and structural perspectives on constitutional judicial review, an alternative model for discussion will be offered. It is hoped that this alternative model will serve to highlight the theoretical and structural features that should be carefully examined with reference to any final product of this important Basic Law drafting process.

II. A THEORETICAL PERSPECTIVE ON CONSTITUTIONAL JUDICIAL REVIEW

Beginning with a commitment to republican government and a concept of fundamental rights, Western constitutional theorists have engaged in a centuries old debate on the legitimacy of constitutional judicial review. Constitutional judicial review engages the courts in the process of deciding whether laws produced through majoritarian processes conform to the more fundamental principles of law enunciated in the constitution or basic law. This includes interpreting the basic law to ascertain its imperatives. Under a system of constitutional judicial review, depending on the type of constitutional review system employed, the court may refuse to give effect to, or invalidate, the statutory law in question. For now this discussion will focus on the American style of judicial review common in many (but not all) common law countries. Discussion of alterative sys-

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to entangle the courts of Hong Kong in the national political process. The character of this entanglement may be very difficult for the people of Hong Kong to appreciate and may further erode their confidence. *See also*, Davis, *Matters Not Being Considered With Respect to the Power of Interpretation Under the Basic Law*, Ming Bao, Jan. 19-22, 1987.

27. *See generally supra* note 18.

tems for judicial review will follow in the next section. This section will instead introduce certain legitimacy issues raised by constitutional theorists concerning judicial review. By understanding these issues one might better focus on the merits of constitutional judicial review, as well as its possible relationship to the autonomous functioning of a liberal capitalist constitutional democracy. This may better inform our judgment with respect to interpreting and applying the Basic Law of Hong Kong.

The United States currently has the world's oldest continuously operating system of constitutional judicial review. This system traces its roots to British common law legal traditions and the colonial experience.[28] The American system of constitutional review can be more directly traced to the famous opinion of Chief Justice John Marshall in *Marbury v. Madison.*[29] In that opinion, which overturned certain features of the Judiciary Act of 1789,[30] Chief Justice Marshall seized for the court the power to declare acts of Congress to be in violation of the American Constitution. Even though constitutional judicial review was not mentioned in the American Constitution, Chief Justice Marshall, using a syllogistic style of analysis, found such a power to be inherent in the American system of separation of powers with checks and balances. He argued that if the Constitution was the supreme law of the land and the court was charged with upholding it, then it followed that any law passed by current majorities in Congress would be unconstitutional and of no effect if it failed to comply with the requirements of the Constitution. The court was charged with upholding the will of the people expressed in the Constitution. In Alexander Hamilton's words, in Federalist Papers No. 78: "Where the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."[31]

The Marshall syllogism sounds convincing enough on its face, but it fails to address two important problems. First, it fails to adequately address how one might confidently discern the will of the people expressed in the constitution, or, more explicitly the problem of construction of the constitution. Secondly, it failed to adequately address the problem of the legitimacy of non-elected justices thwarting the will of the democratically elected branches of government, i.e., it failed to adequately address the counter-majoritarian difficulty inherent in this process. Debate has now raged over these issues for two centuries. This debate, with the spread of judicial review, has now been flung to the far reaches of the world.[32] This

28. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD, 36-41 (1971).

29. Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 80 (1803).

30. The court declared the section of the Judiciary Act of 1789 delegating the mandamus power to the United States Supreme Court in original jurisdiction to be unconstitutional, seizing the important power of judicial review for itself while giving a victory to the president in that particular case.

31. *See generally*, A. M. BICKEL, THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS, 16 *et. seq.* (2d ed.1986).

32. *See e.g.*, Cappelletti, *supra* note 22; Zamudio, *A Global Survey of Governmental*

debate has revealed, in various permutations, the interconnectedness of these issues. More importantly, it has revealed a great deal about the constitutional law-making process that should not be ignored by a polity about to embark on this process. A brief look at recent discussions of these issues will serve to illuminate the useful function of constitutional judicial review in a capitalist liberal democracy.

The historical debate has focused on whether a judge, in exercising judicial review, should be bound by the "original intent" of the constitutional framers, or whether this constitutional mission requires reference beyond the constitutional document to other higher values or principles or perhaps just policy.[33] If one elects the latter avenue, as does a majority of current theorists, the question becomes where to look, and what constrains judicial decision. This all bears obvious relationship to what has been described as the counter-majoritarian difficulty,[34] a concern that increases to the extent that judges are given free rein. For reference, and inconformity with general conceptual practice, the original intent theory will be styled "interpretivism", while the theories calling for reference beyond the constitution and its legislative history will be called "non-interpretivism."[35] It should be noted that some schools of thought have attempted to undermine the enterprise of constitutional theory,[36] e.g.,

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Institutions to Protect Civil and Political Rights, 13 DEN. J. INT'L L. & POL'Y 17 (1983); Barav, *The Judicial Power of the European Economic Community*, 53 S. CAL. L. REV. 461 (1980); Spiliotopoulos, *Judicial Review of Legislative Acts in Greece*, 56 TEMP. L. Q. 463 (1983); Ratner, *Constitutions, Majoritarianism, and Judicial Review: The Function of a Bill of Rights in Israel and the United States*, 26 AM. J. COMP. L. 373 (1978); Gyandoh, *Interaction of the Judicial and Legislative Processes in Ghana Since Independence*, 56 TEMP. L. Q. 351 (1983); Bolz, *Judicial Review in Japan: The Strategy of Restraint*, 4 HASTINGS INT'L & COMP. L. REV. 88 (1980); Keith, *A Bill of Rights for New Zealand? Judicial Review Versus Democracy*, 11 NEW ZEALAND U. L. REV. 307 (1985).

33. For articulation and further reference concerning original intent or the interpretivist position *see e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977). For the more expansive views, *see e.g.*, BICKEL *supra* note 31; J. H. ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW (1980); J. H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS, A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); M. J. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICY MAKING BY THE JUDICIARY (1982); Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587 (1985); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV., 193 (1952).

34. *See* BICKEL *supra* note 31. This difficulty refers to the undemocratic character of non-elected judges in effect invalidating the acts of the elected branches of government and resultant legitimacy problems. *See also*, Ely, *supra* note 33, at 105 *et. seq.*

35. *See*, Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 NW. U. L. REV. 1435 (1984); Grey, *Do we have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

36. *See, e.g.* Van Alstyne, *Interpreting this Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209(1983) (from the right); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L. J. 1037 (1980) (from the left).

critical theorists, while others have tended to dissolve this conflict by shifting the focus to the nature of interpretation, often drawing parallels from literature or scripture.[37] Space does not permit giving all these theories the attention they deserve.

The mission will instead be a more selective one of trying to draw some lessons from the constitutional law-making process that may be of some use in our current, very unique comparative context. This examination reveals a certain elaborative process of dialogue that is fundamental to constitutional human rights development in a system with a written constitution. In most cultural and societal contexts, where rights are taken seriously, judicial review is becoming an important component of this process. Only through understanding this process, particularly in the common law context, can Hong Kong make a rational decision concerning this component.

The interpretivist position, articulated perhaps with greatest elaboration by Raoul Berger, admonishes the judiciary to be mindful of its limited role, delineated in Marshall's syllogism, of applying the written constitution.[38] This interpretation process can appropriately be informed by legislative history, but not otherwise by reference to sources external to the constitution and its original intent. The founding fathers, it is urged, did not intend government by judiciary. Much of modern constitutional law would tend to violate this viewpoint, as it engages in a much more elaborate shaping of fundamental values and even policy.[39] Interpretivists suffer wide ranging criticism. They also suffer their own countermajoritarian difficulty; one of having founding fathers ruling subsequent generations from the grave. Marshall himself admonished us that a constitution was not intended to "partake of the prolixity of a code", that it was a living document.[40] Some would say that the constitution is an outline of principles to which the polity is committed.[41] Elaboration of these principles is a continuous contextual process. Other critiques of interpretivism proceed from a different notion of law in general, and constitu-

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37. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984) (discussing attempts at this approach which he labels "rejectionist"); Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985).

38. Berger, *supra* note 33, at 115 *et. seq.*

39. Most civil law jurisdictions have openly acknowledged the essential political nature of constitutional judicial review in their creation of separate constitutional courts. These courts have in some cases made dramatic constitutional decisions. *See generally*, Mezey, *Civil Law and Common Law Traditions: Judicial Review and Legislative Supremacy in West Germany and Canada*, 32 INT'L & COMP. L. Q. 689 (1983) (discussing abortion cases); Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657 (1980). These cases are matched in America by decisions such as the leading American abortion decision. Roe. V. Wade, 410 U.S. 113 (1972).

40. McCulloch v. Maryland, 4 Wheaton 316, 4 L. Ed. 579 (1819).

41. *See* Curtis, *A Modern Supreme Court in a Modern World*, 4 VAND. L. REV. 427, 428 (1951); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. R. 1 (1959).

tional law in particular. This notion is process-focused and sees the constitutive process as part of a complex dialogue within and between the political branches, the people, and the courts.[42] Other critics would simply admonish interpretivists that a century of constitutional elaboration has proven them wrong.[43]

Non-interpretivists, on the other hand, represents several complex positions. Much current debate ranges between these various positions. Perhaps not enough has been done to achieve a synthesis of their insights. Such a synthesis may be the only reasonable way for a comparativist to make use of this elaboration. Because they cannot claim legitimacy solely from the articulations of the founding event, the non-interpretivists have been more troubled with the counter-majoritarium feature of constitutional judicial review and have sought various means of dissolving this problem. In spite of its difficulties, non-interpretivism has managed greater conformity with constitutional reality and has more clearly taken the much more satisfying step of recognizing that a constitution is something more than an ordinary statute. It has also pushed American constitutionalism beyond the rather acute interpretivist style counter-majoritarian difficulty; the problem of a handful of eighteenth century colonist ruling the present from their grave.[44]

In a broad sense, non-interpretivism, especially as elaborated in what might be considered its best articulation by Alexander Bickel, would have the court look beyond the written constitutional document to certain basic values or principles about which that document only provides an outline.[45] It is in the nature of a living constitution that these principles are not fixed, but evolving. Growth and elaboration of such a principle is a task to which the judiciary is peculiarly suited by virtue of temperament and process. Bickel elaborates two levels of law-making: laws that address immediate or expedient needs, and laws that elaborate our collective deeply felt values and are developed incrementally.[46] These latter laws

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42. BICKEL, *supra* note 31, at 117 *et. seq.*

43. *See* Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, Conkle, *supra* note 33, at 659 (citing congressional acquiesence).

44. Some seek to avoid this problem by citing the ability of constitutional amendment, but in a society such as the United States where this has rarely occurred, the most significant instance requiring a civil war, this position is subject to attack. *See generally* Berger, *supra* note 33.

45. *See* BICKEL *supra* note 31, at 23. Bickel notes in defense of the courts role:

> The search must be for a function which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be accepted in a society that generally shares Judge Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and the burden of their responsibility.

46. Here he refers to what he describes as a "Lincolnian tension". He is speaking of

are best developed with the aid of the reflective, contextually focused judicial process and not in the give and take of policy focused legislative expediency.

Bickel does not stop there but goes on to elaborate a judicial process for value development. This process does not envision a judiciary in isolation, but a judiciary engaged in a complex dialogue with the elected branches and the polity at large.[47] In this process the court has three options: first, it can overturn the legislation in question; second, it can uphold and legitimate it; or third, it can do neither.[48] In choosing the third option, the court employs certain techniques or doctrines of avoidance that contribute to the dialogue with the other branches of government, and permits the court to inform itself and wait for the appropriate time for further elaboration of principle. These avoidance doctrines, or "passive virtues", are instruments of dialogue for law-making on the higher plane of principle. These instruments include such doctrines as standing, mootness, ripeness and the delegation doctrine, and tools such as legislative interpretation and vagueness, to name just a few. What Bickel presents is a very complex notion of process, or dialogue, that may be fundamental to the Anglo-American concept of rights, with or without constitutional judicial review. With the spread of judicial review, this notion may be gaining favor elsewhere.

Dean Harry Wellington has provided further elaboration of Bickel's dialogue-based development of principled law or rights by focusing on the question of finality in constitutional opinions.[49] Bickel might suggest that a constitutional opinion is not really final until the people say it is. While courts will frequently employ passive virtues to avoid the premature elaboration of principles, as they have done in death penalty cases, they may ultimately elaborate a principle, and then, if appropriate, seek to back out somewhat. Wellington sees this as having occurred in American abortion cases after the court initially issued a rather liberal opinion in *Roe v. Wade*.[50] It had worked up to this point with passive virtues in several

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Lincoln's commitment to the principle of equality tempered by willingness to compromise to expediency when political process so demands. In such a process principle can be compromised but not surrendered. This commitment to principle may be counter-majoritarian and so some willingness to compromise is also a concession to democracy. *See Id.* at 65, "Our Democratic system of government exists in this Lincolnian tension between principle and expediency, and within it judicial review must play its role". *Id.* at 68. An important point for Bickel is that the court is not engaged in an unrelenting search for principle but takes account of the competing needs of expediency in its principle development. *Id.* at 200. This permits judicial participation in a wider dialogue.

47. *Id.* at 117 *et. seq.*

48. He stresses the importance of the courts educational function. "But in withholding constitutional judgment the Court does not necessarily forsake an educational function, nor does it abandon principle. It seeks merely to elicit the correct answers to certain prudential questions that, in such society as Lincoln conceived, lie in the path of ultimate issues of principle". *Id.* at 70.

49. Wellington, *The Nature of Judicial Review*, 91 YALE L. J. 486 (1982).

50. *Id.* at 517-519. Dean Guido Calabresi has developed an excellent analysis of the

contraception cases. After *Roe v. Wade*, the court then backed up a little, permitting certain limitations on funding, etc., for abortions.

The Bickel/Wellington reasoning acknowledges the counter-majoritarian difficulty, but, under Bickel, is less concerned with it, given the Court's incremental elaboration of principles in a process informed by dialogue with the people and the democratic branches of government. Wellington elaborates further, noting there are many counter-majoritarian features in any constitutional democracy, and that any system of law based entirely on, and immediately responsive to, majoritarian expediency would be unstable.[51] He notes that fascism under Hitler was initially such a system. Bureaucracy is a common, frequently counter-majoritarian instrument, as are legislative seniority systems, etc. Delay and reformulation of majoritarian preferences may be necessary to prudent government action and stability. This notion of stability is a particular concern in Hong Kong. By providing structure for development and elaboration of higher norms, constitutional judicial review is a valued stabilizing force. Structuring democracy in order to stabilize it seems eminently preferable to destroying democracy in an alleged search for stability; the latter being the direction Basic Law discussions in Hong Kong often take.

As noted above, Wellington would focus more attention on finality than on the counter-majoritarian problem. With the aid of Bickel's passive virtues and principled decision, this latter problem is also largely overcome. This concern with finality stems from the fact that a constitutional decision, unlike a common law decision, cannot be overturned by the legislative branch. But in the case of a properly informed process of principled decision, the court will itself back up when necessary. He feels less secure about policy based decisions as less susceptible to being proven wrong.[52]

A constellation of other theories are located around this non-interpretivist core. Herbert Wechsler, before Bickel, noted a role for courts in developing "neutral principles."[53] Wechsler's neutral principles are very limited reasoned principles that are to be elaborated very conservatively, generally giving way to legislative choice. Wechsler, in Bickel's view, did not appreciate the broader role of the Court with reference to the dialogue concerning policy expediency and principle.[54] Wechsler would not

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dialogue process between courts and the legislative branch in his book focused on updating statutes. *See*, G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

51. Wellington, *supra* note 49, at 488-492. "The instability fostered by a government that instantly gratified majorities would slow or halt the growth of reasonable expectations." *Id.* at 492. "[A] governmental structure that fails to unite a nation's present with its past necessarily fails to preserve values to which its citizens may attach considerable weight." *Id.* at 494. "To the contrary, wherever our system creates a danger of majority willfulness, some tempering devise is interposed." *Id.* at 498.

52. *Id.* at 504 *et. seq.*

53. Wechsler, *supra* note 41.

54. BICKEL, *supra* note 31, at 68-69.

be with the Court on much modern civil rights law.

John Ely, on the other hand, takes issue with Bickel's views concerning the court's superior ability to articulate fundamental values.[55] Absent such superiority, Bickel's views are thought to encounter considerable counter-majoritarian difficulty and legitimacy problems. Borrowing from a footnote in the *Carolene Products*[56] case, Ely sees the mission of judicial review as participation reinforcement and the related function of protection of minority rights.[57] While acknowledging participation reinforcement is also a value, he feels this is the primary value of participatory democracy.[58] Ely sees participation reinforcement as not only what the court should do, but as what it in fact does. Ely urges that he has gotten around the counter-majoritarian difficulty by confining the judiciary to, in effect, unclogging the majoritarian process.[59] This is the one mission elected officials are not good at because their self interest gets in the way.

Other theories, such as Michael Perry's recent effort, would give greater leeway to judicial policy making, letting judges internally reach the right result based on policy concerns.[60] In addition to counter-majoritarian difficulty, this runs into problems with the lack of external constraint. Finally, some recent efforts have focused on the process of interpretation itself, carrying the debate to the rather lofty reaches of scripture interpretation.[61] These scholars examine the contextual element in any effort at understanding a constitutional text, and thereby seek to dissolve the interpretivism/non-interpretivism dichotomy, bringing in through another door - contextualism - many features that would meet with traditional interpretivist disapproval.

At a minimum, these various schools of thought elaborate many concerns with legitimacy and accountability when a non-democratic institution is employed in a system fundamentally committed to democracy. These concerns are described by such terms as counter-majoritarianism finality, and constraint. Yet the use of constitutional judicial review as an instrument of constitutionalism would not be experiencing such a dra-

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55. Ely, *supra* note 33, at 63.

56. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). In a case that was otherwise insignificant, the court hinted a change in direction:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious. . . or national. . . or racial minorities. . .; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

57. Ely, *supra* note 33, at 73 *et. seq.*

58. *Id.* at 75.

59. *Id.* at 88, 102.

60. Perry, *supra* note 33.

61. *See generally supra* note 37.

matic increase if the value achieved was not generally considered sufficient to override these concerns. Outside of certain limited cultural and legal contexts, in modern pluralistic democracies, constitutional judicial review, while not by itself sufficient,[62] may well be practically necessary to a meaningful commitment to rights. I believe its usefulness relates to the principle elaborating dialogue it brings to the process of constitutional rights development.

This dialogue, or communication-based concept of constitutional theory, is less iron-fisted than public debate would have us believe of written constitutions. If anything reflects a failure of constitutional theory, it is the purest strain theories often advance. There is a tendency to demand too much of a theory. Contradiction is not tolerated. Law, outside of the most constricted strains of legal positivism, lacks such iron-fisted will. It appears instead to be a communications process, or a dialogue between relevant actors, that takes shape in legal principles. In constitutional law, if this dialogue produces values, these are the values of an ongoing discussion. This dialogue in the United States, informed by a written constitution, extends the full scope of American history. Any theory of constitutional law should seek to understand the tensions and images this process produces. This is especially true for a comparativist who seeks to benefit from this experience.

Many current constitutional theories give us a picture of part of the dynamic; like photos from different angles. Bickel's passive virtues are fundamental ingredients. Neutral principles are also relevant, though Wechsler may have confined them too narrowly. Representation reinforcement or participation models likewise capture, perhaps, the most fundamental constitutional value under a democratic constitution, but fail to explain all the results. Perry's policy analysis likewise presents an ever present feature of modern constitutional cases, but this has severe legitimacy problems. Yet many, but not all, modern theories place some value on the process of developing fundamental values, perhaps best explained as a dialogue within a democratic political system; a dialogue to a large extent directed by the judiciary incrementally with the instrument of constitutional judicial review. Bickel especially contributed to this foundational understanding.

Constitutional judicial review, as an ingredient in this dialogue, has certain characteristics that may lend order to the process of principle development within a constitutional democracy. I believe this feature is in part honoring the commitment of liberal democracy to passive government, a commitment that other branches of government can often ill afford in modern society. In a system of government strongly influenced by

62. The widespread use and abuse of emergency powers to cut off judicial review illustrates both the strength and weakness of this instrument, e.g. earlier in the Philippines, India, and Taiwan. This likewise reveals dependence on the polity and political branches. Yet, where properly employed, its popularity suggests its value as a stabilizing force of importance to a polity committed to constitutional implementation.

Lockean liberalism and republicanism, the judiciary, more than any other branch, honors liberal government's commitment to uphold certain principles and rights which said government is charged to honor. The commitment to the rule of law, rights, democracy and capitalism, evident in the Sino-British Joint Declaration, seems to envision such a local government for the Hong Kong SAR.

In honoring its commitment, the judiciary engages in a process of developing principles through a discourse with the democratically elected branches of government. John Ely tells us this discourse includes a particularly strong commitment to democratic participatory process. Yet there are other commitments to principles. But these principles, largely described in the broad outline of constitutions or basic laws, often lack contextual coherency. It is with an eye to principled roots and through a dialogue with the political process that the court performs its unique role of ferreting out these values. This ferreting out, as many scripturalists suggest, is contextual, but at the same time textual. The text is only the foundation, but strongly anchors the dialogue process. In this process, Bickel's passive virtues are valuable tools for communication. In this inherently conservative enterprise, these instruments permit the reflection necessary. The counter-majoritarian difficulty may sometimes be less a difficulty and more a virtue as the public dialogue is anchored to our basic values, those values that perhaps the majority, on reflection, cares most about. Such a stabilizing force may not be at all unattractive to Hong Kong.

It seems apparent that, whatever theory or theories are employed, constitutional judicial review has come to play an increasing role in the constitutional conversation in a growing number of national and international legal systems. The growth of this instrument seems to reflect a growing belief in its ability to improve that conversation. If this is so, then the empirical evidence may well suggest that this instrument gives substance to the notion of rights in constitutional democracies. Meta level analysis aside, one may assert that with limited exception,[63] constitutional judicial review may well be essential in the present intellectual context to meaningful and stable rights development. Again, with limited ex-

63. The United Kingdom has succeeded in implementing a system of rights without a written constitution or constitutional judicial review of legislation. Hong Kong has historically benefited from this tradition. It is difficult to determine whether the culturally bound traditions of the United Kingdom can continue to flourish in foreign cultures without British participation. Most former British colonies employ constitutional judicial review. One which does not, New Zealand, appears to be moving in that direction through the drafting of a bill of rights. *See supra* note 32. Britain may itself be moving in that direction, with its participation in the European Community. The problem becomes even more acute when one considers a former British overseas territory which will no longer be under British influence, but will instead be under another national government that has a very different approach to rights. This other approach may not be conducive to continued confidence in Hong Kong's stability, at least in the short run. The Joint Declaration appears to acknowledge this difficulty.

ception, the absence of constitutional judicial review has often revealed the opposite pattern.[64]

For Hong Kong, this might suggest that constitutional judicial review offers a stabilizing, less politicized tool to effectuate the principles of the Joint Declaration and yet afford Hong Kong a stable environment for democracy. Such democracy may indeed depend on it. The competing claims of the Hong Kong SAR political arrangement can best be addressed through proper structuring of this instrument. By transferring a significant portion of the basic value, or rights development process, to a more neutral, less politicized forum, I believe constitutional judicial review may serve to reduce the occasion for disagreement over fundamental values by the Marxist and capitalist participants in this unique political endeavor.

III. A STRUCTURAL PERSPECTIVE ON CONSTITUTIONAL JUDICIAL REVIEW

If one accepts the view that constitutional judicial review has come to serve as a stabilizing force and as a central force for the evolution of basic values or higher law in a liberal capitalist democracy, then it becomes apparent that this instrument is not really the mechanical devise that the Marshall syllogism may suggest. Constitutional judicial review may be said to play a critical role in a dialogue that is central to the evolution of values in a democratic system, a dialogue which seeks to illicit with regard to what values the people can be heard to say, in Bruce Arkerman's words, "we really mean it."[65]

Yet we would be remiss in our search for understanding of the concept if we confined this search to the meta level or to certain Anglo-American roots. In the context of China and Hong Kong, we have the coming together of at least two legal systems -civil law and common law - with certain fundamental elements of a third - socialist law.[66] Added to this are unique Chinese historical roots. This section will briefly examine some of the leading structural elements of various systems of constitutional review extant in the world today. While any exhaustive examina-

64. *See* Cappelletti, *The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 439 (1980): "As for the alleged 'shift away' from democracy, an elementary awareness of historical developments should suffice to convince us that, at least in modern systems of government, precisely the opposite is true. All totalitarian regimes of our century have shown themselves to be antagonistic towards judicial review of governmental, particularly legislative action."

65. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L. J. 1013, 1041 (1984).

66. On constitutional implementation of rights in socialist countries, *see generally*, *supra* note 14; Osakwe, *Soviet Human Rights Law under the USSR Constitution of 1977: Theories, Realities and Trends*, 56 TUL. L. REV. 249 (1981); Hazard, *The Common Core of Marxian Socialist Constitutions*, 19 SAN DIEGO L. REV. 297 (1982); Markovits, *Pursuing One's Rights under Socialism*, 38 STAN. L. REV. 689 (1986); Comment, *Cuba's 1976 Socialist Constitution and the Fidelista Interpretation of Cuban Constitutional History*, 55 TUL. L. REV. 1223 (1981); Eliasoph, *Free Speech in China*, 7 YALE J. WORLD PUB. ORD. 287 (1981).

tion of the unique qualities of the numerous systems available cannot be taken up here, a limited look at the more common structural features may aid our understanding. The next section will then close this essay with some preliminary assessment of the applicability of this concept of constitutional review to the Hong Kong SAR.

A glance over the various legal systems in the world presents a wide array of options employed for constitutional implementation. Prominent examples include, but are not limited to the following:

1. The French Constitutional Court.
This body is not considered a court at all, but instead, a political entity that issues abstract opinions regarding legislation before it is promulgated. It is particularly attentive to allocation of constitutional power within the system. The French constitutional court system is supplemented by administrative courts which review executive acts, as well as courts of general jurisdiction.[67]

2. The Austrian Constitutional Court.
This court decides the constitutionality of statutes only when the statute is in effect sued by the executive or the highest ordinary courts. It has exclusive competence over constitutional issues. This was the prototype of constitutional judicial review in continental Europe. A decision from this court is prospective and may abrogate the statute from the books.[68]

3. The German Constitutional Court.
This court combines elements of the Austrian and American system with the largest number of cases coming to it by way of referral from other courts. Other courts can hold statutes constitutional but not unconstitutional. The German constitutional court also receives abstract cases through certain references from other branches of government.[69]

4. The American System of Judicial Review.
Extends to all courts in the land, with binding decisions coming from the Supreme Court at the top. Courts are empowered to act only in concrete cases or controversies. There are limited exceptions permitting abstract advisory opinions from certain state courts on state constitutional and legislative issues.[70]

5. Legislative Interpretation.

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67. *See generally, supra* note 22; *see also* Cappelletti, *supra* note 64, at 412-21. Cappelletti notes that even France, a country historically most resistant to the concept of judicial review, has somewhat incrementally conceded to this instrument on several fronts, such as review of French executive legislation by the administrative courts, review of non-promulgated laws by the constitutional court, and review of laws under European Economic Community law by the ordinary courts.

68. *See* Capelletti, *supra* note 22, at 71-74.

69. *See id.* at 75-76; Kommers, *supra* note 39; Mezey, *supra* note 39.

70. *See supra* note 29; *see generally, supra* note 33.

Under this system, employed in the Peoples Republic of China, the constitution is interpreted and enforced through legislative acts by the National People's Congress or its Standing Committee. Courts are then to apply such legislation. Courts do not have the power of judicial review over legislation. This system often means that some rights provisions do not receive vigorous attention, depending on current policy concerns.[71]

6. "Implied" Judicial Control With Parliamentary Supremacy.

In a system such as the one employed in the United Kingdom, through tradition and practice, independent courts achieve a measure of judicial control over constitutional implementation through rules of interpretation, application of "unwritten principles" and careful control of administrative acts. This system, in some respects, may be said to rely heavily on Bickel's passive virtues in constitutional dialogue. Yet the courts do not possess the power of constitutional judicial review in this system of parliamentary supremacy. The introduction of European Community law may tend to undermine some aspects of this latter feature.[72]

7. Separate Administrative Courts.

In the French Conseil d'Etat a separate court system reviews administrative acts, delegating statutes (through interpretation) and regulations or executive legislation for conformity to the "general principles of law" reflected in the constitution and the Declaration of the Rights of Man. This includes party initiated review of all executive acts, decrees and ordinances but does not directly permit constitutional judicial review of parliamentary acts. While the Conseil d'Etat cannot directly overrule a statute, it may sometimes interpret away statutory provisions of questionable constitutionality.[73]

8. Constitutional Consultation or Advisory Opinions.

This approach is concurrently employed by some American state supreme courts and in certain countries such as Canada.[74]

While this list is not exhaustive and totally fails to reveal the complexity and functioning of these various systems (a task well beyond the time and space constraints of the current essay), it does reveal a diversity of models and further reveals in the several models employing constitutional judicial review that such a concept is by no means monolithic.

71. CHINA CONST.; *See generally, supra* note 14; Chen, *supra* note 20. Recent political debate and policy in China has tended to pay greater attention to political and economic rights. *See e.g., Resolution of the Sixth Plenary Session of the 12th Central Committee of the Communist Party of China*, South China Morning Post, September 29, 1986, at 22-23. Some in China have recognized a relationship between political reform and economic success. As illustrated in the current campaign against "bourgeois liberalism", China has yet to develop a coherent and comprehensive process for implementation of constitutional rights, leaving China's rights record somewhat spotted.

72. *See* Cappelletti, *supra* note 22, at 36-41; H. STREET & R. BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW DE SMITH 75-119 (5th ed.1985).

73. *See supra* notes 22 and 67.

74. *See* Cappelletti, *supra* note 22, at 70. This approach supplements judicial review.

These differences in approach often flow from fundamental historical conceptual differences.

Mauro Cappelletti has noted that, based on historical roots, systems of constitutional judicial review can sometimes be divided into two main types. These include the American model and the Austrian model, the latter being developed under the influence of Hans Kelsen.[75] In order to make better sense out of these divergent approaches, Cappelletti employed a set of more general concepts. These concepts can be said to operate on at least two different planes as follows:

1. A system may be characterized as centralized or de-centralized.[76]

The decentralized system is typified by the American approach in which all courts of the land have the power of constitutional review. This system is employed in many common law countries including Canada, Australia and India. It also exists in civil law countries such as Japan and Greece and has existed in the Philippines.[77]

A centralized system is typified by Austria and involves a separate constitutional court, often but not always possessing exclusive jurisdiction to decide the constitutionality of legislation. Within the large number of civil law countries that employ this system there is considerable divergence in detail. These countries prominently include Austria, Italy, Germany, Cyprus, Turkey and Yugoslavia, the latter being the only communist nation I know of that possesses such a system.[78] Other communist countries have considered this approach.[79] Under such a system, constitutional issues are referred to the constitutional court. The German system is mixed in that ordinary courts can determine constitutionality but not unconstitutionality of legislation.[80] Cappelletti and others trace this development to separation of powers notions that focus on separation of functions.[81] Constitutional judicial review is considered a political function best assigned to a separate quasi-political court and not ordinary courts. These courts must decide the issue and cannot easily escape through employment of avoidance techniques or "passive virtues."[82] These constitutional courts will formally declare statutes invalid (with the exception of France), while courts in decentralized common law systems do not do so, relying instead on *stare decisis* effect.[83] A civil law system without *stare decisis*, and with more than one court system, would have difficulty employing a decentralized system because of conflicts.

75. *Id.* at 45 *et. seq.*
76. *Id.* at 46-53.
77. *See* Spiliotopoulos, *supra* note 32; Bolz, *supra* note 32.
78. *See* Cappelletti, *supra* note 22 at 50-51.
79. *Id.*; *see also supra* note 66.
80. *See supra* note 69.
81. Cappelletti, *supra* note 64, at 413; Cappelletti, *supra* note 22, at 54.
82. Cappelletti, *supra* note 22, at 81.
83. *Id.* at 85.

Greece has done this by employing a separate court at the top to resolve the constitutional conflicts.[84] Finally, ordinary judges in civil law countries may not be suited by training and practice for value oriented quasi-political constitutional judicial review decisions.

2. A system may be characterized by review "incidenter" or review "principaliter."[85]

Review incidenter, characteristic of the American system, indicates that the court exercises constitutional judicial review when constitutionality issues are raised in ordinary cases by parties. Constitutional jurisdiction is merely incidental to the case. Incidenter review is having an increasing impact. It is routinely employed in common law systems with constitutional review, e.g., United States, Canada, India, Australia. It is likewise employed in Japan, Norway, Denmark, Sweden, and Greece.[86] As noted below, many continental systems with roots in review principaliter have also begun to concurrently employ incidenter review. Cappelletti notes that the mere fact that the legislative body in Canada, India and many American states can request advisory opinions does not defeat their characterization as systems primarily based on review incidenter, as this advisory feature is merely "constitutional consultation" and not constitutional judicial review at all.[87]

Review principaliter is characteristic of the original Austrian model of Hans Kelsen.[88] This system emphasizes presentation of constitutional issues in constitutional courts as the principal issue, via initiation by government authorities. This is done on an *ad hoc* basis and not incidental to a case or controversy. This tends to emphasize abstract resolution of constitutional issues. Even the Austrian prototype was modified in 1929 to permit initiation of action by the highest courts incidental to a case determination, thus incorporating incidenter features while retaining the principaliter foundation.[89] With this modification, such incidenter reference to the constitutional court is not discretionary. In Germany and Italy, the same principaliter and incidenter ingredients co-exist except all judges at all levels are required to make such an incidenter referral if a statute is constitutionally suspect. Likewise, all judges may hold a statute constitutional without referral.

Having developed this structure of analysis Professor Cappelletti, a noted Italian constitutional scholar, gave his impressions of the impact of the differences. He noted that the ordinary continental courts, because of their more limited constitutional role, experience less pressure for constitutional awareness. Constitutional courts tend to focus in the abstract

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84. Spiliotopoulos, *supra* note 32.
85. *See* Cappelletti, *supra* note 22, at 69 *et. seq.*
86. *Id.*; *see also* Spiliotopoulos, *supra* note 32.
87. Capelletti, *supra* note 22, at 70.
88. *Id.* at 71 *et. seq.*
89. *Id.* at 73.

and ignore concrete reality; their constitutional proceedings are less adversarial and more objective, focusing more on safe-guarding the law and less on the rights of individuals. Such constitutional courts have less access to techniques of avoidance or passive virtues, with even legislative interpretation being assigned to ordinary courts.[90] He notes, however, that American courts may too readily employ avoidance, but that generally, the American system has spawned a judiciary very sensitive to the political and potentially anti-democratic nature of constitutional review. Employing this assessment, if constitutional review is an instrument of constitutional dialogue and value development, it becomes difficult to justify a general application of the Austrian or continental model in a common law jurisdiction. Even in continental countries such as Germany and Greece, a certain convergence with the American approach is evident.

In addition to the above, certain other structural options should be noted. Note has already been taken of the rather unique (for civil law countries) Greek model, employing a decentralized incidenter system with a special court at the apex to resolve constitutional conflict between Greece's three court systems.[91] In a common law jurisdiction, Canada has recently added some distinctive features.[92] As noted above, it permits constitutional consultation on request from the political branches. The Canadian Charter of Rights and freedoms also provides in Section (1) for the guarantee of "the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Since Canada has judicial review, the meaning of this provision awaits judicial action. The most distinctive feature of the Canadian Charter is, however, its provision for express parliamentary override of some *but not all* of its bill of rights provisions.[93] This requires an express declaration in the legislation, and last for only five years, subject to renewal. It is noteworthy that even in the American constitutional debate of two centuries ago Edmond Randolf proposed that the President "and a convenient number of the National Judiciary, ought to compose a council of revision" to examine every act of congress and by its dissent constitute a veto.[94] This proposal was rejected.

It should be further noted that any decentralized incidenter system may want to employ a concept similar to the American doctrine of *certiorari* which permits the highest court to choose not to accept a case for review, with certain limited exceptions where appeal might be permitted as of right. In America, this could be viewed as another instrument of avoidance. The highest court in Japan does not have this option to refuse to accept cases and a leading Japanese scholar notes this often results in

90. *Id.* at 79-84.
91. *See* Spiliotopoulos, *supra* note 84.
92. *See* TARNOPOLSKY & BEAUDOIN, CANADIAN CHARTER OF RIGHTS AND FREEDOMS (1982).
93. *Id.* at 10-12.
94. *See* Berger, *supra* note 33, at 300-301.

an overload with less careful drafting of opinions.[95] Of course this is of concern where the important tasks of constitutional review is involved.

IV. A Perspective on the Use of Constitutional Judicial Review in the Hong Kong SAR

The above theories and structural elements could well provide some new ingredients in what is a growing constitutional dialogue in Hong Kong. In some respects, discussion of constitutional implementation has suffered from the press of other compelling issues. It may also suffer from the press of history. Neither the Chinese participants nor the English trained common law lawyers involved in this constitution building process come from legal traditions that currently employ constitutional judicial review of legislation. England has benefited, as has Hong Kong in a subsidiary fashion, from a tradition of rights implementation which depends both on the heavy weight of English tradition and custom, and on an independent and strongly effectual judiciary which has built up a constitutional dialogue through other techniques such as legislative interpretation and judicial review of administrative acts. Nevertheless, even the United Kingdom, outside its heartland, has tended to favor use of constitutional judicial review in its former colonies, as indeed it is so employed in most.[96]

Chinese attitudes on constitutional review, constitutional government, and human rights, likewise bear the weight of history; recent and ancient. Without taking up all of this weight, which has been the topic of a recent book,[97] particular aspects may be worthy of note. As noted

95. Tanaka, *Legal Equality Among Family Members in Japan -The Impact of the Japanese Constitution of 1946 on the Traditional Family System*, 53 S. CAL. L. REV. 611, 616 (1980).

96. It has been pointed out that although England has employed parliamentary supremacy since the Glorious Revolution of 1688, this doctrine in some respects produced the opposite result in the British colonies, empowering colonial judges to disregard local legislation not in conformity with English law. *See* Capelletti, *supra* note 22, at 40. It has been reckoned that more than 600 colonial laws were invalidated by the Privy Council from 1696 to 1782. *See id.* Canada, Australia and India have likewise adopted constitutional judicial review, while South Africa, with perhaps a more troubled rights record, has not. *Id.* at 41. While Hong Kong does not have a tradition of constitutional judicial review of legislation, it does have a British system of judicial review of administrative acts. Though without a written bill of rights Hong Kong also has some confined and virtually unemployed means for courts to review legislation. *See* Wesley-Smith, *Legal Limitations Upon The Legislative Competence of the Hong Kong Legislature*, 11 HONG KONG L. REV. 3-13 (1981). Most noteworthy is a limited power of review for conformity to acts of the British Parliament. Rediffusion (H.K.) Limited v. Attorney General, 1968 H.K.L.R. 277 (Sup.Ct.); Rediffusion (H.K.) Limited v. Attorney General, 1970 H.K.L.R. 231 (Privy Council); regarding an application by the Attorney General, 1985 H.K.L.R. 381 (High Court). As a practical matter such power is rarely exercised, and Hong Kong generally adheres to the British tradition in this respect. Given the experience in other former British overseas possessions, however, building a system of constitutional judicial review on this base would be very much within the scope of Hong Kong's current legal tradition.

97. EDWARDS, MENKIN, NATMAN, *supra* note 14.

above, Professor Edwards and his colleagues have pointed out certain Chinese differences in the conception of rights as an instrument of policy to advance the goals of the state and not as a claim against the state. They have also noted the absence of a tradition and process for adversarial claims of rights, which has grave impact for rights development. It should also be noted that the period during which China borrowed Western legal institutions and constitutionalism, largely from Germany, was a period during which Germany had a lapse in use of constitutional judicial review.[98] While Germany had implemented a system of constitutional review in the middle of the 19th century, that system had fallen out of use in the latter part of the 19th century and the first half of the 20th century. Of course this period also witnessed increased abuse of rights in Germany, culminating in the Nazi regime of Adolf Hitler. All of the axis countries implemented constitutional review as a safeguard against such development in the post-war period. The current German system is especially effective. With France likewise not favoring judicial review, the Western influence on the Chinese legal system had not in the early years included this ingredient to a marked degree. More recently, the Soviet Union and Marxist states (except Yugoslavia) likewise lack such institution.[99]

Rather than accepting the fruits of history and social policy being employed in other contexts, one might better focus on the value of this concept with reference to the goals the participants share for Hong Kong's future. Such an examination not only favors constitutional review as a way to implement the Basic Law, but also gives some preliminary indication of the structural and theoretical components best considered.

Generally one might conclude that the institution committed to the incremental evolution of higher norms and principles in the process of dialogue, discussed above, may well advance the common goal of all participants of maintaining stability. With fundamental value differences evident in the political systems of Hong Kong and the rest of China, there is a great deal of potential for confrontation on fundamental issues in the political arena; the arena, in Bickel's view best suited to more immediate issues of policy and expediency. The Basic Law drafting process has already revealed some of this in debates over such topics as direct elections, accountability and residual powers. For Hong Kong to go into its future legislative process with constant signals of approval or disapproval from the central government, as a basis for proceeding, as has occurred with

98. For an outline of German historical development of constitutional judicial review *see* Casper, *Guardians of the Constitution*, 53 S. CAL. L. R. 773, 775-778 (1980). With limited exception (1929), there was general hostility to this concept from 1871 up to the demise of the Nazi regime, a period which would encompass Chinese exposure to German legal traditions. France, another source of Chinese exposure to modern constitutional systems, has likewise had a tradition of hostility to constitutional judicial review, tradition which is only now starting to break down. *See supra* note 67. France, however, like England, has vigorously employed administrative judicial review.

99. *See supra* note 66.

Basic Law drafting, seems an inherently unstable and perhaps undesirable way to proceed. In a system that tends to shift all issues into the political arena of the legislative or executive branches, the chances are good, with fundamentally different views on rights and democracy, that other hot fundamental issues will someday emerge to replace the current ones. While constitutional judicial review will not completely purge these sensitive issues from the political arena (nor should it), it tends, as Bickel suggests, to render the dialogue in this area more ordered and thus advances stability. The judiciary has a greater potential to insulate itself from the more aggressive political debate than perhaps other supposed stability generating political bodies that have been mentioned from time to time in Hong Kong, e.g., a large appointed group of senior advisers. No one would suggest that the court is totally insulated, nor should it be, in informing its constitutional dialogue.

My initial feeling is that Hong Kong might best benefit from use of a bifurcated system. At the local level this would include a decentralized incidenter system of judicial review similar to the one employed in most common law jurisdictions (all common law jurisdictions with written constitutions or basic laws). This system should be employed, permitting the local judiciary at all levels, bound by the highest court's precedent, to review the acts of the legislative branch, as well as the executive branch, for conformity to both the powers and rights components of the Basic Law. This should generally include the full extent of the Basic Law. Yet, being part of a national system based initially on civil law traditions, certain components of a centralized principaliter system could be used to resolve constitutional issues involving constitutional power or jurisdictional questions between the central and local government or questions involving the constitution of the People's Republic of China. This latter feature would preserve national authority in areas of national concern; yet it is anticipated that it would rarely, if ever, be employed because of its limited field of coverage and the ability to resolve most such issues in the Basic Law itself.[100] A special committee composed of an equal number of Hong Kong and mainland compatriots could be set up either in the NPC or independent of it. To satisfy any question under Article 67 of the PRC Constitution, the Basic Law could expressly delegate such power to the local courts and the special committee as indicated. To preserve autonomy and the independence and finality of local courts, I would permit

100. The Basic Law and any revisions of Article 31 of the Constitution of the Peoples Republic of China should seek to resolve all such issues to the extent possible and this latter institution should stand more as a symbol of national authority and be available to avoid a constitutional crisis within the limited areas indicated. In the latter respect such an institution seems eminently more preferable than political avenues often evident in current debate over the Basic Law. This solution of the problem does not require any conflict with Article 67 of the Constitution of the PRC since such a system of local constitutional judicial review could already be considered authorized by Article 31 and the Joint Declaration and/or could be delegated in the Basic Law. The concern here is with achieving the objectives of the Joint Declaration in a manner satisfactory to both levels of government.

referral of constitutional issues to the special committee only by the SAR executive or ⅔ of the legislature and by an appropriate organ of the central government. Local courts would not make such referral, exercising their constitutional judicial review independently. With this limited exception, all other constitutional judicial review would be vested in the local Hong Kong courts, along with the power of final adjudication. Local courts would ultimately be held in check by the amendment power though the rather conservative Hong Kong courts are unlikely to move beyond the general values of the Hong Kong community or mainland China's expectations.[101] Numerous reasons can be advanced both for employing constitutional review generally, and for using this particular decentralized incidenter system with limited supplementation as indicated. Some of these arguments are efficiently suggested in the following ten points.

1. The current British approach to rights development under a system of parliamentary supremacy may not be realistic outside of the British cultural and political context.

2. Constitutional review seems more appropriate to a written constitution and is generally so employed in most common law jurisdictions.

3. Pure reliance on mainland style legislative implementation seems

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101. There should be no serious concern with the ability of Hong Kong's common law courts to exercise restraint within certain limited areas of national concern. Under the American political question doctrine, the common law courts in the United States have shown similar restraint with respect to issues more appropriately left to other branches of government. Within the foreign affairs area the English act of state doctrine reveals such restraint, as does the rather different act of state doctrine in United States. Under the English act of state doctrine "an act of state is essentially an exercise of sovereign power and hence cannot be challenged, controlled or interfered with by municipal courts." 18 HALSBURY, LAWS OF ENGLAND, § 1414 (4th ed.). An act of state is defined as a "prerogative act of policy in the field of foreign affairs performed by the Crown in the course of its relationship with another state or its subjects". *Id.* § 1413. It includes matters such as entering treaties, declarations of war, annexation of land, etc. *Id.* The occasion for restraint under the American act of state doctrine arises with reference to sovereign acts of foreign states and is principally concerned with notions of separation of powers in the American government. Banco Nacional de Cuba v Sabbatino, 376 U.S. 398 (1964); *see generally* Davis, *Domestic Development of International Law: A Proposal for an International Concept of the Act of State Doctrine*, 20 TEX. INT'L L. J. 341 (1985). It is for the courts to determine the occasion for applying the political question doctrine and the act of state doctrines. This tradition of restraint by common law courts should adequately address any concern with Hong Kong courts aggressively intruding on areas of national concern, including any inappropriate intrusion on China's retained Powers over foreign and defense affairs for Hong Kong. *See* Joint Declaration, paragraph 3(2). In such areas common law courts are appropriately equipped to the determine occasion for restraint. Such occasion for restraint will also occasionally arise with respect to Hong Kong's exercise of foreign affairs in those areas where it has retained such power (e.g. commercial relations) under the terms of the Joint Declaration. On other occasions such restraint may be unnecessary with respect to an issue concerned with foreign or defense affairs. While this line is difficult to draw, within the Hong Kong context, the common lawcourts may generally be best suited for this task. The constitutional committee can in effect serve as a back up devise in this sensitive area and symbolize national authority. Yet, the Hong Kong courts should interpret the entire Basic Law independently and without being subject to appeal to higher authority.

unlikely to achieve a rights commitment that would be trusted and would thus cause considerable local tension and instability, not to mention offense to the notion of autonomy and "one country, two systems."[102]

4. Current discussions in the Basic Law Consultative Committee suggest general agreement on employing separation of powers with checks and balances, as opposed to the separation of functions approach often evident in French style civil law systems, suggesting the appropriateness of a more common law approach.

5. Yet, as is true of the function of the French Constitutional Court, a special committee employing a centralized principaliter system may function well for the limited purpose of functional separation of powers between the local and national government, as well as providing an expression of national authority.

6. The existing use of common law and *stare decisis* in Hong Kong likewise favors the common law decentralized incidenter system, as does generally the education and training of the local judiciary and lawyers.

7. Decentralized judicial review with access to avoidance techniques or passive virtues, may better take advantage of the dialogue based evolution of principles in general, in common law systems and of rights in particular.

8. Decentralized incidenter judicial review offers more avenues for evolutionary change in fundamental values with less risk of serious confrontation, thus advancing political stability and human rights commitments.

9. The existing legal system in Hong Kong already contains the ingredients for such a system and would thus permit continuity and permit Hong Kong to employ other common law precedent.

10. Hong Kong and thus China would be able to participate in a growing international commitment to employing proper processes in the implementation of human rights.

Constitutional judicial review embodies a recognition of, and a commitment to, the basic values of a society. A constitution or a basic law is not a mere statute but is instead some indication of the way a given society constitutes itself. Yet it may at best be an outline of a society's basic values, one that hopefully rises to the demands placed upon it. One intuitively senses that the chances of the success of this enterprise are enhanced if the impetus for value growth comes from within the society that the basic law governs. The almost geometrical growth in use of the

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102. It should be noted that while this reference is to placement of such power in the legislative branch of the central government, it would also not be satisfactory to transfer the central system of legislative implementation to the local government. This would not take advantage of this dialogue based system of value development and implementation and would likewise tend to politicize to a higher degree basic value development. This would of course give rise to the same destabilizing forces. On the level of higher law development. employment of common law courts in the central role with legislative bodies constituting the other side of the dialogue seems much more conducive to a stable democratic process, advancing the shared goals of all participants.

instrument of constitutional judicial review in recent years reflects a growing recognition of the importance of the process of value formulation and the utility of an independent, less politicized institution for this process. Such an institution may serve to provide stable direction to the collective constitutional dialogue.

The Joint Declaration reveals a prominent commitment to stability, capitalist economy, and human rights in a common law framework, as well as autonomy and self determination. These concepts collectively provide the outline of a pluralist, liberal capitalist system. While many ingredients must coalesce to achieve certain shared goals, evidence suggest that constitutional review could be employed as an effective motor to drive this system on the level of fundamental values development and stability enhancement. Constitutional review cannot achieve the expectations placed upon it without many other ingredients and political commitments. It does not function independently of the polity. It is more like one side of a conversation. Yet evidence suggests that those other ingredients and commitments may well be present in Hong Kong. If not the enterprise will likely fail in any event.

It cannot be stressed enough that this concept of the judiciary and constitutional review, as one side of a conversation designed to articulate our basic values, is a concept that depends on the other participants in this conversation. The people, not the courts alone, are the real guardians of liberty. Until now, a British political process has afforded Hong Kong a degree of protection, but that will not be true of the future. If the political process of the future does not engage the people and their representatives in this dialogue, then the rights of the citizen will not be protected. That is the nature of the dialogue in question. Judges are not isolated from the values of the polity. While they may be more reflective participants, less troubled by expediency, they are of necessity participants, as they must be to carry out their mission of value development through constitutional judicial review.

The Hong Kong experiment in constitution building has many unique qualities. The concept of "one country, two systems" has never been tried before, at least with reference to two systems with such a radically different value base. While unique, this effort also shares common ground with other constitution drafting efforts in the world. As is true of many constitutions, observers, both at home and abroad, will be especially attentive to the potential for successful implementation of the constitutional scheme. The Hong Kong case tends to dramatize this concern. As Hong Kong compatriots and other interested parties contemplate their confidence in the future success of "one country, two systems," they will no doubt consider whether China's leaders have demonstrated a will to implement the constitutional scheme and the high degree of autonomy promised in the Joint Declaration. Such demonstrated will depends in part on the legal content that has been given to interpreting and applying the Basic Law. Whatever model is ultimately adopted, the complex factors discussed herein may inform our judgments about the final product

and its likelihood of success. In the interim, we can only hope that all of these concerns will be addressed before a final model is adopted. At a minimum, this process will certainly prove instructive about the enterprise of comparative constitutional law.