EXPORTING JUDICIAL REVIEW FROM THE UNITED STATES TO CHINA

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I. INTRODUCTION

Is the American model of judicial review transplantable to China? As top American judges call for the export of American judicial review and the topic of judicial review is widely debated in legal circles in China, this question demands thorough exploration by today's legal community. Deans at China's leading law schools also lecture and write on the subject, even though it represents a departure from their scholarly specialties. In October of 1997, the PRC's central government launched a program to reform the judiciary.[1] Since then, and particularly since 2001, when the

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[1] 王琳, 司法改革的路径选择 [Wang Lin, *Selecting the Pathway of Judicial Reform*], *in* 4 司法改革论评 [JUDICIAL REFORM REVIEW] 357 (张卫平编 [Zhang Weiping ed.], 2002).

Supreme People's Court took a bold step toward reviewing constitutional questions, Chinese judicial reform has been a hot topic in legal academia and, indeed, in the broader legal community.

A focus on the American model is not foremost in these Chinese discussions, but it does appear among frequent references to judicial review outside China, some of which explicitly discuss the United States. However, such a focus is important in light of assertions by United States Supreme Court Justices Sandra Day O'Connor and Stephen Breyer that American-style judicial review can be and, indeed, should be transplanted anywhere.[2] The implication of O'Connor's and Breyer's arguments is that the United States' judicial review system should be the model for every other country's court system because, in some essential way, it is the most robust version of judicial review.

However, transplanting the American model of judicial review to China would invariably present numerous difficulties. For starters, what *is* the American model? Not only does it vary over time and place, but there is also a lively debate about what the model *should* be. Is it actually serving its intended purposes? For example, is it bolstering individual rights and democracy? An understanding of the situation in China also presents difficulties. Is there any hope that Chinese judges, operating under deeply rooted historical and cultural constraints, could do what judges in the United States do?

In addition to Professor Lubman's work on judicial review of administrative decisions in China, I found several other articles discussing various aspects of the transplantability of American judicial review to Europe or to "liberal democracies" in the legal literature of the United States. An interesting omission seems to exist in these articles. None of them defined the United States model in a comprehensive way. In other words, none answered the question, "What is to be exported?" Martin Shapiro carefully and elegantly examined the link between administrative and constitutional review in the United States,[3] while Michael Perry exhaustively discussed the various advantages and disadvantages of both a restrained and unrestrained judicial review.[4] Both authors correctly assert or assume that U.S. judicial review can vary and, in looking at two variations, Professor Perry makes some inroads into a potential definition. Still, a more precise definition is needed.

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[2] Justice Sandra Day O'Connor, Justice Anthony Kennedy, Justice Stephen Breyer, *Convocation on Law: The U.S. Supreme Court in Global Perspective,* Address at Stanford University (Oct. 16, 1999).
[3] *See generally* Martin Shapiro, *The Giving Reasons Requirement,* 1992 U. CHI. LEGAL F. 179 (1992).
[4] *See generally* Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?,* 38 WAKE FOREST L. REV. 635 (2003).

Despite the complexity of the problem and the vast differences between the judiciaries in China and the United States, the question of transplantability is not entirely absurd. The situation in China allows for cautious hope that some movement toward constitutional and administrative review is possible. The current discussions in the legal literature of judicial review (司法审查, *sifa shencha*), judicial interpretation (司法解释, *sifa jieshi*), and judicial independence (法院的司法独立, *fayuan de sifa duli*) have been much greater than in any other period of recent memory. The references to judicial review outside of China seemed almost obligatory in every piece, and one or two even come close to examining the workability of the American and European models. While interviewing Chinese law scholars in China in the spring of 2005, I was told that arguments about this subject are still too sensitive to be published in the People's Republic of China ("PRC"). Yet this politically sensitive environment is the context within which so much change has happened in China.

I hope to contribute to the literature in three ways with this article. First, I would like to offer a definition of the American model of judicial review because, in order to ask whether something is transplantable, one must know what is being transplanted. Second, I would like to examine the question of transplantability as it applies to China, or to the region that encompasses China, Hong Kong, and Taiwan. Third, I would like to look at whether, even if it can be transplanted, the United States model *should* be transplanted to China. For this purpose, it is better to consider a spectrum of proximity rather than a simple "either-or" possibility; that is, to what extent the movement toward the United States model is, in actuality, possible or occurring, rather than whether it is, in theory, transplantable to China.

II. THE UNITED STATES MODEL OF JUDICIAL REVIEW

The American model of judicial review has seven basic features.[5] One feature is that the highest court possesses the ultimate power to interpret the Constitution, meaning that nobody has the power to directly overturn the holdings of the highest court. Of course, no laws are

[5] This list of features is my own, and my aim in creating it is not to highlight the contribution of the United States to the global development of judicial review, but rather to distinguish the U.S. model of judicial review from other models currently in use. For a discussion of the innovations wrought by the development of judicial review in the United States, see MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 25-28 (1971) (Article 6, Section 2 of the U.S. Constitution and *Marbury v. Madison*, 5 U.S. 137 (1803) led to two innovations: "the supremacy of the Constitution" and "the power and the duty of the judiciary to disregard laws contrary to the Constitution . . .").

permanent or static. Laws continuously change and evolve given the power of the courts to invalidate laws and the legislature's power to pass new laws. Mechanisms even exist to amend state and federal constitutions. Nonetheless, there is a recognized formal finality to the United States Supreme Court's decisions in the American legal system.

A second feature of American-style judicial review is that all courts may interpret the Constitution and any applicable law, rather than only a single court resting atop or outside the ordinary court system. The exercise by all judges of the power to review statutes and administrative acts has been referred to as "decentralized judicial review."[6] This makes the scope of judicial review broader than that of systems which place the power of constitutional or administrative review in one specialized court. The greater the number of courts that may interpret all the laws, the more power is exercised by the court system in a collective sense. In other words, the greater proportion of existing laws that a court may interpret, the greater the jurisdiction of that court and, therefore, the greater its potential influence.

A third feature is that judges in the United States not only rule on the legality or constitutionality of either administrative acts or legislation, but may also invalidate those acts, not just for the purposes of the instant case, but, through the operation of *stare decisis,* for future cases as well. Courts thus reach the zenith of their power, for when they invalidate a statute, they undo a decision by the legislature, and when they invalidate an administrative act, they undo a decision by the executive. Perhaps this is why the power to invalidate statutes has been referred to as "direct judicial review,"[7] as it is a more forceful or plenary exercise of power than any other court function.

A fourth feature, which follows from American principles of federalism, is that state courts may apply not just the laws and the constitution of their state, but also the laws and Constitution of the United States.[8] Indeed, state courts may declare federal statutes or administrative acts invalid under the United States Constitution.[9]

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[6] CAPPELLETTI, *supra* note 5, at 46-60.

[7] *See* EDWARD MCWHINNEY, JUDICIAL REVIEW IN THE ENGLISH-SPEAKING WORLD 13 (1956).

[8] An example of one such decision which was denied certiorari by the U.S. Supreme Court is *In re Bridget R. v. Cindy R.*, 49 Cal. Rptr. 2d 507 (1996), which stated that The Indian Child Welfare Act of 1978 could not, under the Fifth, Tenth, and Fourteenth Amendments to the U.S. Constitution, "invalidate a voluntary termination of parental rights respecting an Indian child who is domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe." *Id.* at 516. Further, an example of one such decision which was reversed by the U.S. Supreme Court is *Committee on Legal Ethics of the West Virginia State Bar v. Triplett*, 180 W. Va. 533 (1988), *rev'd* 494 U.S. 715, in which the Supreme Court of Appeals of West Virginia found that federal limits on

A fifth feature of the American judicial review model is that only courts may declare a law unconstitutional. Of course, legislatures may repeal their own laws, but they rarely exercise this power, perhaps due to the many procedural hurdles and political ramifications involved in such a task. Moreover, repealing a statute is a legislative process requiring only political justifications, and it need not be shrouded in any substantive legal justifications such as unconstitutionality.

Certainly, courts are not the only institutions charged with interpreting the Constitution and laws. Every police officer in the United States interprets the Constitution every time he pulls over a car or asks to search the bag of someone in a train station. Federal administrative agencies interpret statutes where Congress has delegated authority to the agency, and some of these statutes contain rules to guide the respective agency's interpretation of those statutes. The President is also obliged to interpret the United States Constitution in exercising his various duties, such as whether to send troops abroad. When actors outside the courts interpret the law, they do so independently, in that, for the most part, they do not ask courts for advisory opinions. At the same time, they do not interpret the law independently of the courts, in that extra-judicial actions are subject to at least a threshold level of judicial review. Courts in the United States far more frequently interpret the fine points of constitutions and laws than any other actor because, unlike other governmental entities, the courts exist to hear specific disputes under the same legal principles that they are called on to interpret.

Sixth, American courts are the ultimate authorities on the parameters of judicial review. The principle that courts determine the parameters of their authority is rooted in *Marbury v. Madison*, a decision which ensured that the courts alone, and not the legislature or executive, possess this power.[10] Of course, with the development of two centuries of case law and precedent on judicial review, courts must now work within their own constraints. Furthermore, the Constitution sets out some of the

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attorneys' fees in black lung cases violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

[9] In the early 1920s, Congress amended the federal Judicial Code to withdraw federal law and jurisdiction from cases of workmen's compensation claims by longshoremen. Challenges by insurance companies to two such workmen's compensation claims reached the Washington and California state supreme courts on the grounds that the state administrative agency's award was not valid because states had no jurisdiction to award workmen's compensation, notwithstanding the amendment to the federal statute. One court annulled the award in question and the other affirmed the trial court's dismissal of the claim. *See* State v. W.C. Dawson & Co., 122 Wash. 572, 211 P. 724 (1922); *see also* James Rolph Co. v. Industrial Accident Commission of California, 192 Cal. 398 (1923). The U.S. Supreme Court affirmed both decisions. *See* Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924).

[10] *See Marbury*, 5 U.S. 137.

parameters of judicial review by providing broad original jurisdiction to the Supreme Court. The Constitution also delegates to Congress the power to establish lower level federal courts.[11] Congress has established courts—namely the federal courts of appeal and district courts—and federal statutes contain provisions for federal jurisdiction. Still, the vast majority of legal sources which constrain and enable judges to exercise their review powers come from judge-made doctrine and not external government sources.

For example, doctrines of standing prevent persons who lack a prescribed relationship to the facts of the case from using the courts.[12] Similarly, doctrines of ripeness screen out issues raised prematurely,[13] while doctrines of mootness screen out issues that are no longer live cases or controversies.[14] In the United States, these doctrines stem from the "case and controversy" requirement of Article III of the United States Constitution and are further bolstered by the decision in *Marbury v.*

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[11] U.S. CONST. art. III, § 1.

[12] In *Goldwater v. Carter*, 617 F.2d 697 (1979), a U.S. Court of Appeals declared that the Senators who brought suit had standing to sue the President because they claimed each had been denied his constitutional right to advise and give consent to the President's termination of a treaty. The court found that, if there were merit to their claim, then there would have been a deprivation of their right to vote. The test for injury in fact, one of the requirements of standing, as had been laid out in previous case precedent was "a diminution in congressional influence resulting from an Executive action that nullifies a specific congressional vote or opportunity to vote, in an objectively verifiable manner . . . ." *Id.* at 702. The Supreme Court vacated this holding on the ground that the action was not ripe for adjudication because Congress had not yet taken final action on the matter challenged by the plaintiffs. The Court declined to base its ruling on standing. *See* Goldwater v. Carter, 444 U.S. 996, 998 (1979).

[13] *Buckley v. Valeo*, 424 U.S. 1, 113-14 (1976) is a seminal case in the United States for ripeness doctrine. Justice Powell, writing separately, used lack of ripeness to vacate the Court of Appeal's denial of a motion to dismiss a claim by several Congressmen that President Carter's termination of a treaty with Taiwan without their consent "deprived them of their constitutional role with respect to a change in the supreme law of the land." *See Goldwater*, 444 U.S. at 997-98. The Court of Appeals' opinion is at Goldwater, 617 F. 2d. For a discussion of the ripeness and standing doctrines in *Goldwater* and more generally where Congressmen are plaintiffs, see *Congressmen in Court*, 15 GEORGIA L. REV. 241, 254-64 (1981).

[14] In *Burke v. Barnes*, 479 U.S. 361, 362-63 (1987), the U.S. Supreme Court held moot a case in which thirty three Members of the House of Representatives sued President Reagan using the "pocket veto" to terminate legislation requiring the President to certify El Salvador's progress with respect to human rights before approving U.S. military aid to that country. The Court reasoned that the bill in question had, by its own terms, expired by the time the case came up to the Supreme Court. *Id.* at 363. In a similar vein, the District of Columbia Court of Appeals dismissed as moot a suit brought by a member of Congress against President Reagan for sending U.S. troops to Grenada without the consent of Congress. *See* Conyers v. Reagan, 765 F.2d 1124, 1129 (1985). The District Court had dismissed the suit in *Conyers v. Reagan*, 578 F. Supp. 324 (1984). The court invoked the venerable doctrine of equitable discretion, which, as set out in the District of Columbia Circuit, encourages courts to dismiss claims of legislators when they lack standing or have standing but have failed to exhaust the remedies available to them in the legislature. *Id.* at 326-27.

Madison.[15] The reasoning is that plaintiffs must have a stake in the matter before the court in order for there to be a "case."[16]

Political question doctrines are a form of doctrinal constraint found in several legal systems, and although they are articulated in various ways and vary in the extent to which they inhibit judicial discretion, they all work to diminish the range of issues which courts may review.[17] In the United States, this doctrine grows out of notions of separation of powers. The classic exposition of the Political Question Doctrine is in *Baker v. Carr*, in which the United States Supreme Court held that courts could hear an equal protection claim challenging a state voting apportionment statute.[18] Alexander Bickel sees the political question doctrine as fundamentally opposed to *Marbury v. Madison* and different in kind from standing and ripeness, by which he implies that it is a potentially significant incursion upon the power of judicial review.[19] Yet, the fact that it is left to the courts in the United States to determine whether an issue falls within the scope of this doctrine denudes the doctrine of much of its limiting effect.

Related to the Political Question Doctrine is governmental immunity. In *Nixon v. Fitzgerald*, for example, the Supreme Court of the United States addressed the question of the scope of the immunity possessed by the President of the United States.[20]

As another doctrinal constraint, the retroactive and prospective effect of judicial decisions is also limited by principles developed in case law.[21] Yet another self-imposed constraint is for judges to interpret legislative and administrative acts in a way that makes them fall within the ambit of the laws and the Constitution. Alexander Bickel recommends this approach to the extent that courts exercise it voluntarily and prudentially.[22]

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[15] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, 115-25 (1962).

[16] For a classic discussion of these doctrines as they operate in the United States, see *id.*

[17] *See* B.O. NWABUEZE, JUDICIALISM IN COMMONWEALTH AFRICA: THE ROLE OF THE COURTS IN GOVERNMENT 20-43 (1977). The German Constitutional Court has developed a political question doctrine. *See* CAPPELLETTI, *supra* note 5, at 82 n. 37.

[18] Baker v. Carr, 369 U.S. 186 (1962). For a discussion of the difficulties in defining a political question doctrine, see Louis Henkin, *Is There a 'Political Question' Doctrine?*, 85 YALE L. J. 597 (1976). For a discussion of the Political Question Doctrine in the United States with a focus on its application to cases involving the foreign affairs power, see Michael E. Tigar, *Judicial Power, the 'Political Question Doctrine,' and Foreign Relations*, 17 UCLA L. REV. 1135 (1970).

[19] BICKEL, *supra* note 15, at 125.

[20] Nixon v. Fitzgerald, 457 U.S. 733 (1982). For a discussion of sovereign immunity as a bar to suit, see Peter Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281 (1980).

[21] *See* CAPPELLETI, *supra* note 5, at 88-96; WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 267 (1988) (*citing* Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971) and Lemon v. Kurtzman, 411 U.S. 192 (1973)).

[22] *See* BICKEL, *supra* note 15, at 127-33.

This kind of self-restraint can be turned into a doctrine or rule, however, as the United States Supreme Court did in *Fletcher v. Peck*, which created a presumption that statutes are constitutionally valid. Chief Justice Marshall stated that "[t]he question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case."[23]

Seventh, with the exception of doctrinal and procedural constraints which limit their review of the validity of legislation and administrative acts, courts are free from interference in the process of arriving at their decisions. Constraining doctrines present threshold questions to courts about their jurisdiction. Such questions revolve around mootness, ripeness, standing, the Political Question Doctrine, and sovereign immunity. For example, the Act of State Doctrine immunizes foreign governments from United States court jurisdiction as to acts by those governments in their home territories, but not to their extraterritorial activities.[24] The recent case of Terry Schiavo in Florida illustrates both the robustness of this judicial independence in the face of legislative and executive pressure and the potential fragility of this independence if this pressure turns into a campaign by legislatures and executives to undermine judicial independence.

All seven of these attributes combine to form a robust version of judicial review. Without doubt, the American version of judicial review is the most expansive in the world. Where, by way of transplanting it to other societies, it might serve as a model, it would expand the power of judges. This newly acquired power surely would have to be acquired along with an increased trust in, or at least acceptance of, judges, and possibly also a decrease in the power of other agencies, such as legislatures and executive bodies.

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[23] Fletcher v. Peck, 6 Cranch 87, 128 (1810) (challenge of a Georgia statute which conferred title to a massive tract of land to an individual).

[24] *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398 (1964) is the leading case. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 509 (5th ed. 1998). Another key case exemplifying the doctrine is *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (1984), in which the owners of some land in Honduras prayed for relief for the establishment of a military training camp on the land by the U.S. government. The government of the United States moved to dismiss for failure to state a claim upon which relief could be granted. The District Court granted the motion on the ground that the claim involved a nonjusticiable political question. *Id.* at 1511. The Court of Appeals reversed on the ground that there was no broad exemption from suit in the area of foreign affairs, nor did the Act of State Doctrine operate to exempt the government from liability for its occupation and destruction of the plaintiffs' property or the deprivation of the plaintiffs' use and enjoyment of the property. The Court of Appeals saved the second claim from dismissal by refusing to extend the Act of State Doctrine to cover a claim of deprivation of property without due process of law in violation of the Fifth Amendment to the U.S. Constitution. *Id.* at 1510-11.

III. TRANSPLANTABILITY OF THE UNITED STATES MODEL TO CHINA

While the United States is home to the most expansive systems of judicial review in the world, the People's Republic of China hosts one of the most restrictive. This would not be surprising to observers of Chinese history and politics, who note that China's judges have for centuries looked to their superiors for guidance in deciding cases[25] and that socialist countries tend to restrict the powers of judges.[26] The People's Republic of China, which is still officially a socialist country, does not completely prohibit its judges from reviewing official actions. Indeed, Chinese judges may review a limited set of administrative actions.[27] This power of review differs from the American model of judicial review in each of the seven characteristics, illustrating that, compared to the American model, judicial review in China is significantly limited.

As to the first characteristic, in China, the Supreme People's Court is not the ultimate arbiter of the constitutionality of legislation. Granted, there is no rule explicitly enshrined in the letter of the law which permits either China's central legislative body, the National People's Congress, or any other governmental body to overturn the rulings of the Supreme People's Court, which is the highest court of the land. The closest parallels to a Chinese concept of judicial review are provisions in the PRC Constitution that recognize the National People's Congress ("NPC") as the highest government body and permit the NPC Standing Committee to interpret and enforce the Constitution, to interpret statutes, to "supervise" the Supreme People's Court, and to elect and remove all of its justices.[28] Chinese jurists interpret the constitutional status of the NPC to mean that it rules over the court system as it does every other branch of government.[29]

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[25] Zhiqiang Wang, *Case Precedent in Qing China: Rethinking Traditional Case Law*, 19 COLUM. J. ASIAN L. 323 (2005).

[26] Legal comparativists long considered socialist countries, with the exception of the Federal Socialist Republic of Yugoslavia, Poland, and Czechoslovakia, to lack judicial review. *See* CAPPELLETI, *supra* note 5, at 7-9, 51.

[27] *See generally* 中华人民共和国行政诉讼法 [Administrative Litigation Law] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) (P.R.C.), *available at* http://www.dffy.com/faguixiazai/ssf/200311/20031109195715.htm (last visited Mar. 3, 2006) [hereinafter Administrative Litigation Law].

[28] 宪法 [CONST.] art. 63 (1982) (P.R.C.); *id.* at art. 67(1), (4), (6), and (11). These two articles are cited and interpreted by Liu Nanping but only for supporting the proposition that the NPC stands in a higher place in the PRC's government than the Supreme People's Court. *See* LIU NANPING, OPINIONS OF THE SUPREME PEOPLE'S COURT: JUDICIAL INTERPRETATION IN CHINA 28 (1997).

[29] Wang Chenguang, *Introduction: An Emerging Legal System*, *in* INTRODUCTION TO CHINESE LAW 1, 17 (Wang Chenguang & Zhang Xianchu eds., 1997) [hereinafter INTRODUCTION TO CHINESE LAW].

Chinese jurists characterize this hierarchical relationship with the Chinese verb for leadership or direction (领导, *lingdao*).[30] One Chinese jurist propounds the theory that the NPC Standing Committee may decide a conflict between the decisions of the Supreme People's Court and the Supreme People's Procuratorate, which are considered equals in the Chinese governmental hierarchy.[31] The Procuratorate is a Soviet-style institution whose main responsibilities are prosecuting criminal cases and publicizing the Chinese Communist Party's ("CCP") policies on crime. The NPC Standing Committee has not resolved any conflict between the courts and the procuratorates.[32] This might suggest that there is, in some practical sense, an ultimate quality to the decisions of the Supreme People's Court. However, the more likely explanation is that the power of the NPC over the Court, or perhaps the power of the CCP over both the Court and the Procuratorate, is so complete as to induce the Court to incorporate the views of its ultimate reviewing authority in its own process of judicial formulation.

In this sense, the decisions of Chinese courts cannot be disturbed for most practical purposes because the organs that have the authority of review provide input before the decisions are handed down. Below the central government, legislatures also interfere with the work of courts at their corresponding levels.[33] A political culture of "supervision" (监督, *jiandu*) pervades the legal system, and one of its effects is to render courts beholden to a host of other political institutions, including the Chinese Communist Party, the Public Security Bureau, and the legislatures. Court review of any issue is not independent of guidance by the CCP. Judges are guided toward many of their decisions by adjudication committees staffed by Party personnel in each court.[34]

As to the second characteristic, where, in the United States, all courts may interpret the United States Constitution, in China, by contrast, no courts may interpret the PRC Constitution. Only the legislature—the National People's Congress—may interpret the Constitution. Lawyers and law scholars in China agree that judicial review is absent from the Chinese

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[30] *See* LIU, *supra* note 28.

[31] *Id.*

[32] *Id.*

[33] JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 107 (1999).

[34] *See* Margaret Y.K. Woo, *Adjudication Supervision and Judicial Independence in the P.R.C.*, 39 AM. J. COMP. L. 263 (1991); *see also* ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 111 (1992) ("[B]efore judgment is delivered in important and difficult cases heard by a collegiate bench, the cases must first be discussed by the adjudicative committee, and in giving judgment the collegiate bench must implement the decision of the committee.").

legal system and that the NPC is the sole body invested with this authority.[35] The constitutional underpinnings for both are less explicit. The provisions in the Constitution related to the Supreme People's Court are silent as to whether it may also interpret the Constitution.[36] Despite silence in the enacted law, there was accord among published jurists in China through the 1990s that the Supreme People's Court does not have any authority to interpret the PRC Constitution.[37]

Since 2001, however, China's Supreme People's Court has edged closer to engaging in constitutional review. In July 2001, it interpreted the PRC Constitution in determining whether a litigant deserved damages from a school, an official, and other entities in connection with a denial of admission to college.[38] It was a bold move in at least two respects: Not only did it occur without prior official approval from the National People's Congress or the State Council,[39] but the Court reached the constitutional question by going beyond other, narrower issues presented by the parties, which would have been sufficient to reach the same result. Perhaps the absence of any challenge by the litigants to the Chinese government emboldened the Court to reach the constitutional issues where it might otherwise have decided the case on less controversial grounds.[40]

However, the power of constitutional review is not yet shared with the lower courts. One jurist depicts the Supreme People's Court as almost jealously guarding the power for itself.[41] Another suggests that the Chinese government may be taking steps toward involving the NPC Standing Committee even more in the court work touching on constitutional interpretation. He points out, namely, that in May of 2004, the National People's Congress promulgated rules for the reporting of judicial matters involving statutory and constitutional interpretation up to a new office designed to monitor conflicts of law throughout China and

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[35] *See* 周道鸾，论司法解释及其规范化 [Zhou Daoluan, *On Judicial Interpretation and Its Standardization*], 1 中国法学 [LEGAL SCIENCE IN CHINA] 87, 109 (1994); *see also* Interview with Zhao Jian, PRC Lawyer, in Minneapolis, MN (Oct. 20, 2000) (on file with author).

[36] *See* Article 67(1) assigns to the NPC Standing Committee, the most powerful body within the legislature, the power to interpret the Constitution. *See* CHEN, *supra* note 33, at 106. To no other body does the Constitution assign this power.

[37] *See id.*

[38] Liu Yuming et al., *Constitutional Litigation*, CHINA L. & PRACTICE, Oct. 2001, at 77.

[39] *See id.*

[40] *See id.*; *see also, e.g.*, Shen Kui, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case,"* 12 PAC. RIM L. & POL'Y J. 199 (2003).

[41] *See* 论违宪司法审查之法官义务和权能 [*Discussing the Duty and Power of Judges' Review of Constitutionality*], (Feb. 2, 2005), at 2, *at* http://www.dffy.com/faxuejieti/zh/200502/20050202155937.htm.

possibly to monitor the Supreme People's Court's interpretations of statutes.[42]

As to the third characteristic, the courts in China may not invalidate statutes. This function is reserved for the standing committees of people's congresses at the central and local levels.[43] Litigants may not challenge in court the validity of legislation or administrative decisions, except where the decision falls within one of eight subject-matter categories and, in some cases, the litigants involved have exhausted all administrative processes.[44] These categories mainly cover the application of law and exclude the making of laws and rules, which effectively exempts all but low-level functionaries from censure by administrative litigation.[45] Others have noted that this list excludes the broader civil rights such as association, assembly, protest, speech, and publication, focusing instead on narrower rights over property and the person.[46]

Though limited, administrative law is growing in China, spurred by growth in the past decade of the importance of China's agencies in handling international trade and intellectual property. According to one view, the Supreme People's Court has jurisdiction over only civil, criminal, and economic cases,[47] suggesting that administrative cases are outside of the Court's ambit. One justification for this is that only the State Council and the hierarchy of ministries and agencies under it are authorized to interpret administrative regulations.[48] Yet in the past several years, the Court has issued "judicial interpretations"[49] (司法解释, *sifa jieshi*) of

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[42] *See* 违宪审查的司法原则 [*The Judicial Principle of Constitutional Review*] (July 15, 2004), *at* http://www.boxun.com/hero/wangyi/82_1.shtml; *see also* Jim Yardley, *A Judge Tests China's Courts, Making History*, N.Y. TIMES, Nov. 28, 2005, at A1 ("In summer 2004, the Standing Committee announced the creation of a new review panel to mediate conflicts of law. Some lawyers have hailed the panel as the equivalent of a constitutional court. Others are concerned about the panel's secrecy and believe the responsibility should belong to the courts.").

[43] 中华人民共和国立法法 [Law on Legislation] art. 88 (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) 03/2000 全国人民代表大会常务委员会公报 [STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.] 112 (P.R.C.), *available at* http://www.cnlawservice.com/chinese/law&regulation/flcx/a003.htm (last visited Feb. 22, 2006).

[44] *See* Liu Yuming & Zhou Yan, *Reining in the Bureaucracy: Administrative Review and Litigation*, CHINA L. & PRACTICE, Apr. 2000, at 69.

[45] *See* Administrative Litigation Law, *supra* note 27, at art. 11.

[46] *See* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 420 (2002).

[47] *See* Zhu Guobin, *Constitutional Law and State Structure*, *in* INTRODUCTION TO CHINESE LAW, *supra* note 29, at 56.

[48] *See* PEERENBOOM, *supra* note 46, at 317 (citing *Resolution Concerning the Strengthening of Legal Interpretive Work*).

[49] For a discussion of this function of the Supreme People's Court, see INTRODUCTION TO CHINESE LAW, *supra* note 29, at 21 ("Judicial interpretation consists of detailed rules for implementing laws and regulations, judicial guidance to resolve issues encountered in the process of application of law answers to specific questions raised by lower courts and procuratorates, etc., by the Supreme People's Court and the Supreme People's Procuratorate.").

administrative law and procedure, which are similar to procedural regulations for lower courts in administrative cases.[50] A notable proportion of these interpretations since 2001 involve administrative aspects of international trade and respond to issues surrounding China's recently acquired membership in the World Trade Organization.[51]

Fourth, the courts are not divided into federal and sub-federal/state levels. China's legal system and government are officially unitary in structure. In light of the growth in the number and scope of provincial regulations which are enacted by provincial legislatures, the central government has taken a variety of measures to ensure that this budding area of law in China does not turn into a semi-autonomous legal system.[52] Chinese law scholars have recently explored the federalist aspects of other judicial systems, but only those scholars who have emigrated from the PRC argue in print that China should emulate them.[53]

Chinese courts also cannot invalidate statutes using constitutional or legal principles, in contrast to the fifth characteristic of American-style judicial review. However, since China's accession to the World Trade Organization, robust discussions about judicial review, interpretation, and power have developed in academic and legal circles.

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[50] *See, e.g.*, 最高人民法院关于行政机关工作人员执行职务致人死亡构成犯罪的赔偿诉讼程序问题的批复 [*Comments of the Supreme People's Court Responding to Questions Concerning the Procedures for Determining Damages in Lawsuits Comprising Crimes Committed by Personnel in Administrative Organs While Carrying Out Duties Which Result in Human Deaths*] (promulgated Aug. 23, 2002, effective Aug. 30, 2002), *reprinted in* 最高人民法院司法解释 [JUDICIAL INTERPRETATIONS OF THE SUPREME PEOPLE'S COURT] 329-35 (2002) [hereinafter JUDICIAL INTERPRETATIONS OF THE SPC].

[51] *See, e.g.*, 最高人民法院关于海关行政处罚案件诉讼关系问题的解释 [*Interpretation of the Supreme People's Court Concerning Jurisdiction over Lawsuits about Customs Administration Punishments*], *reprinted in* JUDICIAL INTERPRETATIONS OF THE SPC, *supra* note 50, at 35-39; 最高人民法院关于行政诉讼证据若干问题的规定 [*Regulation by the Supreme People's Court Concerning A Number of Questions About Evidence in Administrative Litigation*], *reprinted in* JUDICIAL INTERPRETATIONS OF THE SPC, *supra* note 50, at 187-201, with accompanying official annotations at 201-39 (see especially the reference to the WTO on page 217); 最高人民法院关于审理反倾销行政案件应用法律若干问题的规定 [*Regulations by the Supreme People's Court Concerning a Number of Questions About Hearing Antidumping Administrative Cases*], *reprinted in* JUDICIAL INTERPRETATIONS OF THE SPC, *supra* note 50, at 439-50; 最高人民法院关于审理反补贴行政案件应用法律若干问题的规定 [*Regulations by the Supreme People's Court Concerning a Number of Questions About Hearing Antisubsidy Administrative Cases*], *reprinted in* JUDICIAL INTERPRETATIONS OF THE SPC, *supra* note 50, at 451-60.

[52] *See* Tahirih V. Lee, *The Future of Federalism in China*, *in* THE LIMITS OF THE RULE OF LAW IN CHINA 271 (Karen G. Turner et al. eds., 2000).

[53] For an example of an inquiry by a Chinese scholar into the federal judicial system of a country other than China, see 对阿根廷法律和司法机构的评估 [Jin Yongtong et al., *Toward a Critical Appraisal of Argentina's Legal and Judicial Bodies*], *in* 司法改革报告—有关国家司法改革的理念与经验 [REPORT ON JUDICIAL REFORM: READINGS AND ANALYSIS ON RELEVANT NATIONAL JUDICIAL REFORM] 34 (孙谦 & 郑成良编 [Sun Qian & Zheng Chengliang eds.], 2002).

As to the sixth characteristic, courts in China are not the ultimate authority on the parameters of their review. Within the court system, only the Supreme People's Court, through its authority to issue judicial interpretations, plays a role in defining the boundaries of judicial review. Some interpretations (解释, *jieshi*) set the rule that trial judges are decision-makers in a variety of settings, such as in litigating mediation agreements that break down or are deemed incorrect by a monitoring court.[54] For example, trial courts are directed not to recognize the results of mediations in certain circumstances.[55] Some interpretations are, indeed, regulations followed by an explanation signed by a justice and judicial assistants. Most interpretations spell out procedures. However, a few address questions of the scope of judicial power to interpret statutes.[56] Any power that the courts might have to enunciate a judicial review doctrine is limited by the absence of *stare decisis*. Also, the PRC Constitution, which gives the power of constitutional interpretation to the NPC, is a limiting factor. Although the NPC has delegated some authority to interpret statutes to the Supreme People's Court, the Supreme People's Procuratorate, and the State Council, the NPC has not so delegated the authority to interpret the Constitution.[57] The Chief Justice of the Supreme People's Court sets out procedures and policies for Chinese courts to follow.[58] Any power the courts might have to determine the scope of their review on a case-by-case basis is limited by the adjudication committees at every judicial level, which advise judges on how to conform their decisions to the current policy of the Chinese Communist Party.

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[54] The PRC Civil Procedure Law expressly provides for jurisdiction by the People's Courts over decisions of "People's Conciliation Committees." Each committee is assigned a court, which is supposed to monitor its decisions for correctness. *See* 中华人民共和国民事诉讼法 [Civil Procedure Law] art. 16. (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991) (P.R.C.), *available at* http://www.newsgd.com/business/laws/200305220025.htm (last visited Mar. 3, 2006) [hereinafter Civil Procedure Law]. Judges may also serve as mediators in lawsuits that are pending before them, though no mechanism for review of these settlements is provided. *See id.* at arts. 9, 85-91.

[55] *See, e.g.*, 最高人民法院关于审理涉及人民调解协议民事案件的若干规定 [*A Number of Regulations of the Supreme People's Court Concerning the Hearing Civil Cases Involving People's Mediation Agreements*], *in* JUDICIAL INTERPRETATIONS OF THE SPC, *supra* note 50, at 336-37.

[56] *See, e.g.*, 最高人民法院关于审理著作权民事纠纷案件适用法律若干问题的解释 [*An Interpretation of the Supreme People's Court Concerning A Number of Questions Regarding the Use of Statutes in the Hearing of Lawsuits About Civil Disputes Over Copyright*], *in* JUDICIAL INTERPRETATIONS OF THE SPC, *supra* note 50, at 362.

[57] *See* PEERENBOOM, *supra* note 46, at 317.

[58] The Supreme People's Court is responsible for administering the entire court system at every level, a job that includes circulating bulletins to the courts which set out new procedures or legal developments, training court personnel, and creating procedural rules to implement treaties related to the court system. *See* Susan Finder, *The Supreme People's Court*, 7 J. CHINESE. L. 145, 213-22 (1993); Xianchu Zhang, *Law of Civil Procedure*, *in* INTRODUCTION TO CHINESE LAW, *supra* note 29, at 413-14.

As to the seventh characteristic—independence from outside interference—Chinese courts issue their rulings under the supervision of government officials. As discussed above, intense supervision of the courts by other political institutions is a hallmark of the Chinese legal system.[59] In the name of "supervision," legislatures intervene in the judicial process at their respective administrative levels.[60] Courts do not review any issue without guidance from the Chinese Communist Party, but are guided toward their decisions, particularly in deciding cases deemed as "complex" or "big,"[61] by adjudication committees staffed by Party personnel at each court.[62] Supervision by the adjudication committees is justified as a check on judges by "the masses."[63]

At the same time, the Constitution and at least four major statutes (法律, *falü*) provide for court independence from some types of interference.[64] While the Chinese Communist Party is not prohibited from interfering in the judicial process, the law prohibits interference by "the people" and administrative organs. These provisions reflect a lingering fear of the chaos which prevailed in China during the Cultural Revolution, yet they do not indicate fear of the Party itself.

One feature that is recently shared by judicial review both in the United States and the PRC is the use of doctrine to limit the scope of this

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[59] *See* 王晨光, 浅论法院的依法独立审判权和人大对法院的监督权 [Wang Chenguang, *Discussing the Legal, Independent Judicial Power of Courts and the Supervisory Power of the National People's Congress Over Courts*], *in* 3 司法改革论评 [JUDICIAL REFORM REVIEW] 31 (张卫平编 [Zhang Weiping ed.], 2002).

[60] *See* CHEN, *supra* note 33, at 107.

[61] *See* 熊先觉, 司法制度与司法改革 [XIONG XIANJUE, THE JUDICIAL SYSTEM AND JUDICIAL REFORM] 77-78 (2003).

[62] *See generally* Woo, *supra* note 34. For a less critical approach, see 景汉朝, 中国司法改革策论 [JING HANCHAO, STRATEGIC DISCUSSION ABOUT CHINESE JUDICIAL REFORM] 55-80 (2002); CHEN, *supra* note 34, at 111 ("[B]efore judgment is delivered in important and difficult cases heard by a collegiate bench, the cases must first be discussed by the adjudicative committee, and in giving judgment the collegiate bench must implement the decision of the committee.").

[63] One professor at Beijing Law School terms it the "supervision of the masses." *See* JING, *supra* note 62, at 57.

[64] Albert Chen notes that, aside from Article 126 of the PRC Constitution, the following statutes provide for court independence from "administrative organs, social organizations and individuals": Article 4 of the Organic Law of the People's Courts (as amended in 1983), *see* 中华人民共和国人民法院组织法 [Organic Law of the People's Courts] art. 4 (promulgated by the Nat'l People's Cong., July 1, 1979, as amended through Sep. 2, 1983) (P.R.C.), *available at* http://www.jincao.com/fa/law01.20.htm (last visited Mar. 4, 2006); Article 4 of the 1982 Civil Procedure Law, *see* 中华人民共和国民事诉讼法 [Civil Procedure Law] art. 4 (promulgated by the Standing Comm. of the Nat'l People's Cong., Mar. 8, 1982, effective Oct. 1, 1982, expired Apr. 9, 1991) (P.R.C.), *available at* http://www.chinacourt.org/flwk/show1.php?file_id=2274 (last visited Mar. 4, 2006); Article 6 of the 1991 version of the Civil Procedure Law, *see* Civil Procedure Law, *supra* note 54, at art. 4; and Article 3 of the 1989 Administrative Litigation Law, *see* Administrative Litigation Law, *supra* note 27, at art. 3. *See* CHEN, *supra* note 33, at 107 n.19.

review. In the mid-1990s, the PRC central government began to permit the development of a doctrine of judicial review which appeared to loosen the constraints on judicial review. The Chinese scholars who worked on this project tried to meld Chinese and American concepts into a doctrine which expanded the scope of judicial review as embodied in the 1990 Administrative Litigation Law. Zhang Zhiming of the China Academy of Social Sciences in Beijing, for example, published an article in 1998 which delved into French, German, British, and American scholarship on statutory interpretation, in order to come up with a proposal for refining the PRC's doctrine on statutory interpretation. Zhang's conclusion that judges, when they decide cases, cannot escape the process of interpretation[65] represents an abrupt departure from PRC jurisprudence, which had stressed the fixed nature of law and the unitary nature of its application since the late 1970s.

Moreover, the PRC might be on its way toward developing its own Political Question Doctrine. The PRC jurist Wang Guiguo suggested in 1996 that the PRC was liberalizing its own strict prohibition on judicial review of state acts to more closely resemble the British approach. One example highlights a case in which PRC jurists regarded an act of state as one that furthers the public good.[66] Furthermore, the concept that "purely commercial" matters are, indeed, subject to judicial review is based on a line of United States court cases.[67] Wang's observation fits with a trend in China in the 1990s, in which laws and official pronouncements placed "politics" and "economics" at opposite ends of a spectrum. One effect of this official discourse is to separate those activities which are subject to control by the central government from those which may be regulated by local governments,[68] while decreasing the importance of the matters which are subject to local regulation. The strategy behind this separation is to put

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[65] 张志铭, 法律解释概念探微 [Zhang Zhiming, *Detailed Concepts of Statutory Interpretation*], 5 法学研究 [LEGAL STUDIES] 29 (1998).

[66] Wang Guiguo, *A Comparative Study on the Act of State Doctrine – With Special Reference to the Hong Kong Court of Final Appeal, in* LEGAL DEVELOPMENTS IN CHINA: MARKET ECONOMY AND LAW 249 (Wang Guiguo & Wei Zhenying eds., 1996).

[67] *Id.* at 260 (quoting the U.S. Supreme Court in *Alfred Dunhill v. Republic of Cuba*, 425 U.S. 686, 697-98); *see also id.* at 278 (quoting Republic of Philippines v. Marcos, 806 F.2d 344, 358-59 (1988)). Wang also quotes from an annex to the 1958 Sino-Soviet Treaty of Trade and Navigation which provided that "disputes regarding foreign commercial contracts" were justiciable. *Id.* at 271. Wang probably went too far when he concluded that "commercial activities have ceased to be recognized as acts of state" in courts around the world. *Id.* at 276. English courts have recognized expropriation and other takings as acts of state, and the dispossession of assets generates commercial consequences, both for the parties whose assets are taken and also for all others who are engaged in commerce in that place. *See* Nissan v. Attorney-General [1970] A.C. 179. Regardless of the scholarly basis to his arguments, however, Wang's status as a PRC jurist gives a semi-official tone to them, and they can be seen as signaling current PRC attitudes towards judicial review.

[68] *See* Lee, *supra* note 52, at 291-92.

a lid on the growth of legal power below the center, which has been underway since the early 1980s. Of course, the lexicon does not by itself accomplish this task. If judicial review is defined, in part, by excluding political questions, one must inquire what falls within the category of political questions. In other words, a political question doctrine can evolve to expand or contract judicial review. As with any dichotomy, the separation of politics from economics arrays itself along a spectrum, with politics at one end and economics on the other. Do political issues encompass matters in the mixed area between the two poles, such as public security, elections, birth control, immigration, and labor? An additional rule, or, at least, an implicit understanding, is necessary—one which assigns issues in the middle of the spectrum to one pole or the other, thereby increasing the magnitude of one of the categories and decreasing the other. In China in the 1990s, applying a political/economic dichotomy to judicial review was a way of, first, defining "political" as "non-economic,"[69] and second, characterizing all of the issues in the middle ground as "political" and therefore immune from judicial review. The resulting doctrine protects the government from suit in more situations than does the American Political Question Doctrine, but exposes the government to suit in more situations than does current PRC law, which shields government officials and bodies from suit in all cases except where a law has been erroneously applied or implemented.

These early forays into the doctrinal aspect of judicial review coincide with a governmental push toward academic exploration of judicial reform, which spawned a richer discussion of the possibilities of doctrine and jurisprudence to limit and expand judicial power in the early years of the 21st century.[70]

This survey shows that the Chinese style of judicial review does not accord judges the expansive power found in the American style of judicial review because it invests in the legislature the power of final review of the constitutionality of statutes and of the interpretation of the Constitution. Chinese judges are not the only judges in the world operating within such a constraint; British judges are similarly constrained, but they have more power to interpret the law because other factors, such as *stare decisis* and the power to interpret any law save those excluded by doctrine, give British judges more discretion than Chinese judges. The supremacy of the legislature over the courts in the Chinese system, coupled with the inability of judges to make precedent through case law, results in a Chinese

[69] *Id.* at 294-95.

[70] For a discussion of the inherent limitations of judicial power, see 孙万盛, 司法权的法理质问 [SUN WANSHENG, A JURISPRUDENTIAL INTERPRETATION OF JUDICIAL POWER] 134-36 (2001).

governmental system as far from the American notion of judicial review as any other legislative-judicial relationship in today's world.

IV. THE EXPORT OF AMERICAN-STYLE JUDICIAL REVIEW TO HONG KONG AND THE PRC

Another possible avenue for the expansion of judicial review powers of judges in the PRC might be the influence of the Hong Kong system on the PRC. The story of judicial review in Hong Kong since it reverted to PRC control in 1997 both supports and refutes the likelihood of such an expansion. Support lies in the argument that Hong Kong's judges have exercised greater powers of review since the handover, and might thus serve as an example of the expansion of judicial review powers to the PRC. However, several developments since 1997 refute this argument. First, Hong Kong's Chief Executive and his cabinet successfully pressured Hong Kong's highest court to back down from a decision that had expanded its powers of constitutional review. Second, the nature of judicial review in Hong Kong has been portrayed in the PRC as more limited than it is in reality. Third, the influence has also been reciprocal, with the PRC legal system influencing the courts in Hong Kong.

A. Hong Kong's Influence Has Expanded Judicial Review in the PRC

Hong Kong saw a drastic expansion of judicial review within two years of the handover. On January 29, 1999, the Hong Kong Court of Final Appeal, the highest court in Hong Kong after China resumed sovereignty, decided *Ng Ka Ling*,[71] arguably the Hong Kong equivalent of *Marbury v. Madison*. In *Ng Ka Ling*, the Hong Kong Court of Final Appeal staked out possibly the broadest scope of judicial review for itself and all other Hong Kong courts allowable under the Hong Kong Basic Law. This holding reversed the post-handover trend of the Hong Kong courts to construe their powers of review as more limited than those set out in the Sino-British Joint Declaration, the Hong Kong Basic Law, or the PRC doctrine on judicial review for Hong Kong. In a controversial reversal of a lower court's position, the Court of Final Appeal read this body of constitutional law as delegating to all Hong Kong courts final and full authority to invalidate both administrative and legislative acts.[72] With this reading, the Court of

[71] Ng Ka Ling & Ors v. Director of Immigration, [1999] 1 H.K.L.R.D. 315.

[72] *See* Cliff Buddle, *Following NPC Abode Verdict, Court to be Urged*, S. CHINA MORNING POST, Aug. 23, 1999, at 4 (describing the Court of Final Appeal's ruling as "sweeping . . . on abode laws");

Final Appeal attempted to create for itself the power of final review of laws and to confirm both that Hong Kong's courts could invalidate statutes, even those of the sovereign, and that they are also the ultimate arbiter of their own review parameters.

Ng Ka Ling could be viewed as an exercise of American-style judicial review. These powers constitute three of the seven hallmarks of American-style judicial review. The Court of Final Appeal introduced the finality of judicial review to Hong Kong courts, while the powers of invalidation and defining the scope of judicial review were exercised by Hong Kong colonial courts under British sovereignty. However, the transfer of sovereignty to China threw into question the continued validity of the latter two powers.

During the first two years of the Hong Kong Special Administrative Region ("SAR"), the parameters of judicial review were relatively undeveloped, notwithstanding the several constitutional provisions laying out those parameters. Moreover, no PRC law spelled out which body has the authority to clarify the parameters of judicial review so this remained a crucial question. The court system of Hong Kong, therefore, provided an important forum in which China's "one country, two systems" experiment was put to the test.

The legal traditions of the "two systems" differ over who has the final say about the parameters of judicial review. In the common law tradition, from which grew the legal system of colonial Hong Kong, courts can exercise judicial review if they choose. As pointed out previously, the principle of courts largely determining the parameters of their authority finds its strongest expression in *Marbury v. Madison*.

In *Ng Ka Ling*, for the first time, the Court of Final Appeal of the Hong Kong SAR ruled on which issues Hong Kong courts could consider

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see also Prepared Testimony of Jerome A. Cohen: Hearing on Hong Kong, China and the Rule of Law Before the Senate Foreign Relations Comm. Subcomm. on E. Asian and Pac. Aff. (July 1, 1999) (statement of Jerome A Cohen, Senior Fellow on Asia, Council on Foreign Relations; Professor of Chinese Law, New York University Law School; Partner, Paul, Weiss, Rifkind, Wharton & Garrison) ("Hong Kong's crisis came to prominence in January in a cluster of cases requiring its newly-minted Court of Final Appeal to interpret the Basic Law and related legislation in order to determine (i) which of several categories of mainland Chinese children who have at least one parent currently residing in Hong Kong are entitled to take up permanent residence in Hong Kong, and (ii) whether those entitled to permanent residence require an exit permit issued by the Chinese Government. The Court of Final Appeal's January 29 decision, disagreeing with the lower courts that had considered these questions, stunned Hong Kong and the Chinese Government."). The Court of Final Appeal ("CFA") overreached its authority under Article 158 by issuing its own interpretation of Basic Law Articles 22 and 24 without first requesting an interpretation from the NPC Standing Committee. Article 158 requires such a request whenever a court in Hong Kong needs to interpret a provision of the Basic Law "concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region," and Articles 22 and 24 mention the PRC and cover the subject of immigration between the PRC and Hong Kong.

independently and which issues they could consider with guidance from the NPC Standing Committee. This set of rulings, in three consolidated appeals brought by Ng Ka Ling and others, pronounced that any act of the PRC that affected Hong Kong was justiciable in Hong Kong courts without interference from the NPC Standing Committee.

This case tested whether Hong Kong courts could adopt an American style of judicial review because it involved a constitutional challenge to both an administrative decision and its authorizing statute. The administrative decision was a notice by the Director of Hong Kong's Immigration Department denying permanent resident status to several children from Mainland China who had legally entered Hong Kong before the enactment of both the Basic Law and the statute at issue, but whose visas had since expired. The statute was an amendment to Hong Kong's Immigration Ordinance enacted nine days after the handover, but retroactively dated to the date of the handover itself. The portions of the statute that were at issue, and which the Court of Final Appeal invalidated, were those that required such children to return to Mainland China to obtain a series of immigration documents to be rationed out according to a quota set by the PRC government.

The holding rested on the Court's interpretation of two sets of Basic Law provisions. One set was Articles 22 and 24, which covered the immigration status of the petitioners. The other set was Articles 19 and 158: the provisions for judicial review. Although immigration and judicial review are arguably matters which affect the relationship between the PRC and Hong Kong, the Court of Final Appeal did not request an interpretation from the NPC Standing Committee of the relevant Basic Law provisions.

As a preface to its interpretation of the immigration provisions of the Basic Law, the Court cut the broadest swath of authority given to Hong Kong judges. The Court stated that:

> It is for the courts of the [Special Administrative] Region to determine questions of inconsistency [with the Basic Law] and invalidity when they arise. It is therefore for the courts of the Region to determine whether an act of the National People's Congress or its Standing Committee is inconsistent with the Basic Law.[73]

[73] *See Ng Ka Ling*, [1999] 1 H.K.L.R.D., at 21. Note, however, that because the consistency of an act of the National People's Congress or its Standing Committee with the Basic Law was never at issue, the Court's discussion on this point is dictum.

Not only is the Court claiming Hong Kong jurisdiction over acts of the NPC, but it is also claiming an exclusive right when a law's conformity to the Basic Law is at issue. While the Court does not explicitly state that the NPC Standing Committee does not have the authority to determine whether its acts conform to the Basic Law, this is the implication of the double use of "[i]t is for the courts . . . ." This assertion was based on Article 31 of the PRC Constitution, which empowers the NPC to set up Special Administrative Regions, and provides the Hong Kong courts with the authority for this type of review. This concept was also grounded in Article 158 of the Basic Law, which emphasizes the independence of Hong Kong courts by using the words "on their own." The Court proceeded to fill in some of the gaps in the law on judicial review. It specified that the limits placed upon it by Article 158 applied only to it, the Court of Final Appeal, because of the words "final judgments." The Court stated that it needed to seek an interpretation from the NPC Standing Committee only when the issue fell into one of the two categories set out in Article 158, and even then, only when that issue affected the outcome of the case. Moreover, the Court asserted that it alone determined when an issue fell into one of those categories, and that it would only solicit an interpretation from the NPC Standing Committee for the provisions of the Basic Law that the Court determined fell into one of those categories and "not the question of interpretation involved generally." In other words, not only were all other issues in the case, even those necessary for reaching a decision, not covered by the interpretation, but even those provisions of the Basic Law which the NPC Standing Committee interpreted for the Court had to be applied to the issues by the Court itself.[74]

The Court of Final Appeal interpreted several provisions in Article 158 to fill in the gaps so as to maximize the jurisdiction of the Hong Kong courts over constitutional issues. "[F]inal judgments," for example, need not mean only Court of Final Appeal cases. It could mean, alternatively, *all* courts before they issue their final judgments, which includes anything immediately appealable. This is the common law rule, which the Court chose not to read into Article 158. In an explicit and broad delegation of authority, however, PRC law provided for judicial review in Hong Kong. The Basic Law, which simultaneously serves as the constitution of the Hong Kong SAR and constitutes the "supreme law" under a common law interpretation, and as a PRC national statute on par with other national statutes enacted by the NPC plenary (法律, *falü*), provides not only for the continued force of the English common law in Hong Kong after June 30,

[74] *Id.* at 16-23.

1997, but also for two types of review by Hong Kong SAR.[75] One type is the review of the constitutionality of certain official acts as against the Basic Law. This type of review calls for courts to interpret the provisions of the Basic Law. The other type is the review of official acts as against some type of legal standard. In each case, the Hong Kong courts are subject to instructions from another branch of government.

In either type of review, the question of what constitutes an official act is left open. Excluded from those acts which are reviewable against some type of legal standard are "acts of state." Two types of such acts are "defense" and "foreign affairs."[76] There is no explicit reference made to the Act of State doctrine in this provision. The qualifier "foreign affairs" might be construed as such a reference but for the accompanying language of "defense" and "such as," which expand the scope of this exemption beyond what would be recognizable as the Act of State doctrine. Thus, despite the qualifier "foreign affairs," the phrase "acts of state" may not be a reference to the narrow English, American, or international doctrines, but a generic term that carries no meaning beyond the words themselves.[77] Even though Wang Guiguo asserts that the drafters of the Basic Law "directly borrowed [the phrase] from the common law," he does not conclude from this that interpreters of the phrase should limit themselves to the common law doctrine.[78]

It is not clear whether the "acts of state" exempted from judicial review might range from a lower level administrative decision all the way up to the enactment of a statute, an omission which would expand the scope of this exemption beyond that of the British Act of State doctrine. Article 158 of the Basic Law provides that Hong Kong courts may review official acts against some type of legal standard, except as to issues "which are the responsibility of the Central People's Government [of the PRC], or concerning the relationship between the Central Authorities and the Region."[79] The four categories of issues which the Basic Law posits are susceptible to limited judicial review—"defense," "foreign affairs," "the responsibility of the Central People's Government," and "the relationship between the Central Authorities and the Region"—are not further defined in the Basic Law, nor are they on their face terms which necessarily lend themselves to narrow interpretation.

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[75] 香港基本法 [Basic Law] art. 18 (H.K.) [hereinafter BASIC LAW].
[76] BASIC LAW art.19.
[77] Interview with 王晨光 [Wang Chenguang], Faculty of Law, City University of Hong Kong, in Hong Kong (May 1998) (on file with author).
[78] *See* Wang, *supra* note 66, at 275.
[79] BASIC LAW art. 158.

Yet, even for these four categories of issues, the courts may be free to interpret before an interpretation or certificate is issued. Moreover, these provisions do not specify that a body outside the court system will decide when a certificate or interpretation is warranted. In other words, these four categories, as broadly worded as they are, are susceptible to interpretation, and there is nothing in the text of these provisions to prevent the courts from interpreting them narrowly.

The Basic Law is also silent on whether Hong Kong courts may interpret the PRC Constitution, thereby leaving open the possibility that their review power extends as far as interpreting the document that refers to itself as the "supreme law" of China. As a part of the PRC, Hong Kong must be subject to certain portions of the PRC Constitution, but the PRC government has not explicitly identified which constitutional provisions it believes apply to the Special Administrative Region. The PRC Constitution vests the sole power to interpret it in the NPC, but the Basic Law gives a "high degree of autonomy to Hong Kong" and vests in its judges the power to interpret the Hong Kong SAR's constitution as to issues that fall within that autonomy.

Apart from requiring a request for "an interpretation" from the government as to "acts of state," Article 19 leaves the procedures for conducting this type of review largely undefined. Nor does the Basic Law spell out whether courts may invalidate the official acts, in whole or in part, that are under review. It provides merely that the courts of the Hong Kong SAR interpret "the provisions of this [Basic] Law which are within the limits of the autonomy of the Region."[80] The Basic Law does not explicitly prohibit Hong Kong courts from determining whether the instant case calls for a certificate as to facts from the Hong Kong executive or an interpretation of the Basic Law from the NPC Standing Committee. Nor is there anything explicit in the relevant Basic Law provisions which limits the Hong Kong courts' power to review any issue where no intervention of this type is needed. This provision therefore leaves unanswered questions such as whether the Hong Kong courts merely function as a forum for airing constitutional questions before they are sent up to the NPC Standing Committee, or whether the Hong Kong courts may independently accept constitutional questions as framed by the parties, or recast the questions themselves and then engage in a *de novo* analysis, applying the provisions of the Basic Law that they find relevant to the instant issue with unfettered discretion. The Basic Law uses both the terms "adjudicate" and "interpret" to describe the review authority of the Hong Kong courts,[81] suggesting that

[80] *Id.*
[81] *Id.*

the courts may do more than simply air constitutional questions before they go up to the NPC Standing Committee.[82] The language of the 1995 agreement on the Court of Final Appeal does not add detail to the procedure set out in the Basic Law, nor does it outline a different role of judicial review for the Court of Final Appeal and the rest of the Hong Kong courts.

The other major constitutional document providing for judicial review in Hong Kong is the Sino-British Joint Declaration of 1984. The Joint Declaration gave an implied guarantee under both PRC and international law that the scope of judicial review in Hong Kong would not diminish, and, indeed, would expand under Chinese sovereignty.[83]

Furthermore, the "judicial power" that was to "be vested in the courts" of the SAR was to be exercised "independently and free from any interference."[84] The only limits upon the discretion of judicial decisions mentioned in this document were "the laws of the Hong Kong Special Administrative Region and [to a lesser extent] precedents in other common law jurisdictions."[85]

Thus, we see in PRC law an explicit delegation of authority to Hong Kong courts to review constitutionally and even politically sensitive issues such as acts of local government and statutes, and to interpret independently the Basic Law or issues which are purely local in character. Some of the parameters of this delegation of authority are not spelled out in the Basic Law or any other law and naturally await elaboration by courts. However, the constitutional basis for judicial review in the Hong Kong SAR is stronger than in the PRC, even if it is more limited than under colonial rule. In the PRC, judges may not interpret the PRC Constitution and, under the 1990 Administrative Litigation Law, individuals may challenge only a narrow band of official acts. By giving Hong Kong judges the authority to review a wider band of official acts and laws than their PRC counterparts, the PRC has fulfilled its crucial promise to the SAR that it will enjoy "a high degree of autonomy."

The introduction of American-style judicial review in January of 1999 quickly started to take root. The expansion of the scope of judicial

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[82] *See* YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 284 (1997).

[83] *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*, Section III, Dec. 19, 1984. An English version can be found in PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK 45, 49 (Andrew Byrnes & Johannes Chan eds., 1993). ("[T]he judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication.")

[84] *Id.* at 49-50.

[85] *Id.* at 50.

review wrought by *Ng Ka Ling* prompted a dramatic increase in the number of constitutional cases filed in Hong Kong. Until then, the only constitutional issues heard in the SAR courts were in the first instance trial of the Oriental Press Group's free speech case[86] and several immigration cases.[87] Thereafter, litigants invoked the Basic Law in their arguments not only concerning immigration and the two appellate hearings of the Oriental Press Group's case, but also regarding voting rights issues,[88] a property issue of constitutional magnitude,[89] and criminal law issues.[90]

Two voting rights cases came before the Hong Kong courts between January and July of 1999. In each case, the plaintiff was a life-long resident of a village in the New Territories and claimed that a village rule prohibiting him from running for elected office or from voting in village-wide elections contravened Article 39 of the Basic Law and was, therefore, unlawful. In both cases, the Court agreed, reasoning that this Article had incorporated into Hong Kong law Article 25 of the International Covenant of Civil and Political Rights, which provides for a broad "right to take part in the conduct of public affairs. There can be no doubt that the election or choice of a village representative is a public affair."[91]

In two criminal cases decided just weeks before the NPC Standing Committee handed down its interpretation of the constitutional provisions in *Ng Ka Ling*, defendants raised a creative constitutional argument in an attempt to avoid conviction at the trial level. In both, the defendants argued that Articles 28 and 87 of the Basic Law and Article 5 of the Hong Kong Bill of Rights Ordinance changed the scope of intent sufficient to prove murder such that the evidence in each case was insufficient to convict or sentence the defendant. In both cases, the Court disagreed with the argument that the transfer of sovereignty changed the common law requirement of intent for murder in this manner, and its interpretation of the Basic Law was part of its basis for rejecting the argument.

In one of these cases, the defendant argued that these provisions, in addition to Article 8, narrowed the scope of intent to include only the intent

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[86] Oriental Press Group Ltd. & Ors., [1998] 2 H.K.L.R.D. 976.

[87] *See, e.g.*, Thang Thieu Quyen & Ors v. Director of Immigration & Anor, [1998] 2 H.K.L.R.D. 179 (C.F.A.).

[88] *See, e.g.*, Chan Wah v. Hang Hau Rural Committee & Anor, [1999] 2 H.K.L.R.D. 286 (C.F.I.); *see also* Tse Kwan Sang v. Pat Heung Rural Committee, [1999] 3 H.K.L.R.D. 267 (C.F.I).

[89] *See, e.g.*, Agrila Ltd. & Ors. v. Commissioner of Rating and Valuation, [1999] H.K.E.C. 938 (L.T.), at paras. 1, 2, and 20.

[90] *See, e.g.*, HKSAR v. Chan Chui Mei, [1999] H.K.E.C. 1101 (C.F.I.); *see also* HKSAR v. Pun Ganga Chandra & Ors., [1999] 2 H.K.L.R.D. 648 (C.F.I.).

[91] Chan Wah, [1999] 2 H.K.L.R.D. 286 (C.F.I.). The other voting rights case is *Tse Kwan Sang v. Pat Heung Rural Committee* [1999] 3 H.K.C. 267 (C.F.I).

to kill or the intent to perform an act that endangers life, thereby excluding an intent to cause grievous bodily harm, the additional basis for common law murder, which was part of the law of colonial Hong Kong. The Court reasoned that the Basic Law provision in Article 8 providing for the maintenance of the common law, combined with the language in Article 87 stating that the principles which underpinned criminal proceedings before the transfer "shall be maintained," left no doubt that the substantive law of murder had not changed simply by virtue of the transfer.[92]

In the other case, the defendant argued that a sentence of life in prison for murder upon proving intent to cause serious harm, which was called for by these provisions, constituted arbitrary and unlawful punishment. Here the Court held that Articles 28 and 87 did not change the common law of murder so as to render life imprisonment unconstitutional for this type of murder conviction. Before it reached this conclusion, the Court emphasized that "if any of those provisions have the effect of changing the common law, then it is open to a court to declare the law as it finds it after the change."[93]

The meaning of the term "ratable value" in Article 121 of the Basic Law was at issue in the consolidation of several appeals before the Lands Tribunal of Hong Kong from administrative decisions which set real estate tax rates owed by private owners of land to the government. The tribunal considered two possible interpretations of the term, namely its "liability sense" and its "quantum sense." The former referred to the formula for calculating rates provided in the Government Rent (Assessment and Collection) Regulation of June 6, 1997, which was based on the last rate paid. The latter referred to the use by landlords and tenants, when they litigated claims before this tribunal, of ratable values as evidence of the market rate for rent. This latter sense was not subject to the constraints of the Regulation and the tribunal adopted this interpretation in order to avoid the absurd result that lands that had never been taxed, such as land newly slated for development, could never be taxed.[94]

Thus, in the five months following *Ng Ka Ling*, the Hong Kong courts showed themselves to be unconstrained in their interpretation of the Basic Law and in their review of administrative decisions when deciding these cases. During this period, no challenge to Hong Kong's statutes reached the courts and, therefore, the potential of *Ng Ka Ling* to stake out an American-style of judicial review was not fully tested. Without knowing anything about the reaction in the PRC to this expansion of

[92] Chan Chui Mei, [1999] H.K.E.C. 1101 (C.F.I.).
[93] Pun Ganga Chandra & Ors., [1999] 2 H.K.L.R.D. 648 (C.F.I.).
[94] Agrila Ltd., [1999] H.K.E.C. 938 (L.T.), paras. 1, 2, and 20.

judicial review in Hong Kong, one could surmise that it sent a powerful signal to judges and other jurists in the PRC about the ability of courts within the PRC to stake out broad powers of constitutional interpretation for themselves. Wherever this signal fell on open or progressive minds, it would have inspired people to think more seriously and positively about expanding judicial review in the PRC.

B. Refuting the Possibility that Hong Kong Serves as a Conduit for American Judicial Review to the PRC

However, the sudden expansion of judicial review in Hong Kong provoked a negative reaction from some quarters in the PRC. The PRC government did not react strongly to *Ng Ka Ling* until June 26, 1999, nearly six months after the decision. However, four mainland scholars—reportedly at the behest of the PRC government—and some Hong Kong drafters of the Basic Law launched loud criticisms of the case in the press almost immediately. They asserted that the opinion challenged the supremacy of the PRC central government and, in particular, of the NPC Standing Committee. The expressions of displeasure by mainland officials were more muted, labeling the decision a "mistake" and calling for it to be "rectified."[95]

1. Pressure from Hong Kong's Executive to Undo the Expansion of Judicial Review

Nonetheless, without the intervention of Hong Kong's own Executive, the PRC might have done nothing more. PRC law offered no guidance as to the appropriate response that the PRC government should take toward a Court of Final Appeal ruling that relied on an interpretation of the Basic Law with which it disagreed. Neither the PRC Constitution, nor the Joint Declaration, nor the Basic Law provide for the central government to intervene in a Hong Kong court decision after it has been handed down. In addition, Article 158 of the Basic Law contains two passages which virtually prohibit the NPC Standing Committee from issuing its own interpretations to Hong Kong courts after they hand down their final judgments. Article 158 directs the Hong Kong courts to seek

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[95] *See* No Kwai-Yan, *Lawyers Could Have Done More*, S. CHINA MORNING POST, Feb. 2, 1999, at 4; Angela Li, *Step Down Call to Beijing Advisor*, S. CHINA MORNING POST, Feb. 4, 1999, at 4; Elisabeth Rosenthal, *Ruling Sparks China-Hong Kong Clash*, ST. PAUL PIONEER PRESS, Feb. 11, 1999, at 9A; *Beijing's Hawks Bare Their Talons*, S. CHINA MORNING POST, Feb. 14, 1999, at 8; Mark Landler, *In Clarification on Immigrants, Hong Kong Court Bows to China*, N.Y. TIMES, Feb. 27, 1999, at A5.

such interpretations "before making their final judgments" and assures that "judgments previously rendered shall not be affected."

On the other hand, the law leaves a small opening through which the NPC Standing Committee can assert its authority. Namely, Article 158 is silent as to whether *unsolicited* interpretations may be sent to Hong Kong courts after their final adjudications. Furthermore, the phrase "judgments previously rendered" refers to judgments rendered before the Basic Law came into effect. Still, there would be no need to specifically protect these judgments from being reopened by the NPC Standing Committee unless it actually possessed the power to reopen judgments in Hong Kong.[96]

Based on this reading, the NPC Standing Committee could enact a statute authorizing itself to hand down interpretations after final rulings in Hong Kong courts, essentially reopening any judgment in Hong Kong and undermining the finality so heavily stressed in common law courts. Upon enactment of such a statute, the NPC Standing Committee would be free to reopen the *Ng Ka Ling* decision by sending the Court of Final Appeal a different interpretation of Basic Law Article 24.

However, these actions alone would not ensure the reversal of *Ng Ka Ling*, or those portions of it which the NPC Standing Committee might target. Article 158 provides that it would then fall upon the Court of Final Appeal to apply, "on its own," the interpretation to the facts of the case. Still, with the Basic Law Committee advising it, the members of which are highly accomplished jurists and are on the record as opposing portions of *Ng Ka Ling*, the interpretation would likely be crafted in such a way as to remove the bulk of the Court of Final Appeal's discretion in applying it.

During the first half of 1999, Hong Kong's Chief Executive Tung Chee-hwa and his Secretary of Justice, Elsie Leung, traveled to Beijing to request an interpretation of the Basic Law from the NPC Standing Committee that would contradict the interpretations published in *Ng Ka*

[96] The interpretation issued by the NPC Standing Committee included its interpretations of Basic Law Articles 22 and 24 and, following those, an application of those interpretations, which exempted the named parties to the *Ng Ka Ling* lawsuit from the inevitable reversal of the decision that had to come about with the NPC Standing Committee's interpretation. The Standing Committee could have chosen to apply its interpretation to the parties of the instant case—it simply, for reasons unexplained, chose not to apply its interpretation in this case. Article 158 of the Basic Law allows the NPC to interpret the Basic Law, but it does not provide for it to apply interpretations. As there is no law in the PRC, including the Constitution, which provides for the NPC to apply its interpretations of law, the NPC Standing Committee could have issued another such interpretation and applied it to the instant case. Moreover, another sense in which the NPC Standing Committee interpretation overruled Ng Ka Ling was that it prompted the Court of Final Appeal to explicitly accept such interpretations, even those issued after the CFA decisions to which they pertain. *See* Lau Kong Yung v. Director of Immigration [1999] 3 H.K.L.R.D. 778 (C.F.A.), *available at* www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_10_11_99.htm (last visited Mar. 3, 2006).

Ling.[97] Finally, on June 26, the NPC Standing Committee handed down an interpretation of Basic Law Articles 22(4) and 24(2)(3) which seemed aimed at reversing the Court of Final Appeal's judgment in *Ng Ka Ling*.[98] Prior to this, no SAR court had requested a certificate or the NPC Standing Committee's interpretation, nor had the NPC Standing Committee done so on its own volition. In its interpretation, the NPC cited Articles 67 and 158 of the Basic Law as the source of its authority to issue this interpretation. In summary, it claimed that whether the offspring of permanent residents of Hong Kong are born before or after the handover is irrelevant. When they are born, at least one parent must be a permanent resident of Hong Kong.[99] The NPC Standing Committee's interpretation further established that Hong Kong and its courts were bound to the Standing Committee's determination of who could legally enter Hong Kong.

The interpretation did not include an extensive elaboration on the judicial review authority of the Hong Kong Court of Final Appeal, or of Hong Kong courts in general. It was prefaced by the following language: "The Court of Final Appeal did not rely on Paragraph 3 of Article 158 of the Basic Law and request the NPC Standing Committee to produce an interpretation . . . ."[100] This language suggests that the Court of Final Appeal failed to recognize the limits placed upon its review power, but does not set out a detailed explanation of this constraint. Namely, the NPC Standing Committee did not explain what, in this case, should have triggered the procedure by which the Court requests an interpretation from the Standing Committee.

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[97] *See* Interview with Martin Lee, President, Democratic Party of Hong Kong; Member, Hong Kong Legislative Council, in Hong Kong (July 28, 2000) (on file with author).

[98] *See id.* Furthermore, in its final paragraph of the decision, the NPC Standing Committee added that its interpretations would apply to everyone but the named parties to *Ng Ka Ling*—even parties similarly situated in pending cases, in addition to parties in any future litigation. The authority of the Court of Final Appeal to interpret the Basic Law cannot be ultimate if the NPC Standing Committee can limit the effect of any of the Court's legal interpretations to the instant parties in any given case. Indeed, this flies in the face of a common law understanding of court-made precedent and constitutional interpretation. More to the point, if one accepts the validity of the NPC Standing Committee's 1999 decision, then the NPC Standing Committee is prevented only by the precedent set in that very decision, and not by any law on the books in either the PRC or Hong Kong, from retroactively applying its interpretations of the Basic Law to the parties in the case at hand.

[99] 全国人民代表大会常务委员会, 全国人民代表大会常务委员会关于 "中华人民共和国香港特别行政区基本法" 第二十二条第四款和第二十四条第二款第三款的解疑 (草案) (1999年6月26日第九届全国人民代表大会常务委员会第十次会议通过) [Draft Interpretation of the Standing Committee of the National People's Congress Concerning the PRC Hong Kong Special Administrative Region Basic Law Article 22(4) and Article 24(2)(3)], (issued June 26, 1999, 10th Meeting of the Ninth Plenary Session of the NPC Standing Committee), published online in the 九届全国人大常委会第十次会议专题报道 [SPECIAL REPORT ON THE TENTH MEETING OF THE NINTH PLENARY SESSION OF THE NATIONAL PEOPLE'S CONGRESS STANDING COMMITTEE], *at* www.peoplesdaily.com (last visited Mar. 3, 2006).

[100] *Id.*

The NPC Standing Committee put an end to the effort by the Hong Kong Court of Final Appeal to introduce American-style judicial review by limiting two of its most important features: the finality of constitutional interpretation and the notion that courts are the ultimate interpreters of the Constitution. The Court must now assume that its decisions are susceptible to being overturned by the NPC Standing Committee, or at least those decisions like *Ng Ka Ling* which depend on an interpretation of the Basic Law. However, the NPC Standing Committee decision left untouched the power of courts to interpret the precise scope of their review power, so they may theoretically continue to clarify the precise boundaries of their review power. Moreover, its interpretation also did not prohibit any of Hong Kong's courts from interpreting Hong Kong's Constitution or reviewing whether administrative acts comply with it.

Because the authority to issue final interpretations of the Constitution is one of the hallmarks of American-style judicial review, the court's exercise of judicial review in *Ng Ka Ling* was more akin to American-style review, rather than other types of judicial review previously exercised in Hong Kong, chiefly British and Chinese. While the NPC Standing Committee's decision did not sound the death knell for judicial review in Hong Kong,[101] it did stymie the Court of Final Appeal's attempts to posit itself as the final arbiter of Hong Kong's Constitution.

The precedent of Hong Kong officials seeking a constitutional interpretation from the PRC's legislature was repeated in the spring of 2005, when the Hong Kong government sought an interpretation on whether the Basic Law allows a partial term for the Chief Executive. In this instance, Tung Chee-hwa had decided to step down from the position of Chief Executive before the completion of the term mandated by the Basic Law. Would the next Chief Executive simply serve out the remainder of

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[101] Several scholars in the United States predicted the demise of judicial review in Hong Kong after June 30, 1997. Notable examples are Jared Leung, *Table of Content: Concerns Over the Rule of Law and the Court of Final Appeal in Hong Kong*, 3 ILSA J. INT'L & COMP. L. 843 (1997); Ann D. Jordan, *Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L.J. 335 (1997); Donna Lee, Note, *Discrepancy Between Theory and Reality: Hong Kong's Court of Final Appeal and the Acts of State Doctrine*, 35 COLUM. J. TRANSNAT'L L. 175 (1997). In her excellent studies of constitutional freedoms in the Hong Kong SAR, Frances H. Foster sounded a pessimistic note about their survival and suggested that the court system would not be an ideal place to launch defenses of those freedoms. *See* Frances H. Foster, *Translating Freedom for Post-1997 Hong Kong*, 76 WASH. U. L.Q. 113, 143-45 (1998); Frances H. Foster, *The Illusory Promise: Freedom of the Press in Hong Kong, China*, 73 IND. L.J. 765, 791-95 (1998).

For some English-language publications in the popular media that expressed fears about the fate of Hong Kong's judiciary after the retroversion, see Edward A. Gargan, *Hong Kong Fears Unraveling of Rule of Law*, N.Y. TIMES, May 7, 1997, at A1; William H. Overholt, *Twelve Tips for the Markets*, NEWSWEEK, May 19, 1997, at 48-50.

Tung Chee-hwa's term, or would he serve a full-length term specified in the Basic Law? As the question remained open, an interpretation was sought in the hope of avoiding litigation which might have delayed the election of the new Chief Executive at the start of a new official term in the summer of 2005. Here, the Hong Kong government sought to preempt the Hong Kong Court of Final Appeal's opportunity to issue its own interpretation. Those who wished to truncate the influence of the front-runner for the Chief Executive position also hoped to obtain an interpretation from the NPC Standing Committee allowing a partial term.

Thus, the PRC rejected the American model of judicial review and adopted a blend of the British approach long used in colonial Hong Kong and the PRC's own approach to judicial review. The existing blend mixes mostly British elements with just a single feature of the Chinese judicial process. The retained elements of the British approach allow Hong Kong judges to interpret the Constitution and to invalidate local statutes on some issues, including defining the parameters of judicial review, using common law doctrines to limit review power and investing the sole power of final review in a legislative body. The Chinese element is the central government's ability to direct a particular court on how to interpret a key issue in a case. The NPC Standing Committee's decision resembles the decisions sent from the central Party to courts through adjudication committees, in that the decision was not provided for in any Hong Kong law or court procedure, including the Basic Law. It was not, for example, a response to a request from Hong Kong as provided for in Article 158 of the Basic Law. As with adjudication committees in the Mainland system, it is not a codified procedure, but a process which nonetheless allows the NPC to exercise its role as the sole interpreter of the law, as provided for in the PRC Constitution. Moreover, this mechanism resembles adjudication committees in that it allows the PRC central government to control outcomes in court cases, as on the Mainland.

2. Influence of PRC Judicial Review Upon Hong Kong

The influence of PRC law upon Hong Kong also does not bode well for American-style judicial review in Hong Kong. With the support of Elsie Leung, Hong Kong's Secretary for Justice, and, among others, professors at Hong Kong's most prestigious law schools, judges and lawyers are becoming increasingly exposed to PRC law and to the view that the Basic Law is an "interface" between PRC and Hong Kong law.

According to this view, this interface is porous enough to permit PRC law to infiltrate the decisions of Hong Kong's judges.[102]

The channels of influence are only growing stronger. The first Hong Kong lawyers have already passed the PRC bar examination and thousands of Hong Kong residents are studying law at the PRC's top law schools. In addition, Hong Kong's law schools are offering more and more instruction on PRC law and Mandarin is used in Hong Kong's courts and law offices. Lastly, cooperation between the governments of Hong Kong and the PRC on various fronts—legislative, police, border control, business, media, education—has contributed to the PRC's legal influence on Hong Kong.[103] These influences will only grow stronger with time.

PRC law's influence upon Hong Kong law will likely encompass the development of judicial review in Hong Kong. While it will not nullify the influence of Hong Kong law upon the PRC, the currents flowing from the Mainland to Hong Kong appear stronger. If nothing else, Hong Kong jurists will surely pause before actively campaigning to promote the Hong Kong model of judicial review in the PRC.

V. CONCLUSION

We now come full circle to the ultimate question: Can American-style judicial review be transplanted to China? Probably not now. There is a slight possibility that, within the next generation, judicial review will expand, as it has done, to an extent, since the enactment of the Administrative Litigation Law of 1990, and with greater speed after China's entry to the World Trade Organization. Still, continued momentum depends, in part, on the continued liberalization of the National People's Congress and the willingness of the Chinese Communist Party to loosen its grip on the judiciary.

It is also plausible to suggest that judicial review in China will expand because this is a natural and inevitable force in judiciaries throughout the world. In France, for example, despite a revolution which virtually wiped out all courts in the country two centuries ago, judges have gradually regained influence and power. While the official description of French courts portrays mere bureaucrats bound, by statute, to robotically apply statutory law with barely any interpretation and no recognition of the legal force of their decisions beyond the instant case, the actual work of French judges involves the liberal interpretation of statutes. While no

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[102] *See* Interview with Martin Lee, *supra* note 97.

[103] *See* Tahirih V. Lee, *Mixing River Water and Well Water: The Harmonization of Hong Kong and PRC Law*, 30 LOY. U. CHI. L. J. 627 (1999).

French court, save the quasi-judicial Constitutional Council, is officially allowed to consider constitutional questions, the Court of Cassation, France's highest court in fact, has, since France's entry into the European Union, considered the constitutional question of whether French courts can apply European law without French legislation importing it piecemeal into France.[104]

However, even if one were to conclude that China is headed down a path of expanded judicial review, one should pause before jumping to the conclusion that this path is necessarily desirable for China. To accurately judge such a question, it is necessary to reflect upon the quality of judges in China and their training and ethics. Corruption in the Chinese judiciary is widely acknowledged, as is the selection of judges based on loyalty to the Chinese Communist Party, rather than professional credentials.

Nonetheless, with the rapid advance of legal education in the PRC, it may simply be a matter of time before judges in China acquire a greater respect for the law and come to value legal expertise rather than political loyalties. With such developments, judges armed with the power to review the constitutionality of laws and administrative acts might help China with many of its important initiatives, such as improving the environment, education, and the economy. It is, perhaps, no accident that the first case of constitutional review in the PRC involved the unjust deprivation of a college education.[105]

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[104] *See, e.g.*, Société Stricker Boats Nederland v. Société Entreprises Garoche, Cour de Cassation, Criminal Chamber, May 3, 1973, Bulletin, arrêt 349; [1974] C.M. Law Rev. 469; Re Guerrini, Cour de Cassation, Criminal Chamber, Jan. 7, 1972, *as cited in* Judge Manfred Simon, *Enforcement by French Courts of European Community Law*, 90 LAW Q. REV. 467, 481 (1974).

[105] *See* Liu et al., *supra* note 38, at 77.