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ONE COUNTRY, THREE SYSTEMS? JUDICIAL REVIEW IN MACAU AFTER *NG KA LING*

Judith R. Krebs

Abstract: The *Ng Ka Ling* decision by the Hong Kong Court of Final Appeals and its reversal by the Standing Committee of China's National People's Congress, raise serious concerns regarding the adequacy of judicial review and the protection of the rule of law in the new special administrative regions under China's "One Country, Two Systems" approach. Judicial review lies at the forefront of this controversy because it largely delineates the contours of local autonomy and the extent to which those who experience legal violations will have remedies. This Comment explores the roots of the conflict in Hong Kong and examines whether those same factors are present in Macau. After comparing the Basic Laws of Macau and Hong Kong, it concludes that the conflicts over judicial review in Hong Kong could occur in Macau. However, because of Macau's legal culture, particularly the inexperience of its judiciary, conflicts over judicial review will probably not reappear in Macau.

I. INTRODUCTION

The idea of "One Country, Two Systems" began in 1978 as Deng Xiaoping's slogan promoting the reunification of the People's Republic of China ("PRC") with Hong Kong, Macau, and Taiwan.¹ The 1982 PRC Constitution gave legal expression to the concept through the creation of special administrative regions ("SAR").² Each special administrative region would become part of China, yet exercise a high degree of autonomy. In 1997, Great Britain relinquished control of Hong Kong to China. On December 20, 1999, Portugal returned control of Macau to China after 442 years of colonial rule. The Portuguese colony of Macau then became the Macau Special Administrative Region, PRC. Attempts to obtain special administrative region status over Taiwan have re-ignited tensions between the PRC and Taiwan.³

¹ MING K. CHAN & DAVID J. CLARK, THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY? 3 (1991).

² KUAN HSIN-CHI, THE BASIC LAW AND HONG KONG'S FUTURE 55 (Peter Wesley-Smith & Albert HY Chen eds., 1988); ZHONGHUA RENMIN GONGHEGUO XIANFA [Constitution of the People's Republic of China] (adopted May 5, 1982, amended 1999) [hereinafter PRC CONST.] art. 31 *translated in* <http://www.qis.net/chinalaw/prcon.htm>. "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of specific conditions." *Id.*

³ *China, Taiwan "Shadow Boxing" To Defuse Tensions*, INSIDE CHINA, Mar. 23, 2000, available in <http://www.insidechina.com/features.php3?id=145228>.

Shortly before the Macau handover, Hong Kong faced the first test of its new legal regime under the "One Country, Two Systems" approach in *Ng Ka Ling v. Director of Immigration*⁴ ("Ng Ka Ling"). In *Ng Ka Ling*, the Standing Committee of China's National People's Congress ("NPCSC") reversed a decision by the local Hong Kong Court of Final Appeals ("Final Appeals Court"). The Final Appeals Court had struck down an ordinance adopted by the Hong Kong legislature because it impermissibly conflicted with the "right of abode" guaranteed by Hong Kong's Basic Law.⁵ On request from the local Hong Kong government, the NPCSC issued its own interpretation of the Basic Law. According to the NPCSC, the "right of abode" in Hong Kong's Basic Law grants the right to live in Hong Kong only to those (1) born outside of Hong Kong, and (2) to parents who are already permanent residents of Hong Kong.⁶ This interpretation was completely at odds with the Court of Appeals decision.

The *Ng Ka Ling* cases raise serious concerns regarding the adequacy of judicial review in the new special administrative regions. Judicial review lies at the forefront of this controversy because it largely delineates the contours of local autonomy and the extent to which those who experience violations of law will have remedies. Part II of this Comment provides background on Macau. Part III explores the conflict between China and the Hong Kong Court of Final Appeals. Part IV explores the roots of this conflict and examines whether those same factors are present in Macau.⁷ This comment concludes that it is unlikely that there will be a similar conflict in Macau over judicial review.

II. MACAU: FROM PORTUGUESE TO CHINESE RULE

A. Background

Macau is a former Portuguese colony that spans only 19.3 square miles and has a population of almost 450,000.⁸ The area consists of the

⁴ *Ng Ka Ling v. Director of Immigration*, 38 I.L.M 551 (1999) [hereinafter *Ng Ka Ling*].

⁵ *Id.*

⁶ Andreas Landwehr, *The Honeymoon is Over as Macau Watches Events in Hong Kong*, DEUTSCHE PRESSE, Dec. 14, 1999, available in LEXIS, Asia/Pacific Rim News, Current.

⁷ Vasco Rocha Vieira, Macau's last governor under Portuguese rule, expressed concerns about the events in Hong Kong shortly before Macau's handover. *Id.* Martin Lee, head of the Democratic Party in Hong Kong was quoted as saying, "He is very correct (to be worried). It is absolutely logical, that if Hong Kong loses some of the high degree of autonomy it has had, then Macau loses it, because we are the big brother, Macau is the little brother." *Id.*

⁸ Embassy of Portugal, (visited Jan. 13, 2000) <<http://www.portugalemb.org/territory.html>>. For an in depth history of Macau, see STEVE SHIPP, MACAU, CHINA: A POLITICAL HISTORY OF THE PORTUGUESE

Macau Peninsula, Taipa Island, and Coloane Island.⁹ It is located at the southern tip of China's Pearl River Delta and faces Hong Kong to the east.¹⁰ To its north is the Guangdong Province of Mainland China, which is accessible by road.¹¹ The ethnic population of the tiny island is mainly Chinese, Portuguese, and Macanese.¹² The Macanese are people of mixed Portuguese and Chinese descent and thus represent a culture particular to Macau.¹³

Able to speak both Portuguese and Chinese, the Macanese played an important role in the history of Macau as its translators, civil servants and mediators.¹⁴ This is because under Portugal, Macau used Portuguese as its official language and Portuguese nationals filled the top offices of the government.¹⁵ However, before the handover, Chinese nationals made up sixty-eight percent of Macau's residents and only a small percentage of the total population could read or speak Portuguese.¹⁶ Thus, the Macanese, numbering only ten thousand, were an essential part of the middle level management of the government.¹⁷

Before the Asian financial downturn of the late 1990's, Macau's economy was robust.¹⁸ Its per capita GDP quadrupled from 1982 to 1995.¹⁹ Macau's textile and garment manufacturing industries flourished under favorable quota agreements with the European Union and North America.²⁰ Macau also has a very large gambling establishment, leading to tourism from around the region.²¹ After the financial crisis in Asia, Macau's economy took a significant downturn, including a decline in tourism, exports, and revenue from casino gambling.²² An enormous property glut and rising unemployment made matters worse, and crime, already a problem

COLONY'S TRANSITION TO CHINESE RULE (1997); GEOFFREY C. GUNN, ENCOUNTERING MACAU: A PORTUGUESE CITY-STATE ON THE PERIPHERY OF CHINA 1557-1999 (1996).

⁹ See Embassy of Portugal, *supra* note 8.

¹⁰ *Id.*

¹¹ *Id.*

¹² Henry Chu, *As Portugal Prepares To Hand Over The Enclave To China, Many Of The Territory's Residents Of Chinese-Portuguese Descent—The 'Macanese'—Fear Their Distinctive Way Of Life May Be Near An End*, L.A. TIMES, Dec. 17, 1999, at A1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Harald Bruning, *From Backwater to Thriving City*, S. CHINA MORNING POST, Dec. 17, 1999, available in <<http://www.scmp.com/Special/MacauHandover/HaraldB.asp>>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

in the territory, began to get out of control.²³ Violence broke out from among the numerous gangs or “triads” comprising Macau’s underworld.²⁴ In the four years before the handover, gang violence left more than thirty-five people dead and many others injured after a string of executions, bombings, arsons and stabbings.²⁵ Shortly before the handover, Macau police went on a major offensive, arresting one of the more notorious triad leaders, known as “Broken Tooth.”²⁶

B. Portugal Passes Sovereignty of Macau to China

While the physical handover occurred in 1999, Portugal actually passed sovereignty over Macau to China much earlier. After the Great Proletarian Revolution of China began in the spring of 1966, riots erupted between Portuguese authorities and pro-Communist, pro-China forces in Macau.²⁷ To quiet tensions, Portugal and China signed an agreement in 1967, providing for “reasonable cooperation” and assuring Portugal that it could continue administering Macau.²⁸

When the Portuguese Revolution of 1974 ended a half-century of fascist rule, the opportunity for independence for all of Portugal’s colonies became real.²⁹ Within the new socialist Portuguese regime, the pro-Moscow faction fought with the pro-Beijing faction over the future of Macau.³⁰ The former allied with the Soviet agenda of de-colonization, and argued that Macau should be made independent.³¹ The latter contended that the territory should be returned to China.³² The political debate within Portugal fueled more tensions with China, since China had already asked the United Nations (“UN”) to stop considering Hong Kong and Macau as colonies and instead recognize that the territories were rightfully part of China.³³

Ultimately, the question was resolved in favor of Beijing when Portugal’s Minister of De-colonization told the UN that Portugal no longer

²³ *Id.*

²⁴ Niall Fraser, *Rewriting the Book*, S. CHINA MORNING POST, Dec. 10, 1999, at <http://www.scmp.com/Special/MacauHandover/Crime.asp>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ SHIPP, *supra* note 8, at 87.

²⁸ *Id.* at 94.

²⁹ GUNN, *supra* note 8, at 158.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ SHIPP, *supra* note 8, at 95.

regarded Macau as a Portuguese colony.³⁴ Eager to rid itself of its imperialistic past, Portugal offered Macau to China soon after.³⁵ China declined an immediate return, preferring instead to take formal sovereignty over Macau while allowing Portugal to continue the difficult task of administering the territory.³⁶

In 1984, the PRC and the United Kingdom signed the Joint Declaration on the Question of Hong Kong, setting the stage for the Hong Kong handover.³⁷ The PRC adopted the Hong Kong Basic Law ("HKBL") in 1990.³⁸ The HKBL serves as a mini-constitution for the new special administrative region. The parties set July 1, 1997 as the official date for turning over sovereignty.³⁹ After China and the UK reached agreement on Hong Kong in 1984, the handover of Macau became of greater importance.⁴⁰ Beijing wanted the handover of Macau to coincide with the handover of Hong Kong in order to "set the stage for its main objective—reunification of Taiwan with Mainland China."⁴¹ Portugal, for reasons outlined later, did not want to rush the handover of Macau. In 1987, Beijing and Lisbon finally reached agreement on the Sino-Portuguese Joint Declaration on the Question of Macau.⁴² By 1993, National People's Congress ("NPC") enacted the Basic Law of Macau.⁴³

III. THE POST-HANDOVER CONSTITUTIONAL CRISIS IN HONG KONG

On January 29, 1999, the Court of Final Appeals for the Special Administrative Region of Hong Kong issued the *Ng Ka Ling* decision. *Ng Ka Ling* was the Court's own *Marbury v. Madison*⁴⁴—the first decision clarifying the Court's judicial review powers under the new Hong Kong

³⁴ *Id.* at 96.

³⁵ *Id.*

³⁶ *Id.* at 97.

³⁷ See Sino-British Joint Declaration on the Question of Hong Kong, available in 23 I.L.M. 1366 (1984) [hereinafter HKJD]

³⁸ See Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa [Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] (adopted Apr. 4, 1990) [hereinafter HKBL], translated at http://www.info.gov.hk/basic_law/english/f02.htm.

³⁹ CHAN & CLARK, *supra* note 1, at 3.

⁴⁰ Jaw-ling Joanne Chang, *Settlement of the Macau Issue: Distinctive Features of Beijing's Negotiating Behavior*, CASE W. RES. J. INT'L. L. 253, 261 (1988).

⁴¹ *Id.*

⁴² *Id.* at 253; The Sino-Portuguese Joint Declaration on the Question of Macau (1987), available at http://www.cri.com.cn/english/ncri_special/macao/jointd/index.html [hereinafter MJD].

⁴³ See Zhonghua Renmin Gongheguo Aomen Tebie Xin Zhengqu Jibenfa [Basic Law of the Macao Special Administrative Region of the People's Republic of China] (promulgated Mar. 31, 1993) [hereinafter MBL], translated at http://www.macao.gov.mo/basiclaw/e_basiclaw.html.

⁴⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Basic Law. In *Ng Ka Ling*, a local Hong Kong immigration statute was challenged as conflicting with the guaranteed right of abode in the Basic Law.⁴⁵ Article 24 of the Basic Law guarantees all permanent residents of Hong Kong the right of abode.⁴⁶ However, ambiguous drafting made it unclear whether a child would automatically acquire permanent residency when his or her parent obtained residency *after the handover*.⁴⁷ Granting residency to children whose parents became residents *after the handover* would have allowed the influx of anywhere between 562,000 and 1.6 million Mainland Chinese into Hong Kong.⁴⁸ These estimates worried government officials in Hong Kong and China.⁴⁹

The Hong Kong ordinance sought to limit immigration by providing that any child asserting the right of abode must be born in wedlock.⁵⁰ This meant that children could not claim the right of abode based on a father's residency unless he was married to the child's mother. It also said that any person who had not obtained permanent residency as of July 1, 1997 (the date of the handover) must obtain a valid travel document and an attached certificate of entitlement.⁵¹ The Hong Kong Immigration Department then published a procedural mechanism, under Basic Law Article 22(4),⁵² for obtaining these documents. The procedure required that applications be made through the entry-exit administration of the Public Security Bureau in Mainland China.⁵³ However, under Chinese law, applications from those seeking permanent residency in Hong Kong or Macau are subject to examination and approval under a quota system utilized by China.⁵⁴ Purportedly, this was to safeguard and maintain the economic prosperity of the special administrative regions.⁵⁵ Since none of the four applicants for residency in *Ng Ka Ling* had received permits from China, they were refused residency.⁵⁶

⁴⁵ *Ng Ka Ling*, *supra* note 4.

⁴⁶ *See* Table 1.

⁴⁷ *Id.*

⁴⁸ According to a Hong Kong government survey 1.6 million Mainlanders would have been eligible for the right to abode. A Human Rights Monitor survey estimated only 562,000 would have the right to abode. S. CHINA MORNING POST, *The Case and Why it Matters* (Oct. 23, 1999) available in http://www.scmp.com/Special?.../Fulltext_asp_ArticleID-199910231147113704.asp.

⁴⁹ *Id.* The Hong Kong government claimed that such an influx could cost \$710 billion over 10 years in housing and services.

⁵⁰ *Ng Ka Ling*, *supra* note 4, at 556.

⁵¹ *Id.*

⁵² Lin Feng, *The Constitutional Crisis in Hong Kong—Is it Over?*, 9 PAC. RIM L. & POL'Y J. 281, 284 (2000); *see* Table 1.

⁵³ *Id.*

⁵⁴ *Ng Ka Ling*, *supra* note 4, at 558.

⁵⁵ Feng, *supra* note 52, at 284.

⁵⁶ *Ng Ka Ling*, *supra* note 4, at 560.

Table 1. Comparisons Between Right of Abode Provisions

Hong Kong:	Macau:	Difference:
<p>Article 24 Residents of the Hong Kong Special Administrative Region ("Hong Kong residents") shall include permanent residents and non-permanent residents.</p> <p>The permanent residents of the Hong Kong Special Administrative Region shall be:</p> <p>(1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;</p> <p>(2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;</p> <p>(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);</p> <p>(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;</p>	<p>Article 24 Residents Of the Macao Special Administrative Region ("Macao residents") shall include permanent residents and non-permanent residents.</p> <p>The permanent residents of the Macao Special Administrative Region shall be:</p> <p>(1) Chinese citizens born in Macao before or after the establishment of the Macao Special Administrative Region and their children of Chinese nationality born outside Macao;</p> <p>(2) Chinese citizens who have ordinarily resided in Macao for a continuous period of not less than seven years before or after the establishment of the Macao Special Administrative Region and their children of Chinese nationality born outside Macao after they have become permanent residents;</p> <p>(3) The Portuguese who were born in Macao and have taken Macao as their place of permanent residence before or after the establishment of the Macao Special Administrative Region;</p> <p>(4) The Portuguese who have ordinarily resided in Macao for a continuous period of not less than seven years and have taken Macao as their place of permanent residence before or after the establishment of the Macao Special Administrative Region;</p>	<p>The Hong Kong Law guarantees residency to the child of anyone born in Hong Kong before or after the handover AND to the child of anyone who resided in Hong Kong continuously for at least seven years. In other words, a child not born in Hong Kong would obtain residency if either his or her parent was born in Hong Kong or when his or her parent resided continuously in Hong Kong for at least seven years. Macau limits residency to only those children born outside of Macau whose parents are already residents. The Macau clearly greatly limits the right to residency.</p> <p>The Hong Kong law makes no specific mention of British citizens, rather referring to non-Chinese citizens. It requires these citizens to have entered the region with "valid travel documents" and reside in Hong Kong for not less than seven years. The Macau law recognizes residency for the Portuguese who were born in Macau or who made their home there for seven years. For all those who are not Portuguese, the law in Macau is the same as in Hong Kong.</p> <p>The Hong Kong law gives residency to all non-Chinese citizens born in Hong Kong who are under 21, while the Macau law gives residency to all non-Chinese and non-Portuguese citizens born in Hong Kong who are under 18.</p>

Hong Kong:	Macao:	Difference:
<p>(5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and</p> <p>(6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.</p> <p>The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode.</p> <p>The non-permanent residents of the Hong Kong Special Administrative Region shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the Region but have no right of abode.</p>	<p>(5) Other persons who have ordinarily resided in Macao for a continuous period of not less than seven years and have taken Macao as their place of permanent residence before or after the establishment of the Macao Special Administrative Region;</p> <p>(6) Persons under 18 years of age born in Macao of those residents listed in category (5) before or after the establishment of the Macao Special Administrative Region.</p> <p>The above mentioned residents shall have the right of abode in the Macao Special Administrative Region and shall be qualified to obtain permanent identity cards.</p> <p>The non-permanent residents of the Macao Special Administrative Region shall be persons who are qualified to obtain Macao identity cards in accordance with the laws of the Region but have no right of abode.</p>	<p>The Hong Kong Law guarantees the right to abode to those who had it before the handover. The Macau law does not have this provision.</p>
<p>Article 22(4) For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region.</p>	<p>Article 22(4) For entry into the Macao Special Administrative Region, people from other provinces, autonomous regions or municipalities directly under the Central Government must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region.</p>	<p>In the Hong Kong law, the reference is to other parts of China. In the Macau law, the reference specifically mentions provinces, autonomous regions or municipalities, perhaps to clarify the people applying from Hong Kong to go to Macau must now apply through China.</p>

Under Article 158 of the Basic Law, if the subject matter before any of the Hong Kong courts pertains to the domestic affairs of Hong Kong, then the local court has final adjudication.⁵⁷ However, if the subject matter pertains to the affairs of the Central Government or the relationship between Hong Kong and the Central Government, then the Final Appeals Court must seek an interpretation of the law from the NPCSC.⁵⁸ In striking down the Hong Kong ordinance, the Final Appeals Court resolved the tensions between the power of Mainland China to control emigration in Article 22(4) and the right to abode promised in Article 24(3) by holding that under Article 24(3), the right of abode includes the right to enter the region.⁵⁹ It also held that permanent residents of Hong Kong are not covered by the requirements of Article 22(4).⁶⁰ By adopting this interpretation, the Court obviated any need to examine the issue as one implicating the relationship between Hong Kong and the Mainland. In other words, by focusing on the right to immigrate to Hong Kong instead of China's ability to control its own emigration, the issue no longer fell into an area governed by China. Thus, it was not a matter requiring interpretation by the NPCSC under Basic Law Article 158.

The Court of Final Appeal held that under Article 158, it has the power to strike down local legislation that conflicts with rights guaranteed by the Basic Law.⁶¹ More controversially, it went further and said, in dicta, that it may "examine" acts by the National People's Congress or its Standing Committee to determine whether they conform to the Basic Law and declare "invalid" those acts that do not conform.⁶² The Court of Final Appeal reasoned that the NPC is the "highest organ" of the state. Therefore, its acts are sovereign. The NPC exercised this sovereign power when it created the Hong Kong Region and its Basic Law using its powers under Article 31 of

⁵⁷ See Table 2, attached.

⁵⁸ *Id.*

⁵⁹ Ng Ka Ling, *supra* note 4, at 568.

⁶⁰ *Id.* at 569.

⁶¹ *Id.* at 562. According to the Court of Final Appeals, "in exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law, and if found to be inconsistent, to hold them to be invalid." *Id.*

⁶² *Id.* "What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People's Congress or its Standing Committee . . . are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare them to be invalid if found to be inconsistent." *Id.*

the PRC Constitution.⁶³ Thus, the HKCFA's power of judicial review derives from this sovereign act.⁶⁴

The decision was widely praised for its firm defense of human rights and the rule of law.⁶⁵ However, Mainland officials and Chinese legal scholars attacked the judgment of the HKCFA, arguing that it was putting itself above the NPC and called for the HKCFA's decision to be rectified.⁶⁶ The Hong Kong SAR government moved for a clarification of the decision and the motion was granted. On February 26, 1999, the HKCFA restated its earlier position and reiterated that it was merely upholding the Basic Law as an act of the NPC that takes precedence over subsequent acts of the NPC.⁶⁷

The Hong Kong SAR responded by asking the NPCSC to interpret the relevant provisions of the Basic Law.⁶⁸ Hong Kong SAR's decision to ask the NPCSC to override a local court decision rather than to request an amendment to the Basic Law fueled concerns about judicial independence and the rule of law in Hong Kong.⁶⁹ In the end, the NPCSC issued an interpretation of the right of abode different from that given by the Court of Final Appeal, effectively overruling the local court.⁷⁰ Under the NPCSC's interpretation, only Chinese Mainlanders born after their parents had already become permanent residents of Hong Kong could obtain the right to abode in Hong Kong.⁷¹ The NPCSC offered limited legal reasoning, saying only that this interpretation reflected original legislative intent.⁷² In addition, the Standing Committee said that the Court of Final Appeal should have sought an interpretation of the Basic Law from the NPCSC before adjudicating the case because it involved an issue related to the affairs of the Central Government.⁷³

⁶³ PRC CONST., *supra* note 2.

⁶⁴ Ng Ka Ling, *supra* note 4, at 562.

⁶⁵ Michael C. Davis, *Constitutionalism Under Chinese Rule: Hong Kong After the Handover*, 27 DENV. J. INT'L L. & POL'Y 275, 292 (1999).

⁶⁶ *Id.*

⁶⁷ Ng Ka Ling v. Director of Immigration, Court of Final Appeal, Final Appeal No. 14 of 1998 (Feb. 26, 1999) available in <http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_14_16_98a.htm>.

⁶⁸ Davis, *supra* note 65.

⁶⁹ *Id.*

⁷⁰ Mark Lander, *After 2 Years, Hong Kong Looks More Like China*, N.Y. TIMES, July 1, 1999, available in LEXIS, New Library, Current News File.

⁷¹ Landwehr, *supra* note 6.

⁷² Feng, *supra* note 52, at 288.

⁷³ *Id.*

IV. THE BASIS FOR THE LEGAL CONFLICT IN HONG KONG AND THE LIKELIHOOD FOR CONFLICT IN MACAU

There are numerous reasons for the conflict between China and the Hong Kong Court. This section identifies the following factors as causing the constitutional crisis: (1) the ambiguity of the Hong Kong Basic Law text, (2) the conflict between the common law and the civil law traditions regarding the role of the courts in law making, (3) the different experiences China and Hong Kong have had with judicial review, and (4) the differing levels of independence exercised by judges in China and Hong Kong. The question is whether these same factors are present in Macau.⁷⁴

A. *The Ambiguity of the Text*

1. *The Hong Kong Joint Declaration and Basic Law*⁷⁵

Uncertainty about the adequacy of judicial remedies in Hong Kong exists, in part, because of the ambiguity of the text. On the one hand, Hong Kong's Basic Law promises to preserve the current legal structure, including the continued application of past laws.⁷⁶ On the other hand, it says that prior laws must be consistent with the Basic Law, and that the Basic Law is subject to legislative changes.⁷⁷ What, if any, prior laws are inconsistent with the Basic Law has yet to be determined. Therefore, the level of

⁷⁴ According to TIME MAGAZINE:

Macau's past and its politics couldn't be more dissimilar to those of Hong Kong. In their final decade of colonial control, the British started democratic reforms, which were embraced by Hong Kong's populace (and later diluted by the new pro-Beijing regime). Britain's colony was well run, largely uncorrupt and robustly prosperous (though it suffered from the Asian financial crisis that began the day after the handover). The big question was whether Hong Kong's freedoms—including an independent judiciary and a free press—could survive and whether the economy would wither without them. Macau, in contrast, goes into its transition with a self-censoring press, an antiquated judiciary in need of an overhaul and a partly elected assembly that has virtually shared sovereignty with China for two decades . . . Democracy was never encouraged and corruption is rife, especially in the police and civil service. Also, thanks to the triad wars, the economy is faltering and unemployment recently reached a high of 6%. So in Macau, unlike Hong Kong of two years ago, the change of sovereignty elicits less dread than hope: that China will restore peace and lure high-rollers back to the all-important gaming tables.

Anthony Spaeth, *Macau's Big Gamble: The Portuguese Colony's Return to China will be a Low-Key Affair. The Real Fireworks will Begin when the New Owners Try to Clean Up the Joint*, TIME MAG., Dec. 20, 1999, available in 1999 WL 29489427.

⁷⁵ Much of Hong Kong's Basic Law reiterates what was generally agreed to in the Joint Declaration with language that is more specific. Therefore, this Comment focuses on Hong Kong's Basic Law.

⁷⁶ HKBL, *supra* note 38, art. 8.

⁷⁷ *Id.*

continuity in the legal systems of the new Hong Kong SAR remains uncertain.

These same tensions exist in other areas of Hong Kong's Basic Law. On the one hand, there is the promise of a high degree of autonomy for the SAR, including an independent judiciary and the power of final adjudication.⁷⁸ On the other hand, it is clear that Hong Kong is directly under the authority of the Central People's Government of the PRC.⁷⁹ Importantly, the NPCSC has the authority to interpret the Basic Law in matters that are the responsibility of the PRC government or concern the relationship between the PRC and the Hong Kong governments.⁸⁰

Thus, which body has final adjudication depends on the legal issue under consideration. Ostensibly, the NPCSC has the power to interpret only those legal questions related to its powers under the Basic Law, notably foreign and defense affairs, and those issues that concern the relationship between Hong Kong and China.⁸¹ Since the Basic Law does not clearly define this line, the contours of the pledge of final adjudication are far from clear. Finally, it is unclear whether the NPCSC or the Court of Final Appeal decides where this line should be drawn. This lack of clarity was the primary cause of the *Ng Ka Ling* constitutional crisis. The Court of Final Appeal believed that only domestic issues were implicated in the case, while the NPCSC thought that the question was one that pertained to the relationship between China and Hong Kong. Moreover, each institution believed that it alone had the power to determine which institution would have jurisdiction.

2. *The Macau Joint Declaration*

While the Macau Joint Declaration ("MJD") closely resembles the Hong Kong Joint Declaration ("HKJD"), two major disputes dominated the talks between China and Portugal and resulted in some changes to the MJD.⁸² These disputes centered on the timing of the handover and the future nationality of Macau citizens.⁸³ First, Portugal did not want to handover the territory's administration without "careful planning."⁸⁴ More specifically,

⁷⁸ *Id.* art. 2.

⁷⁹ *Id.* art. 12.

⁸⁰ *Id.* art. 158.

⁸¹ *Id.* art. 18.

⁸² These differences are also reflected in the Macau Basic Law since it also incorporates the Macau Joint Declaration into much of its text.

⁸³ Chang, *supra* note 40, at 263.

⁸⁴ *Id.* at 259.

Portugal did not want to replicate its abysmal failure at de-colonization in, for instance, East Timor.⁸⁵ In addition, Portugal was worried that turning Macau over in 1997 would not allow enough time for the development of local citizens to run the civil service bureaucracy.⁸⁶ Finally, Portugal thought that Macau would benefit economically if it were transferred after Hong Kong. This is because Portugal thought that changes in Hong Kong might cause worried businessmen to “transfer capital and investments from Hong Kong to Macau.”⁸⁷ Ultimately, China adjusted its demands, asking for the handover before the year 2000.⁸⁸

Second, there was a conflict over the nationality laws that would apply to the new territory. Portugal allows for dual citizenship, which would make everyone with a passport a Portuguese citizen.⁸⁹ Since China does not recognize dual national citizenship, Portugal’s rules caused friction over which nationality law would win out.⁹⁰ Portugal held firm, believing that any changes to its passport rule would raise suspicions among residents of its other former colonies that they too would lose their right to live in Portugal.⁹¹ Ultimately, China agreed to grant anyone holding a Portuguese passport before the handover dual citizenship.⁹²

The MJD, like the HKJD, maintains that the SAR “shall be directly under the authority of the Central People’s Government of the People’s Republic of China.”⁹³ However, Macau (like Hong Kong) is promised a high degree of autonomy, except in foreign and defense affairs.⁹⁴ In addition, similar to the HKJD, the MJD maintains that the “current social and economic systems in Macau will remain unchanged, and so will the

⁸⁵ *Id.* at 259-60. After Portugal left East Timor in 1975, Indonesia invaded the territory. Thus “began an occupation marked by brutality and terror and accompanied by a systematic degradation of East Timorese cultural life.” Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court Of Justice*, 17 HASTINGS INT’L & COMP. L. REV. 323, 324 (1994). Leaders in the independence movement in East Timor have sought to establish close ties with the Macau Special Administrative Region based on their similar history under Portugal. Harald Bruning, *East Timor Desires Allegiance in Shared Heritage*, S. CHINA MORNING POST, Aug. 19, 2000, available in 2000 WL 24577676.

⁸⁶ Chang, *supra* note 40, at 260-61.

⁸⁷ *Id.* at 261.

⁸⁸ *Id.* at 259.

⁸⁹ *Id.* at 263.

⁹⁰ *Id.*

⁹¹ *Id.* at 265.

⁹² *Id.* at 267.

⁹³ MJD, *supra* note 42, Annex I, art. I, para. 4; see HKJD, *supra* note 37, art. 3, para. 2. “The Hong Kong Special Administrative Region will be directly under the authority of the Central People’s Government of the People’s Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defense affairs which are the responsibilities of the Central People’s Government.”

⁹⁴ MJD, *supra* note 42, arts. 12-14; see HKJD, *supra* note 37, at 12-14.

lifestyle”⁹⁵ for 50 years.⁹⁶ Again, similar to the HKJD, the MJD also promises “the laws currently in force in Macau will remain basically unchanged.”⁹⁷ Moreover, Portugal assured the UN Human Rights Committee that under the Macau Joint Declaration, the International Covenant on Civil and Political Rights would continue to apply after the administration of the territory passed to China.⁹⁸ This was later expressly confirmed in the Macau Basic Law.⁹⁹

To guarantee these rights, the MJD (similar to the HKJD) promises, “judicial power shall be vested in the courts of the Macau Special Administrative Region.”¹⁰⁰ Moreover, the “power of final adjudication shall be exercised by the Court of Final Appeal . . . independently and free from any interference, and shall be subordinated only to the law.”¹⁰¹ In addition, both declarations vest power in the legislatures of the Special Administrative Regions. However, the MJD, unlike the HKJD, does not guarantee that all members of Macau’s legislature will be elected.¹⁰² In Macau, the legislature “shall be composed of local inhabitants, and the *majority* of its members shall be elected.”¹⁰³ In contrast, the HKJD promises that “[t]he legislature . . . shall be constituted by elections.”¹⁰⁴

3. *The Macau Basic Law*

Although two different committees purportedly drafted the Hong Kong and Macau Basic Laws, the language of the laws is remarkably similar.¹⁰⁵ The question is whether the provisions at stake in the *Ng Ka Ling* case are significantly different from those in Macau’s Basic Law. They are

⁹⁵ MJD, *supra* note 42, art. 2, para. 4; *see* HKJD, *supra* note 37, art. 3, para. 5 (“The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style.”).

⁹⁶ MJD, *supra* note 42, at annex I, art. 1, para. 3; *see* HKJD, *supra* note 37, annex I, art. 1, para. 3.

⁹⁷ MJD, *supra* note 42, art. 2, para. 4.

⁹⁸ Press Release, United Nations, Human Rights Committee Begins Consideration of Portugal’s Report on Territory of Macau (Apr. 4, 1997), U.N. Doc. HR/CT/489.

⁹⁹ *See* MBL, *supra* note 43, art. 40 (“The provisions of the International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights, and international labour conventions as applied to Macau shall remain in force and shall be implemented through the laws of the Macau Special Administrative Region.”).

¹⁰⁰ *Id.*, annex I, art. IV, para. 1.

¹⁰¹ *Id.*

¹⁰² SHIPP, *supra* note 8, at 109; MJD, *supra* note 42, annex I, art. III; HKJD, *supra* note 37, annex I, art. II.

¹⁰³ MJD, *supra* note 42, annex I, art. III (emphasis added).

¹⁰⁴ HKJD, *supra* note 37, annex I, art. I.

¹⁰⁵ SHIPP, *supra* note 8, at 110. For an in-depth discussion of the negotiations over the Hong Kong Basic Law, *see* Chang, *supra* note 40. *See also* Table 2, attached.

not.¹⁰⁶ For instance, both Basic Laws promise a high degree of autonomy, including judicial independence and the right of final adjudication.¹⁰⁷ Both carry laws previously in force into effect after the handover.¹⁰⁸ Together, they also place ultimate interpretation of the Basic Law in the hands of the NPCSC.¹⁰⁹ Finally, both Basic Laws require the Courts of Final Appeals to seek an interpretation from the Standing Committee on issues related to foreign or defense affairs or the relationship between the SARs and Mainland China.¹¹⁰

However, an important difference in the texts is that the Macau Basic Law expressly subordinates judicial decisions of the Court of Final Appeals to the NPCSC.¹¹¹ By contrast, Hong Kong's Basic Law does not expressly do so.¹¹² The presence of this express provision in Macau's Basic Law further weakens the case for greater judicial review in Macau. Another difference in the text reflects Hong Kong's common law versus Macau's civil law tradition. The Hong Kong Basic Law includes an express provision carrying over the judicial system that was "previously practised" in the territory, while Macau's judicial system is to be "prescribed by law."¹¹³ In the common law tradition, present practice is informed by past practice.¹¹⁴ In the civil law tradition, without *stare decisis*, legal process is generally dictated by statute.¹¹⁵

This second difference between common law and civil law is why Portugal raised concerns two months before the handover over inadequate preparation by China for the new judicial system of Macau.¹¹⁶ Vasco Rocha Vieira, Macau's last Portuguese Governor, said that China was unwilling to cooperate in localizing the territory's judicial system before the handover.¹¹⁷ He said that China had "reserved for itself" the decision to set up Macau's Court of Final Appeals and implement the new judicial system of the

¹⁰⁶ See Table 2, attached.

¹⁰⁷ HKBL, *supra* note 38, arts. 2, 12; MBL *supra* note 43, arts. 2, 12.

¹⁰⁸ HKBL, *supra* note 38, arts. 8, 14; MBL *supra* note 43, arts. 8, 14.

¹⁰⁹ HKBL, *supra* note 38, arts. 12, 13; MBL *supra* note 43, arts. 12, 13.

¹¹⁰ HKBL, *supra* note 38, arts. 159, 144; MBL *supra* note 43, arts. 159, 144.

¹¹¹ Compare HKBL, *supra* note 38, art. 84 with MBL *supra* note 43, art. 89.

¹¹² See HKBL, *supra* note 38, art. 84.

¹¹³ HKBL, *supra* note 38, art. 81; MBL *supra* note 43, art. 84.

¹¹⁴ Black's Law Dictionary defines *stare decisis* as "[t]o abide by or adhere to, decided cases." BLACK'S LAW DICTIONARY 978 (6th ed. 1991).

¹¹⁵ JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 22 (1985).

¹¹⁶ Harald Bruning, *Governor Regrets China's Inaction Over Macau Law*, S. CHINA MORNING POST, Oct. 30, 1999, available in LEXIS, News group file.

¹¹⁷ *Id.*

territory after the handover.¹¹⁸ This not only gave total control to China in setting up the judiciary; it also led to a very inexperienced judiciary.¹¹⁹

Finally, the "right of abode" provision in the Macau Basic Law is different from the Hong Kong Basic Law. Drafters of Macau's Basic Law sidestepped this explosive issue by clearly restricting the right of abode to Macau. In Macau, only a child born after his or her parent became a permanent resident of Macau is capable of being a permanent resident of the region.¹²⁰ Thus, the NPCSC interpretation of the Hong Kong Law in the *Ng Ka Ling* case is already the law in Macau.¹²¹

4. Conclusion

Comparing the texts of the Hong Kong Joint Declaration and Basic Law with Macau's versions, reveals that while the language is remarkably similar, the differences are significant enough to prevent the kind of constitutional crisis that occurred in Hong Kong. First, Article 89 of Macau's Basic Law *expressly* requires that when a question regarding foreign or defense affairs arises in a court, the judge must obtain certification from Macau's Chief Executive on questions of fact concerning acts of state.¹²² This certificate is binding on the court.¹²³ Moreover, before the Chief Executive issues the certificate, he or she must obtain a certifying document from the PRC government. Second, there will be less confusion in Macau because unlike Hong Kong, the courts are not applying law "previously practiced."¹²⁴ Instead, in the civil law tradition, all legal norms are spelled out in positive law. Third, the Macau right of abode provision was drafted clearly and narrowly in order to avoid the problem of mass migration into the region. Thus, this lack of ambiguity lessens the need to define the norm through a legal process.

¹¹⁸ *Id.*

¹¹⁹ For a comparison of the judicial cultures of Hong Kong and Macau, see *infra* Part IV.D.

¹²⁰ See Table 1.

¹²¹ Harald Bruning, *Macau Escapes Abode Muddle*, S. CHINA MORNING POST, Mar. 24, 2000, available in LEXIS, News group file.

¹²² MBL *supra* note 43, arts. 19, 89.

¹²³ MBL *supra* note 43, art. 19.

¹²⁴ HKBL *supra* note 38, art. 81.

B. Common Law Versus Civil Law Tradition

1. Hong Kong Common Law and Chinese Civil Law

Another root of the constitutional crisis in *Ng Ka Ling* was the clash between Hong Kong's common law tradition acquired under British rule and the Chinese experience with the civil law tradition.¹²⁵ Specifically, the conflict revolves around whether the courts can or cannot make law. China follows the civil law tradition in which the legislature makes law and the courts may only enforce the law.¹²⁶ Hong Kong, on the other hand, follows the common law tradition where both legislatures and courts may make law.

Interestingly, the civil law tradition of prohibiting courts from making law grows out of the French Revolution and the unique perspective it inspired regarding the notion of separation of governmental powers.¹²⁷ Under Western separation of power theory, in order to protect individual liberty it is necessary to divide governmental power between the three branches of government—the executive, the legislature, and the judiciary.¹²⁸ However, the Chinese regard Western separation of power doctrine as a bourgeois concept.¹²⁹ Instead, the reasoning underlying interpretation by the legislative branch in China is actually the *lack* of competition between the

¹²⁵ Guiguo Wang & Priscilla M.F. Leung, *One Country, Two Systems: Theory Into Practice*, 7 PAC. RIM L. & POL'Y J. 279, 300 (1998).

¹²⁶ *Id.*

¹²⁷ This is because, according to John Henry Merryman:

In France the judicial aristocracy were targets of the revolution not only because of their tendency to identify with the landed aristocracy but also because of their failure to distinguish very clearly between applying law and making law. As a result of these failings . . . progressive legislative reforms had frequently been frustrated. The courts refused to apply the new laws, interpreted them contrary to their intent, or hindered the attempts of officials to administer them.

MERRYMAN, *supra* note 115, at 16.

According to Merryman, the Western common law tradition regards law making in the courts very differently:

In the United States and England . . . here was a different kind of judicial tradition, one in which judges had often been a progressive force on the side of the individual against the abuse of power by the ruler . . . [T]he power of judges to shape the development of the common law was a familiar and welcome institution.

Id.

¹²⁸ ALLAN BREWER-CARIAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* 15 (1989). This idea is well represented by James Madison in *The Federalist Papers*. According to Madison: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." *THE FEDERALIST* NO. 47 (James Madison).

¹²⁹ PETER WESLEY-SMITH, *1 CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG* 31-32 (1987).

branches of government.¹³⁰ Since all governmental institutions are working for the good of the people, and the NPC is the people's institution, then it is appropriate for it to provide interpretation of its laws for the courts.¹³¹

Carefully distinguishing between making law and enforcing it reveals why China can say that the SAR has final adjudication but in reality it reserves final interpretation for itself.¹³² Final adjudication under Chinese judicial review amounts to final enforcement of the legal interpretation provided by the NPC. Thus, at the heart of the right of abode controversy is a fundamental conflict between civil law and common law notions of the judicial role in law making.¹³³

2. *Portuguese Civil Law*

Portugal is a civil law country,¹³⁴ and like China, its courts do not make law. However, while Portugal follows the civil law tradition, it has strong constitutional review in its courts.¹³⁵ Therefore, it does not share the same separation of powers concerns of many civil law countries regarding the judiciary overruling legislation. Moreover, its courts regularly override the legislature.¹³⁶

3. *Conclusion*

Looking at Portugal's civil law tradition, Macau could theoretically run into a *Ng Ka Ling* type conflict with China. This is because Portugal has such strong constitutional review of legislative acts. However, since the Macau Basic Law limits the courts to those legal norms that have been expressly carried forward through the enactment of local law, the Portuguese legal tradition is somewhat inconsequential to the future of Macau.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See, e.g., MBL, *supra* note 43, art. 2.

¹³³ See *infra* Part IV.C.2.

¹³⁴ JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA 341 (1994).

¹³⁵ See *infra* Part IV.C.3.

¹³⁶ For example, the Constitutional Court rejected a proposed nationwide referendum question on European Union participation because it lacked the objectivity, clarity and precision" required by law. The referendum question was ultimately dropped. Peter Wise, *Portugal drops EMU vote proposal*, FIN. TIMES (London), July 31, 1998, available in LEXIS, News group file.

C. *Judicial Review in Hong Kong and China*

There is a significant difference between the common law process of making law in the courts and judicial review. Judicial review refers to the ability of courts to review the constitutionality of legislative acts.¹³⁷ It is possible to have courts make law without constitutional review (e.g., Great Britain) or constitutional review without courts making law (e.g., France).

1. *Judicial Review in Hong Kong under the UK*

Great Britain has an unwritten and abstract constitution, and the courts may not review acts of Parliament.¹³⁸ The absence of a constitution and judicial review derives from Britain's system of parliamentary supremacy.¹³⁹ Thus, according to one scholar, "most British judges and the vast majority of British lawyers must have had little or no contact with the problems and workings of judicial review."¹⁴⁰ In *British Railways Board v. Pickin*,¹⁴¹ Lord Wilberforce described how judicial review is viewed in the British system:

The idea that an Act of Parliament, public or private or a provision in an Act of Parliament, could be declared invalid or ineffective in the courts on account of some irregularity in Parliamentary procedure, or on the ground that Parliament in passing it was misled, or that it was obtained by deception or fraud, has been repudiated by authorities of the highest standing since 1842 onwards. The remedy for a Parliamentary wrong, if one has been committed, must be sought from Parliament, and cannot be gained from the courts.¹⁴²

The British system of legislative supremacy might lead one to believe that Hong Kong's pre-handover constitution could be reconciled with China's Constitution. However, unlike the UK, judicial practice in Hong Kong permitted constitutional review of legislative acts.¹⁴³ The UK followed this custom with all of its colonies, including India and Canada.¹⁴⁴

¹³⁷ See BREWER-CARIAS, *supra* note 128, at 1.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *British Railways Board v. Pickin*, [1974] A.C. 765 (Eng.).

¹⁴² BREWER-CARIAS, *supra* note 128, at 2.

¹⁴³ WESLEY-SMITH, *supra* note 129, at 56.

¹⁴⁴ BREWER-CARIAS, *supra* note 128, at 181.

In pre-handover Hong Kong, the Letters Patent and the Royal Instructions served as the written basis of rights, duties, and power in Hong Kong's colonial government.¹⁴⁵ These colonial regulations constituted the supreme law of Hong Kong and were referred to as "constitutional documents" since no Hong Kong laws could contravene them.¹⁴⁶ Therefore, in the hierarchy of legal norms, these constitutional documents trumped local legislation.

Hong Kong's judicial system before the handover consisted of magistrate courts, district courts, and the Supreme Court of Judicature.¹⁴⁷ However, judicial decisions made in the Hong Kong courts were not final. Instead, the Judicial Committee of the Privy Council in London was the final appeals court for Hong Kong.¹⁴⁸ While the Privy Council was not strictly a judicial body, and it did not always separate legal questions from policy questions, it was a court staffed by professional judges.¹⁴⁹ Moreover, because of British rule, Hong Kong's legal system is based on the doctrine of case precedent or *stare decisis*.¹⁵⁰

2. *Judicial Review in China*

China has a written Constitution. The 1999 Constitution declares that it is the "fundamental law of the state and has supreme legal authority."¹⁵¹

¹⁴⁵ WESLEY-SMITH, *supra* note 129.

¹⁴⁶ *Id.* at 81.

¹⁴⁷ Jin Huang & Andrew Xuefeng Qian, "One Country, Two Systems," *Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflict of Law in China*, 5 DUKE J. COMP. & INT'L L. 289, 299 (1998).

¹⁴⁸ *Id.*

¹⁴⁹ WESLEY-SMITH, *supra* note 129, at 199. On average about 25 cases went to the Privy Council from Hong Kong each year. Frankie Fook-Lun Leung, *Hong Kong: The Hong Kong Court of Final Appeal Ordinance*, 35 I.L.M. 207, 208 (1996).

¹⁵⁰ Daniel R. Fung, Foundation for the Survival of the Rule of Law in Hong Kong—The Resumption of Chinese Sovereignty, 1 UCLA J. INT'L L. & FOREIGN AFF. 283, 285-86 (1997).

¹⁵¹ PRC CONST., *supra* note 2. According to the Preamble: "This Constitution, in legal form, affirms the achievements of the struggles of the Chinese people of all nationalities and defines the basic system and basic tasks of the state; it is the fundamental law of the state and has supreme legal authority." According to Article 5:

The state upholds the uniformity and dignity of the socialist legal system.

No laws or administrative or local rules and regulations may contravene the Constitution.

All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated.

No organization or individual is privileged to be beyond the Constitution or the law.

Thus, the PRC Constitution enjoys precedence over all other legal norms.¹⁵² Additionally, the NPC is the “highest organ of state power and its permanent body is the Standing Committee.”¹⁵³ The NPC, with 3,500 members, meets infrequently.¹⁵⁴ Therefore, the Standing Committee (200 members) plays an important legislative function.¹⁵⁵ The NPC “has the right and obligation to make and revise constitutions and ‘basic laws’.”¹⁵⁶ According to Chinese jurists, generally, “basic laws” are anything enacted by the NPC.¹⁵⁷ The Standing Committee may pass laws other than basic laws or may amend basic laws enacted by the NPC.¹⁵⁸

China’s Supreme People’s Court (“SPC”) is the “highest judicial organ,” and “supervises the administration of justice by the people’s courts at various local levels.”¹⁵⁹ While the SPC is the highest judicial body, it is nonetheless “responsible to the National People’s Congress and its Standing Committee.”¹⁶⁰ Therefore, the NPC has supremacy over the SPC. According to one scholar:

The relationship between the Court and the NPC and its Standing Committee is based on the theory of *yixing heyi*—the combination of legislation and administration, which was first proposed by Karl Marx in the Paris Commune. According to Marx, the Paris Commune, as the highest authority, was to perform both legislative and judicial functions.¹⁶¹

Thus, the NPC has the power to appoint or remove the President of the Court.¹⁶² The Standing Committee may remove the “Vice Presidents and Judges of the Supreme People’s Court, members of its Judicial Committee and the President of the Military Court.”¹⁶³ The NPCSC may supervise the

¹⁵² YONG ZHANG, COMPARATIVE STUDIES ON THE JUDICIAL REVIEW SYSTEM IN EAST AND SOUTHEAST ASIA 108 (1997).

¹⁵³ See PRC CONST., *supra* note 2, art. 57; TAO-TAI HSIA & CONSTANCE AXINN JOHNSON, LAW MAKING IN THE PEOPLE’S REPUBLIC OF CHINA: TERMS, PROCEDURES, HIERARCHY, AND INTERPRETATION 2 (1986). [hereinafter TAO-TAI HSIA].

¹⁵⁴ TAO-TAI HSIA, *supra* note 153, at 4.

¹⁵⁵ *Id.* at 2.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See PRC CONST., *supra* note 2, art. 127.

¹⁶⁰ *Id.*, art. 128.

¹⁶¹ NANPING LIU, OPINIONS OF THE SUPREME PEOPLE’S COURT: JUDICIAL INTERPRETATION IN CHINA 29 (1997).

¹⁶² See PRC CONST., *supra* note 2, art. 63(4); NANPING LIU, *supra* note 161, at 30.

¹⁶³ NANPING LIU, *supra* note 161, at 30; see PRC CONST., *supra* note 2, art. 67(11).

Court's operations.¹⁶⁴ Moreover, the Court's power is limited in its interpretation of laws.¹⁶⁵ Only the NPC and its Standing Committee may interpret the Constitution and supervise its enforcement.¹⁶⁶ The Standing Committee may also offer interpretation of law that essentially makes new law.¹⁶⁷ This is known as "legislative interpretation."¹⁶⁸ "In contrast, the Court's interpretive function is limited to clarifying and strengthening the laws without changing their original meaning."¹⁶⁹ The Court's interpretation is referred to as "judicial interpretation."¹⁷⁰ However, the SPC often oversteps its constitutional limitations and encroaches on legislative power.¹⁷¹ According to Dr. Nanping Liu:

In reality, however, the NPC has not performed its function of supervising the enforcement of the Constitution, and its Standing Committee has not undertaken to construing either laws, with few exceptions, or the Constitution, with no exception. Consequently, the Court has almost exclusive power to construe laws, which has made the distinction between legislative and judicial interpretation meaningless. And the Court . . . may construe any laws if necessary, including the Constitution.¹⁷²

Liu's theory is that the SPC is an "aggressive handmaiden" to the policy of the Chinese Communist Party ("CCP").¹⁷³ By ignoring its constitutional limitations, the Court may deal with urgent issues in line with CCP policy and thus will overstep its jurisdictional boundaries when it serves a political interest.¹⁷⁴ One example he cites relates to Court activities after Tiananmen Square. In an SPC-issued document dated June 20, 1989, the Court asked the lower courts to study the speech of Deng Xiaoping regarding the imposition of martial law in Beijing.¹⁷⁵ The "document instructed the lower courts to *shift their focus* to trying those counter-

¹⁶⁴ NANPING LIU, *supra* note 161, at 30; see PRC Const., *supra* note 2, art. 67(6).

¹⁶⁵ NANPING LIU, *supra* note 161, at 30.

¹⁶⁶ See PRC CONST., *supra* note 2, arts. 62(1)(2), 67(1).

¹⁶⁷ *Id.*, art. 67(4).

¹⁶⁸ NANPING LIU, *supra* note 161, at 30.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 73.

¹⁷² *Id.* at 30-31.

¹⁷³ *Id.* at 5.

¹⁷⁴ *Id.* at 61-62.

¹⁷⁵ *Id.* at 62.

revolutionaries and criminals involved in this political turmoil.”¹⁷⁶ The Court also directed that the lower courts should adjudicate the cases quickly and the punishments should be severe.¹⁷⁷ Clearly, the Court was functioning as a political body.¹⁷⁸

In addition, while the Chinese Constitution guarantees numerous rights,¹⁷⁹ there is a fundamentally different view from liberal democracies over the way individual rights are enforced. According to Hong Kong scholar Michael C. Davis, “from a constitutionalism perspective, the most definitive characteristic of recent constitutions of the People’s Republic of China . . . is the collectivist rights orientation that renders rights subject to the interest of the state.”¹⁸⁰ In his view, someone critical of the government who claims an individual right to speech “will be confronted with the claim that, under the constitution, his voice contradicts the collective interest and the state and that no such right therefore exist[s].”¹⁸¹ The lack of real judicial review further compounds the problem because it becomes impossible to weigh the interests of the state against individual rights in individual cases.¹⁸² According to Chinese scholar Kuan Hsin-Chi:

To a Western lawyer, constitutional practice means the activities by which constitutional norms are elucidated and upheld, especially against the politically powerful. Constitutional review by the courts then occupies a central place in the process. For the Chinese leadership, however, constitutional practice means the implementation of Party policy.¹⁸³

3. *Judicial Review in Macau under Portugal*

Since the Macau Joint Declaration and Basic Law provide that the pre-handover legal structure will be preserved, including the continued application of past laws,¹⁸⁴ it is necessary to review the structure of the

¹⁷⁶ *Id.* at 62 (emphasis in original).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 63.

¹⁷⁹ See PRC CONST., *supra* note 2, arts. 33-50.

¹⁸⁰ Michael C. Davis, *Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 145 (1998).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ KUAN HSIN-CHI, *supra* note 2, at 58.

¹⁸⁴ MBL, *supra* note 43, art. 8; Again, the Basic Law guarantees that the past legal structure will be preserved, but only insofar that it is preserved in law. This is significantly different that the situation in

judiciary in pre-handover Macau. This analysis is essential to determining if there will be the same constitutional conflict in Macau as in Hong Kong.

The Organic Law¹⁸⁵ passed by Portugal in 1976 served as a kind of constitution and the basis of law leading up to the handover.¹⁸⁶ It created a legislative assembly with six of its seventeen members directly elected, six indirectly elected and five appointed.¹⁸⁷ Legislative acts, however, were limited by the rights and privileges guaranteed by the Portuguese Constitution, which was incorporated by reference into the Organic Law.¹⁸⁸ In addition, Portuguese law was incorporated into Macau's legal system, including an independent judiciary and jury trials.¹⁸⁹ Before 1991, Macau was a "sub-judiciary district" of Portugal's judicial framework.¹⁹⁰ All cases appealed from the Macau courts were heard in an appeals court in Lisbon.¹⁹¹ Changes in 1999 made Macau's Supreme Court the court of final appeal within the territory over all cases that did not implicate the Portuguese Constitution.¹⁹² Cases implicating the Constitution were appealed to Portugal's Constitutional Court, which could overturn lower court decisions.¹⁹³

Hong Kong, where one would look to the nebulous common law to discover the legal structure that is to be preserved.

¹⁸⁵ The Organic Statute of Macau, Law No. 1/76, (adopted Feb. 10, 1976, amended May 10, 1990) [hereinafter Organic Law], available in SHIPP, *supra* note 8, at 178-93.

¹⁸⁶ *Id.* at 94-95. GUNN, *supra* note 8, at 160.

¹⁸⁷ GUNN, *supra* note 8, at 161. Chinese had to be residents for five years while Portuguese and Macanese were exempted. *Id.* at 111.

¹⁸⁸ The Organic Law, *supra* note 185, art. 2.

¹⁸⁹ GUNN, *supra* note 8, at 161.

¹⁹⁰ Sam Hou Fai, *Brief Introduction of Judicial System of Macao*, CHINA LAW (Supplement for Macao's Return), Dec. 20, 1999 at 63.

¹⁹¹ *Id.*

¹⁹² *Id.* at 64.

¹⁹³ *Id.* Appeals could be made to Portugal's Constitutional Court for the following decisions:

. . . (i) Those rejecting the application of any provision on the grounds of unconstitutionality; (ii) Those confirming the application of any provision, the constitutionality of which was questioned before the court; (iii) Those rejecting the application of any provisions of a legislative act on the grounds of violation of higher ranking law; (iv) Those giving application to a provision, the legality of which was questioned before that court on the grounds of the preceding subparagraph; v) Those applying a provision which has previously been deemed unconstitutional or illegal by the Constitutional Court; (vi) Those applying a provision which has previously been deemed unconstitutional by the Constitutional Committee, where the decision the Constitutional Court is requested to consider is on the exactly same point of law; (vii) Those rejecting the application of a provision contained in a legislative act, on the grounds that it contravenes an international convention, or those which apply in a manner other than that which has previously been decided by the Constitutional Court. . . .

Third Periodic Reports of State Parties Due in 1991: Portugal Macau (Nov. 28, 1996), U.N. Doc. CCPR/C/70/Add.9 [hereinafter U.N. Report], art. 2, para. 3 (19(f)).

A significant test of this system came in 1994. While Portugal's Prime Minister visited China that year, the Supreme Court of Macau reversed an earlier decision and extradited two ethnic Chinese to the Mainland, where they were wanted for offenses punishable by death.¹⁹⁴ China had told the Court that it would remove the possibility of the death penalty in sentencing. Critics pointed out two significant problems with the Court's decision. First, no extradition treaty existed between China and Portugal.¹⁹⁵ Second, Article 33 of the Portuguese Constitution clearly forbids the extradition of persons to countries that practice the death penalty.¹⁹⁶ The case was appealed to the Constitutional Court of Portugal and the European Human Rights Court in Strasbourg.¹⁹⁷ In 1995, Portugal's Constitutional Court overruled the Macau high court, upheld the defendants' constitutional rights, and refused to extradite them.¹⁹⁸ The Court said that the Constitution's prohibition on extradition was absolute.¹⁹⁹ This decision exemplifies Portugal's commitment to human rights in Macau. This commitment exists, in part, because Portugal includes the International Covenant on Civil and Political Rights in its Constitutional protections and adjudicates in accordance with its jurisprudence.²⁰⁰ However, it is also clear from the decision that Macau did not enjoy final Constitutional adjudication while under Portuguese rule.

In view of the fact that Macau did not enjoy final adjudication, instead enjoying judicial review under Portugal's constitutional system, an analysis of this system is also necessary to determine whether there is potential conflict between Macau and China. One scholar has said that Portugal's judicial review is "the most complete system . . . in Europe."²⁰¹ Established in 1976 and amended in 1982, Portugal has a written Constitution that acts as the supreme law of the land, under which all other state acts are subordinated.²⁰² Moreover, judicial review is expressly established in the

¹⁹⁴ GUNN, *supra* note 8, at 181.

¹⁹⁵ Ed Paisley, *Human Rights for All? Portugal to Extradite Two Criminals to China*, FAR E. ECON. REV. 15 (1994)

¹⁹⁶ GUNN, *supra* note 8, at 181.

¹⁹⁷ *Id.*

¹⁹⁸ Amnesty International, *Macau: Human Rights Challenges for Transition* (Dec. 15, 1999), AI Index: ASA 27/03/99, available in <<http://web.amnesty.org/ai.nsf/Index/ASA270031999?OpenDocument&of=COUNTRIES\MACAO>>.

¹⁹⁹ *Id.*

²⁰⁰ See UN Report, *supra* note 193.

²⁰¹ BREWER-CARIAS, *supra* note 128, at 265.

²⁰² *Id.* The Portuguese Constitution states: "The State shall be subject to this Constitution . . . The validity of the laws and other actions of the State, the autonomous regions, local government and any other public bodies depends upon their compliance with this Constitution." PORT. CONST. art. 3 §§ 2, 3,

Constitution.²⁰³ Portugal has what is known as a mixed system of constitutional review possessing the two kinds of review typified by France on the one hand and the United States on the other. That is, unconstitutional laws may be challenged preventively²⁰⁴ or in a case or controversy.²⁰⁵ In the case of preventive challenges, only the Constitutional Court²⁰⁶ has jurisdiction. Otherwise, any court may refuse to apply a law to a case if it finds it unconstitutional.

One advantage of "preventive control" of unconstitutional legislation is that it allows for early clarification of constitutional issues.²⁰⁷ By contrast, deciding constitutionality through cases and controversies alone will likely leave the constitutional issue unresolved for a significant time.²⁰⁸ Preventive control also avoids the problems arising when a statute is enforced by the courts over time and then is finally declared unconstitutional.²⁰⁹ However, preventive control can become difficult when the law is facially constitutional but later becomes unconstitutional in how it is applied.²¹⁰ In those cases, having the back up of constitutional review through cases and controversies is very important. One scholar has pointed out that under Portugal's form of constitutional review, the legal security found in preventive control is undermined when the Constitutional Court initially

available in <<http://www.Dundee.ac.uk/politics/cphrc/documents/democratic/fundamental.htm>> (last visited Oct. 10, 2000).

²⁰³ PORT. CONST. art. 277 § 1 states: "Rules of law that contravene any provision of this Constitution or the principles contained in it are unconstitutional."

²⁰⁴ *Id.* The Constitution provides:

The President of the Republic may request the Constitutional Court to undertake an anticipatory review of the constitutionality of any provision of an international treaty that has been submitted to the President for ratification, or of an instrument sent to the President for promulgation as a law or a decree-law, or of an international agreement where the decree giving approval has been presented for the signature of the President.

. . . Ministers for the Republic may also request the Constitutional Court to undertake an anticipatory review of the constitutionality of any provision of a regional legislative decree or a regulative decree for the implementation of the general law of the Republic that has been sent to them for signature . . .

PORT. CONST. art. 278 §§ 1, 2.

²⁰⁵ *Id.* Article 204 says that in "matters brought before them for decision, the courts shall not apply any rules that contravene the provisions of this Constitution or the principles contained there."

²⁰⁶ BREWER-CARIAS, *supra* note 125, at 266. The Court is comprised of 13 judges; 10 are elected by the Assembly of the Republic and three are selected by the elected judges. *Core document forming an integral part of the reports of the States Parties: Portugal 19/04/93*, § 61, U.N. Doc. HRI/CORE/1/Add.20 (1993).

²⁰⁷ HELMUT STEINBERGER, *MODELS OF CONSTITUTIONAL JURISDICTION* 5 (1993).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 6.

finds the legal norm constitutional but later finds it unconstitutional.²¹¹ While potentially problematic from the standpoint of certainty, Portugal's constitutional review scheme clearly offers the most opportunities to challenge the constitutionality of a statute or other governmental act. Constitutional review of this sort is at odds with Chinese policy.

4. *Conclusion*

Clearly, the fact that the Hong Kong courts had experienced constitutional review of legislative acts influenced the *Ng Ka Ling* decision. Whether Macau will continue the level of judicial review practiced before the hand-over remains an open question. Arguably, the level of judicial review practiced in a legal system is as much a function of legal culture as it is black letter law. Certainly, the legal basis exists if the judiciary wants to engage in aggressive constitutional review. However, since the Macau judiciary is new and has little experience with constitutional review it is unlikely that the courts will engage in the type of constitutional review found in the *Ng Ka Ling* case.

D. *Judicial Culture*

Another factor leading to the conflict between Hong Kong and China is the radically different style of judging they employ. One example is the differing level of independence exercised by judges in China and Hong Kong. This section compares the presidents of the Chinese and Hong Kong high courts since the presidents of these high courts likely exercise the most independence possible under their judicial systems.

1. *Judicial Independence in Hong Kong and China*

While judges in China are supposed to be independent under the Constitution,²¹² it is easy to see why many are skeptical of that promise. In his annual report to the NPC, Xiao Yang, president of the Supreme People's Court, made numerous references to implementing Communist Party policy

²¹¹ *Id.* at 7.

²¹² See PRC CONST., *supra* note 2, art. 126. "The people's courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual." *Id.*

in the courts.²¹³ According to Mr. Xiao's report, "[i]n 1999, under the leadership of the party Central Committee with Comrade Jiang Zemin at the core, the Supreme People's Court adhered to Deng Xiaoping Theory and the party's basic line . . ."²¹⁴ Mr. Xiao told the NPC that the "people's courts resolutely punished law offenders who tried to subvert the government of the state and split the country," including cracking down on "heretical cult organizations" such as the Falun Gong.²¹⁵

By contrast, Andrew Li Kwok-nang leads the Hong Kong Court of Final Appeals. Mr. Li, a Cambridge-educated lawyer born in Hong Kong, told reporters after his appointment, "I am deeply aware of the community's expectations of the Judiciary. Our rights and freedom can only be safeguarded by the fair and efficient administration of justice by an independent Judiciary."²¹⁶ Mr. Li's comments are in line with the judicial culture before the handover. Since the Hong Kong Bill of Rights Ordinance was implemented in the five years before the handover, the judiciary was "called upon . . . to exercise substantial constitutional judicial review power."²¹⁷ In doing so, the judiciary frequently referenced "overseas common law and European Union precedent."²¹⁸ This independence and use of common law and international law is evident in the *Ng Ka Ling* decision.

2. *Judicial Independence in Macau*

Although Portugal has a strong history of constitutional review, citizens of Macau have not had a chance to share in this history. Unlike Hong Kong, ethnic Chinese have never been significant players in Macau's legal system.²¹⁹ This is because Portugal insisted on using only the Portuguese language and appointing only Portuguese judges.²²⁰ Since the Basic Law now requires that the President of the Court of Appeals be a Chinese citizen,²²¹ the current President, Sam Hou Fai, had only two years

²¹³ See *China: Supreme People's Court Work Report to National People's Congress*, BBC ELECTRONIC MONITORING ASIA PAC., Mar. 30, 2000, available in LEXIS, Asia/Pacific Rim News, Current.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Chris Yeung, *Andrew Li Named as Top Judge*, S. CHINA MORNING POST, May 21, 1997, available in 1997 WL 2263967. See also May Sin-Mi Hon & Patricia Young, *Continuity in Choice of Top Appeal Judges*, S. CHINA MORNING POST, June 13, 1997, available in 1997 WL 2266190.

²¹⁷ Davis, *supra* note 65, at 286.

²¹⁸ *Id.*

²¹⁹ "[B]efore the handover, most judges and prosecutors were Portuguese expatriates who were often completely ignorant of local names, customs and traditions, let alone the local language." Harald Bruning, *Language, Colonial Legacy Test Youthful Judiciary*, S. CHINA MORNING POST, July 22, 2000.

²²⁰ *Id.*

²²¹ HKBL, *supra* note 38, art. 88.

experience as a judge before his appointment.²²² Some legal experts worry that this inexperience would make the new top judges more prone to bow to pressure.²²³ Thus, it is unclear whether the judges on Macau's Court of Final Appeals will be as aggressive as the Hong Kong Court in protecting their judicial review power and subsequently, the rights of its citizens. If the judges do prove to be less aggressive, then it is unlikely that the conflicts that occurred between Hong Kong and China would be relived in Macau.

3. Conclusion

By far the greatest concern should be that the courts function at all. The Court of Final Appeal "has openly acknowledged the problem [of imposing European jurisprudence on Chinese civil society], namely the dearth of court clerks proficient in the two official languages, Portuguese and Chinese."²²⁴ Of the forty-two senior clerks at the Court, only four have a "good command" of written Chinese.²²⁵ Another problem is that most of the eighty-seven lawyers in Macau speak only Portuguese.²²⁶ The new system is plagued with "poorly-translated" evidentiary documents and "seriously flawed" simultaneous interpretations of legal proceedings.²²⁷ Whether the rule of law can survive while Macau's legal system matures is far from clear.

V. CONCLUSION

If the factors that led to the conflict in Hong Kong are any predictor, it is unlikely that a conflict will erupt between the Macau Court of Final Appeal and the National People's Congress of the PRC. First, the Macau Basic Law is less ambiguous than Hong Kong's Basic Law regarding final adjudication. Second, unlike judges in Hong Kong, the Macau Court has never been steeped in the legal tradition of a colonial power. Third, Macau's judges do not have a history of exercising authority in the same way Hong Kong's judges have done. In fact, most judges in Macau have only a few years of legal experience.²²⁸ Moreover, Macau's judges, unlike Hong

²²² Alex Lo, *Fears Raised Over Young Judge's Independence*, S. CHINA MORNING POST, Oct. 10, 1999.

²²³ *Id.*

²²⁴ Bruning, *supra* note 219.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

Kong's, probably have few expectations of what the legal system should "look like." Because of this, they are less likely to guard their power in quite the same way judges have in Hong Kong. Therefore, conflicts like *Ng Ka Ling* are unlikely to occur in Macau.

Table 2. Comparisons Between Judicial Review Provisions

Hong Kong:	Macau:	Difference:
<p>Article 2 The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this law.</p>	<p>Article 2 The National People's Congress authorizes the Macau Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this law.</p>	<p>No difference</p>
<p>Article 8 The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation, and customary law shall be maintained, except for any that contravenes this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.</p>	<p>Article 8 The laws, decrees, administrative regulations and other normative acts previously in force in Macau shall be maintained, except for any that contravenes this Law, or subject to any amendment by the legislature or other relevant organs of the Macau Special Administrative Region in accordance with legal procedures.</p>	<p>Sources of Law are defined more broadly in Macau, including e.g., decrees, administrative regulations – this reflects a civil law tradition. Hong Kong provision says "and subject," while the Macau provision says "or subject" to any amendment by the legislature" and in Macau "other relevant organs." It is not clear if this has any legal effect.</p>
<p>Article 11 In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law. No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.</p>	<p>Article 11 In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Macau Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law. No law, decree, administrative regulations and normative acts of the Macau Special Administrative Region shall contravene this Law.</p>	<p>Again, sources of Law are defined more broadly in Macau, including e.g., decrees, administrative regulations and reflecting Portugal's civil law tradition</p>
<p>Article 12 The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.</p>	<p>Article 12 The Macau Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.</p>	<p>No difference</p>
<p>Article 13 The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region. The Ministry of Foreign Affairs of the People's Republic of China shall establish an office in Hong Kong to deal with foreign affairs. The Central People's</p>	<p>Article 13 The Central People's Government shall be responsible for the foreign affairs relating to the Macau Special Administrative Region. The Ministry of Foreign Affairs of the People's Republic of China shall establish an office in Macau to deal with foreign affairs. The Central People's</p>	<p>No difference</p>

Hong Kong:	Macau:	Difference:
<p>Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law.</p> <p>Article 14 The Central People's Government shall be responsible for the defence of the Hong Kong Special Administrative Region. The Government of the Hong Kong Special Administrative Region shall be responsible for the maintenance of public order in the Region.</p> <p>Military forces stationed by the Central People's Government in the Hong Kong Special Administrative Region for defence shall not interfere in the local affairs of the Region. The Government of the Hong Kong Special Administrative Region may, when necessary, ask the Central People's Government for assistance from the garrison in the maintenance of public order and in disaster relief. In addition to abiding by national laws, members of the garrison shall abide by the laws of the Hong Kong Special Administrative Region. Expenditure for the garrison shall be borne by the Central People's Government.</p> <p>Article 18 The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region. National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region. The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law. In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the</p>	<p>Government authorizes the Macau Special Administrative Region to conduct relevant external affairs, on its own, in accordance with this Law.</p> <p>Article 14 The Central People's Government shall be responsible for the defence of the Macau Special Administrative Region. The Government of the Macau Special Administrative Region shall be responsible for the maintenance of public order in the Region.</p>	<p>The question of whether Chinese military forces would be stationed in Macau was left unanswered in Macau's basic law. Therefore, there are also no assurances that these forces will not interfere in local governance.</p>
<p>Article 18 The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region. National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region. The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law. In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the</p>	<p>Article 18 The laws in force in the Macau Special Administrative Region shall be this Law, the laws previously in force in Macau as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region. National laws shall not be applied in the Macau Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region. The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Macau Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law. In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the</p>	<p>No difference</p>

Hong Kong:	Macau:	Difference:
<p>Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.</p> <p>Article 19 The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication. The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.</p>	<p>within the Macau Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.</p> <p>Article 19 The Macau Special Administrative Region shall be vested with independent judicial power, including that of final adjudication. The courts of the Macau Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Macau shall be maintained. The courts of the Macau Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.</p>	<p>No difference</p>
<p>Article 80 The courts of the Hong Kong Special Administrative Region at all levels shall be the judiciary of the Region, exercising the judicial power of the Region.</p> <p>Article 85 Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.</p> <p>Article 81 The Court of Final Appeal, the High Court, district courts, magistrates' courts and other special courts shall be established in the Hong Kong Special Administrative Region. The High Court shall comprise the Court of Appeal and the</p>	<p>Article 82 The courts of the Macau Special Administrative Region shall exercise the judicial power.</p> <p>Article 83 The courts of the Macau Special Administrative Region shall exercise judicial power independently. They shall be subordinated to nothing but law and shall not be subject to any interference.</p> <p>Article 84 The primary courts, intermediate courts and Court of Final Appeal shall be established in the Macau Special Administrative Region. The power of final adjudication of the Macau Special Administrative Region shall be vested</p>	<p>No difference</p>
<p>Article 81 The Court of Final Appeal, the High Court, district courts, magistrates' courts and other special courts shall be established in the Hong Kong Special Administrative Region. The High Court shall comprise the Court of Appeal and the</p>	<p>Article 84 The primary courts, intermediate courts and Court of Final Appeal shall be established in the Macau Special Administrative Region. The power of final adjudication of the Macau Special Administrative Region shall be vested</p>	<p>1. Before the enactment of the Basic Law, Hong Kong did not have a Court of Final Appeal. Instead, it had a Court of First Instance and a Court of Appeal. These "high courts" will continue to function but their decisions will be</p>

<p>Hong Kong: Court of First Instance. The judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region.</p> <p>Article 82 The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal.</p>	<p>Macau: in the Court of Final Appeal of the Region. The structure, powers and functions as well as operation of the courts of the Macau Special Administrative Region shall be prescribed by law.</p>	<p>Difference: appealable to the Court of Final Appeal.</p>
<p>Article 84 The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.</p>	<p>Article 89 The judges of the Macao Special Administrative Region shall exercise judicial power according to law, instead of according to any order or instruction, except in the situation as prescribed in paragraph 3 of Article 19 of this Law. Judges shall be immune from legal action for discharging his or her judicial functions. During the term of his or her office, a judge shall not Concurrently assume other public or private posts, nor shall he or she assume any post in organizations of a political nature.</p>	<p>2. The Hong Kong Basic Law carries forward a judicial system that was "previously practiced" while the operation of the courts in Macau shall be prescribed by law. This again reflects difference between common law and civil law traditions but is significant because there could be a difference in the carry over effect of past judicial practice.</p> <p>3. The Hong Kong law allows judges from other common law jurisdictions to sit in on the Court of Final Appeal. This no doubt reflects a belief that the common law will continue to be applied in Hong Kong. While the civil law tradition has its own culture, it does not a similar body of common law that foreign judges would be capable of adjudicating over.</p> <p>1. The Hong Kong provision refers to courts and the Macau provision refers to judges. It is not clear if this connotes a difference.</p> <p>2. The Hong Kong Law refers to Article 18 and especially, common law precedents. The Macau version only says according to law. However, article 18 would clearly influence the interpretation of this article.</p> <p>3. The reference to Article 19 in the Macau Basic Law is significant as it makes clear that judges are to abide by the Standing Committee of the National People's Congress on those things considered to be acts of state concerning foreign or defense affairs. See above.</p>
<p>Article 158 The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress. The Standing Committee of the National People's Congress shall</p>	<p>Article 143 The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress. The Standing Committee of the National</p>	<p>No difference</p>

<p>Hong Kong: authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region. The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected. The Standing Committee of the National People's Congress shall consult its Committee for the Special Administrative Region before giving an interpretation of this Law.</p> <p>Article 159</p>	<p>Macau: People's Congress shall authorize the courts of the Macau Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region. The courts of the Macau Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected. The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Macau Special Administrative Region before giving an interpretation of this Law.</p> <p>Article 144</p>	<p>Difference:</p>
<p>Hong Kong: The power of amendment of this Law shall be vested in the National People's Congress. The power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council and the Hong Kong Special Administrative Region. Amendment bills from the Hong Kong Special Administrative Region shall be submitted to the National People's Congress by the delegation of the consent of two-thirds of the deputies of the Region to the National People's Congress after obtaining the consent of two-thirds of the deputies of the Region to the National People's Congress, two-thirds of all the members of the Legislative Council of the Region, and the Chief Executive of the Region. Before a bill for amendment to this Law is put on the agenda of the National People's Congress,</p> <p>Article 159</p>	<p>Macau: The power of amendment of this Law shall be vested in the National People's Congress. The power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council, and the Macau Special Administrative Region. Amendment bills from the Macau Special Administrative Region shall be submitted to the National People's Congress by the delegation of the Region to the National People's Congress after obtaining the consent of two-thirds of the deputies of the Region to the National People's Congress, two-thirds of all the members of the Legislative Council of the Region, and the Chief Executive of the Region. Before a bill for amendment to this Law is put on the agenda of the</p>	<p>No difference</p>

Hong Kong: the Committee for the Basic Law of the Hong Kong Special Administrative Region shall study it and submit its views. No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.	Macau: National People's Congress, the Committee for the Basic Law of the Macau Special Administrative Region shall study it and submit its views. No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Macau.	Difference:
<p>Article 160 Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law. Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region, provided that they do not contravene this Law.</p>	<p>Article 145 Upon the establishment of the Macau Special Administrative Region, the laws previously in force in Macau shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the provisions of this Law and legal procedure. Documents, certificates and contracts valid under the laws previously in force in Macau, and the rights and obligations provided for in such documents, certificates or contracts shall continue to be valid and be recognized and protected by the Macau Special Administrative Region, provided that they do not contravene this Law. The contracts signed by the Portuguese Macau Government whose terms of validity extend beyond 19 December 1999 shall continue to be valid except those which a body authorized by the Central People's Government publicly declares to be inconsistent with the provisions about transitional arrangements contained in the Sino-Portuguese Joint Declaration and which need to be re-examined by the Government of the Macau Special Administrative Region.</p>	<p>Additional provision in Macau's laws that contracts already in force with the Portuguese Macau government shall remain in force.</p>