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The Constitutional Relationship Between the Central Government and the Future Hong Kong Special Administrative Region Government

*Joseph Y.S. Cheng**

The constitutional relationship between the central government of the People's Republic of China ("PRC") and that of the future Hong Kong Special Administrative Region ("SAR"), together with the political system of the future Hong Kong SAR, are the most controversial issues in the drafting of the Basic Law.¹ This Article will discuss a) the relationship between the Basic Law and the Constitution of the PRC;² b) the constitutional and legal status of the Hong Kong SAR in the PRC's political system; c) the relationship between the central government and that of the Hong Kong SAR as discussed in the drafting of the Basic Law; and d) various issues that have to be further clarified in defining the relationship between the central government and that of the Hong Kong SAR. This Article attempts to outline the position of the PRC government on the relationship which has become increasingly clear in the Basic Law's drafting process, to evaluate this position both from a constitutional/legal and a political point of view, and to discuss the response to the PRC position, especially the various alternatives presented by the Hong Kong community in defense of its perceived interests.

I. THE RELATIONSHIP BETWEEN THE BASIC LAW AND THE CONSTITUTION OF THE PRC

The Sino-British Joint Declaration on the Question of Hong Kong ("Joint Declaration") indicates that the PRC's basic policies regarding Hong Kong as stated in the Joint Declaration and elaborated in Annex I

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¹ For a brief account of the formation of the Basic Law Drafting Committee and the Basic Law Consultative Committee, see A. CHEN, XIANGGANG FAZHI YU JIBENFA (Hong Kong's Legal System and the Basic Law) 236-63, (1986); J.Y.S. Cheng *Hong Kong: The Pressure to Converge* 63 INT'L AFFAIRS 272, 275-76 (Spring 1987).

² XIANFA (Constitution) (People's Republic of China) [hereinafter P.R.C. CONST.] (adopted on Dec. 4, 1982 by the Fifth National People's Congress of the People's Republic of China at its Fifth Session), reprinted in THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1983) (Beijing, Foreign Language Press ed.).

to the 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 ["N.P.C."] of the People's Republic of China, and they will remain unchanged for 50 years."³ The Joint Declaration further points out that the PRC's decision to establish a Hong Kong SAR was "in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China."⁴

Article 31 of the PRC Constitution provides that "[t]he state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the NPC in the light of the specific conditions."⁵ In line with this, the Constitution grants the NPC the power "to decide on the establishment of special administrative regions and the systems to be instituted there."⁶

In terms of the hierarchy of laws in the PRC, the Constitution "is the fundamental law of the state and has supreme legal authority."⁷ The basic laws, ordinary statutes, administrative rules and regulations enacted by the State Council,⁸ stand next in line followed by the local regulations adopted by the people's congresses of provinces and municipalities directly under the Central Government and their standing committees.⁹ This hierarchy is strictly defined, and laws of a lower level cannot contravene those of a higher level in the hierarchy.¹⁰

The Basic Law of the Hong Kong SAR belongs to the category of "basic laws" as it will be promulgated by the NPC. A law similar to it in status is the Law on Regional Autonomy for Minority Nationalities of the PRC, which was adopted on May 31, 1984 by the NPC.¹¹ This is a basic law, and administrative rules and regulations enacted by the State Council cannot contravene it. The Standing Committee of the NPC may enact partial supplements and amendments to such statutes enacted by

³ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, United Kingdom-People's Republic of China, 1984 Gr. Brit. T.S. No. 20 (Cmd 9352), para. 3(12) [hereinafter Joint Declaration], reprinted in 23 I.L.M. 1371 (within the British White Paper referred to as the Draft Agreement).

⁴ *Id.* para. 3(1).

⁵ P.R.C. CONSTITUTION art. 31.

⁶ *Id.* art. 62(13).

⁷ *Id.* preamble (para. 13).

⁸ *Id.* art. 89(1).

⁹ *Id.* art. 100.

¹⁰ See SPECIAL GROUP ON THE RELATIONSHIP BETWEEN THE CENTRAL GOVERNMENT AND THE SAR OF THE BASIC LAW CONSULTATIVE COMMITTEE, ZUIHOU BAOGAO: JIBENFA YU XIANFA DE GUANXI (Final Report: The Relationship Between the Basic Law and the Constitution) 3 [hereinafter ZUIHOU BAOGAO]. The Final Report was adopted by the Executive Committee of the Basic Law Consultative Committee on Feb. 14, 1987.

¹¹ For full text of the law, see Renmin Ribao (People's Daily), June 4, 1984.

the NPC, but it can only do so "when the National People's Congress is not in session" and when such partial supplements and amendments "do not contravene the basic principles of these statutes."¹²

When compared with the Law on Regional Autonomy for Minority Nationalities of the PRC, the Basic Law of the Hong Kong SAR seems to enjoy an even higher status since its drafting has been performed by a Basic Law Drafting Committee whose membership list was approved by the Standing Committee of the NPC and which is responsible to the NPC or to its Standing Committee when it is not in session.¹³ On the other hand, there was no formal drafting committee formed for the Law on Regional Autonomy for Minority Nationalities of the PRC. It was simply drafted by a group organized by the Nationalities Committee of the NPC in coordination with other relevant units such as the State Nationalities Affairs Commission under the State Council. The Law was then considered by the Standing Committee of the NPC and finally adopted by the NPC.¹⁴ Hence, the Basic Law of the Hong Kong SAR, which is to define in detail the relationship between the central government of the PRC and that of the Hong Kong SAR, enjoys a very high legal status in the PRC legal system which is just below that of the Constitution. It follows, therefore, that the Basic Law of the Hong Kong SAR may ignore provisions of other basic laws, statutes, administrative rules and regulations enacted by the State Council and other local regulations at the provincial level, and that it only has to be in accord with the Constitution.

Ever since the ideas of "one country, two systems" and a Basic Law for the Hong Kong SAR were first raised by PRC leaders,¹⁵ the relationship between the Basic Law and the PRC Constitution has been a serious concern of the Hong Kong community. The idea of "one country, two systems" is to allow Hong Kong's current social and economic systems to remain unchanged. This promise by the PRC leadership was embodied in paragraph 3(5) of the Joint Declaration.¹⁶ "One country, two systems" and other provisions will be stipulated in the Basic Law. The PRC Constitution, however, clearly states that "the Chinese people of all na-

¹² P.R.C. CONST. art. 67(3).

¹³ J.Y.S. Cheng, *supra* note 1, at 275.

¹⁴ Chang Hsin, *Jibenfa yu Zhongguo Xianfa de Guanxi* (The Relationship Between the Basic Law and China's Constitution) at 3 (speech made to the Basic Law Consultative Committee, Apr. 19, 1986) (published by the Committee).

¹⁵ For a brief account of the background materials on the birth of the ideas of "one country, two systems" and the Basic Law, see ZUIHOU BAOGAO *supra* note 10, at 1. See also YIGUO LIANGZHI YU TAIWAN (One Country, Two Systems and Taiwan) 22-25 (Li Da ed. 1987) (Deng Xiaoping's statements to Mrs. Margaret Thatcher on the same subjects during their meeting on Dec. 19, 1984 in Beijing).

¹⁶ "The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style." Joint Declaration, *supra* note 3, para. 3(5).

tionalities will continue to . . . follow the socialist road."¹⁷ A careful examination of the following articles of the Constitution obviously casts doubt on the ability of the Basic Law to provide for the continuance of the capitalist system in Hong Kong for fifty years after its return to the PRC in 1997. These constitutional provisions are:

Article 1 "The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants."¹⁸

Article 5 "The state upholds the uniformity and dignity of the socialist legal system. No law or administrative or local rules and regulations shall contravene the Constitution."¹⁹

Article 6 "The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people."²⁰

Even before the initialling of the Joint Declaration, various groups in Hong Kong indicated to the PRC officials responsible for Hong Kong affairs that the guarantee of a capitalist system in Hong Kong might be in violation of the PRC Constitution; revision of article 31 of the Constitution was suggested.²¹ The PRC authorities apparently were reluctant to discuss revision of the Constitution,²² but they were aware that some form of assurance was necessary.

Two days after the initialling of the Declaration, *Renmin Ribao* (*People's Daily*) published an article by Wang Shuwen, director of the Institute of Law of the Chinese Academy of Social Sciences, to this effect.²³ At the end of September 1984, a pro-PRC Hong Kong newspa-

¹⁷ P.R.C. CONST. preamble.

¹⁸ *Id.* art. 1.

¹⁹ *Id.* art. 5.

²⁰ *Id.* art. 6.

²¹ In December 1983, the Hong Kong Observers (a local political group) was invited to send a delegation (of which the author was a member) to visit the Hong Kong and Macau Affairs Office of the State Council in Beijing to discuss the issue of Hong Kong's future. This point was raised to the officials of the Hong Kong and Macau Affairs Office including Li Hou and Lu Ping, Deputy Director and Secretary-General respectively of the office. Another political group, Meeting Point, also raised the issue during its Spring 1984 visit to Beijing, and in May 1984 released its position paper, *Xianfa Xiugai, Tiyi ji Jibenfa Dagang (Cao'an)* (Proposal on the Revision of the Constitution and A Draft Outline of the Basic Law) [hereinafter *Meeting Point Position Paper*], collected in *JIBENFA MIANMIANGUAN* (Perspectives on Basic Law of Hong Kong 63-78 (J.Y. Ye ed. 1984).

²² This was the attitude adopted by the PRC officials receiving the Hong Kong Observers and Meeting Point delegations when the issue of revising the PRC Constitution was raised. The author had lengthy discussions with the leading members of the Meeting Point delegation soon after its visit to the P.R.C.

²³ Wang, *Sheli Tebie Xingzhengqu shi Woguo de Zhongyao Juece* (The Establishment of Special Administrative Regions Is an Important Policy Decision of Our Country), *Renmin Ribao*, Sept. 28, 1984.

per, *Wen Wei Po*, published a discussion of the Joint Declaration—the participants were Huan Xiang, adviser to the Hong Kong and Macau Affairs Office and the Chinese Academy of Social Sciences; Qian Junrui, adviser to the Chinese Academy of Social Sciences; Qian Jiaju, adviser to the Shenzhen Special Economic Zone; Pei Monong, deputy director of the Chinese Institute of International Studies; and Ji Chongwei, executive director of the Economic Research Center of the State Council.²⁴ These experts attempted to provide an explanation for the coexistence of the capitalist system and the socialist system in China; a theoretical explanation, from a Marxist-Leninist point of view, of the “one country, two systems” concept; the basis for the “one country, two systems” policy in the PRC Constitution; and an explanation of the practical need to accept the “one country, two systems” policy.

According to these experts, the design of the “one country, two systems” concept emerged in late 1978 when Deng Xiaoping formulated his policy for the peaceful settlement of the Taiwan question. The message from the Standing Committee of the Fifth NPC to the compatriots in Taiwan on New Year’s Day 1979 was the first step in implementing this policy.²⁵ When the question of Hong Kong’s future emerged, PRC leaders then applied this formula to persuade the British government and the Hong Kong community to accept the PRC’s recovery of the territory’s sovereignty and administration by 1997. Deng and these experts boasted that the significance of the “one country, two system” policy lies in the use of peaceful means to settle partitions of states, resolve international conflicts, and maintain world peace. They claimed that their formula might well apply to the German and Korean questions. In an attempt to reassure the Hong Kong people, Qian Jiaju explained that in a “one country, two systems” situation, “the Mainland does not want to ‘swallow’ Taiwan, and Taiwan cannot ‘swallow’ the Mainland; the case of Hong Kong requires no further elaboration.”²⁶ Skeptics in Hong Kong were quick to point out that the Mainland might want to “swallow” Hong Kong at a later date and that no satisfactory guarantee exists to deter it from doing so.

Huan Xiang further stated:

[S]ocialism is a fairly long historical stage; in this historical stage, there is a process in which the capitalist system and the socialist system co-exist In our country, there are three tiers of economic forms: the reforming socialist economy, the special economic zone economy, and specific capitalist economy Therefore, the design of

²⁴ The discussion took the form of a forum and was published in two parts. *Wen Wei Po* (Hong Kong), Sept. 29, 1984; *id.* Sept. 30, 1984.

²⁵ For the text of the message, see *BEIJING REV.*, Jan. 5, 1979, at 16-17.

²⁶ *Wen Wei Po*, *supra* note 24.

"one country, two systems" has a theoretical base.²⁷

Other participants in the discussion also elaborated on the fact that socialism allowed the co-existence of various economic forms so as to develop socialist productivity.²⁸

Wang Shuwen's *Renmin Ribao* article mainly argued that the PRC's basic policies regarding Hong Kong as embodied in the Joint Declaration did not constitute violations of the PRC Constitution. Wang reasoned that, since article 31 of the Constitution is an inalienable part of the Constitution, conformity with article 31 means conformity with the Constitution, and not violating article 31 means not violating the Constitution.²⁹ Wang's argument appears simple and reassuring, though not necessarily logical.

Undeniably, the theoretical and constitutional arguments presented in defense of the "one country, two systems" policy were not entirely satisfactory. What was more convincing was the practical need to accept the "one country, two systems" policy that these experts identified. The participants in the discussion all agreed that the arrangement of "one country, two systems" would contribute to the PRC's four modernizations; allow Hong Kong to maintain its various global links, particularly those with the Asia/Pacific region; and help Hong Kong and the mainland to adapt to each other. Naturally, when the values and goals of the PRC leadership change, these practical needs may well be altered.

The view I hold is that the PRC Constitution should be revised to further demonstrate the sincerity of the PRC leadership and to strengthen the attraction of the "one country, two systems" policy to Taiwan.³⁰ If that were the case, article 31 might stipulate that "within a specified period of time, special administrative regions will not be bound by certain provisions of the Constitution." From a legal point of view, a constitution or a law with constitutional status may exempt certain regions from the application of some or all of its provisions for a specific period of time or under a specific set of circumstances. In terms of the ideology of a socialist state, the constitution is part of the superstructure and it may adjust to the situation and the needs of the different stages of socialist development. In view of the new situation involving the task of the reunification of China, a revision of the Constitution before the formal promulgation of the Basic Law, perhaps in the coming NPC in 1988, would not compromise the dignity of the PRC Constitution.

Furthermore, various statements of the PRC leaders and experts on

²⁷ *Id.*

²⁸ *Id.*

²⁹ Wang, *supra* note 23.

³⁰ J.Y.S. Cheng, *Hong Kong: The Challenge of the Future*, in HONG KONG SOCIETY: A READER 271 (A.Y.H. Kwan & D.K.K. Chan eds. 1986).

the concept of "one country, two systems" and its constitutional basis, as well as the compatibility of the guarantees made to the PRC Constitution, should be presented in an authoritative manner as the official position of the PRC government. The preamble of the Basic Law and the statement of the NPC or its Standing Committee upon the adoption of the Basic Law (such a statement has legal status in the PRC legal system) are appropriate places for this authoritative statement.³¹ The inclusion of the Basic Law as an appendix to article 31 of the Constitution might also be considered. The advantage of this would be that it would give the Basic Law a constitutional status and thus help to allay the concern over its incompatibility with the Constitution; its disadvantage would be the greater difficulty involved in amending the Basic Law. As well as the theoretical and constitutional bases of the "one country, two systems" policy, the major principles of Annex I of the Joint Declaration, in which the PRC government elaborated its basic policies regarding Hong Kong, might also be incorporated in the preamble and other relevant sections of the Basic Law.³²

It soon became very clear that PRC authorities were unwilling to revise the Constitution. Shao Tianren, co-convenor of the Sub-group on the Relationship between the Central Government and the SAR of the Basic Law Drafting Committee and a legal expert of the PRC Ministry of Foreign Affairs, indicated after a May-June 1986 meeting of the sub-group that the proposal to rewrite article 31 of the PRC Constitution would not be accepted.³³ Shao felt that the Constitution should not be altered too easily, and that the problem with previous Constitutions was that there had been too many changes. He, therefore, would like to solve the problem without having to amend the Constitution. Nonetheless, it was acknowledged that a consensus existed in the sub-group on the need to clarify the relationship between the Basic Law and the PRC Constitution in order to assure the Hong Kong community that socialism would not be practised in the territory as prescribed by the Constitution. It was suggested that the PRC authorities' reluctance to amend the Constitution is largely related to the concept of "saving face" and the consideration that amendment of article 31 of the Constitution may imply that the very provisions of the Joint Declaration were in violation of the Constitution as it stood in 1984.

On the other hand, there appears to be little resistance to an authoritative statement from the Standing Committee of the NPC upon promulgation of the Basic Law. Since it has the power "to interpret the

³¹ See ZUIHOU BAOGAO, *supra* note 10, at 4.

³² See Joint Declaration, *supra* note 3, Annex I (Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong).

³³ Ming Pao (Hong Kong), June 2, 1986.

Constitution and supervise its enforcement"³⁴ and "to interpret statutes,"³⁵ this presents an ideal opportunity for the clarification of the relationship between the Constitution and the Basic Law. It has been suggested that the clarification may be based on the principle of "special law taking precedence over general law" after identifying article 31 as a "special law" or "proviso."³⁶

The Sub-group on the Relationship between the Central Government and the SAR of the Basic Law Drafting Committee presented a report to the Basic Law Drafting Committee meeting held in August 1987.³⁷ The report was a draft of the relevant sections of the Basic Law. Article 10 of chapter 1 ("General Principles") reads:

In accordance with Article 31 of the PRC Constitution, the policies and systems of the Hong Kong SAR, including the social and economic systems, the systems regarding the protection of basic rights and freedoms, and the systems concerning administrative management, legislation and the judiciary, are based on the stipulations of this law [the Basic Law]. No law made by the legislature of the Hong Kong SAR shall contravene this law.³⁸

A provision such as this, together with a statement from the Standing Committee of the NPC upon the promulgation of the Basic Law, are probably as far as the PRC authorities are prepared to go in view of the concern of the community over the incompatibility between the PRC Constitution and the Basic Law.

II. THE CONSTITUTIONAL AND LEGAL STATUS OF THE HONG KONG SAR IN THE PRC'S POLITICAL SYSTEM

As indicated above, the constitutional basis of the Hong Kong SAR lies in article 31 of the PRC Constitution, whereas article 62(13) of the Constitution provides the NPC with the power "to decide on the establishment of special administrative regions and the systems to be instituted there."³⁹ The SARs therefore differ from the other constituent units of the PRC whose systems are defined by the Constitution.⁴⁰ SARs are presumably established on an *ad hoc* basis, probably for a limited

³⁴ P.R.C. CONST. art. 67(1).

³⁵ *Id.* art. 67(4).

³⁶ ZUIHOU BAOGAO, *supra* note 10.

³⁷ For the text of the report, see Ta Kung Pao (Hong Kong), Aug. 23, 1987 (author's translation).

³⁸ *Id.* ch. 1, art. 10.

³⁹ P.R.C. CONST. art. 62(13).

⁴⁰ See *id.* arts. 95-111 (§ V: The Local People's Congresses and the Local People's Governments at Different Levels); *id.* arts. 112-22 (§ VI: The Organs of Self-Government of National Autonomous Areas).

period of time.⁴¹ Furthermore, the Constitution does not provide any guidelines concerning the establishment of SARs by the NPC nor stipulations to be observed by all SARs. Hence the Basic Law governing the Hong Kong SAR is a law of its own category, and the possibility exists that the Basic Law governing another SAR may differ substantially from that for Hong Kong.

In contrast to the PRC's national autonomous areas, the power of autonomy of SARs is not guaranteed by the Constitution,⁴² but stipulated by basic laws promulgated by the NPC. (In the case of the Hong Kong SAR, the Joint Declaration provides a further guarantee in its form as an international agreement.) However, as the content of the Hong Kong SAR's power of autonomy is to be defined by a Basic Law promulgated by the NPC, this power of autonomy, from a constitutional point of view, is of a lower order than that of the national autonomous areas which is embodied in the Constitution. In terms of the actual powers enjoyed by the Hong Kong SAR, as outlined by Annex I of the Joint Declaration and the draft articles of the Basic Law prepared by the sub-groups of the Basic Law Drafting Committee and released to the public,⁴³ the Hong Kong SAR will enjoy a much higher degree of actual autonomy than the present national autonomous areas of the PRC.

As a SAR under the sovereignty of the PRC, Hong Kong has been warned against tendencies of becoming an "independent political entity."⁴⁴ The Joint Declaration states: "The Hong Kong Special Admin-

⁴¹ Deng Xiaoping met the Basic Law Drafting Committee in Beijing on Apr. 16, 1987. He said that under the policy of "one country, two systems," Hong Kong would not change its capitalist system for fifty years after 1997. He added that there would be no need for change for even another fifty years after that. See E. Lau, *Now, Down to Basics—Deng Xiaoping Speaks Frankly on the Future Running of the Territory*, FAR E. ECON. REV., Apr. 30, 1987, at 12-13. Deng's statement did not cause much joy or enthusiasm in Hong Kong, instead the local community was uneasy with the fact that a simple statement from the leader could easily alter what had been promised by an international agreement reached after two years of negotiations.

⁴² For the rather limited scope of autonomy of the PRC's national autonomous areas, see P.R.C. CONST. arts. 112-22 (§ VI The Organs of Self-Government of National Autonomous Areas).

⁴³ For the text of the draft articles presented by the Sub-group on the Relationship Between the Central Government and the SAR, see Ta Kung Pao, *supra* note 37. For the drafts presented by the Sub-group on the Political Structure of the Hong Kong SAR; the Sub-group on Education, Science, Technology, Culture, Sport and Religion of the Hong Kong SAR; and the Sub-group on the Economy of the Hong Kong SAR, see *id.* Aug. 25, 1987. See also *id.* Aug. 24, 1987 (draft articles presented by the Sub-group on the Fundamental Rights and Duties of Hong Kong Inhabitants).

⁴⁴ On Sept. 9, 1984, Xu Jiatung, Director of the Hong Kong branch of the New China News Agency, addressed the University Graduates' Association. Xu stated: "Hong Kong after 1997 will not be a dependent territory of Britain, and will not be an independent political entity. Instead it will become a highly autonomous SAR under the Chinese government, a part of the great Motherland." Answering questions afterwards, Xu explained: "Being 'highly autonomous', Hong Kong still remains a part of the Chinese government, while an 'independent political entity' is independent of China. On this question, there is a view and a tendency that is worthy of your attention." See *id.*,

istrative Region will enjoy a high degree of autonomy"⁴⁵ However, a high degree of autonomy also means limited autonomy. The PRC government obviously will not change the existing unitary system into a federal one just for the reunification of Taiwan, Hong Kong and Macau. The idea of granting Hong Kong "residual power" which allows the Hong Kong SAR full authority to handle its own affairs, except in foreign affairs and defense policy areas which are the responsibilities of the central government in Beijing, has been raised by some groups in the Hong Kong community.⁴⁶ The suggestion, if accepted, will certainly affect the absolute authority of the central government.

In a unitary system, the authority of a local government comes entirely from the central government, and this authority, at least theoretically, may be changed or withdrawn at will by the central government. In contrast, the central government and the local governments in a federal system have their respective authorities well defined in a constitution which cannot be amended without the consent of a majority of the constituent units of the federation. Thus, when the PRC government promises in the Joint Declaration that it will enact a Basic Law "in accordance with the Constitution of the People's Republic of China, stipulating that after the establishment of the Hong Kong Special Administrative Region . . . and that Hong Kong's previous capital system and life-style shall remain unchanged for 50 years,"⁴⁷ this implies that, in these fifty years, a federal relationship will exist to a certain extent. Since the Joint Declaration and the Basic Law have to be approved by the NPC⁴⁸ and the Basic Law also has a limited time span of fifty years, this arrangement should not be considered an infringement of the PRC's unitary system of government. This arrangement certainly has implications for Taiwan too. It is on this premise that Hong Kong people have raised the legitimate demand that the Basic Law should stipulate clearly that, except in foreign affairs and defense policy areas, the Hong Kong SAR has the sole authority to handle its domestic affairs.

Peng Zhen, chairman of the Standing Committee of the NPC and architect of the 1982 Constitution, explained the establishment of SARs

Sept. 10, 1984. (All major newspapers in Hong Kong published Xu's remarks, in their Sept. 10, 1984 editions.)

⁴⁵ Joint Declaration, *supra* note 3, para. 3(2).

⁴⁶ See, e.g., The Legal System Group of the Hong Kong Affairs Society, *Women dui Jibenfa de Yixie Kanfa* (Some of Our Views on the Basic Law), in *Meeting Point Position Paper*, *supra* note 21, at 79-90 (released on June 3, 1984). The December 1983 Hong Kong Observers delegation to Beijing also raised the same demand. See *supra* note 21 and accompanying text.

⁴⁷ Joint Declaration, *supra* note 3, Annex I, § 1.

⁴⁸ See P.R.C. CONST. art. 67(14) (stating that the Standing Committee of the National People's Congress exercises the power "to decide on the ratification and abrogation of treaties and important agreements concluded with foreign states"). The Joint Declaration was ratified by the National People's Congress on Apr. 10, 1985. See *Renmin Ribao*, Apr. 11, 1985.

in his report on the revision of the Constitution presented to the NPC in April 1982.⁴⁹ He indicated that concerning the principles of maintaining the state's sovereignty, unity and territorial integrity, the PRC government had a clear-cut stand—at the same time, it would allow a large degree of flexibility regarding concrete policies and measures. Peng further elaborated on the SAR's high degree of autonomy which included the maintenance of the existing social and economic systems, life style and external economic and cultural ties, etc. Mention of a political system exercising the power of autonomy was conspicuously omitted.

It appeared that the PRC leadership was willing to tolerate the maintenance of different systems in the SARs (mainly social and economic systems), but was reluctant to stipulate their political systems within the Constitution, thus making them part of the PRC's state structure. The SAR's political systems may differ from those in the PRC, but they are of a temporary and *ad hoc* nature, and they are not protected by the Constitution. The SAR's political systems are similar to that in Tibet before 1959—a system which differed from those of other national autonomous areas but did not become part of the Constitution.⁵⁰ According to the PRC's orthodox, Marxist thought, the special features of minority nationalities' societies are a reflection of their backwardness. Special arrangements concerning national autonomous areas' political systems are concessions, and not a recognition of the minority nationalities' rights to have their own modes of development guaranteed by their powers of autonomy embodied in their respective political systems.⁵¹ Concessions may vary in extent, but as concessions they are fundamentally tactical measures. As conditions change or when the PRC government's perception of the state of development of the national autonomous areas change, the concessions made will be altered as will the degree of autonomy enjoyed. The Law on Regional Autonomy and Minority Nationalities of the PRC adopted in 1984 reflects this line of thinking. Chapter six of the Law dealing with "Higher State Organs' Leadership and Assistance" clearly indicates the backwardness of national autonomous areas, thus in need of "care" and "assistance" from higher state organs.⁵²

Various promises made to the Hong Kong community in the Joint Declaration, especially the pledge that "Hong Kong's previous capitalist

⁴⁹ For the text of his report, see *Ta Kung Pao*, Apr. 29, 1982.

⁵⁰ See T. Chan, *Xianggang Tebie Xingzhengqu yu Zhongyang Zhengfu de Guanxi* (The Relationship Between the Hong Kong SAR and the Central Government), at 7 (paper presented to the Conference on the Constitution and the Basic Law, Chinese University of Hong Kong, Nov. 28-Dec. 2, 1986).

⁵¹ T. Chan, *Zhonggong de Minzu Quyu Zizhi Zhengce* (The Communist Party of China's Policy on Nationalities' Regional Autonomy), *CHUNG PAO MONTHLY*, Jan. 1987, at 30-33.

⁵² For the text of the law, see *supra* note 11, ch. 6.

system and life-style shall remain unchanged for 50 years"⁵³ are therefore concessions of a tactical nature. It was not surprising therefore that the PRC authorities rejected demands for "residual power" for the Hong Kong SAR to be stipulated in the Basic Law. During the April 1986 Basic Law Drafting Committee meeting held in Beijing, there was considerable discussion on the issue. A legal expert of the PRC and a member of the Basic Law Drafting Committee, Zhang Youyu, indicated that since Hong Kong had always been Chinese territory and the PRC government was only recovering its sovereignty by 1997, the relationship between the central government and the future Hong Kong SAR was not one existing in a federal system, and there was no issue of "residual power."⁵⁴ Li Hou, Deputy Director of the Hong Kong and Macau Affairs Office and Secretary-General of the Basic Law Drafting Committee, echoed Zhang's view.⁵⁵ Simon Li, former Justice of Appeal and a Hong Kong member of the Basic Law Drafting Committee, indicated that since existing "residual power" in Hong Kong belongs to the British crown, it should therefore belong to the central government in Beijing when Hong Kong is returned to the PRC.⁵⁶ Clearly, those in the Basic Law Drafting Committee advocating that the Hong Kong SAR should exercise the "residual power" were a small minority.

With respect to the division of powers between the central government and the SAR government, two concepts associated with "residual power" also emerged, namely, the "grey area" and the "undefined power/unspecified power."⁵⁷ The "grey area" refers to the fact that between the jurisdiction of the central government and that of the Hong Kong SAR government there may be matters of an ambiguous nature that do not clearly fall under either jurisdiction. This concept of "grey area" arises from the Joint Declaration statement that "[e]xcept for foreign and defence affairs which are the responsibilities of the Central People's Government, the Hong Kong Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication."⁵⁸ The powers shared between these two jurisdictions constitute the "gray area."

"Undefined power/unspecified power" refers to the fact that with the passage of time, powers which are omitted by the Basic Law may

⁵³ See Joint Declaration, *supra* note 3, Annex I, § I.

⁵⁴ Ta Kung Pao (Hong Kong), Apr. 20, 1986.

⁵⁵ *Id.*

⁵⁶ Wen Wei Po (Hong Kong), Apr. 26, 1986.

⁵⁷ See SPECIAL GROUP ON THE RELATIONSHIP BETWEEN THE CENTRAL GOVERNMENT AND THE SAR OF THE BASIC LAW CONSULTATIVE COMMITTEE, FINAL REPORT ON RESIDUAL POWER, 2-3; [hereinafter FINAL REPORT ON RESIDUAL POWER] (the Final Report was adopted by the Executive Committee of the Basic Consultative Committee on Feb. 14, 1987).

⁵⁸ Joint Declaration, *supra* note 3, Annex I, § I.

become increasingly important and new areas calling for a clear-cut division of power may arise. These powers which have yet to be revealed are thus generally called "undefined power/unspecified power."

While the PRC authorities rejected granting "residual power" to the Hong Kong SAR, they did not seem to be very interested in considering these two related concepts. The Basic Law Drafting Committee in its April 1986 meeting only agreed to include in the Basic Law in the section on the relationship between the central government and the Hong Kong SAR provisions dealing with "the other functions and powers given to the Hong Kong SAR by the NPC and the State Council."⁵⁹ This provision appeared in the draft presented at the August 1987 Basic Law Drafting Committee meeting by the committee's Sub-group on the Relationship between the Central Government and the SAR as article 9 of chapter 2 ("The Relationship Between the Central Government and the Hong Kong SAR"): "The Hong Kong SAR may exercise other powers given by the NPC, the Standing Committee of the NPC and the State Council."⁶⁰ This, if implemented, would amount to the central government exercising "residual power." Article 9 again reaffirms the *ad hoc*, concessionary nature of the entire arrangement.

In line with the demand for "residual power" for the Hong Kong SAR, various groups in Hong Kong also demanded that the power to amend the Basic Law be vested in the Hong Kong SAR government. A local political group, Meeting Point, suggested that the power to amend the Basic Law should be vested in the Hong Kong SAR legislature; amendments should be adopted by a two-thirds majority of the legislature, and approved by the Standing Committee of the NPC.⁶¹ Since the central government cannot formally initiate amendments, this proposal would be in accord with the promise that "Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years."⁶² The arrangement would provide for the necessary revision of the Basic Law; and as all amendments would have to be approved by the Standing Committee of the NPC, the PRC's sovereignty would not be compromised and Hong Kong would be prevented from becoming an "independent political entity."

The Basic Law Drafting Committee, however, agreed that the power to amend the Basic Law should be vested in the NPC. In March 1987 when the Basic Law Drafting Committee's Sub-group on the Relationship between the Central Government and the SAR met in Guangzhou (Canton), both co-conveners of the sub-group, Shao Tianren

⁵⁹ Wen Wei Po, Apr. 26, 1986 (author's translation).

⁶⁰ See *supra* note 37, ch. 2, art. 9.

⁶¹ See *Meeting Point Position Paper*, *supra* note 21, at 72.

⁶² Joint Declaration, *supra* note 3, Annex I, § I.

and Huang Lisung (Rayson Huang), indicated that the procedure to amend the Basic Law would be decided by the NPC and would not be stipulated by the Basic Law.⁶³ The Basic Law could only propose that the Standing Committee of the NPC establish a committee consisting of members from the PRC and Hong Kong to advise on the interpretation and amendment of the Basic Law as well as on questions related to laws made by the Hong Kong SAR legislature and sent to the Standing Committee of the NPC for recording purposes. They further pointed out that no member had proposed a stipulation in the Basic Law of the procedure for the Basic Law's own revision. (The Basic Law Consultative Committee's Special Group on the Relationship between the Central Government and the SAR also proposed that a Basic Law Select Committee should be set up under the NPC or its Law Committee.⁶⁴) Both the central government and the Hong Kong SAR should be represented in the committee which would discuss ways of dealing with the "grey area" and "undefined power/unspecified power." Presumably this select committee could also advise on the interpretation and amendment of the Basic Law.)

The August 1987 draft of the Sub-group on the Relationship between the Central Government and the SAR dealt with the issue of amending the Basic Law by granting that power to the NPC.⁶⁵ The power to propose bills to amend this law would belong to the Standing Committee of the NPC, the State Council and the Hong Kong SAR. Bills of amendment from the Hong Kong SAR would first have to have the approval of a two-thirds majority of the deputies to the NPC from the Hong Kong SAR, a two-thirds majority of the members of the Hong Kong SAR legislature and the Hong Kong SAR chief executive, and then be proposed to the NPC by the Hong Kong SAR delegation of deputies to the NPC.⁶⁶

Before bills of amendments concerning this law could be put on the agenda of the NPC, they would first need to be studied by the Hong Kong SAR Basic Law Committee which would also present its views. No amendment of this law could contravene the established fundamental guidelines and policies of the PRC towards Hong Kong.⁶⁷

According to the aforementioned provision, the central government of the PRC would have full control of the amendment process. A small minority of the sub-group proposed that a three-quarters majority of the members of the Hong Kong SAR legislature should be given the power

⁶³ Ming Pao, Mar. 15, 1987.

⁶⁴ See FINAL REPORT OF RESIDUAL POWER, *supra* note 57, at 6.

⁶⁵ "The power to amend this law [the Basic Law] belongs to the National People's Congress."

See Ta Kung Pao, *supra* note 37, ch. 9, art. 2.

⁶⁶ *Id.*

⁶⁷ For the text of the draft article, see *supra* note 37.

to propose amendments to the Basic Law, but it seems unlikely that this proposal will have the support of the Basic Law Drafting Committee.⁶⁸

The draft article mentioned a "Hong Kong SAR Basic Law Committee." In the explanatory notes to chapter 2 ("The Relationship Between the Central Government and the Hong Kong SAR"), where the name of the committee first appeared, the sub-group indicated that the committee was only a proposal, and that matters such as its establishment, the organ to which it would be responsible, its duties and functions, and its composition would have to be decided by the NPC.⁶⁹

The power of interpreting the Basic Law is a more complicated matter, but its treatment here will be brief. Official interpretation of the law in the PRC can be divided into three categories: legislative, judicial and executive. Of these, the legislative form of legal interpretation is considered generally applicable and binding in all cases. The judicial and executive forms have, on the other hand, no such binding effect and carry the force of law only in relation to the particular case under consideration by the relevant judicial or executive body wherein the decision was reached through an exercise of the respective forms of legal interpretation.⁷⁰

Legislative interpretation is not only the most important mode of legal interpretation in the PRC, it is in effect an authoritative supplement and accretion to legislation. Furthermore, it is the only form of legal interpretation stipulated in the PRC Constitution. The Standing Committee of the NPC has the power "to interpret the Constitution and supervise its enforcement"⁷¹ as well as "to interpret statutes."⁷² Although the Constitution does not empower the NPC itself to undertake the task of legislative interpretation, it may "alter or annul inappropriate decisions of the Standing Committee of the National People's Congress."⁷³ Indeed, the principle of jurisprudence adopted in the PRC is that only the enacting body or its representative or controlling organ is competent to interpret any given piece of legislation in a manner which is generally binding.⁷⁴

The idea that there may exist authoritative and binding forms of legal interpretation other than those exercised by the judiciary, however, is alien to the common law. Two controversial issues therefore have emerged in the Basic Law Drafting Committee's deliberations on the power of interpreting the Basic Law. They are: 1) Who has the power to

⁶⁸ See *id.* (explanatory note following the draft article).

⁶⁹ *Id.* (§ 3 of the explanatory notes preceding the draft articles.)

⁷⁰ See D.R. Fung, *Interpretation of the Basic Law*, 4 (paper presented to the Conference on the Constitution and the Basic Law, Chinese University of Hong Kong, Nov. 28-Dec. 2, 1986).

⁷¹ P.R.C. CONST. art. 67(1).

⁷² *Id.* art. 67(4).

⁷³ *Id.* art. 62(11).

⁷⁴ D.R. Fung, *supra* note 70, at 5.

determine whether a law passed by the Hong Kong SAR legislature does or does not contravene the Basic Law? and 2) who has the power to interpret the Basic Law? The first question arises from the Joint Declaration provision:

The legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature of the Hong Kong Special Administrative Region. The legislature may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People's Congress for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid.⁷⁵

The question arises because the Joint Declaration is silent as to who will determine whether any such law is "in accordance with the Basic Law and legal procedures."⁷⁶

According to Martin Lee, a member of the Basic Law Drafting Committee and the leading figure among advocates for democracy in the territory, the majority view of the committee is that after a new law has been reported to the Standing Committee of the NPC "for the record," someone in or authorized by the NPC Standing Committee will examine it and decide whether or not it is "in accordance with the Basic Law and legal procedures." If it is, then nothing needs to be done. If it is not, then the Standing Committee can revoke it or send it back to the Hong Kong SAR legislature for reconsideration. The Standing Committee itself, however, will not amend the law.⁷⁷

The minority view, which has been articulated by Martin Lee and his supporters, is to maintain the consistency of the common law system to be practised in the Hong Kong SAR. Once a law is passed, it is up to the judiciary to interpret it. Since the Hong Kong courts today assume both jurisdiction in determining whether or not any law in the territory contravenes the existing constitutional documents and the power, whenever necessary, to declare such a law to be null and void and of no legal effect, it is consistent with present practice for the Hong Kong courts alone to determine whether a new law passed by the Hong Kong SAR legislature is "in accordance with the Basic Law and legal procedures."⁷⁸

Lee further suggested a compromise: if the Standing Committee of the NPC takes the view that any law passed by the Hong Kong SAR legislature may not be "in accordance with the Basic Law and legal pro-

⁷⁵ Joint Declaration, *supra* note 3, Annex I, § II.

⁷⁶ *Id.*

⁷⁷ M. Lee, The Significance of a Written Constitution for Hong Kong, *reprinted in* Ming Pao (Hong Kong), Apr. 13-14, 1987 (speech at the Conference on the American Constitution and the Hong Kong Basic Law: Some Comparative Observations, University of Hong Kong, Jan. 16, 1987).

⁷⁸ *Id.*

cedures," then such a question could be referred to Hong Kong's Final Court of Appeal for determination. The jurisdiction thus conferred on the Final Court of Appeal would only be advisory in nature.⁷⁹ As to what would happen if the opinion of the Final Court of Appeal were not accepted by the Standing Committee of the NPC, Lee believed that there were two alternatives.

First, the Standing Committee of the NPC could not challenge the new law if it had been deemed "in accordance with the Basic Law and legal procedures" by the Final Court of Appeal. If the decision had gone the other way, then the law could be referred by the Hong Kong SAR's executive authorities to the Hong Kong legislature for further consideration and action. This alternative obviously respects the Hong Kong SAR's "high degree of autonomy" promised by the Joint Declaration.⁸⁰

The second alternative is that the Standing Committee of the NPC could refuse to accept the opinion of the Final Court of Appeal, in which case it would refer the law to a special committee for further consideration. The committee would be set up under the NPC Standing Committee and consist of legal experts, the majority of whom should be from the Hong Kong SAR. The NPC Standing Committee would be expected to accept the opinion of this special committee. Lee felt that if the Standing Committee still rejected such an opinion, then a constitutional crisis would result—an undesirable consequence from all points of view.⁸¹

The majority of the Basic Law Drafting Committee also held the view that it would be undesirable or even an infringement of the PRC's sovereignty to allow the courts of the Hong Kong SAR to interpret those parts of the Basic Law dealing with defense and foreign affairs, matters reserved for the central government according to the Joint Declaration. Lee's answer to that concern was that it is a common law principle that acts of state are simply outside the courts' jurisdiction. The central government, therefore, has no need to fear that the courts of the Hong Kong SAR would trespass into such areas pertaining to defense and foreign affairs, thereby prejudicing the PRC's sovereignty or its rights over these matters.⁸²

The August 1987 draft of the Sub-group on the Relationship between the Central Government and the SAR provided for the interpretation of the Basic Law by the NPC Standing Committee in article 1 of chapter 9.

The courts in the Hong Kong SAR could, in adjudicating cases before them, interpret those articles of the Basic Law which fall within the

⁷⁹ *Id.*

⁸⁰ Joint Declaration, *supra* note 3, art. 3(2).

⁸¹ M. Lee, *supra* note 77.

⁸² *Id.*

scope of the SAR's autonomy. When the NPC Standing Committee has made an interpretation of the articles of the Basic Law, the courts of the Hong Kong SAR shall, in applying such an article, follow the interpretation of the Standing Committee of the NPC. Any adjudication made prior to an interpretation of the NPC Standing Committee, however, will not be affected. The Standing Committee of the NPC may consult the Hong Kong SAR Basic Law Committee prior to its interpretation of the Basic Law.⁸³

In line with the majority view of the Basic Law Drafting Committee disclosed by Martin Lee, article 6 of chapter 2 also stipulates that "[t]he Hong Kong SAR shall be vested with legislative power."⁸⁴ Laws enacted by the Hong Kong SAR legislature would be reported to the Standing Committee of the NPC, but this reporting would have no effect on the validity of the laws.

If the Standing Committee of the NPC, after consultation with the Hong Kong SAR Basic Law Committee, considered any law of the Hong Kong SAR not in accordance with this law (the Basic Law) or the legal procedures, it would return the law for reconsideration or have it revoked. It would not, however, amend the law. Any law returned for reconsideration or revoked by the Standing Committee of the NPC would become null and void, but this invalidation has no retrospective effect.⁸⁵

The sub-group apparently did not find the common law principle concerning acts of state assuring enough, and it certainly wanted to avoid the kind of constitutional crisis which could arise if Lee's second alternative were adopted. The sub-group's choice was to let the Standing Committee of the NPC have the final say in interpreting the Basic Law and, in fact, the scope of autonomy of the Hong Kong SAR as defined by the Basic Law. This choice corresponded with the sub-group's previously discussed decisions. Minor concessions were made, however, with respect to the Hong Kong SAR's "high degree of autonomy": a Hong Kong SAR Basic Law Committee with an advisory function was proposed, and the interpretation of the Standing Committee of the NPC would not affect the previous adjudications of the courts in the Hong Kong SAR.

III. THE RELATIONSHIP BETWEEN THE CENTRAL GOVERNMENT AND THE HONG KONG SAR GOVERNMENT

The Joint Declaration states: "The Hong Kong Special Administrative Region shall be directly under the authority of the Central People's

⁸³ See *supra* note 37, ch. 9 art. 1.

⁸⁴ *Id.* ch. 2, art. 6.

⁸⁵ *Id.*

Government of the People's Republic of China"⁸⁶ This was intended to grant the Hong Kong SAR a status on par with the provinces, autonomous regions and municipalities directly under the PRC central government; such a status would not only appeal to the Hong Kong people's sense of pride, but would also serve to allay their fears of interference from various ministries and provincial units of the PRC.⁸⁷

The draft presented by the Sub-group on the Relationship between the Central Government and the SAR at the August 1987 Basic Law Drafting Committee meeting reaffirmed the aforementioned provision in a more specific manner. Article 1 of the draft's chapter 2 on The Relationship Between the Central Government and the Hong Kong SAR states: "The Hong Kong SAR is a local administrative region of the PRC with a high degree of autonomy. The Hong Kong SAR Government is directly under the authority of the central people's government."⁸⁸ Article 11 of the same chapter further states:

The ministries and departments, as well as the provinces, autonomous regions and municipalities under the central people's government shall not interfere in the affairs administered by the Hong Kong SAR on its own in accordance with this law. The ministries and departments of the central government, as well as the provinces, autonomous regions and municipalities, in establishing organs in Hong Kong, must seek the consent of the Hong Kong SAR government and the approval of the central people's government. These organs and their personnel should observe the law of the Hong Kong SAR. People from other parts of China entering into the Hong Kong SAR have to apply for authorization.

. . . .

The Hong Kong SAR may establish offices in Beijing.⁸⁹

The only worry of the Hong Kong community is the lack of specification as to which government has the power to authorize people from other parts of the PRC to enter into the Hong Kong SAR.⁹⁰ A more satisfactory arrangement might require both the consent of the Hong Kong SAR government and the approval of the central people's government, as in the case of the establishment of organs in Hong Kong by central ministries and local governments of the PRC. On the other hand,

⁸⁶ Joint Declaration, *supra* note 3, Annex I, § I.

⁸⁷ See SPECIAL GROUP ON THE RELATIONSHIP BETWEEN THE CENTRAL GOVERNMENT AND THE SAR OF THE BASIC LAW CONSULTATIVE COMMITTEE, FINAL REPORT ON THE RELATIONSHIP BETWEEN THE SAR AND THE VARIOUS PROVINCES/REGIONS (the Final Report was adopted by the Executive Committee of the Basic Law Consultative Committee on Mar. 14, 1987).

⁸⁸ See *supra* note 37, ch. 2, art. 1.

⁸⁹ *Id.* ch. 2, art. 11.

⁹⁰ See Hong Kong Standard, Aug. 24, 1987; Wah Kiu Daily News, Aug. 24, 1987; *id.* Aug. 27, 1987.

the central government may well be reluctant to seek the consent of the Hong Kong SAR government when it deems it necessary to send people to the Hong Kong SAR on various kinds of missions.

Article 1 of Annex I of the Joint Declaration provides "a high degree of autonomy" for the Hong Kong SAR. It states:

Except for foreign and defence affairs which are the responsibilities of the Central People's Government, the Hong Kong Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication. The Central People's Government shall authorise the Hong Kong Special Administrative Region to conduct on its own those external affairs specified in Section XI of this Annex.⁹¹

With respect to foreign and defense affairs, the August 1987 draft of the Sub-group on the Relationship between the Central Government and the SAR made the following provisions. Article 3 of chapter 2 states:

The central people's government shall be responsible for the foreign affairs related to the Hong Kong SAR.

The Hong Kong SAR shall be authorized by the central people's government to conduct its own external affairs in accordance with this law.

The Ministry of Foreign Affairs of the PRC shall establish an office in Hong Kong to handle foreign affairs."⁹²

Article 4 of the same chapter provides:

The central people's government shall be responsible for the defense of the Hong Kong SAR.

Military forces sent by the central people's government and stationed in the Hong Kong SAR for its defense shall not interfere with the local affairs of the Hong Kong SAR. The Hong Kong SAR government, may in times of need, request the central people's government for the assistance of the garrison in maintaining public order and the relief of natural disasters.

Apart from the laws of the state, members of the garrison shall also observe the laws of the Hong Kong SAR.

Expenditure for the garrison shall be borne by the central people's government.⁹³

The handling of members of the garrison violating the laws of the Hong Kong SAR is a complicated matter requiring more specific stipulations.⁹⁴

⁹¹ Joint Declaration *supra* note 3, Annex I, § I.

⁹² See *supra* note 37, ch. 2, art. 1.

⁹³ *Id.* ch. 2, art. 11.

⁹⁴ For Lu Ping's statement on the issue, see Ming Pao (Hong Kong), Dec. 2, 1986. Lu Ping is the Deputy Secretary-General of the Basic Law Drafting Committee.

Chapter 7, "The External Affairs of the Hong Kong SAR,"⁹⁵ basically followed the provisions of section XI of Annex 1 of the Joint Declaration.⁹⁶ Since the Hong Kong SAR government is "authorized by the central people's government to conduct its own external affairs," and such external affairs are largely related to the maintenance and expansion of Hong Kong's external economic ties essential for the SAR's stability and prosperity, the PRC authorities have been generous in this authorization as revealed in the draft articles of the Basic Law released in August 1987.

In contrast to this generosity, the PRC authorities appear eager to retain a measure of control regarding the political system of the Hong Kong SAR. The problem is all the more serious since the Joint Declaration did not attempt to define the political system for the future Hong Kong SAR. The Joint Declaration merely states:

The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally. Principal officials will be nominated by the chief executive of the Hong Kong Special Administrative Region for appointment by the Central People's Government.⁹⁷

Annex I of the Joint Declaration further elaborates: "The legislature of the Hong Kong Special Administrative Region shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature."⁹⁸

Since the chief executive and the principal officials of the Hong Kong SAR government will be appointed by Beijing, there is much local concern as to whether this will amount to veto power by the PRC authorities. The Basic Law may provide a practical check on the exercise of any PRC veto and reduce the appointments to a symbolic act of exercising sovereignty. If the Basic Law clearly provides for the election of the chief executive by universal suffrage, then it will be almost inconceivable for Beijing to reject his appointment. Furthermore, if the Basic Law states that principal officials nominated by the chief executive must be endorsed by the local legislature before they can be presented to Beijing for formal appointment, then it will also be unlikely that their appointments will be vetoed.

Advocates of democracy in Hong Kong have proposed that candidates for the post of the chief executive should be nominated by members

⁹⁵ See *supra* note 37.

⁹⁶ Joint Declaration, *supra* note 3, Annex I, § XI.

⁹⁷ *Id.* para. 3(4).

⁹⁸ *Id.* Annex I, § I.

of the local legislature (say, one-tenth of the legislators), and then elected by universal suffrage.⁹⁹ They obviously hope that such a system will render the appointment of the chief executive by the central people's government to a symbolic act of exercising sovereignty.

On the other hand, the conservative business community in Hong Kong, represented by the Business and Professional Group of Members of the Basic Law Consultative Committee, objected to a system of one man-one vote as well as the election of the chief executive by the legislature. The group instead suggested that the chief executive be elected by an electoral college composed of 600 members including members of the Hong Kong SAR legislature; representatives of the Urban Council, Regional Council and District Boards (existing local representative bodies in the territory with limited powers); and a wide cross section of Hong Kong's community leaders. This electoral college would elect a twenty-member nomination committee from its membership, and the committee would then nominate three candidates to be selected by the entire electoral college. The successful candidate would be required to have the support of an absolute majority of the electoral college.¹⁰⁰ This complicated system is largely seen as an attempt by the conservative business community to secure a chief executive acceptable to the group and to Beijing.

As the election of the chief executive and the Hong Kong SAR legislature are highly controversial issues having an important impact on the political reforms in the territory in the transitional period, the Sub-group on the Political Structure of the Hong Kong SAR avoided these two significant topics in its draft articles presented to the Basic Law Drafting Committee meeting in August 1987.¹⁰¹ Nonetheless, what is stipulated in the Joint Declaration concerning the political system of the Hong Kong SAR differs considerably from the political systems of the provinces, municipalities and the autonomous regions of the PRC.

⁹⁹ See Joint Committee for the Promotion of Democratic Political System Declaration, Nov. 2, 1986 (the Joint Committee is an umbrella group involving almost all political groups demanding for democracy in Hong Kong). (Summaries of the declaration appeared in all major Hong Kong newspapers, Nov. 3, 1986.)

¹⁰⁰ See The Business and Professional Group of Members of the Basic Law Consultative Committee, *A Proposal for the Future Structure of the Hong Kong SAR Government*, 18-20 (1987). Though the pamphlet was published Sept. 1987, the main points of the proposal had been reported by the major newspapers in Hong Kong intermittently in 1986.

¹⁰¹ When the Sub-group of the Political Structure of the Hong Kong SAR of the Basic Law Drafting Committee met in early Aug. 1987, Martin Lee accused other members of the sub-group of deliberately ducking the sensitive issues of the selection of the chief executive and the constitution of the legislature of the Hong Kong SAR; his statement led to sharp criticisms from other members of the sub-group. For Lee's explanation of his position, see Hong Kong Econ. J. (Hong Kong), Aug. 15, 1987. For an attack on Lee, see Ta Kung Pao, Aug. 14, 1987 (Liu Yiu-chu interview). Liu is also a member of the sub-group. For reports of the episode, see Wah Kiu Daily News, Aug. 9, 1987; Hong Kong Econ. J., Aug. 14, 1987; S. China Morning Post (Hong Kong), Aug. 20, 1987.

According to the Constitution of the PRC, local people's congresses, at their respective levels "elect, and have the power to recall, governors and deputy governors, or mayors and deputy mayors, or heads and deputy heads of counties, districts, townships and towns."¹⁰² The Constitution further provides that "the standing committee of a local people's congress at and above the county level . . . decides on the appointment and removal of functionaries of state organs within the limits of its authority as prescribed by law."¹⁰³ According to article 9 of the Organic Law of the Local People's Congresses and the Local People's Government of the People's Republic of China, revised by the Fifth Session of the Fifth National People's Congress in 1982, the local people's congresses have the power to remove members of the local people's governments at their respective levels.¹⁰⁴ Article 28(8) further provides the standing committee of a local people's congress at or above the county level the power to decide on the appointment and removal of the secretary-general, agency heads, bureau directors, etc. of its corresponding local people's government. Such appointments and dismissals have to be reported to the local people's government at a higher level for recording purposes.¹⁰⁵ Similar provisions exist for the organs of self-government of national autonomous areas.

In the PRC's history, the appointment of the chief executive and the principal officials of a local government by the central government only occurred under extraordinary circumstances. In 1950, the Political Council (*Zhengwuyuan*, the predecessor of the State Council) adopted the "General Principles on the Organization of Provincial People's Government."¹⁰⁶ Article 2 of the document stipulated that appointees to provincial governments would be nominated by the Political Council and approved by the Central People's Government Committee; the article explained that the purpose of the arrangement was to establish rapidly the revolutionary order during the early stage of liberation.¹⁰⁷ The docu-

¹⁰² P.R.C. CONST. art. 101.

¹⁰³ *Id.* art. 104.

¹⁰⁴ Organic Law of the Local People's Congresses and the Local People's Governments of the PRC, art. 9 [hereinafter Organic Law of Local Congresses & Governments] (revised according to Resolution on Certain Revisions of The Organic Law of the Local People's Congresses and the Local People's Governments of the PRC, 5th National People's Congress, 5th Sess. (1979). See Renmin Ribao, Dec. 16, 1982.

¹⁰⁵ Organic Law of Local Congresses & Governments, art. 28(8).

¹⁰⁶ Sheng Renmin Zhengfu Zuzhi Tongze (General Principles on the Organization of Provincial People's Governments) [hereinafter General Principles on Provincial Organization] (adopted by the Political Council in 1950), reprinted in PERSONNEL SYSTEMS BUREAU OF THE MINISTRY OF LABOR AND PERSONNEL, ZHONGHUA RENMIN GONGHEGUO ZUZHI FAGUI XIANBIAN (Selected Edition of Organic Laws and Regulations of the PRC) 216-17 (1985) [hereinafter P.R.C. ORGANIC LAWS AND REGULATIONS].

¹⁰⁷ General Principles on Provincial Organization, art. 2.

ment was superseded by the formal promulgation of the first Constitution in 1954; it therefore remained valid only before the Constitution came into existence. The second example is the "Brief Outline of the Organization of the Preparatory Committee for the Tibetan Autonomous Region."¹⁰⁸ The preparatory committee was equivalent to a temporary local people's government. Article 5 of the outline stipulated that the appointment, removal and replacement of committee members were to be based on nominations through consultations of the parties concerned, which would then be approved by the State Council; the latter would formally appoint the chairman, deputy chairmen and members of the preparatory committee.¹⁰⁹ The outline further stipulated that the heads and deputy heads of various agencies, bureaus, etc. under the preparatory committee would similarly be based on nominations through consultations to be approved by the State Council.¹¹⁰ It is believed that the validity of the document lasted until the rebellion broke out in Tibet in 1959.

In those two examples, the central government had an even larger measure of control over the local governments' personnel than is stipulated by the Joint Declaration. But Hong Kong is certainly far more stable than either the various provinces immediately after liberation in 1949 or Tibet in 1956. The situation in Tibet in 1956, nonetheless, has some relevance for Hong Kong; the appointments of local government personnel in Tibet by the central government had two important implications for Hong Kong. First, the central government might, if necessary, help to establish a consensus among the diverse local interests, while allowing a certain measure of autonomy for such interests. This occurred in Tibet. Secondly, the autonomy promised Tibet was not yet constitutional, and the central government was eager to retain the ultimate control. Appointment in this context also symbolized such control and the PRC's sovereignty over the territory.

Above all, in actual practice, the Communist Party of China ("CPC") controls the appointments of local government personnel at all levels, irrespective of the constitutional powers granted to the local people's congresses. When control of the local Party organs is not yet secure as in the three aforementioned cases, then the central government will have to assume that ultimate control.

In the draft articles presented by the Sub-group on the Political Structure of the Hong Kong SAR to the Basic Law Drafting Committee meeting in August 1987, three provisions further expanded the central

¹⁰⁸ *Xizang Zizhiqū Choubēi Weiyuanhui Zuzhi Jianze* (Brief Outline of the Organization of the Preparatory Committee for the Tibetan Autonomous Region) (adopted in 1956), reprinted in P.R.C. ORGANIC LAWS AND REGULATIONS, *supra* note 106, at 318-20.

¹⁰⁹ General Principles on Provincial Organization, art. 5.

¹¹⁰ *Id.* art. 10.

government's power in the Hong Kong SAR's political system. Within chapter 4, "The Political Structure of the Hong Kong SAR," the chief executive is granted the power to dissolve the Hong Kong SAR legislature, subject to the approval of the central government.¹¹¹ The same section stipulates that members of the Executive Assembly (an organ to assist the chief executive in the decision-making process similar to the Executive Council today) shall be nominated by the chief executive and appointed by the central government.¹¹² Finally, section 1 also states that if the chief executive does not adopt the majority view of the Executive Assembly, then he should register his concrete reasons and report for recording purposes.¹¹³

These provisions aroused considerable opposition in the Hong Kong community,¹¹⁴ and the sub-group appeared in its early-October 1987 meeting ready to accept amendments to these three draft articles. The sub-group agreed that the chief executive could dissolve the legislature after consulting the Executive Assembly without involving the central government. A dissolution, however, should take place only under the following circumstances: 1) when the legislature insists on passing a bill rejected by the chief executive on the grounds that it jeopardizes the major interests of the community; and 2) when the legislature repeatedly refuses to endorse a budget.¹¹⁵ According to the draft of chapter 4, "The Political Structure of the Hong Kong SAR," presented by the sub-group, some members suggested that the legislature could pass by a second two-thirds majority vote a bill which it has earlier passed but has been rejected by the chief executive.¹¹⁶ The sub-group also decided that the chief executive should resign if the new legislature formed after the dissolution chose to pass the bill supported by its predecessor.¹¹⁷

The sub-group also indicated that members of the Executive Assembly need not be appointed by the central government, thereby leaving the power of appointment to the chief executive. Further, it also agreed that the chief executive would not have to report his reasons for refusing to adopt the majority view of the legislature to the central government for

¹¹¹ See *supra* note 43, ch. 4, § 1, art. 5(13).

¹¹² *Id.* art. 9.

¹¹³ *Id.* art. 10.

¹¹⁴ Martin Lee, for example, criticized the fact that these provinces would turn Hong Kong into a Chinese colony! See Hong Kong Econ. J., Aug. 13, 1987. A political group, the Hong Kong Association for Democracy and People's Livelihood, and the Current Affairs Committees of the student unions of the two universities also voiced similar criticisms. See S. China Morning Post, July 30, 1987; Ming Pao, Aug. 24, 1987.

¹¹⁵ S. China Morning Post, Oct. 5, 1987; Ming Pao, Oct. 5, 1987.

¹¹⁶ See *supra* note 43 (explanatory note following ch. 4, § 1, art. 5(4)) (ch. 4, "The Political Structure of the Hong Kong SAR").

¹¹⁷ See *supra* note 115.

recording purposes.¹¹⁸

While these amendments represent proper consideration for the "high degree of autonomy" promised to the Hong Kong SAR, the sub-group members from the PRC indicated in the same October 1987 meeting that the PRC government could not accept the election of the first chief executive of the Hong Kong SAR when the territory was still administered by foreigners.¹¹⁹ Given the general consensus of the sub-group—and indeed of all parties concerned—that the first chief executive should be elected well before July 1, 1997 so as to minimize the changes at the time of transition, one would imply that the PRC authorities would like to see the first chief executive selected through consultations rather than by election.¹²⁰

Apart from the fact that the chief executive and the principal officials of the Hong Kong SAR government will be appointed by the central government, thus implying a measure of accountability on their part to the central government, it is also stated in chapter 4 of the August 1987 draft of the Sub-group on the Political Structure of the Hong Kong SAR that the "chief executive of the Hong Kong SAR shall be responsible to the central people's government and the Hong Kong SAR in accordance with the stipulations of this law (the Basic Law)."¹²¹ The section also states that the chief executive shall "execute the orders issued by the central people's government on matters concerned as stipulated by this law."¹²² At the same time, the PRC Constitution clearly states that the State Council is the highest organ of state administration¹²³ and it has the power "to exercise unified leadership over the work of local organs of state administration at different levels throughout the country, and to lay down the detailed division of functions and powers between the Central Government and the organs of state administration of provinces, autonomous regions and municipalities directly under

¹¹⁸ *Id.*

¹¹⁹ Ming Pao, Oct. 6, 1987.

¹²⁰ Lu Ping, Deputy Secretary-General of the Basic Law Drafting Committee, indicated on Oct. 6, 1987, that the PRC government would probably set up a committee under the Standing Committee of the NPC consisting mainly of PRC officials and Hong Kong community leaders to help set up the first Hong Kong SAR government. The committee, similar to the Basic Law Drafting Committee, would be headed by a State Councilor and would most likely be set up by about 1996; the committee would then arrange for the selection of the first chief executive. Two days later, Lu Ping also ruled out the possibility that the existing Legislative Council in Hong Kong would automatically become the provisional legislature of the Hong Kong SAR on July 1, 1997. He considered that a provisional legislature would likely be set up on that date to prepare for the formation of the first legislature by about 1998. There is speculation that the aforementioned committee under the Standing Committee of the National People's Congress will also play a key role in the formation of the first legislature. See S. China Morning Post, Oct. 7, 1987; *id.* Oct. 9, 1987.

¹²¹ See *supra* note 43.

¹²² *Id.* art. 9.

¹²³ P.R.C. CONST. art. 85.

the Central Government.”¹²⁴

It is not sufficiently clear in what way and to what extent the Hong Kong SAR differs from the provinces, etc. concerning its responsibility to the central government. Is the Hong Kong SAR government also one of the “local organs of state administration” as defined by the PRC Constitution? Moreover, the State Council is one of the three parties empowered by the Basic Law to propose amendments to the Basic Law.¹²⁵ With the consent of the NPC, the State Council can seek to expand its power *vis-à-vis* the Hong Kong SAR government. Article 1 of Annex 1 of the Joint Declaration is equally unclear. On one hand it states that “the Hong Kong Special Administrative Region shall be directly under the authority of the Central People’s Government,”¹²⁶ and on the other stipulates that “the executive authorities shall abide by the law and shall be accountable to the legislature.”¹²⁷

A further complication arises because the draft of chapter 4 (“The Political Structure of The Hong Kong SAR”) presented by the Sub-group on the Political Structure of the Hong Kong SAR dealt with the chief executive and the executive authorities in sections 1 and 2 respectively.¹²⁸ As indicated earlier, article 1 of section 1 stipulates that the chief executive shall be “responsible to the central people’s government and the Hong Kong SAR,”¹²⁹ but the whole section does not mention that the chief executive has to be accountable to the legislature. On the other hand, article 5 of section 2 stipulates that:

The executive authorities of the Hong Kong SAR shall abide by the law and shall be accountable to the legislature of the Hong Kong SAR: execute the laws passed by the legislature and which have become effective; present reports on the work of the administration to the legislature at fixed intervals; answer queries from members of the legislature; and seek approval from the legislature on taxation and public expenditures.¹³⁰

It appears, therefore, that the chief executive would not have to be accountable to the legislature of the Hong Kong SAR, while only the executive authorities (not including the chief executive) would have to be accountable to the legislature. This approach certainly is not in accord with the general understanding of the Hong Kong community concern-

¹²⁴ *Id.* art. 89(4).

¹²⁵ See *supra* note 43, art. 2, ch. 9 (draft presented by the Sub-group on the Relationship between the Central Government and the SAR to the Basic Law Drafting Committee in August 1987) (ch. 2 “The Interpretation and Amendment of the Basic Law of the Hong Kong SAR”).

¹²⁶ Joint Declaration, *supra* note 3, Annex I, § I.

¹²⁷ *Id.*

¹²⁸ See *supra* note 43, ch. 4, § 1-2.

¹²⁹ *Id.* § 1, art. 1.

¹³⁰ *Id.* § 2, art. 5.

ing the promise in the Joint Declaration that "the executive authorities shall abide by the law and shall be accountable to the legislature."¹³¹

IV. OTHER ISSUES INVOLVED IN DEFINING THE RELATIONSHIP BETWEEN THE CENTRAL GOVERNMENT AND THE HONG KONG SAR GOVERNMENT

To a political scientist, the study of the PRC Constitution is of limited value as the role and functions of the Communist Party of China ("CPC") are largely omitted from the document. Similarly, an attempt to analyze the constitutional relationship between the central government and the future Hong Kong SAR government has serious limitations without development of a good understanding of the future role of the CPC in the Hong Kong SAR, which, unfortunately, is at the moment a matter of sheer speculation at best.¹³²

Local organs of state administration in the PRC are involved in two systems of accountability.¹³³ The Light Industry Bureau of a province has to be accountable to the provincial people's government which, in turn, has to be accountable to the provincial people's congress. The bureau, however, has to be accountable to the Ministry of Light Industry at the State Council level too. Parallel to the system of state administration is the hierarchy of CPC organs. The provincial Party committee normally has an office (and a deputy secretary) in charge of industry and transport which has jurisdiction over the Light Industry Bureau; the provincial Party committee is accountable to the Secretariat of the Central Committee of the CPC as well as to the Political Bureau of the Party. In addition to this complicated nexus of ties, there are Party groups within organs of state administration. For example, Party members among the senior officials of the Light Industry Bureau form a Party group of the bureau which is accountable to the provincial Party committee.

It is not expected that this complicated system will be borrowed by the Hong Kong SAR government. What needs to be highlighted here is

¹³¹ Joint Declaration, *supra* note 3, Annex 1, § I. See, e.g., Hong Kong Econ. J., *supra* note 114 (views of Martin Lee). The limitations on the legislative power of the Hong Kong SAR government and on the judicial power of the courts of the Hong Kong SAR result from the power of Basic Law interpretation being vested in the Standing Committee of the NPC have been discussed above. See *supra* part III.

¹³² For an account of the activities of the CPC and PRC organs in Hong Kong, see LOONG SIN, XIANGGANG DE LINYIGE ZHENGFU (A Shadow Government of Hong Kong) (1986) (Loong Sin is a pseudonym) (1986 publication date is author's estimation). See also E. Lau, *Positioning for Power*, FAR E. ECON. REV., Aug. 6, 1987, at 26, 26-29; E. Lau *Grasping the Grassroots*, FAR E. ECON. REV., Aug. 6, 1987, at 26, 26-27.

¹³³ See F. SCHURMANN, IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA 105-219 (2d ed. 1968). (Schurmann's book is obviously a bit outdated, but chs. 2 & 3 still provide a good conceptual framework for understanding the Party and the state administrative systems in the PRC and how they interact.)

that within the PRC problems that arise from the dual accountability on the part of a local organ of state administration are normally resolved by the Party committee at the corresponding or higher level. It is not clear what will happen if conflicts arise between the Hong Kong SAR chief executive's accountability to the central government and his accountability to the local legislature.

The Hong Kong and Macau Work Committee probably will have a role in resolving such conflicts, at least its views will be sought by the State Council or the Secretariat of the Party Central Committee which will make the final decisions. The Hong Kong and Macau Work Committee is the CPC organ in Hong Kong and Macau, and its status is equivalent to that of a provincial Party committee.¹³⁴ Ever since the 1950s, the director of the Hong Kong branch of the New China News Agency (*Xinhua*) also serves as the secretary of the Committee. Xu Jiatusun, the present director of the Hong Kong New China News Agency branch, was first secretary of the Jiangsu Provincial Party Committee and a member of the CPC Central Committee before he took up his post in Hong Kong. It was then considered that given the presence of a considerable number of senior PRC cadres in Hong Kong working in the Bank of China's Hong Kong branch, China Resources (a trading conglomerate directly under the Ministry of Foreign Economic Relations and Trade), etc., a cadre with Central Committee membership would be required to coordinate the various lines of activities of the Party and the state administration in Hong Kong. What kind of influence such a high-ranking Party cadre would have on the Hong Kong SAR chief executive is difficult to assess today.

It is unlikely that the Basic Law will prescribe the role of the CPC or that of the Hong Kong branch of the New China News Agency in the Hong Kong SAR. Xu Jiatusun, however, indicated to a group of Hong Kong journalists at a June 1987 off-the-record briefing that the future role of the CPC in Hong Kong would be "to assist the SAR government."¹³⁵

Similarly, a Hong Kong SAR Basic Law Committee would probably be set up under the NPC, as hinted by the draft articles of the Basic Law. At present, the process whereby Hong Kong members of the NPC are chosen is unknown to the Hong Kong community. An educated guess is that they are selected through consultations among the CPC and the PRC organs in Hong Kong, with the Hong Kong and Macau Work Committee and the New China News Agency branch both playing a key

¹³⁴ See *supra* note 132.

¹³⁵ E. Lau, *Positioning for Power*, *supra* note 132, at 26.

role.¹³⁶ How the Hong Kong NPC members will be elected after 1997 when the PRC authorities can hold elections in the SAR again will not be covered by the Basic Law as this remains the prerogative of the Organic Law of the NPC of the PRC.¹³⁷ The extent to which this committee should be consulted by the Hong Kong SAR government, and the degree of influence it will have on the Hong Kong SAR government are similarly left to speculation. It is not unnatural that Hong Kong members of the NPC should demand a role in the Hong Kong SAR government. If they are elected by methods similar to those applied for the elections of members of the Hong Kong SAR legislature, then they certainly also have a legitimate claim to represent the people of the SAR.

Recently there have been signals from PRC officials in charge of Hong Kong affairs that the first Hong Kong SAR government (probably including the legislature) would likely be set up by a committee under the Standing Committee of the NPC headed by a State Councilor.¹³⁸ The first government would then be formed in a way significantly different from that stipulated by the Basic Law—the element of democracy involved would be correspondingly less while the measure of control enjoyed by the central government of the PRC would be correspondingly higher.

Meanwhile in the transitional period, the CPC is stepping up its activities in the territory and seeking to establish itself as the dominant political force.¹³⁹ It began publicly building its Hong Kong community network and influence in 1985 when the Hong Kong branch of the New China News Agency opened three district offices in Hong Kong, Kowloon and the New Territories. Pro-Beijing political forces have been mounting a campaign to block the introduction of direct elections to the Legislative Council in 1988.¹⁴⁰ They have also begun to mobilize their supporters, identify candidates and isolate political opponents in preparation for the District Board elections in March 1988 and the Legislative Council elections the following September.

Since the conclusion of the Joint Declaration, the local New China News Agency and pro-Beijing organizations have been engaging in an all-embracing united front campaign to win the hearts of Hong Kong people. There have been numerous rounds of receptions, cocktail parties and trips to China. To a certain extent, the Chinese organs in Hong

¹³⁶ For lists of the Hong Kong and Macau members of the National People's Congress and the Chinese People's Political Consultative Conference, see LOONG SIN, *supra* note 132, at 119-20.

¹³⁷ For the text of the law, see Renmin Ribao, Dec. 15, 1982.

¹³⁸ See *supra* note 120.

¹³⁹ See J.Y.S. Cheng, *Hong Kong: The Decline of Political Expectations and Confidence*, AUSTRALIAN J. OF CHINESE AFFAIRS; (forthcoming); see also E. Lau, *Positioning for Power*, *supra* note 132, at 26-29; E. Lau, *Grasping the Grassroots*, *supra* note 132, at 26-27.

¹⁴⁰ E. Lau, *Yes, We Want No Elections*, FAR E. ECON. REV., Sept. 17, 1987, at 21.

Kong have been successful in co-opting businessmen, professionals, fledging politicians and grassroots community leaders, who are flattered by the embrace of the motherland and at the same time afraid to reject it. A prominent sign of the united front's success is the expanding list of dignitaries on the organizing committee of the Chinese National Day celebrations, membership of which is now considered a symbol of patriotism, identification with the motherland and an indication of recognition by the PRC authorities.

Such united front activities tend to reduce Beijing's supporters to mere mouthpieces and are already having a damaging effect on freedom of expression. As the PRC authorities become more and more intolerant of dissenting views, one of the aims of the united front strategy has been to isolate opponents and make their views irrelevant. To this end, they have been much facilitated by the self-censoring local mass media which is increasingly inclined to avoid sensitive political issues.

The middle class and the intelligentsia, however, are alarmed by this expanding influence from the PRC. This influence is now largely exercised through the offices of co-opted business leaders and professionals; but it is expected to expand into the political, economic and social arenas. This raises doubts not only about autonomy and self-administration, but also about the very concept of "one country, two systems" which requires certain insulation of Hong Kong from the rest of the PRC.

This brief discussion is obviously not intended to be a detailed analysis of the political factors shaping the relationship between the central government and the future Hong Kong SAR government; it is only hoped that it will arouse an awareness of these political factors as well as the limitations relating to analysis of the constitutional aspects of the relationship. The PRC's increasing involvement in the Hong Kong economy will have a significant impact on the relationship between the central government and the future Hong Kong SAR government too, an important subject which is not dealt with in this Article.

V. CONCLUSION

The PRC leaders' sincerity in maintaining Hong Kong's stability and prosperity now and after 1997 is beyond doubt—otherwise they did not need to take the trouble to hammer out the Joint Declaration and a Basic Law for the Hong Kong SAR. The concern with maintaining the prosperity of the territory, however, clearly takes precedence over the promises of "a high degree of autonomy" and "self-administration" for the SAR.

The refusal to revise the PRC Constitution means that the problems raised in the first section of this Article will remain unsolved. This may

not pose too serious a problem if the present policy orientation of the PRC leadership is maintained; after all, the reformers in the PRC today also encounter difficulties finding a convincing ideological foundation to support their reforms.¹⁴¹ In the event of political conflicts in Beijing leading to uncertainties concerning the previously followed policy programs or even major redefinitions of them, the shock for Hong Kong would be considerable—the theoretical and constitutional bases of “one country, two systems” policy would be in doubt.

In the course of drafting the Basic Law, it has become clear that the central government of the PRC often wants to retain final control, especially in matters related to the political system. The decisions on the concept of “residual power,” the amendment and the interpretation of the Basic Law are significant examples. The result appears to be that the Basic Law will offer very limited guarantees for the political autonomy of the Hong Kong SAR. The instinct of the communist regime following the Leninist principles of democratic centralism to be in control may well be at work here: when the control of the CPC is not secure in the Hong Kong SAR, the ultimate control of the central government has to be defined even more clearly in legal terms. Suspicions regarding Hong Kong becoming an “independent political entity” have been openly articulated by PRC officials in charge of Hong Kong affairs, and they as well as the PRC leadership must continuously be aware of the example that the Hong Kong SAR sets for the rest of the PRC. It cannot be conceived that the PRC leaders will dilute the unitary system of the state to accommodate Hong Kong or even Taiwan. Any concessions made are likely to be of a temporary, *ad hoc* and therefore tactical nature.

Within the Hong Kong SAR political system, the appointment by the central government of the chief executive and the principal officials implies their accountability to the central government. This has been reaffirmed by the draft articles of the Basic Law stipulating that the chief executive shall be “responsible to the central people’s government and the Hong Kong SAR.”¹⁴² Conflicts between his respective responsibilities to the central people’s government and to the Hong Kong SAR therefore may occur in the future. The substantial powers of the chief executive, his appointment by and accountability to the central government, and the lack of specific provisions in the draft Basic Law concerning his accountability to the legislature, on the other hand, have contributed to the emerging perception that Hong Kong will be treated as a colony of the PRC.¹⁴³

¹⁴¹ See R. Delfs, *Ideological Inconsistencies*, FAR E. ECON. REV., Oct. 8, 1987, at 50; see also R. Delfs, *In Search of a Socialist Theory*, FAR E. ECON. REV., Oct. 8, 1987, at 50.

¹⁴² See *supra* note 43, draft ch. 4, § 1, art. 1 (“The Political Structure of the Hong Kong SAR” presented by the Sub-group on the Political Structure of the Hong Kong SAR in Aug. 1987).

¹⁴³ See *supra* note 114. Incidentally, Ronald Li, chairman of the Hong Kong Stock Exchange,

While the future role of the CPC in Hong Kong, that of the New China News Agency branch and that of the Hong Kong members of the NPC will be important factors affecting the relationship between the central government and the Hong Kong SAR government, they will not be prescribed by the Basic Law. The increasing presence and participation of PRC authorities in the Hong Kong economy and society, together with the stepping up of the united front activities of the local Party and state organs, will likely result in the creation of a dominant political force in the Hong Kong SAR which can be mobilized at will at the order of the central government. These developments certainly do not augur well for the political autonomy of the Hong Kong SAR, nor for the development of a democratic political system there.

In the final analysis, the Hong Kong community may have to count not so much on the Basic Law but the following domestic and international factors to ensure the observance by the PRC leadership of its promises made to the Hong Kong people during the negotiations for the Joint Declaration. In the first place, the PRC leadership has been assuring the international community in recent years that its open-door policy will remain unchanged in the long term and, somehow, its policy towards Hong Kong has also been looked upon as a litmus test of its open-door policy. Any violation of the spirit and the terms of the promises made to Hong Kong would hurt the capitalist world's confidence in the PRC. Secondly, as a SAR under the PRC's sovereignty, Hong Kong will have a significant instructional effect on Taiwan. Thirdly, a change in the PRC's policy towards Hong Kong might have a prognostic effect on its domestic economic reforms too; various liberal economic policies in the special economic zones and the coastal cities would most likely be affected. Finally, as long as the PRC leadership values Hong Kong's contributions to its modernization program, this capitalist enclave may continue to be tolerated. All of these factors, however, do not constitute an absolute guarantee that Hong Kong will remain unchanged up to 2047. Moreover, these factors will be more effective to ensure "that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years" than to guarantee the "high degree of autonomy" promised.¹⁴⁴

made the following statement at an international investment conference: "Hong Kong is a colony. It is a dictatorship, although a benevolent one. It is and has been a British colony, and it's going to be a Chinese colony, and as such it will prosper. We do not need free elections here." S. China Morning Post, June 17, 1987.

¹⁴⁴ Joint Declaration, *supra* note 3, Annex 1, § 1.

