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Mixing River Water and Well Water: The Harmonization of Hong Kong and PRC Law

The 1998 Wing Tat Lee Lecture*
Tahirih V. Lee**

The Chinese language is rich with pithy yet evocative sayings. Their terseness makes them easy to remember, fun to use, and relatively safe when the intended meaning contradicts official discourse. One such saying, which enjoys a great deal of popularity in Hong Kong, is he soi bat fan hah soi. Roughly translated, this means, "River water does not mix with well water." The saying's underlying meaning cannot be found in dictionaries or official sources. According to rumor, however, river water represents Guangdong' natives and well water refers to Hong Kong natives. A likely reason for the saying's popularity in Hong Kong is its emphasis on the gulf between Hong Kong locals and the inhabitants of mainland China. The saying implies that this gulf exists even between those as close to each other as the other side of the border between Hong Kong and China's Guangdong Province.

Why emphasize the distinction between Hong Kong and southern China? Such a distinction flies in the face of the economic and political integration of Hong Kong and China, particularly Southern China, that has proceeded without interruption since the early 1980s. Since then, Hong Kong's trade is largely based on exports from China on their way to various places in the world, and its investment is largely foreign capital using Hong Kong as a regional headquarters for

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*As a result of a gift to the Loyola University Chicago School of Law by Wing Tat Lee, a Hong Kong businessman and philanthropist, the School of Law established a lecture series in the area of international and comparative law. The Wing Tat Lee lectureship has enabled the School of Law to participate in ventures such as the Central and Eastern European Law Initiative (CEELI) of the American Bar Association and to invite other speakers to the campus.

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1. Guangdong is a province in southern China.
eventual destination somewhere in mainland China. The distinction between Hong Kong and southern China further blurred on July 1, 1997 when Hong Kong officially became part of the People’s Republic of China ("PRC") and subject to the sovereignty of the government of mainland China. On that date, it became a Special Administrative Region ("SAR") of the PRC, an administrative unit invested with more autonomy than the provinces of the PRC, but which nonetheless may not conduct its own foreign affairs or operate its own military.

Hong Kong’s need to distance itself from mainland China stems from its fear that Beijing will not follow through on its promises of autonomy. Hong Kong’s new constitution, the Basic Law, recognizes this need by providing that Hong Kong will enjoy “a high degree of autonomy” (gaodu zizhi), and will be a separate “system” within the single “nation” of China (yiguoluangzhi). The Basic Law elaborates that Hong Kong’s autonomy extends so far as to allow for continuity of Hong Kong’s economy, society, and law. It provides that “the previous capitalist system and way of life shall remain unchanged for 50 years.” It is widely acknowledged in Hong Kong that the PRC’s top leaders in Beijing intended these provisions to promote Hong Kong’s continuity during its transition from a British colony to a PRC Special Administrative Region ("SAR").

Is the popular fear in Hong Kong unfounded? Examining this question two years after Hong Kong’s return to Chinese sovereignty, there is little doubt that the official assurances of continuity have blossomed into the preservation of most of Hong Kong’s legal system and the continuation of Hong Kong’s economic and political activities. Despite indications of continuity, however, Hong Kong’s legal system has changed since July 1, 1997. The most notable changes have brought Hong Kong’s legal system into closer alignment with PRC law. Legal comparativists and specialists in international business name this type of convergence “legal harmonization.”

2. See Basic Law, Art. 158, reprinted in Ian Dobinson & Derek Roebuck, Introduction to Law in the Hong Kong SAR 147 (1996) [hereinafter Basic Law].

3. See Basic Law, supra note 2, at Preamble.

4. Basic Law, supra note 2, at Art. 5.

5. See Ng Ka Ling, Ng Tan Tan and Director of Immigration (Final Appeal no. 14 of 1998), Tsui Kuen Nang and Director of Immigration (Final Appeal no. 15 of 1998), and Director of Immigration and Cheung Lai Wah (Final Appeal no. 16 of 1998) at <http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_14_16_98.htm>, at 19 (stating “the Basic Law was enacted to implement China’s basic policies regarding Hong Kong to remain unchanged for 50 years . . .”).
Legal harmonization is important to lawyers conducting business in more than one country because harmonization decreases transaction costs. When people of different legal systems come together in a transaction, they must learn and adjust to the other system, and they must perform a second set of analyses to conform to the law that governs the transaction. Legal harmonization in Hong Kong and China is also of interest to China watchers, politicians, and investors alike, who are looking for signs of the growth of China’s influence in Asia.

This essay will briefly describe the signs of continuity of Hong Kong law that provide the context within which Hong Kong's legal system is changing. This essay will next discuss the legal harmonization occurring between Hong Kong and the PRC. Finally, this essay will examine the groundwork for such harmonization made prior to Hong Kong’s assumption of SAR status and will attempt to place Hong Kong’s ongoing legal changes in perspective.

I. SIGNS OF CONTINUITY

Official publicity and public protests, among other things, demonstrate signs of continuity within Hong Kong’s legal system. Official publicity from the government of Hong Kong encourages the perception of legal continuity in Hong Kong. Dozens of articles published by the government-controlled PRC press emphasize the leadership’s promises of “Hong Kong people ruling Hong Kong” and “one country, two systems.” The first leader of the Hong Kong SAR, Chief Executive Tung Chee-hwa, gave several public addresses asserting that nothing had altered “the rule of law” in Hong Kong. The President of the Hong Kong Law Society, Anthony Chow, conducted a campaign during the summer and fall of 1997 which promoted the idea that the legal system had not changed.

6. See infra Part I.
7. See infra Part II.
8. See infra Part III.
9. See Boast of Legal Cornerstone, S. CHINA MORNING POST, Aug. 31, 1997, at 2, available in 1997 WL 13262120 (“The laws previously in force, the court system, judges, international rights and obligations are to a very large extent the same now as before July 1.”).
10. Like its analog in the United States, the American Bar Association, the Hong Kong Law Society lobbies on behalf of lawyers, particularly on issues of licensing and professional responsibility.
Judging from the dozens of interview responses and informal remarks made in Hong Kong from May to August, 1997, the official view may have exerted a significant influence upon popular perceptions of the effect of the handover on Hong Kong's legal system. Specifically, a Mastercard poll showed that fewer Hong Kong residents were contemplating a move from Hong Kong in July than in April 1997. These figures showed a drop of about sixty percent, with fifteen percent of pollees contemplating a move in April and only 6.2 percent contemplating a move in July. Only thirty-four percent of people questioned by the University of Hong Kong's Social Science Research Centre in July 1997, were "less confident" about the "rule of law" after the Hong Kong government took measures to deport PRC children who sought to enforce their new right of abode in Hong Kong under the SAR's constitution, the Basic Law (Jibenfa). Although in January 1999, the Hong Kong Court of Final Appeal declared the measures unconstitutional and invalid, when the measures were enacted, barely more than a third polled expressed the view that the measures signaled a change of course for Hong Kong's legal system.

In addition, the holdover of superficial accoutrements of Hong Kong's court system have bolstered the official and popular views of continuity. For example, judges and barristers still wear unflattering and expensive horsehair wigs, a visual reminder of Hong Kong's roots in the British common law. Barristers appearing before both the Court of First Instance and the Intermediate Appellate High Court also address the bench as "M'lord" or "M'lady," another vestige of British common law tradition.

More substantial signs of continuity have encouraged public perception that Hong Kong and PRC law remain as distinct as ever. For example, English continues to be the primary language in the courts. Almost all hearings are conducted in English even when parties and witnesses can neither speak it nor understand it. The first trial in Cantonese occurred about a month after the handover and was regarded as a special accommodation rather than the beginning of a trend away from the use of English in the courts. Another sign of legal continuity in Hong Kong is that the public still has access to most court hearings and major legislative sessions. Anyone may simply walk in and observe from designated seats and no time limit is set on

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13. See supra note 5 (stating that China's basic policies regarding Hong Kong will be stipulated in the Basic Law to remain unchanged for fifty years).
visits. As before, security is relaxed or nonexistent, with no electronic screening at either the court or legislative buildings, no identification checks at the courts, and no more than cursory checks at the legislature. Observers may also bring bags into the courtrooms and may take notetaking materials into the legislative meeting room after checking bags at the front door.

Perhaps the most significant signs of continuity in Hong Kong were the anti-government demonstrations carried out and the protest banners displayed in the streets of Hong Kong the first year after the handover. For the most part, Hong Kong officials permitted these public displays of dissent, despite the sensitive nature of the critiques. Public demonstrations were not a way of life under British rule. Prior to Hong Kong’s SAR status, the only notable demonstrations were those against the Tiananmen Square incident. The demonstrations after the handover signaled legal continuity, however, because they showed a continued tolerance by the Hong Kong government of public expression of dismay with PRC policies.

Some protests targeted the Provisional Legislative Council, the first legislature of the Hong Kong SAR, because a committee appointed by Beijing, rather than a popular franchise, elected it. During the handover ceremonies, the leaders of Hong Kong’s Democratic Party conducted the most notable protest. Led by its President Martin Lee, the Party’s luminaries, including recently ousted legislators Margaret Ng and Szeto Wah, gave speeches from the balcony of the Legislative Council building and roused the crowd of over a thousand onlookers to openly oppose the new legislature. Hong Kong officials deemed the protest illegal because the protesters occupied the government building without permission. In response, however, police merely patrolled the crowd to ensure that the protest did not spill beyond cordoned areas in front of the building and around the military memorial across the street.

Other protestors criticized the PRC government directly. An organization calling itself the April 5th Action Group rallied outside the Hong Kong Convention Center during the handover ceremonies held there.14 On the eve of July 1, 1997, the group’s members shouted, “down with Li Peng!” for ordering People’s Liberation Army (“PLA”) troops to fire on students and workers near Tiananmen Square eight years earlier.15

14. See infra note 33 and accompanying text (discussing the response of government police to this protest).
Unionists and religious groups attacked the Provisional Legislative Council's moves in July 1997 to freeze a package of labor laws enacted by its predecessor on the eve of the handover. The message blared through Hong Kong's financial district from convoys of vehicles streaming with banners, from the visitor's gallery in the central chamber of the Legislative Council building, and in prayer vigils, fasts, and speeches delivered near the Star Ferry and outside the Chief Executive's offices. These protestors accused the Hong Kong government of opposing labor and siding with "business tycoons."

In the landmark decision *HKSAR and Davis Ma Waikwan and two others*, decided July 22, 1997, the Hong Kong High Court bolstered the continuity of Hong Kong's legal system when a three-judge panel unanimously ruled that the common law had survived the handover. With this ruling, the court rejected the defendants' argument that Article 160 of the Basic Law contemplated the expiration of the common law absent a formal act of adoption by the Provisional Legislative Council.

The PRC left the vast majority of Hong Kong laws intact when it resumed sovereignty. The National People's Congress ("NPC") Standing Committee, the body charged with overseeing the daily work

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16. The bill debated in the Provisional Legislative Council on July 8-11, 1997 was named "Legislative Provisions (Suspension of Operation) Bill 1997." It "suspend[ed] the question of the legislative changes effected by the following Ordinance: Employment (Amendment) (No. 4) Ordinance 1997; Occupational Deafness (Compensation) (Amendment) Ordinance 1997; Employee's Rights to Representation, Consultation and Collective Bargaining Ordinance 1997; Trade Unions (Amendment) (No. 2) Ordinance 1997; Protection of the Harbour Ordinance; Hong Kong Bill of Rights (Amendment) Ordinance 1997." Brief prepared by the Hong Kong Executive Council, a government body that advises the Chief Executive, for the Provisional Legislative Council, at 1 (unpublished, copy on file with the author).

The last two of these laws were not labor laws, but the others all had introduced protections for workers, such as collective bargaining and redress for dismissal after engaging in union activities. The Executive Council argued that these laws "have a serious adverse impact on Government policies and operations . . . ." *Id.* at 2. The laws had been enacted on the eve of the handover. For example, Governor Patten had signed the Collective Bargaining statute on June 9, 1997. *See* Hong Kong Ordinance No. 100 of 1997, Employment (Amendment) (No. 5).


19. This landmark constitutional law decision was rushed through the intermediate court on interlocutory appeal because the defendants raised two defenses which touched on foundational issues for the new SAR. One issue was whether the common law survived the handover, and the other was whether the Provisional Legislative Council was validly constituted. The Court ruled in the affirmative on both, after asserting that Hong Kong courts did not have the authority to query into the acts of the PRC.
of the NPC, slated only 1.3 percent of 1760 laws and regulations in
Hong Kong for expiration at midnight, June 30, 1997. Among
them, three provisions of the recently enacted Hong Kong Bill of
Rights were designated to expire on the basis that they conflicted with
the Basic Law. Those provisions, Articles 2(3), and 4 of the Bill of
Rights, were the most sweeping in scope and power of all those in the
statute. Together, they expressly incorporated a provision of the
International Covenant of Civil and Political Rights into Hong Kong
law. Britain had previously exempted Hong Kong from participation
in the covenant through the reservation it attached to its signature of the
Covenant. Article Three made the Bill of Rights supreme over all
Hong Kong law, past, and future.

II. SIGNS OF HARMONIZATION

Although Hong Kong law showed signs of continuity after its
transfer to Chinese sovereignty, evidence emerged that suggested that
Hong Kong Law is gradually metamorphosizing into the image of its
new sovereign. This evidence comes in the form of both legislative
changes and new political conditions in Hong Kong that favor the
harmonization of its law with PRC law.

Anything that promotes local unity is conducive to the
harmonization of local law with an outside legal system. By the same
token, local disagreement is an impediment to harmonization with
another locality. Harmonization is different from outright conquest, in
which an outside legal power relies upon strategies such as “divide-
and-conquer” to force a locality to adopt its law. In a harmonization
situation, a locality independently decides to adopt an outside law.
The locality harmonizes either by negotiating with an outside power or
by willingly surrendering to an outside power that the locality admires
or views as advantageous. Local unity facilitates the process of
inviting in outside law because this invitation is a local decision and
such unity facilitates the local community’s decision making process.
In at least one sense, harmonization is the inverse of conquest. With
harmonization, an inside power convinces a locality to adopt outside
law; with conquest, an outside power convinces a locality to adopt
outside law.

In Hong Kong, local disagreement and local tolerance of pluralism
further impede harmonization with the PRC because such dissent and
pluralism are at odds with official culture in the PRC. The official
culture’s preference for harmony has deep historical roots in China and

is most vividly symbolized by the doctrine of the "heavenly mandate" which legitimized the emperor's rule so long as peace reigned throughout the land.

Local unity can be fostered in many ways, such as sharpening the focus of the local government or quelling dissent. Such unity was shown in 1997 by growing cooperation between business elites and the Hong Kong government. For example, one week before the Hong Kong handover, reports surfaced that Tung Chee-hwa's close business associates from his long career as a shipping magnate enjoyed more access to him than did Anson Chan who is the head of the Hong Kong civil service and Tung's right hand man according to the constitution. In another symbol of the thinning line between government and business, Tung and his new Secretary of Justice, Elsie Leung, were publicly accused of flouting bureaucratic practices by putting their personal secretaries from their private sector firms directly into government posts. In its first week, the new government also moved to freeze pro-union labor laws enacted on the eve of the handover. Six weeks later, the government scrapped two of those laws that most threatened big business: those that introduced collective bargaining and those that protected workers from termination for union activities.21

As further evidence of the growing elitism of Hong Kong's government, in early November 1997, on the strength of a poll of Hong Kong's business community, the government rejected the Consumer Council's proposal to enact a competition law to fight price-fixing and monopolies. Although the government portrayed the poll as reflective of public opinion, the 110 bodies polled "consisted almost entirely of business associations and monopolies."22 Critics of the government's move asserted that the law would have contributed


toward breaking up Hong Kong's cartels, which owed their success as much to personal connections as to productivity.23

The structure of Hong Kong's government grew more centralized in 1997. Notably, the government cut back the franchise for legislative elections from 2.7 million, which was the number of people eligible to vote in the 1995 election of the Legislative Council, to about 400, the number of members of the Election Committee selected by Beijing to elect the Provisional Legislature which replaced the Legislative Council on July 1, 1997. Furthermore, it curtailed the franchise in elections of district urban councils, which were created in the early 1980s to involve Hong Kong citizens in the upkeep and improvement of their neighborhoods. Before July 1997, civic matters such as governmental funding of the arts, were dispersed among several organizations, but as of July 1997, these matters are concentrated in a single government run body.

Within Hong Kong's political culture, there was a quieting of dissenting views and conflicting interests. Public remarks by high-level officials sent clear signals that legal disagreements should not be aired, even though formal channels were established for that purpose. The Provisional Legislature's President, Rita Fan, stated, "[t]he public should judge whether it is a waste of money for Hong Kong's Legal Aid to assist children from the PRC who are challenging in court the Hong Kong government's effort to deport them under a new Provisional Legislature law."24 In addition, Tung Chee-hwa’s top housing advisor admonished the Provisional Legislature for criticizing the SAR government and not cooperating with it by “making legislation to meet the progress of its projects.”25

Other new local leaders admitted that they were not interested in public opinion and even favored punishment for some expressions of it. Provisional Legislator Charles Yeung Chun-kam criticized people who challenged the legitimacy of the Provisional Legislature stating that, “they have wasted too much time and news coverage discussing our legality and power. We have carried out our tasks in a practical manner. Excessive criticism will not win any sympathy.”26 Similarly,

Provisional Legislator Chim Pui-chung proposed outlawing the failure to stand at attention during the playing of Hong Kong's national anthem and any "showing [of] impoliteness" during the raising of Hong Kong's flag.\textsuperscript{27}

Self-censorship, whose rise in Hong Kong has been widely acknowledged since the early 1990s, has dampened the publication of some opinions. For example, the \textit{South China Morning Post} canceled a popular comic strip because it attacked the PRC.\textsuperscript{28} Similarly, in October 1997, Hong Kong's film distributors declined to import three American films, \textit{Seven Years in Tibet}, \textit{Kundun}, and \textit{Red Corner}, that were critical of the PRC.\textsuperscript{29} All but one local theater shunned a local film that focused on the dark side of life in Hong Kong's poorer neighborhoods.\textsuperscript{30} Rupert Murdoch dropped the BBC international service from the television station he bought in Hong Kong. Another Hong Kong television station in 1993 canceled a documentary on the Tiananmen uprising.\textsuperscript{31} Local pager companies failed to send the messages of student groups about the anniversary of the Tiananmen Square incident in June 1997, and in October 1997, deleted part of a message from the Democratic Party staff regarding a protest against Tung Chee-hwa that they were organizing.\textsuperscript{32}

Although public protests were staged after the handover, police took actions to curb them. For example, police resorted to unorthodox methods to limit the impact of the April 5th Action Group's demonstration during the handover, blasting a recording of Beethoven's music into the area.\textsuperscript{33} On October 10, 1997, the police tore down twenty-two Taiwanese flags hoisted on public buildings and


\textsuperscript{28} See Mark Roberti, \textit{The Fall of Hong Kong: China's Triumph & Britain's Betrayal} 324-25 (2d ed. 1996).


\textsuperscript{31} In early 1998 Murdoch also ordered HarperCollins, one of his companies, to cancel its book contract with former Hong Kong Governor Christopher Patten, after he had turned in half of his manuscript. See Publisher Apologizes to Ex-Hong Kong Governor Over Book Cancellation, \textit{Star Trib.}, Mar. 7, 1998, at A17, available in 1997 WL 6344340.


\textsuperscript{33} See Lee, supra note 15, at 7.
Two weeks later, they pushed back about sixty poor-quality housing project residents from the gated entrance to Tung Chee-hwa's home. Police also cordoned off a group of protestors at the World Bank meeting in Hong Kong and physically provoked them to defend themselves. The police then used the protestors' attempts at self-protection as a pretext for arresting them for assaulting police. In early January 1998, police videotaped two people who fastened a Taiwanese flag and a defaced Hong Kong flag to a barrier outside of Tung Chee-hwa's office. Police also hauled away protestors when they gathered in front of the former residence of the Hong Kong governor to protest the visit of Yang Shang-kun, a past president and military leader of the PRC.

Apart from creating a climate which fostered legal harmonization, Hong Kong's leaders also took direct action to promote harmonization of Hong Kong law and policy with that of the PRC. In July 1997, Solicitor General Daniel Fung argued before the High Court in HKSAR v. Davis Ma Waikwan that where the Basic Law conflicts with other PRC law, PRC law governs. In support, Fung pointed to the conflict between the provision in Article 9 of the Basic Law, which provides that both English and Chinese are official languages of the Basic Law, and a decision by the Standing Committee of the National People's Congress, which provides that the primary language of the Basic Law is Chinese. Notably, the Basic Law, as the Hong Kong SAR's constitution, is the supreme local law of Hong Kong, while a decision of the Standing Committee of the NPC is one of the lowest forms of law in the hierarchy of legal forms in the PRC. The implication of Fung's argument is that Hong Kong law holds a status vastly inferior to that of PRC law. As conflicts arise, therefore, any expression of PRC law will replace Hong Kong law on those issues. This rule for handling conflicts of law questions in Hong Kong is a powerful device for legal harmonization.

34. See Image Conscious, supra note 29, at 20.
37. See Demonstrators Deface Flag of China in Hong Kong Rally, CHI. TRIB., Jan. 2, 1998, § 1, at 3.
The scope of the responsibilities of the fifty-six year old Hong Kong Planning Authority appears to be growing, but its policies in 1997 portend a significant accommodation of PRC policy. In October 1997, its director wrote, "Hong Kong will have to co-operate and co-ordinate more with our neighbouring territories in the Pearl River Delta and beyond. To work jointly with our mainland partners will be essential for the continual growth and development in Hong Kong."39

Mainland China and Hong Kong police forces strengthened their ties after the handover. When the Hong Kong Junior Police Officers' Association celebrated the twentieth anniversary of its founding in October 1997, it invited for the first time officials from the PRC's Ministry of Public Security and the Ministry's provincial bureaus. The Association's spokesperson explained that, "now we are part of China, we want to invite them to join in to establish a closer link."40

Top legal officials in Hong Kong have publicly expressed their willingness to coordinate with PRC lawmakers. Provisional Legislator Ngan Kam-chuen declared his support for the merging of Hong Kong and Shenzhen railroads by stating that, "it is good to have more co-ordination."41 Similarly, the President of Hong Kong's Law Society signaled his willingness to work with PRC jurists when he adopted an official PRC style of discourse about law for one of his speeches. In his speech he announced that the purpose of the seventh annual Law Week was to "improve the public's understanding of the legal system,"42 a sentiment that is alien to Hong Kong's legal culture but which is a stock phrase in official media dispatches in the PRC about law.43

The Basic Law Committee, a creature of the Basic Law, appears to be designed to facilitate the harmonization of Hong Kong and PRC law. Appointed in July 1997 and beginning its work in the summer of 1998, the Committee is a hybrid body, with half of its members from Hong Kong and half from the PRC. The Committee's formal duties, which focus on advising the NPC Standing Committee in Beijing when constitutional issues arise from Hong Kong courts, make it a

powerful liaison between Hong Kong and PRC lawmakers. Although the Committee's advice does not necessarily bind the NPC Standing Committee, the NPC's advice to the Hong Kong courts is binding on the Hong Kong courts.44 Even outside of their responsibilities on the Basic Law Committee, the members are actively engaged in bridging the gulf between Hong Kong and PRC law. One member,45 for example, arranged to teach at Beijing University Law Department during the fall of 1998 just as the Committee was gearing up to perform its functions.

On the legislative front, although the PRC government had slated only 1.3 percent of Hong Kong's laws and regulations to expire at the handover, those that did expire included laws that arguably imposed the greatest limitations on the Hong Kong government of any Hong Kong law. Those provisions, in the Hong Kong Bill of Rights, declared invalid all previous and subsequent laws which conflicted with the Bill of Rights. In effect, the provisions created a private right of action for individuals to challenge Hong Kong laws. They were a potentially powerful tool to defeat any agenda of the Hong Kong government. The removal of those provisions, therefore, paved the way for harmonization more than would have the removal of laws that limited government less. To add to the potential impact of this legislative change, the NPC Standing Committee earmarked an additional unspecified number of laws and regulations for amendment at some unspecified time.

The laws that were amended in the months immediately following the handover also had imposed limitations on Hong Kong's government, and their amendments all remade Hong Kong law to conform more closely to PRC law. Two of the Hong Kong statutes amended by the Provisional Legislature in its first lawmaking act govern civil liberties. Those amendments gave the government broad power to curtail public demonstrations for "national security" reasons. Moreover, the government was empowered to shut down private organizations based on the broad finding of possessing "foreign" ties. About the same time, the Executive Council, a powerful body that advises the Chief Executive, issued guidelines to Hong Kong police which relied on the "national security" concept to specifically ban any advocacy of Taiwanese or Tibetan independence from PRC rule. This definition comports exactly with PRC policy regarding freedom of expression regarding Taiwan and Tibet. Another significant set of

44. See Basic Law, supra note 2, at Art. 158.
45. Anthony Neoh, the Hong Kong attorney and former head of the body that regulated Hong Kong's securities trading.
amendments retracted laws which had permitted collective bargaining and had created a private right of action for dismissal for engaging in union activities. These amendments move Hong Kong law closer to PRC law, which does not recognize collective bargaining or unions.

A set of amendments to Hong Kong’s immigration law in the SAR’s first months further removed differences between Hong Kong and PRC law. Specifically, the Provisional Legislature enacted provisions to slow the immigration of mainland children to Hong Kong who are seeking to claim a right of abode under Article 23(2)(3) of the Basic Law. The Provisional Legislature implemented regulations of the Guangdong Provincial Public Security Bureau to moderate the tide of these entrants to Hong Kong. Now, for people to meet the requirements for “right-of-abode” status under Article 23(2)(3), they must apply to that PRC bureau for a one-way permit and wait, on a first-come-first-serve basis, until their number turns up on a daily quota system created and operated by the bureau.

As a further sign of coordination between Hong Kong and PRC immigration law, the PRC central leadership assumed the responsibility for developing policies to implement the Hong Kong Provisional Legislature’s amendments. The Guangdong Provincial Government and the Shenzhen Public Security Bureau Administration of Aliens and Exit-Entry promulgated the policies, while the Hong Kong Immigration Department joined those Guangdong agencies in implementing them. Further, Hong Kong’s Court of First Instance ruled in October 1997 that the Provisional Legislature’s new enactment was constitutional, notwithstanding the argument that it limited the right of abode, previously accorded constitutional status under the Basic Law.

Further evidence of collaboration between Hong Kong and Guangdong immigration authorities surfaced in Spring 1998, in the case of PRC dissident Wang Bingzhang. Wang had been traveling for

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46. The legal term “right to abode” was imported into Hong Kong law from British law for the first time in the Sino-British Joint Declaration of 1984 and then by amendment in 1987 to the Hong Kong Immigration Ordinance. It is a term used to describe the right to enter and live free of the threat of deportation. See Basic Law, supra note 2, at Art. 24 (discussing who may assert the right of abode).


several years between the United States, Canada, Hong Kong, the PRC, and Taiwan with fake travel documents. Wang was apparently aided by a tacit understanding with Hong Kong and United States customs officials that they would not challenge the validity of his papers. In March 1998, however, Wang tried to enter Hong Kong only to be turned back by Hong Kong customs authorities. Wang alleged that the Hong Kong customs officials were obeying orders from the PRC government. A reporter from the Chinese edition of the Voice of America confided to the author in a personal interview that, notwithstanding a rigorous denial by Hong Kong authorities that they were following PRC orders, Wang's accusation was plausible. Hong Kong does not have an extradition treaty with the PRC; even if it did, its validity under international law would be suspect. As a result, Hong Kong has served as a haven for Chinese activists from Taiwan and the PRC who dispute PRC policy for the last several decades. Since the handover, however, Hong Kong has taken steps to abandon this role because it may be viewed as encouragement of positions that directly contradict PRC law and policy.

Yet another law, passed by the Provisional Legislature as part of its first act, entitled the "Reunification Bill," promotes harmonization by undermining the longterm potential for English law to continue its influence on the development of Hong Kong law. Staving off the potential for continued English influence on Hong Kong law is one way to move the trajectory of its development closer to that of PRC law, which is hardly, if at all, influenced by English law. The Reunification Bill provides, "provisions applying any English law may continue to be applicable ... as a transitional arrangement pending their amendment by the Hong Kong Special Administrative Region through the Legislature thereof, provided that they are not prejudicial to the sovereignty of the People's Republic of China and do not contravene the provisions of the Basic Law."49 This statute does not define the scope of the phrases, "prejudicial to the sovereignty of the PRC," or, "contravene the provisions of the Basic Law." The Reunification Bill, therefore, creates the potential for Hong Kong courts or the legislature to place major limitations on the applicability of English law, including those rules and doctrines that have underpinned the commercial system of Hong Kong for a century. Based on the text of this provision alone, the chances of this happening appear to be better than even, since the Reunification Bill states that English law is applicable in the Hong Kong SAR merely "as

a transitional arrangement.”

III. LAYING THE GROUNDWORK FOR HARMONIZATION

The harmonization of Hong Kong and PRC law did not begin at midnight on June 30, 1997. The PRC government began a campaign to harmonize the legal systems of the PRC and Hong Kong in the early 1980s. At that time, it created a pretext for reshaping Hong Kong’s laws by representing Hong Kong law as a metaphor for British imperialism.50 In the mid-1990s the Xinhua news service annually sent dozens of articles about Hong Kong to the Hong Kong SAR, laden with legal terminology developed in the PRC’s legal framework and with the themes that comprised the agenda for discussion in Beijing by the Sino-British Joint Liaison Group.51 By the end of 1995, the Legal Sub-Group of the Preliminary Working Committee for setting up the Preparatory Committee of the Hong Kong Special Administrative Region had completed evaluations of 600 Hong Kong laws and drawn conclusions about whether to retain or modify them.52

50. See He Delong, Xianggang falu zhongwenhua renwu fanzhong richeng jin [The Translation of Hong Kong Law into Chinese Is a Task Whose Urgency Brings a Strenuous Schedule], FAZHI RIBAO [LEGAL SYS. DAILY], Nov. 19, 1995, at 4.
52. See Fang Jin, Guangrong, wushi de licheng--xianggang tebie xingzhengqu chou weihui yuweihuiyuan man wancheng shiming [The Course of Glory and Responsibility--the Members of the Preliminary Working Committee for Setting up the Preparatory Committee of the Hong Kong Special Administrative Region Fully Complete Their Mission], FAZHI RIBAO [LEGAL SYS. DAILY], Dec. 10, 1995, at 4.

During the negotiations between the PRC and the United Kingdom which led to their signing of the Joint Declaration in 1984, the two sovereigns agreed to cooperate during the ten years until the transfer of sovereignty over Hong Kong when major issues about the transfer arose. The body they set up to implement the cooperation came to be called the Sino-British Joint Liaison Group. See Roberti, supra note 28 at 105-09.

52. See Fang Jin, Guangrong, wushi de licheng--xianggang tebie xingzhengqu chou weihui yuweihuiyuan man wancheng shiming [The Course of Glory and Responsibility--the Members of the Preliminary Working Committee for Setting up the Preparatory Committee of the Hong Kong Special Administrative Region Fully Complete Their Mission], FAZHI RIBAO [LEGAL SYS. DAILY], Dec. 10, 1995, at 4.

The central government of the PRC appointed the Preliminary Working Committee to implement PRC policies regarding Hong Kong before the handover. The Preparatory Committee was a body of 150 people, 56 from the PRC and 94 from Hong Kong, chosen by the central government of the PRC in January 1996 to select the 400 member Selection Committee. See Roberti, supra note 28, at 304. The Selection Committee
The Sino-British Joint Liaison Group also completed a comprehensive review of Hong Kong's laws a year and a half before the handover. By that time, officials had already denounced as invalid certain laws enacted by the Hong Kong Legislative Council before 1997.

China's moves to reshape Hong Kong's legal system in its image did not explicitly contradict the legal rubric created for the retrocession of Hong Kong. The arrangement under the PRC Constitution of 1982, the Sino-British Joint Declaration of 1984, and the Basic Law promulgated in 1990 outlined in only broad terms the bounds of autonomy to be enjoyed by Hong Kong. The breadth of these terms suggests that their drafts intentionally left room for the harmonization of Hong Kong's legal system with that of the PRC. The Joint Declaration and the Basic Law both promise that Hong Kong is free to remain capitalist and autonomous until the year 2047. They further provide that as an SAR of the PRC, Hong Kong will enjoy, "a high degree of autonomy, except in foreign affairs and defense." More specific provisions provide for an independent tax system, the continued circulation of the Hong Kong currency, and autonomy in levying customs duties. These provisions did not clarify, however,
how closely connected the Hong Kong Special Administrative Region's legal system would be to the PRC's legal system. By inventing a new term for Hong Kong's status, the "Special Administrative Region," the drafters of these legal documents avoided specifying the connection between PRC and Hong Kong law because Hong Kong could not be analogized to internationally recognizable political units, such as the protectorate, the province, the federated state, or the allied state.

Under the terms of PRC domestic law, Hong Kong's status would be both independent from and subordinate to the PRC central government. On the one hand, the Joint Declaration provides that Hong Kong will maintain political and legal autonomy, and the Basic Law provides that Hong Kong will enjoy "a high degree of autonomy," except in "foreign affairs" and "national security." On the other hand, the Basic Law subordinates Hong Kong to the PRC through its requirement that Hong Kong's legislature report all of its legislation to the National People's Congress Standing Committee in Beijing. This Basic Law requirement puts the Hong Kong legislature on the same footing as the provincial people's congresses on the mainland. Similarly, the Basic Law provides that the National People's Congress Standing Committee may invalidate any Hong Kong legislation that the Standing Committee deems to conflict with the Basic Law or subsequent legislation passed by the National People's Congress for application in Hong Kong.57

The idea of legal harmonization did, however, run contrary to some official press releases and televised speeches made in January and February of 1984, during the negotiation of the Joint Declaration, which stressed Hong Kong's legal autonomy in a way that implied that the PRC would have no say regarding the content of Hong Kong laws. The language evoked images of legislators and judges in Hong Kong making law without approval from Beijing.58 Between 1984 and 1996, however, the type of autonomy promised to Hong Kong in the PRC media changed. While media transmissions in 1984 had stressed the promise of both political and economic autonomy, by 1996 the PRC media emphasized the economic autonomy of Hong

57. See Zhou Wei, The Sources of Law in the SAR, in HONG KONG IN TRANSITION: PROBLEMS AND PROSPECTS 79, 82, 86-87 (Peter Wesley-Smith ed., 1993).
Kong after 1997\textsuperscript{59} and confirmed the administrative and legal unity of Hong Kong and the PRC.\textsuperscript{60}

The later stress on legal unity is particularly apparent in the official reports about the Preliminary Working Committee and the Hong Kong SAR Preparatory Committee, two bodies established by the PRC central government to implement the provisions of the Basic Law. These reports pronounced that the PRC central government had the authority to both make and nullify law in Hong Kong. Such reports confirmed that by 1995 the Committee was already reviewing Hong Kong legislation for consistency with PRC national law. By early 1996, the Committee was taking steps to select the first governor and the first legislature of the Hong Kong SAR.\textsuperscript{61} Establishing the Preparatory Committee as the focal point for representative law-making was tantamount to nullifying the then-current Legislative Council in Hong Kong which, since Governor Chris Patten's reforms, had become more directly elected by Hong Kong citizens. Although

\textsuperscript{59} See Hong Kong: Official Tax System Not to Change After 1997, FBIS-CHI-96-047, Mar. 8, 1996, at 84-5; Lu Xinhua, HK to Stay Successful, CHINA DAILY, May 31, 1996, at 1 ("Factors that have promoted Hong Kong's economic success, such as a highly-open economic system, free movement of personnel, cargo and capital, low tariffs, sound legal institutions and scarce governmental intervention will be preserved in Hong Kong after 1997."); Xinhua (Singapore), State to Ensure Democratic HK: Lu, CHINA DAILY, June 12, 1996, at 2 ("There is no need to fear for democracy in Hong Kong after 1997. . . . Except for foreign affairs and defense, which will be handled by the central government, everything else will remain the same: the legal system, the existing lifestyle, the currency, the economic and financial policies and so on."); Xinhua (Tokyo), No Worries for HK Economy, CHINA DAILY, June 5, 1996, at 2 (It was "reiterated that the Chinese Government will permit Hong Kong to maintain its free economy under the 'one country, two systems' concept after the region returns to China in 1997. . . . The present social and economic structures as well as citizens' lifestyles in Hong Kong will not change at all. . . . With the exception of diplomatic relations and defence, Hong Kong will have full autonomy."); ("Comrade Deng Xiaoping's principle of 'one country, two systems' means that on the condition of one China, the mainland as the main body of the country persists in a socialist system and Hong Kong will preserve its capitalist system. The two systems will remain unchanged with neither replacing the other."); Hong Kong: Li Peng Interviewed by Hong Kong Dailies, FBIS-CHI-96-024, Feb. 5, 1996, at 84-9; PRC: Trade Minister Assures Hong Kong of Bright Future, FBIS-CHI-96-020, Jan. 30, 1996, p. 87.

\textsuperscript{60} See CD News, Great Hall to Set Up HK Court, CHINA DAILY, Mar. 21, 1996, at 3 ("Since the completion of the Great Hall of the Peole in 1959 it has been a practice that each Chinese province, autonomous region, or municipality has an individual court in the Great Hall."); PRC: Lu Ping on Post-1997 Hong Kong Self-Government, FBIS-CHI-96-013, Jan. 19, 1996, at 84-5. ("The Basic Law is valid not only in Hong Kong but also in the whole country. All provinces and cities and all people in the mainland must abide by the Basic Law when they are involved in affairs related to Hong Kong.").

\textsuperscript{61} See Xie Liangjun, Deleting of Hong Kong Legislation Stirs Concern, CHINA DAILY, July 19, 1995, at 11, available in 1997 WL 7962496; China Approves Creation of Panel To Prepare for Hong Kong Takeover, WASH. POST, Apr. 1, 1993, at A33; Sheryl WuDunn, China Raises Ante Over Hong Kong, N.Y. TIMES, Apr. 1, 1993, at A7.
Patten vowed to remain within the limit of the Basic Law’s limit stating that only one-third of its members can participate in universal elections of Legislative Council, he defined the groups who were eligible to elect the other members broadly enough to include about a third of Hong Kong’s population. The Preparatory Committee’s identification with “self-rule” softened the Joint Declaration’s promises of political and legal autonomy because it narrowed the scope of the “self.”

Signs of legal harmonization before the handover appeared throughout 1995 and 1996 in the PRC press. They are particularly apparent in the PRC press summaries of the initiatives of the PRC central government to prepare Hong Kong for its official incorporation into the PRC on July 1, 1997. The PRC press reported the steps already taken by the PRC government to instill in Hong Kong officials the practices of the mainland’s bureaucracy and the steps it took before the handover to create its own court of final appeal for Hong

62. For a more detailed description of Patten’s reforms, see Roberti, supra note 28, at 295.

63. See Xianggang fating shouci siyong zhongwen shen’an [Hong Kong Courts For the First Time Use Chinese Language To Try Cases], FAZHI RIBAO [LEGAL SYS. DAILY], June 12, 1995, at 1; Luo Baowen, Yao ba jiang zhengzi de yaoqu luoshi dao lingdao ganbu zishen jianshe he hudui gexiang jianshe zhong qu, [We Need Leading Cadres, Departments, and Troops to Individually Establish Explanations of Government Requirements], FAZHI RIBAO, [LEGAL SYS. DAILY], Mar. 12, 1996, at 1; Beijing Xinhua Service, Xianggang tibie xingzhenqiu chouweihui yuwei gongzuo weiyanhui guanyu baochi xianggang gongwuyuan duiwu he zhidu wending de ruogan yijian [The Hong Kong Special Administration Region Preparatory Committee Prepares Work on the Committee Meeting Related to a Certain Number of Opinions About Supporting the Stabilization of Hong Kong Civil Servants Troops and System], FAZHI RIBAO, [LEGAL SYS. DAILY], Dec. 11, 1995, at 2; He Delong, Xianggang falu zhongwenhua renwu fanzhong richeng jin, [The Translation of Hong Kong Law into Chinese Is a Task Whose Urgency Brings a Strenuous Schedule], FAZHI RIBAO, [LEGAL SYS. DAILY], Nov. 19, 1995, at 4; Lian Jintian, Liu Siyang, Zhao Xinbing, Li Ruihuan tong gang ao diqu zhengxi weiyuan zuotan [Li Ruihuan Holds Informal Talks With Members of the Hong Kong-Macao Area Government Joint Committee], FAZHI RIBAO, [LEGAL SYS. DAILY], Mar. 12, 1996, at 2; Xinhua, Classes Train HK Workers, CHINA DAILY, Feb. 26, 1996, at 2 (stating that those who “expressed the desire to stay with the civil service beyond 1997” were selected to undergo training courses in Guangzhou); Xinhua, HK Delegates Call on Mainland Office, CHINA DAILY, Mar. 6, 1996, at 2 (stating that a group of Hong Kong residents who were likely candidates for public office in the HK SAR “acquaint[ed] themselves with functions and structures of the [State Planning Commission] and the ministries [of the PRC central government].”); Xinhua, Mainland, HK to Meet More Often, CHINA DAILY, Mar. 15, 1996, at 2 (stating that Chinese government officials and Hong Kong civil servants “increased their exchanges and understanding.”); Xiao Qiao, Xianggang jiangwei gongwuyuan kaishi zhongwen keicheng, [Hong Kong In Future Will Offer Civil Servants Chinese Language Courses], FAZHI RIBAO, [LEGAL SYS. DAILY], Nov. 12, 1995, at 4.
Some of the press reports described the significant input by the PRC government into the short-term fiscal planning for Hong Kong's government and the selection of the SAR's governor and legislators.

In addition to the affirmative evidence of the PRC's deliberate promotion of legal harmonization publicized in the PRC press, there were some less obvious, yet still detectable, signs of harmonization in the Hong Kong press. One such sign was the coordination of immigration policies, which explains in part the drop in receipts experienced by Hong Kong's tourism industry in 1997. The PRC's restriction on travel by PRC citizens to Hong Kong during the months immediately before and after the handover also contributed to a steep downturn in tourism that year.

IV. PUTTING HONG KONG'S LEGAL CHANGES IN PERSPECTIVE

While legal harmonization had already begun by the time Hong Kong returned to Chinese sovereignty, the handover marked an intensification of the harmonization of PRC and Hong Kong law. Relying on the sheer quantity of statutory provisions changed during the year following the handover, the magnitude of change to the Hong Kong legal system appears to be relatively small. By recognizing that some provisions are more important than others and that the import of some changes is more dramatic than others, however, the change to Hong Kong's legal system in its first year as an SAR of the PRC

64. See Sun Chengbin, Zhongying lianhe lianluo xiaozu diwuci, xianggang zhongshen fayuan wenti zhuanjia jieshu [Policy of Fifth Sino-British Joint Liaison Group Meeting of Experts on The Problem of Hong Kong Court of Final Appeal], FAZHI RIBAO [LEGAL SYS. DAILY], Mar. 26, 1995, at 4; Xinhua, No Concessions Made in Recent HK Court Talks, CHINA DAILY, Mar. 27, 1995, at 2 (The Sino-British Joint Liaison Group on Hong Kong's Court of Final Appeal met to establish the HK Court of Final Appeal, which is provided for in the Basic Law).

65. See Hong Kong Reforms Pass; China Ends Talks, N.Y. TIMES, Feb. 24, 1994, at A6; Patrick E. Tyler, China to Disregard Hong Kong Vote, N.Y. TIMES, Feb. 25, 1994, at A10; Hong Kong: Mainland Seeks More Control Over 1997-98 Budget, FBIS-CHI-96-036, Feb. 21, 1996, at 83, ("Chinese . . . views need to be respected when the budget is mainly concerned with post-colonial Hong Kong."); Xie Liangjun, NPC Sets Up HK Council, CHINA DAILY, Mar. 25, 1996, at 1 ("The current Legislative Council of Hong Kong will be dissolved on June 30, 1997. . ."); Xinhua, Economic Panel Mulls Hong Kong Budget, CHINA DAILY, Mar. 27, 1996, at 2 ("The 1997-98 financial budget of Hong Kong should be compiled jointly by the Chinese side, the British side, and yet-to-be-appointed chief executive and leading body of the [HK SAR].").

66. See supra note 46 and accompanying text (discussing the coordination of immigration policies by Hong Kong and China).

appears to be of no small magnitude.

These changes suggest a pattern of accelerating harmonization of Hong Kong law with PRC law, a process that has been well-planned and progressive. Since the groundwork for the changes that were formalized in 1997 and 1998 was laid years earlier, there is no reason to believe that the groundwork for future harmonization is not being laid right now. 68

The Hong Kong Court of Final Appeal’s recent decision that established the Hong Kong courts’ jurisdiction over issues of the conformity of PRC acts with the Basic Law, 69 however, may slow the pace of this harmonization, because this holding will likely make it more difficult for Beijing to nullify Hong Kong laws. Beijing’s reaction to the decision, however, is fully consistent with a policy of promoting harmonization. Apparently, top officials authorized PRC legal scholars to protest the decision on the ground that it usurped the authority of the National People’s Congress. 70 Thus, despite the court’s ruling, it is likely that the harmonization of the two legal systems will continue for years to come. The harmonization process may even accelerate because the legislature of Hong Kong during its first year as an SAR was empowered only to enact laws which are “indispensable” to the SAR. The Legislative Council elected in May 1998, however, enjoys full legislative power under the Basic Law, and therefore, can do more to move Hong Kong law closer to PRC law and do it faster. Although Democratic Party members, known as fearless critics of the PRC, won a majority of the seats up for popular election in May 1998, they constitute only a small minority of the total body, about one sixth. The number of elected seats will grow at a modest pace under the Basic Law during the next several years, 71 but it will be over a decade before the seats reach a

68. See supra notes 60-63 and accompanying text (discussing the groundwork for the changes that were formalized in 1997 and 1998).

69. See supra notes 18-19 and accompanying text.

70. See Elizabeth Rosenthal, Ruling Sparks China-Hong Kong Clash, ST. PAUL PIONEER PRESS, Feb. 11, 1999, at 9A. It is difficult to know exactly how much the subsequent explanation of that decision issued as an extraordinary measure to satisfy the PRC protestors will weaken the holding of that decision. But regardless of its impact, this explanation, and the outcry that prompted it, confirm that Beijing and the Hong Kong government are pursuing a policy of harmonizing their legal systems.

71. Annex II of the Basic Law of the Hong Kong Special Administrative Region provides that 24 popularly elected legislators will serve in the second term of the Legislative Council, and 30 will serve in the third term, up from 20 in its first term. Each term is four years. The total number of seats is 60. For an English translation of this provision, see Zhongguo renmin gongheguo xianggang tebie xingzhengqu jibenfa [The Basic Law of the Hong Kong Special Administrative Region of the People’s
number which will allow advocates for legal divergence to dictate outcomes.

What parts of the Hong Kong legal system will change the most in the coming years? The laws amended in the SAR’s first year were confined to those touching upon civil liberties and limitations upon government power, areas that fall under the rubrics of constitutional law, civil rights law, labor law, and immigration law. Commercial law, however, has remained virtually untouched. Is a pattern of harmonization emerging in Hong Kong that leaves commercial law intact as other more politically sensitive areas merge with the PRC? The wording of the Basic Law and Beijing’s official pronouncements about Hong Kong stress the economic autonomy of the new SAR. However, the Hong Kong government’s decision in the fall of 1997 not to introduce an antitrust law works against legal continuity for economic matters in Hong Kong. Although Hong Kong had no antitrust law before the handover, the failure to introduce such a law is tantamount to derailing a process that began with the 1966 Application of English Law Ordinance, which updated Hong Kong commercial law to keep pace with developments in the industrialized economies of the world. Seemingly, antitrust law was an inevitable addition to Hong Kong’s legal system, and it would have mirrored a trend in Japan and Europe during the past decade.

Hong Kong’s decision to reject antitrust law may be the most significant signal indicating the direction that Hong Kong’s legal changes will take in the next few years. As antitrust law does not regulate political expression, it falls within the bounds of Hong Kong’s autonomy over “economic” matters as drawn in the Basic Law and official PRC pronouncements. At the same time, any development of this area of law in Hong Kong would diverge from PRC law because the PRC has no developed antitrust law. Despite the lack of political overtones to antitrust law, this divergence proved to be intolerable to the Hong Kong SAR government. Presumably, then, no commercial law in Hong Kong is immune from harmonization with PRC commercial law. Commercial law, therefore, may be the area to look to for the most significant convergence of Hong Kong law with PRC law in the coming decade.

Republic of China]; Basic Law, supra note 2, at Annex II; see also id. at Art. 68-69.