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Towards a Jurisprudence of a Third Kind— “One Country, Two Systems”

*Denis Chang**

I. INTRODUCTION

In September 1984, the Sino-British settlement on the question of Hong Kong was reached in the form of a Joint Declaration and three Annexes.¹ Hong Kong will be restored to China on July 1, 1997 and become a Special Administrative Region (“S.A.R.”) under the direct authority of the Central People’s government with a promise of “a high degree of autonomy.”² Apart from foreign affairs and defense which are the responsibilities of the Central People’s government, the Hong Kong S.A.R. will be vested with executive, legislative and judicial powers, including that of final adjudication.³ A mini-constitution or Basic Law for the Hong Kong S.A.R. will be enacted by the National People’s Congress (“N.P.C.”) pursuant to article 31 of the constitution of the People’s Republic of China (“P.R.C.”).⁴ The Basic Law will provide for the continuity of Hong Kong’s capitalist system and life style for fifty years beyond 1997.⁵ Hong Kong’s laws and judicial system—which belong to the common law family of legal systems—will remain basically unchanged, albeit stripped of colonial elements incompatible with Hong Kong’s future political order.⁶

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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, Dec. 19, 1984, United Kingdom-People’s Republic of China, 1984 Gr. Brit. T.S. No. 20, (Cmd. 9352) [hereinafter Joint Declaration], reprinted in 23 I.L.M. 1371 (1984) (within the British White Paper referred to as the “Draft Agreement”). The Joint Declaration was initialed on Sept. 29, 1984, signed on Dec. 18, 1984, and ratified on May 27, 1985. Annex I of the Joint Declaration is an elaboration by the P.R.C. government of its “basic policies” regarding Hong Kong; Annex II concerns the setting up of a Sino-British Joint Liaison Group; and Annex III deals with land leases.

² *Id.* paras. 1, 2, 3(2). The United Kingdom has since enacted the 1985 Hong Kong Act to provide for the transfer of governance.

³ *Id.* para. 3(2)-(3); *id.* Annex I, § I.

⁴ *Id.* para. 3(12); *id.* Annex I, § I.

⁵ *Id.* para. 3(5); *id.* Annex I, § I.

⁶ The 1966 Application of English Law Ordinance, No. 2, ch. 88 provides that the common

The Hong Kong S.A.R. is clearly intended to be a model of the concept of "one country, two systems" put forward by Chinese leader Deng Xiaoping as an instrument of China's reunification and modernization.⁷ Some of the problems currently encountered in the drafting of the Basic Law⁸ for the Hong Kong S.A.R. go to the very core of the concept and test its coherence. Among the most crucial problems in jurisprudential terms are the application of laws of the P.R.C. to the S.A.R.,⁹ the interpretation of the Basic Law and other matters that touch upon the

law (defined in the Interpretation and General Clauses Ordinance ch.1 as the *common law of England*) and the rules of equity shall be in force in Hong Kong insofar as they may be applicable to the circumstances of Hong Kong or its inhabitants and subject to such modifications as circumstances may require. However, there are exceptions to the extent that such common law or rules of equity may from time to time be modified or excluded by 1) any local ordinance, 2) any U.K. order-in-council which applies to Hong Kong, or 3) any U.K. act of Parliament which by express provision or by necessary implication applies to Hong Kong. For a detailed analysis of the effect and history of ch. 88 and general discussion of reception of English law in Hong Kong, see P. Wesley-Smith, *The Reception of English Law in Hong Kong* (unpublished manuscript presented at the Conference on the Common Law in Asia, Dec. 15-17, 1986, University of Hong Kong).

The paper begins with the following observation:

It seems implicit in the Sino-British Joint Declaration on the Question of Hong Kong that, from July 1, 1997, the law of the Hong Kong Special Administration Region will not include the law of England. Acts of Parliament will no longer apply, the Queen will surrender preogative legislative authority, and, although the common law and rules of equity are to be maintained and are listed among "laws previously in force in Hong Kong," the courts are specifically permitted to refer to precedents in other common law jurisdictions [Annex I, § 3]; the change of sovereignty from British to Chinese makes retention of the "imperial" link in any form whatsoever politically unacceptable.

Id. at 1 (footnote omitted).

A primary purpose of Hong Kong's reception of English law was to set the new colony on its path: to give it a ready-made corpus of law which could be modified by judges as necessity arose and by legislators as policy demanded, a structure which was at once suited to the mercantile requirement of the British Empire yet adapted to local circumstances. After 143 years Hong Kong no longer needs English statutes and can decide for herself what rules of common law and equity she wants. The imperial link with Britain is to be severed but the legacy — a common law legal system — will be as important to the fledgling Special Administration Region as it was to the infant Colony.

Id. at 59 (footnotes omitted).

⁷ DENG XIAOPING, *JIAN SHE YOU ZHONG GUO TE SE DI SHE HUI ZHUYI* (Building Socialism with Chinese Characteristics) 22, 29, 30, 32, 40, 55 (1984).

⁸ On April 10, 1985, at the Sixth N.P.C., 3d. Sess., the N.P.C. and its Standing Committee adopted a Decision on the Basic Law Drafting. Pursuant to the resolution, the Basic Law Drafting Committee was formed in Beijing in mid-1985. This was followed by the formation of the Basic Law Consultative Committee in Hong Kong towards the end of the same year. The Basic Law is scheduled for promulgation in 1990 and to take effect on July 1, 1997.

⁹ See *infra* notes 33-47 and accompanying text. There are many laws in the P.R.C. which on their face apply to the whole of the P.R.C. The principal questions include: 1) which of the pre-existing laws are to be excluded from the S.A.R.; 2) how does one go about excluding such laws; 3) what restraints should be placed in the future on the power of the Central Government organs to make laws for or issue directions to the S.A.R.; and 4) would there be any direct application of laws at all, and if so, which laws.

interface and differentiation of the two systems.¹⁰ This Article seeks to anticipate the new jurisprudential framework within which these and other issues will have to be met, highlighting features different from those found in jurisprudence of a more familiar kind. The Article is heuristic in approach¹¹ and critical realist in orientation.¹² The heuristic devices used to facilitate the transition from political to juridical norms will be identified so as to arrive at a better understanding of the nature and function of the norms themselves.

II. POLITICAL NORMS AND HEURISTIC NOTIONS

A. *Political Norms*¹³

A study of political norms is essential to an understanding of political-legal thought within the P.R.C. In the P.R.C., "the moment the political norms change, the legal system has to adjust."¹⁴ The Sino-British Joint Declaration itself makes explicit reference to two types of norms. Article 3 of the Joint Declaration states the "basic policies" of the P.R.C. regarding Hong Kong and Annex I elaborates on those policies. The term "basic policies" in the English text is in fact a de-ideologized version of the phrase used in the Chinese text of the Joint Declaration, namely "*jiben fangzhen zhengce*." To appreciate the ideological content of the Chinese phraseology, it is necessary to recall that the Chinese Communist Party ("C.C.P.") has established three types of norms which not only govern all aspects of the party's work but also permeate the nation's laws and institutions. The norms are classified as follows: 1. *zhengzhi luxian* ("political line"); 2. *fangzhen* ("direction indicator"); and 3. *zhengce* ("policy"). These party norms are almost always listed in a fixed order and the phrase used in the Joint Declaration embraces the second and third types.¹⁵

The first type, *luxian* for short,¹⁶ expresses the political task formulated by the C.C.P. and the line that must be followed to achieve defined

¹⁰ See *infra* notes 29, 82-84 and accompanying text.

¹¹ See *infra* note 118 and accompanying text.

¹² See *infra* note 28 and accompanying text.

¹³ "Political norms" as used in this Article denotes *all* three types of party norms discussed in this Article not merely norms of the third type. In von Senger's work the term "political norms" is used only for norms of the third type. H. von Senger, *Recent Developments in the Relations between State and Party Norms in the People's Republic of China*, in *THE SCOPE OF STATE POWER IN CHINA* (S. Schram ed. 1985).

¹⁴ See, e.g., Y.Y. ZHANG & S.W. WANG, *TALKS ON BASIC KNOWLEDGE OF LAW 74 passim*, (2d ed. 1980) (observations as to the effect of changes in party policies on statutory law).

¹⁵ See General Principles of the Statutes of the Communist Party of China (last para.) (promulgated by the Party Center (*dang zhongyang*) in Beijing, Sept. 6, 1982.

¹⁶ For a definition of the term "*luxian*," see CIHAI, *ZHENGZHI FALU* (Political-Legal Principles) 23 (1961).

objectives *during a specific period*. According to the prevailing political line, which has developed since the famous Third Plenary Session of the 11th C.C.P. Central Committee held in December 1978 and which was recently confirmed and reinforced by the 13th National Party Congress of the C.C.P. held in October-November 1987, China is passing through a period of "early socialism" (now estimated to last another sixty years)¹⁷ in which the principal task is the four modernizations—namely, in the sectors of agriculture, industry, national defense, and science and technology. The "principal contradiction" (*zhuyao maodun*) between modernization and backwardness is to be resolved by the adoption of an open-door policy under the banner of "socialism with Chinese characteristics."¹⁸

The Joint Declaration, however, makes no explicit reference to this political line. What *is* expressed in the body of the Joint Declaration and its preamble is a *threefold rationale*: first, in the international context, the furtherance of friendly Sino-British relations; second, in the Hong Kong context, the maintenance of the territory's prosperity and stability; and third, in the Chinese context, the upholding of national unity and territorial integrity in light of historical and present realities.¹⁹ The norm to be followed, therefore, is that of peaceful reunification while taking into account Hong Kong's realities.

The second type of norm, *fangzhen*, is more than just a direction indicator. It prescribes the course of the task to be undertaken and regulates those aspects of the work which are perceived to be in dialectical relationship. Every *fangzhen* presupposes or actually identifies the dialectical elements, seeking to resolve "contradictions" by a struggle between opposite aspects or by balancing one aspect with another or by establishing priorities.²⁰ It is for this reason that a *fangzhen* has been described as a "duality norm."²¹ Insofar as the "one country, two systems" concept is a *fangzhen*, a dialectical relationship between the two systems and between different aspects within the same system is implied, thus giving rise to "contradictions" which will have to be resolved. Duality norms will form part of the new scheme of things, at least from the perspective of communist theory and practice.

¹⁷ See 2 COLLECTIONS OF IMPORTANT DOCUMENTS SINCE THE THIRD PLENUM (1982); see also S. China Morning Post, Nov. 3, 1987; S. China Morning Post, Nov. 4, 1987.

¹⁸ See *supra* note 7 and accompanying text.

¹⁹ Joint Declaration, *supra* note 1, preamble, 3(1).

²⁰ Mao Zedong characterized the dialectical nature of the *fangzhen* "[l]et a hundred flowers bloom"—in terms of the supposed contradiction between "let bloom" (*fang*) and "rein in" (*shou*). 5 SELECTED WORKS OF MAO ZEDONG 432 (1954). Other examples are the 8-character *fangzhen* (*bazi fangzhen*) published by the CCP Party Center in 1979 which provided guidelines for the Sixth Five-Year Plan in 1981-85. For an analysis of different types of *fangzhen*, see H. von Senger, *supra* note 13.

²¹ The term "polaritatsnorm" was coined by von Senger. H. von Senger, *supra* note 13, at 177.

The third type of norm, *zhengce* (policy), is the most concrete of the three and refers to the actual measures and procedures laid down by the C.C.P. to realize its political objectives. By combining *fangzhen* with *zhengce* in a single phrase (prefaced by the adjective *jiben* meaning basic), the P.R.C. government is revealing in the Joint Declaration the tip of an ideological edifice that lies largely unseen and beneath the Sino-British accord. The following message, however, is carried in that single phrase, *jiben fangzhen zhengce*: 1. the implementation of the declared policies is a matter involving the norms laid down by the C.C.P.; 2. these basic norms had already been established unilaterally as a matter of internal policy before they were made the subject of the Sino-British accord;²² and 3. the policies are directed to the resolution of perceived contradictions between aspects of things in dialectical relationship in accordance with Chinese-Marxist analysis.

The reference in the Joint Declaration to "the history of Hong Kong and its realities"²³ reflects the formula used in article 31 of the P.R.C. Constitution mandating the establishment of S.A.R.s in light of "specific conditions."²⁴ The setting up of any S.A.R. is, in Chinese communist parlance, an instance of "seeking truth from facts" (*shishi qiushi*) in line with "objective laws" (*keguan guilu*)²⁵ which are supposed to be inherent in historical and present realities. The theoretical P.R.C. journal *Hongqi* (Red Flag) has provided the following elaboration:

The implementation of the concept of "one country, two systems" and the adopting of special policies towards Hong Kong is not an expedient measure, but a major strategic policy decision, which has gradually taken shape since the restoration of the ideological line of seeking truth from facts at the 3d Plenary Session of the 11th CPC [referred to in text as C.C.P.] Central Committee and in the process of the CPC Central Committee considering the problems of solving the Taiwan and Hong Kong issues to achieve the reunification of the motherland on the basis of the attitude of taking account of historical facts and respecting reality. Concerning Hong Kong, this concept starts from the basic principle that when our country resumes sovereignty over Hong Kong, it should at the same time maintain Hong Kong's long-term stability and prosperity. This principle conforms to the fundamental interests of the people of the whole country, including Hong

²² See Government Work Report, 2d Sess., 6th N.P.C., (delivered by Chinese Premier Zhao Ziyang at the opening of the session on May 15, 1987).

²³ Joint Declaration, *supra* note 1, para. 3(1).

²⁴ XIANFA (Constitution) art. 31 (People's Republic of China) [hereinafter P.R.C. CONST.]. This Constitution, adopted in 1982, is the P.R.C.'s fourth (or fifth constitution if the Common Program is counted). The three previous P.R.C. Constitutions were adopted in 1954, 1975, and 1978 respectively.

²⁵ P. Liu, *Zhengce Doubian Xi* (Analysis of Policies Changing All the Time), Guangming Ribao, Mar. 28, 1981.

Kong compatriots, and also makes allowance for the interests of Great Britain and other parties. . . .

. . . .
 . . . At the same time, a stable and prosperous Hong Kong also plays an important supplementary role in the four modernizations of the motherland. . . . Utilizing Hong Kong's special position and conditions will facilitate drawing in funds and introducing advanced technology and administrative and managerial experience for us and facilitate the smooth implementation of the policy of "enlivening the economy at home and opening to the external world." On the other hand, the development of the economic infrastructure in our country's interior will provide more abundant resources and a broader market for Hong Kong.²⁶

The pragmatism is clear. As regards the dialectics, the following translated passages taken from a P.R.C. scholar's analysis of the philosophical basis of "one country, two systems"²⁷ typify the efforts made by P.R.C. theoreticians to justify the concept in terms of communist ideology.

Some people wonder whether permitting Hong Kong, after its return, to retain its capitalist system will not affect China's socialist essence. The question must be concretely analyzed according to materialist dialectics. As Hong Kong's capitalism and the mainland's materialist socialism are two basically opposites [sic] systems, when integrated into one country, is it possible for them not to conflict with each other? Undeniably, Hong Kong's capitalism cannot but affect the mainland's socialism, and refusing to admit this point is incompatible with reality. However, we must also realize that China's main part is socialism. . . . In a unified large socialist country, the presence of the capitalist system in individual areas will not change China's socialist essence. . . . In their mutual influence, the mainland's socialist influence on Hon [sic] Kong will play the principal and decisive role. . . .

. . . .
 The concept of "one country, two systems" recognizes both the abuses of capitalism and its positive role in a certain historical stage, considers both the history of Honk [sic] Kong and its current state, uphold[s] the socialist principles, the unity of the motherland, the in-

²⁶ *A Reliable Guarantee for Hong Kong's Long-Term Stability and Prosperity*, HONGQI, Oct. 21, 1984, at 21-22, reprinted in FOREIGN BROADCAST INFORMATION SERVICE—CHINA REPORT [hereinafter FBIS], Dec. 10, 1984, at 34. See also J.Q. Yan, *The Scientific Meaning and Characteristics of "One Country, Two Systems"*, HONGQI, Mar. 16, 1985, at 18-20, reprinted in FBIS, June 6, 1985, at 26.

It is understood that *Hongqi* (which has the reputation of being ultra-conservative) has been given a three-month grace period by the Chinese Communists to wind up its operations.

²⁷ H.Z. Fan, *An Analysis of the Philosophical Basis of "One Country, Two Systems"*, SHANXI DAXUE XUEBAO (Journal of Shanxi University—Philosophy and Social Science), July 1985, at 22-25, reprinted in FBIS, Jan. 24, 1986, at 28.

terests of the state and the people, and the adherence of China's main part to socialism, while advocating the flexibility of seeking truth from facts, and, on the basis of following the socialist principles, gives attention to Hong Kong's special conditions and the interests of all sides, and permits it to preserve capitalism for an extended period and remain independent to a certain extent. The concept is the result of adhering to the ideological line of seeking truth from facts, starting from reality, linking theory with practice and making a concrete analysis of a concrete issue and a product of searching, under the ideological guidance of materialist dialectics, for commonality between opposites.

In short, pragmatism in the P.R.C. has to be ideologically pure and perfectly in line with the political norms. Any flexibility which exists has to be sought within those norms, but to the extent that some of those norms are "direction indicators" they do have a measure of elasticity and a heuristic function.

B. *Heuristic Notions*

The Chinese communists have through the United Front Work Department of the C.C.P. Central Committee and the China United Front Theory Research Association perfected the art of reducing the most complex and sometimes contradictory goals to simple yet powerfully evocative four-character propositions. The concept of "one country, two systems" began its life as an eight-character proposition (*yige guojia, liangge zhidu*) but was quickly abbreviated to four characters (*yiguo liangzhi*). Three other four-character propositions lie at the heart of the Sino-British accord, namely "Hong Kong People Ruling Hong Kong" (*gangren zhigang*), "High Degree of Autonomy" (*gaodu zizhi*) and "No Change in Systems" (*zhidu bubian*). Each of these four propositions is indeterminate and open to manipulation; each is capable of becoming more determinate and is currently being manipulated. Each proposition provides clues and points the way to a realization of goals and is a challenge to human ingenuity. In short, they make excellent slogans and also possess the characteristics of heuristic notions employed in science, mathematics and education.²⁸

²⁸ See B. LONERGAN, *INSIGHT, A STUDY OF HUMAN UNDERSTANDING* (1958). In this monumental work, classical and statistical methods of arriving at insights, including the use of heuristic notions and structures, are extensively explored. A heuristic notion or device, as used in this Article, has two salient aspects: 1) it points to that which has yet to be discovered and 2) it facilitates discovery by providing an apt symbol or clue or sets of symbols or clues whereby the necessary operations, can be performed and the general shape and content of what is intended may be anticipated. For example, "let the unknown be X" is the heuristic device by which algebra is made possible. "Do good and avoid evil" is a heuristic norm by which morality can have its point of departure. The notion of "being" is the key heuristic notion in metaphysics whereby what is to be known by intelligent grasp and reasonable affirmation is anticipated. The concept of "nature" is a key heuristic notion in modern science whereby what is yet unknown is designated, objectivized and made the

Each of the four propositions can and has in fact been transformed into a principle of political action: they are in the nature of *fangzhen* tending towards *zhengce*. In the current debate over issues which have arisen during the drafting of the Basic Law, the "one country" component of the first proposition is often coupled with the "sovereignty" concept to protect the power of the center from being dispersed. The "two systems" component is regularly employed, along with the second and third propositions ("Hong Kong People Ruling Hong Kong" and "High Degree of Autonomy"), to prevent the future Hong Kong S.A.R. system from being completely absorbed by the P.R.C. socialist body politic. Finally, the fourth proposition, "No Change in Systems," is increasingly invoked to guard against fundamental changes in the status quo of Hong Kong.

How these tensions between "centrality" and "regional autonomy" are eventually resolved in the Basic Law is likely to have significant bearing on the shape and content of the new jurisprudence. For instance, if the interpretation of the Basic Law for the Hong Kong S.A.R. were allowed to rest with a political organ of the P.R.C. central government rather than with a judicial organ of the S.A.R., the common law system within the S.A.R. would be seriously undermined. The idea of law as an autonomous discipline would be at risk and might in time be displaced by political-legal or non-judicial concepts and practices. Again, if the P.R.C.'s laws (even if restricted to those of a certain kind) were given direct and automatic effect in the S.A.R., the autonomy of the S.A.R. system as a whole and the status and function of the Basic Law itself would likewise be jeopardized. It is the author's submission that the "one country, two systems" concept will not stand any chance of success unless the two systems are "hived off" from each other at various strategic points and an interface provided at other points where the systems must meet.

It is the S.A.R. which provides the forum for system differentiation to take place and constitutes the single most important device in the present context to facilitate the transition from political to juridical norms. Article 31 of the P.R.C. Constitution which is contained in the "General Principles" chapter of the constitution provides as follows: "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by laws enacted by the National People's Congress in the light of specific conditions."²⁹

subject of scientific inquiry. The concept of natural law, in the author's view, has essentially a heuristic function, as has the concept of "objective laws" referred to in this Article.

²⁹ The original draft of this article (then numbered 30) was materially different. It provided: "The state may, where necessary, establish special administrative regions. The rules and regulations

Article 31 does not define what an S.A.R. is nor does it tell us what systems may be instituted there. Determination of the systems is left to the N.P.C. in light of specific conditions. In common with other heuristic devices, however, the S.A.R. concept carries clues from which the general nature of what is intended may be anticipated. The clues are: 1) that an S.A.R. is something "special," i.e., an exception from the general system;³⁰ 2) that insofar as it comprises "a system or systems" it is essentially different from other administrative divisions of the P.R.C. which are part of the socialist system; 3) that the S.A.R. system or systems will exist by virtue of a special law or laws to be passed by the N.P.C. thereby signifying a direct relationship with central government organs and independence from provincial authorities and at the same time distinguishing such measures from, for example, the protection of various rights of minority nationalities under article 4 of the constitution;³¹ 4) that such a special law or laws will be tailored to the specific realities which have made it necessary for an S.A.R. to be established in the first place—"necessity" being interpreted in terms of the P.R.C.'s exigencies and the prevailing political norms; and 5) that an S.A.R. is therefore not a permanent but only a transitional reality, a means towards the eventual realization of national goals. It must be emphasized, however, that an S.A.R. is not just an economic unit distinct from the rest of the country. It is a localized political-legal entity and a socio-economic reality differentiated from the general socialist system but forming part of a unitary state. This does not imply that it will ever be allowed by the central government to become a *competing* political entity in relation to the general system. On the contrary, it implies that the two systems are not equal since the basic norm³² of the new order will be located within the

in force in special administrative regions shall be stipulated by law in the light of specific conditions." No mention was made of "system or systems" or to laws enacted by the N.P.C.

³⁰ An S.A.R. is fundamentally different from an S.E.Z. ("Special Economic Zone") such as Shenzhen immediately north of the Hong Kong border with the P.R.C. S.E.Z.s have no special constitutional status and are part of the centrally planned economy of the P.R.C.

³¹ The P.R.C. is a unitary state but a multi-national country with 55 minority nationality groups. There are 116 national autonomous areas (5 autonomous regions, 31 autonomous prefectures and 80 autonomous counties). In at least three major aspects, however, regional autonomy of these areas is severely circumscribed: (1) no policies can be adopted which are contrary to the state constitution and laws, the organs of every national autonomous area being under an express duty to ensure that the P.R.C. constitution and P.R.C. laws are observed; (2) the four "cardinal principles" or "insistences" (*jianchi*) enshrined in the Constitution, (namely following "the socialist path," "the leadership of C.C.P.," adherence to "the people's democratic dictatorship," and to "Marxist-Leninism and Mao Zedong thought"), have to be observed; and, (3) the policies to be adopted within the autonomous regions are subject to the centrally planned socialist economy.

³² The author prefers the term "basic norm" to "grundnorm," the Kelsenian term. The basic norm that grounds other legal norms is a key concept in Hans Kelsen's pure theory of law. The author does not, however, share the philosophical presuppositions of Kelsen's "grundnorm."

For Kelsen, law is a binding norm, and nothing more: it has no ethical or moral content so

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

III. BASIC LAW ENIGMAS

The Joint Declaration, in Annex I, provides that "the laws of the Hong Kong Special Administrative Region shall be the Basic Law, and the laws previously in force in Hong Kong and laws enacted by the Hong Kong Special Administrative Region legislature."³³ On the face of this provision, a self-contained corpus of law is contemplated for the Hong Kong S.A.R. since no mention is made of any central government legislation other than the Basic Law itself applying in Hong Kong. Therefore, it appears that it will generally be unnecessary for a Hong Kong S.A.R. court faced with an issue of Hong Kong domestic law to go outside the "four corners" of the Basic Law and interpret or apply the P.R.C. Constitution or other central government legislation. This matter, however, is not as simple as it sounds.

The Basic Law for the Hong Kong S.A.R. will expressly exclude the socialist system and socialist policies from an important and strategic corner of China for fifty years after 1997, and by implication will also exclude those provisions in the P.R.C. Constitution which either impose or presuppose a socialist system. The basic conundrum is how such a law can exclude provisions in the very Constitution under which it is promulgated without self-contradiction and without running the risk of becoming a bastard child. After all, the nation is solemnly enjoined to take the mother Constitution as "the basic norm of conduct"³⁴ and to "uphold the uniformity and dignity of the Constitution,"³⁵ declaring that "no law or administrative or local rules and regulations shall contravene the Constitution."³⁶

The legal realist will say that no real problem exists since the child will be deemed perfectly legitimate in the P.R.C. as long as its father, the C.C.P., recognizes it as such: in Chinese communist theory, law is party

far as the lawyer is concerned, its validity derives purely causally from the fact that it is enacted with the power of the state behind it. The positivist *rechtsstaat* appeared to Kelsen to be drawing a distinction in favor of the latter between a state based on force and a state based on law. For Kelsen the two are identical. The state is the sum total of laws, and laws are the state in action, the legal order. Every state, therefore, which has a legal order is of necessity a *rechtsstaat*, a state based on law.

L. SCHAPIRO, *RUSSIAN STUDIES*, 33-34 (1986).

³³ Joint Declaration, *supra* note 1, Annex I, § II.

³⁴ P.R.C. CONST. preamble (last para.).

³⁵ *Id.*

³⁶ *Id.* art. 5.

policy made perfect in legal form.³⁷ In other words, while the Constitution may on paper be the jurisprudential basic norm, it is the political norms which govern both its interpretation and application. The Standing Committee of the N.P.C. is, subject to the N.P.C.'s overriding powers,³⁸ the highest organ of constitutional interpretation and application in the P.R.C. and will act in accordance with the political norms. Therefore, the political and jurisprudential basic norms will, under this view, inevitably travel in tandem so long as the Party is not separated from the State.³⁹

This enigma tends to take on an entirely different complexion when seen from the perspective of the Hong Kong system. While the Hong Kong S.A.R. courts will not be able to question the legitimacy or constitutionality of the Basic Law upon which their own legitimacy and very existence will depend, they may in the course of adjudication of disputes be called upon to decide what other provisions of the P.R.C. Constitution (apart from article 31) will apply to the S.A.R. The problem is linked with the broader and equally vexed issue of the application of P.R.C. laws to the S.A.R. The P.R.C. Nationality Law is often cited as an example of a Chinese law which could apply directly to the S.A.R.

Another enigma arises from the fact that while the Hong Kong S.A.R. will be vested with *the final power of adjudication*, the Standing Committee of the N.P.C. will, unless the P.R.C. Constitution is amended, have power to interpret the Basic Law, notwithstanding the fact that the Joint Declaration fully recognizes the need to keep the Hong Kong judicial system separate from that of the Chinese mainland.⁴⁰ The Supreme People's Court will not be part of the Hong Kong S.A.R.'s sys-

³⁷ See A. Chen, *China's Developing Legal System*, 13 HONG KONG L.J. 291, 299-301 (1983).

³⁸ P.R.C. CONST. art. 67. Under article 62 of the P.R.C. Constitution, the N.P.C. has power "to alter or annul inappropriate decisions of the Standing Committee of the National People's Congress." *Id.* art. 62.

³⁹ Recent developments in the P.R.C. have generally tended to raise the status of both the Constitution (declared in the preamble of the Joint Declaration to be "the fundamental law of the state" and to have "supreme legal authority") and of statutory law. However, in the P.R.C. statutory law "does not serve the function of an autonomous force for shaping the social order" rather "as a vehicle for making casuistic elaborations to Party norms and their translation into guiding principles which are compulsory for all citizens of the P.R.C. . . ." and a "substantial change in the paramount importance of the Party norms is not apparent at present since the contemplated withdrawal of the Party from the domain of executive work, especially with renewed stress on the task of the supervision and implementation of Party norms. . . ." H. von Senger, *supra* note 13, at 207. It should nevertheless be mentioned that the C.C.P. in 1982 amended its constitution to insert a provision for the first time in its history to the effect that the *Party* (and not just its *members*, as was previously the case) would be subject to the P.R.C. Constitution and state laws. "No organization or individual may enjoy the privilege of being above the Constitution and the laws." P.R.C. CONST. art. 5.

⁴⁰ Joint Declaration, *supra* note 1, para. 3(3).

tem of courts. Hong Kong will have its own Court of Final Appeal.⁴¹ Appeals to the Judicial Committee of Privy Council will be abolished but the new Court of Final Appeal will be empowered to invite judges from common law jurisdictions to sit in particular cases.⁴² The Joint Declaration expressly declares that precedents in other common law jurisdictions may be referred to by the Hong Kong S.A.R. courts. It leaves undefined, however, the courts' jurisdiction and says nothing about who will interpret the Basic Law and who will decide whether a particular law of the Hong Kong legislature contravenes the Basic Law. There is at present no special constitutional court on either side of the border.

A third enigma, or set of enigmas, arises from the duality of the Basic Law insofar as it is simultaneously a law of the P.R.C.—therefore a product of socialist legality—and the foundational law of the Hong Kong S.A.R.—thus an instrument whereby the common law, its procedures and institutions, are preserved. The Basic Law will have to be structured so as to be able to link as well as separate features from both systems thus incorporating concepts from each without confusing the two systems or undermining the “one country.” Difficulties in drafting arise, however, when the same word or phrase conveys one meaning on the Chinese mainland and has another vastly different connotation in Hong Kong—e.g., freedom in accordance with law, judicial independence, accountability, sovereignty and autonomy.⁴³ While there are common objectives which also need to be stressed, wide divergences exist between the two legal systems with respect to form and content, history and tradition, method and procedure, and theory and practice.⁴⁴ For example, the common law heritage has given Hong Kong not just a neat set of rules but an attitude of mind, not mere *rules of action* but also *ways of acting*,⁴⁵ not just “Rule by law” but “the Rule of Law.” It is these attitudes and forms of conduct as well as the spirit of the Rule of Law that are particularly difficult to translate into legal norms, especially in a context where radically different principles and attitudes are espoused by the incoming sovereign authority.

⁴¹ *Id.* Annex I, § III.

⁴² *Id.*

⁴³ Even within the same system of norms there are differences of perception. How high, for example, will “the high degree of autonomy” promised for Hong Kong turn out to be? How closely will it approach the “full measure of self government” as understood by the United Nations in relation to the development of non-self governing territories towards self-rule? See, L. Sohn, *Models of Autonomy within the United Nations Framework*, in *MODELS OF AUTONOMY* 9-22 (Y. Dinstein ed. 1981).

⁴⁴ See generally *The Migration of the Common Law*, 76 *LAW Q. REV.* 39 (reprint of introductory talks aired by the B.B.C. Overseas Service).

⁴⁵ G. Bartholomew, *The Singapore Legal System*, in *SINGAPORE: SOCIETY IN TRANSITION* 100-02 (R. Hassan ed. 1976); D. Sugarman, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition*, in *LEGAL THEORY AND COMMON LAW* 26-27 (W. Twining ed. 1986).

The problem is complicated by the fact that the Basic Law is being drafted and will be promulgated in Chinese (although an "official" version in English is mooted), whereas English remains the language of the common law and, prior to the introduction of bilingual legislation in Hong Kong, the sole language of legislation in Hong Kong.⁴⁶ Furthermore, in the P.R.C. there are three types of legal interpretation: legislative, executive and judicial.⁴⁷ In the Hong Kong S.A.R. system there will only be one type, namely, judicial. It remains to be seen what canons of interpretation will develop when the common law is placed in such an uncommon setting. The interaction between the two systems is apt to produce a jurisprudence of a new and unusual kind.

IV. SOLVING THE ENIGMAS: A FUNCTIONAL JURISPRUDENCE

In the course of attempting to solve these and other enigmas,⁴⁸ the foundations of a new jurisprudence will be laid. Such a jurisprudence, to be successful, must take as its point of departure the existing realities sought to be embraced by the concept of "one country, two systems."⁴⁹ To that extent, therefore, it is at least initially likely to be a purely functional jurisprudence since it is derived from the very pragmatism that it must serve in order to survive. Nevertheless, it is a jurisprudence that is unlikely to have a future unless it is willing to carry the dynamism and imaginative thrust contained in "one country, two systems" to the outer limits of what is permissible. In the process, a new vocabulary and a new methodology will have to be developed so as to achieve the necessary breakthrough in the face of numerous difficulties caused by a clash of systems.⁵⁰

⁴⁶ The English text of the first bilingual piece of legislation, the Weights and Measures Ordinance, was enacted in Hong Kong in Aug. 1987. The Chinese text, equally authentic, is expected this year.

Annex I, section I of the Joint Declaration provides that "in addition to Chinese, English may be used in organs of government and in the courts in the Hong Kong Special Administration Region." The Hong Kong Additional Instructions 1986 (L.N. 20386, 128 H.K. GOVERNMENT GAZETTE No. 34, Legal Supp. 2) which came into effect on August 22, 1986 amended the Hong Kong Royal Instructions 1917 to 1985 to allow laws to be enacted in English or Chinese, thus paving the way for bilingual legislation. The Official Languages Ordinance and the Interpretation and General Clauses Ordinance have since been amended to provide the necessary legal framework for bilingual legislation and to lay down rules for resolving conflict between texts. The Vienna Convention approach to interpretation of multilingual treaties (article 33) has been adopted: the rule is to ascertain "the meaning which best reconciles the texts, having regard to the object and purposes of the ordinance." See F. Cheung, *Bilingual Statute Law in Hong Kong* (unpublished manuscript presented at the Conference on the Common Law in Asia, Dec. 15-17, 1985, University of Hong Kong).

⁴⁷ See Chang Hsin, *The Power of Interpretation of the Basic Law for Hong Kong as Viewed from the Way of Interpretation of Chinese Law*, Ming Pao, Feb. 28, 1985, at 17.

⁴⁸ See *supra* part III.

⁴⁹ See *supra* part II.

⁵⁰ See *supra* part III. Examples of other difficulties which are being tackled or which will have

Nothing illustrates this better than the issue of constitutional judicial review which involves, among other things, the problem of the power of interpretation of the Basic Law and its relationship with the power of final adjudication to be vested in the S.A.R. courts.⁵¹ One response to the problem, a response that comes from a mentality more suited to "one country" than to "two systems," is to insist that the Standing Committee of the N.P.C. shall retain not merely nominal but real and plenary power of interpretation of *all* aspects of the Basic Law, as well as full power to declare *any* S.A.R. law invalid on the grounds that it is contradictory to the Basic Law or not in accordance with established legal procedures (as interpreted by the Standing Committee).⁵² A radically different response, coming from a mentality more suited to "two systems" than "one country," is to insist that the Hong Kong S.A.R. courts alone shall have the power of interpretation.⁵³

Both types of responses ignore the fact that we are faced with an unprecedented and unique jurisprudential problem: the coming together under one roof, yet remaining in many respects distinct, not just *two* systems of law, civil law and common law, but also substantial factors of a *third*, namely, socialist law. In inspiration and structure, this socialist law used to follow faithfully the Russian model but now is declared by the modern Chinese leadership to have acquired Chinese characteristics.⁵⁴ Socialist legality with a Chinese face includes, as one of its latest features, two systems within one country.⁵⁵ More concretely, in the context of the interpretation of the Basic Law, there are at least three sets of fundamental differences between the two systems which must be resolved or accommodated. The first set of differences concerns the P.R.C.'s cen-

to be addressed include: the question of "residual powers"; the status of central government agencies and instrumentalities in the S.A.R.; the position of the C.C.P. in the S.A.R. in the light of its leadership role and the doctrine of "democratic centralism" under the P.R.C. Constitution; and the problems associated with extradition, internal *renvoi*, etc.

⁵¹ See *supra* part III. See also Joint Declaration, *supra* note 1, para. 3.

⁵² The latest preparatory draft of the Basic Law contains a number of draft articles and various alternative proposals relevant to this issue. See COLLECTION OF DRAFT ARTICLES OF THE VARIOUS CHAPTERS PREPARED BY THE SUBGROUPS OF THE DRAFTING COMMITTEE ch. 9 (*The Interpretation and Amendment of the Basic Law of the HKSAR*) [hereinafter COLLECTION OF DRAFT ARTICLES] (compiled by the Secretariat of the Drafting Committee for the Basic Law, Dec. 1987) (translated by the Secretariat of the Consultative Committee for the Basic Law, Jan. 5, 1988). See also *id.* art. 16 (within ch. 2, *The Relationship between the Central Government and the HKSAR*).

⁵³ This proposal is sometimes coupled with the suggestion that since it is necessary to have a national as distinguished from a regional tribunal to interpret the Basic Law, that task should be assumed not by a political body, such as the Standing Committee of the N.P.C., but rather by a specially formed constitutional court whose members are drawn equally from both systems and whose jurisdiction should be so circumscribed as not to affect the power of final adjudication vested in the S.A.R. See *infra*.

⁵⁴ See *supra* part II; *infra* part V.

⁵⁵ *Id.*

tralized system of legislative interpretation⁵⁶ as contrasted with Hong Kong's decentralized system of judicial interpretation. These differences make the doctrine of constitutional judicial review quite alien to the P.R.C. system but perfectly meaningful and absolutely essential within the Hong Kong system. The second set of differences concerns the essentially interpretivist stance⁵⁷ of the Hong Kong judicial system which tends to see its role as a limited one of interpreting the law according to its original intent and applying it free from political and other external considerations. This is in stark contrast with the essentially non-interpretivist position⁵⁸ adopted by the P.R.C. system which tends to see law as "a weapon" of political norms and the P.R.C. Constitution itself as fundamentally political. The third set of differences concern the method of review, more particularly the "review *incidenter*" system of the Hong Kong courts which, like the courts in many other common law jurisdictions,⁵⁹ reviews legislation generally only in the course of adjudication of disputes in ordinary cases brought before them. This is to be contrasted with a "review *principaliter*" system practiced in some countries⁶⁰ where a constitutional issue is presented as a principal issue independent of any actual case and usually by governmental organizations. The P.R.C. system has characteristics of review *principaliter*, but this function is performed within a system of legislative interpretation and not "judicial" review as we would understand it.

The interpretivist stance of the Hong Kong system is likely to be carried over to the S.A.R. system mainly because the Joint Declaration is essentially "preservationist" in declared intention in relation to Hong Kong's presently existing socio-economic systems and life style and its

⁵⁶ See *supra* note 46 and accompanying text.

⁵⁷ This Article does not attempt to explain all the nuances of an "interpretivist" or "original intent" posture. See generally R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986). American constitutional experience has amply demonstrated the tension that can develop between an approach that professes to look to the intent of the Framers of the Constitution and the non-interpretivist approach of considering "[w]hat . . . the words of the text mean in our time [on the supposed basis that] what the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time." Speech of Associate Justice Brennan, Oct. 1985. The Basic Law, however, will be *sui generis* and will, in many of its essential provisions, be professedly *preservationist* in character.

⁵⁸ See *The Use of the Legal Weapon*, CHINA NEWS ANALYSIS, June 18, 1984, at 1 (no. 1263).

⁵⁹ Examples include the United States, Canada, and Australia although such a system does not necessarily exclude all advisory opinions.

⁶⁰ This is true in a few continental systems, such as Austria and Italy, although recent developments tend to favor a mixed system. See M. CAPPELLOTTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971). See also M. Davis, *The HKSAR Basic Law and the Concept of Constitutional Judicial Review* (paper presented at the Conference on Constitutional Law and Basic Laws, Nov. 28-Dec. 2, 1986, Chinese University of Hong Kong).

judicial system and laws which are to remain "basically unchanged."⁶¹ There is thus a set of historical and empirical reference points likely to shape the future jurisprudence.⁶² One of the greatest challenges that faces Hong Kong is how to ensure that the best features of the present system will be preserved and strengthened in the face of great impending political change and yet retain the flexibility needed to cope with a rapidly changing *milieu*. The Joint Declaration is not, of course, entirely preservationist. The reformist thrust in the Joint Declaration, which must also be carried over to the Basic Law, lies precisely in the political changes mandated as part of the transfer of governance and also in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong which the Joint Declaration says "shall remain in force."⁶³

Constitutional review, whether of the legislative or judicial variety or a combination of both, is therefore likely to focus upon and bring to the forefront two crucial topics among others of perennial concern. The first is the manner and degree of the protection of human rights and freedoms and of Hong Kong's "life style" and the values that underpin the Hong Kong legal system.⁶⁴ The second is the scope of the S.A.R.'s autonomy not only in structural but also in operational terms. The international dimensions of the S.A.R.'s autonomy, such as the legal status of "Hong Kong, China," which affects its capacity to handle external trading relations and its standing in world markets, will also have to be addressed by the new jurisprudence.⁶⁵

It is possible from the foregoing analysis⁶⁶ to ascertain the principal

⁶¹ See Joint Declaration, *supra* note 1, para. 3(3).

⁶² These reference points are likely to affect not only the drafting of the Basic Law but also the canons of interpretation. For example, the constitutional protection of human rights in S.A.R. is presently sought to be achieved by reference (1) to the rights and freedoms presently enjoyed under or in accordance with law, (2) the two international covenants on civil and political rights as currently applied to Hong Kong, and (3) additional rights conferred by the Basic Law. In interpreting what these rights and freedoms are, therefore, the Hong Kong S.A.R. courts should in principle be able to establish presumptive rules of interpretation designed to secure a measure of rights and freedoms no less than the fundamental rights and freedoms "previously" enjoyed. See *supra* note 57 and accompanying text.

⁶³ See Joint Declaration, *supra* note 1, Annex I, § XIII.

⁶⁴ "Life-style" is a product of many factors, including the restraint that the authorities are expected to exercise in using the legal powers they have if the full measure of freedom under the law is to be preserved.

⁶⁵ The relevant issues include: the legal status of the Joint Declaration; the capacity of the Hong Kong S.A.R. under the name of "Hong Kong, China" to conduct its own relations and agreements with other regions and international organizations; its position in relation to multilateral agreements, such as GATT, by virtue of its ability to meet the requirements for a "customs territory"; and the status of the various memoranda to the Joint Declaration in light of art. 31 of the Vienna Convention on the Law of Treaties.

⁶⁶ See *supra* notes 48-65 and accompanying text.

elements of a solution to the enigma of interpretation and indeed to other enigmas caused by a clash of the two systems. These elements are:

1. A "sovereignty norm"⁶⁷ which assigns responsibility to the central government for defense and foreign affairs (as distinguished from external commercial and other affairs delegated to the S.A.R.). The sovereignty norm thus forms the baseline for any solution. This means, for example, that a central organ, here the Standing Committee of the N.P.C., must retain jurisdiction to interpret the Basic Law in relation to foreign affairs and defense. This jurisdiction should be carefully circumscribed and should not jeopardize the autonomy of S.A.R. organs to deal with external affairs or the S.A.R. courts' power to decide if a particular act is or is not an "act of state."⁶⁸
2. An "autonomy norm"⁶⁹ which assigns to the S.A.R. as part of its high degree of autonomy the capacity to effectively exercise the final power of adjudication which will be given to the courts by the Basic Law. The autonomy norm should appropriate not only a sufficiently wide jurisdiction for the S.A.R. courts but also protect their independence.⁷⁰ The norm will carry with it mechanisms for hiving off⁷¹ an S.A.R. system from other systems operating in the mainland to the extent necessary to protect its legitimate autonomy. The power of final adjudication is itself an example *par excellence* of such a mechanism, but it has to be fortified by other rules such as: 1) a rule to the effect that no decision of the Standing Committee of the N.P.C. shall disturb the results of cases finally adjudicated by the S.A.R. courts;⁷² and 2) a rule to the effect that no law of the P.R.C. shall apply to the S.A.R., except the Basic Law or laws expressly made applicable to the S.A.R. through a narrowly defined and closely guarded "window"⁷³ in the Basic Law itself. The Basic Law, however, will have to acknowledge that there are provisions in the P.R.C. Constitution (e.g., article 31 of the Constitution) whose effect would have to be recognized if the Basic Law is to have validity or if territorial integrity is, among other things, to be preserved.⁷⁴
3. A "preservationist norm"⁷⁵ which seeks to preserve as far as possible the essentials of the Hong Kong S.A.R.'s common law system in-

⁶⁷ See Joint Declaration, *supra* note 1, para. 3(2).

⁶⁸ See *infra* notes 79-81 and accompanying text.

⁶⁹ See Joint Declaration, *supra* note 1, para. 3(3).

⁷⁰ See *id.* Annex I, § 3.

⁷¹ See *supra* part II.

⁷² See COLLECTION OF DRAFT ARTICLES, *supra* note 52, ch. 9.

⁷³ See *id.* art. 17 (ch. 2).

⁷⁴ *Id.* art. 17(2).

⁷⁵ The existing systems singled out for preservation by the Joint Declaration include not only the S.A.R.'s judicial and socio-economic systems but also, specifically, its monetary, shipping, aviation, financial and other systems, including freedom from exchange control.

cluding the doctrine of precedent and rules of interpretation. The system sought to be preserved is a dynamic one and, therefore, is always on the move and open to reform. The "preservationist norm" seeks to draw the line between what strengthens, refines or purifies the system as we know it and what subverts or alters it fundamentally beyond those changes necessitated by the new political order and the changeover to constitutionalism.⁷⁶ Thus, in the context of constitutional judicial review, the Hong Kong S.A.R. courts should at the very least retain their existing jurisdiction to interpret all laws, including constitutional instruments, in the course of adjudication of disputes (*review incidenter*).⁷⁷ Their review jurisdiction, of course, is not restricted to laws but also extends to governmental acts,⁷⁸ subject to the existing restrictions which distinguish between "acts of state"⁷⁹ and "facts of state."⁸⁰ With respect to the former, the courts have jurisdiction to decide whether a particular act belongs to the category of "acts of state,"⁸¹ but with respect to "facts of state" (e.g., whether a state of war exists), the courts look to a certification of the fact from the appropriate government official or department.⁸²

4. A *system interface* which creates a meeting ground between the two systems without destroying the identity of either. One option is the creation of a Special Basic Law Advisory Committee of Jurists⁸³ drawn equally from both systems whose primary task would be to advise the Standing Committee of the N.P.C. on the classification of issues,⁸⁴ i.e., whether a particular issue pertains to foreign affairs or defense or the allocation of power between central government organs and the S.A.R. or, on the contrary, involves purely an internal S.A.R. matter and therefore should be outside the purview of the Standing Committee or other central government organs.⁸⁵

⁷⁶ Constitutionalism involves, among other things, the translation of "residual" freedoms under the common law into substantive rights and the securing of legitimate expectations.

⁷⁷ See *supra* notes 59-60 and accompanying text.

⁷⁸ Judicial review is, of course, much wider than *constitutional* judicial review.

⁷⁹ 18 HALSBURY'S LAWS OF ENGLAND ¶ 1413 (4th ed. 1977).

⁸⁰ *Id.* ¶ 1420.

⁸¹ *Id.* ¶ 1416.

⁸² *Id.* ¶ 1420.

⁸³ This is a proposal mooted by the Special Group on Law of the Basic Law Consultative Committee. It envisages a Committee of Jurists forming a distinct organ within a larger "Basic Law Advisory Committee." See *infra* notes 103-04 and accompanying text. The Jurists will deal with questions of legal classification while the larger Committee will deal with political issues such as proposals for amendment of the Basic Law, application of specific P.R.C. legislation, etc.

⁸⁴ The power of final adjudication vested in the S.A.R. courts will, of course, include a power of classification of issues.

⁸⁵ See *infra* notes 86-89 and accompanying text.

5. A set of *directive principles*⁸⁶ designed to induce the birth and accelerate the growth of what in the Hong Kong system would be described as "principal conventions."⁸⁷ An example is a rule to the effect that the Standing Committee, while in a strict legal sense retaining all the powers given to it by the P.R.C. Constitution, would accept the advice of the Basic Law Advisory Committee on the legal classification of issues and refrain from exercising power to interpret the Basic Law or otherwise to declare invalid any S.A.R. legislation not classified as a matter of foreign affairs, defense or S.A.R. government relations with the central government.⁸⁸ These restraints would preferably be built into the Basic Law by way of justiciable rules of law. But pending such amendments as may be needed to the P.R.C. Constitution, directive principles may well be the best practical means of achieving the desired results, especially bearing in mind that even under the Hong Kong system—which maintains a strong tradition of the Rule of Law—the smooth working of the system depends not merely on strict legal rights but also on legitimate expectations habitually upheld as a matter of convention and practice.⁸⁹

The development of constitutionalism⁹⁰ involves, among other things, effective translation of legitimate expectations into legal rights and the implementation of those rights in real life. However, the use of directive principles—whether in the limited context and special sense described above or in the larger field of realization of national goals and the development of economic, cultural and social rights of the people⁹¹—is something which forms part of a continuing process aimed at securing human rights, freedom and a better life for all. Nevertheless, where it is practicable to go beyond directive principles to a more secure system of protection of rights and freedom, we should not be satisfied with a statement of principles which may be rich in inspirational content but bankrupt of legal effect. In the novel setting of "one country, two systems" where credibility has yet to be fully established, it is important that we use in our choice of options what may be conveniently referred to as "*credibility norms*."⁹² A credibility norm is first and foremost a *principle of action* which seeks to make good that which is perceived to be deficient in credibility and, secondly, a *principle of selection* which seeks out among available options that which is perceived to be the most credible

⁸⁶ These directive principles have a different function than the directive principles contained in the International Covenants on Economic, Social and Cultural Rights.

⁸⁷ 8 HALSBURY'S LAWS OF ENGLAND ¶ 819 (4th ed. 1974).

⁸⁸ The scope of the S.A.R.'s autonomy will be affected by interpretations in these fields.

⁸⁹ See *id.*

⁹⁰ See *supra* note 76 and accompanying text.

⁹¹ See *supra* note 86 and accompanying text.

⁹² A term coined by the author.

solution to a given problem. The choice of options therefore involves first a judgment of what deficiency in credibility exists⁹³ and, second, a decision as to what ought to be done to cure the deficiency.⁹⁴

In the context of "one country, two systems," the following set of credibility norms, although of general application, help to raise the status and protect the legitimacy and efficacy of the new legal order and thus find a place in a functional jurisprudence.

1. The maintenance of a "high degree of autonomy"⁹⁵ is a key feature of the Hong Kong S.A.R. which has yet to be firmly established and tested. Therefore, measures likely to fully realize and to protect and enhance autonomy without being inconsistent with "one country" or with the Joint Declaration ought to be strongly favored.
2. The distinction between legal and political organs has yet to be achieved within the P.R.C. Measures that help to separate or at least distinguish between the two and between legal and political norms⁹⁶ (without necessarily denying their ultimate relationship) and to strengthen the independence of the judiciary and of the legal profession generally ought to be strongly favored.
3. The credibility of constitutional guarantees⁹⁷ of human rights and freedoms is dependent in part on justiciability.⁹⁸ Measures that facilitate their legal enforcement ought to be strongly favored.
4. Constitutional guarantees, though necessary, by themselves usually lack credibility even if justiciable. They must be respected and upheld in practice. Steps which go beyond mere legal protection to actual implementation or realization of rights and freedoms guaranteed⁹⁹ ought to be strongly favored.
5. The implementation or realization of constitutional guarantees presupposes or requires sound and credible institutions.¹⁰⁰ Measures which are designed to bring about or to protect such institutions ought to be strongly favored so that a system of checks and balances can be established and maintained and power is dispersed among the institutions without creating paralysis at the center of government.

⁹³ This is to be distinguished from various species of "rule-skepticism" which, on analysis, are really forms of legal realism. See generally HART, *THE CONCEPT OF LAW* 120-50 (1984) (ch. VII).

⁹⁴ For examples of options, see *infra*.

⁹⁵ See Joint-Declaration, *supra* note 1, para. 3(2).

⁹⁶ See *supra* part II.

⁹⁷ See Joint Declaration, *supra* note 1, Annex I, § XIII; see also 8 HALSBURY'S LAWS OF ENGLAND ¶¶ 828-44 (4th ed. 1974).

⁹⁸ One of the crucial tasks facing the legal profession in Hong Kong is to identify which parts, if any, of the Basic Law are justiciable.

⁹⁹ This goes beyond *justiciability* in law to the actual implementation of the rights and freedoms guaranteed.

¹⁰⁰ One of the most difficult tasks is to devise a system of checks and balances in which there is dispersal of power among institutions without paralysis of power at the center.

6. The credibility of the future Hong Kong S.A.R. system depends largely on the continuity of many of the institutions presently existing in Hong Kong.¹⁰¹ Inasmuch as these institutions currently enjoy a large measure of credibility, measures which strengthen and develop those institutions that are intended to be preserved basically unchanged generally ought to be strongly favored.

An overall approach using the different norms set forth above¹⁰² will, it is believed, help to solve many of the problems which have arisen or which will be encountered in the implementation of "one country, two systems." With respect to the enigma of interpretation, the latest (and still incomplete) preparatory draft of the Basic Law¹⁰³ tentatively favors a solution which contains quite a few of the elements put forward in this Article. It combines the preservation of a review *incidenter* system in the S.A.R. with a *principilater* system of legislative interpretation to be exercised by the Standing Committee of the N.P.C. It places the final power of adjudication within the S.A.R. system and supplies an interface via a Basic Law Advisory Committee.¹⁰⁴ This Committee, whose composition is yet to be finalized, serves a role envisaged to include advising the Standing Committee of the N.P.C. on the interpretation and amendment of the Basic Law and the validity of S.A.R. laws. The reconciliation of the powers of the Standing Committee under the P.R.C. Constitution with the final power of adjudication of the S.A.R. courts is sought to be achieved principally by adopting the aforementioned rule¹⁰⁵ that no decision of the Standing Committee shall affect the results of cases finally adjudicated in the S.A.R. The Standing Committee's decision will however have prospective effect. Unfortunately, the preliminary model favored in the draft will leave unresolved major difficulties (e.g., in relation to the scope of the S.A.R. courts' jurisdiction, the problems of classification of issues, and the precise relationship between review *incidenter* of the S.A.R. courts and review *principilater* of the Standing Committee).¹⁰⁶

In the writer's view, the preliminary model falls critically short of a system 1) whereby political and legal functions (insofar as they are distinguishable despite their interrelationship) are sufficiently and credibly sep-

¹⁰¹ The Joint Declaration identifies many of these institutions, e.g. the legal profession, the judiciary, the established religious organisations, etc.

¹⁰² See *supra* notes 67-82 and accompanying text.

¹⁰³ See COLLECTION OF DRAFT ARTICLES, *supra* note 52.

¹⁰⁴ See *id.* ch. 9.

¹⁰⁵ See *supra* note 72 and accompanying text.

¹⁰⁶ See *supra* notes 75-85 and accompanying text. The terms of reference and composition of the Basic Law Advisory Committee (called the "HKSAR Basic Law Committee" in the Draft Articles) have yet to be defined although broad indications are given in the Draft Articles as to its functions. One of the functions indicated in article 169 of the Draft Articles is giving advice on amendments to the Basic Law; this clearly implies a *political* function in addition to legal functions. COLLECTION OF DRAFT ARTICLES, *supra* note 52, art. 169 (ch. 9).

arated and 2) where the powers of an essentially political body such as the Standing Committee of the N.P.C. are sufficiently and credibly defined and circumscribed by justiciable and legally enforceable provisions, or at least by directive principles.¹⁰⁷ Thus, the preliminary model is still seriously deficient in credibility and everything possible must be done to remove this deficiency.¹⁰⁸

V. BEYOND A FUNCTIONAL JURISPRUDENCE: A CRITICAL-REALIST VIEW OF LAW

This Article so far has explored the foundations of the new jurisprudence mainly in terms of its function and of its usefulness and credibility in problem solving.¹⁰⁹ Such a result-oriented approach has severe limitations but is at this stage necessary for a number of reasons. In the first place, overemphasis on ideological purity is unlikely to help Hong Kong in the paradoxical situation in which it finds itself: on the one hand, the P.R.C. is still wedded to socialism with all its "insistences" (*jianchi*)¹¹⁰ and, on the other hand, free market economics are, in accordance with the Joint Declaration, being insistently turned into consitutional guarantees for the future Hong Kong S.A.R.¹¹¹ Secondly, in the growing dialogue between practicing lawyers from the two systems, the emphasis tends to be on *law as business and technology* rather than *law as politics and ideology*. This is perfectly natural at a time when the P.R.C. is using law as an instrument of modernization¹¹² which is often identified with technological progress and when—patriotism¹¹³ aside—the easiest bridge to build across the great ideological divide between the two systems is via the P.R.C.'s new Economic Law.¹¹⁴ Thirdly, it is surely not enough to

¹⁰⁷ See *supra* notes 75-89 and accompanying text.

¹⁰⁸ See *supra* note 92 and accompanying text (the "credibility norms").

¹⁰⁹ See *supra* part IV.

¹¹⁰ The four "insistences" embodied in the preamble to the P.R.C. Constitution are upholding "the leadership of the C.C.P.," "Marxism-Leninism and Mao Zedong Thought," "the people's democratic dictatorship" and "the socialist road." P.R.C. CONST. preamble.

¹¹¹ The Joint Declaration promises to preserve, by way of the Basic Law, not only the capitalist life style but also "the capitalist economic and trade systems previously practised in Hong Kong," the "monetary and financial systems previously practised in Hong Kong," the "free operation of financial business and free flow of capital within, into and out of Hong Kong Special Administrative Region," "no exchange control[s]," freely convertible currency, etc. Joint Declaration, *supra* note 1, Annex I, §§ VI, VII. The irony is that it is a communist government that is making such a law.

¹¹² See *supra* part II.

¹¹³ "Patriotism" is likely to become an increasingly important concept, depending on how it is defined in such contexts as national unity, freedom of speech and of religion; it may even be employed as a substitute in certain areas for nationalism.

¹¹⁴ Economic Law will probably be among the first areas of law to be harmonized, in part, between the two systems. It is, however, far from an ideology-free zone; it is governed by numerous *fangzhen* (see part II), for example, the norm "[l]et things foreign serve China, but let China specify the course!" echoes the "*r'i-yung*" philosophy of the Confucian scholar Chang Chih-tung (c. 1898)

merely ask questions; we must come up with some practical answers to meet the urgent problems encountered in the drafting of the Basic Law,¹¹⁵ even if, as it often happens, the most convenient and safest solution is to preserve the relevant Hong Kong system without immediately spelling out precisely what its fundamentals are for fear that in restating the essentials we unwittingly change them. It is the author's view that among the more difficult and important tasks facing the legal profession in Hong Kong is that of helping to identify the essentials of our legal system so as to protect them more effectively both during the transitional period and beyond.

Law is, of course, not just business or technology. Law is also integrity.¹¹⁶ A jurisprudence which refuses to go beyond purely functional aspects or is too ready to sacrifice principle for the sake of expedience is unlikely to be one which is worth pursuing. Integrity demands that we constantly search for sound principles, correcting our oversights as we move freely from the level of raw data to that of concepts, from concepts to judgments (value or fact) and from there to the level of responsible action.¹¹⁷ Law with its different nuances can make its appearance at any or all of these four levels: as a *datum* to be attended to, as a *concept* to be understood, as a *value or fact* to be reasonably affirmed and as a *rule of conduct* to be observed. Such a view of and an approach to law may be conveniently described as that of a critical realist.¹¹⁸ It is a view and an approach to which the writer personally subscribes and which he would respectfully advocate.

A critical-realist view of law may even supply a new meaning and dimension to the maxim "seeking truth from facts."¹¹⁹ That maxim has

expressed in the dictum: "Chinese learning is for substance [*ti*]; Western learning is for function [*yong*]." See J. LEVENSON, 1 CONFUCIAN CHINA AND ITS MODERN FATE: A TRILOGY 65-70 (1968). It has been suggested that Hong Kong's capitalism is the *function* and the P.R.C.'s socialism is the *substance* in "one country, two systems." See J.D. Young, *Socialism versus Capitalism: Towards a Hong Kong Strategy for Absorption without Integration*, in HONG KONG AND 1997: STRATEGIES FOR THE FUTURE 101-12 (Y.C. Jao, C.K. Leung, P. Wesley-Smith & S.L. Wong eds. 1985).

¹¹⁵ See *supra* parts III & IV.

¹¹⁶ See DWORKIN, *LAW'S EMPIRE* 176-275 (1986). The term integrity is used by the author in a more general sense than that developed by Prof. Dworkin in his writings.

¹¹⁷ For an analysis of the four levels, see generally LONERGAN, *INSIGHT*, *supra* note 27; LONERGAN, *A SECOND COLLECTION* (W. Ryan & B. Tyrrell eds. year).

¹¹⁸ As distinguished from the critical idealism of Kant, the absolute idealism of Hegel, Fichte and Schelling, the empiricism of Hume, and varieties of subjectivism.

¹¹⁹ By interposing the critical component of judgment between the datum of "fact" and the "truth" to be sought, it is possible to avoid an unscientific determinism and at the same time underscore the importance of paying attention to the facts and dictates of practical reason. Truth is conceived of as a correspondence with a reality to be intelligently grasped and reasonably affirmed or anticipated; in other words, truth is the content of correct judgments. The term "anticipated" is used in recognition of the wide range of heuristic and other methods employed in arriving at human understanding, including statistical methods which are not necessarily a cloak for ignorance but can

been and continues to be powerfully invoked in the P.R.C. to justify the building up of a new legal order and the laying down of a whole range of pragmatic policies by underlining the need to be attentive to "objective realities."¹²⁰ This represents part of a larger and continuing effort by P.R.C. theoreticians and jurists to transcend, without necessarily repudiating, the narrow categories of a more backward age.¹²¹ Thus, we find that Peng Zhen, head of the legislative commission of the P.R.C., echoed these sentiments in May 1981 stating:

Our civil law is the civil law of the People's Republic of China. It is not the civil law of the Soviet Union or Eastern Europe; neither is it Anglo-American, Continental European or Japanese civil law. What is the source of our civil law? It must originate from the reality of China.¹²²

Many examples can be given of new ideas being tested within the P.R.C. which are said to originate from the reality of China. One vivid example is the daring concept of a *rural contract-management household*¹²³ which can, within the scope allowed by law, undertake production according to the law of contract. Another example is the "*entrepreneurial legal person*"¹²⁴ with a personality divided between capacity of ownership and managerial authority. A third example, of a more general kind, is the rapid development of Economic Law as a distinct discipline which is at least initially supposed to govern principally "vertical, administrative relations"¹²⁵ as distinguished from the Civil Law which is supposed at this stage of development to serve principally "lateral or horizontal relations."¹²⁶

The specific examples mentioned are still all essentially result-oriented, and naturally so given the prevailing political norms previously discussed.¹²⁷ The examples do contain, however, the seeds for development of a more general concept of law. Indeed, there are signs of development within the P.R.C. of a Chinese-style theory of natural law based on "objective needs."¹²⁸ One articulation of the theory is the "common

yield real insight into things. The law has to deal often not only with what is but also with what can reasonably be anticipated.

¹²⁰ See *supra* part II.

¹²¹ For examples, see *infra*.

¹²² People's Daily, May 15, 1986, at 4; *The "Civil Law's General Rules"*, CHINA NEWS ANALYSIS, June 15, 1986, at 2 (no. 1312).

¹²³ Civil Law's General Rules, art. 27 (promulgated Apr. 12, 1986 at the 6th N.P.C., 4th Sess.).

¹²⁴ This is another concept embodied in the Civil Law's General Rules. See *id*.

¹²⁵ People's Daily, Apr. 17, 1986, at 2.

¹²⁶ *Id*.

¹²⁷ See *supra* notes 69-89 and accompanying text.

¹²⁸ *The Rise of Economic Law*, CHINA NEWS ANALYSIS, June 18, 1984, at 7 (no. 1263).

nature of law" (*falü gongtong xing*)¹²⁹ inspired by a need of some P.R.C. jurists to go beyond, without denying, the class character of law forming part of Marxist analysis. For this reason, this new conception of law is described as having a "beyond class" character while professing to respect historical and present realities.¹³⁰

It is necessary to indicate how a critical-realist view of law is likely to help develop the new or, indeed, any jurisprudence. Critical realism in law is not engaged in partisan politics and is, in that sense, politically neutral. Its method is basically the same as that involved in any act of human understanding¹³¹ and thus is rooted in reason and common sense, yet willing to submit even common sense and "objective realities" to critical judgment. It differs from legal realism¹³² in that while it accepts that law involves predictions of how the relevant rules will be interpreted and applied in real life, it asks the further questions as to why a gap exists between law in action and law in the books and what, if anything, can be done about it. Critical realism differs from legal positivism¹³³ in that while it sees elements of truth in the notion of law as "the command of the sovereign,"¹³⁴ it is aware of the rich variety of norms which are by no means restricted to rules of compulsion but also include rules of facilitation, validation and recognition.¹³⁵ More importantly, it asks the prior question of whether a rule or its sanction for breach is just and otherwise in accordance with reason and good sense, and the further question of what must be done if it is not. In so doing, it does not ignore but instead affirms the *good of order* which in normal circumstances requires us to respond to a law perceived to be unjust not by denying its character as law but by taking steps on the level of responsible action for its amendment or repeal.

Critical realism includes within its vision law as a collaborative and interpretative enterprise seeking, in an adjudicative context, "the best constructive interpretation of the community's legal practice"¹³⁶ but, where appropriate, it goes outside such a context to evaluate the practice

¹²⁹ See Wan & Ni, *A Preliminary Study of the Common Nature of Laws*, SHEHUI KEXUE (Social Sciences), Sept. 1983, at 57-62. Contrast Xu, *On the Correct Analysis of the Nature of Law*, SHEHUI KEXUE (Social Sciences), Feb. 1985, at 46-47.

¹³⁰ See Wan Bin, *A Third Study of the General Character of Laws*, SHEHUI KEXUE (Social Sciences), July 1985, at 27-29; Wu *On Several Problems of Methodology in the Controversies Regarding the "General Character of Laws,"* SHEHUI KEXUE (Social Sciences), Sept. 1985, at 44-46.

¹³¹ For the four levels, see *supra* note 119.

¹³² For the Scandinavian variety of legal realism, see HÄGERSTRÖM, *INQUIRIES INTO THE NATURE OF LAW AND MORALS* (Broad trans. 1953); OLIVECRONA, *LAW AS FACT* (1939). Cf. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1974).

¹³³ See AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1954).

¹³⁴ *Id.*

¹³⁵ See HART, *supra* note 93.

¹³⁶ DWORKIN, *supra* note 116.

itself. It is familiar with empirical methods as well as semantic and economic theories of law¹³⁷ but strives to rise above partial perspectives to find the overall intelligibility of law (including its efficacy and legitimacy) not merely in the language of the rule or its economics but also and principally in the *reason* for the rule, the *authority* that issues it and the *common good* that it must serve.¹³⁸ It recognizes in the hierarchy of individual or communitarian needs a ground for a hierarchy of norms but parts company with any "pure theory of law"¹³⁹ that is little more than an arid and fragile artifact of legal positivism.

Critical realism is, thus, very much at home with the better articulated versions of natural law that appeal to a reality to be intelligently grasped and reasonably affirmed or anticipated,¹⁴⁰ thus helping to preempt or correct any arbitrariness in positive law. Such an appeal moves from the descriptive to the explanatory and does not confuse *is* with *ought* while recognizing the creative tension between the two, as well as the deep relationship between many but not all aspects of law and morality.¹⁴¹ A critical realist conceives "nature" not in static terms but heuristically, as a dynamic reality in a world mediated by meaning.¹⁴² In this way, he expects to discover clues for the laying down, on the one hand, of sensible and flexible rules that are subject to development and change and, on the other hand, of a set of no less intelligible but lasting and even absolute principles that should find a place in every civilized legal system. The critical realist retains, on balance, not only a healthy skepticism that wisely sets limits to rules of compulsion but also an essential openness that will help to make human freedom and progress a reality.

It is hoped that as the tale of two systems unfolds, law will within its proper sphere become established as a principle, a product as well as a means of mediation between the systems. This hope is, however, unlikely to be realized if the promises contained in the Joint Declaration are not solemnly kept. It is on this note of realism that the author wishes to conclude a discussion which, despite its abstract elements, fully recog-

¹³⁷ See R.W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW—A PROGRESSIVE CRITIQUE* 281-92 (D. Kairys ed. 1982).

Critical realism is not the same as although it could, of course, itself be the subject of "Critical Legal Studies." For a bibliography of critical legal studies literature, see Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 *YALE L.J.* 461, 464-90 (1984).

¹³⁸ For an analysis of "the common good," see J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 153-56 (1979).

¹³⁹ Cf. Kelsen, *GENERAL THEORY OF LAW AND STATE* (1949).

¹⁴⁰ Although not in so many words. See ARISTOTLE, *PHYSICS*, ii, ch. 8 (Charlton trans. 1970); AQUINAS, *SUMMA THEOLOGICA*, *QUAESTIONES* 90-97. See also LONERGAN *supra* note 27; FINNIS *supra* note 138.

¹⁴¹ See HART, *supra* note 93.

¹⁴² As distinguished both from the world of immediacy of an infant and from the static classicist world view.

nizes within proper limits the instrumentality of law and the need for pragmatism. If a critical realist submits pragmatism to judgment, it is not because he is unrealistic, but because an uncritical realism is a contradiction in terms.

