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The Illusory Promise: Freedom of the Press in Hong Kong, China

FRANCES H. FOSTER*

If you believe the rhetoric, the future of Hong Kong, China rests on "promises." World leaders and commentators speak of holding China to its "promises" to preserve Hong Kong autonomy, capitalism, rule of law, and democratic freedoms unchanged for fifty years.[1] Their Chinese counterparts also proclaim their commitment to honoring their "promises" to Hong Kong.[2] Hong Kong democrats vow to fight to the end to make Beijing live up to its "promises."[3] All sides agree that the promises of which they speak are

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1. *See, e.g.*, Editorial, *Hong Kong's Freedoms Imperiled*, N.Y. TIMES, Nov. 21, 1996, at A28 ("Washington must make it clear that China's goals of good relations, a smooth transition and continued foreign investment in Hong Kong can only be achieved if Beijing keeps its promises."); Fung Wai-Kong & No Kwai-Yan, *Rifkind Concedes Defeat*, S. CHINA MORNING POST, Feb. 17, 1997, at 1, *available in* LEXIS, News Library, Curnws File (reporting that British Foreign Secretary Malcolm Rifkind "stressed . . . that London would be monitoring China's adherence to its promises"); Liz Sly, *U.S. to Boycott Hong Kong Event; Albright Won't Attend New Legislature's Swearing-in*, CHI. TRIB., June 11, 1997, § 1, at 7 ("Some U.S. lawmakers are proposing linking the renewal of China's most favored nation status to Beijing's promises to grant Hong Kong a high degree of autonomy."); Chris Yeung, *Lu Puts the Case for His Hong Kong*, S. CHINA MORNING POST, June 8, 1996, at 17, *available in* LEXIS, News Library, Curnws File (reporting that Japanese Prime Minister Ryutaro Hashimoto "said at his meeting with Mr. Lu, the world will be watching whether China keeps its promises about the future of Hong Kong").

2. *See, e.g.*, *China's Remarks Disturb HK Lawmakers*, UPI, Oct. 17, 1996, *available in* LEXIS, News Library, Curnws File (reporting that Chinese government spokesman "reiterated China's commitment to its pledge of 'one country, two systems'—a reference to its promise to not co-opt Hong Kong into China's socialist ways and laws"); *Official Says Press Freedom "Fully Guaranteed"*, Xinhua, Apr. 3, 1997, *translated in* BBC Summary of World Broadcasts ("BBCSWB"), Apr. 3, 1997, *available in* LEXIS, Asiapc Library, BBCSWB File (reporting Zeng Jianhui's, Director of the People's Republic of China ("P.R.C.") State Council Information Office, reassertion that in the Sino-British Joint Declaration, "the Chinese government promised to guarantee Hong Kong residents' freedom of speech and publication").

3. *See, e.g.*, *Bracing for the Worst in Post Handover Hong Kong*, NATION, June 5, 1997, *available in* LEXIS, News Library, Curnws File (discussing prominent pro-democracy activist Martin Lee's efforts to secure a high degree of autonomy and civil liberties for Hong Kong and quoting Lee as saying "I just want China to honour its promises"); Dominic Lau, *Hong Kong Activists Vow to Defy China's Protest Ban*, Reuters North American Wire, Oct. 17, 1996, *available in* LEXIS, News Library, Curnws File ("Hong Kong's pro-democracy movement vowed no surrender . . . ."); Dele Olojede, *Land of High Anxiety*, NEWSDAY, June 16, 1997, at A8, *available in* LEXIS, News Library, Curnws File (reporting that Hong Kong's "activists plan to launch an electronic newspaper" and continue "street marches" so that "Beijing would be hard-pressed to abide by its promise of 'one country, two systems'"); Brian Palmer, *The Final Countdown*, U.S. NEWS & WORLD REP., June 16, 1997, at 41, 42-43 (stating that "Hong Kong's pro-democracy forces have vowed to test the new rulers at the very first opportunity,"

"enshrined" in two documents—the 1984 Sino-British Joint Declaration on the Future of Hong Kong ("Joint Declaration")[4] and Hong Kong's "mini-constitution,"[5] the 1990 Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China[6] ("Basic Law").[7] For China, Hong

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and that Hong Kong business leaders "have indicated that they will work pragmatically, if quietly, to make sure Beijing lives up to its promises").

4. Zhonghua Renmin Gongheguo Zhengfu he Dabuliedian ji Bei Aierlan Lianhe Wangguo Zhengfu Guanyu Xianggang Wenti de Lianhe Shengming [The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong] (Sept. 26, 1984), *in* ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO 503 (1985) [hereinafter Joint Declaration], *translated in* 23 I.L.M. 1371 (1984).

5. Hong Kong and foreign officials and commentators commonly refer to the Basic Law as post-1997 Hong Kong's "mini-constitution." *See, e.g.*, Carole J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335, 349 (1996) (stating Basic Law "will serve as the mini-constitution of Hong Kong after 1997"); Charlotte Ku, *Introductory Note*, 29 I.L.M. 1511, 1511 (1990) ("[p]rovisions of the Basic Law will serve as a 'mini-constitution'"); Christine Loh, *Historical Case for Forming an Oligarchy*, S. CHINA MORNING POST, Dec. 2, 1996, at 18, *available in* LEXIS, News Library, Curnws File (describing Basic Law as "Hong Kong's future mini-constitution"). While some Chinese spokespersons have also used the term "mini-constitution" (*xiao xianfa*), *see, e.g.*, RONALD C. KEITH, CHINA'S STRUGGLE FOR THE RULE OF LAW 185 (1994) (quoting Ji Pengfei, "one of the most senior PRC architects of the Basic Law," who referred to Basic Law as Hong Kong's "mini-constitution" in an April 5, 1992 speech), others have explicitly rejected such a characterization of the Basic Law. *See, e.g.*, Zhang Youyu, *The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and Its Essential Contents and Mode of Expression*, 2 J. CHINESE L. 5, 7-8 (1988) ("There are those who call the Basic Law Hong Kong's 'little Constitution,' but as has been seen, this appellation is quite inappropriate."). For a discussion of Chinese views regarding the term "mini-constitution," see Perry Keller, *Freedom of the Press in Hong Kong: Liberal Values and Sovereign Interests*, 27 TEX. INT'L L.J. 371, 390 (1992).

6. Zhonghua Renmin Gongheguo Xianggang Tebie Xingzheng Qu Jiben Fa [The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] (1990), *in* FAGUI HUIBIAN 5 (1990), *translated in* 29 I.L.M. 1520 (1990) [hereinafter Basic Law].

7. *See, e.g., Chinese President Comments on Hong Kong, Says China's Stance Consistent*, Xinhua, Sept. 6, 1996, *translated in* BBCSWB, Sept. 7, 1996, *available in* LEXIS, Asiapc Library, Curnws File (reporting on President Jiang Zemin's statement that China will follow principles in Sino-British Joint Declaration and Basic Law after it resumes sovereignty over Hong Kong); Editorial, *Hong Kong the Key to China's Future*, EVENING POST, Sept. 6, 1996, at 4, *available in* LEXIS, News Library, Curnws File ("[m]ainland authorities insist press freedom is enshrined under the Basic Law"); Editorial, *Lu Must Clarify Press Freedom*, E. EXPRESS, June 3, 1996, at 14, *in* F.B.I.S.-CHI, June 5, 1996, at 94, 94 ("the Joint Declaration and the Basic Law enshrine the sacred right of press freedom"); *Transition of Hong Kong from British to Chinese Rule: Hearing of the Asia Pac. Subcomm. of the House Int'l Relations Comm.*, FED. NEWS SERVICE, Feb. 13, 1997, *available in* LEXIS, News Library, Curnws File ("'Hong Kong's intended status after reversion is spelled out in two important documents: The 1984 Sino British joint declaration and the 1990 Basic Law promulgated by the People's Republic of China. Together these documents are China's promise that, although sovereignty will change, Hong Kong's way of life will not.'") (quoting Jeffrey Bader, Assistant Secretary of State for Asia Pacific Affairs); Tsang Yok-sing, *How to Interpret China's Promises*, S. CHINA MORNING POST, June 11, 1996, at 16, *available in* LEXIS, News Library, Curnws File

Kong, and the world community alike, the sole challenge for the post-1997 era is to "ensure" these promises are "kept."[8]

Current domestic and foreign policies toward Hong Kong are premised on the assumption that meaningful promises exist for China to keep or break and for Hong Kong and the West to monitor and enforce. In fact, the "promises" referred to are illusory because the provisions in which they are contained lack definition. This Article examines one Chinese "promise" to Hong Kong—freedom of the press. This "promise" dominated the headlines on the eve of the handover[9] and is considered a barometer of China's "one country, two systems" policy in the post-1997 era.[10]

Part I discusses the recent debate over China's freedom of the press "promise." It considers China's increasingly restrictive interpretations and the response from Hong Kong, Western, and Chinese commentators. It documents that critics and supporters of China's position alike have erroneously focused on the same question: Is China keeping its "promise" to Hong Kong?

In Parts II and III, the Article demonstrates the illusory nature of the "promise" of freedom of the press through a textual analysis of the relevant provisions of the Joint Declaration and the Basic Law. It shows that both documents expressly guarantee Hong Kong what can be loosely translated as "freedom of the press," but the Chinese meaning of this phrase differs from the Western meaning. British and Chinese drafters to some degree understood this translation problem but for diplomatic reasons chose to ignore it and failed to provide any mechanism for resolving the inevitable conflicts over meaning. The result has been to leave Hong Kong with no effective guarantee of freedom of the press.

Part IV argues that China's freedom of the press "promise" is a fiction based on Western mistranslations of the Joint Declaration and the Basic Law. The English-language translations distort China's "promise" because they fail to capture the original linguistic and cultural meanings of freedom of the press. The Article then criticizes current U.S. policy toward Hong Kong as a futile attempt to enforce promises that do not in fact exist. If the United States persists, it will focus close attention on the wording of Hong Kong's founding documents. The

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("China's promises about the future of Hong Kong are all contained in the Joint Declaration and the Basic Law.").

8. Chris Yeung, *Autonomy Is in Our Hands*, S. CHINA MORNING POST, Oct. 5, 1996, at 23, *available in* LEXIS, News Library, Curnws File ("It is a challenge for the Chinese Government and the whole community to ensure that the promises enshrined in the two documents are kept.").

9. *See, e.g.*, Emma Batha, *Hope for Press Freedom Hit by Journalist Poll*, S. CHINA MORNING POST, May 9, 1997, at 6, *available in* LEXIS, News Library, Curnws File; Elliott Cohen, *Hong Kong: The Future of Press Freedom*, COLUM. JOURNALISM REV., May/June 1997, at 48; Joseph Kahn, *China Has No Need to Suppress the Press in Hong Kong Now*, WALL ST. J., Apr. 21, 1997, at A1; Nicholas D. Kristof, *On Beijing's Leash, the News in Hong Kong May Lose Bite*, N.Y. TIMES, June 25, 1997, at A1.

10. *See An Opportunity for Jiang*, ASIA TIMES, Feb. 12, 1997, at 8, *available in* LEXIS, World Library, Allwld File ("[h]ow Beijing handles the press will be the first indicator of Hong Kong's future"); *Press Freedom and Hong Kong's Future*, ASIA TIMES, May 7, 1997, at 8, *available in* LEXIS, World Library, Allwld File ("But what bears watching most closely as an indicator of how Hong Kong will fare under Chinese rule is the fate of the local media.").

actual language of these documents demonstrates that the British withdrew from Hong Kong without ever exacting meaningful guarantees for freedom of the press. The Article concludes that the United States should pursue other avenues to defend Hong Kong freedoms. Future American policy toward Hong Kong should emphasize pragmatic arguments rather than empty promises.

I. THE DEBATE OVER CHINA'S FREEDOM OF THE PRESS "PROMISE"

In the final months before the handover, Chinese officials stunned the world with their rendition of the "freedom of the press" Hong Kong will enjoy under Chinese rule. On May 31, 1996, China's top spokesperson on Hong Kong provided the first preview of media rights in the post-1997 era. In a CNN interview, Lu Ping, Director of China's Hong Kong and Macau Affairs Office, announced: "'[T]here will certainly be freedom of [the] press after 1997 . . . they can criticize the government. They can object to our policies. They can say anything they like, but with regard to action, they have to be careful..Freedom of [the] press has to be regulated by laws, you see.'"[11] Lu acknowledged that there will be changes in current Hong Kong laws "'in certain instances.'"[12] As an example he cited press "advocacy" of Hong Kong and Taiwan independence, which will "'absolutely not' be allowed" once Hong Kong reverts to Chinese sovereignty.[13]

Five months later, Chinese Foreign Minister Qian Qichen presented an even more restrictive definition of Hong Kong press freedom. In an October 15 statement, he proclaimed that after July 1, 1997, the Hong Kong media "'can put forward criticism, but not rumors or lies. Nor can they put forward personal attacks on the Chinese leaders.'"[14]

In the spring of 1997, Chinese officials reaffirmed and extended these restrictions. Citing world precedent, they announced that Hong Kong's media will not be permitted to advocate "secession"[15] or to "'deceive the public and mislead public opinion.'"[16] Chinese leaders assured the world that "'[t]here will

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11. *China Assures Hong Kong of Press Freedom, But . . .*, Agence France Presse, June 1, 1996, *available in* LEXIS, News Library, Curnws File [hereinafter *China Assures*] (quoting Lu Ping) (alterations added) (omission in original).

12. *Hong Kong Will Not Have Full Press Freedom*, Reuters World Service, May 31, 1996, *available in* LEXIS, News Library, Curnws File (quoting Lu Ping).

13. *China Assures*, *supra* note 11 (quoting Lu Ping).

14. Kathy Chen et al., *China's Foreign Minister Issues Warnings*, WALL ST. J., Oct. 16, 1996, at A17 (quoting Qian Qichen).

15. *China's Hong Kong Chief Says HK to Be Trade Bridge*, Reuters World Service, Mar. 17, 1997, *available in* LEXIS, News Library, Curnws File (discussing Lu Ping's speech in Bonn).

16. *Basic Law Adequate to Protect Freedoms Despite Critics*, RENMIN RIBAO, Apr. 7, 1997, at 11, *translated in* BBCSWB, Apr. 19, 1997, *available in* LEXIS, News Library, Curnws File [hereinafter *Basic Law Adequate*] (reporting Zeng Jianhui's speech at Beijing forum) (quoting Zeng Jianhui, Director of the P.R.C. State Council Information Office).

be no change'"[17] in Hong Kong freedom of the press but, at the same time, emphasized the "'relative and limited'"[18] nature of such freedom.

These remarks touched off a storm of protest in Hong Kong and abroad. Critics charged that China had broken its long-standing "promise" to maintain Western-style freedom of the press in post-1997 Hong Kong,[19] a "promise" enshrined in the Joint Declaration and in the Basic Law. They claimed that China now plans to extend its own fundamentally different notions of freedom of the press to Hong Kong as well as the Mainland.[20] They read the recent comments as a signal that China will renege on its larger commitments to Hong Kong autonomy and capitalism after the July 1, 1997 handover.[21] Some critics argued that China's broken "promise" on press freedom raised serious questions about the P.R.C.'s overall credibility and reliability in fulfilling its international and contractual obligations.[22]

Supporters likewise framed their arguments in terms of China's "promise" to Hong Kong. They claimed these comments evidenced China's utmost sincerity and unequivocal commitment to observing the press freedom stipulations in the Joint Declaration and the Basic Law.[23] They contended that restrictions on media

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17. *Beijing Won't Dip Its Finger into the HK Pie, Says Senior Official*, S. CHINA MORNING POST, Mar. 25, 1997, at 6, *available in* LEXIS, News Library, Curnws File (reporting Chen Ziying's speech in Beijing) (alteration added) (quoting Chen Ziying, Deputy Director of China's Hong Kong and Macau Affairs Office).

18. *Basic Law Adequate*, *supra* note 16 (quoting Zeng Jianhui).

19. *See, e.g.*, *HK Politician: China, Keep Your Promises*, UPI, June 26, 1996, *available in* LEXIS, News Library, Curnws File; Chris Yeung, *Anger as Qian Bans June 4 Protests*, S. CHINA MORNING POST, Oct. 17, 1996, at 1, *available in* LEXIS, News Library, Curnws File ("'If personal attacks against the governor were not allowed, there would hardly be any journalists not in jail . . . that's a free press and that's what Hong Kong has been promised.'") (omission in original) (quoting an unnamed "senior government official").

20. *See, e.g.*, Chan Si-hon, Editorial, *A Word of Caution*, S. CHINA MORNING POST, June 6, 1996, at 17, *available in* LEXIS, News Library, Curnws File (stating that Hong Kong people hope China defines speech "according to the territory's way" rather than China's "very strict view on what is permitted speech"); Editorial, *Media Matters*, S. CHINA MORNING POST, June 7, 1996, at 20, *available in* LEXIS, News Library, Curnws File; *Spokesman Says Hong Kong Citizens to Have 'Liberties'*, Agence France Presse, June 4, 1996, *translated in* F.B.I.S.-CHI, June 4, 1996, at 2, 2, *available in* LEXIS, News Library, Curnws File.

21. *See, e.g.*, Kieron Flynn, *Dispute over Hong Kong Freedoms Escalates, Enters Diplomatic Arena*, Agence France Presse, Oct. 18, 1996, *available in* LEXIS, News Library, Curnws File ("'[Qian's] remarks are raising fresh concerns here about whether Hong Kong people can maintain their current lifestyles as promised under the Sino-British Joint Declaration' . . . .") (alteration added) (quoting independent legislator Christine Loh); Emily Lau, *Britain Shirking Duty over Freedoms*, S. CHINA MORNING POST, June 10, 1996, at 20, *available in* LEXIS, News Library, Curnws File (discussing British reaction to Lu's statement and concern that "China may not abide by the promises in the Joint Declaration and the Basic Law").

22. *See, e.g.*, Richard Halloran, *Hope, Fear Mix on Hong Kong's Future; Residents See Bumpy Ride in Transition*, WASH. TIMES, June 14, 1996, *available in* LEXIS, News Library, Curnws File.

23. *See, e.g.*, *Chinese Foreign Minister's Closing Speech: Stresses Adherence to Law*, Xinhua, Nov. 2, 1996, *translated in* BBCSWB, Nov. 4, 1996, *available in* LEXIS, News Library, Curnws File (arguing China will implement press freedom provisions) (quoting Qian

advocacy and criticism actually promote this guarantee by ensuring that "freedom of the press be embodied normally and . . . play a positive role in maintaining social stability and harmony."[24] They denied any intent on the part of China to impose P.R.C. definitions of press freedom on post-1997 Hong Kong.[25] They reiterated China's "unswerving"[26] support for Hong Kong autonomy and pledged that China will "honor[] to the letter" all Basic Law provisions.[27]

Events on the eve of the handover only fueled this dispute over China's freedom of the press "promise." In late 1996, China launched a campaign of repression against P.R.C. dissidents and journalists.[28] Its actions underscored the differences between Chinese and Hong Kong definitions of expressive liberties and sent a chilling message about the potential costs to Hong Kong's media of a broken "promise."[29] In 1997, China's hand-picked Preparatory Committee,

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Qichen).

24. Editorial, *Freedom of Press and Observing Law Complement Each Other*, WEN WEI PO, June 3, 1996, at A2, *translated in* BBCSWB, June 4, 1996, *available in* LEXIS, News Library, Curnws File.

25. *See, e.g., China Allays Fears on Press Freedom After Hong Kong Handover*, Agence France Presse, Apr. 3, 1997, *available in* LEXIS, News Library, Curnws File (reporting on official statement that "Beijing would not introduce to Hong Kong the same systems it uses to control the press in China").

26. Editorial, *Be Vigilant Against Someone Instigating Political Confrontation*, TA KUNG PAO, July 10, 1996, at A2, *translated in* BBCSWB, July 12, 1996, *available in* LEXIS, News Library, Curnws File [hereinafter *Be Vigilant*] ("It is an unswerving principle of the Chinese Government to implement the policies of 'one country, two systems,' 'Hong Kong people ruling Hong Kong,' and 'a high degree of autonomy' in Hong Kong."); *see* Yu Ming-shan, *Lu Ping Answers Reporters' Questions in Japan*, WEN WEI PO, June 6, 1996, at B5, *translated in* F.B.I.S.-CHI, June 6, 1996, at 96, 97 (statement of Lu Ping):

> Where China's hinterland and Hong Kong are concerned, the hinterland has its own laws while post-1997 Hong Kong will also have its own laws in line with the Basic Law. So foreign reporters will abide by Hong Kong laws [not Chinese laws] while covering events there. There will be no difference between now and post-1997 with respect to the treatment of foreign reporters in Hong Kong.

27. *Be Vigilant*, *supra* note 26, at A2 (stating Basic Law "will undoubtedly be honored to the letter after 1997"); *Foreign Political Activities Will Be Banned in Hong Kong*, Xinhua, July 10, 1996, *translated in* F.B.I.S.-CHI, July 11, 1996, at 92, 93 (citing unnamed spokesman for Hong Kong and Macau Affairs Office as saying "the Chinese side has once again stressed that all the provisions of the Basic Law shall be implemented to the letter"); Editorial, *"One Country, Two Systems" Must Succeed*, WEN WEI PO, June 25, 1996, at A2, *translated in* F.B.I.S.-CHI, June 25, 1996, at 71, 71 ("China has time and again guaranteed that Hong Kong residents will enjoy more democracy, freedom, and rights after 1997. China is absolutely capable of honoring what i[t] has promised.").

28. *See generally* Patrick E. Tyler, *China Rushes Cases Against Dissidents Before Shifts in Law*, N.Y. TIMES, Dec. 31, 1996, at A1 (discussing arrests and trials of dissidents); Tony Walker, *Beijing Takes Tougher Line on Journalists*, FIN. TIMES, Jan. 30, 1997, at 6 (discussing crackdown against journalists).

29. *See, e.g., Hong Kong Press Condemn Wang Dan Jail Term*, Agence France Presse, Oct. 31, 1996, *available in* LEXIS, World Library, Allwld File (reporting that Hong Kong media feel there will be "serious implications" for Hong Kong from the Chinese trial of dissident Wang Dan); *Media: More Journalists Thrown into Prison in 1996*, Inter Press Service, Mar. 15, 1997, *available in* LEXIS, News Library, Curnws File (stating that "Hong Kong journalists are reportedly observing these developments [the crackdown on Chinese dissidents] warily").

Chief Executive, and legislature for Hong Kong further heightened concerns about the future of Hong Kong's free press when they formally repudiated Hong Kong's Bill of Rights[30] and proposed strict new controls on public rights of demonstration and assembly.[31] With the death of Deng Xiaoping, the prime architect and guarantor of the "one country, two systems" policy, the debate over China's "promises" to Hong Kong reached a crescendo.[32] This debate remains unabated today in the wake of Hong Kong's return to Chinese sovereignty.

From the start, commentators on the freedom of the press controversy have focused exclusively on the credibility of China's "promise." In their debate over whether China will keep or break its "promise" they have missed a far more fundamental question: What in fact has China promised Hong Kong? Analysis of treaty and statutory text reveals that the much vaunted freedom of the press "promise" is at best vague and indeterminate. This lack of definition, more than

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But see Editorial, *Subversion Rather than Criticism*, WEN WEI PO, Nov. 1, 1996, at A2, *translated in* BBCSWB, Nov. 4, 1996, *available in* LEXIS, World Library, Allwld File (arguing "[t]he Wang Dan case will not affect Hong Kong's freedom" because "[t]he two places have different laws and have different conditions determining crimes"). China's release in January 1997 of Hong Kong journalist Xi Yang also served as a reminder of the different definitions of freedom of the press in China and Hong Kong. Xi had served three-and-a-half years of a twelve-year prison sentence for "stealing state secrets." Xi had reported Chinese government plans to change interest rates and sell gold overseas, a "crime" in China but not Hong Kong. *See* Editorial, *Growing Appreciation*, S. CHINA MORNING POST, Jan. 27, 1997, at 18, *available in* LEXIS, News Library, Curnws File. Similarly, world attention was focused on Chinese treatment of journalists when reporter Gao Yu was awarded the UNESCO Guillermo Cano World Press Freedom Prize in March 1997. Ms. Gao is currently imprisoned in China for allegedly revealing "state secrets" in her published reports in a Hong Kong journal on P.R.C. government restructuring. *See Award Announced, Parole Denied*, ASIAWEEK, Apr. 4, 1997, at 12, *available in* LEXIS, News Library, Curnws File.

30. *See China on Safeguarding Sino-British Joint Declaration*, Xinhua, Jan. 29, 1997, *available in* LEXIS, News Library, Curnws File [hereinafter *China on Safeguarding*]; Edward A. Gargan, *Beijing Panel Votes to End Rights Laws in Hong Kong*, N.Y. TIMES, Feb. 2, 1997, at A8; Edward A. Gargan, *China's Leader for Hong Kong Backs Repeals of Rights Laws*, N.Y. TIMES, Jan. 24, 1997, at A11; *Pro-China Leaders Say Scrapping Bill of Rights Laws Will Not Axe Human Rights*, WEN WEI PO, Jan. 26, 1997, at A11, *translated in* BBCSWB, Jan. 28, 1997, *available in* LEXIS, World Library, Allwld File.

31. *See* Edward A. Gargan, *Right to Protest in Hong Kong to Be Cut Back*, N.Y. TIMES, Apr. 10, 1997, at A1; *Hong Kong's Next Congress Curbs Rights*, N.Y. TIMES, June 15, 1997, at A6.

32. *See, e.g.*, *Deng's Death Said Likely to Cause Trouble in H.K.*, Japan Economic Newswire, Feb. 21, 1997, *available in* LEXIS, World Library, Allwld File ("'we want the promises he made kept'") (quoting Stephen Yates, Heritage Foundation China expert, on Deng's death); *Deng's Dream Lives On in Hong Kong; 'Beijing Is Anxious to Minimize Damage to Confidence in the Transition . . . and Not Stir Up Controversy'*, S. CHINA MORNING POST, Feb. 22, 1997, at 17, *available in* LEXIS, News Library, Curnws File ("Top communist leaders have vowed to stick to the Deng Xiaoping line of reform and open-door policy as well as the promise of 'one country, two systems.'"); Ryoichi Hamamoto, *H.K. Has Economic Jitters over Deng*, DAILY YOMIURI, Feb. 21, 1997, at 4, *available in* LEXIS, World Library, Allwld File ("[Deng's] death casts doubt on whether that promise ['one country, two systems'] will be kept.").

credibility, will likely pose the greatest threat to Hong Kong press freedom in the post-1997 era.

II. THE JOINT DECLARATION

The Joint Declaration exists in both English-language and Chinese-language texts, which are stated to be "equally authentic."[33] The starting point for any textual analysis of China's freedom of the press "promise" is Paragraph 3(5) of the Joint Declaration. In this provision, China formally guarantees post-1997 Hong Kong an impressive array of civil, economic, and social liberties and explicitly extends legal protection to the media.[34] The text of Paragraph 3(5)'s freedom of the press guarantee reads as follows: "Rights and freedoms, including those . . . of the press . . . will be ensured by law in the Hong Kong Special Administrative Region."[35]

At first glance, this provision appears to offer strong support for expansive media rights in the post-1997 era. A closer examination of textual language, however, reveals significant ambiguities and definitional problems that could potentially undermine rather than reinforce the Hong Kong media's status under Chinese rule. In fact, each key component of the Joint Declaration's freedom of the press provision contains major flaws.

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33. Joint Declaration, *supra* note 4, para. 8, *translated in* 23 I.L.M. 1371, 1372 (1984). Problems with dual- or even multiple-language treaty texts are by no means unique to the Hong Kong context. *See generally* Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT'L & COMP. L. REV. 611 (1997). In cases of conflict between equally authentic texts, the general international law practice is to consult *travaux preparatories* and other official documents to reconcile texts. *See* Anne S.Y. Cheung, *Towards a Bilingual Legal System—The Development of Chinese Legal Language*, 19 LOY. L.A. INT'L & COMP. L.J. 315, 325 (1997). For the Joint Declaration however, there exists no public, written record of the actual negotiations. Due to the sensitive foreign policy nature of the Hong Kong issue, both sides agreed to keep all negotiations secret and confidential. *See* James T.H. Tang & Frank Ching, *Balancing the Beijing-London-Hong Kong "Three-Legged Stool," 1971-1986, in* THE HONG KONG READER: PASSAGE TO CHINESE SOVEREIGNTY 41, 62 n.29 (Ming K. Chan & Gerard A. Postiglione eds., 1996).

34. Joint Declaration, *supra* note 4, para. 3(5), *translated in* 23 I.L.M. 1371, 1375 (1984), states:

> 3. The Government of the People's Republic of China declares that the basic policies of the People's Republic of China regarding Hong Kong are as follows:
>
> . . . .
>
> (5) The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.

35. *Id.*

A. *"Rights and Freedoms"*/"Quanli he Ziyou"

Both the English-language and Chinese-language texts of the Joint Declaration use the broad phrase "rights and freedoms" to refer to a lengthy list of protected liberties. As a result, it is unclear whether Paragraph 3(5) guarantees Hong Kong's press a "right" or only a "freedom." This ambiguity has important implications in translation.

In Chinese, the terms *quanli* ("right") and *ziyou* ("freedom") have distinct meanings and legal effects. At best, "freedoms" are subordinate to "rights." As one Hong Kong commentator has explained:

> If one has the "right" to do something, other people must respect his actions. On the contrary, if one is "free" to do something, there may be no obligation by third parties to respect his actions; he, in fact, may have to respect others' freedoms as well in doing what he wants.[36]

Under this definition, "freedom of the press" is a weaker guarantee than "right of the press." As a "freedom," it would necessarily entail limitation, including legal restraint, to prevent infringement of other people's freedoms.[37] In theory at least,[38] a "right of the press," in contrast, could be restricted only in the most exceptional case.

At worst, use of the term "freedom of the press" rather than "right of the press" would not only undermine the media's status but actually convey "negative rather than positive meanings."[39] In both Chinese Confucian and communist contexts, the word *ziyou* effectively amounts to a "[l]icense to [b]e [b]ad."[40] Under this interpretation, "freedom of the press" would suggest associations "with social disruption, immorality, and acting without conscience."[41]

B. *"Of the Press"*/"Chuban"

The Joint Declaration follows common practice in rendering the English term "freedom of the press" in Chinese as "*chuban ziyou.*" In fact, however, the Chinese word *chuban* is not the precise equivalent of the broader English word "press." *Chuban* refers to "publication" rather than the "mass media" as a whole.

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36. Ting Wai, *What Will the Basic Law Guarantee?—A Study of the Draft Basic Law from a Political and Comparative Approach, in* THE DRAFT BASIC LAW OF HONG KONG 49, 76 (University of Md. Sch. of Law Occasional Papers/Reprints Series in Contemporary Asian Studies No. 5, 1988).

37. *See id.*

38. In P.R.C. practice, however, constitutional "rights" as well as "freedoms" have been frequently limited, ignored, or discarded by party and state authorities. *See* Mark Findlay, *Show Trials in China: After Tiananmen Square*, 16 J.L. & SOC'Y 352 (1989); William C. Jones, Constitutional Protection of Rights in PRC, *in* Donald C. Clarke et al., Introduction to the Law of the People's Republic of China ch. 4 (unpublished manuscript, on file with author).

39. BOYE LAFAYETTE DE MENTE, NTC'S DICTIONARY OF CHINA'S CULTURAL CODE WORDS 502 (1996).

40. *Id.* at 501.

41. *Id.* at 502.

Thus, the Chinese-language version of Paragraph 3(5) appears to be narrower in scope than its English-language counterpart. It guarantees Hong Kong's media only a right of publication.[42] It does not embrace comprehensive media rights to seek, obtain, as well as disseminate information. Unfortunately, the Joint Declaration fails to provide any concrete mechanism or guidance as to how to reconcile such linguistic conflicts.[43]

C. *"Will Be Ensured"/"*Baozhang*"*

Divergences in texts raise another important issue: Does the Joint Declaration codify the Western view of human rights as intrinsic, natural rights or the Chinese notion of human rights as positive rights created by the state?[44] Here, differences in sentence structure and word order rather than translation difficulties create ambiguity.[45]

The Chinese text clearly follows P.R.C. constitutional practice, in which "instead of being expressed as a limitation on government . . . rights provisions are generally positively worded as an express grant."[46] The Chinese-language version of Paragraph 3(5) uses a simple "subject-active verb-direct object" sentence structure. It states "[t]he Hong Kong Special Administrative Region . . . will ensure" the specified rights and freedoms. Thus, in the Chinese-language text the Joint Declaration's freedom of the press "promise" does not constitute a constraint on state action. Rather, it is a privilege that is properly restricted or even revoked when in conflict with the state's interest.[47]

The English text, in contrast, appears to be a compromise between Western and Chinese definitions of rights. In stating that "[r]ights and freedoms . . . will be ensured," the English version of Paragraph 3(5), unlike the Chinese version, places the primary emphasis on "rights and freedoms" rather than state action. By reversing the word order of the Chinese text, the English text features the term "rights and freedoms" prominently at the beginning of the sentence rather than the end. It reinforces this focus on "rights and freedoms" by using the

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42. Indeed, the English-language text of the Basic Law supports this reading. It translates the phrase *chuban de ziyou* as "freedom of publication" and *xinwen . . . de ziyou* as "freedom of the press." Basic Law, *supra* note 6, art. 27, *translated in* 29 I.L.M. 1520, 1525 (1990).

43. It simply states that both texts are "equally authentic." *See supra* note 33 and accompanying text.

44. For outstanding comparative discussions of these differences, see generally JOHN F. COPPER ET AL., HUMAN RIGHTS IN POST-MAO CHINA (1985), and R. RANDLE EDWARDS ET AL., HUMAN RIGHTS IN CONTEMPORARY CHINA (1986).

45. For an examination of the different sentence structures in Chinese and English and the resultant translation problems, see Albert H.Y. Chen, *1997: The Language of the Law in Hong Kong*, 15 H.K. L.J. 19, 27 (1985), and Cheung, *supra* note 33, at 323-24.

46. Michael C. Davis, *Anglo-American Constitutionalism with Chinese Characteristics*, 36 AM. J. COMP. L. 761, 773 (1988).

47. *See* R. Randle Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, *in* EDWARDS ET AL., *supra* note 44, at 41, 44-45 ("China's leaders today, like the imperial and bureaucratic rulers of the past, hold that rights flow from the state in the form of a gratuitous grant that can be subjected to conditions or abrogation by unilateral decision of the state.").

passive verb voice ("will be ensured"). In addition, contrary to the Chinese text, it omits any reference to the entity or agent that will safeguard such rights and freedoms. The English text uses the preposition "in" to render "[t]he Hong Kong Special Administrative Region" as a geographical location rather than a governmental actor.

Unlike the Chinese text, then, the English text creates uncertainty as to the fundamental nature of freedom of the press (and other rights stipulated in the Joint Declaration) in the post-1997 era. It does not reproduce verbatim Chinese-style expression of rights in positive terms. Yet, at the same time, it does not reject that formulation in favor of an unequivocal statement that freedom of the press is an intrinsic right and limit on government.[48] Accordingly, the English text can be read as a weak version of the Chinese view rather than a clear assertion of the conflicting Western view. At least one prominent Hong Kong scholar has already reached that conclusion in his interpretation of Joint Declaration provisions. According to Michael Davis, "the tension with [the] Western variant appears to have been resolved largely in favor of the Chinese socialist approach."[49]

*D. "By Law"/"*Yifa*"*

The term "by law"/"*yifa*" is problematic in two fundamental respects. First, it creates confusion as to the overall legal significance of Paragraph 3(5) and, in particular, the role of courts in enforcing this provision.[50] Is Paragraph 3(5) merely a programmatic policy statement that in making laws Hong Kong authorities will respect the enumerated rights and freedoms? In such case, "freedom of the press" likely would be judicially unenforceable. An alternative reading of the "by law"/"*yifa*" language, however, would create a legal obligation on the part of Hong Kong authorities not to enact any law that violates Paragraph 3(5) rights and freedoms.[51] This interpretation would arguably give Hong Kong courts powers within their assigned jurisdiction to review and invalidate laws not in conformity with Paragraph 3(5),[52] including those that infringe freedom of the press.

Second, neither the English nor the Chinese text specifies the precise meaning of the word "law"/"*fa*." This raises a series of questions. Does "law" refer solely to enacted legislation? Or does it encompass a broad range of legal norms, rules,

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48. *Compare* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."), *with* Joint Declaration, *supra* note 4, para. 3(5), *translated in* 23 I.L.M. 1371, 1375 (1984).

49. Davis, *supra* note 46, at 773.

50. *See* Albert H.Y. Chen, *The Basic Law and the Protection of Property Rights*, 23 H.K. L.J. 31, 56-60 (1993) (discussing *yifa* language in the Basic Law and the questions it raises about the legal effect and judicial enforceability of provisions). In this paragraph of the Article, I apply Chen's analysis to the freedom of the press provision in the Joint Declaration.

51. The *yifa* language could also "impose" an affirmative "obligation on the HKSAR legislature . . . to enact laws" that ensure the specified rights and freedoms. *Id.* at 58. However, as Chen notes, this "obligation is probably unenforceable." *Id.*

52. *See id.* at 58-59.

and acts? Is it used as in P.R.C. practice to distinguish "legal" from "extralegal" measures, such as extrajudicial mediation and administrative methods?[53] Does the term comprehend pre-1997 as well as post-1997 Hong Kong law? Are Chinese national statutes "law" for purposes of Paragraph 3(5)? What about international treaties and conventions?

In Annex I of the Joint Declaration, China attempts to clarify some of these issues. Section XIII of the Annex expressly stipulates two sources of human rights law: (1) "the laws previously in force in Hong Kong" and (2) the International Covenants on Civil and Political Rights ("ICCPR") and on Economic, Social, and Cultural Rights ("ICESCR") "as applied to Hong Kong."[54] Unfortunately, both of these phrases only compound the definitional difficulties presented by Paragraph 3(5).

The first phrase could be read as an absolute guarantee that all pre-1997 Hong Kong laws regarding press rights and freedoms remain in effect in the post-1997 era. This is not a plausible interpretation, however, in view of two earlier provisions in the Joint Declaration. Paragraph 3(3) indicates that there will be at least minimal changes[55] in pre-1997 Hong Kong laws. It stipulates that such laws "will remain basically unchanged."[56] Section II of Annex I uses more explicit language to restrict the scope of "laws previously in force in Hong Kong." It states that such laws "shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region legislature."[57]

Another question is the precise meaning of the word "previously." Does Section XIII refer to "laws . . . in force" prior to the signing of the Joint Declaration, or "laws . . . in force" prior to Hong Kong's reversion to Chinese sovereignty? Under the latter interpretation, Hong Kong legislation enacted after

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53. *See* Richard Swede, *One Territory-Three Systems? The Hong Kong Bill of Rights*, 44 INT'L & COMP. L.Q. 358, 377 n.88 (1995).

> The term "according to law", which as discussed above has a relatively precise meaning in international human rights jurisprudence, tends in the PRC to denote the fact that "law" may be only one of a variety of methods of dealing with e.g. family and local disputes (where mediation—both judicial and extra-judicial—plays a central role) or criminal cases where "administrative", i.e. non-judicial, methods of detention may be used as alternatives to the criminal codes.

Id. (citation omitted).

54. Joint Declaration, *supra* note 4, Annex I, § XIII, *translated in* 23 I.L.M. 1371, 1377 (1984). Section XIII reads in pertinent part:

> The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom . . . of the press . . . .
>
> . . . .
>
> . . . The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.

55. The adverb "basically"/"*jiben*" is itself ambiguous in both English and Chinese. Does it mean that the essence of pre-1997 law "will remain . . . unchanged"? Or does it signify something much weaker—that pre-1997 laws by and large "will remain . . . unchanged"?

56. Joint Declaration, *supra* note 4, para. 3(3), *translated in* 23 I.L.M. 1371, 1371 (1984).

57. *Id.* Annex I, § II, *translated in* 23 I.L.M. 1371, 1373 (1984).

the Joint Declaration but before the July 1, 1997 handover would remain effective. Paragraph 3(3) adds to the confusion by using the phrase "currently in force" rather than "previously in force."[58] The effective freeze date of the Joint Declaration has become of critical importance. Since 1984, the Hong Kong legislature has enacted a substantial body of new legislation, most notably a Bill of Rights Ordinance codifying expansive rights of expression and information.[59] It has also repealed or amended several colonial-era draconian restrictions on media rights of access and publication.[60] Thus, definition of the term "previously" directly affects the contours of China's freedom of the press "promise." The word "laws"/"*falu*" poses related problems. Does the term refer simply to "law on the books" or to "law in action"[61] as well? The Joint Declaration provides no clear guidance on this subject. Yet, the distinction is essential for Hong Kong's media.

Despite the recent reforms mentioned above, Hong Kong legislation on the press diverged markedly from actual practice. Hong Kong's official "law on the books" was repressive but its "law in action" was generally permissive and protective of media rights.[62] The Joint Declaration fails to specify whether China

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58. *Id.* para. 3(3), *translated in* 23 I.L.M. 1371, 1371 (1984).

59. *See* Hong Kong Bill of Rights Ordinance, No. 59 (1991), *reprinted in* THE HONG KONG BILL OF RIGHTS 525 (Johannes Chan & Yash Ghai eds., 1993). For detailed discussion of this statute, see generally Dennis Morris, *Interpreting Hong Kong's Bill of Rights: Some Basic Questions* (pts. 1-3), 15 STATUTE L. REV. 126 (1994), 16 STATUTE L. REV. 144 (1995), 16 STATUTE L. REV. 200 (1995). For a superb description of the ordinance's protections of freedom of the press, see Keller, *supra* note 5, at 405-12.

60. Such changes included amendments to six security-related and broadcasting laws that "allow[ed] the authorities to suppress publications . . . and prohibit links between Hong Kong and overseas organizations." *China's Challenge: Freedom of Expression in Hong Kong*, ARTICLE 19 BULL., Oct./Nov. 1996, at 4, 4; *see also* Editorial, *Repeal Draconian Laws*, S. CHINA MORNING POST, Apr. 29, 1995, at 18, *available in* LEXIS, News Library, Schina File (discussing reforms "to protect the press-freedoms guaranteed in the Bill of Rights and the Basic Law"). It should be noted, however, that some of these changes actually restricted press freedom. For example, amendments to Hong Kong's Control of Obscene and Indecent Articles Ordinance introduced stiff penalties for sale of "indecent" publications and banned "hard-core obscenity and pornography." Kevin Sinclair, *Right to Read in Peril*, S. CHINA MORNING POST, Apr. 28, 1997, at 19, *available in* LEXIS, News Library, Curnws File (discussing enforcement of ordinance and concluding: "And we worry about freedom of the press in the future? How about now?"). For a detailed discussion of "defects" in British colonial Hong Kong's legal system, see Ming K. Chan, *The Imperfect Legacy: Defects in the British Legal System in Colonial Hong Kong*, 18 U. PA. J. INT'L ECON. L. 133 (1997); Richard Klein, *The Empire Strikes Back: Britain's Use of the Law to Suppress Political Dissent in Hong Kong*, 15 B.U. INT'L L.J. 1 (1997).

61. *See generally* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW (1921) (distinguishing between "law on the books" and "law in action").

62. For a detailed description of these laws, see Richard Cullen, Freedom of the Press in Hong Kong § 3.2, at 17 (Oct. 1996) (unpublished manuscript, on file with author). *See* Keller, *supra* note 5, at 380-82 (describing policy of "liberal tolerance"); Editorial, *Media Matters*, *supra* note 20, at 20 ("Whatever old statutes may have been on the files, the press has been answerable only to the courts and has been free to develop both editorially and commercially within a stable and accountable legal framework."). In its annual reports since 1993, the Hong Kong Journalists Association in conjunction with the Article 19 International Centre Against

will respect this prevailing understanding and implementation of "freedom of the press" or only its statutory expression. Arguably, this practice is part of Hong Kong's "customary law"[63] or, even more broadly, the "current social and economic systems" and/or "life-style" that China guarantees "will remain unchanged"[64] for fifty years.

Section XIII's reference to the ICCPR and the ICESCR is equally flawed. Here, too, ambiguous language raises doubts as to what precisely China has promised Hong Kong by way of freedom of the press. On its face, Section XIII appears to proclaim as post-1997 Hong Kong law the expansive human rights definitions and guarantees, including those relating to the press, stipulated in these two international agreements.[65] In fact, however, use of the phrase "as applied to Hong Kong" considerably weakens this provision. There are several plausible readings of the "as applied" language. One interpretation is that the phrase "refer[s] solely to the reservations made by the United Kingdom when it extended the ICCPR to Hong Kong."[66] In such case, the conventions would likely remain in force only at the international level.[67] Another possible interpretation is that these conventions remain in effect to the extent they were specifically incorporated into the pre-1997 domestic legal system of Hong Kong.[68] This reading is problematic as well. The Hong Kong Government expressly refused to incorporate one of the conventions—the ICESCR—into domestic law.[69] Although it did formally incorporate the other convention—the ICCPR—it did so through the 1991 Bill of Rights Ordinance,[70] a statute that itself is

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Censorship consistently pointed out this difference between law and practice and urged repeal of "outdated colonial laws which threaten press freedom." Catherine Ng, S. CHINA MORNING POST, June 7, 1996, at 4, *available in* LEXIS, News Library, Schina File; *see* HONG KONG JOURNALISTS ASS'N, CHINA'S CHALLENGE: FREEDOM OF EXPRESSION—1996 ANNUAL REPORT (1996); Editorial, *A Freedom That Needs to Be Expressed*, S. CHINA MORNING POST, July 2, 1995, at 10, *available in* LEXIS, News Library, Schina File.

63. Joint Declaration, *supra* note 4, Annex I, § II, *translated in* 23 I.L.M. 1371, 1373 (1984).

64. *Id.* paras. 3(5), 3(12), *translated in* 23 I.L.M. 1371, 1372 (1984).

65. It should be noted, however, that while these conventions are generally protective of human rights, they do contain provisions that can be used to restrict freedom of the press. As a pro-Chinese Hong Kong newspaper has already pointed out, Article 19 of the ICCPR explicitly stipulates restrictions "a) for respect of the rights or reputations of others; b) for the protection of national security or of public order, or of public health or morals." Editorial, *It Is Chris Patten Who Stirs Up Controversy over Press Freedom*, TA KUNG PAO, June 11, 1996, at A2, *translated in* F.B.I.S.-CHI, June 13, 1996, at 101, 102.

66. Swede, *supra* note 53, at 373 (describing but rejecting this position).

67. *See* Nihal Jayawickrama, *Hong Kong and the International Protection of Human Rights*, *in* HUMAN RIGHTS IN HONG KONG 120, 126-31 (Raymond Wacks ed., 1992); Swede, *supra* note 53, at 360-61, 373.

68. *See* Swede, *supra* note 53, at 373-75.

69. *See* Keller, *supra* note 5, at 403.

70. *See* Hong Kong Bill of Rights Ordinance, No. 59, § 2(3) (1991), *reprinted in* THE HONG KONG BILL OF RIGHTS 525, 525-26 (Johannes Chan & Yash Ghai eds., 1993) ("the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong").

controversial and of questionable validity after the handover. The Ordinance was enacted subsequent to the 1984 Joint Declaration (and the 1990 Basic Law) and contains provisions that China has already declared incompatible with Hong Kong's "mini-constitution."[71] Thus, neither the ICESCR nor the ICCPR may qualify as pre-1997 "laws" for purposes of Section XIII.

A third interpretation of the "as applied" language would focus on post-1997 rather than pre-1997 incorporation. Under this approach, the two international covenants would continue in force only to the extent that post-1997 Hong Kong authorities expressly incorporate them into local law. This reading is perhaps the most troubling. It effectively leaves human rights definitions at the whim of post-1997 Hong Kong authorities, without any international law standards or protections.

*E. "In the Hong Kong Special Administrative Region"/"*Xianggang Tebie Xingzheng Qu*"*

As one commentator has aptly noted, "though the Joint Declaration lists an impressive series of rights and freedoms that will be protected after 1997, it does not detail exactly how the future political system will implement and protect these rights."[72] Paragraph 3(5) is especially flawed in this respect. It uses the broad term "Hong Kong Special Administrative Region"/ "*Xianggang Tebie Xingzheng Qu*" rather than specifying precisely which entity or entities will define, interpret, and enforce the guaranteed rights and freedoms, including those of the press. In so doing, Paragraph 3(5) gives China considerable latitude to determine unilaterally how and to what extent freedom of the press will in fact be "ensured" in the post-1997 era. Other provisions of the Joint Declaration offer few checks on this power.

The cornerstone of the Joint Declaration is its promise that post-1997 Hong Kong "will enjoy a high degree of autonomy."[73] Under this scheme, Hong Kong "will be vested with executive, legislative and independent judicial power, including that of final adjudication."[74] The Joint Declaration provides no concrete definition of the term "high degree of autonomy."[75] It does specify two exceptions, however. "[F]oreign and defence affairs" will remain "the

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71. *See China on Safeguarding*, *supra* note 30 (stating British Hong Kong authorities violated Joint Declaration by unilaterally enacting Bill of Rights Ordinance and "by placing [it] above Hong Kong's existing laws"); *Western Media Motives Questioned; Britain's Post-Colonial "Time Bombs" Condemned*, LIAOWANG, Feb. 17, 1997, at 45, *translated in* BBCSWB, Mar. 5, 1997, *available in* LEXIS, News Library, BBCSWB File (condemning Bill of Rights Ordinance's provisions that "granted the bill a status that overrides Hong Kong's original laws at the excuse that the latter failed to conform to the bill").

72. Thomas Boasberg, *One Country, One-and-a-Half Systems: The Hong Kong Basic Law and Its Breaches of the Sino-British Joint Declaration*, 10 WIS. INT'L L.J. 282, 296 (1992).

73. Joint Declaration, *supra* note 4, para. 3(2), *translated in* 23 I.L.M. 1371, 1371 (1984).

74. *Id.* para. 3(3), *translated in* 23 I.L.M. 1371, 1371 (1984).

75. For a discussion of the various possible interpretations of the ambiguous term "high degree of autonomy," see Brian Z. Tamanaha, *Post-1997 Hong Kong: A Comparative Study of the Meaning of "High Degree of Autonomy"—With a Specific Look at the Commonwealth of the Northern Mariana Islands*, 5 CHINA L. REP. 163 (1989).

responsibilities of the Central People's Government."[76] These exceptions potentially grant P.R.C. authorities substantial powers to regulate and restrict Hong Kong media activities after the July 1 handover.

The sweeping phrase "foreign and defence affairs" could well comprehend Hong Kong publications that advocate or even report positions China deems detrimental to state interests (e.g., calls for Hong Kong or Taiwan independence). It arguably extends also to articles or broadcasts critical of government policies or officials and to media attempts to gain access to and/or disseminate information China views as "state secrets." An expansive interpretation of the "foreign and defence affairs" exception could give China full authority to monitor all Hong Kong media activities to prevent "destabilizing" acts and to ensure coverage that is "beneficial" and "positive" for Chinese national objectives.

Notwithstanding these serious textual gaps and ambiguities, some commentators remain sanguine about the prospects for future implementation of Joint Declaration rights and freedoms. These authors find the ultimate safeguard and enforcement mechanism for such rights outside the text of the Joint Declaration. They argue that the Joint Declaration is an international treaty, formally registered with the United Nations, and, hence, binding and enforceable under international law.[77] Unfortunately, however, ambiguous textual language once again undermines this potential guarantee for post-1997 Hong Kong rights and freedoms.

The very title of the Joint Declaration creates uncertainty about the document's international law status and effect. The term "joint declaration"/"*lianhe shengming*" has no settled definition in either English or Chinese law or language. Although the British and Chinese sides mutually agreed to adopt this term,[78] their understandings of its meaning have diverged markedly. From the start, the British side has interpreted "joint declaration" to be the equivalent of a binding international treaty. It expressly stated this definition in its official White Paper that accompanied the Joint Declaration: "[a]n international agreement of this kind is the highest form of commitment between two sovereign states."[79]

The Chinese side, in contrast, has consistently rejected this characterization of the Joint Declaration. Indeed, in references to the Joint Declaration, P.R.C. officials and commentators have carefully avoided such words as "treaty," "convention," or "international agreement" that might suggest approval of the

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76. Joint Declaration, *supra* note 4, para. 3(2), *translated in* 23 I.L.M. 1371, 1371 (1984).

77. For an excellent example of this view, see Patricia Homan Palumbo, Comment, *Analysis of the Sino-British Joint Declaration and the Basic Law of Hong Kong: What Do They Guarantee the People of Hong Kong After 1997?*, 6 CONN. J. INT'L L. 667 (1991).

78. "Zhu Taoying, a press official of the PRC Embassy in Washington, D.C., noted that Great Britain and the People's Republic of China mutually decided on using the term 'Joint Declaration' to describe the agreement." *Id.* at 691-92.

79. White Paper, Sept. 26, 1984, ¶ 19, 23 I.L.M. 1366, 1369 (1984).

British position.[80] The prevailing Chinese interpretation appears to be that the Joint Declaration is a "'domestic agreement' that [the P.R.C.] can unilaterally override."[81] Arguably, the P.R.C. may even regard the Joint Declaration as a "transitional" document that expired on July 1, 1997.[82] Thus, it is unlikely at best that China would voluntarily subject itself to international law definition and enforcement of Joint Declaration provisions.[83]

In sum, a textual analysis of the Joint Declaration reveals that its oft-cited freedom of the press "promise" is illusory. Uncertain, ambiguous language provides China maximum flexibility to determine the scope and extent of Hong Kong media rights in the post-1997 era. As the next section demonstrates, the text of the Basic Law only further undermines China's freedom of the press "promise."

III. THE BASIC LAW

On April 4, 1990, the Chinese legislature enacted the Basic Law "to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong."[84] Like the Joint Declaration, this "mini-constitution" explicitly

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80. *See* Anna M. Han, *Hong Kong's Basic Law: The Path to 1997, Paved with Pitfalls*, 16 HASTINGS INT'L & COMP. L. REV. 321, 327 n.27 (1993) (discussing "China's reluctance to apply words such as agreement, convention, or treaty to the Joint Declaration"). Interestingly, during the final months before the handover, China changed this practice somewhat. In defense of their decision to repeal Hong Kong civil rights laws enacted after the Joint Declaration, P.R.C. officials accused Great Britain of violating its commitments under the Joint Declaration. *See, e.g., Signed Article Criticizes US Media on Hong Kong Issue*, Xinhua, Jan. 28, 1997, *available in* LEXIS, Asiapc Library, Xinhua File (stating British "totally violated the statements of the Joint Declaration" in enacting new laws).

81. John McDermott, *The "Rule of Law" in Hong Kong After 1997*, 19 LOY. L.A. INT'L & COMP. L.J. 263, 266 (1997); *see* John H. Henderson, Note, *The Reintegration of Hong Kong into the People's Republic of China: What It Means to Hong Kong's Future Prosperity*, 28 VAND. J. TRANSNAT'L L. 503, 519 (1995). *But see* Steven L. Chan, *Differences Between British and Chinese Views of Law Forebode Uncertainties for Hong Kong's People After the 1997 Transfer*, 15 UCLA PAC. BASIN L.J. 138, 185 (1996) ("In practice, both Britain and China have made various indications that suggest they recognize the Joint Declaration as a treaty.").

82. McDermott, *supra* note 81, at 266.

83. One commentator acknowledges that "international legal mechanisms would be unsuccessful in forcing the PRC to uphold its promises under the Joint Declaration," but argues that economic pressure from the world community could compel China to adhere to the Joint Declaration. Paul Vitrano, Note, *Hong Kong 1997: Can the People's Republic of China Be Compelled to Abide by the Joint Declaration?*, 28 GEO. WASH. J. INT'L L. & ECON. 445, 461-70 (1995).

84. Basic Law, *supra* note 6, preamble, *translated in* 29 I.L.M. 1520, 1520 (1990). In the Joint Declaration, China had expressly provided for the enactment of a future Basic Law. Paragraph 3(12) reads:

> The above-stated basic policies of the People's Republic of China regarding Hong Kong and the elaboration of them in Annex I to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.

Joint Declaration, *supra* note 4, para. 3(12), *translated in* 23 I.L.M. 1371, 1372 (1984). It

guarantees freedom of the press in post-1997 Hong Kong. At the same time, however, its textual formulation of that "promise" introduces significant new checks on media rights.

A. Reformulating "Freedom of the Press"

Article 27 of the Basic Law proclaims in pertinent part that "Hong Kong residents shall have freedom . . . of the press and of publication."[85] At first glance, this new version of the freedom of the press guarantee appears to address all of the problems presented by its predecessor. Unlike Paragraph 3(5) of the Joint Declaration, Article 27 uses one term, "freedom"/"*ziyou*," rather than the confusing compound phrase, "rights and freedoms"/"*quanli he ziyou*," to refer to press liberties. In addition, it captures the broader meaning of the English word "press" with two nouns—"*xinwen*" ("media") and "*chuban*" ("publication"). It also eliminates the Joint Declaration's problematic "will be ensured"/"*baozhang*" and "by law"/"*yifa*" language. Finally, Article 27 even appears to shift the focus from state to citizenry. This provision omits the Joint Declaration's reference to the "Hong Kong Special Administrative Region"/"*Xianggang Tebie Xingzheng Qu.*" In so doing, Article 27 seems to emphasize Hong Kong residents' possession of the specified freedoms rather than state action in ensuring such freedoms.

When Article 27 is read in the context of the Basic Law as a whole, however, a more discouraging picture of freedom of the press emerges. Textual analysis reveals that much of the Joint Declaration's problematic language has not, in fact, been eliminated. It has merely been transposed into other Basic Law provisions. For example, Articles 4 and 39 reproduce the two most ambiguous phrases of Paragraph 3(5)—"rights and freedoms"/"*quanli he ziyou*" and "by law"/"*yifa.*"[86] Moreover, the Basic Law actually goes further than the Joint Declaration in expressly providing for legal restriction of Hong Kong rights and freedoms.[87] It defines this restriction in terms so broad, ambiguous, and imprecise as effectively "to confer upon the central government greater leeway in asserting control over the HKSAR"[88] and media.

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should be noted that the term "basic policies" is itself a problematic translation of the Chinese "*fangzhen zhengce.*" One author suggests that "direction indicator policy" is a more accurate translation because it better expresses the "politically charged" meaning of the original. Ann D. Jordan, *Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L.J. 335, 352 (1997).

85. Basic Law, *supra* note 6, art. 27, *translated in* 29 I.L.M. 1520, 1525 (1990) ("Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.").

86. *Id.* art. 4, *translated in* 29 I.L.M. 1520, 1520 (1990); *id.* art. 39, *translated in* 29 I.L.M. 1520, 1526 (1990).

87. *See id.* art. 39, *translated in* 29 I.L.M. 1520, 1526 (1990). For the text of this provision, see *infra* text accompanying note 90.

88. Che-ning Liu, *The Power of Interpretation of the Hong Kong Special Administrative Region Basic Law—Where Do We Go from Here?*, 5 CHINA L. REP. 185, 186 (1989).

B. Restriction "as Prescribed by Law"/"Yifa": New Definitions of Law?

Article 39 of the Basic Law presents a classic statement of the Chinese socialist view of rights as "positive" rather than "natural."[89] It stipulates: "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law."[90] Article 42 reaffirms this adoption of the P.R.C. approach by linking legal rights to duties.[91] It imposes on Hong Kong residents "the obligation to abide by the laws in force in the Hong Kong Special Administrative Region."[92]

Both provisions raise an obvious question. What constitutes "law"? The Basic Law stipulates three major sources of law—international conventions, Hong Kong law, and P.R.C. national legislation.

1. International Conventions

The Basic Law follows the Joint Declaration in acknowledging two international covenants—the ICCPR and the ICESCR—as potential sources of law for post-1997 Hong Kong.[93] It also includes a broad new category of international instruments—"international labour conventions."[94] Like the Joint Declaration, the Basic Law is unclear as to the precise conditions for recognizing these conventions as Hong Kong law. It repeats the unfortunate "as applied" wording of the Joint Declaration and adds its own ambiguous language. The result is a confusing statement in Article 39 that the "provisions" of the specified conventions "as applied to Hong Kong shall remain in force and shall be

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89. *See* Davis, *supra* note 46, at 774-75.

90. Basic Law, *supra* note 6, art. 39, *translated in* 29 I.L.M. 1520, 1526 (1990).

91. *See id.* art. 42, *translated in* 29 I.L.M. 1520, 1527 (1990). For discussion of P.R.C. linkage of rights and duties, see John F. Copper, *Defining Human Rights in the People's Republic of China, in* HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA 9, 11-12 (Yuan-li Wu et al. eds., 1988), Guo Zu, *Why Those Who Study Law Act Against the Law—Meditation by Teachers and Students of China Politics and Law University*, RENMIN RIBAO, Oct. 23, 1989, at 4, *translated in* F.B.I.S.-CHI, Nov. 15, 1989, at 26, and Jones, *supra* note 38. The linkage between rights and duties is not solely a P.R.C. phenomenon, however. In fact, as Walter Weyrauch has pointed out, "the American concept [of 'duties'] contrasts with and is intimately related to the [con]cept [sic] of 'rights.'" Walter O. Weyrauch, *On Definitions, Tautologies, and Ethnocentrism in Regard to Universal Human Rights, in* HUMAN RIGHTS 198, 199 (Ervin H. Pollack ed., 1971).

92. Basic Law, *supra* note 6, art. 42, *translated in* 29 I.L.M. 1520, 1527 (1990).

93. *Id.* art. 39, *translated in* 29 I.L.M. 1520, 1526 (1990) ("The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.").

94. *Id.*

implemented through the laws of the Hong Kong Special Administrative Region."[95]

This reformulation of Joint Declaration Section XIII only creates further uncertainty about the status of international human rights agreements in post-1997 Hong Kong law. There are radically different possible interpretations of the phrase "shall be implemented through the laws of the Hong Kong Special Administrative Region."[96] One interpretation is that the new language amounts to little more than a broad assertion that, in making laws, Hong Kong Special Administrative Region ("HKSAR") authorities should respect provisions of the ICCPR, ICESCR, and international labour conventions. An alternative interpretation, however, would read Article 39 to deny self-executing status to the specified conventions. Under this approach, the phrase "implemented through the laws of the Hong Kong Special Administrative Region" means that the ICCPR, ICESCR, and international labour conventions are ineffective unless and until the HKSAR expressly incorporates them into domestic law.

Another quasi-international convention with uncertain legal status is the Joint Declaration itself. The Basic Law contains no provisions addressing such key issues as enforcement of Joint Declaration guarantees, the relationship between this document and the Basic Law, or the treatment of conflicts between inconsistent Joint Declaration and Basic Law provisions. Perhaps surprisingly, the Basic Law's only references to the Joint Declaration appear in its introductory preamble.[97] Reports suggest that these statutory gaps may in fact be deliberate omissions designed to dispel any impression that the Joint Declaration is a "competing source of legitimacy"[98] and potential check on Chinese control over definition, amendment, and implementation of the Basic Law.[99]

2. Hong Kong Law: Past, Present, and Future

Like the Joint Declaration, the Basic Law guarantees that the HKSAR will retain the "laws previously in force in Hong Kong."[100] Once again, however, the Basic Law fails to provide any definition of the word "previously." As a result, there are now three plausible freeze dates. Under the Basic Law, "previously" could refer to Hong Kong laws in effect prior to: (1) the signature of the Joint Declaration (1984); (2) the enactment of the Basic Law (1990); or (3) the actual handover (July 1, 1997).

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95. *Id.*

96. *Id.*

97. *Id.* preamble, *translated in* 29 I.L.M. 1520, 1520 (1990) ("On 19 December 1984, the Chinese and British Governments signed the Joint Declaration on the Question of Hong Kong .... The basic policies of the People's Republic of China regarding Hong Kong have been elaborated by the Chinese Government in the Sino-British Joint Declaration.").

98. Boasberg, *supra* note 72, at 319.

99. *See id.* at 318-19 (describing reasons why P.R.C. Government rejected a proposal by Hong Kong executive and legislative officials to "recognize the primacy of the Joint Declaration" in the text of the Basic Law).

100. Basic Law, *supra* note 6, art. 8, *translated in* 29 I.L.M. 1520, 1521 (1990) ("The laws previously in force in Hong Kong ... shall be maintained ....").

The Basic Law also continues to offer no guidance as to whether the phrase "laws previously in force" includes the law as applied in Hong Kong as well as the law as written. Article 8 mirrors Section II of the Joint Declaration in defining such laws broadly as "the common law, rules of equity, ordinances, subordinate legislation and customary law."[101] As in the Joint Declaration, the only explicit exceptions from this category are laws that "contravene" the Basic Law or are amended by the HKSAR legislature.[102]

In Article 23, however, the Basic Law makes a major departure from its predecessor. For the first time, it offers a preview of future HKSAR legislation that is ominous for freedom of the press in the post-1997 era. In some of the most controversial language of the Basic Law, Article 23 directs the HKSAR to "enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets."[103] The list of prohibited acts is so broadly worded as to justify extensive statutory restrictions on Hong Kong civil liberties, including otherwise protected media activities. The terms "secession"/"*fenlie guojia*," "sedition"/"*shandong panluan*," "subversion against the Central People's Government"/"*dianfu Zhongyang Renmin Zhengfu*," and "theft of state secrets"/"*qiequ guojia jimi*" have particular potential to "narrow" "[t]he parameters of press freedom"[104] in the post-1997 era.

An antisecession law would likely apply to media publications advocating independence for Hong Kong, Taiwan, Tibet, or any other region the P.R.C. government regards as an inalienable part of China.[105] It could also include newspaper editorials in favor of independence, coverage of pro-independence movements or Chinese repression of such movements, and even transmission of broadcasts from renegade provinces (e.g., Taiwan).[106] A literal interpretation of the Chinese term translated as "secession"—"*fenlie guojia*"—would prohibit any media act that authorities consider might "split" or "divide" "the country."

Legislation against "sedition" would almost certainly be applicable to Hong Kong media activities. Here, Chinese and HKSAR officials could cite well-established common law as well as Chinese precedent to prohibit publications or

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101. *Id.* ("[t]he laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law").

102. *Id.* ("except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region"); *see also id.* art. 160, *translated in* 29 I.L.M. 1520, 1546 (1990) ("except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law").

103. *Id.* art. 23, *translated in* 29 I.L.M. 1520, 1524 (1990).

104. Frank Ching, *Misreading Hong Kong*, FOREIGN AFF., May/June 1997, at 53, 63. Because of the sweeping and draconian nature of these four clauses, some Hong Kong reformers have proposed deleting them from Article 23 and retaining only the first offense—treason. *See* Emily Lau, *Writing on the Wall for Freedom*, S. CHINA MORNING POST, May 12, 1997, at 18, *available in* LEXIS, News Library, Curnws File.

105. *See* Ching, *supra* note 104, at 63 ("The law against secession, for example, will probably make it illegal for anyone to advocate the breakup of China or independence for Hong Kong, Taiwan, Tibet, or any other part of China.").

106. Notwithstanding this provision, one of Hong Kong's television stations, ATV, has announced that it plans to continue its broadcasts of Taiwan's evening news. *See* Cohen, *supra* note 9, at 49.

broadcasts that "incite" violence, rebellion, antigovernmental sentiment, internecine strife, and the like.[107]

The term "subversion"/"*dianfu*," in contrast, is drawn exclusively from P.R.C. law and practice. This concept is not recognized by either British or pre-1997 Hong Kong law. The term has no fixed legal definition or limits. In the Chinese context, provisions against "subversion" appear to be infinitely expandable to encompass virtually any action the government might deem undesirable.[108] The history of the antisubversion clause in Article 18 suggests that a future HKSAR law against subversion would target "improper" exercise of civil liberties, including freedom of the press.[109] P.R.C. drafters specifically cited the Chinese pro-democracy demonstrations at Tiananmen Square as their rationale for introducing an antisubversion clause into the Basic Law.[110] As one leading drafter explained, "'Somebody did make it clear that they wanted to do that [topple the Chinese Government] during the June 4 event. There's a real need to [insert the clause].'"[111] Since enactment of the Basic Law, P.R.C. officials have only reinforced this linkage between "subversion" and "inappropriate" political expression. Government spokespersons have repeatedly used the term "subversive" to condemn Hong Kong's pro-democracy movement and leaders.[112]

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107. *See* KEITH, *supra* note 5, at 196 (discussing applications of common law approaches to sedition). For an outstanding comparative study of "sedition" approaches, see H.L. Fu, *Sedition and Political Dissidence: Towards Legitimate Dissent in China?*, 26 H.K. L.J. 210 (1996).

108. Because of this broad definition, Hong Kong journalists are particularly concerned that HKSAR authorities will read "subversion" to include "report[ing] the corruption that is endemic in China and threatens to undermine Hong Kong." Nick Higham, *Chinese Rule May Put Great Wall of Silence Around Hong Kong*, MARKETING WK., May 29, 1997, at 17, *available in* LEXIS, News Library, Curnws File, at *2; *see* Peter Preston, *Free Press Is the Only Hope for Hong Kong*, GUARDIAN (London), Jan. 3, 1997, at 15 ("The greatest single fear of Hong Kong is that . . . Chinese rule will mean Chinese levels of corruption—and eventual destruction.").

109. Basic Law, *supra* note 6, art. 18, *translated in* 29 I.L.M. 1520, 1523 (1990).

110. At the request of Hong Kong members of the Basic Law Drafting Committee, the antisubversion language had been deleted from earlier drafts of the Basic Law. Following the Tiananmen Square demonstrations, however, Mainland drafters insisted on reintroducing the phrase into the final version of the Basic Law over the strong objections of their Hong Kong counterparts. *See generally* KEITH, *supra* note 5, at 194-97; MARTIN LEE & SZETO WAH, THE BASIC LAW: SOME BASIC FLAWS 25 (1988) (refusing to support Article 22, which prohibits "any act designed to undermine national unity or subvert the Central People's Government," even before the Tiananmen Square demonstration in 1989); Boasberg, *supra* note 72, at 324-25; Han, *supra* note 80, at 332-33.

111. Chris Yeung, *Hong Kong Drafters Agree to 'Subversive' Clause*, S. CHINA MORNING POST, Dec. 12, 1989, at 1, *available in* LEXIS, World Library, Allwld File (alteration in original) (quoting Shao Tianren).

112. *See* MICHAEL YAHUDA, HONG KONG: CHINA'S CHALLENGE 115 (1996) (stating that "the leaders of the Democratic Party, Szeto Wah and Martin Lee, have been singled out as subversives" by Chinese authorities); Holly Porteous, *Building Bridges to Hong Kong*, JANE'S INTELLIGENCE REV., May 1, 1997, at 219, 222 ("[Martin] Lee has been vilified as 'subversive' by Beijing . . . ."); *HK Politician: China, Keep Your Promises*, *supra* note 19 (stating Hong Kong Democrats "have been branded 'subversives'").

Finally, legislation proscribing "theft of state secrets" promises to be another significant threat to freedom of the press in post-1997 Hong Kong. China's well-published imprisonment of Hong Kong-based *Ming Pao* journalist Xi Yang sends a "'strong signal'"[113] to the Hong Kong media about the potential reach of a "theft of state secrets" provision. Under a similar statute in China, Xi received a twelve-year prison sentence for financial reporting that would be regarded as "'an essential part of the job in Hong Kong.'"[114] Xi committed a "theft of state secrets" merely by using unpublished Central Bank information on interest rates and gold sales.[115]

3. P.R.C. National Law

Another innovation of the Basic Law is its explicit coverage in Article 18 of P.R.C. national legislation applicable to post-1997 Hong Kong. In so doing, it effectively makes Hong Kong's media subject to repressive Chinese as well as HKSAR laws. Article 18 begins on a reassuring note: "National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law."[116] In the final version of the Basic Law, Annex III contains only six P.R.C. laws, extending to Hong Kong China's capital, calendar, anthem, and flag; national day; emblem; territorial seas definitions; nationality law; and rules on diplomatic privileges and immunities.[117] Article 18 then undermines this guarantee, however, by granting the P.R.C. legislature's Standing Committee authority to "add to or delete from" the Annex III list of laws.[118] Article 18 purportedly provides two restrictions on this power but words them in language so broad and ambiguous as to render them meaningless.

The first limitation is that the Standing Committee "may" amend Annex III after "consulting" its own Committee for the Basic Law of the HKSAR and the "government of the Region."[119] Article 18 provides no definition of "consulting"/"*zhengxun*." Yet, this term has a wide range of meaning in both English and Chinese. The result is considerable confusion over the practical effect of Article 18. Does the Standing Committee satisfy the "consulting" requirement merely by informing the specified bodies in advance of any proposed amendment to Annex III? Must it actively solicit their input into the decisionmaking process? Does Article 18 mandate that the Standing Committee

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113. Tim Connolly, *A Pressing Concern; China's Influence Is Inhibiting Media in Hong Kong, Some Journalists Say*, DALLAS MORNING POST, May 14, 1997, at 1A, *available in* LEXIS, News Library, Curnws File (quoting Daisy Li Yuet Wah, former head of the Hong Kong Journalists Association).

114. *Id.* (quoting Radio Television Hong Kong reporter Francis Moriarity).

115. Xi was released in January 1997 after serving three-and-a-half years of the prison term. Soon thereafter, however, P.R.C. officials arrested an SBC Warburg analyst for the identical offense—use of Central Bank information. *See* Sarah Davison, *Hong Kong Media Fight "Pro-China" Label*, Reuters World Service, May 14, 1997, *available in* LEXIS, News Library, Curnws File. For sources on the Xi case, see *supra* note 29.

116. Basic Law, *supra* note 6, art. 18, *translated in* 29 I.L.M. 1520, 1523 (1990).

117. *See id.* Annex III, *translated in* 29 I.L.M. 1520, 1548 (1990).

118. *Id.* art. 18, *translated in* 29 I.L.M. 1520, 1523 (1990).

119. *Id.*

receive prior endorsement from these bodies of any change to Annex III? The Chinese text suggests an intermediate position by stating that the Standing Committee will "consult" the "*yijian*" ("opinions" or "views") of its Basic Law Committee and the Hong Kong Government. Yet, even this language poses interpretative difficulties. For example, suppose that the unlikely event occurs that one or both of the specified bodies expresses disapproval of a proposed Standing Committee amendment. Are these "opinions" advisory only or binding on the Standing Committee?

The second limitation is equally problematic. Article 18 stipulates that Annex III laws "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."[120] As was discussed earlier,[121] the phrase "defence and foreign affairs"/"*guofang, waijiao*" could comprehend legislation on diverse topics, including laws targeting media access to and dissemination of information. It could even arguably require foreign journalists and news organizations in Hong Kong to comply with P.R.C. rather than HKSAR registration rules and other regulations.[122]

The catch-all language at the end of this provision ("matters outside the limits") gives the P.R.C. additional latitude to extend national laws into post-1997 Hong Kong. Like the Joint Declaration, the Basic Law continues to define the respective jurisdictions of the HKSAR and Central People's Government with a broad brush. It retains the amorphous guarantee to Hong Kong of a "high degree of autonomy,"[123] but offers no clarification of this language. Since the Basic Law provides no ascertainable standard for judging HKSAR autonomy, Article 18's restriction of Annex III laws to "matters outside the limits" of that autonomy has little practical significance. As one commentator has aptly noted, "[t]he wording of the Basic Law is such that it seems to allow for either a strict or loose construction of NPCSC powers to extend Mainland laws into the HKSAR."[124]

The final paragraph of Article 18 introduces still more flexibility into P.R.C. lawmaking for post-1997 Hong Kong. It stipulates two instances in which the Standing Committee can bypass even the minimal consultation and amendment requirements and directly impose Chinese national laws on Hong Kong. This streamlined procedure occurs when the Standing Committee either "decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond

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120. *Id.*

121. *See supra* Part II.E.

122. *See* E.C., *Reading the Tea Leaves: What to Look for*, COLUM. JOURNALISM REV., May/June 1997, at 50, 50 ("A broad interpretation of the clause could lead to Beijing's governing foreign media in Hong Kong.").

123. Basic Law, *supra* note 6, art. 2, *translated in* 29 I.L.M. 1520, 1521 (1990) ("The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy . . . .").

124. KEITH, *supra* note 5, at 192.

the control of the government of the Region, decides that the Region is in a state of emergency."[125]

Once again, vague statutory language raises questions about the breadth and meaning of this provision. Arguably, this paragraph reserves for China the right to declare martial law unilaterally in the HKSAR.[126] If so, the implications for Hong Kong freedom of the press are serious. Past precedent and recent P.R.C. legislation suggest that any Chinese martial law regime will involve widespread suppression of Hong Kong media activities.[127]

Particularly troubling is Article 18's reference to "turmoil"/"*dongluan*" as a trigger for "state of emergency" application of P.R.C. laws to Hong Kong. During the past decade, Chinese officials have clearly indicated that they favor an expansive definition of this term. Most notably, they justify the 1989 repression of Tiananmen demonstrators as a response to "turmoil."[128] This response included sweeping measures to censor and control China's media.[129] Thus, Article 18's use of the word "turmoil" raises the specter of similar P.R.C. moves against Hong Kong's "free" press.

Although the Basic Law attempts to provide some guidance in Article 18 regarding extension of P.R.C. statutes to Hong Kong, it leaves unanswered a

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125. Basic Law, *supra* note 6, art. 18, *translated in* 29 I.L.M. 1520, 1523 (1990).

126. Article 18 appears to give Chinese, not HKSAR, authorities the ultimate power to determine the circumstances under which such a declaration is appropriate. In fact, the P.R.C. explicitly rejected Hong Kong proposals to amend Article 18 to give the HKSAR Chief Executive rather than the P.R.C. Standing Committee exclusive power to declare martial law. *See* Boasberg, *supra* note 72, at 325-26.

127. *See* Martial Law of the People's Republic of China art. 13 (1996), Xinhua, Mar. 1, 1996, *translated in* BBCSWB, Mar. 11, 1996, *available in* LEXIS, Asiapc Library, BBCSWB File ("In the duration of martial law, martial law enforcement institutions may adopt the following measures in the martial law area and formulate specific implementation procedures: . . . (3) impose press censorship."); David S. da Silva Cornell, *The Legal Structure of Martial Law in Beijing*, 7 CHINA L. REP. 129, 141 (1993) (forbidding domestic and foreign journalists from "'exploiting newsgathering to engage in incitement and to propagate instigatory reports'" and "'enter[ing] [the premises of] institutions, organizations, schools, factories, mines, [other] enterprises, and neighborhoods to engage in the activities of newsgathering, photography, videotaping, etc. [without the approval of the Beijing Municipal People's Government]'") (first and last alterations added; second and third alterations in original) (translating and quoting Beijing Shi Renmin Zhengfu ling (di 3 hao) [Order of the Beijing Municipal People's Government (No. 3)] (May 20, 1989), *in* ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO 393 (1989)).

128. *See, e.g.*, Cornell, *supra* note 127, at 140 (instituting martial law in Beijing in response to "'turmoil'") (translating and quoting Beijing Shi Renmin Zhengfu ling (di 1 hao) [Order of the Beijing Municipal People's Government (No. 1)] (May 20, 1989), *in* ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO 392 (1989)); *'Cheng Ming' Reports Jiang Zemin's Approval of 1989 Crackdown Methods*, BBCSWB, June 14, 1994, *available in* LEXIS, Asiapc Library, BBCSWB File ("'The resolute action taken by the central leadership against the political turmoil in spring and summer of 1989 was completely correct.'") (quoting Jiang Zemin).

129. *See generally* ALLISON LIU JERNOW, "DON'T FORCE US TO LIE": THE STRUGGLE OF CHINESE JOURNALISTS IN THE REFORM ERA (1993); Judy Polumbaum, *Striving for Predictability: The Bureaucratization of Media Management in China*, *in* CHINA'S MEDIA, MEDIA'S CHINA 113, 113-26 (Chin-Chuan Lee ed., 1994).

more essential national law question—the status of the P.R.C. Constitution as HKSAR law. In particular, it fails to address the relationship between China's national constitution and Hong Kong's "mini-constitution." Yet, these two documents are fundamentally inconsistent. Implementation of P.R.C. constitutional provisions would nullify most of the Basic Law's special "one country, two systems" guarantees to Hong Kong, including freedom of the press.[130]

The Basic Law contains remarkably few textual references to the P.R.C Constitution. It only briefly cites Article 31 of the Constitution as the source of authority for establishment of the HKSAR[131] and the Basic Law.[132] It provides no coverage of the larger issues of the Constitution's impact on the Hong Kong legal system in general or on the Basic Law in particular. These omissions were not an oversight on the part of the Basic Law Drafting Committee but a deliberate choice. Mainland drafters rejected proposals from Hong Kong members to include explicit language in the Basic Law[133] (and the P.R.C. Constitution itself[134]) concerning the applicability of constitutional provisions to Hong Kong. They opted instead to leave these matters for future interpretation on a case-by-

130. For example, P.R.C. constitutional provisions are incompatible with Basic Law guarantees of a capitalist economy, *see, e.g.*, XIANFA art. 6 (1982) ("basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production"); *id.* art. 24 ("The state . . . combats capitalist, feudal and other decadent ideas."), incompatible with guarantees of a "high degree of autonomy," *see, e.g., id.* arts. 62, 67 (granting P.R.C. legislature extensive powers to enact, amend, and repeal local and national statutes), incompatible with the use of English as an official language, *see, e.g., id.* art. 19 ("The state promotes the nationwide use of Putonghua . . . ."), incompatible with a common law legal system, *see, e.g., id.* art. 5 (stating no law shall contravene the Constitution), and incompatible with civil rights and freedoms, *see, e.g., id.* art. 51 (citizens' exercise of their freedoms "may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens"); *id.* art. 54 ("citizens . . . must not commit acts detrimental to the security, honour and interests of the motherland").

131. *See* Basic Law, *supra* note 6, preamble, *translated in* 29 I.L.M. 1520, 1520 (1990) ("A Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China.").

132. *See id.* art. 11, *translated in* 29 I.L.M. 1520, 1522 (1990) ("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 . . . shall be based on the provisions of this Law.").

133. *See* KEITH, *supra* note 5, at 191 (discussing Hong Kong drafters who "urged that the Basic Law include stipulations that, with the exception of Article 31, all other provisions of the 1982 constitution should not apply in the HKSAR"); *id.* at 186 ("'The Hong Kong members of the draft committee generally hold that the Basic Law should clearly state which articles of China's constitution are applicable in Hong Kong.'") (translating and quoting Liu Nanping, *Jiejian Meiguozhou xianfa jiejue Xianggang jibenfadi liangda nantizhi tantao* (*Exploring the Solution to Two Major Problems of the Hong Kong Basic Law by Drawing on the Experience of the American Constitution*), FAXUE PINGLUN, No. 4, at 2 (1987)).

134. *See* Boasberg, *supra* note 72, at 318 (reporting on Hong Kong proposal to amend Article 31 of the Constitution to read "the Basic Law shall have full effect notwithstanding any inconsistency with the Chinese Constitution").

case basis. As even the Chinese drafters have acknowledged,[135] this decision makes definition of post-1997 Hong Kong rights and freedoms unpredictable. Thus, the Basic Law's "democratic" freedom of the press "promise" could ultimately be refracted through the lens of China's socialist Constitution.

*C. "Power of Interpretation"/"*Jieshi Quan*"*

As the preceding textual analysis demonstrates, the Basic Law's "key terms . . . are at best imprecise and at wors[t] open to interpretations detrimental to the HKSAR."[136] Accordingly, the power to interpret Basic Law provisions may well translate into the power to shape the very contours of freedom of the press in the post-1997 era. The Basic Law specifically addresses this crucial issue of interpretation in Article 158. Unfortunately, however, this provision presents more questions than answers. Ambiguous language and definitional problems only contribute to further uncertainty regarding the Hong Kong media's status under Chinese rule.

On its face, Article 158 offers a fairly straightforward scheme. As a general rule, it "vests" the power to interpret Basic Law provisions in the P.R.C. legislature's Standing Committee.[137] It then carves out a narrow exception for one context in which the need for such interpretation will likely arise—adjudication of cases in Hong Kong. In these cases, it grants Hong Kong courts qualified powers of interpretation. The actual extent of this authority varies according to the type of Basic Law provision involved in a given case.

Article 158 expressly "authorize[s]" HKSAR courts "to interpret on their own" any Basic Law provisions that fall "within the limits of the autonomy of the Region."[138] As for "other" Basic Law articles, it assigns Hong Kong courts weaker interpretative authority. They "may"/"*ke*" interpret such provisions.[139] In two instances, however, Article 158 absolutely bars independent interpretation

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135. *See* Wai, *supra* note 36, at 63-64.

> "[The Constitution] as a whole is applicable to Hong Kong, but it does not mean that all is applicable. In the Constitution many provisions are not applicable, but if we need to explain every article to see whether it is applicable to HK or not, there is a technical difficulty. For some articles, half is applicable while the other half is not, or a sentence is applicable while the other one is not."

Id. (alteration in original) (quoting a 1988 report prepared by Mainland Basic Law drafters).

136. Liu, *supra* note 88, at 186; *see also* Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301, 315 (1996) ("In the end, the reality of all human rights guarantees and limitations will be a product of interpretation and implementation.").

137. *See* Basic Law, *supra* note 6, art. 158, *translated in* 29 I.L.M. 1520, 1545 (1990) ("The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.").

138. *Id.* ("The Standing Committee of the National People's Congress shall 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.").

139. *Id.* ("The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases.").

by HKSAR courts. Courts must "seek" and "follow" Standing Committee interpretation of Basic Law provisions "concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region."[140]

Pursuant to Article 158, then, what is the power of Hong Kong courts to interpret the Basic Law's freedom of the press "promise" in Article 27? Do they have full authority to do so "on their own"? "May" they do so? Or must they "seek" and "follow" Standing Committee interpretation of this provision? Article 158 offers no clear answers.

Resolution of these questions will initially turn on the meaning of the phrase "limits of the autonomy of the Region." Unfortunately, Article 158 provides no guidance. It neither defines nor cross-references other Basic Law definitions of this critical jurisdictional marker. One solution to this gap in statutory language is to read Article 158 as defining these "limits" in the negative. That is, courts can interpret "on their own" all Basic Law articles except those expressly mentioned in Article 158—provisions "concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region."[141] This construction only leads to yet another definitional problem, however. How does a court determine whether the Basic Law provision at issue—Article 27 in this case—falls within one of the two excluded categories? Once again, Article 158 is of no assistance. It fails to define either of the two exceptions and, thus, creates further confusion over jurisdictional boundaries.

Arguably, Article 158's two exceptions include only those provisions set out in Chapter II of the Basic Law (Articles 12-23). The title of Chapter II ("Relationship Between the Central Authorities and the Hong Kong Special Administrative Region"/ "*Zhongyang he Xianggang Tebie Xingzheng Qu Guanxi*")[142] is virtually identical to the language of Article 158's second exception ("relationship between the Central Authorities and the Region"/ "*Zhongyang he Xianggang Tebie Xingzheng Qu de Guanxi*").[143] Moreover, Articles 13 and 14 of this chapter cover Article 158's first exception. They outline the two key responsibilities of the Central People's Government, "foreign affairs" and "defence."[144] Under this construction, then, Hong Kong courts could well have the authority to interpret Article 27's freedom of the press guarantee "on their own" in accordance with common law principles and rules.

Article 19 of the Basic Law, however, contradicts this expansive interpretation of HKSAR judicial powers. Indeed, it contains such sweeping restrictions on HKSAR jurisdiction that it effectively makes the Chinese Government, not Hong Kong courts, the ultimate arbiter of the Basic Law's freedom of the press "promise."

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140. *Id.*
141. *Id.*
142. *Id.* ch. II, *translated in* 29 I.L.M. 1520, 1522 (1990).
143. *Id.* art. 158, *translated in* 29 I.L.M. 1520, 1545 (1990).
144. *Id.* arts. 13-14, *translated in* 29 I.L.M. 1520, 1522 (1990).

Two ambiguous sentences in Article 19 threaten to turn Hong Kong courts into "little more than . . . puppet court[s]"[145] of China. The first ambiguous sentence reads: "The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs."[146] What is immediately striking and troubling about this language is its open-ended definition of the matters outside HKSAR jurisdiction. The English term "such as" and, even more notably, its counterpart in the Chinese text "*deng*" ("et cetera") signal that "defence and foreign affairs" are only two examples of the many possible "acts of state" reserved for P.R.C. jurisdiction. Neither Article 19 nor any other Basic Law provision offers a more precise definition of "acts of state." Thus, for all practical purposes, the "such as"/"*deng*" language gives China the power to dictate the jurisdiction of Hong Kong courts.

The second problematic sentence directs HKSAR courts to "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."[147] The Chief Executive in turn must "obtain a certifying document from the Central People's Government."[148] The ambiguous phrase "questions of fact concerning acts of state"/"*guojia xingwei de shishi wenti*" could potentially strip Hong Kong courts of any independent authority to interpret Basic Law provisions, including Article 27's freedom of the press guarantee. Under a literal reading of this language, the Hong Kong Chief Executive (as instructed by the Chinese Government) must resolve as a preliminary matter in each case the "factual question" of whether or not an "act of state" is involved.[149] Unless and until the Chief Executive and Central People's Government certify that no such act is implicated, the HKSAR court would have no jurisdiction to proceed with interpretation of the Basic Law provision(s) at issue.

Finally, the Basic Law undermines its "promises" to Hong Kong by offering virtually no guidelines for how to exercise the "power of interpretation." It provides no mechanisms or techniques for defining indeterminate statutory language or resolving the contested meaning of key terms, such as "freedom of the press." The Basic Law's sole statement about the process of interpretation is vague and ambiguous. Article 158 directs the Standing Committee in all-too-

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145. Donna Lee, Note, *Discrepancy Between Theory and Reality: Hong Kong's Court of Final Appeal and the Acts of State Doctrine*, 35 COLUM. J. TRANSNAT'L L. 175, 200 (1997). This problematic language also appears verbatim in the Court of Final Appeal Ordinance enacted by the Hong Kong legislature in 1995 with China's approval. For a detailed discussion and criticism of the "acts of state" language in both the Basic Law and Court of Final Appeal Ordinance, see James V. Feinerman, *Hong Kong Faces 1997 Legal and Constitutional Issues*, *in* HONG KONG UNDER CHINESE RULE 71, 82-84 (Warren I. Cohen & Li Zhao eds., 1997), Roda Mushkat, *The Joint Declaration and the CFA Agreement*, 26 H.K. L.J. 277 (1996), and Lee, *supra*, at 200. *See also* Jordan, *supra* note 84, at 340 (describing the "demise of judicial powers" in Basic Law and stating that "terms such as *constitution, independence, judiciary, judge, and judicial review* are not translatable into Chinese even though 'equivalent' Chinese terms exist") (emphasis added).

146. Basic Law, *supra* note 6, art. 19, *translated in* 29 I.L.M. 1520, 1524 (1990).

147. *Id.*

148. *Id.*

149. For a similar reading of this language, see Lee, *supra* note 145, at 201.

familiar language[150] to "consult"/"*zhengxun . . . de yijian*" its Basic Law Committee "before giving an interpretation of this Law."[151]

The one ostensibly concrete rule regarding interpretation of Basic Law provisions appears outside the text of Hong Kong's "mini-constitution." Pursuant to a June 28, 1990, P.R.C. Standing Committee Decision on the Basic Law, "in the event of a discrepancy between the meanings of terms in the English-language text and the Chinese-language text, the Chinese-language text governs."[152]

At first glance, this decision introduces much needed clarity and predictability into the interpretative process. It addresses a major source of ambiguity identified earlier in this Article[153]—inconsistent dual-language texts. In fact, however, its resolution of this issue works to the detriment of Hong Kong media interests in two critical respects. First, the decision eliminates an important potential safeguard for Hong Kong's "free" press available under the Joint Declaration—arguments for the more expansive rights and liberties found in the English-language version of the Basic Law. Second, it raises a new definitional question that only heightens uncertainty about future interpretations of China's freedom of the press "promise." This new question is: What constitutes the "meaning"/"*hanyi*" of a Basic Law term, such as "freedom of the press"?

The word "meaning"/"*hanyi*" is itself fundamentally ambiguous. The interpreter of a Basic Law term can give it varying "meanings" based on the literal text of the provision at issue, the Basic Law as a whole, or some outside context.[154] Recognition of regional variations in the use of Chinese-language terms can also affect the "meanings" of Basic Law terms.[155] The interpreter can change "meaning" by considering cultural code[156] as well as dictionary definitions. The interpreter can ascribe "meanings" to Basic Law terms that are fixed or elastic. Finally, it is not difficult to imagine that China's "promises" to

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150. *See supra* text accompanying note 119.

151. Basic Law, *supra* note 6, art. 158, *translated in* 29 I.L.M. 1520, 1545 (1990).

152. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu "Zhonghua Renmin Gongheguo Xianggang Tebie Xingzheng Qu Jiben Fa" Yingwenben de Jueding [Decision of the Standing Committee of the National People's Congress on the English-Language Text of "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China"] (1990), *in* FAGUI HUIBIAN 54 (1990); *see* Chen, *supra* note 50, at 55-56 (discussing and translating decision).

153. *See supra* Part II.B-C.

154. For an extended discussion of these points see Frances H. Foster, *Translating Freedom for Post-1997 Hong Kong*, 76 WASH. U. L.Q. (forthcoming Spring 1998).

155. *See* Cheung, *supra* note 33, at 332 (discussing different meanings of legal terms in different Chinese provinces).

156. *See* DE MENTE, *supra* note 39, at xv:

> All languages are reflections of the emotional, spiritual, and intellectual character of the people who created them.
>
> The older, more structured, and more exclusive a society and its language, the more words it has that have deep cultural implications.
>
> China is therefore a quintessential example of a country in which "cultural code words" play a vital role in the lives of its people.

Id. For a discussion of how a cultural code definition would affect the meaning of "freedom of the press" see *supra* text accompanying notes 39-41.

Hong Kong will acquire new and different "meanings" over time to fit the changing needs and conditions of the "one country, two systems" transitional period.[157]

IV. CONCLUSION

The popular assertion that China promised Hong Kong "freedom of the press" as an American would understand that phrase is false. This misconception is the product of Western errors in translating and reading the Joint Declaration and the Basic Law.

As this Article has shown, the English-language translations of Hong Kong's founding documents have distorted China's "promise." They have failed to capture the original Chinese linguistic and cultural[158] meanings of "freedom of the press." In China's rendition of its "promise," a grant of "freedom of the press" is the grant of a privilege by the state, which the state can properly restrict or revoke when in conflict with state or societal interests.[159] It is not an intrinsic natural right or a limitation on state action as in the West. As a "freedom" ("*ziyou*"), rather than a right ("*quanli*"), it has weak, even negative, connotations.[160] "Freedom of the press" by Chinese definition requires government restraint to prevent infringement of other people's rights and freedoms.[161] Moreover, in the original Chinese text, the freedom extended to the "press" ("*chuban*") is only to publish, not the broader freedoms enjoyed by Western media to seek and obtain, as well as publish, information.[162] And finally, because this freedom is ensured "by law" ("*yifa*"), it has uncertain legal effect

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157. *See* Jacques deLisle, *Political Alchemy, The Long Transition, and Law's Promised Empire: How July 1, 1997 Matters—and Doesn't Matter—in Hong Kong's Return to China*, 18 U. PA. J. INT'L ECON. L. 69 (1997) (arguing that Hong Kong will undergo a "long transition" after 1997).

158. For general discussions of the importance of "cultural translation" as well as linguistic translation of foreign legal texts, see Janet E. Ainsworth, *Categories and Culture: On the "Rectification of Names" in Comparative Law*, 82 CORNELL L. REV. 19 (1996), Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. (forthcoming Winter 1998), and Frances H. Foster, *Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative*, 54 WASH. & LEE L. REV. 923 (1997). *See also* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1266 (1993) ("To translate we must speak another language .... 'Language' is more than words people use; it is their ideals, their hopes, their prejudices, their enlightenments—in short, it is their world."); Edgardo Rotman, *The Inherent Problems of Legal Translation: Theoretical Aspects*, 6 IND. INT'L & COMP. L. REV. 187, 189 (1995) (arguing that "[t]ranslators must be familiar with the legal culture of the target language"); Walter Otto Weyrauch, *Limits of Perception: Reader Response to Hitler's Justice*, 40 AM. J. COMP. L. 237, 240 (1992) (demonstrating how "social context" can be "lost in the process of translating ideas from one legal culture into another").

159. *See supra* Part II.C.

160. *See supra* Part II.A.

161. *See supra* notes 36-38 and accompanying text.

162. *See supra* Parts II.C, III.A.

or enforceability.[163] China retains full authority to define the scope and extent of its own "promise."[164]

The erroneous belief that China has promised Hong Kong Western-style "freedom of the press" is also based on a myopic reading of the Joint Declaration and the Basic Law. Western officials have focused solely on the "freedom of the press" provisions and ignored the remaining text that effectively nullifies those provisions. This reading allows them to maintain the convenient fiction that the West did not abandon Hong Kong to China without first securing legal protection for Hong Kong democracy and human rights.

Against this background, American foreign policy toward Chinese Hong Kong[165] can be seen as seriously misguided. The likelihood that China will take actions against the Hong Kong press that violate Americans' notions of freedom of the press is high. If the United States continues to respond with accusations that China is violating its "promises," the effect will be to focus the world's attention more and more closely on the language of the Joint Declaration and the Basic Law. The result will be to demonstrate, as this Article has, that the British withdrew from Hong Kong without ever exacting meaningful guarantees for freedom of the press in Chinese Hong Kong. Current policy is but a delaying tactic that leads ultimately to disaster.

This is not to say that the United States should accept China's entitlement under the Joint Declaration and the Basic Law to regulate press freedoms in Hong Kong. Such a position could only work to the detriment of the Hong Kong media's future independence. Nonetheless, the United States should realize the ultimate weakness of a policy that relies so heavily on the assertion of "promises" that will not withstand close international scrutiny. It should pursue other avenues to defend Hong Kong freedoms. For example, it could attempt to persuade China that repressive regulation is not in China's self-interest. Commentators have suggested that Hong Kong's continued economic prosperity may depend upon the existence of a free and vital press.[166] Alternatively, it could employ leverage from trade sanctions to bargain for press freedom in Hong Kong or it could assert that particular aspects of that freedom are human rights. There may be other alternatives, but the search for them can only begin once American policymakers have removed the blinders that prevent them from seeing the truth—that China's "promise" of "freedom of the press" for Hong Kong is merely the product of bad translation and wishful thinking.

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163. *See supra* Parts II.D, III.B.

164. *See supra* Parts II.E, III.C.

165. For a detailed discussion of recent U.S. policy toward Hong Kong, see Kerry Dumbaugh, *The U.S. Role During and After Hong Kong's Transition*, 18 U. PA. J. INT'L ECON. L. 333 (1997).

166. The case is not obvious. Singapore is an example of a similar economy that has prospered in the absence of Western-style freedom of the press. For a discussion of these arguments, see Foster, *supra* note 154 (manuscript at Part I.D). *See also* Jacques deLisle & Kevin P. Lane, *Cooking the Rice Without Cooking the Goose: The Rule of Law, the Battle over Business, and the Quest for Prosperity in Hong Kong After 1997*, *in* HONG KONG UNDER CHINESE RULE, *supra* note 145, at 31 (analyzing "Singapore Model" of the rule of law as possible model for Hong Kong).